



**Australian  
Human Rights  
Commission**

# Civil Law and Justice Legislation Amendment Bill 2017 (Cth)

**AUSTRALIAN HUMAN RIGHTS COMMISSION  
SUBMISSION TO THE SENATE LEGAL AND  
CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE**

13 April 2017

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## Table of Contents

	<b><i>Australian Human Rights Commission submission to the Senate Legal and Constitutional Affairs Legislation Committee.....</i></b>	<b><i>1</i></b>
1	<b>Introduction.....</b>	<b>3</b>
2	<b>Summary .....</b>	<b>3</b>
3	<b>Recommendations.....</b>	<b>3</b>
4	<b>Amendments to the <i>Family Law Act 1975 (Cth)</i>.....</b>	<b>5</b>
4.1	<b><i>International parental child abduction</i> .....</b>	<b>5</b>
(a)	<b><i>The rights of the child</i> .....</b>	<b>6</b>
4.2	<b><i>Use of force</i>.....</b>	<b>9</b>
5	<b>Amendments to the <i>Marriage Act 1961 (Cth)</i>.....</b>	<b>13</b>
5.1	<b><i>Capacity to understand the nature and effect of a marriage ceremony</i> .....</b>	<b>13</b>
5.2	<b><i>Consent to the marriage of a minor</i>.....</b>	<b>15</b>
6	<b>Amendments to the <i>Sex Discrimination Act 1984 (Cth)</i>.....</b>	<b>15</b>

## **1 Introduction**

1. The Australian Human Rights Commission makes this submission to the Senate Legal and Constitutional Affairs Legislation Committee in its Inquiry into the Civil Law and Justice Legislation Amendment Bill 2017 (Cth) (Bill) introduced by the Australian Government.

## **2 Summary**

2. The Bill seeks to amend 10 different Acts. Given the limited time available to make submissions, the Commission has focussed on some of the proposed amendments to the *Family Law Act 1975* (Cth), the *Marriage Act 1961* (Cth) and the *Sex Discrimination Act 1984* (Cth).

## **3 Recommendations**

3. The Australian Human Rights Commission recommends that:

### **Recommendation 1**

Advice be sought from the Australian Government Solicitor or other appropriate body about the extent to which the exceptions and defences to offences in the *Family Law Act 1975* (Cth) recommended by the Family Law Council are already provided by existing exceptions and defences under the *Criminal Code* or otherwise.

### **Recommendation 2**

Consideration be given to amending the *Family Law Act 1975* (Cth) to include explicit exceptions and defences to ensure that the existing and proposed offences of unlawful transfer and retention of children abroad will not apply in circumstances of:

- Duress
- Sudden or extraordinary emergency
- Self-defence
- Lawful authority
- Mistake of fact
- Fleeing from violence
- Protecting the child from danger of imminent harm
- Reasonable excuse
- Consent.

### **Recommendation 3**

Consideration be given to:

- a. Clarifying what training and accountability measures are in place in relation to the use of force by the categories of person listed in proposed sections 122A(1)(h) and (i) of the *Family Law Act 1975* (Cth)
- b. Whether the categories of persons to be authorised to make arrests under proposed sections 122A(1)(h) and (i) of the *Family Law Act 1975* (Cth) can be drafted more narrowly
- c. Amending proposed s 122A(2) of the *Family Law Act 1975* (Cth) to make clear that the categories of person specified therein may make arrests only when it is reasonably necessary in specified circumstances, such as to prevent the imminent unlawful removal of a child from Australia
- d. Whether it is appropriate for the categories of person specified in proposed sections 122A(1)(h) and (i) of the *Family Law Act 1975* (Cth) to be permitted to use lethal force, except in self-defence in accordance with the ordinary principles of criminal law.

### **Recommendation 4**

The Commission recommends that the amendments in items 4 and 5 of Schedule 9, dealing with s 23B(1)(d)(iii) of the *Marriage Act 1961* (Cth), be passed.

### **Recommendation 5**

The Commission recommends that the Attorney-General's Department update the *Guidelines on the Marriage Act 1961 for Marriage Celebrants* to reflect the amendment to s 23B(1)(d)(iii) and to provide guidance to marriage celebrants about how they can best ensure that persons with disabilities are able to make decisions about marriage, including through supported decision making where appropriate, and have those decisions respected.

