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Family Law Act Legislative Update 2024

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Family Law Amendment Act 2023

- Introduced and read a first time on 29 March 2023
- Passed Parliament on 19 October 2023
- Royal assent on 6 November 2023
- Commencement on 6 May 2024
 - For majority of the Family Law Amendment Act
 - Exception if final hearing has already commenced

Overview of Amendments

Key Reforms

1. Simplification of Objects and removal of Principles
2. Refinement of best interests factors
3. Removal of the presumption of equal shared parental responsibility
4. Removal of related equal time and substantial and significant time provisions
5. Requirement for ICLs to meet with and seek the views of children
6. Codification of *Rice & Asplund*

Overview of Amendments

Additional Reforms

- 7. New enforcement regime
- 8. Harmful proceedings orders
- 9. Communications
- 10. Family Report Writers

Reforms - Resources

	Resource	Link
	Family Law Amendment Act 2023	https://www.legislation.gov.au/C2023A00087/asmade/text
	Second Reading Speech – Mark Dreyfus MP	https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F26435%2F0021%22
	Explanatory Memorandum	https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2F7011_ems_4e93ba1f-fdac-4ae9-8f64-705cc73925a0%22

Reforms - Purpose

- Reduce complexity and confusion
- Increase protection for people at risk of family violence
- Ensure safety and best interests unequivocally the focus
- Ensure views of children appropriately heard and considered consistent with Australia's obligations under Article 12 of the United Nations Convention on the Rights of the Child (CRC)
- Ensure ATSI children's particular needs and cultural rights are acknowledged when considering their best interest

Simplification of Objects

	Current	Future
60B	(1) The objects of this Part are to ensure that the best interests of children are met by: (a) ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and (b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and (c) ensuring that children receive adequate and proper parenting to help them achieve their full potential; and (d) ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children. of that culture. ... (4) An additional object of this Part is to give effect to the Convention on the Rights of the Child done at New York on 20 November 1989	(1) The objects of this Part are: (a) to ensure that the best interests of children are met, including by ensuring their safety; and (b) to give effect to the Convention on the Rights of the Child done at New York on 20 November 1989.

Removal of Principles

	Current	Future
60B	(2) The principles underlying these objects are that (except when it is or would be contrary to a child's best interests): (a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and (b) children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives); and (c) parents jointly share duties and responsibilities concerning the care, welfare and development of their children; and (d) parents should agree about the future parenting of their children; and (e) children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).	Nil

Amendment to Objects and Principles

Why and to what end?

- Existing objects and principles of part VII often misunderstood
- Purpose includes providing context, indicating legislative purpose and assisting with interpretation
- Repeal and substitution does not necessarily indicate that repealed objects and principles are no longer relevant
- Considerable overlap with best-interest factors
- Clarification that children's best interests are paramount
- Australia's obligations under the United Nations Convention on the Rights of the Child

Best Interest Factors

Removal of distinction between primary and additional considerations

	Current	Future
60CC	(2) The primary considerations are: (a) the benefit to the child of having a meaningful relationship with both of the child's parents; and (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence. (2A) In applying the considerations set out in subsection (2), the court is to give greater weight to the consideration set out in paragraph (2)(b).	Nil

Best Interest Factors

Current considerations v future considerations

New s 60CC(1)

Subject to 60CC(4) (consent orders), in determining what is in the child's best interests, the court must:

- (a) Consider the matters set out in subsection (2); and
- (b) If the child is an Aboriginal or Torres Strait Islander child – also consider the matters set out in subsection (3).

	Current		Future
60CC(2)	Two primary considerations. →	60CC(2) 60CC(2A) 60CC(3)	Seven general considerations.
60CC(3)	Fourteen additional considerations. →		

Best Interest Factors

Consideration 1 – Safety

	Current		Future
(2)(b)	the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.	(2)(a)	what arrangements would promote the safety (including safety from being subjected to, or exposed to, family violence, abuse, neglect, or other harm) of: (i) the child; and (ii) each person who has care of the child (whether or not a person has parental responsibility for the child);
(3)(j)	any family violence involving the child or a member of the child's family;	2A	In considering the matters set out in paragraph (2)(a), the court must include consideration of: (a) any history of family violence, abuse or neglect involving the child or a person caring for the child (whether or not the person had parental responsibility for the child); and (b) any family violence order that applies or has applied to the child or a member of the child's family.
(3)(k)	if a family violence order applies, or has applied, to the child or a member of the child's family—any relevant inferences that can be drawn from the order, taking into account the following: (i) the nature of the order; (ii) the circumstances in which the order was made; (iii) any evidence admitted in proceedings for the order; (iv) any findings made by the court in, or in proceedings for, the order; (v) any other relevant matter;		

Best Interest Factors

Consideration 2 – Any Views Expressed by the Child

	Current		Future
(3)(a)	any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views;	(2)(b)	any views expressed by the child;

Best Interest Factors

Consideration 3 – Needs of the Child

	Current		Future
(3)(g)	the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child's parents, and any other characteristics of the child that the court thinks are relevant;	(2)(c)	the developmental, psychological, emotional and cultural needs of the child;

Best Interest Factors

Consideration 4 – Any Views Expressed by the Child

	Current		Future
(3)(f)	the capacity of: (i) each of the child's parents; and (ii) any other person (including any grandparent or other relative of the child); to provide for the needs of the child, including emotional and intellectual needs;	(2)(d)	the capacity of each person who has or is proposed to have parental responsibility for the child to provide for the child's developmental, psychological, emotional and cultural needs;

Best Interest Factors

Consideration 5 – Benefit to the child of a meaningful relationship with others

	Current		Future
(2)(a)	the benefit to the child of having a meaningful relationship with both of the child's parents;	(2)(e)	the benefit to the child of being able to have a relationship with the child's parents, and other people who are significant to the child, where it is safe to do so;

Best Interest Factors

Consideration 6 – Other

	Current		Future
(3)(m)	any other fact or circumstance that the court thinks is relevant.	(2)(f)	anything else that is relevant to the particular circumstances of the child.

Best Interest Factors

Consideration 7 – Aboriginal or Torres Strait Islander Culture

	Current		Future
(3)(h)	if the child is an Aboriginal child or a Torres Strait Islander child: (i) the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture); and (ii) the likely impact any proposed parenting order under this Part will have on that right;	(3)	For the purposes of paragraph (1)(b), the court must consider the following matters: (a) the child's right to enjoy the child's Aboriginal or Torres Strait Islander culture, by having the support, opportunity and encouragement necessary: (i) to connect with, and maintain their connection with, members of their family and with their community, culture, country and language; (ii) to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and (iii) to develop a positive appreciation of that culture; and (b) the likely impact any proposed parenting order under this Part will have on that right;
3(6)	For the purposes of paragraph (3)(h), an Aboriginal child's or a Torres Strait Islander child's right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right: (a) to maintain a connection with that culture; and (b) to have the support, opportunity and encouragement necessary: (i) to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and (ii) to develop a positive appreciation of that culture.		

Best Interest Factors

Current considerations excluded? (1 of 2)

	Current	Future
(b)	the nature of the relationship of the child with: (i) each of the child's parents; and (ii) other persons (including any grandparent or other relative of the child);	?
(c)	the extent to which each of the child's parents has taken, or failed to take, the opportunity: (i) to participate in making decisions about major long-term issues in relation to the child; and (ii) to spend time with the child; and (iii) to communicate with the child;	?
(ca)	the extent to which each of the child's parents has fulfilled, or failed to fulfil, the parent's obligations to maintain the child;	?

Best Interest Factors

Current considerations excluded? (2 of 2)

	Current	Future
(d)	the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from: (i) either of his or her parents; or (ii) any other child, or other person (including any grandparent or other relative of the child), with whom he or she has been living;	?
(e)	the practical difficulty and expense of a child spending time with and communicating with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;	?
(i)	the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;	?
(l)	whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;	?

Best Interest Factors

Questions?

Removal of the presumption of equal shared parental responsibility (ESPR)

	Current	Future
61DA(1)	When making a parenting order in relation to a child, the court must apply a presumption that it is in the best interests of the child for the child's parents to have equal shared parental responsibility for the child.	Repealed
61DA(2)		Repealed
61DA(3)		Repealed
61DA(4)		Repealed
61DB		Repealed

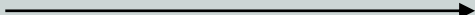
Tailored options for major long-term issues

Section	Future
61D(3)	A parenting order that deals with the allocation of responsibility for making decisions about major long-term issues in relation to the child (see subsection 64B(3)) may provide for joint or sole decision-making in relation to all or specified major long-term issues.

Consultation about major long-term issues

Section	Current	Future
61CA	Nil	If it is safe to do so, and subject to any court orders, the parents of a child who is not yet 18 are encouraged: (a) to consult each other about major long-term issues in relation to the child; and (b) in doing so, to have regard to the best interests of the child as the paramount consideration.

Movement of decision making obligations

Current 	Future
S 65DAC  Effect of parenting order that provides for shared parental responsibility	S 61DAA Effect of parenting order that provides for joint decision-making about major long-term issues
S 65DAE  No need to consult on issues that are not major long-term issues	S 61DAB No need to consult on issues that are not major long-term issues

Removal of related equal time and substantial and significant time provisions s 65DAA

65DAA	Current	Future
(1)	<i>Equal time</i> (1) Subject to subsection (6), if a parenting order provides (or is to provide) that a child's parents are to have equal shared parental responsibility for the child, the court must: (a) consider whether the child spending equal time with each of the parents would be in the best interests of the child; and (b) consider whether the child spending equal time with each of the parents is reasonably practicable; and (c) if it is, consider making an order to provide (or including a provision in the order) for the child to spend equal time with each of the parents.	Repealed

Removal of related equal time and substantial and significant time provisions s 65DAA

65DAA	Current	Future
(2)	<i>Substantial and significant time</i> Subject to subsection (6), if: (a) a parenting order provides (or is to provide) that a child's parents are to have equal shared parental responsibility for the child; and (b) the court does not make an order (or include a provision in the order) for the child to spend equal time with each of the parents; the court must: (c) consider whether the child spending substantial and significant time with each of the parents would be in the best interests of the child; and (d) consider whether the child spending substantial and significant time with each of the parents is reasonably practicable; and (e) if it is, consider making an order to provide (or including a provision in the order) for the child to spend substantial and significant time with each of the parents.	Repealed

Removal of related equal time and substantial and significant time provisions s 65DAA

65DAA	Current	Future
(3)	<i>Substantial and significant time</i>	Repealed
(4)	<i>Substantial and significant time</i>	Repealed
(5)	<i>Reasonable practicality regarding equal time or substantial and significant time</i>	Repealed

Removal of presumption of ESPR and the pathway

Questions?

Independent Children's Lawyers

Requirement to meet with the child

	Current		Future
68L(5)	Specific duties of independent children's lawyer The independent children's lawyer must: (a) act impartially in dealings with the parties to the proceedings; and (b) ensure that any views expressed by the child in relation to the matters to which the proceedings relate are fully put before the court; and (c) if a report or other document that relates to the child is to be used in the proceedings: (i) analyse the report or other document to identify those matters in the report or other document that the independent children's lawyer considers to be the most significant ones for determining what is in the best interests of the child; and (ii) ensure that those matters are properly drawn to the court's attention; and (d) endeavour to minimise the trauma to the child associated with the proceedings; and (e) facilitate an agreed resolution of matters at issue in the proceedings to the extent to which doing so is in the best interests of the child.	68LA(5A)	Requirement to meet with the child and give the child the opportunity to express their views Subject to subsection (5B), the independent children's lawyer must perform the following duties (not necessarily at the same time): (a) meet with the child; (b) provide the child with an opportunity to express any views in relation to the matters to which the proceedings relate.

Independent Children's Lawyers

Requirement to meet with the child

S 68LA	Future
(5AA)	The independent children's lawyer has discretion in relation to the following matters (subject to any order or direction of the court with respect to the matter, for example under paragraph 68L(2)(b) or paragraph (5D)(b) of this section): (a) when, how often and how meetings with the child take place; (b) when, how often and how the child is provided with an opportunity to express views.
(5B)	The independent children's lawyer is not required to perform a duty if: (a) the child is under 5 years of age; or (b) the child does not want to meet with the independent children's lawyer, or express their views (as the case requires); or (c) there are exceptional circumstances that justify not performing the duty.
(5C)	Without limiting paragraph (5B)(c), exceptional circumstances for the purposes of that paragraph include that performing the duty, would: (a) expose the child to a risk of physical or psychological harm that cannot be safely managed; or (b) have a significant adverse effect on the wellbeing of the child.
(5D)	If the independent children's lawyer proposes not to perform a duty because of paragraph (5B)(c), the court must do the following before making final orders: (a) determine whether it is satisfied that exceptional circumstances exist that justify not performing the duty; (b) if the court determines that those circumstances do not exist—make an order requiring the independent children's lawyer to meet with the child or provide the child with an opportunity to express their views (as the case requires).

Independent Children's Lawyers

Requirement to meet with the child

Questions?

Codification of *Rice & Asplund* (in parenting matters)

Legislative Amendment (new s 65DAAA)

	Future
65DAAA	(1) If a final parenting order is in force in relation to a child, a court must not reconsider the final parenting order unless: (a) The court has considered whether there has been a significant change of circumstances since the final parenting order was made; and (b) the court is satisfied that, in all the circumstances (and taking into account whether there has been a significant change of circumstances since the final parenting order was made), it is in the best interests of the child for the final parenting order to be reconsidered.
65DAAA	(3) Despite subsection (1), the court may reconsider a final parenting order with the agreement or consent of all the parties to that order.

Codification of *Rice & Asplund* (in parenting matters)

Legislative Amendment (new s 65DAAA)

Factors the court may have regard to

	Future
65DAAA(2)	For the purposes of determining whether the court is satisfied as mentioned in paragraph (1)(b), and without limiting section 60CC, the court may have regard to any matters that the court considers relevant, including the following: (a) the reasons for the final parenting order and the material on which it was based; (b) whether there is any new material available that was not available to the court that made the final parenting order; (c) the likelihood that, if the final parenting order is reconsidered, the court will make a new parenting order that affects the operation of the final parenting order in a significant way (whether by varying, discharging or suspending the final parenting order, in whole or in part, or in some other way); (d) any potential benefit, or detriment, to the child that might result from reconsidering the final parenting order.

Final Questions?



Family Law Amendment Act 2023

No. 87, 2023

**An Act to amend legislation relating to family law,
and for related purposes**

Note: An electronic version of this Act is available on the Federal Register of Legislation
(<https://www.legislation.gov.au/>)

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Family Law Amendment Act 2023

No. 87, 2023

An Act to amend legislation relating to family law, and for related purposes

[Assented to 6 November 2023]

The Parliament of Australia enacts:

1 Short title

This Act is the *Family Law Amendment Act 2023*.

2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with

column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	6 November 2023
2. Schedule 1	A single day to be fixed by Proclamation. However, if the provisions do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.	
3. Schedule 2, Part 1, Division 1	A single day to be fixed by Proclamation. However, if the provisions do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.	
4. Schedule 2, Part 1, Division 2	The later of: (a) immediately after the commencement of the provisions covered by table item 2; and (b) immediately after the commencement of the provisions covered by table item 3.	
5. Schedule 2, Part 1, Division 3	At the same time as the provisions covered by table item 3.	
6. Schedule 2, Part 2, Division 1	The day after this Act receives the Royal Assent.	7 November 2023
7. Schedule 2, Part 2, Division 2	Immediately after the commencement of the provisions covered by table item 3.	
8. Schedule 3	Immediately after the commencement of the provisions covered by table item 2.	
9. Schedule 4	A single day to be fixed by Proclamation.	

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
	However, if the provisions do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.	
10. Schedule 5	A single day to be fixed by Proclamation. However, if the provisions do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.	
11. Schedule 6	A single day to be fixed by Proclamation. However, if the provisions do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.	
12. Schedule 7	A single day to be fixed by Proclamation. However, if the provisions do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.	
13. Schedules 8 and 9	The day after this Act receives the Royal Assent.	7 November 2023
14. Schedule 10	The day after this Act receives the Royal Assent.	7 November 2023

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

- (2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

3 Schedules

Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Parenting framework

Part 1—Best interests of children

Family Law Act 1975

1 Paragraph 4(1AB)(b)

Repeal the paragraph, substitute:

(b) paragraph 60CC(3)(a); and

2 Paragraph 60A(a)

Omit “and the principles underlying it,”.

3 Subdivision B of Division 1 of Part VII (heading)

Omit “, principles”.

4 Section 60B

Repeal the section, substitute:

60B Objects of Part

The objects of this Part are:

- (a) to ensure that the best interests of children are met, including by ensuring their safety; and
- (b) to give effect to the Convention on the Rights of the Child done at New York on 20 November 1989.

Note: The text of the Convention is set out in Australian Treaty Series 1991 No. 4 ([1991] ATS 4). In 2023, the text of a Convention in the Australian Treaty Series was accessible through the Australian Treaties Library on the AustLII website (www.austlii.edu.au).

5 Section 60C (table item 1, column headed “Divisions and coverage”)

Omit “principles underlying it, and”.

6 Section 60CC

Repeal the section, substitute:

60CC How a court determines what is in a child's best interests

Determining child's best interests

- (1) Subject to subsection (4), in determining what is in the child's best interests, the court must:
 - (a) consider the matters set out in subsection (2); and
 - (b) if the child is an Aboriginal or Torres Strait Islander child—also consider the matters set out in subsection (3).

General considerations

- (2) For the purposes of paragraph (1)(a), the court must consider the following matters:
 - (a) what arrangements would promote the safety (including safety from being subjected to, or exposed to, family violence, abuse, neglect, or other harm) of:
 - (i) the child; and
 - (ii) each person who has care of the child (whether or not a person has parental responsibility for the child);
 - (b) any views expressed by the child;
 - (c) the developmental, psychological, emotional and cultural needs of the child;
 - (d) the capacity of each person who has or is proposed to have parental responsibility for the child to provide for the child's developmental, psychological, emotional and cultural needs;
 - (e) the benefit to the child of being able to have a relationship with the child's parents, and other people who are significant to the child, where it is safe to do so;
 - (f) anything else that is relevant to the particular circumstances of the child.
- (2A) In considering the matters set out in paragraph (2)(a), the court must include consideration of:
 - (a) any history of family violence, abuse or neglect involving the child or a person caring for the child (whether or not the person had parental responsibility for the child); and
 - (b) any family violence order that applies or has applied to the child or a member of the child's family.

Additional considerations—right to enjoy Aboriginal or Torres Strait Islander culture

- (3) For the purposes of paragraph (1)(b), the court must consider the following matters:
- (a) the child’s right to enjoy the child’s Aboriginal or Torres Strait Islander culture, by having the support, opportunity and encouragement necessary:
 - (i) to connect with, and maintain their connection with, members of their family and with their community, culture, country and language; and
 - (ii) to explore the full extent of that culture, consistent with the child’s age and developmental level and the child’s views; and
 - (iii) to develop a positive appreciation of that culture; and
 - (b) the likely impact any proposed parenting order under this Part will have on that right.

Consent orders

- (4) If the court is considering whether to make an order with the consent of all the parties to the proceedings, the court may, but is not required to, have regard to all or any of the matters set out in subsection (2) or (3).

7 Subsection 60CD(1)

Omit “60CC(3)(a)”, substitute “60CC(2)(b)”.

8 Paragraph 60D(1)(b)

Repeal the paragraph, substitute:

- (b) encourage the person to act in the child’s best interests by applying the considerations set out in subsections 60CC(2) and (3).

9 Paragraph 68N(b)

Omit “and principles”.

10 Subsection 68P(2C)

Repeal the subsection.

10A After subsection 68P(3)

Insert:

- (3A) Paragraph (3)(c) does not require the court to give a copy of the order or injunction to a child if the court is satisfied that it is in the child's best interests not to receive a copy of the order or injunction.

11 Paragraph 68S(2)(a)

Omit "60CC(3)(a) (about taking into account a child's views etc.)", substitute "60CC(2)(b) (about taking into account a child's views)".

12 Application provision

The amendments of the *Family Law Act 1975* made by this Part apply in relation to the following proceedings:

- (a) proceedings instituted on or after the day this item commences;
- (b) proceedings instituted before, and not finally determined by, the day this item commences, other than proceedings in respect of which a final hearing has commenced by the day this item commences.

Part 2—Parental responsibility

Family Law Act 1975

13 Subsection 61C(1) (note 2)

Omit “See section 61DA for the presumption that the court does apply when making a parenting order.”.

14 After section 61C

Insert:

61CA Consultation between parents on major long-term issues

If it is safe to do so, and subject to any court orders, the parents of a child who is not yet 18 are encouraged:

- (a) to consult each other about major long-term issues in relation to the child; and
- (b) in doing so, to have regard to the best interests of the child as the paramount consideration.

15 At the end of section 61D

Add:

- (3) A parenting order that deals with the allocation of responsibility for making decisions about major long-term issues in relation to the child (see subsection 64B(3)) may provide for joint or sole decision-making in relation to all or specified major long-term issues.

16 Sections 61DA and 61DB

Repeal the sections, substitute:

61DAA Effect of parenting order that provides for joint decision-making about major long-term issues

- (1) If a parenting order provides for joint decision-making by persons in relation to all or specified major long-term issues in relation to a

child, then, except to the extent the order otherwise specifies, the order is taken to require each of the persons:

- (a) to consult each other person in relation to each such decision; and
 - (b) to make a genuine effort to come to a joint decision.
- (2) To avoid doubt, this section does not require any other person to establish, before acting on a decision about the child communicated by one of those persons, that the decision has been made jointly.

61DAB No need to consult on issues that are not major long-term issues

- (1) If a child is spending time with a person at a particular time under a parenting order, the order is taken not to require the person to consult a person who:
- (a) has parental responsibility for the child; or
 - (b) shares parental responsibility for the child with another person;
- about decisions that are made in relation to the child during that time on issues that are not major long-term issues.

Note: This will mean that the person with whom the child is spending time will usually not need to consult on decisions about such things as what the child eats or wears because these are usually not major long-term issues.

- (2) Subsection (1) applies subject to any provision to the contrary made by a parenting order.

17 At the end of section 61F

Add:

Note: The expression *Aboriginal or Torres Strait Islander culture* is defined in subsection 4(1).

18 At the end of subsection 63C(2B)

Add:

Note: For the definition of *major long-term issues*, see subsection 4(1).

19 Paragraphs 63DA(2)(a) and (b)

Repeal the paragraphs.

20 Subsections 63DA(3) and (4)

Repeal the subsections.

21 At the end of subsection 64B(3)

Add:

Note 1: See also subsection 61D(3) and section 61DAA in relation to parenting orders dealing with allocation of responsibility for making decisions about major long-term issues.

Note 2: For the definition of *major long-term issues*, see subsection 4(1).

22 Subsection 65D(1)

Omit “sections 61DA (presumption of equal shared parental responsibility when making parenting orders) and”, substitute “section”.

23 Subsection 65D(2)

Omit “61DA (presumption of equal shared parental responsibility when making parenting orders) and”.

24 Sections 65DAA, 65DAC and 65DAE

Repeal the sections.

25 Application provision

- (1) Subject to subitem (2), the amendments of the *Family Law Act 1975* made by this Part apply in relation to the following proceedings:
 - (a) proceedings instituted on or after the day this item commences;
 - (b) proceedings instituted before, and not finally determined by, the day this item commences, other than proceedings in respect of which a final hearing has commenced by the day this item commences.
- (2) Section 61CA of the *Family Law Act 1975*, as inserted by this Part, applies from the day this item commences.

Part 3—Child-related proceedings

Family Law Act 1975

26 After section 65D

Insert:

65DAAA Reconsideration of final parenting orders

- (1) If a final parenting order is in force in relation to a child, a court must not reconsider the final parenting order unless:
 - (a) the court has considered whether there has been a significant change of circumstances since the final parenting order was made; and
 - (b) the court is satisfied that, in all the circumstances (and taking into account whether there has been a significant change of circumstances since the final parenting order was made), it is in the best interests of the child for the final parenting order to be reconsidered.
- (2) For the purposes of determining whether the court is satisfied as mentioned in paragraph (1)(b), and without limiting section 60CC, the court may have regard to any matters that the court considers relevant, including the following:
 - (a) the reasons for the final parenting order and the material on which it was based;
 - (b) whether there is any material available that was not available to the court that made the final parenting order;
 - (c) the likelihood that, if the final parenting order is reconsidered, the court will make a new parenting order that affects the operation of the final parenting order in a significant way (whether by varying, discharging or suspending the final parenting order, in whole or in part, or in some other way);
 - (d) any potential benefit, or detriment, to the child that might result from reconsidering the final parenting order.

- (3) Despite subsection (1), the court may reconsider a final parenting order with the agreement or consent of all the parties to that order.
- (4) The failure of a court to comply with subsection (1) does not affect the validity of any order made by the court.

27 Application provision

The amendment made by this Part applies in relation to final parenting orders whether the orders came into force before, or come into force on or after, the day this item commences.

Schedule 2—Enforcement of child-related orders

Part 1—Enforcement of child-related orders

Division 1—Main amendments

Child Support (Assessment) Act 1989

1 Subsection 100(2)

Omit “Division 13A of Part VII (Consequences of failure to comply with orders, and other obligations, that affect children)”, substitute “Division 13A of Part VII (Orders in proceedings relating to contraventions of child-related orders)”.

Family Law Act 1975

2 Subsection 4(1) (definitions of *alleged contravention* and *alleged offender*)

Omit “in Subdivision D of Division 6 of Part VII”, substitute “in Subdivision B of Division 14 of Part VII”.

3 Subsection 4(1) (definition of *applied provisions*)

Repeal the definition.

4 Subsection 4(1)

Insert:

child-related order: see subsection 70NBA(2).

5 Subsection 4(1) (definition of *community service order*)

Repeal the definition.

6 Subsection 4(1)

Insert:

contravene a child-related order: see section 70NAC.

7 Subsection 4(1)

Repeal the following definitions:

- (a) definition of *contravened*;
- (b) definition of *order under this Act affecting children*;
- (c) definition of *primary order*.

8 Subsection 4(1)

Insert:

reasonable excuse for contravening a child-related order has a meaning affected by section 70NAD.

9 Subsection 4(1) (definition of *reasonable excuse for contravening*)

Repeal the definition.

10 At the end of Part II

Add:

Division 5—Post-separation parenting programs

10PA Admissibility of communications in post-separation parenting programs

- (1) Evidence of anything said, or of any admission made, by a person attending a post-separation parenting program is not admissible:
 - (a) in any court (whether exercising federal jurisdiction or not);
or
 - (b) in any proceedings before a person authorised by a law of the Commonwealth, of a State or of a Territory, or by the consent of the parties, to hear evidence.
- (2) Subsection (1) does not apply to the following:
 - (a) an admission by an adult that indicates that a child under 18 has been abused or is at risk of abuse;
 - (b) a disclosure by a child under 18 that indicates that the child has been abused or is at risk of abuse;

unless, in the opinion of the court, there is sufficient evidence of the admission or disclosure available to the court from other sources.

Note: A court may make an order directing a person to attend a post-separation parenting program under subsection 65LA(1) or 70NBD(1).

11 Section 60C (table item 6)

Repeal the item, substitute:

- | | |
|---|--|
| 6 | <p>Division 6—Parenting orders other than child maintenance orders</p> <ul style="list-style-type: none">• applying for and making parenting orders (other than child maintenance orders) after attending, if necessary, family dispute resolution (see section 60I)• measures to promote the exercise of parental responsibility• obligations under parenting orders, other than child maintenance orders, relating to taking or sending children from Australia |
|---|--|

12 Section 60C (table item 13A)

Repeal the item, substitute:

- | | |
|-----|--|
| 13A | <p>Division 13A—Orders in proceedings relating to contraventions of child-related orders</p> <ul style="list-style-type: none">• orders that the court may make in proceedings where it is alleged that a person has contravened a child-related order (including parenting orders) |
|-----|--|

13 Section 60C (table item 14)

Repeal the item, substitute:

- | | |
|----|---|
| 14 | <p>Division 14—Miscellaneous</p> <ul style="list-style-type: none">• dealing with people who have been arrested and miscellaneous matters relating to children |
|----|---|

14 Subsection 63F(3) (paragraph (a) of the note)

Omit “Subdivisions C, D and E”, substitute “Subdivision E”.

15 Paragraphs 65A(1)(b) and (c)

Repeal the paragraphs.

16 Subsection 65D(3)

Repeal the subsection (not including the notes).

17 Subsection 65D(3) (notes 1 and 2)

Omit “or for the proceedings under Subdivision E of Division 13A of Part VII, or both,”.

18 Subdivisions C and D of Division 6 of Part VII

Repeal the Subdivisions.

19 Section 67Q (note 1)

Omit “Subdivision D of Division 6”, substitute “Subdivision B of Part 14”.

20 Subsections 69ZH(2) and (4)

Omit “Subdivisions C, D and E”, substitute “Subdivision E”.

21 Division 13A of Part VII

Repeal the Division, substitute:

**Division 13A—Orders in proceedings relating to
contraventions of child-related orders**

Subdivision A—Preliminary

70NAA Simplified outline

This Division sets out orders that a court may make if an issue arises in the proceedings about whether a person (the <i>respondent</i>) has contravened a child-related order.
--

The court may, at any stage of proceedings (and without having to make a finding about the contravention), make any of the following orders:

- (a) a make-up time parenting order;
- (b) an order varying or suspending a parenting order;
- (c) an order requiring the respondent and any other party to the proceedings to attend a post-separation parenting program.

If the court finds on the balance of probabilities that the respondent contravened the child-related order without having a reasonable excuse, the court may make any of the following orders (having regard to the seriousness of the contravention):

- (a) an order requiring the respondent to enter into a bond;
- (b) an order imposing a fine on the respondent for failing to enter into a bond.

If the court is satisfied beyond reasonable doubt that the respondent contravened the child-related order without having a reasonable excuse, the court may also make any of the following orders (having regard to the seriousness of the contravention):

- (a) an order imposing a fine on the respondent;
- (b) an order imposing a sentence of imprisonment on the respondent.

This Division also sets out ancillary matters relating to terms of imprisonment, the enforcement of bonds and other miscellaneous matters.

Note: A court may also award costs against a party under section 117 if satisfied there are circumstances that justify it doing so.

70NAB Objects

The principal objects of this Division are to meet the best interests of children to whom child-related orders relate by:

- (a) supporting compliance with child-related orders; and
- (b) resolving difficulties associated with child-related orders that are parenting orders which have contributed to

- non-compliance with such orders (including by varying or making further orders); and
- (c) deterring non-compliance with child-related orders; and
 - (d) upholding the authority of the court by enforcing compliance with child-related orders where the court considers this necessary and appropriate; and
 - (e) providing for sanctions for a person who contravenes a child-related order without reasonable excuse.

70NAC Meaning of *contravene* a child-related order

- (1) A person ***contravenes*** a child-related order only if:
 - (a) the person is a person (other than a child) to whom the order applies and:
 - (i) the person intentionally fails to comply with the order; or
 - (ii) the person makes no reasonable attempt to comply with the order; or
 - (b) the person is not a person to whom the order applies, and the person is not a child, but:
 - (i) the person intentionally prevents compliance with the order by a person to whom the order applies; or
 - (ii) the person aids or abets a contravention of the order by a person to whom the order applies.

Note: A child-related order that is a parenting order may be subject to a later parenting plan: see section 64D. This means that conduct that would otherwise contravene such an order may not constitute a contravention because of the terms of a later parenting plan.

- (2) Without limiting subsection (1), the following table sets out circumstances in which a person ***contravenes*** a child-related order.

Circumstances in which a person <i>contravenes</i> a child-related order		
Item	The order provides for ...	and the person intentionally ...
1	with whom a child is to live	either: (a) contrary to the order, removes the child from the care of another person; or (b) contrary to the order, refuses or

Schedule 2 Enforcement of child-related orders

Part 1 Enforcement of child-related orders

Circumstances in which a person <i>contravenes</i> a child-related order		
Item	The order provides for ...	and the person intentionally ...
		fails to deliver or return the child to another person.
2	with whom a child is to spend time	hinders or prevents another person from spending time with the child in accordance with the order.
3	with whom a child is to communicate	hinders or prevents another person from communicating with the child in accordance with the order.
4	the allocation of parental responsibility for a child to another person	hinders or prevents the other person from discharging that responsibility in accordance with the order.
5	the maintenance of a child	either: (a) contrary to the order, fails to pay maintenance; or (b) prevents another person paying maintenance in accordance with the order.

70NAD Meaning of *reasonable excuse* for contravening a child-related order

Where person did not understand obligations

- (1) A person has a ***reasonable excuse*** for contravening a child-related order if:
 - (a) the person contravened the order because at the time of the contravention the person did not understand the obligations imposed by the order; and
 - (b) the court considers that the person ought to be excused in respect of the contravention.
- (2) If the court decides that a person has a reasonable excuse under subsection (1) for contravening a child-related order, the court must explain to the person, in language likely to be readily understood by the person:
 - (a) the obligations imposed on the person by the order; and

- (b) the consequences that may follow if the person contravenes the order again.

Protection of health or safety of a person

- (3) A person has a **reasonable excuse** for contravening a child-related order if:
 - (a) the person contravened the order because the person reasonably believed that the person's actions constituting the contravention were necessary to protect the health or safety of the person, a child or any other person; and
 - (b) the period of the contravention was not longer than necessary to protect the health or safety of the person, child or other person.

Section does not limit circumstances of a reasonable excuse

- (4) This section does not limit the circumstances in which a person may have a reasonable excuse for contravening a child-related order.

70NADA Burden of proof in relation to reasonable excuse

A person who claims to have a reasonable excuse for contravening a child-related order has the legal burden of proving the excuse.

70NAE Standard of proof

The standard of proof to be applied in determining matters in proceedings under this Division (other than paragraph 70NBF(1)(d)) is proof on the balance of probabilities.

Note: The court may make an order under paragraph 70NBF(1)(d) in relation to a person only if the court is satisfied beyond reasonable doubt that the person contravened the child-related order.

Subdivision B—Orders relating to contraventions of child-related orders

70NBA Court may make orders in proceedings relating to contravention of child-related orders

- (1) This Subdivision sets out orders that a court exercising jurisdiction in proceedings under this Act may make if:
- (a) an issue arises in the proceedings about whether a person (the *respondent*) has contravened a child-related order; and
 - (b) a party to the proceedings makes an application for an order under this Subdivision in relation to the issue.

