Australian Government
Attorney-General's Department

Amendments to the *Family Law Act 1975* to respond to family violence

Public Consultation Paper

December 2016

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Introduction

It is the Australian Government's firm view that family violence and child abuse are unacceptable and require a strong response from Australian governments. This response, from the Australian Government, includes legislative amendments.

Several recent reports and enquiries have considered the need for changes to the *Family Law Act 1975* and the broader family law system. These include the:

- Family Law Council's interim and final reports into *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* (2015 and 2016)
- Victorian Royal Commission into Family Violence (2016)
- Coronial Inquest into the Death of Luke Batty (2015), and
- Women's Legal Service Australia '*Safety First in Family Law*' Plan (2016).

The Government is progressing amendments to the Family Law Act that would improve the family law system's response to family violence. Given the importance of these amendments, the Government is releasing an Exposure Draft of the amendments for public consultation. These amendments form part of the Government's broader package of measures to stop family violence.

This consultation paper describes the proposed purpose and effect of the amendments.

Some of the amendments in this Exposure Draft were included in the *Family Law Amendment (Financial Agreements and Other Measures) Bill 2015*, which was introduced into Parliament on 25 November 2015. That Bill lapsed at the dissolution of parliament on 9 May 2016. Those amendments have been included in this draft to confirm the Government's intention to reintroduce them at the next opportunity.

The Government is committed to ongoing improvements to the family law system and providing the best possible outcomes for families, particularly children. The Government agrees with the Family Law Council's recommendation that Part VII of the Family Law Act (which provides rules for resolving parenting disputes) be comprehensibly reviewed with a view to identifying improvements to support more expeditious decision-making in matters involving at risk children. The Family Law Act's structure and other key provisions must also be considered to ensure that the Act provides a framework that is capable of supporting families into the future.

Making a submission

The Exposure Draft Bill is available at:
<https://www.ag.gov.au/Consultations/Pages/Proposed-amendments-to-the-Family-Law-Act-1975-to-respond-to-family-violence.aspx>

Submissions on the proposed amendments can be emailed to familylawunit@ag.gov.au.

Submissions may also be posted to:

Public consultation: Family violence amendments
Family Law Branch
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

Submissions should be provided by **20 January 2017**. Submissions may be made publicly available. Please indicate if you wish your submission to be confidential. Please note that submissions or comments will generally be subject to freedom of information provisions.

What would the proposed amendments do?

Family law matters to be resolved by state and territory courts as appropriate

Currently, families experiencing violence and conflict are often required to engage with multiple courts to address their legal needs—including state and territory criminal courts, family law courts and children's courts. This can cause confusion and lead to delays in resolving matters, which can give rise to unsafe situations.

Many state and territory courts already exercise family law jurisdiction on a regular basis. The Government proposes to amend the Family Law Act to increase the number of state and territory courts vested with family law jurisdiction, expand the current jurisdiction of state and territory courts for family law property matters, and encourage those courts, in particular the state and territory children's and magistrates courts, to exercise their family law jurisdiction where appropriate. These changes are intended to reduce the need for some families to navigate both the state/territory and federal court systems in order to resolve their disputes.

State and territory courts are not intended to become the primary fora for resolving family law disputes; nor would this amendment necessarily remove the need for parties to shift between systems in all cases, particularly in complex matters. However, where it would be appropriate for a state court to make a family law order to complement other orders they are making (for example, an order in a child protection matter), the amendments will ensure that they have the clear jurisdiction to do so.

The proposed amendments to the Family Law Act would:

- expressly enable state and territory children's courts to be prescribed as courts of summary jurisdiction under the Family Law Act, thereby ensuring that those courts have the capacity to exercise family law jurisdiction. The Government will consult with jurisdictions regarding the prescription of their courts under this provision, and
- enable state and territory courts to hear more family law property matters. The jurisdiction of state and territory courts to determine family law property matters is currently limited to matters where the value of the property is less than or equal to $20,000. The Act would be amended to remove this monetary limit. The limit would instead be prescribed in regulations, at a higher amount, to increase the jurisdiction of these courts and enable them to hear more matters. In matters involving family violence, a single court will be able to resolve disputes about property settlements and parenting arrangements. The limit would also be adjusted over time, through changes to the regulations, as appropriate. The Government will consult with jurisdictions and other family law stakeholders to set an appropriate increased threshold.

State and territory courts would also be encouraged to exercise family law jurisdiction in appropriate cases by a further amendment to the Family Law Act to make it clear that judicial officers can give reasons for their decisions in short form in family law matters. This is intended to support the timely resolution of matters by a single court, and is consistent with the usual practice of these courts.

Together, these amendments to the Family Law Act would reduce delays and better protect families by allowing more cases, particularly cases involving relatively simply family law issues, to be resolved in a single court; and, in cases that are not suitable for full resolution in a single court, allowing timely interim orders pending full consideration of the matter in the Federal Circuit Court of Australia or Family Court of Australia.

The amendment would implement recommendation 15-2 of the Family Law Council's final report on *Families with complex needs and the intersection of the family law and child protection systems*, and (in part) recommendation 131 of the Victorian Family Violence Royal Commission.

Assisting the courts to exercise family law jurisdiction

These changes would be accompanied by non-legislative measures to support state and territory courts to exercise jurisdiction under the Family Law Act.

National Domestic and Family Violence Bench Book

The Government is funding the development of a *National Domestic and Family Violence Bench Book* (Bench Book). The Bench Book is a national online resource for judicial officers aimed at promoting best practice and consistency in judicial decision making in cases involving family violence. The Bench Book provides guidance for judicial officers in all jurisdictions.