### **Recommendation 6**

The Commission recommends that the amendments in items 3 and 42 of Schedule 9, dealing with consent to the marriage of a minor, be passed.

### **Recommendation 7**

The Commission recommends that Schedule 10 of the Bill, dealing with the repeal of s 43 of the *Sex Discrimination Act 1984* (Cth), be passed.

## **4 Amendments to the *Family Law Act 1975 (Cth)***

4. Schedule 6 of the Bill proposes a number of amendments to the *Family Law Act 1975 (Cth)* (Family Law Act). The Commission makes the following submissions in relation to two of these amendments:
- a. the proposed creation of new offences of ‘retaining a child outside Australia’
  - b. changes to the powers to make arrests, and the use of force in making such arrests, under the Family Law Act.

### **4.1 *International parental child abduction***

5. The Family Law Act currently contains a number of provisions making it an offence to take or send a child overseas where:
- a. a parenting order is in place (s 65Y), or court proceedings for the making of a parenting order are pending (s 65Z), in relation to a child, and that order provides (or would provide) that:
    - i. a child is to live with a person; or
    - ii. a child is to spend time with a person; or
    - iii. a child is to communicate with a person; or
    - iv. a person is to have parental responsibility for a child;<sup>1</sup> and
  - b. a person takes or sends the child from Australia to a place outside Australia, unless:
    - i. they have the written consent of each person in whose favour the parenting order was made, or
    - ii. the act is in accordance with an order of a court.
6. The Bill would create several new offences, making it an offence to ‘retain a child outside Australia.’ These offences would apply where:
- a. Either:
    - i. a relevant parenting order is in place with respect to a child (proposed s 65YA), or
    - ii. proceedings for the making of such an order are pending (proposed s 65ZAA), and
  - b. a person has taken or sent a child from Australia with written consent or in accordance with a court order, but retains the child outside Australia otherwise than in accordance with that consent or court order.

7. These offences would apply where a person has lawfully taken or sent a child (with respect to whom a relevant parenting order is pending or in place) from Australia, but keeps that child outside of Australia for longer than allowed by any written consent or court order. The rationale for these amendments is to 'remedy an identified gap' in the current provisions of the Family Law Act.<sup>2</sup>

8. The Explanatory Memorandum states:

.... The Australian Government has a broader interest in ensuring that children are not wrongfully removed from Australia....

The gravity of the effects of abduction and wrongful retention on a child's wellbeing, irrespective of who commits the offence or in which country the child is retained, can be devastating and long-lasting. The new offences are intended to be a deterrent to the wrongful retention of a child and apply to any person (regardless of whether they have Australian citizenship or residency) who wrongfully retains a child.

The proposed amendments aim to address the wrongful removal or retention of children regardless of the intended country of destination or the country of retention.<sup>3</sup>

(a) *The rights of the child*

9. Article 11 of the Convention on the Rights of the Child (CRC) provides:

1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad.
2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.

10. While the terms of article 11 address all illicit international transfers and non-returns of children, it is 'primarily concerned with parental abductions or retentions.'<sup>4</sup> Abduction and trafficking in children more generally is dealt with in article 35 of the CRC.

11. Article 11 serves to protect a number of the child's other rights protected by the CRC, including:

- a. Article 7(1), which protects the right of a child, as far as is possible, to know and be cared for by his or her parents
- b. Article 9(1), which provides that a child shall not, except in limited circumstances, be separated from his or her parents against their will
- c. Article 10(2), which provides that:

A child whose parents reside in different states shall have the right to maintain on a regular basis, save in exceptional circumstances, personal relations and direct contact with both parents.

- d. Article 18(1), which provides that parents have primary responsibility for bringing up a child, and that both parents have common responsibilities in that regard.

12. As the UN *Manual on Human Rights Reporting* states:

[R]ealities show the challenges arising from situations where children are born from a mixed marriage or parents become separated and reside in different countries. In the first case, children may be abducted by one of the parents and are usually not permitted to return home, even when a previous judicial authority had already decided on the custody and place of residence of the child, as well as on the visiting rights of the parent with whom the child should no longer live. The situation often tends to permanently prevent the child from having access to the parent with whom the child used to live or with whom the child had direct and regular contacts and personal relations (see Articles 9, para. 3 and 10, para. 2). It also shows how important it is to be guided by the best interests of the child and in ensuring, as a general rule, that both parents continue to assume their responsibilities for the up-bringing and development of the child, even when separation or divorce has intervened.<sup>5</sup>

