

FAMILY LAW AMENDMENT (ARBITRATION) REGULATIONS 2024

EXPLANATORY STATEMENT

Issued by authority of the Attorney-General

under section 10M of the *Family Law Act 1975*

PURPOSE AND OPERATION OF THE INSTRUMENT

The *Family Law Act 1975* (Cth) (the Act) provides the legislative framework for resolving arrangements for children, finances and property following a relationship breakdown. Division 4 in Part II and Division 4 in Part IIIB of the Act provide a framework supporting the use of arbitration to resolve disputes between separated couples about financial matters. Section 10M of the Act defines an arbitrator as a person who meets requirements prescribed in the regulations. These requirements and other provisions dealing with arbitration are in Part V of the *Family Law Regulations 1984* (the Regulations).

Subsection 125(1) of the Act provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters that are required or permitted by the Act to be prescribed or are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The *Family Law Amendment (Arbitration) Regulations 2024* (the instrument) amends the Regulations to provide separated couples with confidence that arbitrators have recent, relevant and ongoing experience in family law to determine their financial matters.

Regulation 67B of the Regulations provides the following eligibility requirements for a person to be an arbitrator. The person:

- is a legal practitioner; and
- either has accreditation as a family law specialist through a State or Territory legal professional body or practised as a legal practitioner for at least 5 years with at least 25% of that work in relation to family law matters; and
- has completed specialist arbitration training conducted by a tertiary institution or professional association of arbitrators; and
- has their name included in a list, kept by the Law Council of Australia or by a body nominated by the Law Council of Australia, of legal practitioners who are prepared to arbitrate family law matters.

The instrument will amend the Regulations to strengthen these requirements by:

- broadening the range of professionals who may become arbitrators to include retired judges and magistrates. This will ensure that separated couples have access to a pool of skilled and experienced arbitrators; and
- requiring a minimum level of *recent* and *ongoing* experience in family law matters, and the completion of continuing professional development, to better recognise the importance of maintaining skills and experience in dealing with family law.

The requirement for a person to have family law specialist accreditation by a State or Territory professional body is no longer required as the instrument provides a greater focus on ensuring a person has ongoing expertise and skills in dealing with family law matters, recognising the unique and complex nature of these disputes.

While Western Australia is the only Australian State with its own family law legislation, the instrument will apply to family law arbitrations in Western Australia as regulation 8 of the *Family Court Regulations 1988* (WA) adopts Part V of the Regulations.

CONSULTATION

The Attorney-General's Department engaged in targeted consultation with the Australian Institute of Family Law Arbitrators and Mediators and the Family Law Section of the Law Council of Australia to inform the development of this instrument. These stakeholders have specific expertise in this area of law and are directly affected by the regulations. AIFLAM is an independent body established to promote arbitration in family law and train suitably qualified persons as family law arbitrators. The Family Law Section of the Law Council of Australia represent the family law practitioners in each state and territory, some of whom may seek work as family law arbitrators. AIFLAM and the Family Law Section of the Law Council support the amendments in the instrument.

REGULATION IMPACT STATEMENT

The Office of Impact Analysis has advised the instrument is unlikely to have more than a minor regulatory impact and that the preparation of an Impact Analysis is not required ([OIA reference number OIA23-05082](#)).

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

The instrument 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* (Cth). A Statement of Compatibility with Human Rights is set out in **Attachment A**.

The instrument is a legislative instrument for the purposes of the *Legislation Act 2003* (Cth). Details of the instrument are set out in **Attachment B**.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

1. This disallowable legislative instrument 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* (Cth).

Overview of the Legislative Instrument

2. The *Family Law Amendment (Arbitration) Regulations 2024* (the instrument) amends the provisions in Part V of the *Family Law Regulations 1984* (the Regulations) to strengthen the arbitration framework to better support separating couples to resolve their property or financial disputes.
3. Division 4 in Part II and Division 4 in Part IIIB of the *Family Law Act 1975* (the Act) provide a framework supporting the use of arbitration to resolve disputes between separated couples about financial matters. Section 10M of the Act defines an arbitrator as a person who meets requirements prescribed in the regulations. These requirements and other provisions dealing with arbitration are in Part V of the Regulations.
4. Arbitrators play a central role in the arbitration process to make decisions that affect the financial rights of separated couples. The amendments in the instrument will strengthen the eligibility requirements by requiring family law arbitrators to demonstrate and declare relevant and ongoing family law experience. This provides separated couples with confidence that arbitrators have the necessary experience and skills in family law to resolve complex family law matters.

