



# Family law changes from May 2024

## Factsheet for family law professionals

### Overview

The *Family Law Amendment Act 2023* (Cth) (the Amendment Act) contains a number of changes that will affect family law professionals and users of the family law system. These changes include significant amendments to the framework for making parenting orders, and new obligations in legislation for Independent Children's Lawyers.

The Amendment Act received Royal Assent on 6 November 2023, and most measures will commence after six months (on 6 May 2024). Professionals in the family law system should be aware that many significant changes will apply to all new and existing matters from the commencement date, except where a final hearing has commenced.

This factsheet contains an overview of each schedule of the Amendment Act, including information on when specific changes will commence and how they will apply. It contains general information only and does not constitute legal advice.

### More information

The Amendment Act can be downloaded from the [Federal Register of Legislation](#) and the accompanying explanatory materials are available from the [Australian Parliament House](#) webpage.

A simple overview of the Amendment Act for people seeking parenting orders can be found in the [Factsheet for Parents and Parties](#).

### Schedule 1: Parenting framework

#### Amended section 60B – Objects of Part VII

Section 60B of the *Family Law Act 1975* (Cth) (the Family Law Act) has been simplified and now provides that the objects of Part VII (Children) are to:

- ensure that the best interests of children are met, including by ensuring their safety, and
- give effect to the Convention on the Rights of the Child (CRC).

#### Amended Section 60CC – Best interests of the child

Existing section 60CA of the Family Law Act makes it clear that, when deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.

The Amendment Act sets out a new list of factors that a court must consider when determining the best interests of a child.

#### General considerations

The new list of factors is located at subsection 60CC(2), and reflects the core list of six factors recommended by the Australian Law Reform Commission in its 2019 report on the family law system. This list is non-hierarchical, and there is no longer a distinction between 'primary' and 'additional' considerations. The removal of the hierarchy provides the court discretion to consider the unique circumstances in each parenting matter in a way that places the best interests of a child at the forefront of decision-making.

When determining the parenting arrangement in the best interest of the child, the court must now consider the factors in 60CC(2):

- a) what arrangements would promote the safety (including safety from family violence, abuse, neglect, or other harm) of the child; and each person who has care of the child (whether or not a person has parental responsibility for the child)
- b) any views expressed by the child
- c) the developmental, psychological, emotional and cultural needs of the child





- d) the capacity of each person who has or is proposed to have parental responsibility for the child to provide for the child's developmental, psychological, emotional and cultural needs
- e) the benefit to the child of being able to have a relationship with the child's parents, and other people who are significant to the child, where it is safe to do so, and
- f) anything else that is relevant to the particular circumstances of the child.

In addition, new subsection 60CC(2A) highlights the relevance of family violence orders and past family violence, abuse and neglect in determining future parenting arrangements.

### Best Interests of Aboriginal or Torres Strait Islander Children

Subsection 60CC(3) of the Amendment Act provides a standalone 'best interest' factor requiring a court to consider the right of Aboriginal or Torres Strait Islander children to enjoy their culture, as well as the support they will receive to connect to that culture. This operates in addition to the general considerations at subsection 60CC(2).

### Parental responsibility

The Amendment Act does not change the current position in the Family Law Act that separated parents retain parental responsibility, which can be exercised jointly or separately, unless this is varied by a court order (section 61C).

### Repeal of the presumption of equal shared parental responsibility

The presumption of equal shared parental responsibility (the presumption), contained in previous section 61DA, has been repealed. The presumption related to the joint making of major long-term decisions, but was commonly misunderstood to create a right to equal time arrangements.

The removal of the presumption means the court no longer has to presume it is in the best interests of the child for the child's parents to be required to make joint decisions in relation to major long-term issues (such as education, religious and cultural upbringing, health, name and significant changes to living arrangements), unless the presumption is rebutted.

The changes clarify that decisions about parental responsibility should be based on what is in the best interests of the child, and the particular circumstances of the case.

### Removal of mandatory consideration of certain time arrangements

Section 65DAA has been removed. This provision required courts to consider making an order that the child spend equal time, or substantial and significant time, with each parent, if an order for equal shared parental responsibility was made.

It remains open to the court to consider equal time arrangements, or arrangements that give substantial or significant time with each parent, in accordance with the child's best interests.

### New guidance on joint decision-making

In light of the removal of the presumption, the Amendment Act provides further guidance to parents on consultation on major long-term issues, and the court's powers to make orders that deal with the allocation of responsibility for making decisions about these issues.

