2016-2017

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

CIVIL LAW AND JUSTICE LEGISLATION AMENDMENT BILL 2017

EXPLANATORY MEMORANDUM

(Circulated by authority of the
Attorney-General, Senator the Honourable George Brandis QC)

CIVIL LAW AND JUSTICE LEGISLATION AMENDMENT BILL 2017

GENERAL OUTLINE

1. The purpose of the Civil Law and Justice Legislation Amendment Bill 2017 is to make minor and technical amendments to civil justice legislation. This would improve the operation and clarity of civil justice legislation administered by the Attorney-General.

2. The Bill is an omnibus bill which would amend the following Acts:

- *Acts Interpretation Act 1901*
- *Archives Act 1983*
- *Bankruptcy Act 1966*
- *Domicile Act 1982*
- *Evidence Act 1995*
- *Family Law Act 1975*
- *International Arbitration Act 1974*
- *Legislation Act 2003*
- *Marriage Act 1961*, and
- *Sex Discrimination Act 1984.*

3. The Bill would also make consequential amendments to the:

- *Defence Force Retirement and Death Benefits Act 1973*
- *Defence Forces Retirement Benefits Act 1948*
- *Governor-General Act 1974*
- *Income Tax Assessment Act 1997*
- *Judges' Pensions Act 1968*
- *Parliamentary Contributory Superannuation Act 1948*
- *Superannuation Act 1922*
- *Superannuation Act 1976, and*
- *Superannuation (Unclaimed Money and Lost Members) Act 1999*.

4. Amendments to the *Acts Interpretation Act 1901* and the *Legislation Act 2003* would clarify the validity of Ministerial acts and the operation of provisions about the management of compilations prepared for the Federal Register of Legislation.

5. Amendments to the *Archives Act 1983* would provide the National Archives of Australia with some tools to appropriately manage high volume applicants requesting access to records and make other minor technical amendments, including repealing outdated provisions that do not reflect the Archives' current services or technology advances.

6. An amendment to the *Bankruptcy Act 1966* would clarify that the Family Court of Australia has bankruptcy jurisdiction when a trustee applies to have a financial agreement set aside under the Family Law Act.

7. An amendment to the *Domicile Act 1982* would amend the Act so that it applies to territories currently specified in the *Domicile Regulations 1982*.

8. An amendment to the *Evidence Act 1995* would amend the presumption about when postal articles sent by prepaid post are received, to accord with changes to Australia Post delivery times.

9. Amendments to the *Family Law Act 1975* would:

- strengthen Australia's response to international parental child abduction
- clarify the range of persons who may perform the powers of the Registry Managers in the Family Court of Australia or any other court
- improve the consistency of financial and other provisions for de facto and married couples
- assist the operation of the family law courts, and
- make minor and technical amendments, including clarifying definitions and removing redundant provisions.

10. Amendments to the *International Arbitration Act 1974* would:

- specify expressly the meaning of 'competent court' for the purpose of the Model Law
- clarify procedural requirements for enforcement of an arbitral award
- modernise provisions governing arbitrators' powers to award costs in international commercial arbitrations, and
- clarify the application of confidentiality provisions to arbitration subject to the United Nations Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration.

11. Amendments to the *Marriage Act 1961* would:

- remove outdated concepts and ensure consistency with the Family Law Act in relation to parental consent for the marriage of minors
- make technical amendments of minor policy significance to improve the operation of the Marriage Act, and
- remedy errors and defects in existing legislation to clarify and streamline relevant provisions to ensure consistency.

12. An amendment to the *Sex Discrimination Act 1984* would repeal section 43 which exempts discrimination against women in connection with employment, engagement or appointment in Australian Defence Force (ADF) positions involving combat duties.

FINANCIAL IMPACT

13. There is nil financial impact associated with this Bill.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Civil Law and Justice Legislation Amendment Bill 2017

14. 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

15. The Bill is an omnibus bill, which would make minor, technical and uncontroversial amendments to the following Acts:

- *Acts Interpretation Act 1901*
- *Archives Act 1983*
- *Bankruptcy Act 1966*
- *Domicile Act 1982*
- *Evidence Act 1995*
- *Family Law Act 1975*
- *International Arbitration Act 1974*
- *Legislation Act 2003*
- *Marriage Act 1961*, and
- *Sex Discrimination Act 1984.*

16. The Bill would also make consequential amendments to the:

- *Defence Force Retirement and Death Benefits Act 1973*
- *Defence Forces Retirement Benefits Act 1948*
- *Governor-General Act 1974*
- *Income Tax Assessment Act 1997*
- *Judges' Pensions Act 1968*
- *Parliamentary Contributory Superannuation Act 1948*
- *Superannuation Act 1922*
- *Superannuation Act 1976*, and
- *Superannuation (Unclaimed Money and Lost Members) Act 1999*.

17. Amendments to the *Acts Interpretation Act 1901* would reinstate a provision that clarifies that a Minister's exercise of power is not invalid merely because that power, duty or function is conferred on another Minister. For example, the performance of a duty by a Minister under the belief that that duty lies with him or her will not automatically be an invalid exercise of power if in fact a change in the Administrative Arrangement Orders placed responsibility for that duty on another Minister. This provision would not, however, validate the acts of Ministers purporting to exercise power which is conferred on another Minister in all circumstances. Further, it would not authorise or allow Ministers to perform functions or duties or exercise powers that do not fall within their areas of responsibility. This provision is intended to operate in accordance with the convention of collective responsibility, which is part of the Cabinet system of Government.