Note: The court does not need to find that the respondent contravened a child-related order to make certain orders under this Subdivision. For example, the court may make the following orders at any stage of the proceedings:

- (a) a make-up time parenting order under section 70NBB;
 - (b) an order varying or suspending a parenting order under section 70NBC;
 - (c) an order requiring the respondent and any other party to the proceedings to attend a post-separation parenting program under section 70NBD.
- (2) Each of the following is a *child-related order*:
- (a) a parenting order;
 - (b) an injunction granted by the court:
 - (i) under section 68B; or
 - (ii) under section 114 in so far as the injunction is for the protection of a child;
 - (c) a bond entered into:
 - (i) under a parenting order; or
 - (ii) under paragraph 70NBF(1)(a); or
 - (iii) for the purposes of subsection 70NCC(3);
 - (d) an undertaking given to, and accepted by, the court that relates to, or to the making of, an order, injunction or bond referred to in any of paragraphs (a) to (c);
 - (e) a subpoena issued under the applicable Rules of Court that:
 - (i) relates to, or to the making of, an order, injunction or bond referred to in any of paragraphs (a) to (c); and

- (ii) is issued to a party to the proceedings for the order, injunction or bond, as the case may be.

70NBB Make-up time parenting orders

- (1) If a child does not spend time with a person as required by a child-related order as a result of the alleged contravention mentioned in subsection 70NBA(1), then, in lieu of that time, the court may make a parenting order (a ***make-up time parenting order***) that the child spend time with the person.

Note 1: Parenting orders are made under Division 6.

Note 2: The court may also make an order requiring the respondent to compensate another person for reasonable expenses incurred as a result of a child not spending time with that other person: see paragraph 70NBF(1)(c).

- (2) The court may make a make-up time parenting order at any stage of the proceedings.
- (3) To avoid doubt, the amount of time specified in the make-up time parenting order may be different from the amount of time that the child missed with the person as a result of the alleged contravention.

70NBC Variation and suspension of child-related orders that are parenting orders

Variation of child-related orders that are parenting orders

- (1) The court may, at any stage of the proceedings, vary a child-related order that is a parenting order.
- (2) Subsection (1) does not limit the circumstances in which a court having jurisdiction under this Act may vary a child-related order that is a parenting order.

Suspension of child-related orders that are parenting orders

- (3) The court may, at any stage of the proceedings, suspend for a specified period of time the operation of, or part of the operation of, a child-related order that is a parenting order.

70NBD Post-separation parenting programs

Post-separation parenting program orders

- (1) The court may, at any stage of the proceedings, make an order requiring the respondent and, if appropriate, one or more other parties to the proceedings, to attend a post-separation parenting program or other specified program.

Note 1: Before making an order under this section, the court must consider seeking the advice of a family consultant about the services appropriate to the party's needs (see section 11E).

Note 2: Things said, or admission made by, a person in a post-separation parenting program are generally not admissible in a court: see section 10PA.

Duty of principal executive officer to notify program provider

- (2) The principal executive officer of the court must advise the provider of the program of the making of an order under subsection (1) as soon as reasonably practicable after the order is made.

Unsuitability to attend program or failure to attend program

- (3) The provider of the program must inform the court, and any other party to the proceedings, if:
- (a) the provider considers that a person ordered to attend the program is unsuitable to attend the program; or
 - (b) a person ordered to attend the program fails to attend the entire program, or any part of it.
- (4) The court may make any order (other than an order under paragraph 70NBF(1)(d)) that it considers appropriate if a person ordered to attend a program is considered as being unsuitable to attend the program, or fails to attend any part of the program.
- (5) If the court has found that the respondent has contravened the child-related order without having a reasonable excuse, then the court must take into account the seriousness of that contravention when making an order under subsection (4).

70NBF Orders where contravention established without reasonable excuse

Orders for contraventions without reasonable excuse

- (1) If the court finds that the respondent has contravened a child-related order without having a reasonable excuse, the court may make any of the following orders:
- (a) an order requiring the respondent to enter into a bond in accordance with section 70NCA;
 - (b) if an order is made under paragraph (a), and the respondent fails, without having a reasonable excuse, to enter into the bond—an order imposing a fine not exceeding 10 penalty units on the respondent;
 - (c) where the contravention resulted in a child not spending time with, or living with, a person (the ***affected person***) for a period—an order requiring the respondent to compensate the affected person for some or all of any expenses the affected person reasonably incurred as a result of the contravention;
 - (d) where the court is satisfied beyond reasonable doubt that the respondent contravened the order:
 - (i) an order imposing a fine not exceeding 60 penalty units;
 - (ii) an order imposing a term of imprisonment.

Note: For subparagraph (d)(ii), see subsection (4), subsection 70NCC(2) and section 70NCE for limits on how and when the court may impose a term of imprisonment on the respondent.

Matters to be considered by the court

- (2) In making an order mentioned in subsection (1), the court must have regard to:
- (a) the likely effects of making the order on any child, or any other person; and
 - (b) the seriousness of the contravention.
- (3) Without limiting the matters the court may take into account, the following matters must be taken into account by the court when having regard to the seriousness of the contravention:

- (a) whether a court has previously found that the respondent has contravened a child-related order without having a reasonable excuse;
 - (b) whether the respondent behaved in a way that showed a serious disregard of the respondent's obligations under the child-related order mentioned in subsection (1);
 - (c) the behaviour of any person with whom the child is to live or spend time under the child-related order mentioned in subsection (1).
- (4) The court may sentence the respondent to imprisonment under subparagraph (1)(d)(ii) only if the court is satisfied that, in all the circumstances of the case, it would not be appropriate for the court to deal with the contravention in any other way under subsection (1).

Subdivision C—Further provisions relating to bonds and imprisonment

70NCA Matters relating to bonds

- (1) This section sets out requirements relating to bonds that the court may require the respondent to enter into under paragraph 70NBF(1)(a).

Matters dealt with in bonds

- (2) A bond is to be for a specified period of up to 2 years.
- (3) A bond may be:
- (a) with or without surety; and
 - (b) with or without security.
- (4) The conditions that may be imposed on the respondent by a bond include (without limitation) conditions that require the respondent:
- (a) to attend a post-separation parenting program; or
 - (b) to attend an appointment (or a series of appointments) with a family consultant; or
 - (c) to attend family counselling; or
 - (d) to attend family dispute resolution; or

- (e) to be of good behaviour.

Duty to explain bond

- (5) Before requiring the respondent to enter into a bond, the court must explain to the respondent, in language likely to be readily understood by the respondent:
 - (a) the purpose and effect of the proposed requirement; and
 - (b) the consequences that may follow if the respondent:
 - (i) fails to enter into the bond; or
 - (ii) having entered into the bond—fails to act in accordance with the bond.

70NCB Procedure for enforcing bonds

- (1) This section applies if:
 - (a) the court finds that the respondent has contravened a child-related order without having a reasonable excuse; and
 - (b) the respondent has entered into a bond in accordance with an order made under paragraph 70NBF(1)(a); and
 - (c) the respondent fails, without having a reasonable excuse, to comply with the bond.
- (2) The court may:
 - (a) without prejudice to the continuance of the bond, impose a fine not exceeding 10 penalty units on the respondent; or
 - (b) revoke the bond and deal with the respondent in any manner in which the respondent could have been dealt with for the contravention of the child-related order if:
 - (i) the bond had not been entered into; and
 - (ii) the respondent was before the court under this Division in respect of the contravention of the child-related order.
- (3) Without limiting the matters the court may take into account, the court must take into account the following matters when acting under subsection (2):
 - (a) the fact that the bond was entered into;
 - (b) anything done pursuant to the bond;
 - (c) any fine imposed, and any other order made, for or in respect of the contravention of the child-related order.

70NCC Matters relating to imprisonment

- (1) This section applies if a sentence of imprisonment is imposed on the respondent under subparagraph 70NBF(1)(d)(ii).

Limits on sentences of imprisonment

- (2) The sentence of imprisonment must be expressed to be:
- (a) for a specified period of no more than 12 months; or
 - (b) for a period ending at the earlier of:
 - (i) the time when the respondent complies with the child-related order concerned; or
 - (ii) the time when the respondent has been imprisoned under the sentence for 12 months, or such lesser period as is specified by the court ordering the sentence.

Good behaviour bonds

- (3) When sentencing the respondent to imprisonment, the court may direct that, after serving a specified part of the term of imprisonment, the respondent be released upon the respondent entering into a bond (with or without surety or security) that the respondent will be of good behaviour for a specified period of up to 2 years.

Statement of reasons

- (4) The court that sentences the respondent to imprisonment must:
- (a) state the reasons why it is satisfied as mentioned in subsection 70NBF(4); and
 - (b) cause those reasons to be entered in the records of the court.

Note: Subsection 70NBF(4) provides that the respondent may be sentenced to imprisonment only if the court is satisfied that it would not be appropriate for the court to deal with the contravention in any other way under subsection 70NBF(1).

- (5) The failure of the court to comply with subsection (4) does not invalidate a sentence.

70NCD Powers of court in relation to imprisoned person

Release of imprisoned respondent

- (1) The court that has sentenced the respondent to imprisonment may order the release of the respondent if it is satisfied that the respondent will, if released, comply with the court's orders.

Suspension of sentence

- (2) The court that sentences the respondent to imprisonment may:
 - (a) suspend the sentence upon the terms and conditions determined by the court; and
 - (b) terminate such a suspension.

70NCE Rules relating to child maintenance orders and child support

Sentences of imprisonment for contravention of child maintenance orders

- (1) The court must not make an order imposing a sentence of imprisonment on the respondent under subparagraph 70NBF(1)(d)(ii), in respect of a contravention of a child maintenance order made under this Act, unless the court is satisfied that the contravention was intentional or fraudulent.
- (2) To avoid doubt, the serving by the respondent of a period of imprisonment imposed under subparagraph 70NBF(1)(d)(ii) for failure to make a payment under a child maintenance order does not affect the respondent's liability to make the payment.

Court must not imprison respondent for contravention of child support assessments etc.

- (3) The court must not make an order imposing a sentence of imprisonment on the respondent under subparagraph 70NBF(1)(d)(ii) in respect of:
 - (a) a contravention of an administrative assessment of child support made under the *Child Support (Assessment) Act 1989*; or

- (b) a breach of a child support agreement made under that Act;
or
- (c) a contravention of an order made by a court under Division 4 of Part 7 of that Act for a departure from such an assessment (including such an order that contains matters mentioned in section 141 of that Act).

Subdivision D—Miscellaneous

70NDA Court may issue warrant for arrest of alleged offender

- (1) The court may issue a warrant authorising a person to whom it is addressed to arrest the respondent if:
 - (a) a child-related order that is a parenting order provides that a child is to live with, spend time with or communicate with a person (the *complainant*); and
 - (b) the court is satisfied that there are reasonable grounds for believing that the respondent has contravened the order on any of the grounds mentioned in any of items 1 to 3 of the table in subsection 70NAC(2); and
 - (c) the issue of the warrant is necessary to ensure that the respondent will attend before the court to be dealt with under this Division for the alleged contravention.
- (2) A warrant stops being in force on the date specified in the warrant (which must be no more than 6 months after the issue of the warrant).

70NDB Relationship between Division and prosecutions for offences under other laws

- (1) This section applies if:
 - (a) an act or omission by the respondent:
 - (i) constitutes an alleged contravention of a child-related order; and
 - (ii) also constitutes an alleged offence under any law; and
 - (b) the respondent is prosecuted in respect of the offence.
- (2) The court must:

- (a) dismiss proceedings in relation to the alleged contravention of the child-related order; or
 - (b) adjourn those proceedings until the prosecution has been completed.
- (3) Nothing in this Division renders a person liable to be punished twice in respect of the same act or omission.

70NDC Division does not limit operation of section 105

Nothing in this Division limits the operation of section 105 (which deals with enforcement generally).

22 Division 14 of Part VII (after the heading)

Insert:

Subdivision A—What this Division does

23 Section 70P

Omit “deals with”, substitute “is about dealing with people who have been arrested and”.

24 After section 70P

Insert:

Subdivision B—Dealing with people who have been arrested

70PA Situation to which Subdivision applies

This Subdivision applies if a person:

- (a) is arrested under a warrant issued under subsection 70NDA(1) (warrants for arrest of persons alleged to have contravened a child-related order); or
- (b) is arrested without warrant under a recovery order.

70PB Arrested person to be brought before a court

- (1) The arresting person must:

- (a) ensure that the alleged offender is brought before a court having jurisdiction under this Part before the end of the holding period applicable under subsection (4); and
 - (b) take all reasonable steps to ensure that, before the alleged offender is brought before a court, the person who applied for the warrant or recovery order is aware:
 - (i) that the alleged offender has been arrested; and
 - (ii) of the court before which the alleged offender is to be brought.
- (2) The alleged offender must not be released before the end of the holding period except under an order of a court having jurisdiction under this Part.
- (3) This section does not authorise the holding in custody of the alleged offender after the end of the holding period.
- (4) The ***holding period*** is:
 - (a) if a Saturday, Sunday or public holiday starts within 24 hours after the arrest of the alleged offender—the longer of the following periods:
 - (i) the period starting with the arrest and ending 48 hours later;
 - (ii) the period starting with the arrest and ending at the end of the next day after the day of the arrest that is not a Saturday, Sunday or public holiday; or
 - (b) in any other case—the period starting with the arrest and ending 24 hours later.

70PC Obligation of court—where application before it to deal with contravention

- (1) This section applies if:
 - (a) the alleged offender is brought before a court under section 70PB; and
 - (b) there is an application before the court for the alleged offender to be dealt with under Division 13A for the alleged contravention.

- (2) The court must, without delay, proceed to hear and determine the application.

70PD Obligation of court—where no application before it, but application before another court, to deal with contravention

- (1) This section applies if:
- (a) the alleged offender is brought before a court under section 70PB; and
 - (b) there is no application, or no longer any application, before the court for the alleged offender to be dealt with under Division 13A for the alleged contravention; and
 - (c) the court is aware that there is an application before another court for the alleged offender to be dealt with under Division 13A for the alleged contravention.
- (2) The court must, without delay:
- (a) order that the alleged offender is to be released from custody on entering into a recognisance (with or without surety or security) that the alleged offender will attend before the other court on a date, at a time and at a place specified by the court; or
 - (b) order the arresting person to arrange for the alleged offender to be brought before the other court on such date and at such time as the court specifies, being a date and time such that the alleged offender is to be brought before the other court as soon as practicable, and in any event not more than 72 hours, after the order is made.
- (3) If a court makes an order under paragraph (2)(b) for the alleged offender to be brought before another court:
- (a) subject to paragraph (c), the alleged offender may be kept in custody until brought before the other court; and
 - (b) if the alleged offender is brought before the other court as required by the order, the other court must, without delay, proceed to hear and determine the application mentioned in paragraph (1)(c); and

- (c) if the alleged offender is not brought before the other court as required by the order, the alleged offender must be released without delay.

70PE Obligation of court—where no application before any court to deal with contravention

- (1) This section applies if:
 - (a) the alleged offender is brought before a court under section 70PB; and
 - (b) there is no application, or no longer any application, before the court for the alleged offender to be dealt with under Division 13A for the alleged contravention; and
 - (c) so far as the court is aware, there is no application, or no longer any application, before any other court for the alleged offender to be dealt with under Division 13A for the alleged contravention.
- (2) The court must, without delay, order the release of the alleged offender.

70PF Applications heard as required by subsection 70PC(2) or paragraph 70PD(3)(b)

- (1) If a court hearing an application as required by subsection 70PC(2) or paragraph 70PD(3)(b) adjourns the hearing, the court must:
 - (a) order the alleged offender to be kept in such custody as the court considers appropriate during the adjournment; or
 - (b) order that the alleged offender is to be released from custody, either on entering into a recognisance (with or without surety or security) that the alleged offender will attend before the court on the resumption of the hearing or otherwise.
- (2) This section does not authorise the holding in custody of the alleged offender during an adjournment of proceedings that:
 - (a) is expressed to be for a period of more than 24 hours; or
 - (b) continues for more than 24 hours.

Subdivision C—Other matters

25 Paragraph 109A(1)(a)

Repeal the paragraph, substitute:

(a) a child-related order; or

26 Subsection 112AP(9) (definition of *order under this Act*)

Omit “an order under this Act affecting children”, substitute “a child-related order”.

27 Subsection 117(1)

Omit “subsections”, substitute “subsection”.

28 Subsection 117(1)

Omit “and 70NFB(1) and sections”, substitute “and sections”.

29 Subsection 117(1)

Omit “shall bear his or her”, substitute “must bear the party’s”.

30 Subparagraph 123(1)(j)(iii)

Omit “70NEB or 70NEG”, substitute “70NBB, 70NBD or 70NBF”.

Federal Circuit and Family Court of Australia Act 2021

31 Subparagraph 98(2)(n)(iv)

Repeal the subparagraph, substitute:

(iv) subsection 70NBD(1);

32 Subparagraph 224(1)(i)(iii)

Omit “70NEB or 70NEG”, substitute “70NBB, 70NBD or 70NBF”.

33 Subparagraph 254(2)(n)(iv)

Repeal the subparagraph, substitute:

(iv) subsection 70NBD(1);

Division 2—Amendments contingent on the commencement of Part 3 of Schedule 1

Family Law Act 1975

34 At the end of subsection 70NBC(1)

Add:

Note: The court must not reconsider a final parenting order (other than a child maintenance order) unless the court has considered certain matters and is satisfied of certain matters: see section 65DAAA.

35 At the end of subsection 70NBC(3)

Add:

Note: The court must not reconsider a final parenting order (other than a child maintenance order) unless the court has considered certain matters and is satisfied of certain matters: see section 65DAAA.

Division 3—Application and transitional rules

36 Application and transitional rules

- (1) The Minister may, by legislative instrument, make rules prescribing matters of a transitional nature (including prescribing any saving or application provisions) relating to the amendments or repeals made by this Part.
- (2) To avoid doubt, the rules may not do the following:
 - (a) create an offence or civil penalty;
 - (b) provide powers of:
 - (i) arrest or detention; or
 - (ii) entry, search or seizure;
 - (c) impose a tax;
 - (d) set an amount to be appropriated from the Consolidated Revenue Fund under an appropriation in this Act or the *Family Law Act 1975*;
 - (e) directly amend the text of this Act or the *Family Law Act 1975*.

Part 2—Delegations

Division 1—Main amendment

Federal Circuit and Family Court of Australia Act 2021

37 Subsection 7(1) (before paragraph (c) of the definition of *excluded child order*)

Insert:

- (ba) a further parenting order made under paragraph 70NDB(1)(c), 70NEB(1)(b) or 70NFB(2)(c) of the *Family Law Act 1975*; or

Division 2—Amendment relating to amendments made by Part 1 of this Schedule

Federal Circuit and Family Court of Australia Act 2021

38 Subsection 7(1) (paragraph (ba) of the definition of *excluded child order*)

Repeal the paragraph, substitute:

- (ba) an order made under section 70NBB (make-up time parenting orders) of the *Family Law Act 1975*; or

Schedule 3—Definition of member of the family

Family Law Act 1975

1 Subsection 4(1) (subparagraph (a)(vi) of the definition of *relative*)

Omit “child; and”, substitute “child; or”.

2 Subsection 4(1) (at the end of paragraph (a) of the definition of *relative*)

Add:

- (vii) for an Aboriginal child or Torres Strait Islander child—a person who, in accordance with the child’s Aboriginal or Torres Strait Islander culture (including but not limited to any kinship systems of that culture), is related to the child; and

3 Subsection 4(1) (paragraph (b) of the definition of *relative*)

Repeal the paragraph, substitute:

- (b) in paragraph (1AB)(e)—has the meaning given by subsection (1AC); and
- (c) in paragraph (1AB)(ea)—has the meaning given by subsection (1AD).

4 Paragraph 4(1AB)(e)

Repeal the paragraph, substitute:

- (e) the first person is or has been a relative of the second person within the meaning of subsection (1AC); or
- (ea) except for the purposes of sections 60CF, 60CH and 60CI—the first person is or has been a relative of the second person within the meaning of subsection (1AD); or

5 Subsection 4(1AC)

Omit “subsection (1AB)”, substitute “paragraph (1AB)(e)”.

6 After subsection 4(1AC)

Insert:

- (1AD) For the purposes of paragraph (1AB)(ea), if a person is related to an Aboriginal or Torres Strait Islander child in accordance with the child's Aboriginal or Torres Strait Islander culture (including but not limited to any kinship systems of that culture), the person is a **relative** of the child.

Note: This subsection adds to the persons who are **relatives** of a person within the meaning of subsection (1AC). The difference is that the addition in this subsection does not apply for the purposes of sections 60CF, 60CH or 60CI, which relate to informing courts of certain matters (see paragraph (1AB)(ea)).

7 Application provision

So far as the amendments of the *Family Law Act 1975* made by this Schedule apply in relation to proceedings, they apply in relation to:

- (a) proceedings instituted on or after the day this item commences; and
- (b) proceedings instituted before, and not finally determined by, the day this item commences, other than proceedings in respect of which a final hearing has commenced by the day this item commences.

Schedule 4—Independent children's lawyers and Hague Convention proceedings

Part 1—Requirement to meet with the child

Family Law Act 1975

1 Subsections 68L(5) and (6)

Repeal the subsections.

2 After subsection 68LA(5)

Insert:

*Requirement to meet with the child and give the child the
opportunity to express their views*

(5A) Subject to subsection (5B), the independent children's lawyer must perform the following duties (not necessarily at the same time):

- (a) meet with the child;
- (b) provide the child with an opportunity to express any views in relation to the matters to which the proceedings relate.

Note: A person cannot require a child to express the child's views in relation to any matter (see section 60CE).

(5AA) The independent children's lawyer has discretion in relation to the following matters (subject to any order or direction of the court with respect to the matter, for example under paragraph 68L(2)(b) or paragraph (5D)(b) of this section):

- (a) when, how often and how meetings with the child take place;
- (b) when, how often and how the child is provided with an opportunity to express views.

(5B) The independent children's lawyer is not required to perform a duty if:

- (a) the child is under 5 years of age; or
- (b) the child does not want to meet with the independent children's lawyer, or express their views (as the case requires); or

- (c) there are exceptional circumstances that justify not performing the duty.
 - (5C) Without limiting paragraph (5B)(c), exceptional circumstances for the purposes of that paragraph include that performing the duty, would:
 - (a) expose the child to a risk of physical or psychological harm that cannot be safely managed; or
 - (b) have a significant adverse effect on the wellbeing of the child.
 - (5D) If the independent children's lawyer proposes not to perform a duty because of paragraph (5B)(c), the court must do the following before making final orders:
 - (a) determine whether it is satisfied that exceptional circumstances exist that justify not performing the duty;
 - (b) if the court determines that those circumstances do not exist—make an order requiring the independent children's lawyer to meet with the child or provide the child with an opportunity to express their views (as the case requires).
- Note: The court may also make such other orders it considers necessary to secure the independent representation of the child's interests (see paragraph 68L(2)(b)).

3 Application provision

The amendments of the *Family Law Act 1975* made by this Part apply in relation to the following proceedings:

- (a) proceedings instituted on or after the day this item commences;
- (b) proceedings instituted before, and not finally determined by, the day this item commences, other than proceedings in respect of which a final hearing has commenced by the day this item commences.

Part 2—Convention on the Civil Aspects of International Child Abduction

Family Law Act 1975

4 Subsection 68L(1)

Repeal the subsection, substitute:

- (1) This section applies to proceedings under this Act in which a child's best interests are, or a child's welfare is, the paramount, or a relevant, consideration. This includes any such proceedings arising under regulations made for the purposes of section 111B.

Note: Section 111B is about the Convention on the Civil Aspects of International Child Abduction.

5 Subsection 68L(3)

Repeal the subsection.

6 Application provision for items 4 and 5

The amendments of the *Family Law Act 1975* made by items 4 and 5 of this Part apply in relation to the following proceedings:

- (a) proceedings instituted on or after the day this item commences;
- (b) proceedings instituted before, and not finally determined by, the day this item commences, other than proceedings in respect of which a final hearing has commenced by the day this item commences.

7 Subsection 111B(1B)

Repeal the subsection.

Schedule 5—Case management and procedure

Part 1—Harmful proceedings orders and co-location of sections 45A and 102Q

Family Law Act 1975

1 Section 45A

Repeal the section.

2 Part XIB (heading)

Repeal the heading, substitute:

Part XIB—Decrees and orders relating to unmeritorious, harmful, and vexatious proceedings

3 Before section 102Q

Insert:

102QAA Simplified outline

This Part sets out the court's powers to deal with proceedings that are unmeritorious, harmful, or vexatious.

Unmeritorious proceedings are proceedings that are without reasonable prospect of success, frivolous, vexatious, or an abuse of process.

Harmful proceedings are proceedings that may result in harm to another party, or to a child involved in the proceedings. The kinds of harms that might provide grounds for such an order could include severe stress (that could arise, for example, from repeated filings of applications against the respondent).

Vexatious proceedings include proceedings that are an abuse of process, proceedings instituted without reasonable grounds, and proceedings instituted or conducted for a wrongful purpose.

4 Subsection 102Q(1)

Insert:

harmful proceedings order means an order made under subsection 102QAC(1).

5 Section 102QA

Repeal the section, substitute:

102QA Interactions between provisions and with other powers of court

The provisions of this Part do not limit or otherwise affect:

- (a) each other; or
- (b) any other power that a court has to deal with proceedings.

6 After section 102QA

Insert:

Division 1A—Summary decrees

102QAB Summary decrees

No reasonable prospect of successfully defending proceedings

- (1) The court may make a decree for one party (the *first party*) against another in relation to the whole or any part of proceedings if:
 - (a) the first party is prosecuting the proceedings or that part of the proceedings; and
 - (b) the court is satisfied that the other party has no reasonable prospect of successfully defending the proceedings or that part of the proceedings.

No reasonable prospect of successfully prosecuting proceedings

- (2) The court may make a decree for one party (the **first party**) against another in relation to the whole or any part of a proceedings if:
- (a) the first party is defending the proceedings or that part of the proceedings; and
 - (b) the court is satisfied that the other party has no reasonable prospect of successfully prosecuting the proceedings or that part of the proceedings.

When there is no reasonable prospect of success

- (3) For the purposes of this section, a defence or proceedings or part of proceedings need not be:
- (a) hopeless; or
 - (b) bound to fail;
- to have no reasonable prospect of success.

Proceedings that are frivolous, vexatious or an abuse of process

- (4) The court may dismiss all or part of proceedings at any stage if it is satisfied that the proceedings or the part is frivolous, vexatious or an abuse of process.
- (5) To avoid doubt, proceedings or a part of proceedings are not frivolous, vexatious or an abuse of process merely because an application relating to the proceedings or the part is made and later withdrawn.

Costs

- (6) If the court makes a decree, or dismisses all or part of proceedings, under this section, the court may make such order as to costs as the court considers just.

Action by court on its own initiative or on application

- (7) The court may take action under this section on its own initiative or on application by a party to the proceedings.

Division 1B—Harmful proceedings orders

Subdivision A—Making harmful proceedings orders

102QAC Making harmful proceedings orders

Making harmful proceedings orders

- (1) A court exercising jurisdiction in proceedings under this Act may make an order (a ***harmful proceedings order***) prohibiting a party (the ***first party***) to the proceedings from instituting proceedings under this Act against another party to the proceedings without the leave of the court under section 102QAG, if the court is satisfied that there are reasonable grounds to believe that:
- (a) the other party would suffer harm if the first party instituted further proceedings against the other party; or
 - (b) in the case of child-related proceedings (within the meaning of Part VII)—the child who is the subject of the proceedings would suffer harm if the first party instituted further proceedings against the other party.

Note: ***Proceedings*** includes cross-proceedings and incidental proceedings (see subsection 4(1)).

- (2) For the purposes of subsection (1), harm may include, but is not limited to, the following:
- (a) psychological harm or oppression;
 - (b) major mental distress;
 - (c) a detrimental effect on the other party's capacity to care for a child;
 - (d) financial harm.
- (3) In determining whether to make an order under subsection (1), the court may have regard to:
- (a) the history of the proceedings under this Act between the first party and the other party; and
 - (b) whether the first party has frequently instituted or conducted proceedings against the other party in any Australian court or tribunal (including proceedings instituted (or attempted to be instituted) or conducted, and orders made, before the commencement of this section); and

- (c) the cumulative effect, or any potential cumulative effect, of any harm resulting from the proceedings referred to in paragraphs (a) and (b).
- (4) The court may make a harmful proceedings order on its own initiative or on application by a party to the proceedings.
- (5) The court must not make a harmful proceedings order in relation to a person without hearing the person or giving the person an opportunity of being heard.
- (6) An order made under subsection (1) is a final order.

Order about notifying other party in relation to application for leave etc.

- (7) If the court makes an order under subsection (1), the court must also make an order as to whether the court is to notify the other party, in the event that the first party makes an application under section 102QAE for leave to institute proceedings against the other party, of either or both of the following:
 - (a) that the application has been made;
 - (b) if the application is dismissed—that the application has been dismissed.
- (8) The court must have regard to the wishes of the other party in making an order under subsection (7).

Subdivision B—Consequences of harmful proceedings orders

102QAD Proceedings in contravention of harmful proceedings order

- (1) If a person is subject to a harmful proceedings order prohibiting the person from instituting proceedings under this Act in a court having jurisdiction under this Act:
 - (a) the person must not institute proceedings in the court without the leave of the court under section 102QAG; and
 - (b) another person must not, acting in concert with the person, institute proceedings in the court without the leave of the court under section 102QAG.

- (2) If proceedings are instituted in contravention of subsection (1), the proceedings are stayed.
- (3) Without limiting subsection (2), the court may make:
 - (a) an order declaring proceedings are proceedings to which subsection (2) applies; and
 - (b) any other order in relation to the stayed proceedings it considers appropriate, including an order for costs.
- (4) The court may make an order under subsection (3) on its own initiative or on the application of a person a party to the proceedings.

102QAE Application for leave to institute proceedings

- (1) This section applies to a person (the *applicant*) who is:
 - (a) subject to a harmful proceedings order prohibiting the person from instituting further proceedings under this Act in a court having jurisdiction under this Act; or
 - (b) acting in concert with another person who is subject to an order mentioned in paragraph (a).
- (2) The applicant may apply to the court for leave to institute proceedings that are subject to the order.

Note: The court may be required to give notice that the application has been made (see subsection 102QAC(7)).
- (3) The applicant must file an affidavit with the application that:
 - (a) lists all the occasions on which the applicant has applied for leave under this section; and
 - (b) discloses all relevant facts about the application, whether supporting or adverse to the application, that are known to the applicant.
- (4) The applicant must not serve a copy of the application or affidavit on a person unless an order is made under section 102QAG. If the order is made, the applicant must serve the copy in accordance with the order.

102QAF Dismissing application for leave

- (1) The court may make an order dismissing an application under section 102QAE for leave to institute proceedings if it considers the affidavit does not substantially comply with subsection 102QAE(3).

Note: The court may be required to give notice that the application has been dismissed (see subsection 102QAC(7)).

- (2) The court must make an order dismissing an application under section 102QAE for leave to institute proceedings if it considers the proceedings are vexatious proceedings.

Note: The court may be required to give notice that the application has been dismissed (see subsection 102QAC(7)).

- (3) The court may dismiss the application without an oral hearing (either with or without the consent of the applicant).
- (4) The court may make an order under this section in Chambers.

102QAG Granting application for leave

- (1) The court may make an order granting the application for leave only if it is satisfied that the proceedings are not frivolous, vexatious or an abuse of process, and have reasonable prospects of success.
- (2) An order under subsection (1) may be made subject to the conditions the court considers appropriate.

7 Division 2 of Part XIB (after the heading)

Insert:

Subdivision A—Making vexatious proceedings orders

8 Division 3 of Part XIB (heading)

Repeal the heading, substitute:

Subdivision B—Consequences of vexatious proceedings orders

9 Section 102QE (heading)

After “proceedings”, insert “by person subject to vexatious proceedings order”.

10 Sections 102QF and 102QG (heading)

After “leave”, insert “by person subject to vexatious proceedings order”.

11 Subsection 117(1)

Omit “45A(6)”, substitute “102QAB(6)”.

Federal Circuit and Family Court of Australia Act 2021

12 Subsection 143(5) (note)

Omit “45A”, substitute “102QAB”.

13 Savings provision

To avoid doubt, the repeal of section 45A of the *Family Law Act 1975* made by this Schedule does not affect any decree made or action taken under that section, as in force before the commencement of this item.

14 Application provision

The amendments of the *Family Law Act 1975* made by this Part apply in relation to the following proceedings:

- (a) proceedings instituted on or after the day this item commences;
- (b) proceedings instituted before, and not finally determined by, the day this item commences.

Part 2—Overarching purpose of the family law practice and procedure provisions

Family Law Act 1975

15 Subsection 4(1)

Insert:

family law practice and procedure provisions has the meaning given by subsection 95(4).

16 Before Division 1 of Part XI

Insert:

Division 1A—Overarching purpose of the family law practice and procedure provisions

95 Overarching purpose of the family law practice and procedure provisions

- (1) The overarching purpose of the family law practice and procedure provisions is to facilitate the just resolution of disputes:
- (a) in a way that ensures the safety of families and children; and
 - (b) in relation to proceedings under this Act in which the best interests of a child are the paramount consideration—in a way that promotes the best interests of the child; and
 - (c) according to law; and
 - (d) as quickly, inexpensively and efficiently as possible.

Note: For *family law practice and procedure provisions*, see subsection (4).

- (2) Without limiting subsection (1), the overarching purpose includes the following objectives in relation to proceedings under this Act:
- (a) the just determination of all such proceedings;
 - (b) the efficient use of the judicial and administrative resources available for the purposes of courts exercising jurisdiction in such proceedings;

- (c) the efficient disposal of the overall caseload of courts exercising jurisdiction in such proceedings;
 - (d) the disposal of all such proceedings in a timely manner;
 - (e) the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute.
- (3) The family law practice and procedure provisions must be interpreted and applied, and any power conferred or duty imposed by them (including the power to make applicable Rules of Court) must be exercised or carried out, in the way that best promotes the overarching purpose.
- (4) The *family law practice and procedure provisions* are the following, so far as they apply in relation to proceedings under this Act:
 - (a) the applicable Rules of Court;
 - (b) any other provision made by or under this Act, or any other Act, with respect to the practice and procedure of the Federal Circuit and Family Court of Australia or any other court.

96 Duty to act consistently with the overarching purpose

Duty of parties

- (1) The parties to proceedings under this Act must conduct the proceedings (including negotiations for settlement of the dispute to which the proceedings relate) in a way that is consistent with the overarching purpose of the family law practice and procedure provisions.