- **New section 61CA** provides that unless there are court orders stating otherwise, and if it is safe to do so, parents are encouraged to consult each other about major long-term issues in relation to the child, having regard to the best interests of the child as the paramount consideration. This section is not enforceable, but acts as a signal to parents as to what to do about these major decisions if there are no court orders.
- **New subsection 61D(3)** (alongside existing subsection 64B(3)) makes it clear that courts will still make orders relating to the allocation of parental responsibility, and adopts the terminology of 'joint decision making on major long-term issues'.
- **New section 61DAA** sets out the effect of an order that provides for joint decision-making on major long-term issues; which is that parties are required to consult with each other and make a genuine effort to come to a joint decision.

### Changes to advisers' obligations

The schedule also contains amendments to advisers' obligations in sections 60D and 63DA. These sections outline the obligations on advisers when working with parents to reach parenting arrangements for their children. 'Advisers' is defined as legal practitioners, family counsellors, family dispute resolution practitioners or family consultants.

Section 60D stated that these advisers must advise their clients of the paramountcy of the best interests of the child, including the two primary considerations in





existing 60CC. With the amendments to section 60CC simplifying the list of best interest factors and removing the distinction between the 'primary' and 'additional' considerations, this section is amended to simply reflect that advisers must:

- note to their client that the best interests of the child are paramount, and
- encourage the person to act in the child's best interests by applying the considerations set out in subsections 60CC(2) and (3).

Section 63DA contains additional obligations for advisers. The amendments remove the obligation to advise parents to consider the possibility of the child spending equal time with each parent or, if that is not reasonably practicable, substantial or significant time. This reflects the repeal of section 65DAA.

## New section 65DAAA – Reconsideration of final parenting orders

New section 65DAAA sets out when a final parenting order can be reconsidered by a court and codifies the common law rule in *Rice v Asplund (1979)*.

Where a final parenting order is in place, new section 65DAAA makes it clear that the court must not reconsider the final parenting order unless:

- the court has considered whether there has been a significant change of circumstances since the final parenting order was made, and
- the court is satisfied that it is in the best interests of the child for the final parenting order to be reconsidered.

## Commencement and application information

Schedule 1 (Parenting Framework) will commence on 6 May 2024.

- Parts 1 (Best Interests of Children) and 2 (Parental Responsibility, except section 61CA) will apply to all proceedings instituted on or after 6 May 2024, and all proceedings underway on that date, **except where the final hearing has commenced**.
- Section 61CA and Part 3 (Child-related Proceedings) apply from 6 May 2024.

## Schedule 2: Enforcement of child-related orders

This schedule contains:

- a redraft of Division 13A of Part VII (enforcement of child-related orders), and
- amendments to allow registrars to be delegated the power in the Rules of Court to make 'make-up time parenting orders' (previously referred to as an 'order compensating person for time lost').

### Division 13A redraft

Division 13A of Part VII of the Family Law Act has been redrafted to make the consequences of non-compliance with parenting orders clearer and the provisions easier for the courts to apply.

The redraft makes a number of policy changes, but does not significantly change the underlying principles of the compliance and enforcement provisions. The policy changes are:

- removal of specific cost order provisions from Division 13A (cost orders for non-compliance will now be made under section 117 of the Family Law Act),
- removal of the power for the court to make Community Service Orders in cases of non-compliance, and
- clarification that the court may order that a child spend additional time with a person, vary a parenting order, or order parties to attend parenting programs at any stage of a contravention proceeding, without necessarily making a finding on a contravention.

The redraft retains a broad range of sanctions that the court can apply when orders are not complied with. The existing law on when there is a 'reasonable excuse' for contravention of orders, including in circumstances where there are safety concerns, has also been retained.

### Delegating new powers to registrars

The changes also amend the *Federal Circuit and Family Court of Australia Act 2021* (FCFCOA Act) so that registrars of both Divisions of the FCFCOA can be delegated the power to make a further parenting order for a child to spend additional time with a person (commonly referred to as a 'make-up' time or 'compensatory time' order).

### Commencement and application information

Most Schedule 2 provisions fall under Part 1, Division 1 (Enforcement of Child Related Orders) – main amendments and will apply from 6 May 2024.





## Schedule 3: Definitions of ‘member of the family’ and ‘relative’

The amendments in Schedule 3 expand the definitions of ‘relative’ and ‘member of the family’ to include Aboriginal and Torres Strait Islander concepts of family.

The amendments include an expanded definition of ‘relative of a person’ in subsection 4(1AD). This provides that if a person is an Aboriginal or Torres Strait Islander child, a person is a relative of that child if, in accordance with that child’s Aboriginal or Torres Strait Islander culture (including but not limited to any kinship systems of that culture), they are related to the child.