Part 1 of the Bench Book was released on 18 August 2016. It provides information about the dynamics of domestic and family violence, guidelines for courtroom management, information about referrals for victims and perpetrators of domestic and family violence, and guidance on the specific matters judicial officers should consider when making decisions in domestic and family violence related cases. It can be accessed at: <http://dfvbenchbook.aija.org.au/contents>

In addition to supporting and assisting judicial officers with decision-making and judgment writing in family law matters, Part 1 of the Bench Book also provides information for service providers and professionals who work with victims and perpetrators of domestic and family violence.

Part 2 of the Bench Book is currently being developed and the Government expects it to be released by June 2017.

Judicial training

The Government has agreed to fund training for judicial officers on family violence and family law which will build on the Bench Book and offer tailored support to judicial officers. One module will provide training on family violence to assist judicial officers when sitting on matters involving family violence. The other module will provide training on family law, which is intended to be particularly useful for state and territory judicial officers who are called upon to make family law decisions (exercising family law jurisdiction). Both training modules will be developed and rolled out in 2017-18.

Strengthening the powers of the courts to protect victims of family violence

The Family Law Act would be amended to give the family law courts stronger powers to protect victims of family violence in family law proceedings. The amendments would create a new criminal offence for breaching a personal protection injunction issued under the Family Law Act, extend the operation of family law orders varied by a state or territory judge, and enhance the ability of the courts to dismiss unmeritorious matters at the earliest opportunity. The Act would also be amended to allow a judge to explain the impact of a family law order in a manner that supports the best interests of the child.

Criminalising breaches of personal protection injunctions

The Family Law Act would be amended to make it a criminal offence to breach a personal protection injunction issued under the Act. This would provide additional protections for victims of family violence and would reinforce that family violence is not a private matter. Family Violence it is a matter of public concern.

Under the Family Law Act, the court can issue injunctions for the personal protection of a person or a child. However, contravention of an injunction is currently a private matter between the parties and can only be enforced if the aggrieved party (victim) brings a civil enforcement action in a family court.

This new offence would remove the need for the victim to be a party to enforcement proceedings—actions taken in respect of criminal offences are brought by the state against the offender. However, civil enforcement action would remain available to the victim as well.

This amendment would implement recommendation 17-4 of the Australian Law Reform Commission's report *Family Violence—A National Legal Response*, and (in part) recommendation 131 of the Victorian Royal Commission into Family Violence.

Strengthening orders issued by state and territory courts

The Family Law Act would be amended to remove the 21 day time limit on a state or territory court's variation of a family law order in interim domestic violence order proceedings. At the moment, if a state or territory court, in hearing an interim domestic violence matter, orders that a family law order be varied, revived or suspended, then that variation, revival or suspension only has effect for 21 days. This can give rise to risk and uncertainty.
For example, in response to matters put before a state or territory court in a family violence proceeding, that court may, to protect the victim, make an order varying an existing family law parenting order which restricts the perpetrator's access to the victim or to his or her children. However, if the victim is unable to have their family law matter heard in the family law courts within the 21 days, the variation to the parenting order would expire. This results in inconsistent family law and family violence orders, and gives rise to risk for the victim and children.

The Family Law Act would be amended to prevent this situation arising in the future. The Act will enable a state and territory court's variation, revival or suspension of a family law order to continue to have effect until:

- the time specified by the court in that order (for example, this may be tied to the making of a final family violence order)
- a further order is made, or
- the interim domestic violence order ceases to be in force.

This amendment would remove the need for the parties to revert to the family law courts within 21 days to continue the family court order variation, made in response to matters relating to family violence. It would also avoid inconsistencies between family law and family violence orders, which can put children and their carers at risk.

Increasing the power of the court to dismiss unmeritorious claims

The Family Law Act would be amended to strengthen the family law courts' powers to summarily dismiss unmeritorious applications. For example, this amendment will enable the courts to dismiss proceedings if it becomes clear that the proceedings are unmeritorious and are being progressed, by a perpetrator, for the purpose of inflicting further family violence and trauma upon the victim. The amended powers would also be more consistent with provisions applying in other courts, and would be a powerful tool to prevent abuse of the family law system by perpetrators. The family law courts are well placed to identify the difference between a litigant in person who is underprepared due to inexperience or trauma, and a litigant whose case should be dismissed as an abuse of process or because it has no prospect of success.

Enabling the court to explain orders in a manner that supports the best interests of the child

The Family Law Act requires judges to explain an order or injunction issued under the Act relating to a person, including how that order or injunction is inconsistent with any existing family violence order relating to the person. The Act is very prescriptive about the matters that the judge must explain.

The Family Law Act would be amended to be more flexible about the manner in which a judge must explain orders and injunctions to a child. The Act would be amended to confer discretion on the family law courts to dispense with the requirement, or adjust their explanation of an order or injunction to a child, if that is in the best interests of the child. This amendment is designed to enable the court to communicate effectively with a child and in a manner that does not re-traumatise them. For example, young children covered by the order or injunction, such as infants and toddlers, are unlikely to be able to grasp the concepts to be conveyed in a detailed explanation.

Other amendments

The Family Law Act would be amended to implement recommendation 17-6 of the Australian Law Reform Commission, in its report *Family Violence—A National Legal Response*, to repeal the now redundant provision in the Family Law Act that allows courts to make an order relieving a party to a marriage from an obligation to

perform marital services or render conjugal rights. The continuing existence of this provision implies that these concepts are still valid in Australian law.

For more detail about each of the proposed amendments, please see notes on clauses beginning at **Appendix 1**.

A draft statement of compatibility with human rights is at **Appendix 2**.

Appendix 1—Notes on clauses

Part 1—Family law matters to be resolved by state and territory courts

Exercise of family law jurisdiction by children's courts (Items 1–5, and 8–9)

Item 1–Subsection 28(2)

1. Item 1 would repeal existing subsection 28(2) and insert a new subsection which would provide that the jurisdiction of the Court in an appeal from either a court of summary jurisdiction, or a court prescribed by regulations for the purposes of section 69GA or subsection 96(7), may be exercised by one Judge or by a Full Court.