Human Rights Implications

5. The amendments in the instrument engages the following human rights:
 - Right to a fair and public hearing, and to an effective remedy: Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR).
 - Right to privacy and reputation: Article 17(1) of the ICCPR.
 - Right to the protection and assistance of the family: Article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR); Article 23 of the ICCPR.
 - Right to work: Article 6 of the ICESCR.

Right to a fair and public hearing – Article 14(1) of the ICCPR

6. Article 14(1) of the ICCPR recognises the right for all persons to be equal before courts and tribunals. It provides that everyone is entitled, in the determination of ‘rights and obligations in a suit of law’, to a ‘fair and public hearing by a competent, independent and impartial tribunal established by law.’ The right applies in both criminal and civil proceedings,

including whenever rights and obligations are to be determined. While arbitrations in family law matters are not court proceedings and are conducted confidentially, it is essential that they can operate consistently with principles of procedural fairness and the fully informed consent of the parties.

7. This right is promoted by the amendments because they expand the eligible class of people who can become family law arbitrators to include retired judges and magistrates. This provides separating couples with greater access to competent and impartial decision-makers with significant experience in determining complex family law matters.
8. This right is further promoted by the strengthened requirements for eligibility as a family law arbitrator. The focus on recent, relevant and ongoing experience in family law will ensure that all family law arbitrators will have up to date legal and practical knowledge, helping to ensure fair processes and just and equitable outcomes for separated couples with financial disputes.

Right to privacy and reputation – Article 17(1) of the ICCPR

9. Article 17(1) of the ICCPR protects individuals from arbitrary or unlawful interference with their privacy, family, home or correspondence. The amendments promote this right. Arbitrators will be required to complete at least 10 hours of continuing professional development training every two years to ensure they maintain a good working knowledge, including of family law, family violence and related ethical considerations (i.e. obligations of confidentiality). Arbitrators must protect the sensitive and personal information that the parties provide when they engage in arbitration to resolve their family law matter.

Protection and assistance of the family during marriage and at dissolution – Article 10 of the ICESCR; Article 23 of the ICCPR

10. Article 10 of the ICESCR and Article 23 of the ICCPR recognise that the widest possible protection and assistance should be accorded to the family, particularly during marriage and at its dissolution.
11. The amendments promote this right by requiring family law arbitrators to demonstrate they have gained experience in family law that is sufficient for them to have the necessary experience to become or remain an arbitrator. This ensures that arbitrators have experience in family law that is appropriate to determine complex financial matters using arbitration with outcomes that are fair to parties in the circumstances of their dispute. Further, arbitrators will be required to complete at least 10 hours of continuing professional development training every two years to ensure they maintain a good working knowledge, including of family law, family violence and related ethical considerations (i.e. obligations of confidentiality).

Right to work – Article 6 of the ICESCR

12. Article 6(1) of the ICESCR recognises the right of everyone to the opportunity to gain their living through work. Article 6(2) encourages State Parties to achieve this right with technical and vocational guidance and training programmes, policies and techniques to achieve full and productive employment.
13. The amendments promote this right by expanding the class of professionals who can be family law arbitrators to include retired judges and magistrates. This encourages a broader range of professionals to continue to work and utilise their highly relevant experience in

supporting separating couples to resolve their family law matters. This experience will significantly benefit arbitration practice in family law.

14. The amendments also provide flexibility to enable professionals with legal experience across multiple areas of law or those who have different types of working arrangements (such as part-time, semi-retired) to be eligible to be family law arbitrators provided they have the necessary recent and relevant experience that is critical to providing family law services.

Conclusion

15. The disallowable legislative instrument is compatible with human rights because it promotes and advances their protection.

NOTES ON SECTIONS

PART 1 – Preliminary

Section 1 – Name

1. Section 1 provides that this instrument is the Family Law Amendment (Arbitration) Regulations 2024.

Section 2 – Commencement

2. This section states that sections 1 to 4 in this instrument commence the day after the instrument is registered and for Schedule 1 to commence on 1 August 2024.

Section 3 – Authority

3. This section states the instrument is made under the *Family Law Act 1975* (the Act).

Section 4 – Schedules

4. This is a formal section that enables each instrument specified in a Schedule to this instrument to be amended or repealed in accordance with the items set out in the relevant Schedule, and any other item in a Schedule to this instrument has effect according to its terms.