18. Amendments to the *Archives Act 1983* would assist the Archives to appropriately manage high volume applicants requesting access to records and make other minor technical amendments to the Archives Act, including:

- extending the timeframe within which the Archives is required to respond to access requests from 90 calendar days to 90 business days
- providing the Director-General of the Archives with the ability to extend the timeframe for processing an access request by mutual agreement with the applicant
- giving the Director-General of the Archives the power to extend the timeframe for processing an access request where that request exceeds a specified number of items, and
- extending the timeframe for internal review by the Archives of access decisions from 14 calendar days to 30 business days.

19. An amendment to the *Bankruptcy Act 1966* would clarify that the Family Court of Australia has bankruptcy jurisdiction when a trustee applies to have a financial agreement set aside under the Family Law Act.

20. An amendment to the *Domicile Act 1982* would amend the Act so that it applies to the territories currently specified in the *Domicile Regulations 1982*.

21. An amendment to the *Evidence Act 1995* would update the presumption about when postal articles sent by prepaid post are received, to accord with changes to Australia Post delivery times.

22. Amendments to the *Family Law Act 1975* would:

- strengthen Australia's response to international parental child abduction
- clarify the range of persons who may perform the powers of the Registry Managers in the Family Court of Australia or any other court
- improve the consistency of financial and other provisions for de facto and married couples
- assist the operation of the family law courts, and
- make minor and technical amendments, including clarifying definitions and removing redundant provisions.

23. Amendments to the *International Arbitration Act 1974* would:

- specify expressly the meaning of 'competent court' for the purpose of the Model Law
- clarify procedural requirements for enforcement of an arbitral award
- modernise provisions governing arbitrators' powers to award costs in international commercial arbitrations, and

- clarify the application of confidentiality provisions to arbitration subject to the United Nations Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration.

24. The amendments to the *Legislation Act 2003* would promote effective practical management of the Federal Register of Legislation by clarifying that retrospective amendments are not required to be incorporated into previous compilations, that an agency is not required to prepare and lodge for registration a compilation of an Act or instrument merely because a provision of the Act or instrument ceases to be in effect, unless the provision is expressly repealed by amending legislation, and when an instrument should be removed from the "In Force" part of the Register. The Office of Parliamentary Counsel and other agencies preparing compilations of legislation will be able to assess where it is necessary to incorporate retrospective amendments to past compilations, and amending legislation will continue to be available to the public in their most current and correct versions.

25. An amendment to the *Marriage Act 1961* would:

- remove outdated concepts and ensure consistency with the Family Law Act in relation to parental consent for the marriage of minors

- make technical amendments of minor policy significance to improve the operation of the Marriage Act, and

- remedy errors and defects in existing legislation to clarify and streamline relevant provisions to ensure consistency.

26. An amendment to the *Sex Discrimination Act 1984* would repeal section 43, which exempts discrimination against women in connection with employment, engagement or appointment in Australian Defence Force (ADF) positions involving combat duties. This amendment is consistent with the removal of gender restrictions from ADF combat roles, which took full effect from 1 January 2016, and would ensure women have equal opportunities to apply and be considered for ADF positions.

Human rights implications

27. The Bill engages the following human rights:

- the right to privacy: Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR)

- the right to a fair and public hearing: Article 14(1) of the ICCPR

- the obligation to eliminate discrimination against women in employment: Article 11 of the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW)

- illicit transfer of children: Article 11 of the *Convention on the Rights of the Child* (CRC)

- the right to life; the right to security of the person; and the prohibition on torture and other cruel, inhuman or degrading treatment or punishment: Article 6 of the ICCPR; Article 9 of the ICCPR; and Article 7 of the ICCPR and the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT)

- prohibition on retrospective criminal laws: Article 15 of the ICCPR

- the right to freedom of opinion and expression: Articles 19 and 20 of the ICCPR

- respect for home and the family for people with a disability: Article 23 of the Convention on the Rights of Persons with A Disability (CRPD), and

- the right to marry: Article 23 of the ICCPR.

The right to privacy: Article 17 of the ICCPR

28. Article 17 of the ICCPR prohibits arbitrary or unlawful interference with an individual's privacy, family, home or correspondence, and protects a person's honour and reputation from unlawful attacks.

29. The right to privacy can be limited to achieve a legitimate objective where the limitations are lawful and not arbitrary. In order for an interference with the right to privacy to be permissible, the interference must be authorised by law, be for a reason consistent with the ICCPR and be reasonable in the circumstances. The United Nations Human Rights Committee has interpreted the requirement of 'reasonableness' as implying that any interference with privacy must be proportionate to a legitimate end and be necessary in the circumstances.

Family Law Act 1975

30. The Bill would authorise an arrester to enter and search premises and stop and detain conveyances (which includes a vehicle, a vessel and an aircraft) for the purposes of making an arrest.

31. While the amendments do limit the right to privacy, this limitation is in accordance with the law. The amendments are necessary to achieve the legitimate aim of ensuring that an arrestee can be arrested and brought before a Court for the administration of justice where they would otherwise attempt to evade arrest by staying inside premises.