2. This amendment reflects the insertion of a new section 69GA by Item 2 and a new subsection 96(7) by Item 8. This would ensure that, for consistency, section 28(2) would apply to courts prescribed in the regulations as courts of summary jurisdiction, in the same way as it applies to other courts of summary jurisdiction.

Item 2—After section 69G

3. Item 2 would insert a new section 69GA into the Family Law Act to enable the Attorney-General to prescribe, by regulation, courts for which Subdivision C of Division 12 of Part VII applies in the same way as the Subdivision applies to a court of summary jurisdiction.

4. The amendment aims to enhance the capacity of the federal family law, and state and territory child protection and family violence systems, to deliver integrated services to families with multiple legal needs, by removing some of the existing Commonwealth legislative barriers to state and territory children's court exercising family law jurisdiction.

5. Decision-making in parenting cases is governed by Part VII of the Family Law Act. This Part empowers the family law courts and, in some circumstances, state and territory courts of summary jurisdiction, to make orders about who a child will live with, how much time the child should spend with other people, and how often and in what ways a child and parent should communicate with one another.

6. Section 69J of the Family Law Act vests state and territory 'courts of summary jurisdiction' with federal jurisdiction to make orders under Part VII of the Family Law Act, including parenting orders. This power is limited to circumstances where the parties consent to the particular orders being sought, or where the parties consent to the court of summary jurisdiction hearing and determining the matter.

7. As the Family Law Council noted in its interim report on *Families with complex needs and in the intersection of the Family Law and Child Protection Systems*:

> …there are a number of potential benefits of enabling state and territory children's courts to exercise jurisdiction under the Family Law Act to make parenting orders in certain circumstances. In particular, there are significant potential benefits for children where the matter is already before the children's court and a parent or kinship carer needs orders for (sole) parental responsibility to support their care of the children. Enabling children's court judicial officers to exercise Family Law Act powers in this situation would mean that the parent or carer could obtain parenting orders in the court with which they are familiar.
>
> Council believes there are circumstances where an interim decision by a children's court would be beneficial for families who need parenting orders when a child protection matter has been finalised and the children's court (and the child protection department) is familiar with the family's circumstances. In Council's view, children's courts should be supported to exercise jurisdiction under the Family Law Act in such circumstances where appropriate (pages 100-101).

8. The *Acts Interpretation Act 1901* defines a court of summary jurisdiction as 'any justice of the peace, or magistrate of a state or territory, sitting as a court of summary jurisdiction'. In Tasmania and the

Northern Territory, child protection matters are heard by magistrates in the Magistrates Court of Tasmania and the Family Matters Court (respectively) where jurisdiction to make parenting orders is available under section 69J of the Family Law Act. However, there is uncertainty about whether this jurisdiction extends to specialist children's courts that are not part of a magistrates' court. The children's courts in some states have also expressed concern about the ability of their heads of jurisdiction to exercise Family Law Act powers pursuant to section 69J where the President of the children's court is a judge of a superior court rather than a magistrate.

9. The Family Law Council recommended that the Family Law Act be amended to remove any doubt that children's courts, no matter how constituted, can make family law orders under Part VII of the Family Law Act in the same circumstances that currently apply to courts of summary jurisdiction.

10. It is not to be taken that, if a state and territory children's court is not prescribed by the regulations, then it is not able to make family law orders under Part VII of the Family Law Act as a court of summary jurisdiction. Rather, it is intended that, in cases where there is doubt about whether a court is a court of summary jurisdiction, that court can be prescribed, in the regulations, to confirm the court's jurisdiction.

Item 3—Application of amendments

11. Item 3 would provide that new section 69GA would apply to decisions made on or after the commencement of Part 1, whether the proceedings in which the decision was made were instituted before, on or after that commencement.

Items 4 and 5—Subsection 69J(1)(note); At the end of the subsection 69N(1)

12. Items 4 and 5 would insert add a note under subsections 69J(1) and 69N(1) to confirm that section 69J and 69N apply to courts prescribed by the regulations for the purposes of new section 69GA, in the same way as the section applies courts of summary jurisdiction.

13. Section 69J sets out various matters relating to the jurisdiction of courts of summary jurisdiction. The current note under subsection 69J(1) would be repealed as it has been rendered redundant as a result of amendments to the *Judiciary Act 1903*. This is because the meaning of this provision is dependent on paragraph 39(2)(d) of the *Judiciary Act 1903,* which was repealed by the *Judiciary Legislation Amendment Act 2006*.

14. Section 69N deals with the transfer of proceedings from courts of summary jurisdiction in certain courts.

15. Together, these notes provide consistency by confirming that the provisions in the Family Law Act relating to courts of summary jurisdiction apply equally to courts prescribed as courts of summary jurisdiction by the regulations for the purposes of new section 69GA.

Item 8—At the end of section 96

16. Item 8 would add a new subsection 96(7) to confirm that the section applies to a court prescribed by the regulations for the purposes of this subsection, in the same way as this section applies to a court of summary jurisdiction.

17. As part of its recommendation regarding clarification of the jurisdiction of state and territory courts (Recommendation 1 of the interim report into *Families with complex needs and the intersection of the family law and child support systems*), the Family Law Council also recommended that the Government consider the appropriate process of appeal from family law decisions made by state and territory courts. Section 96 of the Family Law Act sets out the procedure for appeals from courts of summary jurisdiction. In particular, subsection 96(1) provides that an appeal lies from a decree of a court of summary jurisdiction of a state and territory exercising jurisdiction under the Family Law Act to the Family Court or to the Supreme Court of that state or territory.

