

---

# Family Law Reform – passed and proposed

What you need to know

**Genevieve Morgan**  
Family Law Principal, Barry Nilsson

24 March 2024

# Overview

## The Family Law Amendment Bill 2023

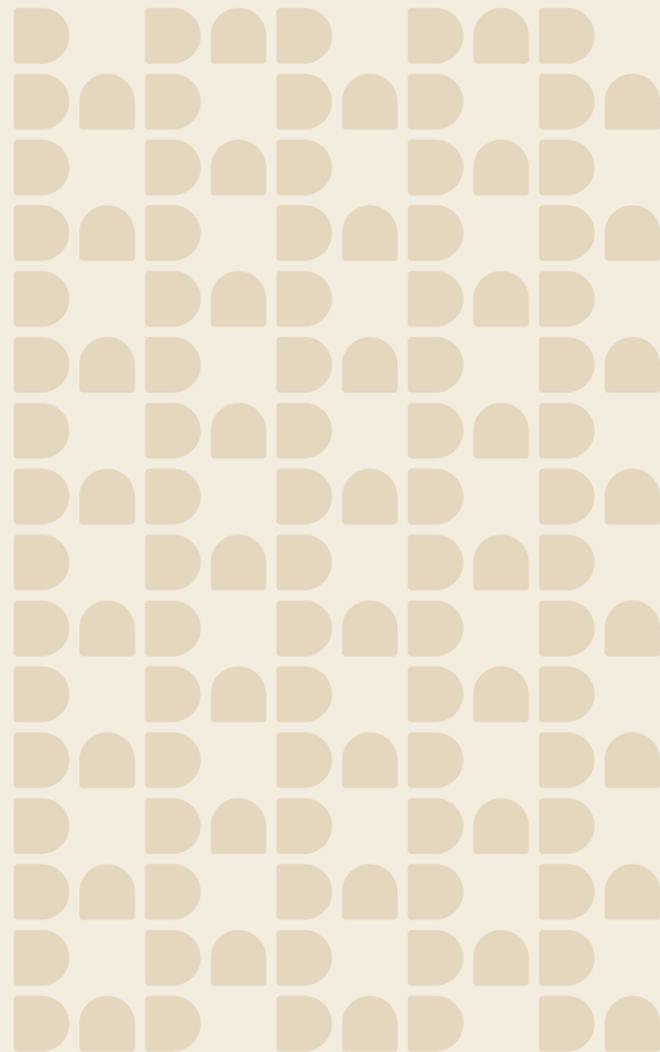
- Primarily parenting amendments – passed by Parliament on in October 2023, **commencing 6 May 2024 (except where final hearing has commenced)**.

## The Family Law (Information Sharing) Bill

- Amendments in relation to information sharing between the Family Law and Family Violence and Child Protection Systems relating to risks of family violence, child abuse and neglect in parenting proceedings – passed by Parliament in October 2023

## Family Law Amendment Bill (No.2) 2023

- Exposure draft relating to property (and other) reforms released for consultation on 18 September 2023 – **watch this space**



# Family Law Amendment Bill (2023)

## What are the major changes?

Removal of the presumption of equal shared parental responsibility (ESPR) and removal of the live with/time pathway

### CURRENT

- Presently s 61DA of the Family Law Act provides that the court must apply a presumption that is in the best interests of the child for the child's parents to have ESPR.
- The presumption does not apply if there are reasonable grounds to believe that a parent of the child has engaged in abuse of the child or family violence.
- The presumption is rebuttable by evidence that satisfies the court it would not be in the best interests of the child for the child's parents to have ESPR.
- If the Court makes an order for ESPR, s 65DAA states the court **must consider** making an order for equal time, if it is reasonably practicable and in the best interests of a child to do so.