Duty of lawyers

- (2) A party's lawyer must, in the conduct of proceedings under this Act on the party's behalf (including in the conduct of negotiations for settlement of the dispute to which the proceedings relate):
 - (a) take account of the duty imposed on the party by subsection (1); and
 - (b) assist the party to comply with the duty.

Estimate of costs

- (3) In proceedings under this Act a court may, for the purpose of enabling a party to comply with the duty imposed by subsection (1), require the party's lawyer to give the party an estimate of:
- (a) the likely duration of the proceedings or part of the proceedings; and
 - (b) the likely amount of costs that the party will have to pay in connection with the proceedings or part of the proceedings (including the costs that the lawyer will charge to the party).

Costs orders

- (4) In exercising the discretion to award costs in proceedings under this Act, a court must take account of any failure to comply with the duty imposed by subsection (1) or (2).
- (5) Without limiting the exercise of that discretion, a court may order a party's lawyer to bear costs personally.
- (6) If a court orders a lawyer to bear costs personally because of a failure to comply with the duty imposed by subsection (2), the lawyer must not recover the costs from the lawyer's client.

17 At the end of subsection 117(2)

Add:

Note 3: See also subsections 96(4) to (6) of this Act.

18 Application provision

The amendments of the *Family Law Act 1975* made by this Part apply in relation to the following proceedings:

- (a) proceedings instituted on or after the day this item commences;
- (b) proceedings instituted before, and not finally determined by, the day this item commences, other than proceedings in respect of which a final hearing has commenced by the day this item commences.

Federal Circuit and Family Court of Australia Act 2021

19 Subsection 7(1) (definition of *civil practice and procedure provisions*)

Repeal the definition, substitute:

civil practice and procedure provisions:

- (a) in relation to the Federal Circuit and Family Court of Australia (Division 1)—has the meaning given by subsection 67(4); and
- (b) in relation to the Federal Circuit and Family Court of Australia (Division 2)—has the meaning given by subsection 190(4).

20 Subsection 7(1) (definition of *family law practice and procedure provisions*)

Repeal the definition.

21 Subsection 7(1) (paragraph (a) of the definition of *overarching purpose*)

Omit “family law practice and procedure provisions”, substitute “civil practice and procedure provisions”.

22 Section 67 (heading)

Omit “family law practice and procedure provisions”, substitute “civil practice and procedure provisions”.

23 Subsection 67(1)

Omit “family law practice and procedure provisions”, substitute “civil practice and procedure provisions, in relation to the Federal Circuit and Family Court of Australia (Division 1),”.

24 Subsection 67(1) (note 1)

Repeal the note, substitute:

- Note 1: For ***civil practice and procedure provisions***, in relation to the Federal Circuit and Family Court of Australia (Division 1), see subsection (4).

25 Subsection 67(3)

Omit “family law practice and procedure provisions”, substitute “civil practice and procedure provisions, in relation to the Federal Circuit and Family Court of Australia (Division 1),”.

26 Subsection 67(4)

Omit “The *family law practice and procedure provisions* are the following,”, substitute “The *civil practice and procedure provisions*, in relation to the Federal Circuit and Family Court of Australia (Division 1), are the following,”.

27 Subsection 68(3) (note)

Repeal the note.

28 After section 68

Insert:

68A Proceedings under the *Family Law Act 1975*

Sections 67 and 68 do not apply in relation to proceedings under the *Family Law Act 1975*.

Note: See sections 95 and 96 of the *Family Law Act 1975* for the overarching purpose of provisions dealing with the practice and procedure of courts (including the Federal Circuit and Family Court of Australia) in relation to proceedings under that Act.

29 Subsection 190(1)

After “civil practice and procedure provisions”, insert “, in relation to the Federal Circuit and Family Court of Australia (Division 2),”.

30 Subsection 190(1) (note 1)

Repeal the note, substitute:

Note 1: For *civil practice and procedure provisions*, in relation to the Federal Circuit and Family Court of Australia (Division 2), see subsection (4).

31 Subsection 190(3)

After “civil practice and procedure provisions”, insert “, in relation to the Federal Circuit and Family Court of Australia (Division 2),”.

32 Subsection 190(4)

Omit “are the following”, substitute “, in relation to the Federal Circuit and Family Court of Australia (Division 2), are the following”.

33 Subsection 191(3) (note)

Repeal the note.

34 After section 191

Insert:

191A Proceedings under the *Family Law Act 1975*

Sections 190 and 191 do not apply in relation to proceedings under the *Family Law Act 1975*.

Note: See sections 95 and 96 of the *Family Law Act 1975* for the overarching purpose of provisions dealing with the practice and procedure of courts (including the Federal Circuit and Family Court of Australia) in relation to proceedings under that Act.

35 Application provision

The amendments of the *Federal Circuit and Family Court of Australia Act 2021* made by this Part apply on and after the day this item commences in relation to:

- (a) proceedings instituted before that day that were not finally determined before that commencement; and
- (b) proceedings instituted on or after that day.

Schedule 6—Communications of details of family law proceedings

Family Law Act 1975

1 Subsection 4(1)

Insert:

communicate: see subsection 114P(1).

2 Subsection 4(1) (definition of *proceedings*)

Repeal the definition, substitute:

proceedings:

- (a) in Part XIVB—see subsection 114P(1); and
- (b) otherwise—means a proceeding in a court, whether between parties or not, and includes cross-proceedings or an incidental proceeding in the course of or in connection with a proceeding.

3 Subsection 4(1)

Insert:

public: see subsection 114P(2).

4 Section 102PC (heading)

Omit “section 121”, substitute “**Part XIVB**”.

5 Section 102PC

Omit “section 121”, substitute “**Part XIVB**”.

6 After Part XIVA

Insert:

Part XIVB—Restriction on communication of accounts and lists of proceedings

114N Simplified outline of this Part

It is an offence to communicate an account of proceedings under this Act to the public, if the account identifies certain people involved in the proceedings.

It is an offence to communicate a list of proceedings that are to be dealt with under this Act to the public, and that are identified by reference to the names of the parties to those proceedings.

A communication is not made to the public if the communication is made to a person with a significant and legitimate interest in the subject matter of the communication that is greater than the interest of members of the public generally.

114P Meaning of terms used in this Part

(1) In this Part:

communicate means communicate by any means, including by any of the following:

- (a) publication in a book, newspaper, magazine or other written publication;
- (b) broadcast by radio or television;
- (c) public exhibition;
- (d) broadcast or publication or other communication by means of the internet.

Example: For the purposes of paragraph (d), online communications and communications using a social media service.

proceedings includes a part of proceedings.

(2) In this Part (other than paragraph 114S(1)(b)):

public includes a section of the public.

114Q Indictable offence—communication to the public of account of proceedings that identifies parties or others involved in proceedings

- (1) A person commits an indictable offence if:
- (a) the person communicates to the public an account of proceedings under this Act; and
 - (b) the account identifies:
 - (i) a party to the proceedings; or
 - (ii) a witness in the proceedings; or
 - (iii) a person who is related to, or is associated with, a party to the proceedings; or
 - (iv) a person who is, or is alleged to be, in any other way concerned in the matter to which the proceedings relate.

Penalty: Imprisonment for 1 year.

- (2) Subsection (1) does not apply if the communication is:
- (a) in accordance with a direction of a court; or
 - (b) otherwise approved by a court.

Note: A defendant bears an evidential burden in relation to the matters in this subsection (see subsection 13.3(3) of the *Criminal Code*).

- (3) For the purposes of paragraph (1)(b), an account of proceedings is taken to identify a person if the account includes material that is sufficient to identify the person to a member of the public.

Examples of such material might include the following:

- (a) a picture, recording, or physical description of the person;
- (b) a name or title that identifies the person;
- (c) an address or location where the person resides or works;
- (d) details of the person's employment, paid or voluntary;
- (e) the relationship or other connection between the person and an identified person or business;
- (f) the person's political, philosophical or religious beliefs;
- (g) any real or personal property associated with the person.

Note: Paragraphs (a) to (g) are examples of material that might be sufficient to identify a person to a member of the public. The examples are not exhaustive (see section 15AD of the *Acts Interpretation Act 1901*) and might not be sufficient to identify a person in every circumstance.

114R Indictable offence—communication to the public of list of court etc. proceedings that refers to names of parties

- (1) A person commits an indictable offence if the person communicates to the public a list of proceedings, identified by reference to the names of the parties to the proceedings, that are to be dealt with by any of the following under this Act:
- (a) a court;
 - (b) an officer of a court investigating or dealing with a matter in accordance with this Act, the regulations or the applicable Rules of Court;
 - (c) a tribunal established by or under a law of the Commonwealth or of a State or Territory.

Penalty: Imprisonment for 1 year.

- (2) Subsection (1) does not apply if:
- (a) the communication is the publication, by the court, officer or tribunal, of a list of proceedings the court, officer or tribunal is to deal with; or
 - (b) the communication is:
 - (i) in accordance with a direction of a court or otherwise approved by a court; or
 - (ii) in accordance with the applicable Rules of Court.

Example: For the purposes of paragraph (a), a list of proceedings a court is to deal with that is published by the court at the court's premises.

Note: A defendant bears an evidential burden in relation to the matters in this subsection (see subsection 13.3(3) of the *Criminal Code*).

114S When a communication is not a communication to the public

- (1) For the purposes of paragraph 114Q(1)(a) and subsection 114R(1), a communication to a person or body is not a communication to the public if:
- (a) the person or body has a significant and legitimate interest in the subject matter of the communication; and
 - (b) that interest is substantially greater than, or different from, the interests of members of the public generally.

Note: A defendant bears an evidential burden in relation to the matters in this subsection (see subsection 13.3(3) of the *Criminal Code*).

-
- (2) Without limiting subsection (1), none of the following is a communication to the public:
- (a) a private communication between a party to proceedings and one or more persons who are members of the party's family or friends of the party;
 - (b) a communication of a pleading, transcript of evidence, or other document for use in connection with any of the following proceedings, to a person concerned in those proceedings:
 - (i) proceedings in a court;
 - (ii) proceedings before an officer of a court investigating or dealing with a matter in accordance with this Act, the regulations or the applicable Rules of Court;
 - (iii) proceedings in a tribunal established by or under a law of the Commonwealth or of a State or Territory;
 - (c) a communication of a pleading, transcript of evidence, or other document, to a prescribed authority of a State or Territory that has responsibilities relating to the welfare of children;
 - (d) a communication of a pleading, transcript of evidence, or other document, to:
 - (i) a body that is responsible for disciplining members of a profession in a State or Territory; or
 - (ii) a person concerned in disciplinary proceedings against a member of a profession in a State or Territory (being proceedings before a body that is responsible for disciplining members of that profession in that State or Territory);
 - (e) a communication of a pleading, transcript of evidence, or other document, to a body that grants assistance by way of legal aid for the purpose of facilitating a decision as to whether assistance by way of legal aid should be granted, continued or provided in a particular case;
 - (f) a communication of material intended primarily for use by the members of any profession (being part of a series of law reports or any other publication of a technical character);
 - (g) a communication of an account of proceedings to a member of a profession in connection with:
 - (i) the person's practice of that profession; or
-

- (ii) any form of professional training in which that person is involved;
- (h) a communication of an account of proceedings to a student in connection with the student's studies.

114T Consent of Director of Prosecutions required to commence proceedings

Proceedings for an offence against subsection 114Q(1) or 114R(1) must not be commenced without the written consent of the Director of Public Prosecutions.

7 Section 121

Repeal the section.

8 Saving of regulations

Regulations that were in force for the purposes of paragraph 121(9)(aa) of the *Family Law Act 1975* immediately before the commencement of this item continue in force after that commencement as if they were regulations in force for the purposes of paragraph 114S(2)(c) of that Act.

9 Application provision

Part XIVB of the *Family Law Act 1975*, as inserted by this Schedule, applies in relation to acts or omissions occurring on or after the day this item commences.

Federal Circuit and Family Court of Australia Act 2021

10 At the end of subsection 98(2)

Add:

- ; (t) the power to give directions, or approve communications, for the purposes of subsection 114Q(2) or subparagraph 114R(2)(b)(i) of the *Family Law Act 1975*.

Schedule 7—Family report writers

Family Law Act 1975

1 Subsection 4(1)

Insert:

civil penalty provision has the same meaning as in the Regulatory Powers Act.

designated family report: see section 11J.

family report writer: see section 11H.

regulator: see paragraph 11K(2)(b).

Regulatory Powers Act means the *Regulatory Powers (Standard Provisions) Act 2014*.

2 Section 11D

Before “A family”, insert “(1)”.

3 At the end of section 11D

Add:

- (2) However, if a family consultant is also a family report writer, that protection and immunity:
 - (a) does not relieve the family consultant of their obligations under regulations made for the purposes of section 11K (regulations prescribing standards and requirements for family report writers); and
 - (b) does not extend to action taken to enforce such regulations.

4 After Part III

Insert:

Part IIIAA—Family report writers

11H Family report writers

Any individual who prepares a designated family report (see section 11J) is a *family report writer*.

11J Designated family reports

- (1) A report that relates to a child is a *designated family report* if:
 - (a) the report is prepared following a family assessment (which usually includes the report's preparer meeting with the child and others significant to the child's care, welfare and development and, if appropriate, advising of the child's views); and
 - (b) the report sets out the expert views and advice of the report's preparer on parenting arrangements for the purposes of parenting orders being made by the court in relation to the child; and
 - (c) the report is both:
 - (i) covered by subsection (2); and
 - (ii) not excluded by regulations made for the purposes of this paragraph.
- (2) This subsection covers the following reports:
 - (a) a report prepared for the court by a family consultant in relation to an appointment (or a series of appointments) a party to proceedings has been directed to attend, or to arrange for a child to attend, with the family consultant under section 11F;
 - (b) a report prepared for the court by a family consultant for the purposes of subsection 55A(2) (report regarding arrangements for the care, welfare and development of a child of a marriage);
 - (c) a report prepared by a family consultant at the direction of the court under subsection 62G(2) (direction to give report in relation to proceedings in which the care, welfare and development of a child under 18 is relevant);

- (d) a report about a child prepared for the use of an independent children's lawyer as mentioned in subsection 68M(2);
- (e) any other report prepared for parties to proceedings before the court, or for the court for the purposes of proceedings before the court.

11K Regulations prescribing standards and requirements for family report writers

Regulations prescribing standards and requirements for family report writers

- (1) The regulations may make provision for, and in relation to:
 - (a) standards and requirements that family report writers, or a class or classes of family report writers, must comply with in connection with the role of preparing designated family reports; and
 - (b) consequences of non-compliance with prescribed standards and requirements.

Standards and requirements

- (2) Without limiting paragraph (1)(a), regulations made for the purposes of that paragraph may deal with any or all of the following matters:
 - (a) recognition, monitoring and enforcement of compliance with prescribed standards and requirements;
 - (b) the person or persons responsible for that recognition, monitoring and enforcement (each such person is a **regulator**);
 - (c) duties of family report writers, and persons intending to become family report writers, in relation to establishing and maintaining recognition of their compliance, including duties in relation to providing information and documents to a regulator;
 - (d) circumstances in which a regulator may collect, use and share information and documents for the purposes of meeting the regulator's responsibilities;
 - (e) review of decisions that affect recognition of a family report writer's compliance;

- (f) processes for dealing with persons who make false or misleading representations about a family report writer's compliance;
 - (g) processes for handling complaints involving family report writers;
 - (h) training for family report writers;
 - (i) the charging of fees, to family report writers, for services provided to them in connection with recognition, and maintenance of recognition, of their compliance;
 - (j) publication of the names of family report writers who are recognised as complying with prescribed standards and requirements;
 - (k) publication of information about the named family report writers for the purposes of informing the court, parties to proceedings and the public about any or all of the following:
 - (i) their qualifications, training and experience;
 - (ii) their availability;
 - (iii) the fees they charge;
 - (iv) their compliance status, including in relation to particular standards or requirements;
 - (v) any relevant memberships of professional associations, registration or employment;
 - (vi) any other matters relevant to their role of preparing designated family reports;
 - (l) standards and requirements in relation to the content of designated family reports.
- (3) Regulations dealing with the matter mentioned in paragraph (2)(k) must not require or allow the publication of personal information (within the meaning of the *Privacy Act 1988*) about any child or other individual to whom a report relates.

Consequences of non-compliance

- (4) Without limiting paragraph (1)(b), regulations made for the purposes of that paragraph may do any or all of the following:
- (a) prescribe offences, the penalties for which do not exceed 30 penalty units;

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- (b) prescribe civil penalty provisions, the penalties for which do not exceed 30 penalty units;
 - (c) provide for suspension or cancellation of recognition of compliance;
 - (d) provide that, if a family report writer is not recognised, or if recognition of a family report writer's compliance is suspended or cancelled, the court must not have regard to designated family reports prepared by the family report writer;
 - (e) prohibit the preparation of designated family reports by family report writers who are not recognised.
- (5) Each civil penalty provision prescribed by regulations made for the purposes of this section (a **Part IIIAA civil penalty provision**) is enforceable under Part 4 of the Regulatory Powers Act.

Authorised applicant

- (6) For the purposes of Part 4 of the Regulatory Powers Act, each of the following persons is an authorised applicant in relation to the Part IIIAA civil penalty provisions:
- (a) each regulator;
 - (b) the Secretary of the Department.
- (7) The Secretary of the Department may, in writing, delegate the Secretary's powers and functions under Part 4 of the Regulatory Powers Act in relation to the Part IIIAA civil penalty provisions to an SES employee, or an acting SES employee, in the Department.

Relevant court

- (8) For the purposes of Part 4 of the Regulatory Powers Act, each of the following courts is a relevant court in relation to the Part IIIAA civil penalty provisions:
- (a) the Federal Court of Australia;
 - (b) the Federal Circuit and Family Court of Australia;
 - (c) a court of a State or Territory that has jurisdiction in relation to matters arising under this Act.

11L Disclosure by court to regulator

The court may disclose any of the following to a regulator, for the purposes of the regulator performing the regulator's functions under the regulations:

- (a) a designated family report prepared for or at the direction of the court, or for a party to proceedings before the court;
- (b) a final order made by the court in proceedings for which a designated family report was prepared.

11M Immunity of regulator

A regulator is not liable in civil or criminal proceedings for or in relation to anything done or omitted to be done, in good faith, in the performance or exercise, or purported performance or exercise, of the regulator's functions or powers under regulations made for the purposes of section 11K.

5 At the end of subsection 67ZA(1)

Add:

- ; or (i) a family report writer who is recognised, in accordance with regulations made for the purposes of section 11K, as complying with prescribed standards and requirements.

6 At the end of subsection 111CV(1A)

Add:

- ; and (j) a family report writer who is recognised, in accordance with regulations made for the purposes of section 11K, as complying with prescribed standards and requirements.

Schedule 8—Review of operation of the Federal Circuit and Family Court of Australia Act 2021

Federal Circuit and Family Court of Australia Act 2021

1 Subsection 284(1)

Omit “fifth”, substitute “third”.

Schedule 9—Dual appointments

Federal Circuit and Family Court of Australia Act 2021

1 Section 23

Before “If a person”, insert “(1)”.

2 At the end of section 23

Add:

(2) A person:

- (a) may be appointed to the office of Judge of the Federal Circuit and Family Court of Australia (Division 1), regardless of whether the person holds an office of Judge of a Family Court of a State; and
- (b) may serve in that office of Judge of the Federal Circuit and Family Court of Australia (Division 1) even if the person continues to hold, and serve in, the office of Judge of the Family Court of that State.

3 Application provision

The amendments of section 23 of the *Federal Circuit and Family Court of Australia Act 2021* made by this Schedule apply to the appointment of a person to the office of Judge of the Federal Circuit and Family Court of Australia (Division 1), regardless of whether that appointment is made before, on or after the day this item commences.

Schedule 10—Review of amendments

1 Review of amendments

- (1) The Minister must arrange for the conduct of a review of the operation of the amendments made by this Act (other than the amendments made by Schedules 8 and 9). The review is to start as soon as practicable after the third anniversary of the day that Schedule 1 to this Act commences and be completed within 12 months of the day the review starts.
- (2) The Minister must arrange for a report of the review to be prepared.
- (3) The Minister must table copies of the report in each House of the Parliament within 15 sitting days of that House after completion of the report.

*[Minister's second reading speech made in—
House of Representatives on 29 March 2023
Senate on 13 June 2023]*

(43/23)

2022-2023

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

FAMILY LAW AMENDMENT BILL 2023

EXPLANATORY MEMORANDUM

(Circulated by authority of the
Attorney-General, the Hon Mark Dreyfus KC MP)

FAMILY LAW AMENDMENT BILL 2023

GENERAL OUTLINE

1. The Family Law Amendment Bill 2023 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). These amendments will make the family law system safer and simpler for separating families to navigate, and ensure the best interests of children are placed at its centre. The Bill also includes amendments to clarify various aspects of family law and support the operation of the Federal Circuit and Family Court of Australia (FCFCOA).
2. The amendments will address recommendations from the Australian Law Reform Commission's Final Report No. 135: *Family Law for the Future – An Inquiry into the Family Law System* (ALRC Report), as well as elements of the Government Response to the Joint Select Committee on Australia's Family Law System (JSC Inquiry). These inquiries highlighted a number of challenges facing the family law system, including extensive court delays, complex and confusing legislation and inadequate protection for people at risk of family violence. This Bill will focus on the ALRC Report and JSC Inquiry recommendations relating to parenting and children.
3. Parenting arrangements are covered in Part VII of the Family Law Act which provides the family courts with a wide power to make such orders about children's care and living arrangements, parental responsibility, and other matters relevant to a child's welfare as it thinks proper. Parenting matters profoundly affect the lives of the children they concern, and deal with the issues that are most important and often most contested between separating parents – their engagement in their children's lives. The effective operation of Part VII of the Family Law Act is therefore critical to support the diverse needs of separating families in Australia and to safeguard the best interests of the children involved. However, Part VII has become overly complex and confusing over time, which has detracted attention from what should be its primary objective.
4. The Bill will amend Part VII of the Family Law Act to make changes to provisions governing parenting arrangements after separation. In most cases, these provisions will serve as a guide for the majority of parenting decisions which are made outside of the courts. Part VII also creates the framework for judicial decision-making for the smaller volume of matters determined in the courts, which generally also have the highest concentrations of complex psycho-social needs and often a combination of risk factors, such as allegations of family violence or child abuse. The Bill will make a number of amendments to simplify and clarify the pathway for decision-making in determining parenting arrangements to ensure that children's safety and best interests are squarely and unequivocally the focus.
5. Consistent with Australia's obligations under Article 12 of the *United Nations Convention on the Rights of the Child* (CRC), the Bill will also seek to ensure the views of children are appropriately heard and considered in family law proceedings. Studies indicate that children have difficulty having their views properly understood or taken seriously in family law matters. The Bill will ensure that, in appropriate circumstances, and where they wish to, children can express their views to the Independent Children's Lawyer, providing an opportunity for their voice to be heard in family law matters affecting them.

6. The Bill will ensure that Aboriginal and Torres Strait Islander children's particular needs and cultural rights are acknowledged and focused on when considering their best interests, and better incorporate Aboriginal and Torres Strait Islander concepts of family and kinship in determining care arrangements.

7. The Bill will provide a new mechanism for the court to respond to and deter a known form of harassment, that being the repetitive filing of applications by one party to oppress another party. Often termed 'systems abuse', this tactic can be employed by perpetrators of family violence to manipulate the legal system to exert control over, threaten and harass a current or former partner. This can have substantial detrimental impacts on the physical and psychological health of the respondent, and on any children involved in proceedings. The Bill will provide the courts with a new power to scrutinise the impact of the institution of further proceedings to prevent systems abuse occurring.

8. The ALRC Report and JSC Inquiry recommendations that this Bill seeks to address were the product of extensive consultations over multiple years. This Bill was developed through consultation with family law stakeholders, including the family law courts, peak national non-government organisations, Aboriginal and Torres Strait Islander peak organisations, legal professional bodies and family law service providers.

Overview of the Bill

9. Schedule 1 of the Bill contains significant amendments to streamline 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.

10. Schedule 2 of the Bill contains a redraft of Division 13A of Part VII of the Family Law Act, which provides for the enforcement of parenting orders and other orders affecting children, to make the consequences of non-compliance with parenting orders clearer and more straightforward.

11. Schedule 3 of the Bill 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.

12. Schedule 4 of the Bill contains amendments to provisions about Independent Children's Lawyers (ICLs), including a requirement for ICLs to meet with a child and give them 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).

13. Schedule 5 of the Bill contains amendments to the Family Law Act and 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.

14. Schedule 6 of the Bill contains a redraft of section 121 of the Family Law Act to clarify restrictions around public communication of family law proceedings.

15. Schedule 7 of the Bill contains amendments to establish a new power for Government to make regulations that would provide standards and requirements to be met by professionals who prepare family reports.

16. Schedules 8 and 9 of the Bill make two administrative amendments to the FCFCOA Act to enhance the operation of the FCFCOA. The amendments will:

- bring forward the review of the FCFCOA Act by two years, and
- state explicitly that a judge serving in the Family Court of Western Australia (FCWA) can be dually appointed as a judge of Division 1 of the FCFCOA.

FINANCIAL IMPACT

17. Nil current financial impact.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Family Law Amendment Bill 2023

1. This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Bill

2. The Bill will amend the Family Law Act to address recommendations from the ALRC Report as well as elements of the Government Response to the JSC Inquiry, with a focus on the safety and best interests of children and their families. The Bill also amends the FCFCOA Act to better support the new approach to case management established by the FCFCOA.

3. In particular, the Bill will:

- amend the parenting orders framework in the Act to:
 - refine the list of ‘best interests’ factors, with the aim of reducing complexity and repetition and enhancing the focus on the needs of individual children
 - include a standalone ‘best interest’ factor requiring a court to consider the right of Aboriginal or Torres Strait Islander children to enjoy their culture
 - repeal the presumption of equal shared parental responsibility and the related equal time and substantial and significant time provisions
 - make it clear in what circumstances a court can vary an existing parenting order
- strengthen compliance with, and enforcement of, parenting orders by:
 - redrafting the provisions in Division 13A of Part VII (compliance with parenting orders) to make them simpler and easier to apply
 - ensuring registrars can make compensatory time orders
- enhance the power of the courts to protect parties, and their children, from the harmful effects of litigation through:
 - new case management provisions
 - a new power for courts to restrain the repeated filing of new applications
- clarify the restrictions on the publication of family law proceedings
- enhance the voices of children in family law proceedings, including by:
 - codifying a requirement for ICLs to meet with and seek the views of children
 - removing the restriction on judicial discretion to appoint ICLs in proceedings under the Hague Convention
- establish a regulatory making power for Government to make regulations that would provide standards and requirements to be met by family report writers who prepare family reports, and
- make minor administrative amendments to the FCFCOA Act to enhance the administration of the FCFCOA.

Human rights implications

4. The Bill engages the following human rights:
 - Rights of parents and children, including:
 - best interests of the child: Article 3 of the *United Nations Convention on the Rights of the Child* (CRC)
 - responsibilities, rights and duties of parents: Article 18 of the CRC
 - separation of children: Article 9 of the CRC
 - right of children to be heard: Article 12 of the CRC
 - Right to life and protection from exploitation, violence and abuse: Article 24(1) of the *International Covenant on Civil and Political Rights* (ICCPR), and Articles 3(2), 6, 19(1) and 34 of the CRC
 - Rights of equality and non-discrimination: Article 26 of the ICCPR and Articles 2 and 3 of the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW)
 - Right to privacy and reputation: Article 17 of the ICCPR and, in relation to children, Article 16 of the CRC
 - Right to enjoy and benefit from culture: Article 27 of the ICCPR and Article 30 of the CRC
 - Right to a fair and public hearing: Article 14(1) of the ICCPR, and
 - Right to freedom of opinion and expression: Article 19 of the ICCPR.

Rights of parents and children – Best interests of the child: Article 3 of the CRC

5. Article 3(1) of the CRC provides that in all actions concerning children, including by courts, the best interests of the child shall be a primary consideration.
6. Article 3(2) of the CRC provides that parties will take appropriate measures to ensure that children have the protection and care necessary for their well-being.

Determining a child's best interests

7. When a court is making a parenting order under Part VII of the Family Law Act, it is required to regard the best interests of the child as the paramount consideration. Recent inquiries have highlighted that the existing list of factors the court must consider in making parenting orders is overly long and complex, can be confusing and can detract from the focus on the best interests of the child.

8. The Bill will reduce complexity and increase focus on the best interests of children by removing the existing two-tier structure of 'primary' and 'additional' considerations and focusing on a core list of considerations that are likely to be relevant in a majority of matters. The Bill will also introduce an additional factor for Aboriginal and Torres Strait Islander children. The new best interests factors are:

- what arrangements 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, emotional and cultural needs of the child

- the capacity of each proposed carer of the child to provide for the child's developmental, psychological, emotional and cultural needs.
- the benefit of being able to have relationships with their parents and other people who are significant to them, where it is safe to do so
- anything else that is relevant to the particular circumstances of the child, and
- for an Aboriginal or Torres Strait Islander child, the child's right to enjoy their Aboriginal or Torres Strait Islander culture.

9. In its General Comment on the implementation of Article 3 of the CRC, the Committee on the Rights of the Child stated that it 'considers it useful to draw up a non-exhaustive and non-hierarchical list of elements that could be included in a best-interests assessment by any decision maker'. The 'list should provide concrete guidance, yet flexibility'. The redrafted section 60CC is a manifestation of this approach and provides the court with the ability to consider the unique circumstances in each parenting matter in a way that places the best interests of a child at the forefront of decision-making.

Repeal of the presumption of equal shared parental responsibility

10. The Bill will repeal the presumption of equal shared parental responsibility (the presumption) contained in section 61DA of the Family Law Act. The Bill will also repeal section 65DAA. Currently, when the court makes an order for equal shared parental responsibility, it is also required to consider making an order for the child to spend equal, or substantial and significant, time with the child's parents. The repeal of the presumption 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.¹ 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.

11. The repeal of the presumption will ensure that the law focuses on the child's needs, especially in matters involving allegations of family violence or other complex issues. It will also ensure that the purpose of the parenting framework is clearer, assisting parents settling their matters outside of court to more accurately and easily navigate the law. 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.

Redraft of Division 13A – compliance and enforcement

12. Non-compliance with parenting orders is a common issue, causing distress for many families. The ALRC Report 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 Bill redrafts Division 13A to make the consequences of non-compliance with parenting orders clearer and easier for court users to understand and for the courts to apply.

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

13. A new provision (section 70NAB) emphasises that the principal objects of Division 13A are to meet the best interests of children by:
- supporting parties to child-related orders to comply with those orders
 - resolving difficulties associated with child-related orders that are parenting orders which have contributed to non-compliance with such orders (including by varying or making further orders)
 - deterring non-compliance with child-related orders
 - upholding the authority of the court by enforcing compliance with child-related orders where the court considers this necessary and appropriate, and
 - providing for the imposition of appropriate sanctions on a person who seriously or repeatedly contravenes child-related orders without having a reasonable excuse.
14. 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, and encourage compliance with parenting orders that are made in a child's best interests.
15. The Bill will also allow registrars of both Divisions of the FCFCOA to 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 will support the operation of the FCFCOA's National Contravention List that commenced on 1 September 2021. The List promotes the best interests of children by helping to achieve timely outcomes in contravention proceedings and supporting future compliance with parenting orders.
16. The proposed amendments to Division 13A promote the best interests of a child by encouraging compliance with parenting orders, ensuring greater consistency for children and by reducing complex, expensive and lengthy contravention proceedings which have the potential to detract from the best interests of the child.

Other provisions

17. The Bill also expressly recognises and strengthens the paramountcy of the best interests of children in family law parenting proceedings by:
- specifying that, in proceedings where the best interests of children are paramount, the court, parties to proceedings, and lawyers must act in a way that promotes the best interests of a child (new Division 1A of Part XI)
 - codifying the common law rule established by *Rice and Asplund*, that specifies that for a court to reconsider a final parenting order it must be in the child's best interests to do so (new section 65DAAA), and
 - including an express statement in new subsection 68L(1) that Hague Convention matters are to be included in the list of matters involving a child's welfare as a paramount or a relevant consideration for the purposes of section 68L.

Rights of parents and children – Right of children to be heard: Article 12 of the CRC

18. Article 12 of the CRC provides that children who are capable of forming their own views have the right to express those views freely in all matters affecting them, the views being given due weight in accordance with the age and maturity of the child.

19. Article 12(2) further provides that children shall be provided the opportunity to be heard in any judicial and administrative proceedings affecting them, either directly, or through a representative or an appropriate body.

20. The Bill recognises a child's right to be heard in family law proceedings, by providing that the court must, when determining what is in the child's best interest, consider any views expressed by the child (new paragraph 60CC(2)(b)). This is supported by existing section 60CD, which details how the views of a child can be expressed, and section 60CE which notes that none of these sections require a child to express their views.

21. The Bill strengthens the right of the child to be heard in family law proceedings by including 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. The best interests of the child will ordinarily be served by the ICL enabling the child to be involved in proceedings in a safe and appropriate way. While an ICL is required by the Family Law Act (paragraph 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 (subsection 68L(5)). Although many ICLs do meet with children and seek to facilitate children's participation where appropriate, new subsection 68L(5A) will require all ICLs to do this. New subsections 68L(5B) and (5C) clarify the circumstances where the ICL is not required to perform these duties, in order to safeguard the safety and wellbeing of the child.

22. The Bill also repeals existing subsection 68L(3) of the Family Law Act, to remove the requirement that the court must consider there to be 'exceptional circumstances' to justify the appointment of an ICL for proceedings under the Hague Convention. This will allow judicial discretion to appoint ICLs in Hague Convention matters in line with other family law matters rather than only in exceptional circumstances, increasing the voice of the child in these cases, and therefore promoting the child's right to be heard.

Rights of parents and children – Responsibilities rights and duties of parents: Article 18 of the CRC

23. Article 18 of the CRC recognises the principle that parents have common responsibilities for the upbringing and development of the child, and that the best interests of the child will be their basic concern.

24. The Bill promotes this right by including a requirement that, when determining what is in a child's best interest, a court must consider the capacity of each proposed carer of the child to provide for the child's developmental, psychological and emotional needs.

25. The Bill will also strengthen the family law system's focus on parents' responsibilities by repealing the presumption of equal shared parental responsibility and its associated provisions to consider equal time, or substantial and significant time. As noted above, there is evidence that these provisions have created a misunderstanding that parents are entitled to equal time with a child, which may lead parents to agree to unsafe or unfair arrangements. Repealing these provisions will support parents to focus on what arrangements are in their child's best interests.