13. Article 11 protects against both illicit transfers and non-return, and requires states parties to take measures against both. The Commission acknowledges that in principle there is no reason to treat illicit retention of children abroad differently from illicit transfers.
14. The Commission notes that article 11 does not require states parties to criminalise parental abductions.
15. Australia's entry into, and ratification of, the *Hague Convention on the Civil Aspects of International Child Abduction* (Hague Convention),<sup>6</sup> and the implementation of that Convention in the Family Law Act, provide civil measures to implement Australia's obligations under article 11.
16. The Commission further notes that in 1998 the Family Law Council was asked to consider whether criminal sanctions should be introduced to prevent the unlawful transfer of children overseas by their parents. While noting that there were arguments both for and against, on balance the Council recommended that such measures should not be introduced.<sup>7</sup>
17. The Explanatory Memorandum indicates that one motivation for the existing and proposed criminal offences is that not all countries are signatory to the Hague Convention. The criminal offences are therefore intended to deter illicit transfer and retention of children outside Australia 'regardless of the intended country of destination or the country of retention.'<sup>8</sup>
18. The Commission notes that there are arguments both for and against the use of criminal sanctions to deter parents from unlawfully taking or keeping their children abroad. As stated above, the Commission acknowledges that in principle there is no reason to treat illicit retention of children abroad differently from illicit transfers.

19. However, the Commission considers that there are circumstances in which it would be inappropriate to expose parents or others to criminal sanction for taking, sending, or retaining a child outside Australia.
20. In 2011, the Family Law Council was asked to consider whether provisions (such as proposed ss 65YA and 65ZAA) should be inserted in the Family Law Act, criminalising the wrongful 'retention' of children abroad. The Council concluded that there are not principled reasons to treat unlawful retentions differently from unlawful transfers. However, it noted that any criminal provisions should be subject to appropriate defences and exceptions.<sup>9</sup>
21. For instance, there the Council noted that there is evidence that in some cases children are taken, or retained, abroad by parents fleeing domestic violence.<sup>10</sup> The Commission agrees with the Council's observation that such conduct should not be subject to criminal sanction. The Council also noted that 'practical difficulties associated with travel' may mean that there are cases where a child is retained overseas for longer than permitted, in circumstances which do not warrant criminal sanction.<sup>11</sup> While it noted that certain exceptions or defences in the Criminal Code may apply in some of these circumstances, the Council recommended that the Family Law Act be amended to include explicit exceptions or defences that apply in the following circumstances:<sup>12</sup>
  - Duress
  - Sudden or extraordinary emergency
  - Self-defence
  - Lawful authority
  - Mistake of fact
  - Fleeing from violence
  - Protecting the child from danger of imminent harm
  - Reasonable excuse
  - Consent.
22. The Commission recommends that consideration be given to implementing this recommendation of the Family Law Council.

### **Recommendation 1**

Advice be sought from the Australian Government Solicitor or other appropriate body about the extent to which the exceptions and defences to offences in the *Family Law Act 1975* (Cth) recommended by the Family Law Council are already provided by existing exceptions and defences under the *Criminal Code* or otherwise.

### **Recommendation 2**

Consideration be given to amending the *Family Law Act 1975* (Cth) to include explicit exceptions and defences to ensure that the existing and proposed



offences of unlawful transfer and retention of children abroad will not apply in circumstances of:

- Duress
- Sudden or extraordinary emergency
- Self-defence
- Lawful authority
- Mistake of fact
- Fleeing from violence
- Protecting the child from danger of imminent harm
- Reasonable excuse
- Consent.

#### **4.2 Use of force**

23. Section 122AA of the Family Law Act currently provides that a person who is authorised or directed by that Act (or by a warrant issued under that Act) to make an arrest may 'use such reasonable force as is necessary to make the arrest or to prevent the escape of [an arrested person] after the arrest.'
24. Section 122A of the Family Law Act currently provides that where:
  - a. a person is authorised under that Act (or by a warrant issued under that Act) to arrest a person, and
  - b. the authorised person reasonably believes that the other person is in a place or vehiclethen the authorised person may enter and search the place or vehicle without warrant, and may stop and detain a vehicle to conduct that entry and search. In exercising these powers, an authorised person is authorised to 'use such force and assistance as is necessary and reasonable.'
25. These provisions do not themselves create any power of arrest. That power is sourced elsewhere in the Family Law Act.
26. Items 35 and 36 of Schedule 6 of the Bill would repeal and replace sections 122AA and 122A.
27. Like the provisions they would replace, proposed ss 122A and 122AA would not create any power of arrest. Rather:
  - a. proposed section 122A regulates the degree of force that may be applied in effecting an arrest, and specifies certain categories of person who may exercise the powers in s 122AA

- b. proposed s 122AA provides a power of warrantless stop, entry, and search of places, including premises and vehicles, to effect an arrest; and regulates the use of force in the exercise of that power.

