



Australian Government

Australian Government response to the
Senate Legal and Constitutional Affairs
Legislation Committee report:

Attorney-General's Portfolio Miscellaneous
Measures Bill 2023 [Provisions]

AUGUST 2024

Introduction

The Australian Government welcomes the opportunity to respond to the Senate Legal and Constitutional Affairs Legislation Committee's (the Committee) report, *Attorney-General's Portfolio Miscellaneous Measures Bill 2023 [Provisions]* (the Report), tabled on 1 February 2024. The Government would like to acknowledge the contribution that organisations made in preparing written submissions to the Committee's inquiry.

The *Attorney-General's Portfolio Miscellaneous Measures Act 2024* (the Act) received Royal Assent on 11 June 2024. The Act makes a range of important amendments to update, clarify and improve the intended operation of legislation administered by the Attorney-General's portfolio. The Act:

- confers jurisdiction on the Federal Court of Australia (Federal Court) to hear and determine a range of summary and indictable offences relating to conduct within the responsibility of the Australian Securities and Investments Commission (ASIC) (Schedule 1);
- enables the Sheriff of the Federal Court (Sheriff) to request a State/Territory jury official to prepare and provide a jury panel for use by the Federal Court (Schedule 2);
- makes minor amendments to the *Marriage Act 1961* (Marriage Act) to clarify and improve the operation of the Commonwealth Marriage Celebrants Program and provide greater accessibility for marrying couples (Schedule 3);
- removes an administrative burden on the Federal Circuit and Family Court of Australia in relation to hearing arbitration applications in family law matters (Schedule 4, Part 1);
- repeals section 213A of the *Native Title Act 1993* (Native Title Act) (Schedule 4, Part 2);
- expands the membership of the Parliamentary Joint Committee on Human Rights (PJCHR) (Schedule 4, Part 2A); and
- corrects typographical errors in the *Federal Circuit and Family Court of Australia Act 2021* (FCFCOA Act) and the *Federal Court of Australia Act 1976* (Federal Court Act) (Schedule 4, Part 3).

The amendments to the *Human Rights (Parliamentary Scrutiny) Act 2011* to expand the membership of the PJCHR (Schedule 4, Part 2A) were inserted after the Committee's inquiry.

The Government tabled an Addendum to the Explanatory Memorandum for the Attorney-General's Portfolio Miscellaneous Measures Bill 2023 (Addendum) in the Senate on 16 May 2024 to address Committee recommendations 1–2 and dissenting recommendations 2–4 and 6–7 of Senator Paul Scarr.

The Government's response to the Report is set out below. The response addresses the recommendations of the Committee and the recommendations in Senator Scarr's dissenting report.

Recommendations

Recommendation 1: The committee recommends the Attorney-General's Department update the Explanatory Memorandum to the Attorney-General's Portfolio Miscellaneous Measures Bill 2023 to include further guidance and information to clarify how the proposed reforms to the Federal Court of Australia in Schedule 1 and 2 of the Bill will result in more efficient prosecution of corporate crimes and increased procedural fairness.

The Government **supports** this recommendation.

The Addendum tabled by the Government in the Senate on 16 May 2024 addresses this recommendation and the Committee's associated comments.

Recommendation 2: The committee recommends that, subject to the passage of the Bill, the Attorney-General's Department amend the Guidelines on the Marriage Act 1961 for authorised celebrants to reflect the requirements for a celebrant to hold a separate meeting with each party to the marriage before it is solemnised. The amendments should provide information as to how the meetings might operate in practice and how consent can be determined.

The Government **supports** this recommendation.

The Attorney-General's Department will amend the *Guidelines on the Marriage Act 1961 for authorised celebrants* to reflect the requirements for a celebrant to hold a separate meeting with each party to the marriage before it is solemnised.

There will not be a mandatory approach to the issue of separate meetings. The duration, timing and approach to a separate meeting with each party to a marriage will be at the discretion of the marriage celebrant, having regard to cultural and other relevant considerations. However, the department will work with celebrants and celebrant associations to develop options to support celebrants to comply with this obligation, for inclusion in the Guidelines.

Recommendation 3: The committee recommends the Bill be passed.

The Government **notes** this recommendation.

The Act received Royal Assent on 11 June 2024.

Dissenting recommendations of Senator Paul Scarr

Recommendation 1: It is recommended that the Bill be divided to allow the Senate to consider Part 2 of Schedule 4 (dealing with the Native Title Respondents Scheme) in its own bill separate from Schedules 1 and 3 and Parts 1 and 3 of Schedule 4 in the Bill.

The Government **does not support** this recommendation.

The Government considered that division of the Bill was not be an effective use of the Parliament's time. Scrutiny by this Committee illustrates that the Senate was able to appropriately consider the Bill in its entirety, including Part 2 of Schedule 4. Accordingly, no amendment was made to the relevant provisions.

Recommendation 2: It is recommended that the government considers providing additional commentary in the Explanatory Memorandum regarding the offence categories included in subsection 67G(4) to address the concern of the Law Council.

The Government **notes** this recommendation.

The Addendum tabled by the Government in the Senate on 16 May 2024 addresses this recommendation and Senator Scarr's associated comments.

Recommendation 3: It is recommended the government considers amending the Bill and/or its explanatory materials to include further matters that could guide the court's consideration about whether a transfer of proceedings would be in the interests of justice.

The Government **does not** support this recommendation.