Rights of parents and children – Separation of children: Article 9 of the CRC

26. Article 9(1) of the CRC recognises the right of a child not to be separated from their parents against their will except where it has been determined to be in the child's best interests. Article 9(1) recognises that such a determination may be necessary in cases involving neglect or abuse by a parent, or where parents are living separately.

27. Article 9(3) outlines that children separated from one or both parents have a right to maintain personal relations and contact with their parents, except if it is contrary to their best interests.

28. The Bill expressly recognises and supports these rights by providing that, in determining what is in a child's best interests in parenting proceedings, the court must consider:

- what arrangements promote the safety of the child and the child's carers, including safety from family violence, abuse, neglect or other harm (new paragraph 60CC(2)(a)), and
- 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 (new paragraph 60CC(2)(e)).

Right to life and protection from exploitation, violence and abuse: Article 24(1) of the ICCPR, and Articles 3(2), 6, 19(1) and 34 of the CRC

29. The ICCPR provides for fundamental civil and political rights which derive from the inherent dignity of each person, and makes special provision for children. In particular, Article 24(1) provides for protection for all children, without discrimination, by virtue of their status as minors.

30. The CRC recognises that children are entitled to special care and assistance, and that they should grow up in an atmosphere of happiness, love and understanding. In particular:

- Article 3(2) provides that parties will take appropriate measures to ensure that children have the protection and care necessary for their well-being.
- Article 6 provides that children have the right to live a full life and Governments should ensure that children survive and develop healthily.
- Article 19(1) requires parties to take all appropriate legislative measures to protect children from all forms of physical or mental violence, injury or abuse, including negligent treatment and sexual abuse.
- Article 34 provides that parties will protect children from all forms of sexual abuse.

31. The Bill promotes children's right to protection from exploitation, violence and abuse by providing that, in determining what is in a child's best interests, the court must consider what arrangements promote the safety of the child and people who care for the child, including safety from family violence, abuse, neglect or other harm (new paragraph 60CC(2)(a)). This right is strengthened by the Bill's emphasis on prioritising safety for children over having a dangerous or harmful relationship with a parent. The Bill does this by providing that, when determining what is in a child's best interest, the court must consider the benefit to a child of having relationships with each parent and other people who are

significant to them, *where it is safe to do so* (new paragraph 60CC(2)(e)). The need to ensure safety from neglect promotes Article 6 of the CRC and the Government's requirement to ensure children's healthy development.

32. The Bill also inserts a new definition of 'overarching purpose of family law practice and procedure' in section 96B of the Family Law Act, to ensure 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, in addition to the existing elements of the overarching purpose in the FCFCOA Act.

Rights of equality and non-discrimination: Article 26 of the ICCPR and Articles 2 and 3 of the CEDAW

33. Article 26 of the ICCPR provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law, and that the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

34. The CEDAW provides for key principles of equality which cover many aspects of women's lives, including political participation, health, education, employment, marriage, family relations and equality before the law. In particular:

- Article 2 provides that parties agree to pursue the elimination of discrimination against women, including by introducing new laws or policies, changing existing discriminatory laws and providing sanctions for discrimination where appropriate.
- Article 3 requires parties to take appropriate measures to ensure women's full development and advancement, so that they can enjoy human rights and fundamental freedoms on the same basis as men.

35. Discrimination against women includes gender-based violence – that is, violence that is directed against a woman because she is a woman, or that affects women disproportionately. Although family violence is perpetrated by and against both men and women, and the Family Law Act is accordingly neutral, the majority of those who experience family violence, are women. Therefore, the measures in the Bill which seek to better protect victims of family violence will, in turn, address the impacts of gender-based violence on women.

36. The Bill introduces 'harmful proceedings orders' to prevent vexatious litigants from filing and serving new applications without first obtaining leave from the court. The new orders will allow the court to prevent harm to the intended respondent, assisting to protect victim survivors of family violence from systems abuse. Recognising the agency of victim survivors, as part of the court's powers to make harmful proceedings orders, the courts will have the power to order whether or not the respondent (the person who a harmful proceedings order is intended to protect) should be notified of any further application for leave made by an applicant that has been dismissed. In making this decision, the court must have regard to the wishes of the respondent.

37. To ensure procedural fairness, a meritorious application made for a proper purpose would be allowed to proceed, regardless of the impact that it might have on the respondent.

38. The Bill also seeks to better protect victim survivors of family violence by providing that, in determining what is in a child's best interest, the court must consider what arrangements would promote the safety (including from family violence, abuse, neglect or other harm) of each person who cares for the child (new subparagraph 60CC(2)(a)(ii)).

Right to privacy and reputation: Article 17 of the ICCPR and, in relation to children, Article 16 of the CRC

39. Article 17(1) of the ICCPR states that 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation'. Under Article 17, an interference with an individual's privacy must have a lawful basis and must not be arbitrary. The right to protection against arbitrary and unlawful interference protects personal information.

40. Article 16 of the CRC states that 'No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation. The child has the right to the protection of the law against such interference or attacks'.

41. The Bill contains a number of provisions dealing with non-disclosure of confidential information, which support the right to privacy of the parties involved in a family law case.

Communications of Details of Family Law Proceedings

42. New Part XIVB will replace section 121 of the Family Law Act and will prohibit public communication of identifiable information. The purpose of the new Part is to make the law in this area clearer and easier to understand. The Part contains two offences, both with a maximum penalty of one-year imprisonment, which prohibit the public communication of identifiable information connected to family law proceedings as well as prohibiting publicly disclosing lists of names of persons in connection with family law proceedings. As is the case with the existing section 121, private communications are permitted under the new Part, as well as necessary exceptions.

43. The restriction on communication of court proceedings is an important aspect of affording privacy to separating families. The new Part promotes the right to privacy for those within the family law system by prohibiting intrusive media reporting and public exposure of sensitive family law details. The new Part further supports Article 17 of the ICCPR and Article 16 of the CRC by protecting against an attack on a person's reputation by prohibiting public communication of identifiable family law information.

44. The Part contains exceptions where identifiable information of those within the family law system may be communicated publicly. This includes where identifiable information is shared with agencies, persons and bodies who have a significant and legitimate interest, which is greater than the interest of the public generally, in the subject matter of the communication and other exceptions to facilitate court proceedings, such as legal aid, training and studies. In order for an interference with the right to privacy not to be arbitrary, the interference must be for a reason consistent with the provisions, aims and objectives of the ICCPR and be reasonable in the particular circumstances. The sharing of information permitted under the Part imposes a reasonable limitation on the right to privacy, as limited information sharing is only permitted for specified and necessary purposes such as to support

families and children during family law proceedings, including through access to services, to protect children from harm or abuse, and to facilitate court proceedings.

45. The Bill promotes the right to privacy, with any limitations being reasonable, necessary and proportionate to the aim of protecting the particular vulnerabilities of children.

Right to enjoy and benefit from culture: Article 27 of the ICCPR and Article 30 of the CRC

46. Article 27 of the ICCPR protects the rights of individuals belonging to ethnic, religious and linguistic minorities within a country to enjoy their own culture, practise their own religion and use their own language. These rights are particular to members of such minorities, who also enjoy the other rights guaranteed in the human rights treaties.

47. Article 30 of the CRC states that children of indigenous origin should not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

48. The Bill promotes Aboriginal and Torres Strait Islander children's right to enjoy their culture by introducing a requirement for the court to consider that right when determining what is in the child's best interest. Specifically, the court is required to consider the child's right to enjoy their Aboriginal or Torres Strait Islander culture by having the opportunity to connect with, and maintain, their connection with, their family, community, culture, country and language. The court must also consider the likely impact any proposed parenting order will have on that right.

49. Connection to culture is a significant protective factor for the wellbeing of Aboriginal and Torres Strait Islander children and their families. Creating a specific provision for Aboriginal and Torres Strait Islander children, rather than including it in new subsection 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 what is in their best interests.

Right to a fair and public hearing: Article 14(1) of the ICCPR

50. Article 14(1) of the ICCPR requires all persons to be equal before the courts and tribunals. It further provides that everyone is entitled, in the determination of 'rights and obligations in a suit at law', to a 'fair and public hearing by a competent, independent and impartial tribunal established by law'. The right to a fair hearing applies in both criminal and civil proceedings, including whenever rights and obligations are to be determined.

51. A fair hearing requires recognition of the interests of all parties. The procedures followed in a hearing should respect the principle of 'equality of arms' which requires that all parties to a proceeding must have a reasonable opportunity of presenting their case under conditions that do not disadvantage them as against other parties to the proceeding.

Harmful proceedings orders

52. New Division 1B introduces 'harmful proceedings orders'. This will provide the 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 purpose of

this measure is to protect the respondent and/or children who are the subject of proceedings from the harmful impact of frequent and unnecessary applications filed by an applicant. Once this order is in place, further applications will 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.

53. The power to make a harmful proceedings order will 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 will need to be satisfied that there are reasonable grounds to believe that further proceedings will be harmful to the respondent. A non-exhaustive list of examples of ‘harm’ is provided to assist in determining what may be considered harmful (new section 102QAC).

54. The new orders constitute a limitation on the right to a fair hearing as they may limit an applicant’s opportunity to present their case if they are subject to such an order. However, this limitation is reasonable and proportionate to the legitimate aim of preventing harm to the respondent through continuous litigation. To ensure procedural fairness to the applicant, the court must not make a harmful proceedings order without first hearing the person or giving them an opportunity of being heard on the merits of their application (new subsection 102QAC(5)). Additionally, once a harmful proceedings order is in place, a meritorious application made for a proper purpose would be allowed to proceed, regardless of the impact that it might have on the respondent (new subsection 102QAG(1)).

55. The Bill’s limitations on the right to a fair hearing are therefore necessary, reasonable and proportionate to the legitimate aim of protecting vulnerable parties and sensitive information.

Regulation making power for standards and requirements for family report writers

56. The Bill inserts a new Part IIIAA in relation to family report writers. New section 11K of that Part introduces a power to make regulations that set standards and requirements, including recognition, monitoring and enforcement of compliance with the set standards and requirements for family report writers, and to provide for consequences for non-compliance. New subsection 11K(4) provides that these consequences may include offences and civil penalty provisions with pecuniary penalties not exceeding 30 penalty units, and other administrative sanctions such as suspension or cancellation of recognition of compliance.

57. The limitations on these offences have been developed by reference to the Attorney-General’s Department’s *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, and the example penalties provided in that document.² The limitations on the potential offences and penalties are consistent with the recommendation in the Guide that offences enabled by regulation should not exceed 50 penalty units for an individual.

58. New subsection 11K(4) does not itself engage the rights and protections as provided for in Article 14 of the ICCPR (such as rights to a fair trial and fair hearing in Article 14(1))

² [The Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers available at www.ag.gov.au.](http://www.ag.gov.au)

and the right not to be tried or punished twice for the same offence in Article 14(7), but provides a power to make regulations, and sets the parameters for those regulations. The regulations may engage these rights, once developed. Further consideration of relevant rights and appropriate protections will be undertaken as part of the preparation of any regulations enabled by the Bill. The regulations would be disallowable to allow Parliament to have appropriate oversight and scrutiny of the delegated powers.

59. New section 11K also triggers the enforcement powers of Part 4 of the *Regulatory Powers (Standard Provisions) Act 2014* so that any civil penalty provisions created by the regulations for the purposes of section 11K are enforceable under Part 4 of that Act. Subsection 82(6) of that Act applies to require the court to take into account all relevant matters in determining the pecuniary penalty. This provides for the effective monitoring, investigation and enforcement of a regulatory scheme for family report writers under new Part IIIAA.

Right to freedom of opinion and expression: Article 19 of the ICCPR

60. Article 19 of the ICCPR provides that everyone shall have the right to freedom of expression stating ‘this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice’.

61. It further notes the exercise of the right to freedom of expression ‘carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary for respect of the rights or reputations of others, [or] for the protection of national security or of public order, or of public health or morals’.

Communications of Details of Family Law Proceedings

62. As outlined above, new Part XIVB restricts public communication of identifiable information relating to persons connected to family law proceedings. The Part will replace existing section 121 of the Family Law Act to make the current law clearer and easier to understand.

63. New Part XIVB imposes a justifiable limit on the right to freedom of expression. This limitation is necessary to protect sensitive information disclosed in family law proceedings, to protect the privacy of families and children, and to not discourage families from engaging in family law proceedings due to fear of public disclosure of sensitive information. Therefore, this limitation is reasonable, necessary, and proportionate to achieving the legitimate objective of protecting the privacy of persons involved in proceedings.

Conclusion

64. The Bill is compatible with human rights because it promotes their protection. To the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate to achieve the legitimate aims of the Bill and the Family Law Act.

NOTES ON CLAUSES

Preliminary

Clause 1 – Short title

1. This clause provides for the short title of the Act to be the *Family Law Amendment Act 2023*.

Clause 2 – Commencement

2. Item 1 in the table provides that sections 1 to 3 which concern the formal aspects of the Bill, as well as anything in the Bill not elsewhere covered by the table, will commence on the day on which the Bill receives Royal Assent.
3. Except where specified, the Schedules of the Bill will commence on a single day to be fixed by Proclamation. However, if the provisions do not commence within a period of six months after Royal Assent, they will commence on the day after the end of that period.

Clause 3 – Schedules

4. This is a formal clause that enables an Act specified in a Schedule to the Bill to be amended in accordance with the items set out in the relevant Schedule.

Schedule 1—Parenting framework

Part 1 – Best interests of children

Family Law Act 1975

Item 1 – Paragraph 4(1AB)(b)

5. This item repeals paragraph 4(1AB)(b) which applies the definition of ‘member of the family’ to paragraphs 60CC(3)(j) and 60CC(3)(k). Paragraphs 60CC(3)(j) and 60CC(3)(k) are repealed by item 6. This item also inserts a new paragraph 4(1AB)(b), which applies the definition of ‘member of the family’ to new paragraph 60CC(3)(a).

6. Schedule 3 of the Bill expands the definition of ‘member of the family’ for Aboriginal and Torres Strait Islander children by amending the definition of ‘relative’ to include persons who, in accordance with the child’s Aboriginal or Torres Strait Islander culture, are related to the child. The definition of ‘member of the family’ in the Act only applies to the provisions specified in subsection 4(1AB).

7. New paragraph 60CC(3)(a) is inserted by item 6, and requires the court, in matters involving Aboriginal and Torres Strait Islander children, to consider the child’s right to enjoy the child’s Aboriginal or Torres Strait Islander culture, by having the opportunity to connect with, and maintain their connection with, members of their family, and with their community, culture, country and language.

8. The effect of item 1 is to apply the new expanded definition of ‘member of the family’ to new paragraph 60CC(3)(a).

Item 2 – Paragraph 60A(a)

9. This item omits reference to ‘and the principles underlying it,’ from paragraph 60A(a).

10. This reflects the repeal of section 60B (Objects of Part and principles underlying it) and the substitution of new section 60B which does not contain principles (see item 4).

Item 3 – Subdivision B of Division 1 of Part VII (heading)

11. This item omits the word ‘principles’ from the heading of Subdivision B of Division 1 of Part VII.

12. This reflects the repeal of section 60B and the substitution of new section 60B which does not contain principles (see item 4).

Item 4 – Section 60B

13. This item repeals section 60B and substitutes a simplified objects provision for Part VII of the Act.

14. The repeal and substitution of section 60B does not indicate that the repealed objects and principles are no longer relevant. Rather, the intention is to simplify the objects to better

assist with the interpretation of Part VII and avoid duplication with section 60CC which sets out what the court must consider when determining what is in the best interests of the child.

15. The purpose of new section 60B is to provide context, indicate the legislative purpose and assist with interpretation.

New section 60B – Objects of Part

16. New section 60B provides that the objects of Part VII are to ensure that the best interests of children are met, including by ensuring their safety, and to give effect to the CRC.

17. New paragraph 60B(a) outlines that the purpose of the provisions in Part VII is to ensure that the best interests of children are met, including by ensuring their safety. This reflects that, when making a parenting order under Part VII, a court must regard the best interests of the child as the paramount consideration (section 60CA). Paragraph 60B(a) emphasises that ensuring the best interests of the child are met includes ensuring their safety. This is intended to make it clear to all users of the Family Law Act that safety is a fundamental consideration when considering the best interests of the child. To avoid doubt, ensuring children's safety includes protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

18. New paragraph 60B(b) confirms, in cases of ambiguity, the obligation on decision makers to interpret Part VII of the Family Law Act, to the extent its language permits, and where relevant, consistently with Australia's obligations under the CRC. The CRC may be considered as an interpretive aid to Part VII of the Family Law Act. To the extent that the Family Law Act departs from the CRC, the Family Law Act prevails. This provision is not equivalent to incorporating the CRC into domestic law.

19. A note is included in the new section which provides the user with a reference for accessing the CRC, as current during the year of drafting.

Item 5 – Section 60C (table item 1, column headed 'Divisions and coverage')

20. This item omits reference to 'principles underlying it, and' from the outline of Part VII in section 60C.

21. This reflects the repeal of section 60B and the substitution of new section 60B which does not contain principles (see item 4).

Item 6 – Section 60CC

22. This item repeals the existing section 60CC and replaces it with a new section 60CC.

23. Under section 60CA of the Family Law Act, in deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration. New section 60CC outlines the matters a court must consider in determining what is in the best interests of the child.

New Section 60CC – How a court determines what is in a child’s best interests

24. New section 60CC removes the two-tier hierarchical structure of two ‘primary’ and 14 ‘additional’ considerations contained in previous section 60CC, and focuses on a core list of six considerations, with an additional factor for Aboriginal or Torres Strait Islander children, that are likely to be relevant to a large majority of matters.

25. The ALRC Report recommended that six factors form the basis of the new section 60CC and that legislative prioritisation be removed. This is intended to address the complex and repetitive nature of the previous section 60CC, and ensure that matters are given different weight as appropriate to the particular situation of a child. New section 60CC is intended to continue to provide the court with a wide discretion to consider the facts in each case, with a list of non-exhaustive considerations providing guidance.

Determining child’s best interests

26. New subsection 60CC(1) provides that, in determining what is in the child’s best interests, the court must consider the matters set out in subsection (2) and, if the child is an Aboriginal or Torres Strait Islander child, must also consider the matters set out in subsection 60CC(3).

General considerations

27. New subsection 60CC(2) sets out a list of six matters that the court must consider when determining what is in a child’s best interests. The list is intended to provide guidance about the matters that must be considered by a court, but retain flexibility to adapt to each child’s specific circumstances. The list is non-hierarchical and allows all matters to be taken into consideration and balanced in light of each situation. For each child, particular matters will be more relevant than others in arriving at a best interests assessment.

What arrangements will promote safety – new paragraph 60CC(2)(a)

28. New paragraph 60CC(2)(a) provides that the court must consider what arrangements would promote the safety (including safety from family violence, abuse, neglect, or other harm) of:

- (i) the child; and
- (ii) each person who has the care of the child (whether or not a person has parental responsibility for the child).

29. It is intended that new sub-paragraph 60CC(2)(a)(ii) apply to all people who have parental responsibility for the child, as well as people who provide day-to-day care for the child but who may not have parental responsibility. Such people may include, but are not limited to, parents, step-parents, grandparents, siblings, informal kinship carers, and other extended family members.

30. New paragraph 60CC(2)(a) requires the court to consider what arrangements, under a parenting order, would promote the safety of the child and each person who has care of the child. It is intended that in considering what arrangements promote safety, the court would

consider what arrangements would encourage or support a removal, reduction or avoidance of harm.

31. New paragraph 60CC(2)(a) provides that safety includes safety from family violence, abuse, neglect, or other harm.

32. Where there are allegations of family violence, abuse, neglect, or other harm affecting the child and/or those who care for the child, ensuring the safety of parenting arrangements will be particularly relevant. Appropriately, the existence of any family violence orders applying to the child or a member of the child's family, and the nature of these orders, will remain relevant under new paragraph 60CC(2)(a) (as was provided for by previous paragraph 60CC(3)(k)). Section 60CG will continue to stipulate that the court must consider the risk of family violence, including the requirement to ensure any order is consistent with any family violence order, to the extent that it is possible to do so consistently with the child's best interests being the paramount consideration. Existing sections 60CF, 60CH and subsection 69ZX(4) will also continue to allow the court to be informed of matters relating to this factor.

33. 'Family violence' is defined in subsection 4AB(1) as 'violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member), or causes the family member to be fearful'. Subsection 4AB(2) lists several non-exhaustive examples of behaviour that may constitute family violence, including physical or sexual assault, stalking, verbal abuse, damage to property, harm to pets, unreasonably denying a person autonomy or liberty, preventing contact with family or friends and withholding financial support. Subsection 4AB(3) provides that a child is exposed to family violence if the child sees or hears family violence or otherwise experiences the effects of family violence. It is intended that the child's safety from family violence includes safety from exposure to family violence.

34. 'Abuse' in relation to a child is defined in section 4 and covers an assault, including a sexual assault, of the child, a person involving the child in sexual activity, causing the child to suffer serious psychological harm, including (but not limited to) when that harm is caused by the child being subjected to, or exposed to, family violence, or serious neglect of a child.

35. 'Neglect' is not defined in the Family Law Act. However, this Bill adopts the position of the explanatory memorandum to the *Family Law Amendment (Shared Parental Responsibility) Act 2006*, which inserted the term. Consistent with this, the term 'neglect' within the Family Law Act should be applied by reference to its meaning or understanding in accordance with state and territory child protection legislation. Further, it is intended to be limited to situations where a lack of reasonable care is likely to cause unnecessary suffering or injury to the health of the child.

36. Inclusion of the broad term 'other harm' allows a court-wide discretion to consider the child's particular situation and to draw conclusions of what is in a child's best interests. It will allow, for example, consideration of whether certain arrangements are workable in a family situation where high conflict and poor communication is present (as is often the case in family law matters that proceed to court). This acknowledges the findings by the Australian Psychological Society that continuing inter-parental conflict is one of the strongest single predictors of negative child outcomes. Previously, the parents' current and future capacity to communicate could be considered when making orders for substantial or significant time under paragraph 65DAA(5)(c), which is repealed by item 22.

Any views expressed by the child – new paragraph 60CC(2)(b)

37. New paragraph 60CC(2)(b) provides that the court must consider any views expressed by the child. This simplifies previous paragraph 60CC(3)(a) which also required the court to consider any factors (such as the child’s maturity or level of understanding) that the court thought relevant to the weight it should give to the child’s views. The requirement to consider any views expressed by the child recognises children’s agency and their right to be heard in proceedings that affect them. As with all of the general considerations in subsection 60CC(2), the court will have discretion to consider those views in light of the child’s particular circumstances and determine how much weight to place on them.

38. The Bill also makes amendments to strengthen this approach by requiring that, where an ICL has been appointed by the court under section 68L to independently represent a child’s interests, that ICL will now be required to meet with a child to seek their views, subject to certain exceptions (see Schedule 4).

39. Of note, section 60CD deals with how the court informs itself of views expressed by a child and section 60CE clarifies that nothing in Part VII permits the court or any person to require the child to express their views in relation to any matter.

The child’s developmental, psychological, emotional and cultural needs – new paragraph 60CC(2)(c)

40. New paragraph 60CC(2)(c) provides that the court must consider the developmental, psychological, emotional and cultural needs of the child. It is intended that this will allow a broad range of evidence to be considered concerning a particular child’s needs, including their usual daily routine.

41. In recommending inclusion of this consideration, the ALRC Report cites a position paper of the Australian Psychological Society that lists considerations that provided conditions for promoting child wellbeing during and after parental separation³ and noted that it ‘supports developmentally appropriate care and parenting arrangements following separation’ including tailored arrangements that ‘take into account the child’s developmental stage, wishes, needs, concerns and capacities to cope with change’. Consideration of the child’s cultural needs is also included, to account for the cultural and linguistic diversity of Australia’s children.

The capacity of each person with parental responsibility to provide for the child’s needs – new paragraph 60CC(2)(d)

42. New paragraph 60CC(2)(d) provides that the court must consider the capacity of each person who has, or is proposed to have, parental responsibility for the child, to provide for the child’s developmental, psychological, emotional and cultural needs.

43. Consideration of ‘capacity’ is intended to allow broad judicial discretion to consider a range of matters to assess the ability of each person who has, or is proposed to have, parental responsibility, to provide for the individual needs of each child. This may require an

³ Australian Psychological Society, *Child Wellbeing After Parental Separation: Position Statement* (2018).

examination of the history of care of the child and the nature of the relationship with each person (as provided for in previous paragraph 60CC(3)(b) and 60CC(3)(c)). An examination of the attitude to the child and to the responsibilities of parenthood, demonstrated by each person (as provided for in previous paragraph 60CC(3)(i)) may also assist the court to make a conclusion on a carer's capacity to provide for the child's particular developmental, psychological, developmental, and cultural needs.

The benefit to the child of being able to have a relationship with parents, and other significant people, where it is safe to do so – new paragraph 60CC(2)(e)

44. New paragraph 60CC(2)(e) provides that the court must consider the benefit to the child of being able to have a relationship with the child's parents, and other people who are significant to the child, where it is safe to do so.

45. This consideration recognises the importance of parental relationships, and relationships with other people who are significant to the child (such as grandparents or members of a broader kinship group) to a child's wellbeing. Where appropriate and safe, parenting orders that ensure children benefit from a close and nurturing relationship with their parents should be made.

46. No one particular arrangement will work for all children or all families, whose needs are diverse and will change over time. However, where safe and appropriate, most children benefit from spending time with their parents not only at the weekends and in school holidays, but also during the school week, and will also benefit from allowing each parent to be involved in the child's daily routine and occasions and events that are of particular significance to the child.

47. Paragraph 60CC(3)(e) recognises that while in the majority of cases the courts will give consideration to the benefit to the child of being able to maintain an existing relationship with each parent and those significant to the child, in some matters children may not yet have had the opportunity to form a relationship (such as where parents separate prior to the child's birth or when the child is very young). In these instances, the court should consider the benefit to the child of being able to develop a relationship with their parent or other person of significance to the child.

Anything else that is relevant to the child – new paragraph 60CC(2)(f)

48. New paragraph 60CC(2)(f) provides that the court must consider anything else that is relevant to the particular circumstances of the child.

49. This factor is a necessary safeguard to account for the myriad of circumstances that arise in family law proceedings. It is not intended or expected that the court would take into account trivial or inconsequential matters in determining whether there is 'anything else' that is relevant to the particular circumstances of the child in making a decision of what is in the best interests of the child.

Additional considerations – right to enjoy Aboriginal or Torres Strait Islander culture

50. New subsection 60CC(3) sets out additional matters that must be considered when determining what is in the best interests of an Aboriginal or Torres Strait Islander child.

These matters must be considered in addition to the general considerations contained in subsection 60CC(2)).

51. New paragraph 60CC(3)(a) provides that, in determining what is in the best interests of an Aboriginal or Torres Strait Islander child, the court must consider the child's right to enjoy their Aboriginal or Torres Strait Islander culture, by having the opportunity to connect with, and maintain their connection with, members of their family and with their community, culture, country and language.

52. Schedule 3 of the Bill expands the definition of 'member of the family' for Aboriginal and Torres Strait Islander children by amending the definition of 'relative' to include persons who, in accordance with the child's Aboriginal or Torres Strait Islander culture, are related to the child. Item 1 of Schedule 1 applies this new expanded definition to new paragraph 60CC(3)(a).

53. Paragraph 60CC(3)(b) provides that, in determining what is in the best interests of an Aboriginal or Torres Strait Islander child, the court must consider the likely impact of any proposed parenting order on the child's right to enjoy their Aboriginal or Torres Strait Islander culture.

54. Having a specific provision for Aboriginal and Torres Strait Islander children, rather than including it in the list of general considerations in new subsection 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.

Consent orders

55. New subsection 60CC(4) provides that if the court is considering whether to make an order with the consent of all the parties to the proceedings (consent orders), the court may, but is not required to, have regard to all or any of the matters set out in subsections 60CC(2) or (3). This reflects previous subsection 60CC(5).

Item 7 – Subsection 60CD(1)

56. This item replaces a reference to paragraph 60CC(3)(a) in subsection 60CD(1) (which sets out how the views of a child are to be expressed) with new paragraph 60CC(2)(b), reflecting the redraft of section 60CC.

Item 8 – Paragraph 60D(1)(b)

57. This item repeals paragraph 60D(1)(b) and substitutes a new paragraph 60D(1)(b) providing that where an adviser gives advice or assistance to a person about child-related matters, the adviser must encourage the person to act in the child's best interests by applying the considerations set out in subsections 60CC(2) and (3).

58. 'Adviser' is defined in subsection 60D(2) as:

- a. a legal practitioner
- b. a family counsellor

- c. a family dispute resolution practitioner, or
- d. a family consultant.

59. Previously, section 60D stated that advisers must advise their clients of the paramountcy of the best interests of the child, including the two primary considerations in previous section 60CC. This item reflects the simplification of section 60CC (item 6) by providing that the adviser must encourage the person to act in the child's best interests by applying the considerations set out in new subsections 60CC(2) and (3).

Item 9 – Paragraph 68N(b)

60. This item omits reference to 'and principles' in paragraph 68N(b).

61. This reflects the repeal of section 60B and the substitution of a new objects section which does not contain principles (see item 4).

Item 10 – Subsection 68P(2C)

62. This item repeals subsection 68P(2C), which limited the effect of previous section 60CC on a court making decisions under section 68P about whether it is in a child's best interests not to receive an explanation of an order or injunction that is inconsistent with a family violence order. Such a limitation is not necessary in relation to new section 60CC, due to its non-hierarchical structure.

Item 11 – Paragraph 68S(2)(a)

63. This item omits a reference to previous paragraph 60CC(3)(a) (taking into account a child's views) in paragraph 68S(2)(a) and replaces it with a reference to new paragraph 60CC(2)(b), reflecting the redraft of section 60CC in item 6.

Item 12 – Application of provision

64. This item provides that the amendments contained in Part 1 apply to proceedings that commence on or after the day this item commences.

Part 2 – Parental responsibility

Family Law Act 1975

Item 13 – Subsection 61C(1) (note 2)

65. This item omits the reference to section 61DA in note 2 to subsection 61C(1). This reflects the repeal of section 61DA by item 16.

Item 14 – After section 61C

New section 61CA – Consultation between parents on major long-term issues

66. Item 14 inserts new section 61CA that provides that, subject to court orders, and if it is safe to do so, parents are encouraged to consult each other about major long-term issues and, in doing so, to have regard to the best interests of the child.

67. ‘Major long-term issues’ are defined in subsection 4(1) of the Family Law Act as issues about the care, welfare and development of the child of a long-term nature and include (but are not limited to) issues of that nature about:

- the child’s education (both current and future)
- the child’s religious and cultural upbringing
- the child’s health
- the child’s name, and
- changes to the child’s living arrangements that make it significantly more difficult for the child to spend time with a parent.

68. New section 61CA is not enforceable but is intended to signal to parents that, in the absence of court orders, decisions about major long-term issues should be made in consultation, with the best interests of the child being the paramount consideration.

69. New section 61CA explicitly specifies that the encouragement to consult applies if it is safe to do so. Nothing in new section 61CA is intended to require or encourage consultation where that may be unsafe for a parent.

Item 15 – At the end of section 61D

70. Item 15 inserts new subsection 61D(3) that provides that a parenting order that deals with the allocation of responsibility for making decisions about major long-term issues in relation to the child may provide for joint or sole decision-making in relation to all or specified major long-term issues.

71. Subsection 61D(3) reflects existing subsection 64B(3) that provides that a parenting order may deal with the allocation of responsibility for making decisions about major long-term issues in relation to the child.

72. New subsection 61D(3) is intended to make it clear that decision-making about major long-term issues is a component of parental responsibility, and that parenting orders may provide for joint decision-making or sole decision-making in relation to a major long-term issue or issues.

Item 16 – Sections 61DA and 61DB

73. This item repeals section 61DA, the presumption of equal shared parental responsibility. This item also repeals section 61DB that outlines the application of that presumption after interim parenting orders are made.

74. The presumption of equal shared parental responsibility was introduced by the *Family Law Amendment (Shared Parental Responsibility) Act 2006*. Matters that end up in court often involve concerns about family violence, health issues or substance abuse. These are complex matters which the court must consider very carefully. In these matters, the court's primary focus should be on making arrangements that meet the best interests of the children involved. Any presumptions about the allocation of parental responsibility or consideration of specific time arrangements can detract from a focus on the needs of the individual child.

75. Recent inquiries into the family law system have concluded that the presumption of equal shared parental responsibility is commonly misunderstood. An order for 'equal shared parental responsibility' simply means that parents are required to make joint decisions about major long-term decisions (for example, in relation to education and health). However, the majority of parenting matters are settled outside of court, and the ALRC Report and the JSC Inquiry as well as numerous studies have found that this part of the law is commonly misinterpreted as creating a right to equal shared time with children which has never been the case. This means that parents can enter negotiations based on incorrect assumptions about their entitlements. This can lead to inappropriate arrangements for children and increased parental conflict.

76. New subsection 61D(3) (item 15) is intended to make it clear that, with the removal of the presumption of equal shared parental responsibility, the court may still make orders providing for joint decision-making about major long-term issues, and parties can continue to agree to such matters between themselves. The court will still be required to consider the allocation of parental responsibility, and responsibility for decision-making about major long-term issues, whenever this is raised by one of the parties, or on its own motion.

New Section 61DAA – Effect of parenting order that provides for joint decision-making about major long term issues

77. New subsection 61DAA(1) provides that if a parenting order provides for joint decision-making by persons in relation to all or specified major long-term issues in relation to a child, the order is taken to require each of the persons to consult each other person in relation to each such decision and to make a genuine effort to come to a joint decision.

78. New subsection 61DAA(2) makes it clear that this section does not require any other person to establish that the decision has been made jointly before acting on a decision about a child communicated by one of the persons that has been allocated responsibility for a major long-term decision.

79. New section 61DAA reflects relevant parts of previous section 65DAC, which outlined the effect of a parenting order that provides for shared parental responsibility. This provision has been relocated to Division 2 – Parental responsibility, to ensure that the provisions relating to the allocation of parental responsibility are collocated. This is intended to make the Family Law Act more user-friendly.

80. New subsection 61D(3) (item 15) makes it clear that, with the removal of the presumption of equal shared parental responsibility, the court may still make orders providing for joint decision-making about major long-term issues. New section 61DAA outlines the effect of such orders.

New Section 61DAB – No need to consult on issues that are not major long-term issues

81. New section 61DAB reflects previous section 65DAE, and provides that, if a child is spending time with a person under a parenting order, there is no requirement for the person to consult a person with parental responsibility for the child about issues that are not major long-term issues. This provision has been relocated to Division 2 to ensure that provisions relating to the allocation of parental responsibility are collocated.

