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# **Senate Legal and Constitutional Affairs Legislation Committee**

**Inquiry into the Family Law Amendment Bill 2024**

**Attorney-General's Department Submission**

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## Inquiry into the Family Law Amendment Bill 2024

### Submission of the Attorney-General's Department

The Attorney-General's Department (the department) welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Legislation Committee's inquiry into the provisions of the Family Law Amendment Bill 2024 (the Bill). The purpose of this submission is to provide an overview of the key provisions of the Bill, consultation on the Bill and changes that were made to incorporate stakeholder feedback prior to its introduction to Parliament.

#### Background

In the past decade, a number of reviews and inquiries have highlighted significant, ongoing challenges in the family law system. These include the Australian Law Reform Commission's 2019 report *Family law for the Future: An Inquiry into the Family Law System (ALRC Report 135)*, the 2021 Australian Parliamentary Joint Select Committee on Australia's Family Law Reform, the 2017 House of Representatives Standing Committee on Social Policy and Legal Affairs Inquiry: *A better family law system to support and protect those affected by family violence*, and Chapter Four of the 2019 Senate Legal and Constitutional Affairs References Committee report *The practice of dowry and the incidence of dowry abuse in Australia*.

This Bill is the second tranche of legislative reform to Australia's family law system that responds to recommendations raised in these inquiries. It focusses on the property and financial aspects of relationship breakdown to help ensure those matters are resolved safely and fairly, including by better recognising the impact of family violence in property division. It also introduces amendments to safeguard sensitive information in family law proceedings, simplifies divorce for parties with children, recognises pets in property division, and improves case management and clarity in the family law system. It follows on from the *Family Law Amendment Act 2023 (Cth) (Amendment Act)*, which addressed a number of recommendations in relation to children's matters.

#### Provisions of the Family Law Amendment Bill 2024

The Bill is organised into five schedules, which are summarised below. A table outlining all inquiry recommendations that the provisions of the Bill address is included at **Attachment A** of this submission.

## Schedule 1 – Property reforms

Schedule 1 of the Bill contains amendments to clarify and support the framework for making property and financial orders in the Family Law Act so that parties can resolve their matters confidently and safely, including:

- specifying the approach a court will take in making decisions about the division of property and finances, and making clear that the economic impact of family violence is a relevant consideration
- providing the court with particular factors to consider when determining the ownership of a pet after a relationship breakdown, to ensure pets are not used to continue the cycle of family violence
- providing the court with the discretion to use the less adversarial approach in property and financial matters to enhance their ability to manage evidence where family violence is alleged or is present
- inserting a specific duty of disclosure in property and financial matters, that would apply during court proceedings or when a party is starting to prepare a proceeding, and
- clarifying and strengthening the family law arbitration process.

These amendments, specifically the inclusion of the new family violence factors, may increase the number of cases where family violence is raised. This may increase the length of some property matters requiring judicial determination, as parties seek to introduce evidence about family violence and its impact. However, this is balanced against the importance of ensuring property settlements account for the economic consequences of family violence. It is expected that the vast majority of matters will continue to be resolved by agreement between parties outside of court.

As a result of stakeholder feedback, a number of changes were made to these provisions following consultation on the exposure draft of the Bill.

### Property framework

A number of changes in the Bill from the exposure draft ensure that the economic consequences of family violence are considered in property and spousal maintenance matters, wherever this may be relevant. The changes include:

- inserting a new family violence factor into the list of matters that may be considered when the court assesses a spousal maintenance application
- permitting the courts to consider the effect of family violence that one party was ‘exposed’ as well as ‘subjected’ to, to ensure family violence directed towards children can be considered (note it is the economic consequences of family violence, not the conduct itself, that is relevant to determining the division of property), and

- a revised approach to more expressly recognise economic or financial abuse in property proceedings. Instead of including ‘economic or financial abuse’ as a stand-alone factor in the list of matters that may be considered by the court, the Bill includes ‘economic or financial abuse’ as an example of behaviour within the definition of family violence in section 4AB of the Family Law Act, and includes a new provision with a non-exhaustive list of examples of behaviour that might constitute economic or financial abuse (including new examples of dowry abuse).