18. Item 8 would confirm that section 96 applies to the courts prescribed by regulation in new section 69GA.

Item 9—Application of amendments

19. Item 9 would provide that new subsection 96(7) would apply to decisions made on or after the commencement of Part 1, whether the proceedings in which the decision was made were instituted before, on or after that commencement.

Short form judgments (Items 6–7)

Item 6—At the end of Division 12 of Part VII

20. Item 6 would insert a new section 69ZL into the Family Law Act to provide that a court may give reasons in short form for a decision it makes in relation to an interim parenting order.

21. In its interim report on *Families with complex needs and the intersection of the family law and child protection systems,* the Family Law Council identified a practical barrier to state children's or magistrates courts exercising family law jurisdiction. Council noted that writing detailed judgments is not the usual practice of these courts and recommended that the Family Law Act be amended to enable judicial officers to deliver 'short form' judgments in interim proceedings.

22. Council noted in its report:

> …it is not the practice of state and territory children's courts to provide written judgments in all matters. Where a written judgment is supplied, it is usually less detailed than are judgments of the family law courts in interim matters. Allowing children's courts and magistrates courts to provide family law interim decisions in short form will support an efficient use of a judicial officer's time and help to ensure that family law work does not lead to hearing delays in these courts (page 103).

23. Currently, courts may give reasons for any decision in short form, as long as the reasons provided for the decision are adequate (as required by the implied guarantee of procedural due process in the exercise of judicial power). The amendment does not purport to give courts any additional power. Rather, it is intended to encourage judicial officers in state and territory courts to consider giving short form judgments, where appropriate.

24. The statement is not intended to, and should not, limit the court's existing powers in any way. For example, it should not be implied that the court cannot deliver short form judgments in final proceedings or in proceedings under other Parts of the Act.

25. The Family Law Act already makes provision for short form judgments in relation to certain appeals: subsections 94(2A) and 94AAA(7) provide that in dismissing an appeal from another court, the Full Court of the Family Court and the Family Court, respectively, may give reasons in short form.

Item 7—Application of amendments

26. Item 7 would provide that new section 69ZL would apply to decisions made on or after commencement of Part 1, whether the proceedings in which the decision was made were instituted before, on, or after that commencement. As noted above, since courts can already provide reasons in short form, this application provision is not strictly necessary. Rather, it is intended to prevent any retrospective application of new section 69ZL.

Property jurisdiction of state and territory courts (Items 10–11)

Item 10—Subsection 46(1)

27. Item 10 would omit '$20,000' from subsection 46(1) and substitute 'the amount prescribed by the regulations'.

28. Section 69J vests each court of summary jurisdiction in each state and territory with federal jurisdiction to determine matters under Part VII of the Family Law Act.

29. Subsection 46(1) provides that if proceedings in relation to property of a total value exceeding $20,000 are instituted in, or transferred to, a court of summary jurisdiction, and the respondent seeks an order different from that sought in the initiating application then, unless each of the parties consents to the court hearing and determining the proceedings, the court must transfer the proceedings to one of the family law courts or to the relevant state or territory Supreme Court.

30. The limit of $20,000 has not been updated since 1988.

31. Item 10 would amend section 46 to remove the $20,000 monetary limit and provide for the limit to be prescribed by regulations. The amendment would commence upon proclamation to allow time for the limit to be prescribed. This amendment would allow the monetary limit to be increased to a more appropriate amount, and to be updated in the future as necessary.

32. Many families have to engage with more than one court to address their legal needs. By increasing the jurisdictional limit, magistrates in state and territory courts would be able to deal with more property matters. This amendment is intended to encourage magistrates to exercise their Family Law Act powers to determine property claims that fall within the limit prescribed by the regulation. This would reduce the number of parties required to navigate both the state and federal court systems to resolve their disputes.

33. The amendment would partially implement recommendation 15-2 of the Family Law Council in its final report on *Families with complex needs and in the intersection of the Family Law and Child Protection Systems*, and (in part) recommendation 131 of the Victorian Royal Commission into Family Violence.

34. The new monetary limit will be settled in consultation with the states and territories, and other stakeholders.

Item 11—Application of amendments

35. Item 11 specifies that the amendment to subsection 46(1) by item 10 would apply to proceedings instituted after this item commences. The amendment would commence upon proclamation or within six months, whichever occurs first.

Part 2—Strengthening the powers of the courts to protect victims of family violence

Summary dismissal (Items 12–13, 21 and 24)

Item 12—After section 45

36. Item 12 would insert a new section 45A into the Family Law Act to clarify and modernise the powers of courts exercising jurisdiction under the Family Law Act to summarily dismiss unmeritorious applications, and to make clear the legislative and jurisdictional foundations of the court's power to summarily dismiss applications without merit. It is not intended to change the matters that a court must be satisfied of when determining that a proceeding or defence should be dismissed. It would replace existing section 118 (which would repealed), which enables the court to dismiss proceedings, and make such costs orders as the court considers just, if satisfied that the proceedings are frivolous or vexatious.

37. This amendment is intended to improve outcomes for victims of family violence by clarifying the court's powers to dismiss proceedings where people are using the legal system as a tool of victimisation. As noted in the *National Domestic and Family Violence Bench Book*:

> Research has…recognised that a party to proceedings in domestic and family violence related cases may use a range of litigation tactics to gain an advantage over or to harass, intimidate, discredit or otherwise control the other party. These tactics may be referred to in legislation and other bench books and by judicial officers as malicious, frivolous, vexatious, querulous, or an abuse of process. (<http://dfvbenchbook.aija.org.au/understanding-domestic-and-family-violence/systems-abuse/>)

38. An explicit power to dismiss unmeritorious applications or arguments brought to harass a party would allow courts to prevent the use of their courtrooms as a way for perpetrators of family violence to inflict further abuse on victims. The new power would complement existing powers to manage proceedings, conferred on courts by Division 12A of Part VII of the Family Law Act (which provides principles for conducting child-related proceedings).