Item 17 – At the end of section 61F

82. This item inserts a note at the end of section 61F directing the user to the definition of ‘Aboriginal or Torres Strait Islander culture’ which is defined in subsection 4(1).

Item 18 – At the end of subsection 63C(2B)

83. This item inserts a note at the end of subsection 63C(2B) directing the user to the definition of ‘major long-term issues’ which is defined in subsection 4(1).

Item 19 – Paragraphs 63DA(2)(a) and (b)

84. This item repeals paragraphs 63DA(2)(a) and 63DA(2)(b) that set out obligations of advisers giving advice to people in connection with the making of a parenting plan. These paragraphs refer to an obligation to advise the parties about considering specific time-care arrangements which reflect the time-care arrangements set out in section 65DAA which is being repealed by item 22.

Item 20 – Subsections 63DA(3) and (4)

85. This item repeals subsections 63DA(3) and 63DA(4) that define the concept of ‘substantial and significant time’ for the purposes of paragraph 63(DA)(2)(b) which is repealed by item 19.

Item 21 – At the end of subsection 64B(3)

86. This item adds Note 1 to the end of subsection 64B(3) directing users to new subsection 61D(3) and new section 61DAA, to make it clear to users that these provisions also relate to parenting orders dealing with allocation of responsibility for making decisions about major long-term issues.

87. This item also adds Note 2 to the end of subsection 64B(3) directing users to the definition of ‘major long-term issues’ in subsection 4(1).

Item 22 – Subsection 65D(1)

88. This item removes a reference in subsection 65D(1) to section 61DA, which is repealed by item 16.

Item 23 – Subsection 65D(2)

89. This item removes a reference in subsection 65D(2) to section 61DA, which is repealed by item 16.

Item 24 – Sections 65DAA, 65DAC and 65DAE

90. This item repeals section 65DAA (Court to consider child spending equal time or substantial and significant time with each parent in certain circumstances). This section applied when an order of ‘equal shared parental responsibility’ was made under previous section 61DA. This section is repealed by item 16.

91. Repealing this section, along with section 61DA, simplifies the way decisions are made on appropriate arrangements for children, putting the best interests of the child as set out in new section 60CC at the centre. These provisions were commonly misunderstood as providing parents with an entitlement to spend equal time with a child. The court can continue to make orders for equal time or substantial and significant time in the event that it determines that arrangement is in the best interests of the child, however there is no requirement to consider these arrangements if they would not be suitable.

92. This item also repeals sections 65DAC and 65DAE, which are replaced by new sections 61DAA and 61DAB at item 16.

Item 25 – Application provision

93. This item provides that, apart from new section 61CA, the amendments in Part 2 apply in relation to proceedings that commence on or after the day this item commences.

94. Section 61CA applies from the day this item commences. This is because the provision is not linked to proceedings.

Part 3 – Child related proceedings

Family Law Act 1975

Item 26 – After section 65D

New section 65DAAA – Reconsideration of final parenting orders

95. This item inserts a new section 65DAAA after section 65D.

96. The court has a power in subsection 65D(2) to discharge, vary, suspend or revive earlier parenting orders. However, the Family Law Act does not specify the circumstances in which parties may return to the court to seek revision of an order.

97. New section 65DAAA codifies the common law rule established by *Rice and Asplund* (1979) FLC 90-725 and elaborated on in subsequent cases, that is, where final parenting orders are in place the applicant must establish that there has been a significant change of circumstance since the making of the orders before those orders can be reconsidered.⁴ The rule is founded on the notion that continuous litigation over a child or children is generally not in their best interests.⁵

⁴ *In the marriage of Rice and Asplund* (1978) 6 FamLR 570; *SPS and PLS* (2008) FLC 93-363; *Marsden v Winch* (2013) 50 Fam LR 409; *Marsden v Winch* (2009) 42 Fam LR 1.

⁵ *Marsden v Winch* (2013) 50 Fam LR 409 at [36]; *Marsden v Winch* (2009) 42 Fam LR 1 at [49].

98. New subsection 65DAAA(1) specifies that if a final parenting order is in place, the court must not reconsider it unless the court has considered whether there has been a significant change in circumstances since the final order was made and is satisfied that it is in the best interest of the child for the order to be reconsidered.

99. Subsection 65DAAA(1) is intended to apply to any reconsideration of a final parenting order, other than a child maintenance order.

100. New subsection 65DAAA(2) 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 or prescriptive. The court may have regard to any other factors in considering whether it is in the child's best interests to reconsider the final parenting order.

101. For avoidance of doubt, the Government does not intend for this subsection to displace the best interests considerations contained in section 60CC (see item 6).

102. New subsection 65DAAA(3) provides that the court may reconsider a parenting order with the agreement or consent of all the parties to the final parenting order. This may occur, for example, in circumstances where both parties acknowledge that final parenting orders have become plainly ineffective or impractical over time. It is also intended to allow parents to include consent at the time of making of final parenting orders that the orders can be revisited upon the happening of a particular event or after a particular period of time has elapsed, which may enhance parties' willingness to resolve their disputes.

103. Additionally, subsection 65DAAA(4) provides that the failure of a court to comply with subsection 65DAAA(1) does not affect the validity of any order made by the court.

Item 27 – Application provision

104. This item provides that the amendments made by this Part apply in relation to final parenting orders whether the orders came into force before, or come into force on or after, the day this item commences. .

Schedule 2—Enforcement of child-related orders

Part 1 – Enforcement of child related orders

Division 1 – Main amendments

Child Support (Assessment) Act 1989

Item 1 – Subsection 100(2)

105. This item amends subsection 100(2) of the *Child Support (Assessment) Act 1989* (Cth) to reflect the new title of Division 13A of Part VII of the Family Law Act, ‘Orders in proceedings relating to contraventions of child-related orders’.

Family Law Act 1975

Item 2 – Subsection 4(1) (definition of *alleged contravention* and *alleged offender*)

106. This item amends the definitions of ‘alleged contravention’ and ‘alleged offender’ in subsection 4(1) to reflect the relocation of Subdivision D to new Subdivision B of Division 14 of Part VII.

Item 3 – Subsection 4(1) (definition of *applied provisions*)

107. This item repeals the definition of ‘applied provisions’ from subsection 4(1) to reflect the removal of community service orders as an available sanction from Division 13A of Part VII. Community service orders were rarely used as a sanction and their removal aids the simplification of the Division.

Item 4 – Subsection 4(1)

108. This item inserts a definition of ‘child-related order’ into subsection 4(1), directing the user to the meaning set out in new subsection 70NBA(2) (see further below).

Item 5 – Subsection 4(1) (definition of *community service order*)

109. This item repeals the definition of ‘community service order’ from subsection 4(1). This reflects the repeal of subsection 70NFC(3), to which the definition refers.

Item 6 – Subsection 4(1)

110. This item inserts a definition of ‘contravene a child-related order’ into subsection 4(1), directing users to the meaning set out in section 70NAC (see further below).

Item 7 – Subsection 4(1)

111. This item repeals the existing definitions for ‘contravened’; ‘order under this Act affecting children’; and ‘primary order’ from subsection 4(1).

112. The definition of ‘contravened’ has been replaced by contravene in subsection 4(1) (see item 6).

113. The definition of ‘order under this Act affecting children’ has been replaced in new Division 13A by child-related order (see item 4).

114. The definition of ‘primary order’ has been removed from subsection 4(1) to consolidate and simplify the use of definitions pertaining to child-related orders.

Item 8 – Subsection 4(1)

115. This item inserts a definition of ‘reasonable excuse for contravening a child-related order’ into subsection 4(1), directing users to the meaning set out in section 70NAD (see further below).

Item 9 – Subsection 4(1) (definition of *reasonable excuse for contravening*)

116. This item repeals the previous definition of ‘reasonable excuse for contravening’ from subsection 4(1), to give effect to item 8.

Item 10 – At the end of Part II

New Division 5—Post-separation parenting programs

Section 10PA Admissibility of communications in post-separation parenting programs

117. This item adds a new Division at the end of Part II containing new section 10PA. Section 10PA replicates previous section 70NEF, with the addition of a note.

118. New subsection 10PA(1) provides that evidence of anything said, or any admission made, by a person attending a post-separation parenting program is not admissible in any court, or any proceedings. New subsection 10PA(2) provides that evidence in the form of an adult’s admission of abuse or risk of abuse to a child under 18 years, or a disclosure by a child indicating that the child has been abused or is at risk of abuse, is not excluded by operation of subsection 10PA(1).

119. A note has been added beneath subsection 10PA(2), to alert users of the legislation to the fact that a court may make an order directing a person to attend a post-separation parenting program under subsection 65LA(1) or 70NBD(1).

Item 11 – Section 60C (table item 6)

120. This item repeals the outline of Division 6 of Part VII contained in section 60C (table item 6) and substitutes a new outline.

121. The new outline reflects the amendments made to Division 6, including the consolidation of previous Subdivision C into new Division 13A and the relocation of Subdivision D to Division 14 of Part VII.

Item 12 – Section 60C (table item 13A)

122. This item repeals the outline of Division 13A of Part VII contained in section 60C (table item 13A) and substitutes a new outline. The new outline reflects the simplified new Division 13A inserted by item 21.

Item 13 – Section 60C (table item 14)

123. This item repeals the outline of Division 14 of Part VII contained in section 60C and substitutes a new outline. The new outline reflects amendments made to Division 14, including the relocation of ‘Subdivision D – Dealing with people who have been arrested’ from Division 6 to Subdivision B of Division 14 of Part VII.

Item 14 – Subsection 63F(3) (paragraph (a) of the note)

124. This item omits ‘Subdivisions C, D and E’ from paragraph (a) of the note to subsection 63F(3) and substitutes ‘Subdivision E’. This reflects the repeal of Subdivisions C and D of Division 6 (see item 18).

Item 15 – Paragraphs 65A(1)(b) and (c)

125. Section 65A provides an outline of what Division 6 of Part VII does. Item 15 repeals the references to paragraphs 65A(1)(b) and 65A(1)(c) to reflect the relocation of Subdivisions C and D of Division 6 (see item 18).

Item 16 – Subsection 65D(3)

126. This item repeals subsection 65D(3) (not including the notes) due to the repeal of the paragraph to which it refers, paragraph 70NEB(1)(c).

Item 17 – Subsection 65D(3) (notes 1 and 2)

127. This item removes ‘or for the proceedings under Subdivision E of Division 13A of Part VII, or both,’ from notes 1 and 2 of subsection 65D(3). This reflects the restructure of Division 13A and the removal of previous Subdivision E.

Item 18 – Subdivisions C and D of Division 6 of Part VII

128. This item repeals Subdivisions C and D of Division 6 of Part VII.

129. Consistent with the intention to simplify and streamline key parts of the Family Law Act, previous ‘Subdivision C – General obligations created by certain parenting orders’ has been consolidated into the new Divisions 13A and 14 of Part VII.

130. Sections 65M, 65N, 65NA, 65P and 65Q from previous Subdivision C of Division 6 have been redrafted and are now reflected in new sections 70NAC and 70NDA of Division 13A of Part VII (see below).

131. Subdivision D has been substantively replicated in new Subdivision B of Division 14 of Part VII (see item 24). This Subdivision applies if a person is arrested under a warrant issued under subsection 70NDA(1) (warrants for arrest of persons alleged to have contravened a child-related order), or where a person is arrested without warrant under a recovery order. It sets out the obligations of the arresting person, and the obligations of the court where there is an application before it to deal with an alleged contravention; where there is an application before another court; or where there is no application before any court.

Item 19 – Section 67Q (note 1)

132. This item omits ‘Subdivision D of Division 6’ from section 67Q (note 1) and substitutes ‘Subdivision B of Part 14’. This reflects the removal of Subdivision D from Division 6 and its inclusion in a new Subdivision in Part 14 (see item 18).

Item 20 – Subsections 69ZH(2) and (4)

133. This item omits ‘Subdivisions C, D and E’ from subsections 69ZH(2) and (4) and substitutes ‘Subdivision E’. This reflects the removal of Subdivisions C and D from Division 6 (see item 18).

Item 21 – Division 13A of Part VII

New Division 13A—Orders in proceedings relating to contraventions of child-related orders

134. This item repeals existing Division 13A of Part VII and replaces the Division with a redrafted Division which is intended to be simpler and easier to apply.

135. The Division is 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, and
- Subdivision D – Miscellaneous.

136. For the purposes of simplifying the structure of the Division, the Division no longer separately provides for circumstances where the court considers the contravention to be ‘less serious’ or ‘more serious’. Instead, the court has 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 intends to simplify the law, while retaining the court’s discretion to consider the circumstances of each case.

137. Under the Division’s new structure, the penalties and costs provisions are centralised to improve readability. Currently these provisions are repeated throughout the Division against the different outcomes that can result from a contravention matter.

138. Each provision in the redraft is placed alongside the existing equivalent provisions (where applicable) of the Family Law Act, for ease of reference.

New section	Summary	Previous provision in the Act
70NAA	Provides a simplified outline of Division 13A	70NAA

New section	Summary	Previous provision in the Act
70NAB	Outlines the objects of Division 13A	N/A
70NAC	Outlines the meaning of to ‘contravene’ an order and the circumstances in which a person contravenes an order	70NAC, 65M, 65N, 65NA, 65P
70NAD	Provides the meaning of ‘reasonable excuse’ for contravening an order	70NAE
70NAE	Provides the standard of proof to be applied in determining matters in proceedings	70NAF
70NBA	Outlines when orders can be made under this Division	70NBA(2) is based on the definition of <i>order under this Act affecting children</i> in section 4
70NBB	The court may make a make-up time parenting order at any stage of the proceedings	70NDB, 70NEB(1)(b), 70NFB(2)(c)
70NBC	The court may vary or suspend a parenting order at any stage of the proceedings	70NBA
70NBD	The court may require one or more parties to attend a post-separation parenting program, or other specified program	70NEB(1)(a), 70NED, 70NEG
New section 10PA (see item 10)	Inadmissibility of evidence of disclosures by persons attending a post-separation parenting program	70NEF
70NBE	The court may make, or in certain circumstances must consider making, 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	70NCA, 70NCB, 70NDC, 70NEB(1)(f) and 70NEB(1)(g), 70NFB(2) (g) and 70NFB(2)(h)

New section	Summary	Previous provision in the Act
70NBF	Outlines orders the court can make where a contravention is established without a reasonable excuse	70NEB(1), 70NFB(2)
Removed	Provisions relating to the making, enforcement, variation and discharge of community service orders	70NFB(2)(a), 70NFC, 70NFD, 70NFF
70NCA	Provides conditions for the court to require a person to enter into a bond	70NEC, 70NFE
70NCB	Outlines the procedure for the court to enforce a bond	70NECA
70NCC	Provides conditions for the court to make an order imposing a sentence of imprisonment	70NFG
70NCD	Outlines the powers of court in relation to the imprisoned person, including release and suspension of sentence	70NFG
70NCE	Outlines the rules relating to contravention of child maintenance orders and child support	70NFB(4)
70NDA	Outlines the circumstances where the court may issue a warrant for the arrest of an alleged offender	65Q
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

Division 13A—Orders in proceedings relating to contraventions of child related orders

Subdivision A—Preliminary

New section 70NAA – Simplified outline

139. Section 70NAA is a simplified outline for the redrafted Division 13A of Part VII.

New section 70NAB – Objects

140. New section 70NAB provides five principal objects for the new Division. This new provision clarifies 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 the objects of Part VII (Children) as a whole, the overarching object of new Division 13A is to meet the best interests of children.

New section 70NAC – Meaning of *contravene* a child-related order

141. New section 70NAC provides for the circumstances where a person contravenes a child-related order. Previous sections 65M to 65P, which set out general obligations created by parenting orders, are centralised in new section 70NAC. The new section performs an equivalent function to the previous provisions without changing the underlying policy.

142. New subsection 70NAC(1) provides a general meaning for when a person contravenes a child-related order, largely replicating previous section 70NAC. New paragraph 70NAC(1)(a) provides that a person (other than a child) to whom an order applies, contravenes that order if they intentionally fail to comply, or make no reasonable attempt to comply, with the order. New paragraph 70NAC(1)(b) provides that a person who intentionally prevents compliance by a person to whom an order applies, or who aids or abets such a contravention, would contravene an order.

143. A note to subsection 70NAC(1) highlights that a parenting order may be subject to a later parenting plan by virtue of section 64D. If such a plan is in place, conduct that would otherwise contravene such an order may not constitute a contravention because of the terms of the later parenting plan.

144. New subsection 70NAC(2) sets out the circumstances where a person contravenes a child-related order. The circumstances detailed in the table centralises specific types of contraventions that are captured across several previous provisions (sections 65M, 65N, 65NA and 65P). This is intended to aid readability for users of the Family Law Act.

145. Subject to new section 70NAD (see below) which outlines what constitutes a reasonable excuse for the contravention of a child-related order (e.g. safety), there are five circumstances in which a person may contravene a child-related order.

146. The first circumstance is where an order deals with whom a child is to live with and a person intentionally removes the child from the care of another person, or refuses or fails to deliver or return the child to another person.

147. The second circumstance is where an order deals with whom a child is to spend time with and a person intentionally hinders or prevents another person from spending time with the child. This could include interfering with a person and the child benefitting from spending time with each other under the order.

148. The third circumstance is where an order deals with whom a child is to communicate with and a person intentionally hinders or prevents another person from communicating with a child. This could include interfering with the communication that a person and the child are supposed to have with each other under the order.

149. The fourth circumstance is where an order allocates parental responsibility for a child to another person and a person intentionally hinders or prevents the carer from discharging that responsibility. This could include interfering with the exercise of performances of any of the powers, duties or responsibilities that the carer has under the order.

150. The fifth circumstance is where the order deals with the maintenance of a child and the person contravenes the order where the person fails to pay maintenance or prevents the maintenance for the child.

New section 70NAD – Meaning of *reasonable excuse* for contravening a child-related order

151. New section 70NAD sets out what constitutes a reasonable excuse for contravening a child-related order. This provision is intended to simplify previous section 70NAE without altering the policy intent.

152. New subsection 70NAD(1) provides that a person has a reasonable excuse for contravening a child-related order if the person did not understand the obligations of the order, and the court considers the person ought to be excused for the contravention. New subsection 70NAD(2) provides that if the court decides a person had a reasonable excuse under subsection 70NAD(1), the court must explain to the person the obligations imposed by the order, and the consequences for further contraventions, in language likely to be readily understood by the person.

153. New subsection 70NAD(3) provides that a person has a reasonable excuse for contravening a child-related order if the person reasonably believed the contravention was necessary to protect the health and safety of the person, the child or any other person, and the contravention was no longer than necessary to protect the health and safety of that individual.

154. New subsection 70NAD(4) provides that the new section does not limit the circumstances in which a person may have a reasonable excuse for contravening a child-related order.

New section – 70NAE Standard of proof

155. New section 70NAE provides that the standard of proof to be applied in determining matters in proceedings under this Division is proof on the balance of probabilities, except for new paragraph 70NBF(1)(d). A note is included in the new section that states that the standard of proof to be applied to orders made under paragraph 70NBF(1)(d) is proof beyond reasonable doubt. Paragraph 70NBF(1)(d) deals with the court's power to order a fine or a term of imprisonment. A higher standard of proof for court orders imposing the most serious sanctions under the Division is preserved.

Subdivision B—Orders relating to contraventions of child-related orders

New section 70NBA – Court may make orders in proceedings relating to contravention of child-related orders

156. Subsection 70NBA(1) sets out the orders that a court exercising jurisdiction in proceedings under the Family Law Act may (or must in certain circumstances) make, on application from a party, if an issue arises in the proceedings about whether a person (the respondent) has contravened a 'child-related order' (which is defined in new subsection 70NBA(2)).

157. A note is included under subsection 70NBA(1) to clarify that the court does not need to find the respondent contravened a child-related order to make certain orders under this Division. The note clarifies that a court may impose the following three sanctions at any stage of the proceedings:

- a make-up time parenting order under new section 70NBB
- an order varying or suspending a parenting order under new section 70NBC, and
- an order requiring the respondent and any other party to the proceedings to attend a post-separation parenting program under new section 70NBD.

158. Flexibility to order these measures is intended to allow the court to make timely orders to address the underlying cause of the contravention. This flexibility complements the operation of the National Contravention List (which commenced on 1 September 2021) established by the FCFCOA. 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.

159. New subsection 70NBA(2) sets out the types of orders that are ‘child-related orders’, reflecting the previous definition of ‘order under this Act affecting children’ which is repealed under item 7. The purpose of this amendment is to clarify what constitutes a ‘child-related order’. Division 13A applies primarily to the contravention of parenting orders, which are included in the definition of ‘child-related order’. The other sanctions covered are orders that often apply in conjunction with parenting orders and therefore it is appropriate that contravention of these orders are also dealt with under this Division. These orders are: injunctions under section 68B or section 114 (if it is for the protection of the child), bonds that may relate to parenting orders or order for contravention without reasonable excuse and orders for subpoenas issued under the applicable Rules of Court during proceedings relating to these particular orders.

New section – 70NBB Make-up time parenting orders

160. New section 70NBB centralises several existing provisions (sections 70NDB, 70NEB and 70NFB) that provide the court with the power to make a make-up time parenting order. The underlying policy intent is not to ‘compensate’ a parent for lost time, but rather to allow the court to order additional care time on a temporary basis to rebuild a relationship between a child and a parent.

161. New subsection 70NBB(1) provides that where a child does not spend time with a person as required by a child-related order as a result of the alleged contravention mentioned in new subsection 70NBA(1), then the court may make an order that a child spend (make-up) time with that person.

162. Note 1 under subsection 70NBB(1) clarifies that parenting orders are made under Division 6. Note 2 under this subsection highlights that the court may also make orders for the respondent to compensate another person for reasonable expenses incurred as a result of a child not spending time with that person under new paragraph 70NBF(1)(c).

163. New subsection 70NBB(2) clarifies that the court may make a make-up time parenting order at any time during proceedings without necessarily finding a contravention. This reflects the situation that existed previously under section 70NDB. This allows the court flexibility to use these orders and complements the operation of the registrar-led National

Contravention List in the FCFCOA. However, it should be noted that by virtue of section 60CA (and as reinforced in new section 70NAB, the Objects of Division 13A), in deciding whether to make a particular parenting order, the best interests of the child are paramount. The best interests of the child are set out in section 60CC and include considerations of whether orders promote the child's safety. In considering what order to make, a court is also obliged to consider whether the order is consistent with any family violence order under section 60CG.

164. New subsection 70NBB(3) clarifies that the quantity of time specified in the make-up time parenting order does not need to be the same amount as the time missed. This reflects that the underlying purpose of such orders is to ensure the relationship between the child and the relevant adult has not been impacted by the time missed.

New section 70NBC – Variation and suspension of child-related orders that are parenting orders

165. New section 70NBC provides the family law courts with the flexibility to vary or suspend a child-related order that is a parenting order at any stage of a contravention proceeding. It simplifies and replaces previous section 70NBA of the Family Law Act. The purpose of new section 70NBC is to assist parties to resolve difficulties associated with parenting orders which have contributed to non-compliance, acknowledging that many contravention applications are brought because circumstances have changed and the existing orders are no longer appropriate. As with new section 70NBB, new section 70NBC is also intended to complement the operation of the registrar-led National Contravention List in the FCFCOA.

166. New subsection 70NBC(1) provides the family law courts with the power to vary a parenting order at any stage of a contravention proceeding and replaces existing subsection 70NBA(1) of the Family Law Act. The effect of this subsection is to clarify that the family law courts have a broad and flexible power to vary a child-related order at any time, without necessarily making a finding as to whether there has been a contravention. However, it should be noted that by virtue of section 60CA (and as reinforced in new section 70NAB, the Objects of Division 13A), in deciding whether to make a particular parenting order, the best interests of the child are paramount. The best interests of the child are set out in section 60CC.

167. New subsection 70NBC(2) provides that new subsection 70NBC(1) does not limit the circumstances in which a court having jurisdiction under the Family Law Act may vary a parenting order. This replaces previous subsection 70NBA(3) and substitutes the general term 'primary order' with the more specific term 'child-related order that is a parenting order'. This terminology change assists users of the Family Law Act to clarify that only parenting orders may be varied under this section. This change is also consistent with the broader terminology change throughout Division 13A which replaces 'primary order' with 'child-related order'.

168. New subsection 70NBC(3) relates to the suspension of child-related orders that are parenting orders. This new subsection clarifies that the court may suspend for a specified period of time the operation of, or part of the operation of a parenting order at any stage of the proceedings.

169. Items 34 and 35 (below) insert notes at the end of subsection 70NBC(1) and subsection 70NBC(3) which cross-references new section 65DAAA, to clarify that a court must not reconsider a final parenting order (other than a child maintenance order) unless the court has considered and is satisfied with the matters contained in that section. New section 65DAAA sets out the matters the court must consider when varying a parenting order, codifying previous case law (see item 24).

New section 70NBD – Post-separation parenting programs

170. New section 70NBD empowers the family law courts to order attendance at a post-separation parenting program, or other specified program. It also imposes obligations on the principal executive officer of the court and the provider of the program to support compliance with these orders. New section 70NBD amalgamates and simplifies existing sections 70NEB, 70NED and 70NEG of the Family Law Act. The effect of this section is to assist parties in addressing and resolving issues that affect carrying out of their parenting responsibilities by requiring that the respondent (and any other party) attend a relevant program.

171. New subsection 70NBD(1) clarifies that the family law courts may order the attendance of the respondent and any other party to the proceedings (if appropriate) at a post-separation parenting program or other specified program. This replaces existing paragraph 70NEB(1)(a) of the Family Law Act.

172. However, new subsection 70NBD(1) introduces the policy that attendance at a program can be ordered by the court at any time. This is a minor policy change and aligns the power to order attendance at a program with the power to vary and suspend a parenting order at any time (see new section 70NBC). New subsection 70NBD(1) effectively gives ability to the family law courts to order any party's attendance at a program, regardless of the stage of proceedings and whether a contravention is eventually established.

173. Note 1 under new subsection 70NBD(1) refers to section 11E and functions as a signpost which clarifies that the family law courts must consider seeking the advice of a family consultant about the services appropriate to the parties' needs before making an order under new section 70NBD. This note emphasises the importance of family law courts giving due consideration to advice of a family consultant to ensure that any orders made are appropriately tailored to the unique circumstances of the parties.

174. Note 2 under new subsection 70NBD(1) provides a cross-reference to new section 10PA of the Family Law Act and clarifies that things said or admissions made by a person in a post-separation parenting program are generally not admissible in any court or in any proceedings before a person authorised by a Commonwealth, state or territory, or by the consent of the parties to hear evidence. New section 10PA replaces existing section 70NEF of the Family Law Act.

175. New subsection 70NBD(2) provides that the principal executive officer of the family law courts must advise the provider of the program of the order as soon as reasonably practicable after it is made under subsection 70NBD(1). This new subsection replaces existing subsection 70NEB(3) of the Family Law Act. The effect of new subsection 70NBD(2) is to ensure that the provider of the program is aware of the orders that parties must comply with.

176. New subsection 70NBD(3) imposes a duty on the provider of the program to inform the family law courts, and any other party to the proceedings, if a person is unsuitable to attend the program (paragraph (a)) or fails to attend all or part of it (paragraph (b)). The effect of new subsection 70NBD(3) is to ensure the court is informed of a party's non-attendance at a program. New subsection 70NBD(3) replaces previous section 70NED of the Family Law Act and modifies the existing language for simplicity and clarity.

177. New subsection 70NBD(4) empowers the family law courts to make an order that it considers appropriate if a person ordered to attend a program is assessed as being unsuitable to attend, or fails to attend any part of the program. This new subsection replaces previous section 70NEG of the Family Law Act. The effect of new subsection 70NBD(4) is that any order can be made by the court for failing to attend a program, except for orders made under new paragraph 70NBF(1)(d) which includes imposing a fine or a term of imprisonment.

178. New subsection 70NBD(5) provides that if the family law courts have found that the respondent has contravened the child-related order without having a reasonable excuse, then the court must take into account the seriousness of that contravention when making an order under new subsection 70NBD(4).

New section 70NBE – Costs orders

179. New section 70NBE provides the family law courts with a central power to order costs against a complainant which can be made at any stage during proceedings. It has been designed to simplify Division 13A by reducing duplication and improving readability.

180. In particular, this new section centralises and consolidates the previous costs provisions (in sections 70NCB, 70NDC, 70NEB and 70NFB) while retaining the existing underlying policies, namely 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.

181. New subsection 70NBE(1) provides guidance for when the family law courts may make a costs order against the complainant. It replaces previous section 70NCA and subsections 70NCB(1) and 70NDC(1). New subsection 70NBE(1) effectively allows a family law court to make a costs order when the complainant has alleged that the respondent contravened a child-related order (paragraph (a)) and either: the court does not find that the respondent contravened the child-related order; or the court finds that the respondent had a reasonable excuse for contravening the child-related order (paragraph (b)). The effect of new subsection 70NBE(1) is to deter parties from making unreasonable contravention applications for minor breaches of child-related orders.

182. New subsection 70NBE(2) provides circumstances where the family law courts must consider making a costs order against a complainant. It replaces previous subsections 70NCB(2) and 70NDC(2). This subsection requires the court to turn its mind to making a costs order if the complainant has previously alleged, in proceedings under the Family Law Act or any other Act, that the respondent contravened a child-related order (paragraph (a)) and: the court did not find that the child-related order was contravened; or found that the order was contravened by the respondent but did not make a related order under

Division 13A (paragraph (b)). The effect of new subsection 70NBE(2) is to deter parties from making repeated contravention applications for minor breaches which aim to harass or inconvenience the other party.

183. New subsection 70NBE(3) provides circumstances where the family law courts must not make a costs order. This section obliges the court to not make the costs order if it finds that the respondent had a reasonable excuse for contravening the child-related order (paragraph (a)) and has made (or will make) a make-up time parenting order under new section 70NBB in respect of the contravention (paragraph (b)).

184. New subsection 70NBE(4) provides that a court must make a costs order against a person found to have contravened an order without reasonable excuse. This subsection replaces previous paragraphs 70NEB(1)(f) and 70NEB(1)(g), subsection 70NFB(1) and paragraphs 70FB(2)(g) and 70FB(2)(h). This provision is slightly broader than the existing requirement at paragraph 70NFB(1)(a) that currently only applies if a ‘more serious’ contravention is found. The new provision requires the family law courts to make a costs order in these circumstances, regardless of the seriousness of the contravention, unless satisfied it is not appropriate to do so. The effect of new subsection 70NBE(4) is to uphold the authority of the court and deter non-compliance with court orders where the respondent does not have a reasonable excuse to do so.

New section 70NBF – Orders where contravention established without reasonable excuse

185. New section 70NBF provides the family law courts with powers to make a variety of orders in circumstances where it has been found that the respondent has contravened a child-related order without having a reasonable excuse. It replaces previous subsections 70NEB(1) and 70NFB(2) and does not separately provide for circumstances where the court considers the contravention to be ‘less serious’ or ‘more serious’. This departs from the structure of existing Division 13A, which distinguished between the seriousness of the contraventions by separating appropriate orders into ‘less serious’ and ‘more serious’ which added to complexity of the previous Division. The effect of new section 70NBF is to provide the family law courts with increased discretion to tailor orders to the gravity of the contravention, while maintaining the obligation to consider several relevant factors when considering the seriousness of the contravention.

186. New subsection 70NBF(1) outlines the orders available for the family law courts to make if it is found that the respondent has contravened a child-related order without a reasonable excuse. This replaces existing subsections 70NEB(1) and 70NFB(2) of the Family Law Act. The effect of this subsection is to centralise and amalgamate the orders already available under Division 13A in order to improve its clarity for users.

187. New subsection 70NBF(1) provides that if the family law courts are satisfied on the balance of probabilities that a contravention has occurred without a reasonable excuse, the court may make any of the following orders:

- the respondent entering into a bond under new section 70NCA (paragraph (a))
- a fine not exceeding 10 penalty units if the respondent fails to enter into the bond (paragraph (b))

- the respondent compensating an affected person for expenses reasonably incurred as a result of contravention (paragraph (c)). New paragraph 70NBF(c) is intended to cover types of situations where airfares or other travel tickets are unable to be used as a result of a person not making the child available for time with the other parent under a child-related order. This is not intended to include court costs which are dealt with separately. These types of orders are already available to the court under existing paragraphs 70NEB(1)(e) and 70NFB(2)(f), or
- an order imposing a fine not exceeding 60 penalty units (subparagraph (i)) or a term of imprisonment (subparagraph (ii)), if the family law courts are satisfied beyond reasonable doubt that the respondent contravened the order without reasonable excuse. These orders are already available to the court under previous subsection 70NFB(1) and they enable the court to address contraventions that are of a more serious nature, including where there are repeated breaches of orders, in a way that upholds the authority of the court, deters future contraventions and imposes a proportionate sanction on the respondent. The higher standard of proof (beyond reasonable doubt) under paragraph 70NBF(1)(d) reflects the more serious nature of the sanctions available to the court under this provision.

188. Note 1 under new subsection 70NBF(1) directs users to new subsection 70NBE(4) which provides that the family law courts must make a costs order against the respondent, unless the court is satisfied that it is not appropriate to do so in the circumstances. This cross-reference assists users of the Family Law Act to clarify that in addition to being subject to an order under subsection 70NBF(1), the respondent would also likely be subject to a costs order. This reflects the slightly broadened application under new subsection 70NBE(4), in favour of a costs order being made against a person found to have contravened an order without reasonable excuse, regardless of the seriousness of the contravention.

189. Note 2 under new subparagraph 70NBF(1)(d)(ii) direct users to new subsections 70NBF(4) and 70NCC(2) and new section 70NCE which sets out limits on how and when the court may impose a term of imprisonment on the respondent. These cross-references assist users to navigate and understand Division 13A by drawing their attention to other sections which closely relate to new subparagraph 70NBF(1)(d)(ii).

190. New subsection 70NBF(2) provides that when making an order under new subsection 70NBF(1), the family law courts must have regard to the likely effects of making the order on any child or any other person (paragraph (a)) in addition to the seriousness of the contravention (paragraph (b)). The effect of new subsection 70NBF(2) is to ensure that the court takes these significant factors into account before making an order against the respondent under new subsection 70NBF(1). This also clarifies that the court is obliged to determine the most appropriate order on a case-by-case basis.