There are a number of drafting changes in the Bill from the exposure draft to more accurately codify the decision-making process that the court undertakes to determine a property settlement, and to minimise disruption to existing case law principles relating to the treatment of ‘liabilities’ (formerly ‘debt’) and ‘wastage’ in family law property matters. There are also new amendments in the Bill to clearly signal where the housing needs of children might be relevant to determining a property settlement or spousal maintenance matter.

### [Pets](#)

The Family Law Act does not have a specific framework for determining ownership of the family pet following separation. This can be a source of confusion and angst for separating Australian families, particularly where there is family violence.

The Bill will provide that pets – defined as ‘companion animals’ – are a specific form of property of a married or de facto couple under the Family Law Act. Particular considerations will apply to pets in determining what order, if any, should be made about the ownership of a pet, as part of a property settlement. These considerations may include family violence, for example where a family pet was used as a tool of coercion or control. This will help ensure that pets are not used to continue the cycle of family violence following separation. Consistent with the aim of property proceedings to bring finality to the financial relationship between parties, the court will only be able to order sole-ownership of a pet. The court will not be able to make orders for shared ownership or split time arrangements, nor endorse consent orders for shared ownership or split time arrangements.

While not included in the exposure draft, these amendments complement other reforms proposed by the Bill to support better outcomes in matters involving family violence.

### [Principles for conducting property or other non-child-related proceedings](#)

The amendments in the exposure draft extended the existing less adversarial approach for child-related proceedings in Part VII of the Family Law Act, to property or other non-child-related proceedings.

The less adversarial approach provides for principles, duties and powers to help the court to control and manage proceedings in a way that reduces delay, legal formality and provides protections for parties and

children against the harmful impacts of adversarial litigation processes – which is particularly relevant in matters involving allegations of family violence. To support the court in minimising delay and legal formality in the proceedings, where the less adversarial approach is adopted, a range of *Evidence Act 1995* (Cth) provisions do not apply, unless the court considers there are exceptional circumstances.

The Family Law Act already provides for the less adversarial approach to apply to child-related proceedings automatically, and the Bill preserves that position. The exposure draft proposed that the less adversarial approach also apply to property or other non-child-related proceedings automatically.

Following stakeholder feedback, the Bill proposes that the less adversarial approach apply to property or other non-child-related proceedings only with the consent of the parties, or at the discretion of the Federal Circuit and Family Court of Australia as guided by the less adversarial principles in the Bill and the issues relevant to the proceeding. This approach has been proposed because stakeholders raised particular concerns about automatically relaxing the rules of evidence in all property and financial matters, given the nature of those disputes is inherently adversarial and commonly involve complex evidence that may be best considered through the application of the rules of evidence.

The key intent of the Bill is to extend the less adversarial approach to any type of matter involving family violence, given the insidious nature of family violence is not limited to children's matters. However, the Bill does not seek to limit the court's discretion in applying the procedures to only non-children's matters which involve family violence. This would be difficult to achieve given family violence concerns are not necessarily raised early in a proceeding, and because a matter which does not involve family violence may benefit from a more direct case management approach.

Empowering the court with the discretion to apply the less adversarial approach to a property or other non-child-related proceeding is an important aspect of the measure given parties may withhold consent, particularly where a matter involves family violence.

It is intended that the court consider whether the less adversarial approach should apply, at the earliest practicable stage appropriate to the case, to give parties certainty about whether the approach will apply.

The Bill co-locates the less adversarial approach for child-related-proceedings and property or other non-child-related proceedings in new Division 4 of Part XI – Procedure and Evidence of the Act. This will provide a clear, consolidated legislative basis for applying the framework to the relevant children's and/or non-children's matter.

### Duty of disclosure and arbitration

The exposure draft proposed clarifying parties' obligations to make full and frank disclosure in financial matters by elevating these duties from the Federal Circuit and Family Court of Australia (Family Law) Rules 2021 into the Family Law Act, to support parties to better understand their obligations and improve compliance. Following feedback from stakeholders, the Bill will make a number of technical clarifications to the duty, including to clarify that the obligations do not apply to proceedings on appeal or to parties seeking a declaration about the existence of a de facto relationship.