32. The proposed amendments are reasonable and proportionate to this objective. An arrester can only enter premises, using such force as is necessary and reasonable, if the arrester reasonably believes that the arrestee is on the premises. Furthermore, the arrester must not enter premises between 9pm one day and 6am the next day, unless he or she reasonably believes that it would not be practicable to make the arrest at another time. This is an appropriate safeguard on the unnecessary interference with an arrestee's place of residence.

33. These amendments are not an arbitrary interference with privacy because they are necessary, reasonable and proportionate to the legitimate and lawful objective of bringing a

person who is the subject of an arrest warrant before the Court for the administration of justice.

The right to a fair and public hearing: Article 14(1) of the ICCPR

International Arbitration Act 1974

34. Article 14(1) of the ICCPR sets out the right to a fair and public hearing and requires all persons to be equal before courts and tribunals, and to have the right to a fair and public hearing before a competent, independent and impartial court or tribunal established by law.

35. The International Arbitration Act is part of a global framework supporting international commercial arbitration, by providing for the conduct of arbitral proceedings, the recognition and enforcement of foreign arbitral awards, and for the judicial supervision of arbitration in over 150 countries. This framework allows parties to international arbitration agreements to resolve their disputes in a manner of their choosing, subject to the limitations of domestic and international law.

36. Items 1 to 17 of Schedule 7 to the Bill would amend the International Arbitration Act to clarify the meaning of certain terms used in the Act, clarify the procedure for enforcing a foreign award in Australia, permit judicial review of a decision by an arbitral tribunal that it does not have jurisdiction to hear a particular dispute, modernise arbitrators' powers to award costs, and clarify the application of the confidentiality provisions in the Act to Treaty-based Investor-State arbitrations seated in Australia.

37. Parties under the International Arbitration Act are predominantly commercial entities. However, it is possible that parties may be individuals. The amendments promote the right to a fair hearing because they seek to ensure that arbitration related litigation is less costly and more time efficient. These measures serve to make arbitration in Australia fairer and more efficient, promoting the right to have civil rights and obligations determined fairly and independently.

38. Amendments made by the Bill would facilitate the conduct of investor-state arbitrations in accordance with the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration. The Rules apply to investor-state arbitrations under certain bilateral and multilateral investment treaties or free trade agreements concluded on or after 1 April 2014. The Convention on Transparency in Treaty-based Investor-State Arbitration, done at Mauritius in 2014, applies the Rules to certain bilateral and multilateral investment treaties or free trade agreements concluded before 1 April 2014.

39. The facilitation of the transparency regime provided for in the Rules, whether applied by the Convention or not, supports the right to a fair and public hearing. Treaty-based Investor-State arbitrations involve disputes between an investor and a foreign State over the treatment by the host State, of the investment. These disputes occur within the investor-State dispute settlement regime provided for in certain bilateral and multilateral investment treaties or free trade agreements. While investors are usually corporations, it is possible for an investment to be made by an individual.

40. Where the Rules apply to an investor-state arbitration, whether by force of the Convention or not, the amendments set out in the Bill would suspend the operation of the confidentiality provisions in the Act, ensuring that an otherwise confidential arbitral

proceeding is subject to the transparency regime contained in the Rules. This regime requires, subject to limited exceptions, the arbitration hearings to be public, and the publication of certain information about the arbitration, certain documents related to the arbitration such as pleadings, witness statements, the tribunal's orders, decisions and awards and other documents. These measures would ensure the public nature of the arbitrations conducted under the framework of the Rules, promoting consistency in arbitral practice and contributing to the right of individual investors to a fair and public hearing.

The obligation to eliminate discrimination against women in employment: Article 11 of CEDAW

Sex Discrimination Act 1984

41. Item 1 of Schedule 10 of the Bill would repeal section 43 of the *Sex Discrimination Act 1984* which exempts discrimination against women in connection with employment, engagement or appointment in Australian Defence Force (ADF) positions. This item engages the obligation to eliminate discrimination against women in employment under article 11 of CEDAW.

42. Australia has a reservation to the CEDAW providing that it does not accept the application of the Convention so far as it would require the alteration of ADF policies which exclude women from combat duties. Notwithstanding this reservation, the Australian Government's policy to remove all gender restrictions from ADF combat roles was fully implemented on 1 January 2016. As there are no longer any policies in place which exclude women from combat duties, Australia will now move to withdraw this reservation.

43. This amendment supports existing Australian Government policy, and further promotes rights to non-discrimination and equality by ensuring that discriminatory conduct on the basis of sex in connection with combat duties is no longer exempt from the operation of the Sex Discrimination Act.

Illicit transfer of children: Article 11 of the CRC 38.

Family Law Act 1975

44. Article 11 of the CRC requires States to take measures to combat the illicit transfer and non-return of children abroad. The *travaux préparatoires* indicate that this Article of the CRC is particularly concerned with international parental child abduction.

45. The measures of the Bill related to international parental child abduction create two new offences. These offences would make it unlawful to retain a child outside of Australia in breach of a court order or written consent of all parties to a parenting order related to that child, when a parental order exists or is pending. These offences will complement existing provisions that make it an offence to remove such a child from Australia.

46. The measures would also allow a person to request a location order for the purposes of the Hague Convention on the Civil Aspects of International Child Abduction (Child Abduction Convention). This explicitly includes a person appointed as the Central Authority for the Commonwealth, a State or a Territory for the purposes of Article 6 of the Child Abduction Convention.