28. Proposed section 122A(1) provides:

*Application*

- (1) This section and section 122AA apply to any of the following persons (the **arrestor**) who is authorised by this Act, or by a warrant issued under this Act, the standard Rules of Court or the related Federal Circuit Court Rules, to arrest another person (the **arrestee**):
  - (a) the Marshal of the Family Court;
  - (b) a Deputy Marshal of the Family Court;
  - (c) the Sheriff of the Federal Circuit Court;
  - (d) a Deputy Sheriff of the Federal Circuit Court;
  - (e) the Sheriff of a court of a State or Territory;
  - (f) a Deputy Sheriff of a court of a State or Territory;
  - (g) a police officer;
  - (h) the Australian Border Force Commissioner;
  - (i) an APS employee in the Department administered by the Minister administering the *Australian Border Force Act 2015*.

29. The Commission notes that the terms of s 122A(1) do not limit the classes of person who may make an arrest. Nor do they ensure that all arrests made under the Family Law Act are regulated by proposed ss 122A and 122AA. Rather, the section provides that where the person making an arrest falls within one of the categories of person described in s122A(1)(a)-(i), then the provisions of ss 122A and 122AA apply.

30. The Explanatory Memorandum states that proposed s 122A ‘provides for a specific list of persons who may exercise force.’ If the amendment is intended to limit the classes of person who may be authorised to effect an arrest under the Family Law Act, the Bill should be amended to reflect that fact. Further, if the limits in proposed s 122A(2) are intended to apply to all arrests under the Family Law Act, then the Bill should be amended to reflect that fact.

31. Proposed s 122A(2) provides:

*Use of force*

- (2) In the course of arresting the arrestee, the arrestor:
  - (a) must not use more force, or subject the arrestee to greater indignity, than is necessary and reasonable to make the arrest or to prevent the arrestee’s escape after the arrest; and
  - (b) must not do anything that is likely to cause the death of, or grievous bodily harm to, the arrestee unless the arrestor reasonably believes that doing that thing is necessary to protect life or prevent serious injury to another person (including the arrestor); and

Australian Human Rights Commission  
*Civil Law and Justice Legislation Amendment Bill 2017, Senate inquiry – April 2017*

- (c) if the arrestee is attempting to escape arrest by fleeing—must not do a thing described in paragraph (b) unless:
  - (i) the arrester reasonably believes that doing that thing is necessary to protect life or prevent serious injury to another person (including the arrester); and
  - (ii) the arrestee has, if practicable, been called on to surrender and the arrester reasonably believes that the arrestee cannot be arrested in any other way.
  
- 32. This provision would apply to a person who falls within the scope of s 122A(1)(a)-(i), who makes an arrest under the Family Law Act. It regulates the degree of force that may lawfully be used in making that arrest.
  
- 33. Proposed ss 122A(3)-(5) provide that a person making an arrest must, except in limited circumstances, inform the arrestee of the grounds for the arrest.
  
- 34. As the Explanatory Memorandum observes, proposed s 122A(2) is in substantially the same terms as the provisions regulating the use of force in making arrests by officers of the Australian Federal Police in s 3ZC of the *Crimes Act 1914* (Cth).
  
- 35. The Explanatory Memorandum states that the purpose of proposed s 122A(2) is to limit the force that may be used in effecting an arrest, and ensure that a person making an arrest does not use more force than is reasonable and necessary. This intent is consistent with international human rights principles. For instance, article 3 of the UN *Code of Practice for Law Enforcement Officials* provides:

Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.<sup>13</sup>
  
- 36. The Commission is, however, concerned by the inclusion in the list of persons who may exercise certain powers of arrest in s 122A(1) of the Australian Border Force Commissioner (which would presumably include his or her delegates or *Carltona* agents) and certain APS employees, in circumstances where the proposed powers of arrest contemplate the use of lethal force.
  