In relation to arbitration, the amendments in the exposure draft removed the current distinction between the types of matters that may be arbitrated in private arbitration as compared to a court-ordered arbitration. Following stakeholder feedback and to ensure consistency with recent developments in case law, the Bill includes section 106B proceedings (transactions to defeat claims) in the list of matters referable to arbitration.

### Schedule 2 – Children's contact services

Schedule 2 introduces the ability to establish accreditation rules governing the provision of children's contact services (CCS), with relevant accreditation rules to be established in regulation. Once accreditation rules are in place, courts will only be able to refer families to accredited CCS, and penalties (including strict liability offences) can apply for non-compliance with the accreditation rules. The accreditation framework will foster accountability and consistency across the sector, supporting the safe provision of service to families.

Following consultations, the penalties for non-compliance with the accreditation rules were increased to 50 penalty units for individuals and 250 units for corporations, up from the original 10 and 50 units, respectively. This adjustment was made in response to feedback indicating that similar regulatory frameworks aimed at protecting vulnerable individuals imposed higher penalties. Additionally, changes were implemented to safeguard sensitive information held by CCS, restricting its release unless required by law or consent is provided. The Schedule now limits the sharing of information related to the planning and delivery of safe services, which may include details such as transportation arrangements to CCS locations.

### Schedule 3 – Case management and procedure

Schedule 3 contains amendments to the Family Law Act, *Child Support (Assessment) Act 1989* (Cth) and *Child Support (Registration and Collection) Act 1988* (Cth) to enhance aspects of case management and procedure in family law matters to promote the earlier resolution of disputes and safe outcomes for parties and their children, including:

- empowering the courts to determine sole applications for divorce where there are children under the age of 18 without requiring the parties to attend a divorce hearing

- clarifying the pre-filing requirements for children’s matters to allow the courts to determine if an exemption to the requirement to attend family dispute resolution before seeking a Part VII child-related order applies before an application for parenting orders is accepted
- ensuring that Commonwealth departments and agencies disclose information of the location of a child under a Commonwealth information order, while improving safety by expanding the categories of family members and persons about which violence-related information must be provided
- clarifying the jurisdiction of ‘prescribed courts’ in section 69GA by making clear that state or territory courts prescribed under the section can exercise jurisdiction in children’s matters, and
- providing the court with powers to prevent protected confidences (that is, confidential communications arising in the course of a health, specialist sexual violence or specialist family violence service) from being used as evidence, when the harm caused outweighs the desirability of the evidence being available in proceedings.

As a result of stakeholder feedback, a number of changes were made to these provisions following consultation on the exposure draft of the Bill.

#### [Attending family dispute resolution before applying for Part VII order](#)

The Bill contains an amendment to ensure that family courts can consider whether an exemption to family dispute resolution attendance requirements applies before accepting applications for child-related orders for filing. The intention of this amendment is to streamline case management processes, and support compliance with existing family dispute resolution requirements in the Family Law Act.

During the consultation period, the department sought feedback on a proposed review mechanism to allow persons affected by a decision to seek judicial review, noting that such persons would not have a review pathway available to them under the *Federal Circuit and Family Court of Australia Act 2021* (Cth). Following strong stakeholder support, an amendment was included in the final Bill to allow parties and persons who have not been granted an exemption from complying with family dispute resolution requirements to seek judicial review of these decisions.

This ensures that persons affected by a decision made by a registrar exercising delegated power have a valid review pathway and can have access to court proceedings, including in circumstances where family dispute resolution may not be appropriate.

#### [Commonwealth information orders](#)

Commonwealth information orders facilitate the provision of information about the location of a missing child and violence and risk-related information to a court from a Commonwealth department or instrumentality. The amendments proposed to Commonwealth information order provisions by the Bill clarify

requirements for Commonwealth departments and instrumentalities, and expand the categories of family members about which violence-related information may be provided.

A number of changes were made to this measure following consultation on the exposure draft including empowering the court to order one-off searches for information, and clarifying the operational obligations of Commonwealth departments or instrumentalities by:

- providing a default position that a department or instrumentality in receipt of an order is required to search records that are up to two-years old on the day the order is made, unless a court specifies a different timeframe, and
- requiring information to be provided to the courts as soon as practicable, unless the court specifies otherwise.