47. While aspects of international parental child abduction are generally a private civil issue between parents, the Australian Government has responsibilities arising under the CRC and under the Child Abduction Convention. The Australian Government has a broader interest in ensuring that children are not wrongfully removed from Australia regardless of whether that removal is to a Convention or non-Convention country.

48. The gravity of the effects of abduction and wrongful retention on a child's wellbeing, irrespective of who commits the offence or in which country the child is retained, can be devastating and long-lasting. The new offences are intended to be a deterrent to the wrongful retention of a child and apply to any person (regardless of whether they have Australian citizenship or residency) who wrongfully retains a child.

49. The proposed amendments aim to address the wrongful removal or retention of children regardless of the intended country of destination or the country of retention.

50. By protecting the interests of the child, the amendments positively engage with the rights of a child.

51. These new offences will assist Australia in fulfilling its international obligations including its obligations under Article 11 of the CRC, which provides that State Parties shall take measures to combat the illicit transfer and non-return of children abroad.

52. By introducing offences related to retaining a child overseas and by making location orders available for the purpose of the Child Abduction Convention, Australia is fulfilling its responsibilities under that treaty and increasing protections in accordance with Article 11 of the CRC.

<u>The right to life; the right to security of the person; and the prohibition on torture and other cruel, inhuman or degrading treatment or punishment: Article 6 of the ICCPR; Article 9 of the ICCPR; and Article 7 of the ICCPR and the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)</u>

Family Law Act 1975

53. Article 6 of the ICCPR provides that everyone has the inherent right to life and that no one shall be arbitrarily deprived of life. Article 9 of the ICCPR provides that everyone has the right to liberty and security of the person and that no one shall be subjected to arbitrary arrest or detention. It also provides for further protections in the course of arrest, including to be informed of the reason for arrest, to be brought promptly before a judge, to habeas corpus, and to take proceedings before a court.

54. Article 7 of the ICCPR contains the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment. The CAT also prohibits torture and other cruel, inhuman or degrading treatment or punishment.

55. The Bill would modernise the existing arrest provisions in the Act to bring them in line with the similar powers of the Federal Court of Australia and the Federal Circuit Court of Australia to provide for when force may be used by an arrester when exercising his or her powers of arrest. It would also limit, in line with similar powers in the *Crimes Act 1914*, an arrester's power to enter and search premises and stop and detain conveyances (which include a vehicle, a vessel and an aircraft) for the purposes of making an arrest.

56. The proposed amendments engage the right to security of the person in Article 9 and the right to life in Article 6 of the ICCPR and require the provision of reasonable measures to protect a person's physical security. They also engage the prohibition on torture and cruel, inhuman and degrading treatment or punishment in Article 7 of the ICCPR and in CAT.

57. These amendments are necessary to achieve the legitimate aim of ensuring that an arrestee can be arrested and brought before a court for the administration of justice. This will allow an arrester to, for example, disrupt an attempted international parental child abduction by searching the vehicle on which the arrestee intended to leave the country. This engages Australia's obligations in regard to the illicit transfer of children under Article 10 of the CRC.

58. The proposed amendments are reasonable and proportionate to this objective. The powers of the arresters would be appropriately and proportionately limited in that:

- only people authorised by the Act can exercise the powers, which includes, for example, police officers and Marshals of the Family Court. This is a significant additional limitation compared to the Court's existing arrest powers.

- the arrester must not use more force than is necessary and reasonable to make the arrest or to prevent the arrestee's escape after the arrest

- the arrester must not do anything that is likely to cause death or grievous bodily harm unless the arrester reasonably believes that doing so is necessary to protect life or prevent serious injury, and

- the arrester must only enter premises, using only such force as is necessary and reasonable in the circumstances, when they reasonably believe that the arrestee is on the premises.

59. Arresters who do not comply with these restrictions may face criminal charges, particularly if they are found to have used more force than is necessary.

60. These amendments are consistent with the rights to life, security of the person and the prohibition on torture and cruel, inhumane and degrading treatment and punishment because they are aimed at the legitimate and lawful objective of bringing a person who is the subject of an arrest warrant before a Court for the administration of justice and they are necessary, reasonable and proportionate to this objective.

<u>Prohibition on retrospective criminal laws: Article 15 of the ICCPR</u>

Family Law Act 1975

61. Article 15 of the ICCPR provides that no one shall be held guilty of any criminal offence or subject to a higher penalty than was provided for under national or international law, at the time when the act or omission in question was committed.

62. As discussed above, the Bill would create two new offences to make it unlawful to retain a child outside of Australia in breach of a court order or written consent of all parties to a parenting order related to that child, when a parental order exists or is pending. The new offences would apply to a parent abductor of a child who left Australia on, after or before

commencement of the measure. As the manner in which the child left Australia is a physical element of the offence this may mean that past conduct will retroactively become part of the offence.

63. However, the retroactive nature of the offence only applies to when the child was removed from Australia. This element of the offence is only a circumstance in which the unlawful conduct may occur. Conduct that makes up the offence, that is, retaining the child beyond the specified period, will only be an element of the offence if the child is retained on or after commencement. Retention from prior to commencement would not make up part of an offence.