- 37. As the Explanatory Memorandum notes, the *Guide to Framing Commonwealth Offences* states that ‘arrest powers should only be granted to sworn police officers unless there are exceptional circumstances which clearly justify extending these powers to non-police.’<sup>14</sup> It is appropriate to limit powers of arrest to police officers where possible, to ensure that those powers are exercised by persons with appropriate qualifications and training, and subject to appropriate reporting and review procedures. That is consistent with the UN *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*.<sup>15</sup>
  
- 38. The *Guide to Framing Commonwealth Offences* provides that legislation conferring coercive powers should require:
  - a. That those powers can only be exercised by specified, appropriately qualified persons,<sup>16</sup> and

- b. That accountability measures must be put in place in relation to any coercive powers.<sup>17</sup>
39. These protections are particularly important when persons are authorised to use lethal force. The right to life is protected by article 6(1) of the *International Covenant on Civil and Political Rights* (ICCPR).<sup>18</sup> It is the ‘supreme right’,<sup>19</sup> necessary to the enjoyment of all other human rights. The UN Human Rights Committee has stated that:
- The deprivation of life by the authorities of the State is a matter of the utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.<sup>20</sup>
40. While it would be justifiable for a person authorised to make arrests to use lethal force where that is reasonably necessary to defend themselves or someone else from serious harm, it is not clear that it is appropriate to authorise public servants (not being police officers) to use lethal force in other circumstances. Even without the exceptions in proposed s 122A(2)(a) and (b), any person is entitled to use reasonable force in self-defence.<sup>21</sup> It is not clear why additional statutory authorisation for the use of lethal force by such public servants should be provided.
41. The Commission is concerned that the proposed amendments contemplate that a wide range of APS employees may be empowered to make arrests. The Commission is unaware of what training these employees would be required to undertake, and what accountability measures are in place in relation to those employees.
42. The Explanatory Memorandum states that the inclusion of the Australian Border Force Commissioner and APS employees is:
- intended to cover Australian Border Force officers who may be required to exercise powers of arrest in relation to, for example, a parent attempting to abduct their child overseas. The urgency of ensuring children are not abducted internationally warrants the extension of these powers to officers of the Australian Border Force.<sup>22</sup>
43. In the event the Committee is satisfied that there may be circumstances in which it is necessary to empower public servants to effect arrests (including the Australian Border Force Commissioner, persons authorised to act on his or her behalf, or relevant APS employees), the Commission submits that consideration should be given to the following:
- a. Clarifying what training and accountability measures are in place in relation to the use of force by these categories of person
  - b. Whether the categories of persons to be authorised to make arrests can be drafted more narrowly
  - c. Amending proposed s 122A(2) to make clear that the specified categories of person may make arrests only when it is reasonably necessary in specified circumstances, such as to prevent the imminent unlawful removal of a child from Australia

- d. Whether it is appropriate for these categories of person to be permitted to use lethal force, except in self-defence in accordance with the ordinary principles of criminal law.

### **Recommendation 3**

Consideration be given to:

- a. Clarifying what training and accountability measures are in place in relation to the use of force by the categories of person listed in proposed sections 122A(1)(h) and (i) of the *Family Law Act 1975* (Cth)
- b. Whether the categories of persons to be authorised to make arrests under proposed sections 122A(1)(h) and (i) of the *Family Law Act 1975* (Cth) can be drafted more narrowly
- c. Amending proposed s 122A(2) of the *Family Law Act 1975* (Cth) to make clear that the categories of person specified therein may make arrests only when it is reasonably necessary in specified circumstances, such as to prevent the imminent unlawful removal of a child from Australia
- d. Whether it is appropriate for the categories of person specified in proposed sections 122A(1)(h) and (i) of the *Family Law Act 1975* (Cth) to be permitted to use lethal force, except in self-defence in accordance with the ordinary principles of criminal law.

## **5 Amendments to the *Marriage Act 1961* (Cth)**

44. Schedule 9 of the Bill proposes a number of amendments to the *Marriage Act 1961* (Cth) (Marriage Act). The Commission limits its submissions in relation to this schedule to two areas. The first comprises the amendments at items 4 and 5 which amend the circumstances in which a marriage will be void. The second comprises the amendments at items 3 and 42 which amend the identity of the persons who are able to consent to the marriage of a minor.
45. The Commission supports each of these amendments.