39. Concerns were raised by Women's Legal Services Queensland and the Australian Women Against Violence Alliance during the Senate Legal and Constitutional Affairs Committee's consideration of the Family Law Amendment (Financial Agreements and Other Measures) Bill 2015. These organisations submitted that the new provisions could be misused by the more powerful party, and litigants in person may make mistakes which make their cases appear unmeritorious. The court has strict parameters around when an application may be dismissed. The court may only dismiss an application if it is satisfied that the application has no prospect of success, is clearly vexatious or frivolous, or is clearly an abuse of process.

40. There is a high rate of litigants in person in the family law system, and the family law courts have significant experience in working with litigants with limited legal backgrounds. The courts are well placed to identify the difference between a litigant in person who is underprepared due to inexperience or trauma, and a litigant whose case should be dismissed as an abuse of process or because it has no prospect of success.

41. New section 45A is substantially similar to the powers the Family Court currently exercises under Part 10.3 of the *Family Law Rules 2004*. The power in new section 45A to dismiss proceedings that have no reasonable prospect of success would also be substantially similar to the powers of the Federal Court of Australia and the Federal Circuit Court in relation to summary judgement. Section 45A would differ from these powers by expressly conferring power to dismiss proceedings that are frivolous, vexatious or an abuse of process. The explicit power to dismiss frivolous or vexatious proceedings reflects the existing dismissal power in section 118.

42. New subsections 45A(1) and (2) would allow the court to make a summary decree in favour of one party, in relation to the whole or part of a proceeding, if satisfied that a party has no reasonable prospect of successfully:

- prosecuting the proceedings or part of the proceedings, or
- defending the proceedings or part of the proceedings.

43. New subsection 45A(3) would provide that, for the purposes of section 45A, in determining 'no reasonable prospect of success', proceedings need not be hopeless or bound to fail.

44. New subsection 45A(4) would also empower the court to dismiss all or part of the proceedings if they are frivolous, vexatious or an abuse of process.

45. New subsections 45A(5)–(7) would provide that:

- the court may make costs orders as it sees fit
- the court may take such action of its own volition, or on the application of a party to the proceedings, and
- the new section does not limit any powers that the court has apart from this section.

46. The reference to 'court' in this provision has the meaning given by subsection 4(1) of the Family Law Act which provides that, in relation to any proceedings, court means the court exercising jurisdiction in those proceedings by virtue of the Act. This means that the power of dismissal provided by section 45A would be available to any court exercising jurisdiction under the Family Law Act.

47. For consistency with other provisions of the Family Law Act, the new section 45 would refer to making a decree, rather than giving judgment as in section 17A of the *Federal Circuit Court of Australia Act 1999* and section 31A of the *Federal Court of Australia Act 1976.* This is not intended to reflect any difference in policy between these provisions.

Item 13—Application

48. Item 13 would provide that the amendment made by item 12 would apply to all proceedings in the family law courts whether instituted before, on, or after the commencement of Part 2 of the amendments.

Item 21—Section 102QA (note)

49. Item 21 would repeal the existing note and substitute a new note to reflect the replacement of existing section 118 by new section 45A.

Item 24—Subsection 117(1)

50. Item 24 would insert a reference to subsection 45A(5) to reflect the insertion of a new subsection 45A by item 12.

Criminalisation of breaches of injunctions (Items 15–16 and 22–23)

Items 15 and 22—Section 68C; Section 114A

51. Items 15 and 22 would provide that a breach of an injunction for personal protection, granted under section 68B or paragraph 114(1)(a) of the *Family Law Act 1975*, is a criminal offence.

Injunctions under the Family Law Act

52. Section 68B of the Family Law Act permits a court to grant an injunction to protect the welfare of a child. The injunction may be:

- for the personal protection of the child, the child's parent, a person with a parenting order in respect of the child, a person with whom a child is to live, spend time or communicate under a parenting order, or a person who has parental responsibility for the child, or
- to restrain a person from entering or remaining in the place of residence, employment or education or other specified area of the child, the child's parent, a person to whom a parenting order relates in respect of the child, or a person who has parental responsibility for the child.

53. Section 114 of the Family Law Act permits a court to grant an injunction in circumstances arising out of the marital relationship, where the court considers it proper. An injunction may be granted:

- for the personal protection of a party to the marriage
- to restrain a party to the marriage from entering or remaining in the matrimonial home or the other party's residence, or a specified area where those places are situated
- to restrain a party to the marriage from entering the place of work of the other party
- for the protection of the marital relationship
- in relation to the property of a party to the marriage, or
- in relation to the use or occupancy of the matrimonial home.

Breaches of injunctions—as currently provided in the Family Law Act

54. If a police officer believes, on reasonable grounds, that an injunction for personal protection has been breached, existing sections 68C and 114AA of the Family Law Act give state, territory and federal police officers the power to arrest the respondent without a warrant.

55. Once arrested, the police must bring the person before a family court by the close of business on the day following the arrest, or the first day after a weekend or public holiday. The effect of the injunction is that once at court, the protected person can make an application to seek contravention of the injunction. This requires the aggrieved party (the victim) to bring a private (civil) action against the offender for breaching the injunction. If they do not, the person who is the subject of the injunction will be released and there will be no further consequences flowing from the breach.

Breaches of injunctions—after commencement of amendments

56. The Australian Law Reform Commission (recommendation 17-4 in its report *Family Violence—A National Legal Response*) and the Victorian Royal Commission into Family Violence (recommendation 131 (in part)) both recommended amending the Family Law Act to provide that a breach of an injunction for personal protection, including an injunction restraining a person from entering or remaining in certain places, is a criminal offence.