64. As such, despite the retroactive application of one element of the offence, there is no possibility that a person will be guilty of the offences due to conduct undertaken prior to the commencement of the offence. As all convictions would necessarily be due to conduct undertaken after commencement, there is no substantial injustice that arises from the retroactive nature of this element of the offence.

The right to freedom of opinion and expression: Articles 19 and 20 of the ICCPR

Archives Act 1983

65. The right to freedom of opinion and expression is contained in articles 19 and 20 of the International Covenant on Civil and Political Rights (ICCPR). This right is not absolute and includes the freedom to seek, receive and impart information.

66. Article 19 of the ICCPR states:

> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

67. In General Comment No. 34 on Article 19 (CCPR/C/GC/34) the Human Rights Committee noted the importance of States parties proactively putting into the public domain Government information of public interest to give effect to the right of access to information and the need to make every effort to ensure easy, prompt, effective and practical access to such information (at paragraph 19). The amendments to the Archives Act measures in the Bill are consistent with these requirements and the role of the Archives in encouraging public use and access to Commonwealth records as a vital element in documenting the history of the nation.

68. The Archives Act empowers the Archives to, amongst other things, preserve and conserve the archival resources of the Commonwealth. The Archives Act establishes a right of public access to non-exempt Commonwealth records in the 'open access period' (which is transitioning from 30 years to 20 years over the period 2011–21) in the care of the Archives or the custody of a Commonwealth institution.

69. The Archives was established under the Archives Act and is an executive agency of the Australian Government.

70. Under the Archives Act, the functions of the Archives are broadly grouped into the following areas:

- leading Australian Government entities in creating and maintaining authentic, reliable and useable Commonwealth records by providing guidance and setting standards for the management of information and records
- authorising retention and disposal of Commonwealth records, including identification of records of national archival value
- transferring records of national archival value from entities and securing, describing and preserving them, and
- making publicly available Commonwealth records and other archival resources of the Commonwealth in accordance with the Archives Act.

71. The Archives Act currently requires the Archives to accept and process all applications for access to records it receives under section 40 of the Archives Act, regardless of the size or complexity of the application. If a decision is not made by the Archives on an application within 90 days of receipt, then the Archives is deemed to have refused access to the records in that application under subsection 40(8). This deemed refusal then enlivens appeal rights for merits review in the Administrative Appeals Tribunal. There is no limit on the number of applications that can be lodged or the number of records that can be sought by any applicant. As technology improves it is becoming easier to make bulk and voluminous requests for records online. It is now theoretically possible for an individual to seek access to the approximately 40 million items in the Archives' collection and there are currently no grounds under the Archives Act permitting the Archives to refuse or have further time to process such a request.

72. The Bill would provide new mechanisms for the Archives to appropriately manage high volume applicants requesting access to records, and facilitate more efficient and equitable access to records for all applicants. These mechanisms would enable the Director-General of the Archives to, either with agreement of the applicant or unilaterally (provided certain criteria are met), extend the statutory timeframe within which the Archives must respond to an application for access to records.

73. The resources of the Archives are heavily impacted by high volume requests made by a small number of people. In some cases, the same individuals are submitting very large numbers of requests year after year. These measures are intended as a means to provide more realistic time periods for the Archives to process applications for access to records and to encourage applicants to prioritise and narrow their requests. The Archives would continue to process the same volume of applications, but these amendments are intended to enable the Archives to process requests from a broader range of applicants to enable more equitable access to the Archives' collection (rather than a small number of high volume applicants consuming resources). In addition, there would be no changes to the Archives' requirement

to cause Commonwealth records in the open access period, which are not exempt, to be made available for public access under section 31 of the Act (also known as 'proactive release'). By mitigating the demands on the Archives' resources from high volume applicants, it is hoped that the Archives will have greater capacity to identify and proactively disclose records which appear to have a greater public interest.

74. The Bill is compatible with the human right to freedom of expression and opinion in that it provides ongoing and manageable access to records held by the Archives. Any limitation of the right to freedom of opinion and expression is permissible as each of these measures is reasonable, necessary and proportionate means to achieve the goals of these amendments to the Archives Act and the Archives Act as a whole. These measures are not intended to prevent or limit access to records or be intrusive and will enable a regime of equitable access by all applicants to records held by the Archives to be promoted. In particular, the resources of the Archives which are available to process requests for access to records need to be allocated appropriately and equitably. By providing new tools for the Archives to manage the processing of access requests, the goals of easy, prompt, effective and practical access to information required by the Human Rights Committee in General Comment No. 34 on Article 19 (CCPR/C/GC/34) will be fostered.

Respect for home and the family for people with a disability: Article 23 of CRPD

Marriage Act 1961

75. Article 23 of the CRPD recognises the right of persons with disabilities to marry. The Bill includes amendments to the Marriage Act regarding consent to marry. Currently, consent is not 'real consent' where a person is 'mentally incapable of understanding the nature and effect of the marriage ceremony'. The amendments will move the focus from whether a person has a disability to, simply, whether the person understands the nature and effect of the marriage ceremony. These amendments will ensure that persons with a disability are not unnecessarily prevented from entering a marriage, and therefore will promote the rights of persons with a disability as set out in article 23 of the CRPD.