### **5.1 Capacity to understand the nature and effect of a marriage ceremony**

46. Section 23B of the Marriage Act deals with the grounds on which a marriage is void. At present, s 23B(1)(d)(iii) provides that a marriage is void where the consent of either of the parties is not a real consent because that party 'is mentally incapable of understanding' the nature and effect of the marriage ceremony. The Bill proposes to remove the quoted words and replace them with the words 'did not understand'.
47. This amendment adopts Recommendation 11-1 made by the Australian Law Reform Commission (ALRC) in its 2014 report *Equality, Capacity and Disability in Commonwealth Laws*.<sup>23</sup> The amendment would change the focus

of the inquiry from the nature of a person's disability to their actual understanding of the nature and effect of the ceremony.

48. Article 23 of the Convention on the Rights of Persons with Disabilities provides that states shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, so as to ensure that the right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses is recognized.<sup>24</sup>
49. In making its recommendation, the ALRC noted that it did not also make recommendations to include a statutory test of decision-making ability in the Marriage Act, or to require consideration of the available decision making supports. It said that it took this approach 'because of concerns about such provisions unintentionally resulting in a higher threshold for real consent to marry for persons with disability'.<sup>25</sup> It referred to the Guidelines on the Marriage Act 1961 for Marriage Celebrants, published by the Australian Government. These guidelines provide:

In cases where there is doubt about whether a party has the mental capacity to understand the nature and effect of the marriage ceremony, a very simple or general understanding will be sufficient. A high level of understanding is not required. The authorised celebrant should ask questions of the person about whom they have concerns in order to gauge the level of their understanding of the marriage ceremony and what it involves. For example, why they want to marry the other person, what marriage is or where they will be living after the marriage.<sup>26</sup>

50. It will be necessary to update these Guidelines once the changes made by this Bill come into effect. The Commission recommends that when these changes to the Guidelines are made, the Attorney-General's Department include in the Guidelines information for marriage celebrants about how they can best ensure that persons with disabilities are able to make decisions about marriage, including through supported decision making where appropriate, and have those decisions respected.

#### **Recommendation 4**

The Commission recommends that the amendments in items 4 and 5 of Schedule 9, dealing with s 23B(1)(d)(iii) of the *Marriage Act 1961* (Cth), be passed.

#### **Recommendation 5**

The Commission recommends that the Attorney-General's Department update the *Guidelines on the Marriage Act 1961 for Marriage Celebrants* to reflect the amendment to s 23B(1)(d)(iii) and to provide guidance to marriage celebrants about how they can best ensure that persons with disabilities are able to make decisions about marriage, including through supported decision making where appropriate, and have those decisions respected.

## **5.2 Consent to the marriage of a minor**

51. Article 23(2) of the *International Covenant on Civil and Political Rights* (ICCPR) recognises the right of men and women of marriageable age to marry and found a family.<sup>27</sup> Paragraph 3 of the same article provides that no marriage shall be entered into without the free and full consent of the intending spouses. In relation to this article, the United Nations Human Rights Committee has said:

The Covenant does not establish a specific marriageable age either for men or for women, but that age should be such as to enable each of the intending spouses to give his or her free and full personal consent in a form and under conditions prescribed by law.<sup>28</sup>

52. In Australia, a person is of marriageable age if they are at least 18 years old.<sup>29</sup> However, in exceptional circumstances, a person who has turned 16 years old may apply to a court for an order authorising him or her to marry someone else of marriageable age.<sup>30</sup> A 16 or 17 year old may not marry unless they obtain the written consent of parents or others with parental responsibility.<sup>31</sup> Section 14 and the Schedule to the Marriage Act set out details of the persons who are required to give consent in order for a marriage of a minor to take place.
53. Items 3 and 42 of Schedule 9 of the Bill will replace s 14 and the Schedule to the Marriage Act.
54. These amendments will update the language of the Schedule to reflect the language currently used in family law. In general, consent to marriage of a minor would be required by each of the child's parents, each person with relevant parental responsibility, or each guardian of the child.

### **Recommendation 6**

The Commission recommends that the amendments in items 3 and 42 of Schedule 9, dealing with consent to the marriage of a minor, be passed.