57. This amendment would enable the family law courts to provide additional protection for victims of family violence. It would remove the onus on the victim of family violence to bring the application for contravention of the injunction. The State enforces the criminal law. Actions brought in respect of a criminal offence are brought as a prosecution, by the State (these are not civil disputes). By criminalising this conduct, the amendment will reinforce that family violence is not a private matter. It is a matter of public concern.

58. It would also enable state police to enforce the injunctions. Although police are currently empowered to arrest individuals who breach orders, without criminalisation of this conduct, breaches of these injunctions remain a civil matter, only enforceable by the aggrieved party returning to court. This delay can lead to perpetuation of abuse, and the lack of immediate consequences could lead to an escalation of conflict.

59. Making a breach of these orders a criminal offence would, by effectively providing the family law courts with an enforceable restraining order, reduce the number of courts that a person subject to violence is required to interact with.

60. Breaches of injunctions made under section 68B and 114 would also remain enforceable as civil matters, should criminal enforcement action not be undertaken for a particular reason (for example, if the victim did not report the breach to law enforcement authorities).

Elements of the offence

61. The Bill would make it a criminal offence for a respondent to breach an injunction made under section 68B that is expressed to be for the personal protection of another person. The offence would not apply in respect of injunctions made under paragraphs 68B(1)(c)–(d), for a purpose other than the purpose of personal protection.

62. The Bill would also make it a criminal offence to breach an injunction for personal protection made under paragraph 114(1)(a).

63. To constitute an offence:

- there must be an injunction in force under section 68B that is expressed to be for the personal protection of another person or under paragraph 114(1)(a)
- the injunction must be directed against the respondent
- the respondent must engage in conduct, and
- the conduct must breach the injunction.

64. The default fault elements set out in Division 5 of Chapter 2 of the Criminal Code would apply to the new offences.

- In relation to the physical element of the respondent engaging in conduct (new paragraphs 68C(1)(c) and 114AA(1)(c)), the fault element is intention: subsection 5.6(1) of the Criminal Code.
- In relation to the physical element of the circumstance or result of the conduct breaching the injunction (new paragraphs 68C(1)(d) and 114AA(1)(d)), the fault element is recklessness: subsection 5.6(2) of the Criminal Code. Under subsection 5.4(4) of the Criminal Code, recklessness can be established by proving intention, knowledge or recklessness.

Penalty

65. The maximum penalty for this offence would be imprisonment for a period of up to 2 years or 120 penalty units, or both. The penalty for imprisonment is comparable to the length of imprisonment for breaches of family violence orders in the states and territories, under state and territory law. The financial penalty of 120 penalty units adopts the standard fine/imprisonment ratio of 5 penalty units to 1 month of imprisonment set out in the *Commonwealth Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

Defences

66. The defences available in respect of this offence are the default defences prescribed in the Criminal Code. However, the generally applicable provision relating to lack of criminal responsibility for intoxication in subsections 8.2(3)-(4) and 8.4(1) of Part 2.3 of the Criminal Code would not apply to this offence. This means that evidence of self-induced intoxication cannot be considered in determining whether the conduct was accidental, or a person had a mistaken belief about the facts. The defence of intoxication would still be available where the intoxication was not self-induced.

67. The consumption of alcohol is a significant contributing factor in incidents of intimate partner homicide and incidents of non-fatal family violence (Australian Institute of Criminology, 2009) and should not be available to be used as a defence against charges relating to family violence.

Powers to arrest

68. Breaches of injunctions made under section 68B and 114 would remain enforceable as civil matters. However, the primary mode of immediate enforcement of breaches would be criminal enforcement.

69. The power for police to arrest respondents under the new offences would be contained in the general provisions of the *Crimes Act 1914*. In particular, Division 4 of the Crimes Act sets out the law relating to arrests. Section 3W of the Crimes Act gives police officers the power to arrest a person, with or without a warrant, for an offence if the officer believes on reasonable grounds that the person has committed or is committing an offence, and proceeding by summons against the person would not achieve one of the purposes set out in the section.

70. Section 23 of the Crimes Act provides that a person arrested for Commonwealth offences must be released within the investigation period, or, if they are not released, they must be brought before a judicial officer within the investigation period, or as soon as practicable at the end of that period.

71. Given that these provisions of the Crimes Act would apply to the new offences, and police officers would arrest pursuant to the powers set out in that Act, the Bill would repeal the existing powers of arrest provisions for sections 68B and 114 (set out in sections 114AA and 68C) because they are no longer required.

Items 16 and 23—Application of amendments

72. Items 16 and 23 would provide that offences created by new section 68C and new section 114A would only apply to conduct engaged in after the commencement of Part 2. This is so, whether or not the injunction was made before or after the commencement of the amendment.

Dispensing with explanations regarding orders or injunctions to children (Items 14 and 17)

Item 17—After subsection 68P(2)

73. Existing subsection 68P sets out the obligations of a court when making an order, or granting an injunction under the Act, that is inconsistent with an existing family violence order.

74. Existing subparagraph 68P(2)(c)(iii) requires the court, to the extent to which the order or injunction provides for the child to spend time with a person, or expressly or impliedly requires or authorises a person to spend time with a child, to explain the order or injunction to the person protected by the family violence order (if that person is not the applicant or respondent). In some circumstances, the person protected by the family violence order may be a child.

75. Existing paragraph 68P(2)(d) sets out the matters that the court must include in the explanation.

76. In practice, it can be difficult for the court to comply with the requirements of subparagraph 68P(2)(c)(iii) and paragraph 68P(2)(d) where the person protected is (or includes) a child. For instance, young children covered

by the order or injunction, such as infants and toddlers, are unlikely to grasp the concepts conveyed in the court's explanations. For older children, it may not be in their best interest to be exposed to the parental controversy to the extent necessary to fully comply with the requirements.