The right to marry: Article 23 ICCPR

76. The other amendments to the Marriage Act in this Bill are minor or machinery in nature. In general terms, the Marriage Act engages the right to marry in Article 23 of the ICCPR. By improving the administration of the Marriage Act and the marriage celebrants programme, the provisions in the Bill relating to marriage continue to support the rights of individuals to marry, as set out in Article 23 of the ICCPR.

Conclusion

77. The Bill is compatible with human rights because it promotes the protection of some human rights, and to the extent that it may limit some human rights, those limitations are reasonable, necessary and proportionate.

NOTES ON CLAUSES

Preliminary

Item 1—Short title

1. Item 1 would provide that the short title of the Act is the *Civil Law and Justice Legislation Amendment Act 2017*.

Item 2—Commencement

2. Item 2 sets out when various provisions of the Civil Law and Justice Legislation Amendment Act 2017 would commence.

3. Subitem 2(1) would provide that each provision of the Act specified in column 1 of the table in subitem 2(1) commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

4. Item 1 of the table provides that sections 1 to 3, which concern the formal aspects of the Act, as well as anything in the Act not elsewhere covered by the table, would commence on the day the Act receives Royal Assent.

5. Item 2 of the table provides that Schedule 1, which would amend the *Acts Interpretation Act 1901*, would commence the day after Royal Assent.

6. Item 3 of the table provides that Part 1 of Schedule 2, which would amend the *Archives Act 1983*, would commence by Proclamation or 6 months after they receive Royal Assent if they are not Proclaimed, whichever is the earliest. This is to provide the National Archives of Australia with adequate time to adjust its business practices to the amendments. Item 4 of the table provides that Part 2 of Schedule 2, which would also amend the Archives Act, would commence on the day after they receive Royal Assent. Unlike the amendments provided for in Part 1, the National Archives of Australia would not need additional time to adjust its business practices to accommodate these amendments.

7. Item 5 of the table provides that Schedule 3, which would amend the *Bankruptcy Act 1966*, would commence the day after the Act receives Royal Assent.

8. Item 6 of the table provides that Schedule 4, which would amend the *Domicile Act 1982*, would commence the day after the end of the period of 3 months after the day the Act receives Royal Assent. This is to allow time for an instrument repealing the Domicile Regulations 1982 to be made.

9. Item 7 of the table provides that Schedule 5, which would amend the *Evidence Act 1995*, would commence the day after the Act receives Royal Assent.

10. Item 8 of the table provides that Schedule 6, Part 1, which would amend the *Family Law Act 1975*, would commence the day after the Act receives Royal Assent.

11. Item 9 of the table provides that Schedule 6, Part 2, which would amend the *Family Law Act 1975*, would commence by proclamation, or within six months of the Act receiving Royal Assent, whichever is the earliest. This is to allow time to prepare for implementation of legislative changes before the provisions commence.

12. Item 10 of the table provides that Schedule 6, Part 3, which would amend the *Family Law Act 1975*, would commence 28 days after the Act receives Royal Assent. This would allow time for consequential amendments to be made to subordinate instruments to update references to provisions that would be renumbered by Schedule 6, Part 3.

13. Item 11 of the table provides that Schedules 7—10 would commence the day after the Act receives Royal Assent.

Schedule 1—Amendment of the *Acts Interpretation Act 1901*

Item 1—Section 1

14. Item 1 of Schedule 1 would substitute a new subparagraph (d) to include the new section 19E into the outline of the *Acts Interpretation Act 1901* provided by section 1A, which concerns the validity of acts done by Ministers. This would be a consequential amendment necessary due to the new section 19E, to be inserted by item 3 of this Schedule.

Item 2—Subsection 19D(1)

15. Item 2 of Schedule 1 would omit "The" at the beginning of subsection 19D(1) of the Acts Interpretation Act and insert "Subject to section 19E, the". This would ensure that new section 19E (to be inserted by Item 3) is not restricted in its operation by existing section 19D, which deals with some of the situations in relation to the exercise of Ministerial powers that are also sought to be covered by section 19E.

Item 3—After section 19D

16. Item 3 of Schedule 1 would insert new section 19E into the Acts Interpretation Act after section 19D. Section 19E would replicate repealed section 19BD, which was repealed by the *Acts and Instruments (Framework Reform) Act 2014* because of a drafting error. The purpose of section 19E is to ensure that the exercise of a power or the performance of a function or duty that is conferred or imposed on a Minister by an Act is not invalid merely because another Minister exercises the power or performs the function or duty. For example, the performance of a duty by a Minister under the belief that that duty lies with him or her will not automatically be an invalid exercise of power if in fact a change in the Administrative Arrangement Orders placed responsibility for that duty on a another Minister. This provision does not, however, validate the acts of a Minister purporting to exercise power which is conferred on another Minister in all circumstances. Further, it does not authorise or allow a Minister to perform functions or duties or exercise powers that do not fall within that Minister's responsibility. This provision is intended to operate in accordance with the convention of collective responsibility, which is part of the Cabinet system of Government.

17. Section 19BD was repealed because its policy outcome and operation were mistakenly considered at the time to be adequately covered by section 19D, which deals with Minister's powers along with those of other authorities, but only in the context of machinery of government changes. The purpose of reinstating section 19BD (as new section 19E) is to deal with the exercise of Ministerial power in a broader range of situations than just machinery changes.