### Protecting sensitive information in family law matters ('protected confidences')

The Bill includes a new mechanism for courts to safeguard evidence of confidential communications arising in the course of a health, specialist sexual violence or specialist family violence service.

The proposed legislation will allow a court to make a direction that evidence not be adduced in proceedings where the harm that might be caused to a party, or a child involved in proceedings, outweighs the desirability of the evidence being available to the court. The direction may be made on the court's own initiative, or on application from a protected confider, protected confidant or other persons with standing such as a litigation guardian or Independent Children's Lawyer (ICL). In the context of children's matters, the legislation provides that the best interests of the child will be the paramount factor in deciding whether to make a direction.

In 2019, the ALRC recommended that the Government introduce statutory protections for 'protected confidences' evidence. Subsequently, the department consulted on a measure that would have made this type of evidence inadmissible, except with leave of the court, as part of the exposure draft of the Family Law Amendment Bill 2023. This measure was removed prior to introduction of the Family Law Amendment Bill 2023 due to a number of concerns raised by various family law sector stakeholders, including:

- it did not address the harm caused by people's confidential records being subpoenaed and inspected in pre-trial processes
- it would prevent the court from considering critical information relating to children's safety and best interests by presumptively excluding this evidence, and
- it would lead to these applications being frequent and routine and invite significant further litigation between parties in family law matters, resulting in substantial delays in resolving matters in the best



interests of the child, increasing costs for parties and requiring substantial court resources for implementation.

The revised approach in the Family Law Amendment Bill 2024 engages with these concerns by:

- widening the protection to include documents that are sought to be produced, inspected or copied in pre-trial processes, and
- shifting the approach in where the onus for initiating action lies. The original measure required the person seeking to have the evidence admitted to seek leave of the court, whereas the revised measure requires an application to be made by the person seeking to exclude the evidence. This ensures that important evidence will not be excluded where no application for leave is made.

Other changes from the original drafting that respond to stakeholder feedback include that:

- the primary test for exclusion of the evidence focusses on harm to the individual, rather than public interest considerations in response to feedback that this was a more appropriate test, and to make it easier for litigants to identify and provide relevant evidence, and
- the definition of ‘protected confidence’ has been expanded to explicitly capture confidential communications arising in specialist family and sexual violence services, in addition to health services.

#### **Schedule 4 – General provisions**

Schedule 4 contains other amendments to the Family Law Act, including:

- clarifying the costs orders framework by:
  - incorporating costs provisions from the rules of the Federal Circuit and Family Court of Australia and the Family Court of Western Australia into the Family Law Act, and
  - clarifying that a recipient of assistance under the Family Violence and Cross-Examination of Parties Scheme is not automatically exempt from contributing towards the costs of an ICL.
- establishing a court rule-making power for a Family Court of a State when it exercises federal family law jurisdiction, and
- establishing a power to make regulations to require superannuation trustees to review the actuarial formulas used to value superannuation interests for family law matters.

#### **Costs**

Schedule 4, Part 1 repeals and replaces the costs provisions in the Family Law Act, to provide greater clarity about when and how the court can make costs orders in family law matters. The amendments also clarify the circumstances when parties could be ordered to pay the costs of an ICL in a parenting proceeding.

Two main changes were made following consultation on the exposure draft. Firstly, the amendments relating to costs against lawyers were removed due to concerns raised by stakeholders that the elevation of these rules into the legislation may undermine the lawyer-client relationship. There is also already a provision that sets out duties of lawyers and associated costs implications for breaches in the overarching purpose provision in new section 96, introduced by the Amendment Act.

Secondly, the clarification of who would be automatically exempt from contributing to the costs of an ICL was originally to be achieved by providing a definition of means-tested legal aid, and specifying that parties must be in receipt of means-tested legal aid before an automatic exemption from contributing to the costs of an ICL will apply. Following further consultation, it was determined that this approach created unnecessary complexity and the proposed definition of means-tested legal aid has been removed from the Bill. To address the core policy issue that gave rise to the proposed amendment, a new provision has also been inserted to make clear that recipients of a lawyer under the Family Violence and Cross-examination of Parties Scheme may be ordered to pay for costs of the ICL (unless the financial hardship provision applies).