The amendment to the definition of ‘relative of a person’ applies to the definition of ‘member of the family’ in subsection 4(1AB), subsequently expanding the definition of ‘member of the family’ to apply to:

- the definition of step parent in subsection 4(1),
- the definition of family violence in section 4AB, and
- the standalone best interest factor for Aboriginal or Torres Strait Islander children in paragraph 60CC(3)(a).

The expanded definition of ‘member of the family’ does not apply to the obligations on parties to proceedings under the Family Law Act to inform the court of certain matters under sections 60CF, 60CH and 60CI. The definition of ‘member of the family’, excluding the expanded component, will continue to apply to the obligations under sections 60CF, 60CH and 60CI, including for Aboriginal or Torres Strait Islander parties to proceedings.

The definition of ‘relative of a child’ in subsection 4(1) has also been amended, with the effect that for an Aboriginal or Torres Strait Islander child, a relative of that child includes any person, who in accordance with the child’s Aboriginal or Torres Strait Islander culture (including but not limited to any kinship systems of that culture), is related to the child.

These definitions are intended to be considered and applied with reference to a child’s Aboriginal or Torres Strait Islander culture, as defined in subsection 4(1) of the Family Law Act.

### Commencement and application information

Schedule 3 changes apply to all proceedings instituted on or after 6 May 2024, and all proceedings underway on that date, **except where the final hearing has commenced.**

## Schedule 4: Independent Children’s Lawyers and Hague Convention proceedings

This schedule contains amendments to provisions about Independent Children’s Lawyers (ICLs), including a requirement for ICLs to meet with children and give the child an opportunity to express a view, and expanding the use of ICLs in cases brought under the 1980 Hague Convention on the Civil Aspects of International Child Abduction (the Hague Convention).

### Requirement to meet with the child and provide an opportunity to express a view

ICLs will be required to meet with the child and provide the child with an opportunity to express a view, unless an exception applies. This will ensure this engagement occurs in every appropriate case and supports national consistency in ICL practice. Having the opportunity to express their views can be of significant importance to children and can assist in determining what is in their best interests. These amendments will better facilitate the participation of children in family law proceedings, consistent with children’s rights under Article 12 of the CRC, while safeguarding their safety and wellbeing.

The ICL cannot require the child to express the child’s views in relation to any matter, consistent with section 60CE of the Family Law Act.

The provisions do not fetter an ICL’s discretion about how they may undertake these duties. The legislation specifically provides that an ICL has discretion in relation to when, how often and how meetings with the child take place, and when, how often and how the child is provided with an opportunity to express views (new subsection 68LA(5AA)). This discretion is subject to any order or direction of the court.

Under new subsection 68LA(5B), an ICL will not be required to perform a duty if the child is under 5 years of age or if the child does not want to meet with the ICL or express their views. An ICL will not be required to perform a duty if there are exceptional circumstances that justify it, which includes but is not limited to circumstances which would expose the child to a risk of physical or psychological harm that cannot be safely managed or would have a significant adverse effect on the wellbeing of the child (new subsection 68LA(5C)).

There is no specific time that an ICL must perform these duties because this will depend on the facts and circumstances of each case. It is only required that the ICL must perform these duties at some point





prior to the court making final orders. If the ICL has not performed these duties because of exceptional circumstances, the court must determine whether it is satisfied that exceptional circumstances exist that justify not performing the duty. If the court determines that those circumstances do not exist, the court must make an order requiring the performance of the duty or duties (new subsection 68LA(5D)). Whether circumstances are exceptional will come down to the facts and circumstances of each case.

The ICL may seek external evidence to support their decisions, such as advice from a family consultant or relevant expert in the case, or a treating practitioner. ICLs may also wish to refer to evidence from a parent or carer of the child. The weight to be given to this advice is at the professional discretion of the ICL, and considered by the court.

These new legislative requirements work in tandem with the other specific duties provided in the Family Law Act, including that the ICL must ensure that any views expressed by the child in relation to the matters to which the proceedings relate are fully put before the court (section 68LA(5)(b)).

## Expansion of the use of Independent Children's Lawyers in cases brought under the Hague Convention

The changes to the law remove the requirement that the appointment of ICLs in cases brought under the Hague Convention can only be made in 'exceptional circumstances'.

Judges were previously only permitted to appoint ICLs in cases brought under the Hague Convention where there are exceptional circumstances that justify doing so (subsection 68L(3) of the Family Law Act). The amendment:

- repeals subsection 68L(3), removing the restriction on the appointment of ICLs in these cases, and
- substitutes subsection 68L(1) to express that section 68L, that is the court's consideration of appointing ICLs, applies to proceedings where a child's best interests are paramount or a relevant consideration and further specifies that this also applies to proceedings arising under regulations made for the purposes of section 111B (which is about the Hague Convention).