Justice O'Brien said in 2010:

**“A law that cannot be understood by the people affected by it – or worse still lends itself to being misunderstood – is a bad law. That is particularly so when we are talking about a law which affects families and children.”**

# Family Law Amendment Bill (2023)

## What are the major changes?

Removal of the presumption of equal shared parental responsibility (ESPR) and removal of the live with/time pathway

### NEW

- There is no longer a presumed starting point of equal shared parental responsibility .
- 61D(3) - A parenting order that deals with the allocation of responsibility for making decisions about major long-term issues in relation to the child (see subsection 64B(3)) may provide for joint or sole decision-making in relation to all or specified major long-term issues.
- 61CA **If it is safe to do so**, and subject to any court orders, the parents of a child who is not yet 18 are encouraged:
  - (a) to consult each other about major long-term issues in relation to the child; and
  - (b) in doing so, to have regard to the best interests of the child as the paramount consideration.

# Family Law Amendment Bill (2023)

## What are the major changes?

### Removal of the live with/time pathway

#### NEW

- Repeal of the legislative pathway.
- No 'trigger' for consideration of equal time or substantial and significant time. These concepts no longer found in the Family Law Act.
- Removal of the definition of substantial and significant time which was found at 65DAA(3) – it included weekends, holidays, days that are not weekends and holidays, time that enabled a parent to be involved in daily routine, time that enabled a parent to be involved in special events and occasions in a child's life.
- The 'practicality' factors under 61DAA(5) in relation to how far apart the parents live from each other, the parents' capacity to implement an equal time or substantial and significant time arrangement, capacity to communicate, resolve difficulties and implement that arrangement – all repealed.

# Family Law Amendment Bill (2023)

## Objects of the Act simplified

### CURRENT

- 60B(1) The objects of this Part are to ensure that the best interests of children are met by:
- (a) ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and
  - (b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and
  - (c) ensuring that children receive adequate and proper parenting to help them achieve their full potential; and
  - (d) ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.
- 60B(4) An additional object of this Part is to give effect to the Convention on the Rights of the Child done at New York on 20 November 1989.
- 60B(1)

### NEW

The objects of this Part are:

- (a) to ensure that the best interests of children are met, including by ensuring their safety; and
- (b) to give effect to the Convention on the Rights of the Child done at New York on 20 November 1989.

# Family Law Amendment Bill (2023)

## What are the major changes?

Amending the list of 'best interests' factors at section 60CC from 2 primary considerations and 14 additional considerations, to 7 general considerations as follows:

### CURRENT

60CC(2) The primary considerations are:

- (a) the benefit to the child of having a meaningful relationship with both of the child's parents; and
- (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

60CC(2A) In applying the considerations set out in subsection (2), the court is to give greater weight to the consideration set out in paragraph (2)(b).

+ 14 additional considerations

# Family Law Amendment Bill (2023)

## NEW 60CC

- 2)(a) **what arrangements would promote the safety (including safety from being subjected to, or exposed to, family violence, abuse, neglect, or other harm) of:**
- (i) **the child; and**
  - (ii) **each person who has care of the child (whether or not a person has parental responsibility for the child);**
- 2A(a) **any history of family violence, abuse or neglect involving the child or a person caring for the child (whether or not a person has parental responsibility for the child);**
- 2A(b) any family violence order that applies or has applied to the child or a member of the child's family.
- 2(b) **any views expressed by the child;**
- 2(c) the developmental, psychological, emotional and cultural needs of the child;
- 2(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;
- 2(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;**
- 2(f) anything else that is relevant to the particular circumstances of the child

# Family Law Amendment Bill (2023)

## NEW 60CC

60CC(3)(a) the child's right to enjoy the child's Aboriginal or Torres Strait Islander culture, by having the support, opportunity and encouragement necessary:

- (i) to connect with, and maintain their connection with, members of their family and with their community, culture, country and language;
  - (ii) to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and
  - (iii) to develop a positive appreciation of that culture; and
- (b) the likely impact any proposed parenting order under this Part will have on that right;

## Practical considerations

- Be conscious of timing of your trial affidavits, instructions to experts, consider whether expert evidence needs to be updated.