#### [Court rule making power for Family Court of a State](#)

This amendment will empower a Family Court of a State to make its own rules of court that apply when it exercises federal family law jurisdiction. This will facilitate the efficient administration of family law procedure in Family Courts of a State.

This amendment was inserted into the Bill after the release of the exposure draft, following consultation with the Family Court of Western Australia, which is presently the only Family Court of a State.

#### [Review of approved methods and factors for valuing superannuation interests](#)

This amendment will enable the making of regulations to require superannuation trustees to review and, if needed, update the actuarial formulas used to value superannuation interests for family law property matters. This will ensure courts have access to accurate and reasonable valuations of superannuation interests when determining a just and equitable property division for separated parties.

This measure was included in the Bill following a public consultation process on the exposure draft of the Family Law (Superannuation) Regulations 2024 earlier this year. The exposure draft Regulations are proposed to replace the Family Law (Superannuation) Regulations 2001 which are due to sunset on 1 April 2025. They propose updated 'default' actuarial formulas for valuing certain superannuation interests. However, the exposure draft Regulations cannot update 'approved' actuarial formulas, which are contained within another instrument outside of the regulations, and are used for valuing other prescribed superannuation interests. The amendments proposed in the Family Law Amendment Bill 2024 will ensure the regulations can require that these 'approved' actuarial formulas also be updated.

## **Schedule 5 – Review of amendments**

Schedule 5 provides for a statutory review of the amendments made in Schedules 1 to 4 of the Bill, to ensure they operate effectively and as intended. The review is required to be undertaken as soon as practicable three years from commencement of the amendments made in Division 1 of Part 1 of Schedule 1. The review must be completed within 12 months and a copy of the report tabled in both Houses of Parliament.

This is consistent with the review provisions under the Amendment Act, which provides for a statutory review of the amendments arising from that Act.

This measure was inserted into the Bill following the release of the exposure draft, as suggested by stakeholders.

## **Consultation**

### **Overview**

The department consulted with a wide range of stakeholders throughout the development of the Bill, including a public submissions process on an exposure draft of the Bill, and consultation meetings with key family law sector stakeholders. This included the Federal Circuit and Family Court of Australia, the Family Court of Western Australia, Aboriginal and Torres Strait Islander organisations, former judges, legal practitioners, academics, peak bodies, legal, family relationship service and family safety service providers and advocate groups.

### **Pre-briefings – August to September 2023**

Prior to public release of the exposure draft of the Bill, the department held confidential pre-briefings on the proposed draft legislation with a smaller subset of stakeholders, including Government departments impacted by the proposed amendments, select bodies representing the legal and family relationship services professions, academics, domestic and family violence advocacy groups and others. The purpose of these meetings was to understand whether the proposed draft amendments were likely to operate as intended in practice, and identify any potential unintended consequences or issues of concern.

### **Exposure draft of legislation – September to November 2023**

Public consultation on an exposure draft of the Bill commenced on 18 September 2023 and closed on 10 November 2023. The public were informed of the release of the exposure draft via media release and social media posts. The department's website offered a submissions portal and explanatory information on the Bill, including a summary fact sheet, detailed consultation paper, a public information webinar (live and published recording) and the exposure draft.

The department received 86 responses to the public consultation process, the majority of which comprised formal submissions on the Bill. Where permission was granted to publish, those submissions were published

online. Where necessary, submissions were redacted to avoid breaching Part XIVB of the Family Law Act (restriction on the communication of details of family law proceedings), for privacy considerations, and where there were concerns that the submissions contained copyrighted material and a licence to use the material may not have been sought.

### **Stakeholder consultations – September 2023 to July 2024**

The department conducted approximately 42 stakeholder meetings during and after the public consultation period, to discuss the specific provisions in the Bill. The department also held a public information webinar on the Bill on 5 October 2023. Approximately 930 people have viewed the webinar, either live or via a recording.

Further, the department conducted targeted consultation on the revised protected confidences provisions in July 2024 with seven stakeholder organisations with relevant expertise.

A number of changes were made to the exposure draft based on the feedback received during consultation, as summarised above. A marked-up comparison version of the Bill which shows the changes made between the exposure draft and introduction into Parliament is included at **Attachment B** of this submission.

The department thanks the Committee for the opportunity to make a submission on the Bill.