The amendments clarify beyond doubt that Hague Convention proceedings fall within the scope of section 68L. Under the amended section 68L, ICLs will be appointed by the court for Hague Convention proceedings under the same circumstances as other family law matters under the Family Law Act.

## Repeal of section 111B(1B) – child's objections exemption in Hague Convention cases

The changes to the law will also remove section 111B(1B) of the Family Law Act in its entirety. The amendment will remove the higher threshold requirement in the Family Law Act which provides that the Family Law (Child Abduction Convention) Regulations 1986 must not allow an objection by a child to return under the Hague Convention to be taken into account unless the objection imports a strength of feeling beyond the mere expression of a preference or of ordinary wishes. The changes will realign the Family Law Act with the obligation under Article 13 of the Hague Convention.

### Commencement and application information

Schedule 4 will commence on 6 May 2024.

- Parts 1 (Requirement to meet with the child) and 2 (Convention on the Civil Aspects of Child Abduction) will apply to all proceedings instituted on or after 6 May 2024, and all proceedings underway on that date, **except where the final hearing has commenced**.

## Schedule 5: Case Management and Procedure

Schedule 5 contains two new Parts to be introduced into the Family Law Act:

- Part 1: introduces new 'harmful proceedings orders' to prevent a vexatious litigant from filing and serving new applications without first obtaining leave from the court, and
- Part 2: broadens and extends the 'overarching purpose of family law practice and procedure' and the accompanying duty, to all proceedings instituted under the Family Law Act.

### Harmful proceedings orders

Courts will have the power to make harmful proceedings orders, either on their own initiative or on application by a party to proceedings, at any time while the proceedings are on foot. The court would need to be satisfied that there are reasonable grounds to believe that further proceedings would be harmful to the respondent. Harm may include psychological harm or oppression, major mental distress, behaviour which causes a detrimental effect on the other party's capacity to care for a child, or financial harm.





## Overarching purpose

The overarching purpose of the family law practice and procedure provisions is to facilitate the just resolution of disputes:

- a) in a way that ensures the safety of families and children
- b) in relation to proceedings under the Family Law Act in which the best interests of a child are the paramount consideration—in a way that promotes the best interests of the child
- c) according to law, and
- d) as quickly, inexpensively and efficiently as possible.

This is accompanied by a statutory duty on parties and their legal representatives to conduct proceedings in a way that is consistent with the overarching purpose. Cost orders can be made against parties and legal representatives who are found to have breached the duty.

### Commencement and application information

Schedule 5 will commence on 6 May 2024.

- Part 1 will apply to all proceedings instituted on or after 6 May 2024, and all proceedings underway on that date.
- Part 2 will apply to all proceedings instituted on or after 6 May 2024, and all proceedings underway on that date, **except where the final hearing has commenced.**

## Schedule 6: Communication of details of family law proceedings

Schedule 6 of the Amendment Act repeals section 121 of the Family Law Act and replaces it with new Part XIVB. The new Part XIVB does not introduce any significant policy changes in this area, and existing penalties and offences are retained. New Part XIVB is intended to simplify the language of this provision and clarify when persons can share identifiable family law information.

### Commencement and application information

Schedule 6 will commence on 6 May 2024 and apply to acts or omissions occurring on or after that day.

## Schedule 7: Family report writers

The changes establish a new power for Government to make regulations that would provide standards and requirements to be met by family report writers who prepare family reports. This is similar to the powers enabling the establishment of a regulatory scheme for family dispute resolution practitioners and family counsellors (section 10A of the Family Law Act). The regulations will be developed following further consultation with stakeholders and consideration of the impacts of particular regulatory options.

### Commencement information

Schedule 7 will commence on 6 May 2024.

The standards and requirements developed as a result of the regulatory power in the Amendment Act will commence once the regulations are developed, in consultation with relevant stakeholders.

## Schedule 8: Review of the operation of the FCFCOA

The Amendment Act brings forward the review of the FCFCOA Act by two years. The review will commence in September 2024.

## Schedule 9: Dual appointments

The changes explicitly state that a person can be appointed and serve as a Judge of the FCFCOA (Division 1) regardless of whether the person holds office as a judge of the Family Court of a State (ie the Family Court of Western Australia).

## Schedule 10: Review of amendments

There will be a review of the operation of the Amendment Act to ensure the new provisions are operating as intended. This review must commence as soon as possible after the third anniversary of the commencement of the Amendment Act, and be completed within twelve months. A report of the review must be tabled in Parliament.

### Commencement information

Schedules 8, 9 and 10 commenced on 7 November 2023.