# Family Law Amendment Bill (2023)

## Independent Children's Lawyers

- Independent Children's Lawyers now required to meet with the child and give the child an opportunity to express any views (with limited exceptions)
- If a child expresses a view in relation to matters which relate to the proceedings, the ICL is now required to ensure those views are put before the Court (previously case law provided the ICL to have discretion)

## Rice v Asplund

- Codifying the rule in *Rice v Asplund* (1979) FLC 90-725 into new s 65DAAA of the *Family Law Act* which provides that a Court **must not** reconsider a parenting order unless a significant change of circumstances has been established **and** that it is in the best interests of the child for the order to be reconsidered.
- In considering the best interests of the child (and without limiting section 60CC), the Court can have regard to any matter it considers relevant including:
  - why the final parenting order was made and the evidence available to the Court at the time it was made;
  - any new evidence available that was not available at the time the final parenting order was made;
  - whether, if the final parenting order is reconsidered, the Court would make an order in significantly different terms; and
  - any potential benefit or detriment to the child of the final parenting order being reconsidered.

**The effect of s 65DAAA is that if the Court determines that it is not in the best interest of the child to vary the final parenting order, it will not be varied, regardless of a significant change in circumstances.**

# Family Law Amendment Bill (2023)

## What are the major changes?

- Redrafting provision in Div 13A of Part VII of the *Family Law Act* (contravention of parenting orders) to make them simpler and easier to apply.
- Harmful proceedings relief - amend the *Family Law Act* to provide the Court with a power to restrain a party from filing new applications in a matter without leave of court, where it is necessary for the protection of the child or the respondent.
- Government to develop regulations that set standards and requirement for family report writers to ensure the competency and accountability of family report writers (for example accreditation scheme or other oversight mechanism), with consequences for non-compliance.

# Family Law Amendment (Information Sharing) Bill 2023

## What are the major changes?

- Establishes two new information sharing orders to allow courts to directly and quickly seek information from police, child protection and firearms agencies about family violence, child abuse and neglect that could place children at risk
- Allows a court to make these orders at any point during proceedings so information is accurate and up-to-date

# Family Law Amendment Bill (No. 2) 2023 – Property

## What are the proposed changes?

- **Not yet passed - still in consultation phase**
- Amend the *Family Law Act* to specify the steps that a court will take when considering whether to make an order altering any property interests of parties to a relationship. Steps include:
  1. Identify the legal and equitable rights, interests and liabilities, of the parties to property.
  2. Consider each party's contributions to the property of the relationship.
  3. Consider each party's current and future considerations.
  4. Only make an order if it is just and equitable in all the circumstances.

### Notes:

- The court would not be required to take these steps in a particular order.
- The just and equitable consideration is an overarching consideration that permeates the whole decision-making process.