The Addendum tabled by the Government in the Senate on 16 May 2024 states:

The Bill does not define the criteria for assessing the interests of justice. Rather, the court should assess the interests of justice on a case-by-case basis, having regard to the relevant circumstances. In this regard, the Bill is consistent with transfer regimes provided for in other Commonwealth legislation, particularly the [*Jurisdiction of Courts (Cross-Vesting) Act 1987*].

The methodology for assessing the interests of justice, including considerations, has been developed by the common law. This existing methodology would also apply to transfer decisions under the Bill.

Recommendation 4: It is recommended that the accused be provided the right to make an application to transfer proceedings as proposed by the Law Council.

The Government **does not support** this recommendation.

The Addendum tabled by the Government in the Senate on 16 May 2024 states:

Although the Bill does not afford the accused a right to apply for part or all of the proceedings to be transferred, the accused's rights are protected in several ways. The principles of procedural fairness will require the court to provide the accused an opportunity to be heard before any decision to transfer or not transfer is made by the court. Depending on the relevant rules of court, the accused may have a right to make an application requesting the court exercise its powers to transfer proceedings on its own motion. Superior courts, such as the Federal Court, have inherent powers to protect the administration of justice and prevent abuses of power. These powers would ensure that transfers do not occur in circumstances which would unfairly prejudice the accused.

Recommendation 5: It is recommended that if the Bill is passed, the government refers to the CDPP for its consideration of the request of the Law Council that guidance material be developed by relevant federal agencies, and be made publicly available, about when a prosecutor should apply to transfer proceedings.

The Government **notes** this recommendation.

The management of prosecutions for the Australian Government is the responsibility of the Commonwealth Director of Public Prosecutions (CDPP). The CDPP publishes and maintains the *Prosecution Policy of the Commonwealth* and other materials to guide decision-making in the prosecution process. As an independent entity, the appropriateness and development of any guidance relating to whether to transfer proceedings is a matter for the CDPP.

Recommendation 6: It is recommended that the government considers including an enhanced explanation of jury preparation and jury selection processes in the Explanatory Memorandum to the Bill as requested by the Law Council.

The Government **notes** this recommendation.

The Addendum tabled by the Government in the Senate on 16 May 2024 addresses this recommendation and Senator Scarr's associated comments.

Recommendation 7: It is recommended that the government considers including in the Explanatory Memorandum more detailed specification of the criteria to be applied by the Sheriff in utilising the discretionary, hybrid jury preparation procedure proposed in Schedule 2 of the Bill.

The Government **does not support** this recommendation.

The Addendum tabled by the Government in the Senate on 16 May 2024 states:

Subject to certain safeguards ..., the Sheriff will have discretion to determine whether a jury panel is to be prepared by the Sheriff or provided by a State/Territory jury official, on a case-by-case basis. The Sheriff is best placed to determine which of these approaches for preparing a jury panel is appropriate in the circumstances.

Specifying detailed criteria to which the Sheriff must have regard when making their election could impact the efficiency and effectiveness of this measure.

Although the Sheriff will have discretion as to which of these approaches is to be adopted, the Bill provides a number of safeguards. The Sheriff must, in writing to the Chief Executive Officer of the Federal Court, elect whether a jury panel is to be prepared by the Sheriff or provided by a State/Territory jury official, pursuant to new section 23DD of the Federal Court Act. This ensures certainty for the Federal Court in managing the proceedings before it. A request by the Sheriff to a State/Territory jury official to prepare and provide a jury panel may only be made with the consent of the relevant State or Territory. Therefore, a State/Territory jury official will not be required to prepare and provide a jury panel for a particular jury trial unless the relevant State or Territory has consented to do so.

Recommendation 8: It is recommended that the amendments in the Bill in relation to subsection 42(1) of the Marriage Act 1961 relating to identity requirements be passed.

The Government **notes** this recommendation.

The Act, including the amendments in relation to subsection 42(1) of the Marriage Act, received Royal Assent on 11 June 2024.

Recommendation 9: It is recommended that the issues raised by the Celebrant Institute be considered through meetings held by the Attorney-General's Department and the Celebrant Associations and Networks, including at biennial meetings. If the results of such consultation indicate that any further clarifications or improvements should be made to the Marriage Act 1961 to address the concerns raised by the Celebrant Institute in its submission (or in relation to any other matter), then these should be the subject of a further amendment of the Marriage Act 1961 to be introduced into the Parliament as soon as reasonably practicable.

The Government **notes** this recommendation.

Recommendation 10: It is recommended that the issues raised by the Celebrant Institute be considered through meetings held by the AGD and the Celebrant Associations and Networks, including at biennial meetings. If the results of such consultation indicate that any further clarifications or improvements should be made to the Marriage Act 1961 to address the concerns raised by the Celebrant Institute.

The Government **notes** this recommendation.

Recommendation 11: It is recommended that the Bill not be passed if it continues to contain Part 2 of Schedule 4 abolishing the Native Title Respondent Scheme

The Government **does not support** this recommendation.

Abolition of the Native Title Respondents Scheme was an election commitment of the Government.

Consistent with its election commitment, the Government ceased providing this funding in the October 2022 Budget. The repeal of section 213A of the Native Title Act gives full effect to the Government's election commitment.

The Native Title Act has been in place for 30 years. Many legal questions and uncertainties have now been settled by the courts which means that the outcomes of many native title proceedings are more predictable, and in turn less costly. In addition, native title matters are increasingly being resolved through negotiation rather than litigation, which reduces the cost of involvement.

The Native Title Respondents Scheme has been used by a range of entities to fund their involvement in native title matters. With more legal certainty and familiarity with native title now, those entities should be in a position to factor the costs associated with native title matters into their expected business costs.

Accordingly, no amendment was made to the relevant provisions.