## **6 Amendments to the Sex Discrimination Act 1984 (Cth)**

55. Schedule 10 to the Bill proposes to repeal s 43 of the *Sex Discrimination Act 1984* (Cth) (SDA).
56. Section 43 of the SDA currently permits discrimination against women in connection with their employment, engagement or appointment in the Australian Defence Force (ADF) in positions involving combat duties.
57. This section reflects a reservation made by Australia when it ratified the *Convention of the Elimination of Discrimination Against Women* (CEDAW).<sup>32</sup> Australia's ratification of CEDAW was expressed to be subject to two primary reservations in respect of article 11: that it would not institute paid maternity leave under article 11(2)(b) and that it would continue to exclude women from combat and combat-related duties. The second of these reservations is the following form:

The Government of Australia advises that it does not accept the application of the Convention in so far as it would require alteration of Defence Force policy which excludes women from combat duties.

58. In its statement on reservations, the Committee on the Elimination of Discrimination against Women called on all States parties to re-examine their self-imposed limitations to full compliance with all the principles in CEDAW by the entry of reservations. The Committee noted that removal or modification of reservations would indicate 'a State party's determination to remove all barriers to women's full equality and its commitment to ensuring that women are able to participate fully in all aspects of public and private life without fear of discrimination or recrimination'.<sup>33</sup>
59. Since 2011, the Australian Government's policy has been to progressively remove the restrictions on combat roles for women in the ADF.
60. The decision to remove restrictions on combat roles for women was first made by the then Minister for Defence, the Hon Stephen Smith MP on 27 September 2011.<sup>34</sup> The Explanatory Memorandum provides that this decision took full effect from 1 January 2016.<sup>35</sup> The Attorney-General has also said that, after repealing s 43 of the SDA, Australia intends to withdraw its combat duties reservation to CEDAW.<sup>36</sup>
61. The removal of gender restrictions from combat roles is an important step in providing women in the ADF equal opportunity in their work and career progression. Women will be able to compete for all positions on the basis of merit and ability, rather than being excluded from some because of their gender. The Commission has previously considered the implications of removing the restrictions on combat roles for women as part of its *Review into the Treatment of Women in the Australian Defence Force* and made recommendations to the ADF about how to best implement this change.<sup>37</sup>
62. The Commission supports the repeal of s 43 of the SDA and the withdrawal of Australia's combat duties reservation from CEDAW.

## **Recommendation 7**

The Commission recommends that Schedule 10 of the Bill, dealing with the repeal of s 43 of the *Sex Discrimination Act 1984* (Cth), be passed.

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<sup>1</sup> See Family Law Act, s 65X(1).  
<sup>2</sup> Explanatory Memorandum, [228], [236].  
<sup>3</sup> Explanatory Memorandum, [47]-[49].  
<sup>4</sup> UNICEF *Implementation Handbook for the Convention on the Rights of the Child* (3rd ed, 2007), 143.  
<sup>5</sup> UN *Manual on Human Rights Reporting* (1997), UN Doc HR/PUB/91/1 (Rev.1), 451. Available at <http://www.ohchr.org/Documents/Publications/manualhrren.pdf> (viewed 9 April 2017).  
<sup>6</sup> (The Hague, 25 October 1980); [1987] ATS 2.  
<sup>7</sup> Family Law Council, *Parental Child Abduction – A Report to the Attorney-General Prepared by the Family Law Council* (1998), 37-38. At <https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Parental%20child%20abduction.pdf> (viewed 9 April 2017).  
<sup>8</sup> Explanatory Memorandum, [49].



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- 9 Family Law Council, advice to the Attorney-General (14 March 2011), 3, 6 10-11. At <https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/International%20Parental%20Child%20Abduction.doc> (viewed on 9 April 2017).
- 10 Family Law Council, advice to the Attorney-General (14 March 2011), 10-11, 13. At <https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/International%20Parental%20Child%20Abduction.doc> (viewed on 9 April 2017). See also Family Law Council, *Parental Child Abduction – A Report to the Attorney-General Prepared by the Family Law Council* (1998), [2.31]-[2.41]. At <https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Parental%20child%20abduction.pdf> (viewed 9 April 2017).
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- 13 UN General Assembly Resolution 34/169, passed on 17 December 1979.
- 14 Explanatory Memorandum, [194]; *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011), Chapter 10. At <https://www.ag.gov.au/Publications/Pages/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers.aspx> (viewed on 10 April 2014).
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