77. To address this, Item 17 would insert new subsections (2A), (2B) and (2C) into section 68P. New subsection 68P(2A) would specify that the court is not required to provide the explanation required by subparagraph 68P(2)(c)(iii) to a child if the court is satisfied that:

- the child is too young to understand an explanation of the order or injunction, or
- it is in the child's best interests not to receive an explanation of the order or injunction.

78. Similarly, new subsection 68P(2B) would specify that the court is not required to include a particular matter otherwise required to be explained by paragraph (2)(d) if the court is satisfied that:

- the child is too young to understand the matter, or
- it is in the child's best interest for the matter not to be included in the explanation.

79. New subsection 68P(2C) would provide that in determining whether it is satisfied as to the matters listed above, the court may have regard to all or any of the matters set out in subsections 60CC(2) or (3), which provide detailed considerations to be taken into account in determining the best interests of the child. However, the court is not required to consider each of these matters. To require this would be unnecessary given the relatively confined scope of the decision required of the court.

Item 14—At the end of subsection 60CC(1)

80. Item 14 would add a note to the end of existing subsection 60CC(1). Section 60CC specifies how a court must determine what is in a child's best interests. The note would alert the reader that section 68P (which would be amended by item 17), limits the effect of section 60CC on a court making decisions under the section about whether to limit, or not provide, an explanation to a child about an order or injunction that is inconsistent with a family violence order.

Removal of 21 day time limit on state or territory courts' power to vary, discharge or suspend an order (Items 18–20)

Item 18—Subsection 68T(1)

81. Item 18 would omit the word 'earlier' and substitute 'earliest' to reflect the greater number of paragraphs in subsection 68T(1) after the amendment that would be made by Item 19.

Item 19—Paragraph 68T(1)(b)

82. Existing section 68R of the Act provides that a state or territory court making a family violence order may revive, vary, discharge or suspend a parenting order, recovery order, injunction or other arrangement (together, 'Order') to the extent to which the Order provides for a child to spend time with a person. Existing subsection 68R(4) restricts the court's power, in relation to interim family violence orders, to reviving, varying or suspending an Order.

83. Existing section 68T places a strict 21 day time limit on the operation of a state or territory court's revival, variation or suspension of an Order under section 68R, where that revival, variation or suspension occurs in the context of proceedings to make an interim family violence order or an interim variation of a family violence order.

84. The existing strict 21 day time limit can result in inconsistent orders about parent-child contact. For example, if a party is unable to have their parenting matter heard in the family law courts within 21 days, the

parenting order that was varied or suspended by the state or territory court is revived. This can result in two valid, yet inconsistent, orders—an interim family violence order prohibiting or limiting the other party's contact with a child, and a parenting order providing for the party's contact with the child. This outcome has the potential to put children and their carers at risk of further family violence.

85. A number of reports have recommended that this issue be addressed, including the Family Law Council's interim report on *Families with complex needs and in the intersection of the Family Law and Child Protection Systems*, the report of the Coronial inquest into the death of Luke Batty, and the Victorian Family Violence Royal Commission.

86. To address these issues, Item 19 would remove the 21 day time limit and instead provide that the court's revival, variation or suspension under section 68R ceases to have effect at the earliest of:

- the time the interim family violence order stops being in force
- the time specified in the interim order as the time at which the revival, variation or suspension ceases to have effect, and
- the time that the order, injunction or arrangement is affected by an order made by a court, under section 68R or otherwise, after the revival, variation or suspension.

87. This would mean that any revival, variation or suspension of an Order would always cease upon the expiration of the interim protection order, but judicial officers would have the flexibility to determine timeframes and relist matters to manage cases according to their particular circumstances.

88. The use of the term 'affected' in new paragraph 68T(1)(c) is intended to include orders made by a court that directly impact on the Order or interim family violence order. The paragraph is not intended to include orders, injunctions or arrangements involving the parties that do not have direct relevance to the Order or interim family violence order.

89. The amendment would not affect existing subsection 68T(2), which provides that parties cannot appeal orders for the revival, variation or suspension of an Order. Section 68T applies in relation to proceedings for interim family violence orders or interim variations of family violence orders. Therefore, if a respondent is unhappy with the terms of an Order, he or she may challenge it at the next, or a later, hearing of the proceeding. The respondent may also challenge the interim protection order itself.

Item 20—Application

90. Item 20 would provide that the amendments to section 68T only apply to revivals, variations and suspensions made under section 68R on or after the commencement.

Part 3—Other Amendments

Repeal obligation to perform marital services (Item 15)

Item 25 —Subsection 114(2)

91. Existing subsection 114(2) of the Act permits the court to make an order relieving a party to a marriage from any obligation to perform marital services or render conjugal rights.

92. Item 25 would repeal this subsection.

93. Existing subsection 114(2) implies that there is a continuing obligation to render conjugal rights or perform marital services. This does not reflect current law, and is repugnant to modern principles of autonomy and equality within relationships.

94. The amendment would implement the Australia Law Reform Commission's recommendation 17-6 in its report *Family Violence—A National Legal Response*.

Appendix 2—Human Rights compatibility

Draft Statement of Compatibility with Human Rights

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

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 would make amendments to the *Family Law Act 1975* to improve the family law system's response to family violence.