191. New subsection 70NBF(3) provides the matters that must be taken into account by the court in determining the seriousness of the contravention under new paragraph 70NBF(2)(b). Those matters are:

- whether a court has previously found that the respondent has contravened a child-related order without a reasonable excuse (paragraph (a))
- whether the respondent behaved in a way that showed a serious disregard of their obligations under the child-related order (paragraph (b)), and

- the behaviour of any person with whom the child is to live or spend time under the child-related order (paragraph (c)).

192. This new subsection reflects concepts that existed in the previous version of Division 13A which required the court to consider various aspects of past behaviour to make an assessment about the seriousness of the contravention and which order was the most appropriate in the circumstances of the case. This subsection also clarifies that these factors are not intended to limit any other matters the court may consider under new paragraph 70NBF(2)(b).

193. New subsection 70NBF(4) provides that the court may impose a term of imprisonment under new subparagraph 70NBF(1)(d)(ii), only if the court is satisfied, taking into account all the circumstances of the case, that it would be inappropriate to deal with the contravention of a child-related order in any other way as described under new subsection 70NBF(1). This makes it clear that imposing a term of imprisonment is the last resort to take under the particular circumstances of the case if the contravention of the child-related order cannot be dealt with by other orders as described in new paragraphs 70NBF(1)(a), 70NBF(1)(b) and 70NBF(1)(c).

194. Under previous Division 13A, the court also had the power to order a community service order. Community service orders were rarely used as a sanction and their removal aids simplification of the Division.

Subdivision C—Further provisions relating to bonds and imprisonment

New section 70NCA – Matters relating to bonds

195. New section 70NCA provides for the type of bonds the court may require a person to enter into as a sanction for contravening a child-related order under new paragraph 70NBF(1)(a). This consolidates and replaces previous sections 70NEC and 70NFE, aiding the user's understanding of the practicalities of using bonds as a sanction. New section 70NCA also substitutes the word 'person' (found in existing sections 70NEC and 70NFE) with 'respondent'. The effect of this terminology change is to clarify for the reader that bonds can only be ordered against the respondent in contravention proceedings.

196. New subsection 70NCA(1) outlines the purpose of new section 70NCA, which sets out the requirements relating to bonds that the family law courts may require the respondent to enter into under new paragraph 70NBF(1)(a). This replaces previous subsections 70NEC(1) and 70NFE(1).

197. New subsection 70NCA(2) provides that the court must specify the period of the bond, which is limited to 2 years. This replaces previous subsections 70NEC(2) and 70NFE(2).

198. New subsection 70NCA(3) provides that the court must determine if the bond is to be with or without surety and security. This replaces previous subsections 70NEC(3) and 70NFE(3).

199. New subsection 70NCA(4) provides the conditions that may be imposed on the respondent by a bond. This replaces previous subsections 70NEC(4) and 70NFE(4). The

conditions (without limitation) that may be imposed under new subsection 70NCA(4) include requiring the respondent: to attend a post-separation parenting program (paragraph (a)); to attend an appointment (or a series of appointments) with a family consultant (paragraph (b)); to attend family counselling (paragraph (c)); to attend family dispute resolution (paragraph (d)); or to be of good behaviour (paragraph (e)).

200. New paragraphs 70NCA(4)(b), 70NCA(4)(c), 70NCA(4)(d) and 70NCA(4)(e) replicate the conditions in previous subsections 70NEC(4) and 70NFE(4), with attendance at a post-separation parenting program added as a new condition at new paragraph 70NCA(4)(a). This minor inclusion ensures consistency with the court's power to order attendance at such programs under new section 70NBD. The effect of this section is to assist the contravening party to address issues that affect the carrying out of their parenting responsibilities that may have contributed to the contravention of the child-related order.

201. New subsection 70NCA(5) provides that before requiring the respondent to enter into a bond, the court has a duty to explain the bond to them in language that is easily understood by the respondent. This replaces previous subsections 70NEC(5) and 70NFE(5). The duty contained in new subsection 70NCA(5) is consistent with other provisions that oblige the court, legal professionals and others, to provide clear information about the nature and effect of any orders made in family law proceedings in order to reduce the potential for any misunderstandings about what is intended.

New section 70NCB – Procedure for enforcing bonds

202. New section 70NCB outlines the procedure for enforcing bonds. This replaces previous sections 70NECA and 70NFF. The effect of new section 70NCB is to provide clarity for the court as to when and how to enforce the respondent's compliance with a bond they have entered into through an order made under new paragraph 70NBF(1)(a). The broader effect of this section is to uphold the authority of the court and deter non-compliance with bonds entered into as a result of contravening a child-related order.

203. In new section 70NCB, the word 'person' (found in previous sections 70NECA and 70NFF) is substituted with 'respondent'. The effect of this terminology change is to clarify that only the respondent in contravention proceedings can be subject to further powers by the family law courts to enforce compliance with a bond.

204. New subsection 70NCB(1) outlines the circumstances in which new section 70NCB applies. This replaces existing subsections 70NECA(1), 70NECA(2), 70NFF(1) and 70NFF(2) of the Family Law Act. New subsection 70NCB(1) provides that section 70NCB applies if the family law courts find that the respondent has contravened a child-related order without having a reasonable excuse (paragraph (a)); and the respondent has entered into a bond in accordance with an order made under new paragraph 70NBF(1)(a) (paragraph (b)); and the respondent fails, without having reasonable excuse, to comply with the bond (paragraph (c)).

205. New subsection 70NCB(2) clarifies the options available to the court in order to enforce the respondent's compliance with the bond they entered into. This new subsection replaces existing subsections 70NECA(3) and 70NFF(3) of the Family Law Act. This new subsection provides that the court may: impose a fine not exceeding 10 penalty units, without prejudice to the continuance of the bond (paragraph (a)); or revoke the bond and deal with the

respondent in any manner in which they could have been dealt with for the contravention of the child-related order, if the bond had not been entered into, and the respondent was before the court under Division 13A in respect of that contravention (paragraph (b)). The wording of new subsection 70NCB(2) is almost identical to previous subsection 70NECA(3), with minor consequential changes and edits made for clarity and readability.

206. New subsection 70NCB(3) outlines the matters which the court must take into account when acting under new subsection 70NCB(2). This replaces previous subsections 70NECA(4) and 70NFF(4). New subsection 70NCB(3) provides that the matters the court must take into account (without limiting the matters the court may take into account) are: the fact that the bond was entered into (paragraph (a)); anything done in accordance with the bond (paragraph (b)); and any fine imposed, and any other order made, for or in respect of the contravention of the child-related order (paragraph (c)). The wording of new subsection 70NCB(3) is almost identical to previous subsection 70NECA(4), with minor consequential changes and edits made for clarity and readability.

New section 70NCC – Matters relating to imprisonment

207. New section 70NCC provides guidance to the court when sentencing a respondent to imprisonment under new subparagraph 70NBF(1)(d)(ii) in response to the contravention of a child-related order without having a reasonable excuse, established beyond reasonable doubt. It replaces previous section 70NFG. In new section 70NCC, the word ‘person’ (found in existing section 70NFG) is substituted with ‘respondent’. The purpose of this change is to clarify that this section only applies to respondents in contravention proceedings, as only respondents can be subject to a sentence of imprisonment under new subparagraph 70NBF(1)(d)(ii).

208. New subsection 70NCC(1) clarifies the circumstances in which new section 70NCC applies, which is when a sentence of imprisonment is imposed on the respondent under new subparagraph 70NBF(1)(d)(ii).

209. New subsection 70NCC(2) outlines the limits on sentences of imprisonment imposed by the court. This replaces previous subsection 70NFG(1). This subsection provides that the sentence of imprisonment must be expressed to be for a specified period of no more than 12 months (paragraph (a)); or for a period ending at the earlier of the time when the respondent complies with the child-related order concerned, or when the respondent has been imprisoned under the sentence for 12 months, or such lesser period as is specified by the court ordering the sentence (paragraph (b)).

210. New subsection 70NCC(3) outlines arrangements relating to good behaviour bonds. This replaces previous subsections 70NFG(6) and 70NFG(7). New subsection 70NCC(3) provides that when sentencing the respondent to imprisonment, the family law courts may direct that, after serving a specified part of the term of imprisonment, the respondent be released upon them entering into a bond (with or without surety or security) that they will be of good behaviour for a specified period of up to two years.

211. New subsection 70NCC(4) provides that the court must give reasons as to why it is satisfied that in all the circumstances of the case, it would not be appropriate to deal with the contravention in any way other than imprisonment (paragraph (a)); and cause those reasons to be entered in the records of the court (paragraph (b)). This replaces previous

subsection 70NFG(3). The Note to this new subsection refers to new subsection 70NBF(4) which requires the court to take into account all the circumstances of the matter and satisfy itself that imprisonment is the only appropriate way to deal with the contravention.

212. New subsection 70NCC(5) provides that the failure of the court to provide a statement of reasons in accordance with new subsection 70NCC(4) would not invalidate a sentence of imprisonment. This replaces previous subsection 70NFG(4).

New section 70NCD – Powers of court in relation to imprisoned person

213. New section 70NCD clarifies the powers of the court in relation to a person who is sentenced to imprisonment under new subparagraph 70NBF(1)(d)(ii) in response to the contravention of a child-related order without having a reasonable excuse, established beyond reasonable doubt. This replaces previous section 70NFG. In new section 70NCD, the word ‘person’ (found in existing section 70NFG) is substituted with ‘respondent’. The purpose of this terminology change is to clarify that this section only applies to respondents in contravention proceedings, as only respondents can be subject to a sentence of imprisonment under new subparagraph 70NBF(1)(d)(ii).

214. New subsection 70NCD(1) provides that the court that has sentenced the respondent to imprisonment may order their release if it is satisfied that the respondent will, if released, comply with the court’s orders. This replaces previous subsection 70NFG(8).

215. New subsection 70NCD(2) provides that the court which sentences the respondent to imprisonment may suspend the sentence upon the terms and conditions determined by the court (paragraph (a)); and terminate such suspension (paragraph (b)). This replaces existing subsection 70NFG(5).

New section 70NCE – Rules relating to child maintenance orders and child support

216. New subsection 70NCE(1) replaces previous subsection 70NFB(4) and provides that a sanction of imprisonment under new subparagraph 70NBF(1)(d)(ii) may be imposed only if the court is satisfied that the respondent has intentionally or fraudulently breached a child maintenance order.

217. New subsection 70NCE(2) relocates and replaces previous subsection 70NFG(9). It specifies that the serving by the respondent of a period of imprisonment imposed under new subparagraph 70NBF(1)(d)(ii) for failure to make a payment under a child maintenance order does not affect the respondent’s liability to make the payment.

218. New subsection 70NCE(3) replaces previous subsection 70NFB(5). It provides that the court must not impose a sanction of imprisonment in respect of a breach of certain provisions of the *Child Support (Assessment) Act 1989* – in particular, a contravention of a child support assessment or a breach of a child support agreement made under that Act, or a contravention of a departure order made under Division 4 of Part 7 of that Act (including such an order that contained matters mentioned in section 141 of that Act).

Subdivision D—Miscellaneous

New section 70NDA – Court may issue warrant for arrest of alleged offender

219. New section 70NDA relocates and replaces previous section 65Q of the Family Law Act, which outlines the circumstances where the court may issue a warrant for the arrest of an alleged offender (the respondent).

220. New subsection 70NDA(1) provides that a court may issue a warrant to arrest the respondent where: a parenting order which provides for a child to live with, spend time with or communicate with the complainant (paragraph (a)) and the court is satisfied that there are reasonable grounds for believing that the respondent has breached the orders in respect of the grounds covered in items 1-3 of the table in new subsection 70NAC(2) (paragraph (b)); and the issue of the warrant is required to ensure that the respondent will attend court for the purposes of the alleged contravention (paragraph (c)).

221. New subsection 70NDA(2) clarifies that a warrant ceases to be in force on the date mentioned in the warrant, which must be not more than 6 months after the issuing of the warrant.

New section 70NDB – Relationship between Division and prosecutions for offences under other laws

222. New section 70NDB replaces previous section 70NFH of the Family Law Act, outlining the relationship between Division 13A and other laws. This new section creates a broader requirement to dismiss or adjourn proceedings, as compared with existing section 70NFH which only requires a dismissal or adjournment for serious contraventions. This change reflects the fact that the restructured Division 13A no longer separately provides for circumstances where the court considers the contravention to be ‘less serious’ or ‘more serious’. It also adds the word ‘alleged’ before ‘contravention’ and ‘offence’ into new subsections 70NDB(1) and 70NDB(2). This ensures that a contravention or an offence does not need to be proven before this section would apply.

223. New subsection 70NDB(1) provides that this section applies if an act or omission by the respondent not only constitutes an alleged contravention of a child-related order but also constitutes an alleged offence under any law and the respondent is prosecuted for that particular offence.

224. New subsection 70NDB(2) provides that the court must dismiss proceedings relating to the alleged contravention of the child-related order; or adjourn those court proceedings until the prosecution is completed.

225. New subsection 70NDB(3) clarifies that nothing in Division 13A renders a person liable to be punished twice in relation to the same act or omission.

New section 70NDC – Division does not limit operation of section 105

226. New section 70NDC replaces previous section 70NFJ and confirms that nothing in Division 13A limits the operation of section 105 which deals with enforcement generally.

Item 22 – Division 14 of Part VII (after the heading)

Subdivision A—What this Division does

227. This item inserts new a Subdivision A – What the Subdivision does after the heading in Division 14 of Part VII. These changes, and the related changes below, concern the repeal and relocation of Subdivision D – ‘Dealing with people who have been arrested’ from Division 6 to Subdivision B of Division 14 of Part VII (see item 18). This change, along with the consolidation of previous Subdivision C of Division 6 into various sections of new Division 13A (see item 18) streamline Division 6 and place the provisions nearer the operative provisions in Division 13A.

Item 23 – Section 70P

228. This item amends section 70P of the Family Law Act by removing the reference to ‘deals with’ and substitutes ‘is about dealing with people who have been arrested and’.

Item 24 – After section 70P

Subdivision B—Dealing with people who have been arrested

229. This item inserts, after section 70P, new Subdivision B—Dealing with people who have been arrested, which is outlined as follows.

New section 70PA Situation to which Subdivision applies

230. New section 70PA replaces previous subsection 65R(1) and clarifies that Subdivision B only applies if a person is arrested under a warrant issued under new subsection 70NDA(1)(warrants for the arrest of persons alleged to have breached a child-related order)(paragraph (a)); or the person is arrested without a warrant under a recovery order (paragraph (b)).

New section 70PB Arrested person to be brought before a court

231. New subsection 70PB(1) replaces previous subsection 65S(1) and confirms that the person who arrested the alleged offender must ensure that they are brought before a court having jurisdiction under this Part before the end of the holding period application under new subsection 70PB(4) (paragraph (a)); and take all reasonable steps to ensure that, before the alleged offender is brought before a court, the person who applied for the warrant or recovery order is aware of two circumstances. These are that the alleged offender has been arrested and of the court before which the alleged offender is to be brought (paragraph (b)).

232. New subsection 70PB(2) replaces previous subsection 65S(2) and provides that the alleged offender must not be released before the end of the holding period except under an order of a court having jurisdiction under this Part.

233. New subsection 70PB(3) replaces previous subsection 65S(3) and confirms that new section 70PB does not authorise the holding in custody of an alleged offender after the end of the holding period.

234. New subsection 70PB(4) replaces previous subsection 65S(4) and defines ‘holding period’ to mean if a Saturday, Sunday or public holiday commences within 24 hours after the arrest of the alleged offender – the longer of the following periods – the period commencing with the arrest and ceasing 48 hours later; or the period commencing with the arrest and ending at the end of the next day after the day of the arrest which does not fall on a Saturday, Sunday or public holiday (paragraph (a)); or in any other case, the period commencing with the arrest and ceasing 24 hours later (paragraph (b)).

New section 70PC Obligation of court – where application before it to deal with contravention

235. New subsection 70PC(1) replaces previous subsection 65T(1) and clarifies that this section only applies where the alleged offender is brought before a court under new section 70PB (paragraph (a)); and there is an application before the court for the alleged offender to be dealt with under Division 13A for the alleged breach (paragraph (b)).

236. New subsection 70PC(2) replaces previous subsection 65T(2) and confirms that a court, without delay, must proceed to hear and determine the application before it to deal with the breach of order.

New section 70PD Obligation of court – where no application before it, but application before another court, to deal with contravention

237. New subsection 70PD(1) replaces previous subsection 65U(1) confirms that this section only applies where the alleged offender is brought before a court under section 70PB (paragraph (a)); and there is either no application or no longer any application, before the court for the alleged offender to be dealt with under Division 13A for the alleged breach (paragraph (b)); and so far as the court is aware, there is either no application, or no longer any application, before any other law court for the alleged offender to be dealt with under Division 13A for the alleged breach (paragraph (c)).

238. New subsection 70PD(2) replaces previous subsection 65U(2) and confirms that the court must, without delay make an order that the alleged offender is to be released from custody on their entering into a recognisance (with or without surety or security) that they will attend court on a date, time and place specified by the court (paragraph (2)); or order the arresting person to arrange for the alleged offender to be brought to court on a date and time as specified by the court, being a date and time not being more than 72 hours, after the order is made.

239. New subsection 70PD(3) replaces previous subsection 65U(3) and confirms that if a court makes an order under new paragraph 70PD(2)(b) for the alleged offender to be brought before another court, subject to paragraph 70PD(3)(c), the alleged offender may be kept in custody until they are brought before the other court (paragraph (a)); and if the alleged offender is brought before the other court, that court must, without delay proceed to hear and determine the application mentioned in paragraph 70PD(1)(c) (paragraph (b)); and the alleged offender must be released without delay if they are not brought before the other court as required by the order (paragraph (c)).

New section 70PE Obligation of court – where no application before any court to deal with contravention

240. New subsection 70PE(1) replaces previous subsection 65V(1) and clarifies that this section applies in the following three circumstances: the alleged offender is brought before a court under new section 70PB (paragraph (a)) and there is either no application or no longer any application, before the court for the alleged offender to be dealt with under Division 13A for the alleged breach (paragraph (b)); and so far as the court is aware, there is either no application, or no longer any application, before any other law court for the alleged offender to be dealt with under Division 13A for the alleged breach (paragraph (c)).

241. New subsection 70PE(2) replaces previous subsection 65V(2) and confirms that the court must, without delay, order the release of the alleged offender if the three circumstances as described in subsection 70PE(1) are met.

New section 70PF Applications heard as required by subsection 70PC(2) or paragraph 70PD(3)(b)

242. New subsection 70PF(1) replaces previous subsection 65W(1) and provides that if a court hearing an application as required by new subsection 70PC(2) or paragraph 70PD(3)(b) adjourns the hearing, the court must order the alleged offender to be kept in custody as it considers appropriate during the adjournment period (paragraph (a)); or order that the alleged offender is to be released from custody either on them entering into a recognisance (with or without surety or security) that they will attend the court upon resumption of the hearing or otherwise (paragraph (b)).

243. New subsection 70PF(2) replaces previous subsection 65W(2) and clarifies that new section 70PF does not authorise the holding in custody of the alleged offender during the adjournment of court proceedings that is either for a period of more than 24 hours (paragraph (a)); or continues for more than 24 hours (paragraph (b)).

Item 25 – Paragraph 109A(1)(a)

244. This item repeals existing 109A(1)(a) which provides for ‘an order under this Act affecting children’ and replaces it with the new definition of ‘a child-related order’ (see new subsection 70NBA(2) above).

Item 26 – Subsection 112AP(9) (definition of *order under this Act*)

245. This item amends subsection 112AP(9) (definition of ‘order under this Act’) by omitting the reference to ‘an order under this Act affecting children’ and substituting with a reference to the new definition of ‘a child-related order’ (see new subsection 70NBA(2) above).

Item 27 – Subsection 117(1)

246. This item amends subsection 117(1) to reflect the repeal of subsection 70FNB(1), by removing reference to two ‘subsections’ as relevant to subsection 117(1) and retaining reference only to a singular ‘subsection’. Subsection 45A(6) remains relevant, and reference to this subsection is retained.

Item 28 – Subsection 117(1)

247. This item amends subsection 117(1) to remove reference to subsection 70NFB(1) and substitutes it with reference to new section 70NBE, to reflect the new costs provisions in Division 13A.

Item 29 – Subsection 117(1)

248. This item updates the language in subsection 117(1) to omit reference to ‘his or her’ costs and refer to ‘the party’s’ costs.

Item 30 – Subparagraph 123(1)(j)(iii)

249. This item amends subparagraph 123(1)(j)(iii), by omitting sections ‘70NEB or 70NEG’ and replacing them with references to the new sections ‘70NBB, 70NBD, 70NBE or 70NBF’ of Division 13A.

Federal Circuit and Family Court of Australia Act 2021

Item 31 – Subparagraph 98(2)(n)(iv)

250. This item repeals existing subparagraph 98(2)(n)(iv) which refers to ‘paragraph 70NEB(1)(a)’ and substitutes new subsection ‘(iv) subsection 70NBD(1)’ to reflect the renumbering and simplification changes made to Division 13A.

Item 32 – Subparagraph 224(1)(i)(iii)

251. This item amends existing subparagraph 224(1)(i)(iii) by omitting references to existing sections 70NEB or 70NEG’ and substituting with references to new sections 70NBB, 70NBD, 70NBE or 70NBF to reflect the renumbering and simplification changes made to Division 13A.

Item 33 – Subparagraph 254(2)(n)(iv)

252. This item repeals existing subparagraph 254(2)(n)(iv) and substitutes new paragraph (iv) subsection 70NBD(1) to reflect the renumbering and simplification changes made to Division 13A.

Division 2—Amendments contingent on the commencement of provisions of Part 3 of Schedule 1

Family Law Act 1975

Item 34 – At the end of subsection 70NBC(1)

253. This item inserts a note at the end of subsection 70NBC(1) which cross-references new section 65DAAA, to clarify that a court must not reconsider a final parenting order (other than a child maintenance order) unless the court has considered and is satisfied with the matters contained in that section.

Item 35 – At the end of subsection 70NBC(3)

254. This item inserts a note at the end of subsection 70NBC(3) which cross-references new section 65DAAA, to clarify that a court must not reconsider a final parenting order (other than a child maintenance order) unless the court has considered and is satisfied with the matters contained in that section.

Division 3 – Application and transitional rules

Family Law Act 1975

Item 36 – Application and transitional rules

255. This item creates a rule-making power which would permit the Minister to make application and transitional rules via legislative instrument, relating to the amendments or repeals made by this Part.

256. While every effort has been taken to ensure the comprehensiveness of this Bill, it is prudent to provide a means for a rule to be issued quickly should relevant circumstances emerge.

257. The power is limited to making rules for matters of a transitional nature that relate to commencement of these provisions and would not be used to make longer term or more substantial rules. Subitem 36(2) prescribes what the rules may not do.

258. This new rule-making power is not designed to undermine Parliament's legislative responsibility. Any such rules would be made in the form of legislative instruments, and subject to the scrutiny of Parliament and motions of disallowance.

Part 2 – Delegations

Division 1 – Main amendment

Federal Circuit and Family Court of Australia Act 2021

Item 37 – Subsection 7(1) (before paragraph (c) of the definition of *excluded child order*)

259. This item inserts paragraph (ba) to the definition of 'excluded child order' contained in existing subsection 7(1) of the FCFCOA Act. This amendment allows registrars of the FCFCOA to be delegated the power to impose a make-up time parenting order, under existing paragraphs 70NDB(1)(c), 70NEB(1)(b) and 70NFB(2)(c) contained in Division 13A of the Family Law Act which refer to the court's power to order make-up time parenting orders in contravention proceedings.

260. This item commences immediately on Royal Assent (see item 5 of the commencement table) and therefore allow registrars to make these delegations in the interim period between Royal Assent and commencement of the redrafted Division 13A provisions (which commence 6 months after Royal Assent – see item 6 of the commencement table).

261. Following commencement of the redrafted Division 13A provisions, the FCFCOA Act is amended in accordance with item 38 below.

Division 2 – Amendment relating to amendments made by Part 1 of this Schedule

Federal Circuit and Family Court of Australia Act 2021

Item 38 – Amendment relating to amendments made by Part 1 of this Schedule

262. This item repeals paragraph 7(1)(ba), inserted in the definition of ‘excluded child order’ by item 37, and substitutes it with a new paragraph (ba).

263. New paragraph (ba) is inserted to reflect commencement of the redraft of Division 13A (see item 21) and the insertion of new section 70NBB which refers to the court’s power to order make-up time parenting orders in contravention proceedings.

264. This amendment allows registrars of the FCFCOA to be delegated the power to impose a make-up time parenting order under new section 70NBB.

Schedule 3—Definition of member of the family

Family Law Act 1975

Item 1 – Subsection 4(1) (subparagraph (a)(vi) of the definition of *relative*)

265. Subsection 4(1) includes a definition of ‘relative of a child’. Item 1 amends the definition to enable the definition to be expanded in item 2.

Item 2 – Subsection 4(1) (at the end of paragraph (a) of the definition of *relative*)

266. Subsection 4(1) includes a definition of ‘relative of a child’. Item 2 expands the definition to include ‘for an Aboriginal child or a Torres Strait Islander child - a person who, in accordance with the child’s Aboriginal or Torres Strait Islander culture, is related to the child’. This amendment is intended to reflect that Aboriginal or Torres Strait Islander peoples may have extended family structures or kinship systems and that child-rearing responsibilities may extend beyond the immediate family group or what is reflected in the current definition of relative.

Item 3 – Paragraph 4(1AC)(a)

267. Subsection 4(1AC) includes a definition of ‘relative of a person’ that applies specifically to the definition of ‘member of the family’ in subsection 4(1AB). Item 4 amends this definition to include ‘any other ancestor’. This expands the definition of relative to familial relationships based on ancestry that are not otherwise included in subsection 4(1AC).

Item 4 – At the end of subsection 4(1AC)

268. Subsection 4(1AC) includes a definition of ‘relative of a person’ that applies specifically to the definition of ‘member of the family’ in subsection 4(1AB). Item 4 expands this definition to include, for an Aboriginal child or a Torres Strait Islander child - a person who, in accordance with the child’s Aboriginal or Torres Strait Islander culture, is related to the child. This amendment has the effect of broadening the application of the definition of ‘member of the family’ in the Act to include Aboriginal and Torres Strait Islander concepts of family. This amendment is intended to reflect that Aboriginal and Torres Strait Islander peoples may have extended family structures or kinship systems and that child-rearing responsibilities may extend beyond the immediate family group or what is reflected in the current definition of relative or ‘member of the family’.

Item 5 – Application provision

269. This item provides that so far as the definition of relative in subsections 4(1) and 4(1AC) apply in relation to proceedings, the amendments of those provisions apply in relation to proceedings that commence on or after the day this item commences.

Schedule 4—Independent Children’s Lawyers

Part 1 – Requirement to meet with the child

Family Law Act 1975

Item 1 – Subsections 68L(5) and (6)

270. This item repeals subsections 68L(5) and 68L(6) because these subsections are duplicative of actions that are required under the provisions inserted by Schedule 4 Part 1 to require an ICL to meet with the child and to provide the child with an opportunity to express any views in relation to the matters to which proceedings relate.

271. Subsection 68L(5) provides that the court may make an order under paragraph 68L(2)(b) for the purpose of allowing the lawyer who is to represent the child’s interests to find out what the child’s views are on the matters to which the proceedings relate. Subsection 68L(5) does not itself impose duties on the ICL, and only specifies one of the orders available to the court under paragraph 68L(2)(b).

272. Subsection 68L(6) provides that subsection 68L(5) does not apply if complying with that subsection would be inappropriate because of the child’s age or maturity or some other special circumstance. The current formulation implies that in the circumstances envisioned under subsection 68L(6), the court does not have the power to make an order under subsection 68L(5).

273. Item 2 inserts new subsections that establish duties of ICLs to meet with and seek the views of children, and the role of the courts in overseeing this process. New subsection 68LA(5A) introduces a requirement for the ICL to meet with the child and give the child the opportunity to express their views. New subsections 68LA(5B) and 68LA(5C) identifies when the ICL is not required to perform these duties because of certain circumstances or the impact on the child. New subsection 68LA(5D) provides that the court may make an order that the ICL perform these duties.

Item 2 – After subsection 68LA(5)

274. Item 2 inserts four new subsections after subsection 68LA(5) to require an ICL to undertake certain duties that facilitate in a safe and appropriate manner the participation of the child in matters that affect them. These new duties complement the existing duties in subsection 68LA(5) which require the ICL to act in a certain way and undertake specific actions in order to promote the best interests of the child. This item will ensure that the child is provided an opportunity to express views and to be heard, consistent with Article 12 of the CRC.

275. New subsection 68LA(5A) provides that the ICL must meet with the child and give the child the opportunity to express any views in relation to the matters to which the proceedings relate. The requirement to perform these duties applies in all cases where an ICL is appointed, including parenting matters under Part VII, welfare matters under section 67ZC, and where ICLs are appointed for children in proceedings relating to the Hague Convention under regulations made for the purposes of section 111B. The performance of these duties is subject to new subsection 68LA(5B). The note to subsection 68LA(5A) states that a person

cannot require a child to express the child's views in relation to any matter in accordance with section 60CE.

276. The performance of the two duties in subsection 68LA(5A) do not necessarily need to occur at the same time. The ICL retains the discretion to determine the timing, frequency and method of engagement with the child based on professional judgement and subject to any directions or orders of the court. A meeting with the child may occur for various purposes, including but not limited to giving the child an opportunity to express a view. For example, an ICL may choose to meet with the child upon appointment to explain to the child the ICL's role, the nature of the relationship between the child and the ICL and to determine the extent to which the child wishes to be involved. The ICL may seek a subsequent meeting to discuss with the child their views on the matters of the proceedings.

277. The method by which an ICL may meet with a child under subsection 68LA(5A) is not limited, nor is the method by which a child's views may be obtained under subsection 68LA(5A), which may include a letter or electronic communication, provided the method facilitates the child's views. *Guidelines for Independent Children's Lawyers*, as updated from time to time, provides guidance on methods for meeting with and obtaining the view of the child. Legal Aid Commissions may provide other guidance materials on the methods and expectations of ICLs when engaging with children.

278. The requirement to meet with a child and to provide the child with an opportunity to express a view is not specified to occur at a specific point in proceedings, but must occur prior to final orders being made. The ICL must perform the duties at some stage in proceedings, subject to subsection 68L(5B). It is not intended that the ICL must perform the duties before each court appearance, unless the ICL considers this to be appropriate in the circumstances. It remains the discretion of the ICL to determine the timing and frequency of performing the duties.

279. The ICL under subsection 68LA(5A) must provide the child with the opportunity to express any views in relation to the matters to which the proceedings relate. For example, in proceedings under Part VII, the child may wish to express general views about their home situation or relationship with parents and siblings, or express more specific views about time proposed to be spent with parents. If the child does choose to express any views about matters to which the proceedings relate, the ICL must ensure that these views are put fully before the court under paragraph 68LA(5)(b).

280. It is important that children have the opportunity to express a view and to be heard in relation to matters that affect them. The ICL may determine the weight to be given to a child's views when making a submission to the court about a particular course of action under subsection 68LA(3). The court must also consider any views expressed by the child when determining what is in a child's best interests when making orders under Part VII.

281. The child may also communicate other information to the ICL. Under subsections 68LA(6) to (8), the ICL is not under an obligation to disclose to the court any information communicated by the child, however may do so if the ICL considers disclosure to be in the best interests of the child. This applies to disclosures that are made against the wishes of the child. Subsections (6) to (8) continue to apply in conjunction with the new provisions inserted by Schedule 4 Part 1.

282. New subsection 68LA(5B) provides that an ICL is not required to perform one or both of the duties in subsection 68LA(5A) if certain circumstances exist. These include if the child is under 5 years of age, or if the child does not wish to meet with the ICL or express their views (as the case requires), or if these are exceptional circumstances that justify not performing the duty.

283. Paragraph 68LA(5B)(a) provides that an ICL is not required to perform a duty if the child is under 5 years of age. This reflects that as a general position it is not appropriate for the ICL to be required to perform the duties in subsection 68LA(5A) in relation to children below school age. However, the ICL retains the discretion to meet with a child under 5 years of age if this is considered appropriate. For example, if an ICL is appointed to represent the best interests of multiple siblings where one child is under 5 years of age, the ICL may choose to meet with the sibling group together and seek individual meetings with the older children.

284. Paragraph (5B)(b) provides that an ICL is not required to perform a duty if the child does not wish to do so. This is consistent with section 60CE which provides that nothing in Part VII permits the court or any person to require the child to express views in relation to any matter. This paragraph makes clear that a child has choices about the way they want to engage with the ICL. These must be the child's wishes, and not those of others. The child may choose not to meet with the ICL and not to express any views. The child may choose to meet with the ICL, but may not wish to express a view. Alternatively, the child may wish to express a view but may not wish to meet with the ICL. In these circumstances, the ICL should organise for an alternative method for the child to communicate their views, for example, a letter or electronic communication.

285. Paragraph (5B)(c) provides that an ICL is not required to perform a duty if there are exceptional circumstances that justify not performing the duty. This subsection acknowledges that there may be circumstances where it is not in the best interests of the child for the ICL to perform one or both of the duties in subsection 68LA(5A) to meet with the child and to provide an opportunity to express a view.

286. New subsection (5C) identifies exceptional circumstances for the purposes of paragraph (5B)(c). Paragraph (5C)(a) provides that where performing a duty would expose the child to a risk of physical or psychological harm, and this risk cannot be safely managed, the ICL is not required to perform the duty. Paragraph (5C)(b) provides that where performing a duty would have a significant adverse effect on the wellbeing of the child, the ICL is not required to perform the duty.

287. The risk of physical or psychological harm, or significant adverse effect on the wellbeing of the child, must result from the ICL's performance of the duty. The risk of physical or psychological harm or significant adverse effect on the wellbeing of the child must be considered in relation to the specific child. ICLs are frequently appointed in cases where family violence or child abuse risks are present, but this should not preclude a child from meeting with the ICL and, if they wish to, from being given an opportunity to express a view. In these circumstances, additional support and safeguards may be put in place to minimise any trauma to the child to ensure that they can safely engage in matters that affect them, rather than a presumption in favour of precluding them from engagement. The wishes

and needs of each child, including within a sibling group, may differ and should be considered on a case-by-case basis.

288. Subsection (5C) does not limit the circumstances that could be considered exceptional for the purposes of paragraph (5B)(c). The examples of circumstances that are considered exceptional outlined in (5C)(a) and (5C)(b) are focused on the impact on the child of the ICL performing the duties. This is intended to balance risks to the safety of the child and their rights to participate. There may be other circumstances that impact an ICL's decision to perform a duty that do not necessarily relate to the impact on the child. Determining whether these circumstances are exceptional and justify not performing the duty must be carefully considered, particularly in light of the child's right to express their views freely in all matters affecting them in accordance with Article 12 of the CRC.