Schedule 2—Amendments of the *Archives Act 1983*

18. The *Archives Act 1983* regulates the operations of the National Archives of Australia. The Archives has in its custody approximately 40 million items and is responsible for accepting, preserving and making Commonwealth records of archival value accessible for current and future generations. It also has a significant role in overseeing, and setting standards around, Commonwealth record-keeping by providing advice and assistance to Commonwealth institutions.

19. The Archives is required under the Archives Act to cause Commonwealth records in the open access period, which are not exempt, to be made available for public access. The open access period is progressively reducing from 30 to 20 years over a ten year period and currently stands at 25 years from a record's creation date. The Archives identifies records that appear to have greater public interest and prioritises the proactive disclosure of those records. However, members of the public also have a statutory right to request access to Commonwealth records in the open access period that have not yet been made publicly available by the Archives.

Part 1—Access to records

Item 1—Section 40 (heading)

20. Item 1 of Schedule 2 would repeal the existing heading for section 40 of the Archives Act and substitute the new heading 'Applications for access to records'. The new heading would more clearly reflect the content of section 40 following other amendments which would be made by this Schedule.

Item 2—Before subsection 40(1)

21. Item 2 of Schedule 2 would insert the subheading 'Applications to which this section applies' before subsection 40(1) of the Archives Act to improve clarity and usability for the reader.

Item 3—At the end of subsection 40(1)

22. Item 3 of Schedule 2 would add a note at the end of subsection 40(1) of the Archives Act. This amendment is consequential to item 11 which would, among other things, insert a new section 40B at the end of Division 3 of Part V of the Archives Act. The note informs readers that a determination made under section 40B that an application by a person is taken to have been made by another person, may have the effect that the application is taken to have been made by a person other than the person who actually made it.

Item 4—Before subsection 40(2)

23. Item 4 of Schedule 2 would insert the subheading 'Assistance to make applications' before subsection 40(2) of the Archives Act to improve clarity and usability for the reader.

Item 5—Subsections 40(3) and (4)

24. Item 5 of Schedule 2 would repeal subsections 40(3) and (4) of the Archives Act and substitute a new subsection 40(3) providing for the timeframe for the Archives to make a

decision on an application. This amendment is consequential to amendments in item 11 which would, among other things, introduce '***consideration period***' as a defined term in new section 40A. When read together with new paragraph 40A(1)(a), there is no substantive change in the effect of new subsection 40(3) from current subsections 40(3) and (4) (other than the change to business days instead of calendar days; see item 11 below).

25. Item 5 would also insert the subheading 'Notice of decision relating to refusal to grant access' at the end of subsection 40(3) of the Archives Act to improve clarity and usability for the reader.

Item 6—Before subsection 40(8)

26. Item 6 of Schedule 2 would insert the subheading 'Effect of delay in dealing with application' before subsection 40(8) of the Archives Act to improve clarity and usability for the reader.

Item 7—Paragraph 40(8)(b)

27. Item 7 of Schedule 2 would repeal paragraph 40(8)(b) of the Archives Act and substitute a new paragraph 40(8)(b) which refers to the consideration period under section 40A. This amendment is consequential to amendments in item 11 which would, among other things, introduce '***consideration period***' as a defined term in new section 40A. There would be no change in substance from existing paragraph 40(8)(b) of the Archives Act.

Item 8—Subsection 40(9)

28. Item 8 of Schedule 2 would amend subsection 40(9) of the Archives Act to omit the reference to subsection 40(8) and substitute a reference to the consideration period under section 40A. This amendment is consequential to amendments in item 11 which would, among other things, introduce '***consideration period***' as a defined term in new section 40A. There would be no change in substance from existing subsection 40(9) of the Archives Act.

Item 9—Subsection 40(9)

29. Item 9 of Schedule 2 would amend subsection 40(9) of the Archives Act to omit the words 'that subsection' and substitute 'subsection (8)'. This amendment is consequential to amendments in item 8 above.

Item 10—Subsection 40(10)

30. Item 10 of Schedule 2 would amend subsection 40(10) of the Archives Act to omit the reference to subsection 40(8) and substitute a reference to the consideration period under section 40A. This amendment is consequential to amendments in item 11 which would, among other things, introduce '***consideration period***' as a defined term in new section 40A. There would be no change in substance from existing subsection 40(10) of the Archives Act.

Item 11—At the end of Division 3 of Part V

31. Item 11 of Schedule 2 would insert two new sections, sections 40A and 40B, at the end of Division 3 of Part V of the Archives Act. The primary purpose of this amendment is to introduce two new mechanisms which will provide the Archives with some tools to appropriately manage high volume applicants requesting access to records, and facilitate

more efficient and equitable access to records for all applicants. Both mechanisms would enable the Director-General of the Archives to, either with agreement of the applicant or unilaterally (provided certain criteria are met), extend the statutory timeframe within which the Archives must respond to an application for access to records under section 40.

32. Currently the Archives Act requires the Archives to accept and process all applications for access to records it receives under section 40 of the Archives Act, regardless of the size or complexity of the application. If a decision is not made by the Archives on an application within 90 days of receipt, then the Archives is deemed to have refused access to the records in that application under subsection 40(8). This deemed refusal then enlivens appeal rights for merits review in the AAT. There is no limit on the number of applications that can be lodged or the number of records that can be sought by any applicant. As technology improves it is becoming easier to make bulk and voluminous requests for records online. It is now theoretically possible for an individual to seek access to the approximately 40 million items in the Archives' collection and there are currently no grounds under the Archives Act permitting the Archives to refuse or have further time to process such a request.