3. In particular the Bill would amend the Family Law Act to:

- remove any doubt that state and territory children's courts can, no matter how they are constituted, make family law orders under Part VII of the Family Law Act, in the same circumstances currently applicable to state and territory courts of summary jurisdiction. It does so by inserting a power to prescribe by regulation courts which are to be treated like courts of summary jurisdiction, and clarifying the appeal pathway from parenting order decisions of these courts
- allow regulations to set the monetary limit on the jurisdiction of state and territory courts to resolve family law property disputes
- encourage judicial officers to deliver 'short form' judgments in interim proceedings
- remove the strict time limit of 21 days on the variation or suspension of parenting orders by state and territory magistrates in family violence protection order proceedings
- provide that a breach of an injunction for personal protection, including such an injunction restraining a person from entering or remaining in certain places, is a criminal offence
- give clearer power to the family law courts to dismiss applications which clearly have no merit
- allow the family law courts discretion to dispense with requirements to explain an order or injunction that is inconsistent with an existing family violence order to a child protected by the family violence order. The courts would able to dispense with these requirements where doing so is in the best interests of the child or where the child is too young to understand the explanation, and
- repeal the redundant provision that allows the court to make an order relieving a party to a marriage from an obligation to perform marital services or render conjugal rights.

Human rights implications

4. This Bill engages the following rights:

- Protection from exploitation, violence and abuse: in relation to children: Article 19(1) of the *Convention on the Rights of the Child* (CRC); Article 24(1) of the *International Covenant on Civil and Political Rights* (ICCPR)
- Eradication of discrimination against women: Articles 2 and 3 of the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW)
- Best interests of the child: Article 3(1) of the CRC, and
- Prohibition on retrospective criminal laws: Article 15 of the ICCPR

<u>Protection from exploitation, violence and abuse: Article 19(1) of CRC, and Article 24(1) of the ICCPR; and Eradication of discrimination against women: Articles 2 and 3 of CEDAW</u>

5. The Bill promotes women and children's right to protection from exploitation, violence and abuse as contained in Article 24(1) of the ICCPR and Article 19(1) of the CRC.

6. Article 24(1) of the ICCPR provides for protection of the child as required by his/her status as a minor. Article 19(1) of the CRC requires States to 'take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent

treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person'.

7. The Bill also promotes the elimination of discrimination against women required by CEDAW. CEDAW provides for key principles of equality which broadly cover many aspects of women's lives, including political participation, health, education, employment, marriage, family relations and equality before the law.

8. In particular:

- Article 2 urges parties to CEDAW to work towards eradicating discrimination against women, including by introducing new laws or policies, changing existing discriminatory laws and providing sanctions for discrimination where appropriate, and
- Article 3 requires parties to promote actively women's full development and advancement, so they can enjoy human rights and fundamental freedoms on the same basis as men.

9. 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 both men and women, and the Family Law Act is accordingly gender-neutral, the majority of those who experience family violence are women.

10. The following measures in the Bill promote Article 19(1) of CRC, Article 24(1) of the ICCPR, and Articles 2 and 3 of CEDAW.

Removal of 21 day time limit for variation, suspension or discharge of orders

11. The Bill would make amendments to protect women and children from family violence. The key change is to sections 68R and 68T of the Family Law Act, which provide that a state and territory court making an interim family violence order may revive, suspend, vary or discharge a parenting (or other) order to the extent to which that order provides for a child to spend time with a person. This power is designed to protect children by removing any inconsistency between family violence orders and other orders. However, there is currently a strict 21 day time limit on the court's power to revive vary, suspend or discharge orders. The Bill would strengthen the court's ability to protect children from violence by removing this 21 day time limit and instead allowing judicial officers to set timeframes according to the particular circumstances of the case.

Criminalisation of breaches of injunctions

12. The Bill would criminalise breaches of an injunction under section 68B and 114 of the Family Law Act. Where a person, including a child, is experiencing family violence, sections 68B and 114 of the Family Law Act permit a court exercising federal family law jurisdiction to grant an injunction for personal protection. The court may grant such injunctions in circumstances arising out of the marital relationship, or for the personal protection of a child, a parent, a person who is to spend time with, communicate with a child, with whom the child is to live under a parenting order, or a person who has parental responsibility for the child.

13. The amendment would remove the onus on the victim of family violence to bring the application for contravention of the injunction and reinforce that family violence is not a private matter, but may involve commission of a criminal offence and is therefore a matter of public concern.

14. Making this amendment would enable the family law courts to provide additional protection for victims of family violence and promote legal protection from exploitation, violence and abuse.

Repeal of subsection implying an obligation to perform marital services

15. The Bill would also repeal a subsection that implies that there is a continuing obligation to render conjugal rights or perform marital services. This does not reflect current law, and is repugnant to modern principles of autonomy and equality within relationships.

16. These measures promote the right to protection from exploitation, violence and abuse for children, and promote the eradication of gender-based violence by increasing protection against violence for women.

Best interests of the child: Article 3(1) of the CRC

17. 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.

18. At present, the Act requires the court to explain orders or injunctions that are inconsistent with an existing family violence order to children, irrespective of their best interests.

19. The Bill supports the best interests of the child as a primary consideration by removing the requirement for the court to explain orders or injunctions that are inconsistent with an existing family violence order to a child where:

- it would not be in the child's best interest, or
- the child would be too young to understand the explanation.

20. In most cases, it will be in a child's best interests to understand the application of court orders to their family. However, this may not always be the case. In particular, it may not be in the child's interest in all cases to be exposed to the parental controversy to the extent necessary for courts to comply with this section. The Bill would provide an appropriate discretion for courts to dispense with this requirement if that is in the child's best interest.

Prohibition on retrospective criminal laws: Article 15 of the ICCPR

21. Article 15 of the ICCPR prohibits retrospective criminal laws.

22. The Bill would criminalise breaches of an injunction under section 68B and 114 of the Family Law Act.

23. The amendment would apply to breaches that take place after commencement of the amendment, whether or not the injunction was in force before or after commencement of the amendment. The amendment would not constitute a retrospective criminal law, as the amendment would apply only to action constituting a breach that takes place after the commencement of the amendment. That is, it is not an offence for acts done before commencement.

Conclusion

24. The Bill is compatible with human rights because it promotes the protection of human rights.