SCHEDULE 1 – Amendments

Family Law Regulations 1984

5. Family law matters are some of the most complex legal disputes, and may involve a high level of conflict or allegations of family violence. The outcomes of these matters have long-term implications for separating couples and their children. It is important that professionals who support separated couples through arbitration have recent and ongoing practical legal experience and knowledge, specifically in family law, to ensure a sound understanding of family law and the intersections with child support, and the nuances and dynamics of family violence.
6. Schedule 1 in the instrument makes amendments to strengthen the requirements that must be met for a person to be an arbitrator in family law matters.

Item 1 – Regulation 67B

7. Item 1 repeals regulation 67B and inserts a new regulation 67B to prescribe the eligibility requirements for family law arbitrators.
8. Subregulation 67B(1) prescribes the requirements that must be met for the purposes of the definition of ‘arbitrator’ in section 10M of the Act.

Requirement for name to be included in list of arbitrators

9. Subregulation 67B(2) requires that a person must have their name in a list held by the Law Council of Australia, or by a body nominated by the Law Council of Australia, of persons who are prepared to provide arbitration services under the Act. This is consistent with the current approach in the *Family Law Regulations 1984* (the Regulations). The list is held by the Australian Institute of Family Law Arbitrators and Mediators (AIFLAM).
10. Subregulation 67B(3) provides that for a person to apply to be included in the list, they must provide a statutory declaration to the body keeping the list. The statutory declaration is to the effect that the person meets the requirements in subregulation 67B(4).

Requirements to be met to become an arbitrator

11. The specific requirements that must be met for a person to become an arbitrator are set out in subregulation 67B(4). These requirements seek to ensure a sufficient level of *recent* experience in family law matters, recognising the importance of having the skills, knowledge and understanding of family law and being well equipped to support separated couples to resolve their financial disputes through arbitration.
12. Subregulation 67B(4) requires that a person applying to be included in the list of arbitrators must have during the previous 6 years:
 - practised as a legal practitioner, held office in a court listed in subregulation 67B(5) as a judge or magistrate, or a combination of both, for at least five of those years (paragraph 67B(4)(a)); and
 - spent at least 25% of their experience in practice or judicial office on family law matters for at least five of those years (paragraph 67B(4)(b)); and
 - gained the necessary experience in family law matters that is sufficient for the person to be an arbitrator (paragraph 67B(4)(c)); and
 - successfully completed a specialist arbitration training course provided by a tertiary institution or professional association of arbitrators (paragraph 67B(4)(d)).
13. It is intended that ‘practised as a legal practitioner’ at subparagraphs 67B(4)(a)(i) and (iii) captures a broad range of professional experience, including work as a solicitor or barrister. Regulation 3 in the Regulations defines a legal practitioner as a person enrolled as a barrister, a solicitor, a barrister and solicitor, or a legal practitioner, of the High Court of Australia, or of the Supreme Court of a State or Territory.
14. Paragraphs 67B(4)(a) and (b) do not prescribe a particular number of hours of relevant work. This is because persons with relevant professional experience have a range of different working arrangements including full time, part time or semi-retired and the intention is not to preclude a person from eligibility because of any particular working arrangement. Paragraph 67B(6)(c) ensures an assessment is made based on a person’s particular working arrangement and experience to ensure they have sufficient recent and relevant experience, so as to be well equipped to support separated couples and determine a family law financial matter.

15. For a retired judge or magistrate to be eligible to apply to be in the list as a family law arbitrator, they must have held office as a judge or magistrate at a court exercising family law jurisdiction as listed in subregulation 67B(5). The courts are:

- the Federal Circuit and Family Court of Australia (Division 1);
- the Federal Circuit and Family Court of Australia (Division 2);
- the Family Court of Western Australia;
- the Magistrates Court of Western Australia constituted by a magistrate who is not a Family Law Magistrate of Western Australia, sitting at a place outside the metropolitan region (within the meaning of the Family Court Act 1997 (WA));
- the Magistrates Court of Western Australia constituted by a Family Law Magistrate of Western Australia, sitting at any place in Western Australia;
- the former Family Court of Australia;
- the former Federal Circuit Court of Australia.

16. The inclusion of the Magistrates Court of Western Australia in new paragraphs 67B(5)(d)-(e) reflects that both ‘specialist’ Family Law Magistrates, who are co-located with the Family Court of Western Australia, and magistrates in regional Western Australia, can exercise jurisdiction in family law matters in Western Australia. A legislative note refers users to the defined term ‘Family Law Magistrate of Western Australia’ in section 4(1) of the Act to explain this distinction.

Requirements to be met to continue to be an arbitrator

17. Subregulation 67B(6) provides the requirements that a person must demonstrate to remain in the list of arbitrators. These new requirements recognise the importance of maintaining ongoing experience in family law matters, to be well equipped to support separated couples to resolve their financial disputes through arbitration.