289. New subsection (5D) provides that the court must determine whether an ICL should meet with the child or provide the child with an opportunity to express a view (as the case requires) if the ICL proposes not to perform a duty because of paragraph (5B)(c). Paragraph (5D)(a) provides that the court must determine whether it is satisfied that exceptional circumstances exist that justify not performing the duty. Paragraph (5D)(b) provides that if the court determines that those circumstances do not exist, it must make an order requiring the ICL to perform the relevant duty. The court must consider this prior to final orders being made.

290. Examples have been provided to assist in determining the matters that could be considered 'exceptional' to justify not performing one or both duties.

291. Example 1: Nicola is an ICL who was recently appointed for 10-year-old Adam due to allegations that Adam's father has demonstrated violent and controlling behaviour towards Adam's mother that has escalated since the breakdown of their relationship. Adam currently spends time with both his father and mother. Adam's father disputes the allegations of violent and controlling behaviour and each parent wants Adam to live with them. Adam has disclosed to a family consultant that he does not feel safe talking about the family law proceedings at home because he is scared that his father will overhear and get angry. The family consultant has written a report that identifies the relevant risk issues, provides information about Adam's experiences and needs, including Adam's views about where he wants to live right now. Nicola is expected to appear before the court and make a submission on interim parenting arrangements for Adam in two days' time. Adam and his parents live in a rural area and Nicola cannot travel there or organise Adam and one of his parents to travel in the time before the hearing. Nicola considers that she cannot guarantee Adam's safety if a meeting is conducted via electronic means and explains this to the presiding judge at the hearing. The judge agrees that this would expose Adam to the risk of physical or psychological harm but asks that Nicola organise an alternative form of meeting with Adam, such as with a safe supervisor, and seek his views prior to the final hearing. If this does not occur, the judge will make an order for Nicola to perform the duties under paragraph 68LA(5D)(b) unless she can demonstrate that there are exceptional circumstances that justify not performing the duty.

292. Example 2: Marc is an ICL who was appointed for 8-year-old Sasha six months ago. Sasha's mother and father have been separated for three years and are involved in court proceedings to determine whether Sasha should have contact with her mother. Sasha's

mother struggles with substance abuse and Sasha has been subjected to child sexual abuse by her mother's partner. Sasha has had engagement with child protection services and is seeing a child psychologist. A family consultant has also prepared a family report that provides information about Sasha's relationship to her parents, views that Sasha has previously expressed about her relationship with her mother, a risk assessment and a recommendation about appropriate parenting arrangements for Sasha. Both the child psychologist and the family consultant who has completed a family report state that Sasha's mental state is very fragile and when she is asked about her mother and her new partner she begins to cry for her father and paternal grandmother. Marc considers that a meeting with an additional professional to discuss her experiences and the court proceedings would have a significant adverse effect on Sasha's wellbeing. At a hearing, the judge asks Marc if he has met with Sasha. The judge agrees that the evidence provided indicates that meeting with Sasha and seeking her views would have a significant adverse effect on her wellbeing, satisfying the test in paragraph 68LA(5C)(b). Marc makes a submission to the court about appropriate parenting arrangements for Sasha on the basis of the other evidence available.

293. Example 3: Rashna is an ICL who has been appointed for 12-year old Annie. Annie has significant developmental disabilities and is non-verbal. Annie's mother is her full-time carer and wants to relocate to a different state and has commenced court proceedings to reconsider the final parenting orders made two years ago which allow Annie's father to spend time with her every other weekend. Rashna considers the evidence provided to her and explains to the judge that these are exceptional circumstances that would justify not performing the duty to meet with the child and give the child an opportunity to express a view. The judge agrees that these circumstances are exceptional, but notes that although Annie cannot express her wishes or views verbally, it is still important for an ICL to understand the individual child and suggested that Rashna could organise to meet with Annie in a format that is adjusted for her needs with the assistance of a specialised professional instead of a formal meeting.

294. The note to subsection 68LA(5D) states that the court may also make such other orders as it considers necessary to secure the independent representation of the child's interests, in accordance with paragraph 68L(2)(a).

Item 3 – Application provision

295. Item 3 provides that the amendments will apply in relation to proceedings that commence on or after the day this item commences.

Part 2 – Convention on the Civil Aspects of International Child Abduction

Family Law Act 1975

Item 4 – Subsection 68L(1)

296. This item repeals subsection 68L(1) and replaces it with a provision that adds an express statement that Hague Convention matters are to be treated as matters involving a child's welfare as the paramount or a relevant consideration for the purposes of section 68L.

297. The purpose of this item is to clarify that Hague Convention proceedings fall within the scope of matters that fall within section 68L.

Item 5 – Subsection 68L(3)

298. This item repeals the existing subsection 68L(3), to remove the requirement that the court considers there to be ‘exceptional circumstances’ that justify the appointment of an ICL for proceedings under the Hague Convention.

299. The inclusion of subsection 68L(3) to restrict ICL appointments in Hague Convention matters was intended to ensure the primacy of speed and efficiency in Hague Convention proceedings and reflect the intention of Convention proceedings to return children back to the country of habitual residence without the need to inquire into the best interests of the child.

300. However, in practice, Convention matters are often complex and do not always proceed in the summary nature originally contemplated. Rather than slow down proceedings, ICLs can often facilitate more efficient resolution in complex matters including pre-trial resolution or compensation for deficiencies in parties’ cases.

301. Removing the exceptional circumstances restriction will bring judicial discretion to appoint ICLs in Hague Convention matters in line with other family law matters, contributing to safer implementation of the Hague Convention.

Item 6 – Application provision

302. Item 6 provides that the amendments apply in relation to proceedings that commence on or after the day this item commences.

Schedule 5—Case management and procedure

Part 1 – Harmful proceedings orders and co-location of sections 45A and 102Q

Family Law Act 1975

Item 1 – Section 45A

303. This item repeals section 45A. Section 45A empowers the court to summarily dismiss proceedings where the applicant or respondent has no reasonable prospects of success or where the proceedings are frivolous, vexatious or an abuse of process. Item 6 replicates section 45A in Division 1A – Summary decrees.

Item 2 – Part XIB (heading)

304. This item repeals the Part XIB heading and replaces it with a new heading to reflect the collocation of existing section 45A to the new Division 1A and the inclusion of harmful proceedings orders in this Part.

Item 3 – Before section 102Q

102QAA Simplified outline

305. This item inserts a simplified outline of Part XIB in section 102QAA. The outline provides that Part XIB sets out the court’s powers to deal with proceedings that are unmeritorious, harmful and vexatious.

306. The outline explains the concepts of unmeritorious proceedings, harmful proceedings and vexatious proceedings in simple terms to assist the user with their understanding of Part XIB and improve usability of the Family Law Act. An example is provided of the type of harm and circumstances that could be grounds for a harmful proceedings order.

Item 4 – Subsection 102Q(1)

307. This item inserts a new definition of ‘harmful proceedings order’ into the list of definitions for Part XIB in section 102Q. The definition provides that a ‘harmful proceedings order’ means an order made under subsection 102QAC(1).

Item 5 – Section 102QA

308. This item repeals section 102QA and replaces it to make clear that Part XIB does not limit or otherwise affect the powers that a court has in other provisions in this Part or any other power that a Court has to deal with proceedings.

Item 6 – After section 102QA

Division 1A—Summary decrees

309. This item inserts new Division 1A – Summary decrees and new Division 1B – Harmful proceedings order into Part XIB of the Family Law Act alongside the court’s existing power to make vexatious proceedings orders. The purpose of this measure is to

collocate all the court's powers for dealing with applications or proceedings that are frivolous, vexatious, unmeritorious or an abuse of process to improve usability.

310. Division 1A contains new section 102QAB. This section substantially replicates previous section 45A, which is repealed by item 1. Section 102QAB brings the text in line with current drafting practice and clarifies the language to improve usability.

311. New subsection 102QAB(1) allows the court to make a summary decree in favour of one party, the 'first party', in relation to the whole or part of a proceeding, if the first party is prosecuting the proceedings or part of the proceedings, and the court is satisfied that the other party has no reasonable prospect of successfully defending the proceedings or part of the proceedings.

312. New subsection 102QAB(2) allows the court to make a summary decree in favour of one party, the 'first party', in relation to the whole or any part of a proceeding, if the first party is defending the proceedings or part of the proceedings, and the court is satisfied that the other party has no reasonable prospects of successfully prosecuting the proceedings or part of the proceedings.

313. New subsection 102QAB(3) provides that, for the purposes of this section, in determining whether a defence or proceeding has no reasonable prospect of success, proceedings need not be hopeless or bound to fail.

314. New subsection 102QAB(4) empowers the court to dismiss all or part of proceedings at any stage if it is frivolous, vexatious or an abuse of process.

315. New subsection 102QAB(5) provides that proceedings or a part of proceedings are not to be considered frivolous, vexatious or an abuse of process just because a related application is made and later withdrawn.

316. New subsection 102QAB(5) is intended to operate as a safeguard against the court misinterpreting the actions of victims of family violence who are litigants in person, who might make an application and then withdraw it for reasons other than the merits of their case, for example as a result of the power and control dynamics of family violence.

317. New subsection 102QAB(6) provides that the court may make costs orders as it sees fit.

318. New subsection 102QAB(7) provides that the court may take action under this section of its own volition, or on the application of a party to the proceedings.

Division 1B—Harmful proceedings orders

319. Item 6 also inserts a new Division 1B which contains provisions relating to the court's new power to make harmful proceedings orders. The purpose of this measure is to protect the respondent and/or children who are the subject of proceedings from the harmful impact of frequent and unnecessary applications filed by an applicant. This measure aims to limit systems abuse, which is a form of family violence that is prevalent in the family law system.

320. This measure addresses a gap in the court’s powers to scrutinise the institution of further proceedings, cited in the case of *Marsden & Winch* (2013) 50 FamLR 409. The ALRC Report found that the court’s 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.

321. Harmful proceedings orders powers are different from the court’s current vexatious proceedings orders powers (section 102QB). Harmful proceedings orders require the court to consider the impact that the repetitive and litigious nature of the applicant’s filings would have on the respondent, whereas vexatious proceedings orders powers focus on the applicant’s intent to institute or conduct proceedings in a way so as to harass or annoy, cause delay or detriment, or achieve another wrongful purpose (see section 102Q). Harmful proceedings orders powers are not intended to limit the court’s other powers, including those in relation to vexatious proceedings or summary dismissal under section 102QAB.

Subdivision A—Making harmful proceedings orders

322. Subdivision A contains new section 102QAC, which provides the court with power to make a ‘*harmful proceedings order*’. A harmful proceedings order is defined in new subsection 102QAC(1) as an order restraining a party to the proceedings from making any further applications and serving them on the respondent to the proceedings, without first obtaining leave of the court under new section 102QAG. The person being restrained by the order is known as the ‘first party’. The intention of this power is to allow the courts to proactively intervene, or intervene upon application by a party to the proceedings, before further applications are served on the other party, and therefore limit the detrimental effect, major mental distress or psychological harm that may result from further applications.

323. In considering whether to make a harmful proceedings order under new subsection 102QAC(1), the court should be satisfied there are reasonable grounds to believe that:

- the other party would suffer harm of the kind outlined in new subsection 102QAC(2) if the first party instituted further proceedings against the other party, or
- in the case of child-related proceedings (within the meaning of Part VII), the child who is the subject of the proceedings would suffer harm if the first party instituted further proceedings against the other party.

324. New subsection 102QAC(2) provides examples of what may constitute ‘harm’. Harm may include psychological harm or oppression, major mental distress or a detrimental effect on the other party’s capacity to care for a child. This list is intended to provide examples of when repetitive and litigious filing by an applicant has or may result in a significant negative impact on the respondent’s wellbeing to the point where the making of a harmful proceedings order is appropriate for the protection of the respondent and/or any children involved in the proceedings.

325. The list of examples under subsection 102QAC(2) is non-exhaustive. A non-exhaustive list has been adopted as there are various types of harm that a respondent and/or their children who are the subject of proceedings may experience as a result of a litigant utilising the family court system as a mechanism to instigate further family violence.

For this reason, a prescriptive definition of harm has not been included to avoid the risk of narrowing the scope of what constitutes harm.

326. In effect, what constitutes harm will depend on the individual circumstances of each case as determined or assessed by the court, having regard to any or all matters including those in new subsection 102QAC(3).

327. Subsection 102QAC(3) provides that in determining whether to make a harmful proceedings order, the court may also have regard to:

- the history of the proceedings under the Family Law Act between the two parties
- whether the first party has frequently instituted or conducted proceedings against the other party in any Australian court or tribunal (including proceedings instituted (or attempted to be instituted) or conducted, and orders made, before the section would have commenced), and
- the cumulative effect, or any potential cumulative effect, of any harm resulting from the proceedings referred to in the two paragraphs above.

328. Subsection 102QAC(3) is not intended to be an exhaustive list of the matters the court may consider in determining whether to make a harmful proceedings order. The court may have regard to any other factor relevant to the matter, including where there have been proceedings in other courts that relate to the matter, interactions with agencies, for example in relation to child welfare or child support, and any other relevant factor.

329. New subsection 102QAC(4) provides that the power is exercisable by the court on its own initiative or on application by a party to proceedings.

330. Similar to existing subsection 102QB(4) of the Family Law Act (which relates to vexatious proceedings orders), new subsection 102QAC(5) provides that the court must not make a harmful proceedings order in relation to a person without hearing the person, or giving the person an opportunity to be heard on the merits of their application. This ensures procedural fairness to the applicant and balances access to justice considerations. This also ensures any restriction on a party's capacity to institute proceedings is not unfair or disproportionate, while balancing the need to protect the respondent from harm.

331. New subsection 102QAC(6) provides that a harmful proceedings order made under subsection 102QAC(1) is final (as opposed to an interlocutory or interim order).

332. New subsection 102QAC(7) provides that, when a court is making a harmful proceedings order under subsection 102QAC(1), the court must make a determination on whether the other party should be notified of any applications under section 102QAE for leave to institute proceedings against the other party. This notification includes, either or both, that the application was made, and if applicable, that the application has been dismissed.

333. New subsection 102QAC(8) provides that the court must have regard to the wishes of the other party when determining whether the respondent should be notified of any applications for leave made by an applicant, who is subject to a harmful proceedings order, under subsection 102QAC(7).

334. Whilst the objective of harmful proceedings orders is to minimise the exposure to harm of a respondent or child subject to proceedings, a victim-survivor of family violence who is a respondent may wish to be made aware of applications for leave to file further proceedings, including dismissed applications, to enable them to make arrangements for their safety and the safety of their children. If a respondent wishes to not be notified, the court will not be required to make arrangements to notify the respondent of any future applications made by an applicant that were dismissed, therefore minimising their exposure to further harm.

Subdivision B—Consequences of harmful proceedings orders

335. New Subdivision B contains provisions relating to the consequences of harmful proceedings orders.

336. New subsection 102QAD(1) provides that a person subject to a harmful proceedings order must not institute proceedings, or act in concert with another person to institute proceedings, without leave of the court under section 102QAG.

337. New subsection 102QAD(2) provides that if proceedings are instituted by a person who is the subject of a harmful proceedings order and leave has not been granted, the proceedings are automatically stayed.

338. New subsection 102QAD(3) provides that if proceedings are stayed, the court may make any orders relating to the proceedings, including a costs order.

339. New subsection 102QAD(4) provides that the court may make an order under subsection 102QAD(3) of its own volition, or on the application of a party to the proceedings.

340. New section 102QAE provides the requirements for the party who is subject to a harmful proceedings order to make an application for leave to institute proceedings. To do so, the applicant must file an affidavit with the application which lists all occasions on which the applicant has applied for leave as well as disclosing all relevant facts about the application known to the applicant (including both supporting and adverse).

341. Applications for leave made under section 102QAE would be made *ex parte* – without serving documents on the respondent – unless an order is made under section 102QAG granting an application for leave.

342. A note is provided at subsection 102QAE(2) that the court may be required to give notice to the respondent that an application has been made, with reference to subsection 102QAC(7). This is intended to account for circumstances where a respondent expressed a wish under subsection 102QAC(8) to be notified of applications for leave under section 102QAE, including dismissed applications.

343. Unless the respondent expressed a wish to be notified under subsection 102QAC(8), and the court has made an order to notify the respondent in accordance with the respondent's wishes under subsection 102QAC(7), the court will consider the application filed by the applicant without the respondent being made aware of the application or requiring the respondent to appear. Subsection 102QAE(4) provides that the applicant must not serve a copy of their application or affidavit on the respondent until an order is made granting leave

to institute further proceedings. The rationale for this provision is to minimise further harm to the respondent resulting from repeated exposure to unnecessary and unmeritorious applications.

344. New section 102QAF provides that the court may dismiss an application for leave under section 102QAE if the court considers that the affidavit does not substantially comply with subsection 102QAE(3) or if it considers the proceedings to be vexatious proceedings. If an application for leave is dismissed, due to the application being heard on an *ex parte* basis, the applicant is not able to serve the application on the respondent and the respondent will not be made aware of the unsuccessful application. This ensures that the section is consistent with the intention of Division 1B of this Part.

345. Notes at subsections 102QAF(1) and 102QAF(2) provide that the court may be required to give notice that the application has been dismissed, with reference to subsection 102QAC(7).

346. New subsection 102QAF(3) provides that the court may dismiss an application without an oral hearing (either with or without the consent of the applicant). This will assist with the case management of matters while still preserving the court's discretion to conduct an oral hearing if it chooses to do so.

347. New subsection 102QAF(4) provides that the court may make an order under this section in Chambers. This section does not prohibit the court from conducting an oral hearing if it chooses to do so, but is intended to ensure that matters proceed efficiently and without undue delay.

348. Subsections 102QAF(3) and 102QAF(4) are intended to provide the court with an efficient way of dealing with harmful or unmeritorious litigation sought to be brought by persons already subject to harmful proceedings orders. The court can still afford procedural fairness to such persons by providing them with the opportunity to make written submissions. These provisions will give the court the flexibility to determine applications by a person subject to a harmful proceedings order on the papers alone in Chambers, while preserving the court's ability to conduct oral hearings.

349. New section 102QAG provides that a court may only grant an application for leave to institute proceedings if it is satisfied that the proceedings are not frivolous, vexatious or an abuse of process, and have reasonable prospects of success. The respondent will only be made aware of the application filed by the applicant at the time of the application being served on them. This ensures that the respondent is only exposed to applications which the court has first filtered and assessed.

Item 7 – Division 2 of Part XIB (after the heading)

350. This item inserts a new Subdivision A heading for making vexatious proceedings orders after the Division 2 heading of Part XIB. This creates a new Subdivision within the Division.

Item 8 – Division 3 of Part XIB (heading)

351. This item repeals the heading of Division 3 of Part XIB and substitutes it with a new Subdivision B heading for the consequences of vexatious proceedings orders

Item 9 – Section 102QE (heading)

352. This item amends the section 102QE heading to specify that the section relates to proceedings instituted by a person who is subject to a vexatious proceedings order. This reflects the collocation and inclusion of unmeritorious and harmful proceedings in Part XIB.

Item 10 – Sections 102QF and 102QG (heading)

353. This item amends headings for sections 102QF and 102QG, which concern the court's power to dismiss or grant an application for leave, to specify that the sections relate to a person who is subject to a vexatious proceedings order. This reflects the collocation and inclusion of unmeritorious and harmful proceedings in Part XIB.

Item 11 – Subsection 117(1)

354. This item updates a cross-reference in subsection 117(1) to reflect the collocation of current section 45A with proposed section 102QAB.

Federal Circuit and Family Court of Australia Act 2021

Item 12 – Subsection 143(5) (note)

355. This item updates a cross-reference in the note to subsection 143(5) to reflect the collocation of current section 45A of the Family Law Act with proposed section 102QAB and make it clear that the power of the FCFCOA (Division 2) to give summary judgment of the court is contained in section 102QAB.

Item 13 – Savings provision

356. This item provides that the repeal of section 45A of the Family Law Act does not affect any decree or action taken that was in force prior to the commencement of this item.

Item 14 – Application provision

357. This item provides that the amendments made by this Part apply on or after the day this item commences in relation to proceedings instituted before that day that were not finally determined before that day; and proceedings instituted on or after that day.

Part 2 – Overarching purpose of the family law practice and procedure provisions

Family Law Act 1975

Item 15 – Subsection 4(1)

358. This item inserts a definition of ‘family law practice and procedure provisions’ into subsection 4(1). This definition provides that the term *family law practice and procedure provisions* has the meaning given by subsection 95(4).

Item 16 – Before Division 1 of Part XI

Division 1A—Overarching purpose of the family law practice and procedure provisions

359. This item inserts a new Division 1A of Part XI to broaden and extend the overarching purpose of family law practice and procedure and an associated duty, to all proceedings instituted under the Family Law Act.

360. New Division 1A broadens the overarching purpose provisions that currently exist in the FCFCOA Act, as well as extending the overarching purpose to cover all proceedings instituted under the Family Law Act. This includes proceedings heard by other courts, such as the FCWA (when exercising its federal family law jurisdiction) and courts of summary jurisdiction exercising jurisdiction under the Family Law Act.

361. New section 95 broadens the obligation upon the court, the parties and legal practitioners to facilitate the safe, just and efficient resolution of disputes in a way that ensures the safety of families and children and promotes the best interests of the child.

362. New subsection 95(1) provides that the overarching purpose of family law practice and procedure provisions is to facilitate the just resolution of disputes:

- in a way that ensures the safety of families and children
- in relation to proceedings under the Family Law Act in which the best interests of a child are the paramount consideration – in a way that promotes the best interests of the child
- according to law, and
- as quickly, inexpensively and efficiently as possible.

The list of considerations under subsection 95(1) is intended to be a non-hierarchical structure where all considerations are given equal weight.

363. A note under subsection 95(1) refers the user to subsection 95(4) for the definition of ‘family law practice and procedure provisions’.

364. New subsection 95(2) elaborates on the objectives of the overarching purpose. These include:

- the just determination of all proceedings
- the efficient use of the judicial and administrative resources available for the purposes of courts exercising jurisdiction in proceedings
- the efficient disposal of the overall caseload of courts exercising jurisdiction in proceedings

- the disposal of all proceedings in a timely manner, and
- the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute.

365. This provision is intended to remind litigants that costs should be proportionate to the matters in dispute. It is not only the cost to the parties that is relevant. The efficient use of court resources needs to be taken into account, while due process is observed. These objectives are intended to ensure the litigant's and court resources are spent efficiently and there is a timely resolution of proceedings.

366. New subsection 95(3) provides that the family law practice and procedure provisions, and any power conferred or duty imposed by them, must be interpreted and applied in the way that best promotes the overarching purpose.

367. New subsection 95(4) defines 'family law practice and procedure provisions' as, the applicable Rules of Court and any other provision made by or under the Family Law Act, or any other Act, with respect to the practice and procedure of the FCFCOA or any other court.

368. New section 96 imposes a duty on parties and lawyers to act consistently with the overarching purpose, to promote compliance and cooperation among parties, lawyers and the court to achieve the overarching purpose. This section will extend the duty to comply to all courts exercising jurisdiction under the Family Law Act, including state family courts and courts of summary jurisdiction. New section 96 generally mirrors sections 68 and 191 of the FCFCOA Act.

369. The intention of new section 96 is to support a culture of litigation where family law disputes are resolved as quickly, inexpensively and efficiently as possible in accordance with the law, with a focus on the safety and best interests of families and children. Parties and lawyers who act consistently with this duty will be able to avoid costs orders being made against them.

370. New subsection 96(1) will impose a duty on parties to proceedings under the Family Law Act to conduct the entire proceeding, including settlement negotiations, consistently with the overarching purpose of the family law practice and procedure provisions.

371. New subsection 96(2) will require a party's lawyer to take into account the duty imposed on the party by subsection 96(1). It also requires the party's lawyer to assist the party to comply with the duty. In practice, this will require a lawyer to conduct a case in a manner consistent with the overarching purpose, taking into account the duty imposed on their client, and advise their client if certain actions are consistent with the overarching purpose and possible consequences if they fail to comply.

372. If, for example, a party wishes to prolong the litigation as a strategy to increase the costs of the other party, their lawyer would be obliged to explain that this behaviour is contrary to the overarching purpose and may have adverse cost consequences.

373. New subsection 96(3) provides that a court may order a party's lawyer to give the party an estimate of the likely duration of the proceedings or part of the proceedings and the likely amount of costs the party will have to pay in connection with the proceedings, or part of the proceedings.

374. This subsection is intended to assist parties to comply with their duty by making informed decisions about the progress of their matter. This may have the effect of assisting the party to prioritise the issues in dispute, or re-consider the resources they wish to allocate to the litigation.

375. New subsection 96(4) requires a court to take into account any failure to comply with subsections 96(1) or (2), in awarding costs in proceedings under the Family Law Act. The intent of this subsection is to enable the courts to have discretion to take into account any non-compliance with the duty, in making costs orders. This emphasises the court's broad power to award costs and that the consequences that may follow from failing to comply with the overarching purpose include an adverse costs order.

376. New subsection 96(5) provides that a court may order a party's lawyer to bear costs personally.

377. New subsection 96(6) provides that should a court order a lawyer to bear costs personally for a failure to comply with the duty imposed by subsection 96(2), the lawyer cannot pass such costs onto their client. This subsection ensures that lawyers take responsibility for their own failure to comply with their duty under subsection 96(2) and emphasises that the duty to comply with the overarching purpose extends to parties' legal representatives.

Item 17 – At the end of subsection 117(2)

378. This item inserts a note under subsection 117(2) of the Family Law Act, referring the user to new subsections 96(4) to 96(6) of the Family Law Act. This note emphasises the duty to comply with the overarching purpose and consequences when parties fail to comply. It will facilitate awareness for users of the legislation that failure to comply may have implications when costs are awarded.

Item 18 – Application provision

379. This item provides that the amendments made by this Part apply on and after the day this item commences in relation to proceedings instituted before that day that were not finally determined before that day; and proceedings instituted on or after that day.

Federal Circuit and Family Court of Australia Act 2021

380. To resolve the overlap with the existing overarching purpose and duty provisions in the FCFCOA Act, consequential amendments will limit the application of the existing provisions to civil proceedings other than those under the Family Law Act.

Item 19 – Subsection 7(1) (definition of *civil practice and procedure provisions*)

381. This item repeals the definition of 'civil practice and procedure provisions' in subsection 7(1) of the FCFCOA Act and substitutes a new definition. This amendment refers the user to the definitions in subsection 67(4) in relation to the FCFCOA (Division 1) and subsection 190(4) in relation to the FCFCOA (Division 2).

Item 20 – Subsection 7(1) (definition of *family law practice and procedure provisions*)

382. This item repeals the definition of ‘family law practice and procedure provisions’ in subsection 7(1) of the FCFCOA Act. The term will instead be defined in the new subsection 95(4) of the Family Law Act as per item 16 of Part 2 of Schedule 5 of the Bill.

Item 21 – Subsection 7(1) (paragraph (a) of the definition of overarching purpose)

383. This item omits ‘family law practice and procedure provisions’ from paragraph (a) of the definition of overarching purpose in subsection 7(1) and substitutes it with ‘civil practice and procedure provisions’. This amendment intends to limit the application of the existing overarching purpose for the FCFCOA (Division 1) in the FCFCOA Act to civil proceedings other than those under the Family Law Act.

Item 22 – Section 67 (heading)

384. This item omits ‘family law practice and procedure provisions’ from the section 67 heading and substitutes it with ‘civil practice and procedure provisions’. This amendment clarifies that the application of the existing FCFCOA (Division 1) overarching purpose in the FCFCOA Act is limited to civil proceedings other than those under the Family Law Act.

Item 23 – Subsection 67(1)

385. This item omits ‘family law practice and procedure provisions’ from subsection 67(1) and substitutes it with ‘civil practice and procedure provisions, in relation to the Federal Circuit and Family Court of Australia (Division 1)’. This amendment limits the application of the existing FCFCOA (Division 1) overarching purpose in the FCFCOA Act to civil proceedings other than those under the Family Law Act.

Item 24 – Subsection 67(1) (note 1)

386. This item repeals note 1 under subsection 67(1) and substitutes it with a new note 1. New note 1 refers the user to subsection 67(4) of the FCFCOA Act for guidance on the term *civil practice and procedure provisions* in relation to the FCFCOA (Division 1).

Item 25 – Subsection 67(3)

387. This item omits ‘family law practice and procedure provisions’ from subsection 67(3) and substitutes it with ‘civil practice and procedure provisions, in relation to the Federal Circuit and Family Court of Australia (Division 1),’ aligning subsection 67(3) with the amendments to subsection 67(1).

Item 26 – Subsection 67(4)

388. This item omits ‘The *family law practice and procedure provisions* are the following,’ from subsection 67(4) and substitutes it with ‘The *civil practice and procedure provisions*, in relation to the Federal Circuit and Family Court of Australia (Division 1), are the following,’. This amendment provides that, with respect to the practice and procedure of the FCFCOA (Division 1), the civil practice and procedure provisions are the Rules of Court and any other provision made by or under the FCFCOA Act or any other Act.

Item 27 – Subsection 68(3) (note)

389. This item repeals the note to subsection 68(3). The intent of this note will be contained in the new note under subsection 117(2) of the Family Law Act, as per item 17 of Part 2 of Schedule 5 of the Bill.

Item 28 – After section 68

68A Proceedings under the *Family Law Act 1975*

390. This item inserts a new section 68A after section 68. New section 68A clarifies that sections 67 and 68 do not apply in relation to proceedings under the Family Law Act.

391. This amendment resolves the overlap between the existing overarching purpose and duty provisions in sections 67 and 68 of the FCFCOA Act and the new expanded overarching purpose provision that will be included in the Family Law Act.

392. A note after section 68A directs the user to new sections 95 and 96 of the Family Law Act for the overarching purpose of provisions dealing with the family law practice and procedure of courts, including for proceedings in the FCFCOA, when instituted under the Family Law Act. These sections insert an overarching purpose and duty into the Family Law Act that applies to proceedings under that Act, as per item 16 of Part 2 of Schedule 5 of the Bill.

Item 29 – Subsection 190(1)

393. This item inserts the text ‘, in relation to the Federal Circuit and Family Court of Australia (Division 2),’ into subsection 190(1) after the words ‘civil practice and procedure provisions’. This amendment clarifies that the overarching purpose in subsection 190(1) applies only to the FCFCOA (Division 2).

Item 30 – Subsection 190(1) (note 1)

394. This item repeals note 1 under subsection 190(1) and substitutes it with a new note 1. New note 1 refers the user to subsection 190(4) for guidance on the term *civil practice and procedure provisions* in relation to the FCFCOA (Division 2).

Item 31 – Subsection 190(3)

395. This item inserts the text ‘, in relation to the Federal Circuit and Family Court of Australia (Division 2),’ into subsection 190(3) after the words ‘civil practice and procedure provisions’. This amendment clarifies that the overarching purpose in subsection 190(1) applies only to the FCFCOA (Division 2).

Item 32 – Subsection 190(4)

396. This item omits the words ‘are the following,’ from subsection 190(4) and substitutes them with ‘, in relation to the Federal Circuit and Family Court of Australia (Division 2), are the following’. This amendment provides that with respect to the practice and procedure of the FCFCOA (Division 2), the civil practice and procedure provisions are the Rules of Court and any other provision made by or under the FCFCOA Act or any other Act.

Item 33 – Subsection 191(3) (note)

397. This item repeals the note to subsection 191(3). This amendment resolves an error in the note to subsection 191(3).

Item 34 – After section 191

191A Proceedings under the *Family Law Act 1975*

398. This item inserts a new section 191A after section 191. New section 191A clarifies that sections 190 and 191 do not apply in relation to proceedings under the Family Law Act.

399. This amendment resolves the overlap between the existing overarching purpose and duty provisions in sections 190 and 191 of the FCFCOA Act and the new expanded overarching purpose provision in the Family Law Act.

400. A note after new section 191A directs the user to new sections 95 and 96 of the Family Law Act for the overarching purpose of provisions dealing with family law practice and procedure of courts, including for proceedings in the FCFCOA, when instituted under the Family Law Act. These sections insert an overarching purpose and duty into the Family Law Act that applies to proceedings under that Act, as per item 16 of Part 2 of Schedule 5 of the Bill.

Item 35 – Application provision

401. This item provides that the amendments of the FCFCOA Act 2021 made by this Part apply on and after the day this item commences in relation to proceedings instituted before that day that were not finally determined before that commencement; and proceedings instituted on or after that day.

Schedule 6—Communications of details of family law proceedings

Family Law Act 1975

Item 1 – Subsection 4(1)

402. This item inserts a definition of ‘communicate’ into section 4(1) and refers to the meaning of ‘communicate’ contained in the new subsection 114P(1).

Item 2 – Subsection 4(1) (definition of *proceedings*)

403. This item expands the definition of the term ‘proceedings’ in subsection 4(1) in relation to the new Part XIVB by referencing the new definition of ‘proceedings’ contained in the new Part XIVB. This is to make clear that the new Part XIVB, which restricts communication of identifiable information connected to family law proceedings, also applies to a part of proceedings.

Item 3 – Subsection 4(1)

404. This item inserts a definition for the term ‘public’ in subsection 4(1) and refers to the meaning of ‘public’ contained in new subsection 114P(2).

Item 4 – Section 102PC (heading)

405. Part XIA of the Family Law Act contains provisions that relate to court-based suppression and non-publication orders. Section 102PC of that Part provides that the existing section 121 and Part XIA do not limit each other. This item will replace the existing reference to ‘section 121’ with ‘Part XIVB’ in the heading of section 102PC as the Bill proposes to repeal section 121 of the Family Law Act and replace it with new Part XIVB.

Item 5 – Section 102PC

406. Part XIA of the Family Law Act contains provisions that relate to court-based suppression and non-publication orders. Section 102PC of that Part provides that the existing section 121 and Part XIA do not limit each other. As the Bill proposes to repeal section 121 of the Family Law Act and replace it with new Part XIVB, this item will replace the existing reference to section 121 with Part XIVB in section 102PC of the Family Law Act. This will ensure that Part XIA provisions relating to suppression and non-publication orders and the new Part XIVB provisions relating to restrictions on public communications of identifiable information do not limit each other.

Item 6 – After Part XIVA

Part XIVB—Restriction on the communication of accounts and lists of proceedings

407. This item inserts new Part XIVB into the Family Law Act which will replace section 121 of the Family Law Act. The new Part will continue to protect the privacy of families and other persons connected with family law proceedings by restricting public communication of information that identifies children, families and other persons involved in family law matters. The new Part aims to clarify the law in this area and does not introduce any

significant changes to the existing law in section 121 of the Family Law Act, including in relation to the offences and penalties.