# Family Law Amendment Bill (No. 2) 2023 – Property

## What are the proposed changes?

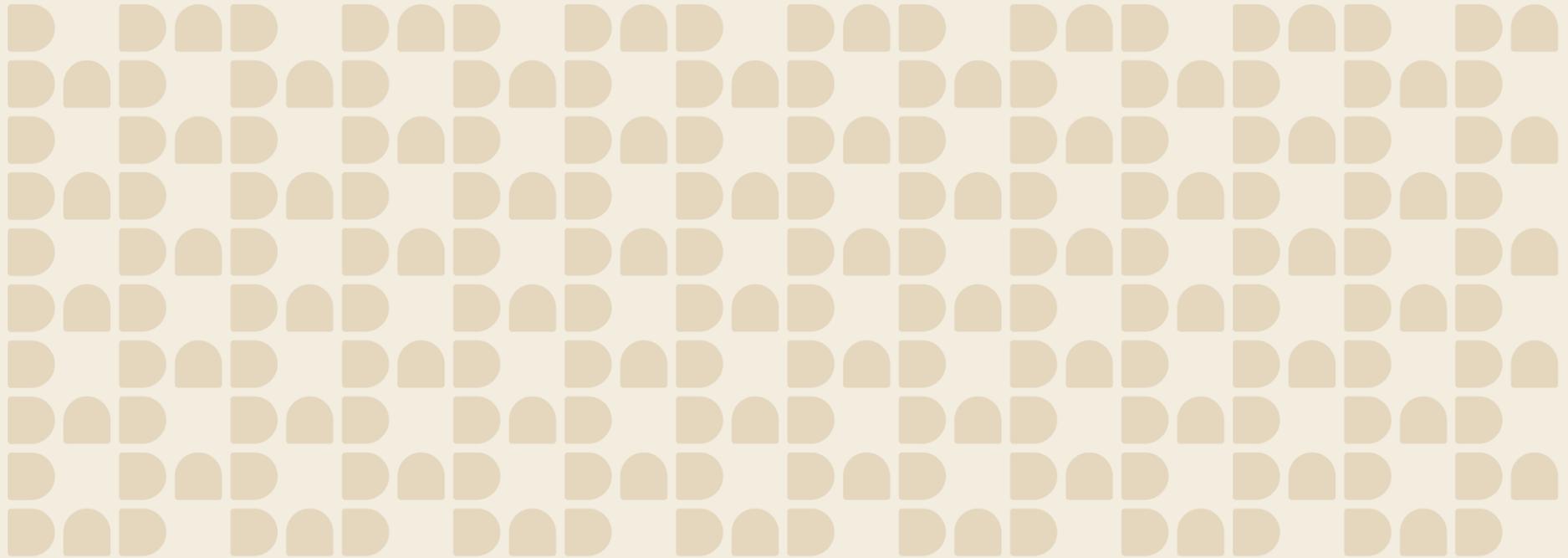
- Amend *Family Law Act* so that at ‘step 2’ there are four additional contribution factors to account for the effect of family violence, financial and economic abuse, debt and wastage on a party’s contributions.
  - consider any debts incurred by either or both of the parties to the relationship
  - consider the effect of wastage by a party to the relationship of property or financial resources of either or both parties
  - consider the effect of any family violence to which one party to the relationship has subjected the other party on the ability of the other party to make financial and non-financial contributions.
  - Consider the effect of any economic or financial abuse to which one party of the relationship has been subjected by the other party
- Amend *Family Law Act* so that at ‘step 3’ the cross-referencing to spousal maintenance factors is provided and there is a separate, self-contained list of current and future factors for consideration.
- The list of current and future considerations includes the effect of family violence that a party to the marriage or de facto relationship has subjected the other party to the relationship on the current and future circumstances of that party.
- Establishing a Less Adversarial Trial process for conducting property proceedings – Court to actively direct, control and manage the conduct of the proceedings, safeguard parties against family violence and conduct the proceedings without undue delay and with as little formality and legal technicality as possible – includes how *Evidence Act 1995 (Cth)* is to apply to the proceedings.

# Family Law Amendment Bill (No. 2) 2023 – Property

## What are the proposed changes?

- Codify existing duty of financial disclosure
- Extend the existing disclosure duty to apply when parties are preparing to start proceedings – codify pre-action procedures from Rules to Act?
- Introduce a requirement for legal practitioners and FDRP's to advise parties about their disclosure duty, the consequences of a breach and encourage compliance with the duty
- Create one consolidated list of financial and property matters that can be arbitrated, regardless of whether the arbitration is court-referred or privately arranged
- Scope of matters which may be arbitrated will not be expanded as part of these amendments to include, for example, child support
- Empower arbitrators to make an application to the court for directions to facilitate the efficient conduct of an arbitration
- Empower a court to terminate an arbitration on the application of a party or an arbitrator

# Questions?





---

# Genevieve Morgan

## Principal, Family Law

Genevieve.morgan@bnlaw.com.au

+61 2 8031 2678

Copyright © 2023 Barry Nilsson All rights reserved.

Barry Nilsson presentations and materials are for educational and general information purposes only. They are current at the date of the presentation or as stated. The content is not intended to constitute legal advice and should not be relied upon as such. Separate legal advice should be obtained for specific situations. While every care has been taken, BN takes no responsibility for the accuracy, currency or reliability of any material published or supplied.

Barry Nilsson acknowledges the traditional owners of the land on which we conduct our business, and pays respect to their Elders past, present and emerging.