18. The person must, during each two-year period:

- complete at least 10 hours of continuing professional development (CPD) (paragraph 67B(6)(a)); and
- demonstrate that at least 25% of their practice as a legal practitioner in that period was in relation to family law matters (paragraph 67B(6)(b)); and
- maintain the necessary experience in family law matters that is sufficient for them to be an arbitrator (paragraph 67B(6)(c)).

19. The reference to CPD at paragraph 67B(6)(a) is intended to include courses, seminars and conferences that practising legal practitioners are required to attend as part of holding a practising certificate issued by State or Territory Law Societies and Bar Associations. This requirement for completing CPD is irrespective of whether or not a person has a practising certificate, recognising the importance of a person continuing to undertake professional education as part of their commitment to working as an arbitrator in family law matters.

20. It is intended that a ‘person’s practice as a legal practitioner’ at paragraph 67B(6)(b) captures a broad range of professional experience, including a person’s work as a solicitor, barrister or family law arbitrator while in the list. Regulation 3 in the Regulations defines a legal practitioner as a person enrolled as a barrister, a solicitor, a barrister and solicitor, or a legal practitioner, of the High Court of Australia, or of the Supreme Court of a State or Territory.
21. Paragraph 67B(6)(b) does not prescribe a particular number of hours of relevant work in family law matters. This is because persons with relevant professional experience have a range of different working arrangements including full time, part time or semi-retired and the intention is not to preclude a person from eligibility because of any particular working arrangement. Paragraph 67B(6)(c) ensures an assessment is made based on a person’s particular working arrangement and experience to ensure they have recent and relevant experience so as to be well equipped to support separated couples and determine a family law financial matter.
22. Subregulation 67B(8) provides that the person must, within a month from the end of each two-year period mentioned in subregulation 67B(6), give a statutory declaration to the body that keeps the list to the effect that they have met the requirements in subregulation 67B(6).
23. Subregulation 67B(7) provides clarity for when the two-year period commences. It is as follows:
 - For a person who has been included in the list of arbitrators before 1 August 2024 (which is the day the new requirements commence), the two-year period would commence on 1 August 2024. This means that the person is required to provide a statutory declaration within a month after 1 August 2026 (i.e. on or before 31 August 2026), and at the end of each two-year period thereafter.
 - For a person who is included in the list of arbitrators on or after 1 August 2024, that person must provide a statutory declaration within a month after the date their name was included in the list, and at the end of each two-year period thereafter.

Continuing professional development

24. Subregulation 67B(9) provides that for a person to meet the continuing requirement for CPD at paragraph 67B(6)(a), CPD that is completed in a State or Territory by a person who does not hold a practising certificate must be of at least a similar standard to CPD required to be undertaken in that State or Territory, as a condition of a legal practitioner’s practising certificate. This will enable Government lawyers who may engage in family law matters and retired judges or magistrates who are arbitrators, to meet the continuing CPD requirement.

Item 2 – Part VI (heading)

25. Item 2 omits the words ‘repeal and savings’ from the heading in Part VI of the Regulations and substitutes the words ‘Application, saving and transitional provisions’. This is technical amendment to reflect the arrangements inserted at item 3.

Item 3 – At the appropriate position in Part VI

26. Item 3 inserts regulation 84 to provide the application, saving and transitional arrangements for the amendments made in item 1 of the instrument.
27. The application provisions in subregulations 84(1) and (2) provide that the eligibility requirements to become an arbitrator (in subregulation 67B(4)), and the requirement to give a statutory declaration to the body keeping the list, to the effect that they meet the requirements (in subregulation 67B(3)), must be met by a person applying to become an arbitrator if they are not already in the list of arbitrators upon the commencement of the amendments on 1 August 2024.
28. An application made by a person to become an arbitrator that is not decided before the commencement of the amendments (on 1 August 2024), or an application made by a person on or after that date, must comply with the new requirements of the instrument.
29. Subregulation 84(3) is intended to avoid any doubt about the application of the new requirements to persons already in the list of arbitrators at the time the amendments commence on 1 August 2024. This provision ensures that those who are already in the list of arbitrators held by AIFLAM are taken to continue to be in the list of arbitrators at the commencement of the amendments on 1 August 2024.
30. To maintain eligibility to be kept in the list, these arbitrators will need to comply with the continuing requirements in subregulations 67B(6)-(8), including to provide a statutory declaration at the end of each two-year period to declare that they have met the requirements in subregulation 67B(6) for that period. The first period will be 1 August 2024 to 1 August 2026.