408. In line with the ALRC Report recommendation 56, the new Part XIVB also aims to simplify and clarify the scope and operation of the restrictions on the public communicating identifiable information that relates to family law proceedings. The ALRC Report noted section 121 can create confusion about the sharing of information for professional regulators and Government agencies or other organisations who provide services to families who are involved in family law proceedings. The new Part intends to make clear the circumstances within which information can be shared with such bodies and also clarifies that social media and internet-based communications, to the public, may constitute a breach of the new Part. As is the case with section 121, the new Part is not intended to apply to private communications. Therefore, the new Part does not substantially change the existing law contained in section 121 and instead aims to improve readability and provide clarity about prohibited communication.

409. New section 114N contains a simplified outline of the two offences contained in new Part XIVB and summarises when communications do not constitute communications to the public for the purposes of the new Part.

410. New section 114P provides the meaning of terms ‘communicate’, ‘proceedings’ and ‘public’ used in new Part XIVB. The term ‘communicate’ forms part of the two offences contained in new sections 114Q and 114R and is intended to capture a broad range of communications. These include publication in a book, newspaper, magazine or other written publication, broadcast by radio or television, public exhibition, broadcast or publication or other communication by means of the internet. An example is provided to clarify that the term ‘communicate’ includes online communications via social media. The term ‘proceedings’ clarifies that the new Part can apply information relating to a part of proceedings. The term ‘public’ is broad, intended to be given its common meaning and includes a section of the public.

411. New subsection 114Q(1) establishes that it is an offence if a person:

- communicates to the public an account of family law proceedings, and
- the account identifies a party to the proceedings, a witness in the proceedings, a person related to, or associated with, a party to the proceedings, or a person who is, or alleged to be, in any other way concerned in the matter to which the proceedings relate.

412. This section also contains the penalty for this offence which is a maximum of one year imprisonment, consistent with the existing penalty under section 121. The penalty reflects the need to protect the identity of persons involved in family law proceedings, including children, to avoid causing undue distress, to protect against intrusive media reporting and to protect the safety of all persons.

413. New subsection 114Q(2) permits a court to approve or direct communication that would otherwise be in breach of this section. This is to ensure that there is a power to facilitate communications in circumstances that may not be provided for by the Family Law Act but are otherwise considered necessary or appropriate by the court.

414. Subsection 114Q(2) also contains a note that makes clear that a defendant bears an evidential burden in relation to the matters in this subsection as per the principle codified in subsection 13.3(3) of the *Criminal Code* 1995 (Cth).

415. New subsection 114Q(3) also provides examples of information that may be considered sufficient to identify a person to a member of the public. These include, but are not limited to:

- a picture, recording, or physical description of the person
- a name or title that identifies the person
- an address or location where the person resides or works
- details of the person's employment, paid or voluntary
- the relationship or other connection between the person and an identified person or business
- the person's political, philosophical or religious beliefs, and
- any real or personal property associated with the person.

416. This offence is not intended to apply to information that is not, at the time of public communication, identifiable but post-communication becomes identifiable due to some other identifying factor not arising from the initial communication.

417. These examples substantially replicate the existing law contained in section 121 but have been rewritten for clarity to assist with understandings of the scope and limitations of the offence.

418. New subsection 114R(1) establishes that it is an offence for a person to communicate to the public a list of proceedings under the Family Law Act that identifies the parties to the proceedings by reference to their names. Subsection 114R(1) also contains the penalty for this offence which is a maximum of one year imprisonment, consistent with the existing penalty under section 121. The penalty reflects the need to protect the identity of persons involved in family law proceedings, including children, to avoid causing undue distress, to protect against intrusive media reporting and to protect the safety of all persons.

419. Under subsection 114R(2), it is not an offence to communicate to the public a list of proceedings under the Family Law Act that identify the parties to the proceedings if the communication is by a relevant court or tribunal (or its officers) and is a list of proceedings that that court or tribunal is dealing with. This is to allow a court to publish its necessary daily lists setting out the parties, court rooms and judicial officers hearing the proceedings. It is also not a breach of this section if the court directs, approves or otherwise states in its Rules of Court that the communication is permitted. This is to ensure that there is a power to facilitate communications in circumstances that may not be provided for by the Family Law Act but are otherwise considered necessary or appropriate by the court. The section includes a note to make clear that the defendant bears an evidential burden in relation to approved communications under the Family Law Act or by the court.

420. This offence is not intended to apply to information that is not, at the time of public communication, identifiable but post-communication becomes identifiable due to some other identifying factor not arising from the initial communication.

421. Subsection 114R(2) also contains a note that makes clear that a defendant bears an evidential burden in relation to the matters in this subsection as per the principle codified in subsection 13.3(3) of the Criminal Code.

422. New section 114S sets out the circumstances whereby a communication to a person or body is not considered a communication to the public.

423. Subsection 114S(1) provides that a communication to a person or body is not a communication to the public if the person or body has a significant and legitimate interest in the subject matter of the communication and that interest is substantially greater than, or different from, the interests of members of the public generally. This subsection is intended to apply to a range of circumstances, including in relation to communications with professional regulators and Government agencies or other organisations who provide services to families who are involved in family law proceedings. It only applies where there is a significant and legitimate interest in the subject matter of the communication and that interest is substantially greater than, or different from, the interests of members of the public generally. For example, a party may communicate with a child welfare organisation and include information that identifies the other party to proceedings. Subsection 114S(1) is not intended to exclude media reporting from being subject to the offences under the new Part.

424. Subsection 114S(1) contains a note that makes it clear that a defendant bears an evidential burden in relation to the matters in this subsection as per the principle codified in subsection 13.3(3) of the Criminal Code.

425. Subsection 114S(2) outlines other circumstances where a communication will not be considered a communication to the public. These include private communication between a party to proceedings and a person who is a family member or friend of the party, and communication to a prescribed state or territory child welfare authority. They also include communication to a body responsible for disciplining members of a profession in a state or territory, such as a law society, communicating information for legal aid grant purposes and other forms of communication as set out in the provision. Subsection 114S(2) reflects the permitted communications currently contained in section 121 of the Family Law Act.

426. In considering whether a communication is a communication to the public, the list of communications provided in subsection 114S(2) is not exhaustive or intended to limit subsection 114S(1). This broad approach would ensure that communication for a legitimate purpose to a person with a substantially different or greater interest in the communication than a member of the public would not constitute an offence.

427. Section 114T provides that proceedings for an offence against subsection 114Q(1) or 114R(1) must not be commenced without the written consent of the Director of Public Prosecutions. This is consistent with the current subsection 121(8). This is an important safeguard in addition to the Prosecution Policy of the Commonwealth which requires that a prosecution only be pursued where there is sufficient evidence to prosecute the case, and the prosecution would be in the public interest.

Item 7 – Section 121

428. This item proposes to repeal section 121 which will be replaced with Part XIVB.

Item 8 – Saving of regulations

429. This item ensures that any Regulations that were in force for the purposes of paragraph 121(9)(aa) of the Family Law Act, which relates to the communication of pleadings, transcripts of evidence or other documents to prescribed authorities of states and territories that have responsibilities relating to the welfare of children, continue to be in force as if they were regulations for the purposes of the new paragraph 114S(2)(c) which is the equivalent provision to paragraph 121(9)(aa).

Item 9 – Application provision

430. This item provides that Part XIVB of the Family Law Act applies in relation to acts or omissions occurring on or after the day this item commences.

Federal Circuit and Family Court of Australia Act 2021

Item 10 – At the end of subsection 98(2)

431. Section 98(1) of the FCFCOA Act 2021 allows the Chief Justice to make Rules of Court delegating a range of powers of Division 1 of the FCFCOA to a delegate or prescribed class of delegate. Section 98(2) sets out the kinds of powers that can be delegated. Item 10 of this Schedule proposes to expressly include, within the list of powers that can be delegated under section 98(2), the power of the court to give directions, or approve communications under the new Part XIVB.

Schedule 7—Family report writers

Family Law Act 1975

Item 1 – Subsection 4(1)

432. This item inserts definitions for inclusion in subsection 4(1).

433. A definition of ‘designated family report’, ‘family report writer’ is provided in item 4. A ‘family report’ and ‘family report writer’ have been terms used and understood for family law purposes, but have not been defined in the Family Law Act. It is essential to define these terms to establish who the regulations that prescribe standards and requirements for family report writers will apply to.

434. This item also inserts a definition of ‘regulator’ by referencing new paragraph 11K(2)(b) in item 4, which is the person or persons responsible for recognition, monitoring and enforcement of standards and requirements provided for in the regulations.

435. This item inserts a definition for ‘Regulatory Powers Act’ to refer to the *Regulatory Powers (Standard Provisions) Act 2014*, and defines ‘civil penalty provision’ as having the same meaning as in the Regulatory Powers Act. Defining these terms provides greater clarity and simplicity for the purposes of references to civil penalty provisions in new paragraph 11K(4)(b), and new subsections 11K(5)-(8), which relate to consequences of non-compliance by family report writers with standards and requirements.

Item 2 – Section 11D

436. This item and item 3 amends section 11D into two subsections. The substantive text of subsection 11D(1) is unchanged from the text of section 11D that prevailed prior to this amendment. Subsection 11D(1) provides that a family consultant, in performing functions as a family consultant, has the same protection and immunity as a judge of the FCFCOA (Division 1) has in performing the functions of a judge. As outlined in the Explanatory Memorandum for this provision in the Family Law Amendment (Shared Parental Responsibility) Bill 2005, family consultants require immunity as their work directly feeds into the court’s decision-making process. Without immunity, individuals unhappy with the court’s decision may endeavour to attack the foundations of that decision by challenging the family consultant. Any problems with the court’s decisions should be dealt with directly through the appeals process.

Item 3 – At the end of section 11D

437. This item inserts a new subsection 11D(2) to confine the immunity conferred on family consultants in new subsection 11D(1). New subsection 11D(2) provides that if a family consultant is also a family report writer (as defined in new section 11H), the protection and immunity provided under subsection 11D(1) is limited in certain circumstances. New paragraph 11D(2)(a) provides that the protection and immunity does not relieve the family consultant of their obligations under regulations made to prescribe standards and requirements for family report writers under new section 11K in item 4. New paragraph 11D(2)(b) provides that the protection and immunity also does not extend to action taken to enforce such regulations.

438. This item ensures that any regulations made under section 11K can apply to family consultants in the same way as they would apply other classes of family report writers, and are not avoided as a consequence of the protection and immunity in section 11D. This limitation is intended to be confined to the effective application and enforcement of the regulations under section 11K, and is not intended to otherwise affect the immunity conferred on family consultants by section 11D.

Item 4 – After Part III

Part IIIAA—Family Report Writers

439. This item inserts a new Part IIIAA about family report writers. Part IIIAA provides: a power to make regulations about family report writers; a framework and parameters for the regulation of family report writers; and definitions to clarify the application of the regulations.

440. This item inserts a new section 11H to provide the definition of ‘family report writer’. This item also inserts a new section 11J to provide the definition of ‘designated family report’. The Family Law Act presently does not define ‘family report writer’ or ‘family report’. Defining these terms provides clarity about the application of the future regulations, standards and requirements.

441. New section 11H defines a ‘family report writer’ as any individual who prepares a ‘designated family report’. This definition of family report writer is intended to capture the activity of preparing a ‘designated family report’, rather than specifying classes or cohorts of individuals to be family report writers. The definition is intended to capture both family consultants and single expert witnesses who prepare reports in family law proceedings that meet the definition of a ‘designated family report’. It is not intended to capture individuals who prepare reports that do not meet the definition of a ‘designated family report’ at new section 11J.

442. New section 11J defines ‘designated family report’. The definition is intended to capture those reports commonly understood in family law matters as a ‘family report’. These are reports typically prepared by social science professionals following a family assessment, which set out expert views and advice to the court on parenting arrangements for children for the purposes of the court making parenting orders. New subsection 11J(1) establishes requirements in paragraphs 11J(1)(a)-(c), all of which must be satisfied for a report to be a designated family report; and new subsection 11J(2) provides detail for the purposes of assisting to determine whether a report meets the requirements for a designated family report in subsection 11J(1). Subsections 11J(1) and (2) must be read together because while a broad range of reports can be prepared or ordered for the purposes of the Family Law Act not all reports are intended to fall within the definition of designated family reports and be subject to the regulations.

443. New subsection 11J(1) focusses on the method of preparing, and the content and function of a report, to establish whether it meets the definition of a designated family report. New paragraph 11J(1)(a) provides that to meet the definition, a report must follow a family assessment, which is a professional forensic assessment undertaken to assist a court and/or the parties decide on parenting arrangements for children of separated parents or caregivers. It is an independent, professional and comprehensive forensic appraisal of the family, done

from a social science perspective. The assessment provides information about the needs of children and their relationships with their parents and other significant adults, and of the attitudes and parental capacities of the adults with regard to the children's needs. The definition reflects and is consistent with the description and purpose of family assessments provided by the *Australian Standards of Practice for Family Assessments and Reporting*, that are intended to guide the preparation of family reports. Where possible and appropriate the report will also often, but not always, include obtaining and conveying the views of a child. The views of a child are required when designated reports are ordered under section 62G.

444. New paragraph 11J(1)(b) provides that a designated family report is a report with content that sets out the expert's views and advice on parenting arrangements, for the purposes of parenting orders being made by the court. This is intended to ensure that other reports, which are not within the common understanding of a family report, are not captured by the definition in new section 11J. Reports not intended to be captured include specialist medical reports such as a psychiatric evaluation or treating practitioner report, and expert reports provided to address a specific, narrowly defined issue or event identified by the court.

445. New paragraph 11J(1)(c)(i) provides that to meet the definition of 'designated family report', a report must also be covered by new subsection 11J(2). Subsection 11J(2) identifies the provisions under the Family Law Act that establish powers under which a family report, as well as other reports, may be ordered or prepared. New paragraph 11J(1)(c)(ii) enables the regulations to exclude reports from the definition of 'designated family report'. As the provisions under which a court may order a report for the purposes of proceedings are broad and capture more than designated family reports, this paragraph enables reports to be excluded by regulation for the avoidance of doubt where they are not intended to be the subject of regulation. This may include circumstances where it is considered there are sufficient existing regulatory mechanisms surrounding the preparation of a report, or where it is found that reports are unintentionally falling within the definition of a 'designated family report'. For example, a specialised report or a report that provides advice about specific issues such as a psychiatric evaluation but does not involve a family assessment would not meet the definition of a designated report and would not be required to be prepared by an individual who meets the standards and requirements prescribed by new section 11K.

446. New subsection 11J(2) identifies the range of provisions under the Family Law Act that establish powers under which a family report – that is a designated family report which is intended to be the subject of regulation – may be ordered. These include reports prepared under section 11F, subsection 55A(2), subsection 62G(2) and section 68M for the court or an ICL. New paragraph 11J(2)(e) also includes reports that are prepared for parties or for the court for the purposes of proceedings before the court, such as by single expert witnesses, as may be provided by the relevant rules of court or other subordinate legislation. However, these identified provisions of the Family Law Act also enable the court to order other reports, which are not intended to fall within the definition of designated family report. These other reports include specialised reports prepared by experts where there is no comprehensive forensic social science assessment of the family, such as specialised medical reports, or specific issues reports which are limited reports targeting a particular individual, issue or specific event identified by the court. Therefore, to be considered a designated family report and subject to the regulations, a report that satisfies new subsection 11J(2) must also meet the other requirements in subsection 11J(1).

447. This item inserts a new section 11K which establishes the power for Government to make regulations to prescribe standards and requirements for family report writers, including consequences for non-compliance. New section 11K also establishes a framework of the issues the regulations may address. The regulations would be disallowable, to allow Parliament to have appropriate oversight and scrutiny of the delegated powers.

448. New subsection 11K(1) enables regulations to be made that establish standards and requirements that must be met to prepare and provide designated family reports in family law matters. Subsection 11K(1) also provides that the regulations may establish and provide consequences for non-compliance with regulated standards and requirements. New subsection 11K(2) elaborates on what standards and requirements may encapsulate. New subsection 11K(4) provides the types of consequences the regulations may provide for non-compliance.

449. It is necessary to establish standards and requirements for family report writers via regulations. Regulations enable the Government to rapidly respond to any issues or changing circumstances that arise affecting family report writers, particularly those who are also psychologists or psychiatrists. This is to ensure an appropriate balance between expectations and requirements as family report writers, and any other requirements arising as part of their professional registration under the Australian Health Practitioner Regulation Agency (Ahpra).

450. New subsection 11K(1) also provides that regulations, in full or in part, may apply to all family report writers, or a subset of family report writers. Family report writers are typically from a variety of social science professions, including but not limited to social work, psychology or psychiatry. Family report writers are also engaged to write reports in a variety of ways, either as family consultants employed by the family law courts or appointed under Regulation 7 of the *Family Law Regulations 1984*, or as single expert witnesses jointly appointed by, or on behalf of, both parties to the proceeding as allowed for in the relevant rules of court. Given the different professional backgrounds and employment types, family report writers have diverse regulatory, professional and employment obligations that do not apply equally to each individual. For example, a family report writer who is also a registered psychologist, is regulated by Ahpra. However, a person with a psychology degree and other work experience, but not registered as a psychologist, would not be regulated by Ahpra. Providing that regulations may apply to all family report writers, or a class or classes of family report writers, will enable standards and requirements, as well as consequences for non-compliance with standards and requirements, to be established that are fit for purpose and facilitate an equitable regulatory approach across all professionals. Competency and accountability requirements for family report writers as established by the regulations can leverage or work within existing regulatory frameworks where appropriate, to reduce duplication and unnecessary additional regulatory burden.

451. New subsection 11K(2) provides comprehensive parameters for the types of matters the proposed regulations may cover in relation to standards and requirements for family report writers.

452. New paragraph 11K(2)(a) provides that regulations may provide for how compliance with prescribed standards and requirements is to be ascertained and recognised (for example by certification, registration, accreditation or other mechanism). It also provides that the

regulations may stipulate how compliance may be checked, scrutinised, verified and enforced.

453. New paragraph 11K(2)(b) provides that regulations may be made that establish who is responsible for recognition, monitoring and compliance of family report writers with the standards and requirements established by regulations. This may be more than one person. Such a person or persons would occupy a relevant position in a relevant entity which is capable of making a decision about whether a person meets the standards and requirements of a family report writer. Such a person or persons is also defined by the new paragraph 11K(2)(b) as a ‘regulator’, and this definition applies only for the purposes of new Part IIIAA.

454. New paragraph 11K(2)(c) provides that the proposed regulations may prescribe how a person who wishes to be recognised as a family report writer is to demonstrate that they meet the standards and requirements. The regulations may also prescribe how a family report writer is to maintain their recognition once this has been obtained. This includes that the regulations may provide for certain actions or activities to be undertaken, the types of information that is to be provided, and the timing and form of these duties and provision of information. Certain information and documentation may also be required to be provided to a regulator as defined in new paragraph 11K(2)(b), to assist with recognition, monitoring and enforcement of compliance with prescribed standards and requirements.

455. New paragraph 11K(2)(d) provides that regulations may be made in relation to the circumstances in which a regulator may collect, use and share information and documents for the purposes of recognising, monitoring and enforcing compliance of family report writers with prescribed standards and requirements. This is intended to ensure that a person or persons responsible for recognising, monitoring and enforcing compliance with standards and requirements is able to access the necessary evidence and advice needed to undertake this function in a timely and efficient manner. It also provides that the regulations may establish how and with whom regulators may share information and documentation, which may be necessary if the regulator is seeking external independent advice or evidence to verify information from a family report writer – for example that they are a member of a particular industry association, have completed certain training, or have obtained certain professional memberships. It may also be necessary for the regulator to share information with another entity – such as the Ahpra, or with law enforcement.

456. New paragraph 11K(2)(e) enables regulations to deal with the review of decisions, including those of a regulator, that affect recognition of a family report writer’s compliance with prescribed standards and requirements. This is intended to enable the regulations to provide for administrative review of decisions made by a regulator where appropriate.

457. New paragraph 11K(2)(f) provides for regulations to include processes for dealing with people who make false or misleading representations about a family report writer’s compliance with prescribed standards and requirements. Depending on who makes the false or misleading representation – whether it be a person who is a family report writer or seeking to become one, or someone relied upon to provide advice or evidence about a report writer’s compliance with requirements and standards, such as a referee or person employed by an industry association or training entity – different responses may be required. This is intended to enhance public confidence through ensuring that information regarding which

professionals are compliant with prescribed standards and requirements is accurate and reliable. It also provides that other relevant entities, including law enforcement, can be made aware of issues such as potential fraud or employee misconduct.

458. New paragraph 11K(2)(g) enables regulations to be made in relation to processes for handling complaints received in relation to family report writers. Assessment of complaints may be important to establishing whether a family report writer meets the standards and requirements expected of the profession as outlined in the regulations. Noting that there may be more than one entity to which a complaint about a professional who prepares family reports may be made, the large number of family law matters for which a family report is ordered, and that some matters may still be subject to family law proceedings, it is important the regulations can establish a streamlined, efficient, informative and fair process for receiving and managing complaints.

459. New paragraph 11K(2)(h) enables regulations to be made in relation to training that is expected to be undertaken by, or to become, a family report writer. As family report writers make recommendations to the court about parenting arrangements that affect the lives of parents and children, it is essential they have appropriate skills to make this assessment. These skills can be established and enhanced through training in key issues including recognising and reporting on: family violence risks and impacts; the impact of trauma on children and parenting, and other issues impacting engagement with and safe parenting of children. The social science professionals who undertake family reports do not come from the same professional backgrounds, and some have not undertaken previous or current training or professional development in all matters essential to family report writing. The regulations may identify relevant training requirements, including topic and frequency of training, and establish how such training is to be identified, selected and provided, to ensure consistency in skill and practice of family report writers. Having training requirements in regulations mean they can be responsive to industry best practice and standards.

460. New paragraph 11K(2)(i) provides that regulations may be made in relation to the fees that can be charged to family report writers for them to be recognised and maintain recognition as a family report writer under the regulations. This would reflect the services provided to them to recognise their compliance with prescribed standards and requirements. The regulations would not establish fees to recover other costs associated with the general administration of a regulatory scheme.

461. New paragraph 11K(2)(j) provides that regulations may be made in relation to the publication of the names of family report writers who are recognised as complying with prescribed standards and requirements. The intention is to enable family report writers who meet standards and requirements to have their name included on a list of family report writers considered compliant and therefore eligible to prepare a family report for family law matters.

462. New paragraph 11K(2)(k) enables regulations to prescribe that certain information about family report writers, who have been assessed as compliant with standards and requirements and named in accordance with new paragraph 11K(2)(j), may be made publicly available. This information is intended to enable the court, parties to proceedings and the public to have access to relevant information about a family report writer. It would also enable a compliant family report writer to communicate relevant information to prospective parties. Information that the regulations may deem relevant and suitable for publishing

include information about a family report writer's qualifications, training and experience, availability, fees for their services, compliance status, relevant association memberships, registrations (such as with the Ahpra) or employment, and any other matters relevant to their role in preparing designated reports. As with all the regulatory provisions, any regulations providing for the publication of information about family report writers will be disallowable, and subject to oversight and scrutiny by Parliament.

463. New paragraph 11K(2)(l) enables the proposed regulations to include standards and requirements in relation to the content of designated family reports. This would facilitate the identification of key topics of interest and a consistent baseline of issues to be identified in a report and brought to the court's attention. For example, as identification and risk management of family violence is a key issue in family law matters, the regulations may prescribe that a designated family report must address this issue. This would not preclude other issues from being raised by a family report writer in a report.

464. New subsection 11K(3) provides that regulations dealing with the publication of information about named family report writers as provided for in new paragraph 11K(2)(k) must not require or allow the publication of personal information as defined in the *Privacy Act 1988*, about a child or other individual to whom a report relates. This provision is inserted to ensure existing privacy protections for parties who are the subject of family law matters prevail.

465. New subsection 11K(4) enables the regulations to provide for consequences for non-compliance with prescribed standards and requirements for family report writers. Consequences for non-compliance have been included as any regulatory scheme or approach establishing standards and requirements for family report writers will be ineffective if family report writers are able to continue to prepare designated family reports outside of that scheme, once established. The consequences provided for in new subsection 11K(4) are non-exhaustive, and provide for a spectrum of consequences that can respond to the cause and outcome of the non-compliance.

466. New paragraphs 11K(4)(a) and 11K(4)(b) provide for offences and civil penalty provisions respectively, each not exceeding 30 penalty units, which can be applied to family report writers who do not comply with the standards and requirements established by the regulations. A maximum of 30 penalty units for these types of matters is consistent with penalty comparisons across Commonwealth legislation, and consistent with the Attorney-General's Department's *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, for conduct in relation to matters such as the giving and withholding of information, failures to keep records and failures to comply with notices.

467. New paragraph 11K(4)(b) also triggers the enforcement powers of Part 4 of the *Regulatory Powers (Standard Provisions) Act 2014* (Regulatory Powers Act) so that any civil penalty provisions created by the regulations for the purposes of section 11K are enforceable under Part 4 of that Act.

468. Authorising the regulations to create offences and impose penalties as provided in new subsection 11(K)(4) is necessary to ensure sufficient detail and accurate targeting of behaviour to support the effective operation of the regulatory scheme for family report writers. Matters to be dealt with through offences or penalties for the purposes of regulating

family report writers may include but are not limited to: circumstances of deliberate dishonesty, such as dishonest representations regarding a person's status as a recognised family report writer; knowingly providing false or misleading information or documents, or failing to notify a regulator of relevant changes in circumstances, should this be required by the regulations, for example, failure to disclose a recent criminal conviction.

469. The capacity to establish penalties in the regulations as provided by new subsection 11(K)(4) is important to deter and correct behaviour and actions that significantly impact others, particularly parties to family law matters and their children, or the court. For example, if a family report has been prepared when the writer was knowingly aware that they did not meet the standards and requirements, this would mean that the report may not be of a quality suitable to the court and therefore could not be relied upon, and that another report might need to be ordered resulting in further delay, costs and inconvenience. Such a report may also include unsafe or inappropriate recommendations in relation to children, which may form the basis of a decision by parties to family law proceedings to settle their matter prior to the report being tested through a trial process.

470. New paragraph 11K(4)(c) enables the regulations to provide for the suspension or cancellation of recognition of a family report writer's compliance. This provides that the regulations may provide powers to the regulator that assist to enforce the standards and requirements established for family report writers. New paragraph 11K(4)(d) enables regulations to provide that the court must not have regard to designated reports prepared by a family report writer who is not recognised or whose recognition is suspended or cancelled. New paragraph 11K(4)(e) provides that the regulations may include a prohibition on non-recognised family report writers from preparing designated family reports. These consequences will help ensure adherence to any regulations made that set standards and requirements for family report writers. These consequences also assist to prevent non-recognised or non-compliant professionals preparing designated family reports for parties to proceedings or the courts, and the court from considering designated family reports that may not be to expected standards and requirements.

471. New subsection 11K(5) provides that civil penalty provisions prescribed by regulations for the purposes of new section 11K are enforceable under Part 4 of the *Regulatory Powers (Standard Provisions) Act 2014* (the Regulatory Powers Act). The Regulatory Powers Act creates a standard suite of provisions in relation to monitoring and investigation powers, as well as enforcement, including through the use of civil penalties. The standard provisions of the Regulatory Powers Act are an accepted baseline of powers required for an effective monitoring, investigation or enforcement regulatory regime. They provide consistency and clarity in relation to the exercise of powers across regulatory regimes. Part 4 of the Regulatory Powers Act provides a framework for the use of civil penalties to enforce civil penalty provisions. Subsection 82(6) of the Regulatory Powers Act requires that a relevant court take into account all relevant matters in determining a penalty.

472. New subsection 11K(6) prescribes who is an 'authorised applicant' for the purposes of the exercise of powers under Part 4 of the Regulatory Powers Act. An 'authorised applicant', defined to include 'each regulator' as defined in new paragraph 11K(2)(b), and the Secretary of the Department, being the Attorney-General's Department, is able to exercise powers under Part 4, including by making an application to a relevant court for a civil penalty order. The prescribing of who is an 'authorised applicant' is necessary to enable the effective

operation of the provisions in Part 4 of the Regulatory Powers Act and to give effect to the penalties established by the regulations. The inclusion of both a ‘regulator’ and the Secretary of the Department will enable a targeted and fit for purpose approach to any future regulation, to account for the diversity of professionals preparing family reports, and the need to minimise additional regulatory burden where possible.

473. New subsection 11K(7) enables the Secretary of the Department to delegate their powers and functions in relation to civil penalty provisions under Part IIIAA to a member of the Senior Executive Service or acting Senior Executive Service within the Attorney-General’s Department. This delegation is consistent with the delegation of other powers by the Secretary to senior members of the Australian Public Service, and reflects the importance of continued and timely decision-making in circumstances where the person on whom power is conferred is not available.

474. New subsection 11K(8) prescribes the courts that are the relevant courts to decide the civil penalty provisions. These are the Federal Court, the Federal Circuit and Family Court of Australia or a court of a state or territory that has jurisdiction in relation to matters arising under the Family Law Act. Prescribing these courts is necessary for the civil penalty provisions in Part 4 of the Regulatory Powers Act to be effective. These courts have been selected as they will have a relevant understanding of and experience in the role and function of family report writers and the issues to which the penalties would relate, including the impact of not having met the regulated standards and requirements.

475. New section 11L permits the family law courts to disclose certain documents to a regulator as defined in new paragraph 11K(2)(b) to enable the regulator to perform functions under the regulations. Any scheme established under the regulations that enables the investigation of complaints or monitoring of compliance by family report writers with standards and requirements will require a regulator to have access to relevant documents. New paragraph 11L(a) permits the court to disclose to a regulator a designated family report prepared for or at the direction of the court, or for a party to proceedings before the court. New paragraph 11L(b) permits the court to disclose to a regulator a final order made by the court in proceedings for which a designated family report was prepared. This provision is intended to prevail over any restrictions of publication provided for in the Family Law Act.

476. New section 11M provides immunity for a regulator in civil and criminal proceedings in certain circumstances. Such circumstances are where actions taken or not taken by a regulator were done in good faith as part of the role and performance of the regulator, consistent with regulations made under new section 11K. This would include actions taken or not taken that are consistent with powers and processes set out in the Family Law Act and the proposed regulations, based on information available to the regulator at the time.

Item 5 – At the end of subsection 67ZA(1)

477. Item 5 inserts new paragraph 67ZA(1)(i) to include family report writers in the list of professionals in subsection 67ZA(1) to whom section 67ZA applies. Section 67ZA requires notification to child welfare authorities of reasonably held suspicions of abuse or risk of abuse of a child. The addition of family report writers to this list of professionals is consistent with types of professionals already holding obligations under Subsection 67ZA(1), such as family consultants, family counsellors, family dispute resolution practitioners and lawyers independently representing a child’s interests. Imposing notification obligations on family

report writers is also consistent with the role and nature of the work of family report writers in undertaking a family assessment, seeking the views of the child or children involved, and providing expert views on parenting arrangements for the purposes of the court making parenting orders.

Item 6 – At the end of subsection 111CV(1A)

478. Item 6 inserts new paragraph 111CV(1A)(j) to include family report writers in the list of persons covered by section 111CV. Section 111CV creates obligations on a court and certain people to inform another country about information held by that person about serious danger to a child whose residence has moved to the other country or who is present in the other country. Given the nature of the work performed by family report writers and their role in undertaking family assessments, including seeking the views of the child or children involved, it is appropriate that these professionals also hold obligations to provide information to relevant authorities regarding any serious danger to a child. Including family report writers in subsection 111CV(1A) is also consistent with the types of professionals who already have obligation to inform under this provision, including family consultants, family counsellors, family dispute resolution practitioners and arbitrators.

Schedule 8—Review of operation of the *Federal Circuit and Family Court of Australia Act 2021*

Federal Circuit and Family Court of Australia Act 2021

Item 1 – Subsection 284(1)

479. Subsection 284(1) of the FCFCOA Act provides that the minister must cause a review of the operation of the FCFCOA Act to be conducted within 6 months after the fifth anniversary of that Act’s commencement. This would trigger a review of the FCFCOA Act to be conducted between 1 September 2026 and 31 March 2027.

480. This item amends subsection 284(1) to provide that the minister must cause the review within 6 months after the third anniversary of the FCFCOA Act’s commencement. This would bring forward the review by 2 years. It would be conducted between 1 September 2024 and 31 March 2025.

481. The substituted subsection provides for a timelier assessment of the effectiveness and impact of the FCFCOA Act on both the operation of the Courts and its users. This is intended to enable earlier Government decision-making on improvements that may be required to the FCFCOA Act.

Schedule 9—Dual appointments to the Family Court of Western Australia and the FCFCOA (Division 1)

Federal Circuit and Family Court of Australia Act 2021

482. Items 1 to 3 provide an express legislative provision to clarify that a person can be dually appointed to the FCWA and the FCFCOA (Division 1).

483. Prior to the commencement of the FCFCOA Act in September 2021, section 22(2A) of the Family Law Act explicitly provided that a judge can be dually appointed to the Family Court of a State and the Family Court of Australia. Dual appointments of this nature enabled appeals arising from the FCWA, under the Family Law Act, to be heard by the Family Court of Australia. An equivalent provision to section 22(2A) of the Family Law Act was not included in the FCFCOA Act.

484. The absence of an express power to dually appoint judges does not prevent dual appointments being made. However, it is considered preferable to have an express legislative basis for dual appointments as was the case prior to 1 September 2021.

485. This amendment will operate both prospectively and retrospectively to provide clarity in relation to the position from 1 September 2021. This amendment will restore the previous legislative arrangements.

Item 1 – Section 23

486. Item 1 converts section 23 of the FCFCOA Act into subsection 23(1) to accommodate the inclusion of new subsection 23(2) (see item 2).

Item 2 – At the end of section 23

487. Item 2 inserts subsection 23(2) which explicitly provides that a person may be appointed to the office of judge of the FCFCOA (Division 1) regardless of whether they hold office as a judge of a Family Court of a State such as the FCWA. In addition, a person may serve in the office of judge of the FCFCOA (Division 1) even if they continue to hold office and serve as a judge of a Family Court of a State.

Item 3 – Application provision

488. Item 3 provides that the amendments to section 23 of the FCFCOA Act apply to the appointment of a person as a judge, regardless of when they were appointed.

489. This provision is intended to clarify that any appointments that preceded the commencement of this item are valid.