33. The resources of the Archives are heavily impacted by high volume requests made by a small number of people. As at January 2017, the top ten applicants had 12,572 active applications with the Archives. These applications have been submitted over the course of a number of years. In some cases, the same individuals are submitting very large numbers of requests year after year.

34. These measures are intended as a means to provide more realistic timeframes for the Archives to process applications for access to records and to encourage applicants to prioritise and narrow their requests. The Archives would continue to process the same volume of applications, but these amendments are intended to enable the Archives to process requests from a broader range of applicants to enable more equitable access to the Archives' collection (rather than a small number of high volume applicants consuming resources). In addition, there would be no changes to the Archives' requirement to cause Commonwealth records in the open access period, which are not exempt, to be made available for public access under section 31 of the Act (also known as 'proactive release'). By mitigating the demands on the Archives' resources from high volume applicants, it is hoped that the Archives will have greater capacity to identify and proactively disclose records which appear to have a greater public interest.

Consideration period for applications to access records

35. New subsection 40A(1) provides the definition for the new term '***consideration period***' which would be introduced by these amendments. Generally, '***consideration period***' refers to the period of time within which the Archives must respond to an application for access to a record or records made under subsection 40(1). Where the Archives fails to respond to an application within that timeframe, it is deemed to have refused the application under subsection 40(8). The term 'consideration period' is introduced as a drafting measure to facilitate the new mechanisms to extend the timeframe under new section 40A.

36. New paragraph 40A(1)(a) provides that, subject to paragraph (b), the consideration period is the period starting on the day after an application is received by the Archives and ending at the end of 90 business days or a period of business days prescribed by regulation (whichever is shorter). This period is described as the '***initial period***'. The effect of this amendment would be to extend the standard timeframe within which the Archives must

respond to applications from 90 calendar days to 90 business days. The current 90 calendar day timeframe is insufficient, particularly for complex requests and requests involving transfer of records between and/or consultation with other agencies. Extending the timeframe to 90 business days will more accurately reflect the length of time required for the Archives to make access decisions in relation to applications made under section 40. The ability to prescribe by regulation a shorter timeframe for consideration preserves an existing power in current subsection 40(4), which would be repealed by item 5 above. To date there have been no regulations made under subsection 40(4) providing for a shorter timeframe.

37. New paragraph 40A(1)(b) provides that if the initial period is extended on one or more occasions under section 40A, then the consideration period ends at the end of the initial period as extended. New paragraph 40A(1)(b) reflects the two new powers to extend the timeframe for considering access applications which would be introduced by item 11. New paragraph 40A(1)(b) also makes clear that under those new powers the initial period for a single application may be extended multiple times.

Extending the initial period—by agreement with applicant

38. New subsections 40A(2) and (3) provide a new discretionary power for the Director-General (or his or her delegate) to extend an application's initial period by a specified number of business days with the applicant's written agreement. The initial period may only be extended before the consideration period expires and must be by written notice from the Director-General. There is no limit to the number of times the Director-General may seek an applicant's agreement to an extension of the initial period. An applicant is not obliged to agree to any such request and new subsection 40A(3) requires the Director-General to inform the applicant that he or she is not obliged to comply with the request. Where an applicant provides written agreement to an extension under new subsection 40A(2) this will be binding. Accordingly, under new paragraph 40A(1)(b) the consideration period would become the initial period (90 business days) as extended by the number of business days agreed to by the applicant and the deemed refusal provision in subsection 40(8) would not apply until the expiration of that extended initial period.

39. For example, an individual makes an application on 19 April 2017 for access to records that include sensitive national security information. The Archives is required to consult with three different Commonwealth institutions before it can make an access decision about those records due to arrangements in place under section 35 of the Archives Act. Given the complexity of the access request the Director-General's authorised delegate writes to the applicant notifying them that the request will take more than 90 business days to finalise. The Director-General's delegate asks the applicant whether they would agree to an extension of the initial period (90 business days) by 60 business days. The applicant decides to accept and provides written agreement to the extension. The deadline for the Archives to make an access decision is therefore amended from 25 August 2016 to 21 November 2017 (150 business days after 19 April 2017).

40. Subsection 40(3) of the Archives Act, as amended by item 5, requires the Archives to notify applicants of decisions on all applications for access to records made under section 40 'as soon as practicable' and before the end of the consideration period. Without the ability to extend this timeframe, the standard consideration period would be 90 business days. If the Archives has not made a decision before the 90 days expires, it is deemed to have refused access to the record under subsection 40(8). This 90 day timeframe, even as extended to 90 business days, can be unduly restrictive, particularly for complex requests and requests

involving the transfer of records between and/or consultation with other agencies. Currently, the Archives can only apply for further time to deal with an application for access after an applicant has lodged an application to appeal the deemed refusal decision with the Administrative Appeals Tribunal (see subsection 40(12) of the Archives Act). This can be an inefficient and costly practice, both to the applicant and the Archives.

41. The purpose of this amendment is to provide a common sense approach to enable the 90 business day timeframe to be extended by mutual agreement with the applicant and thereby avoid invoking the deemed refusal provision where there are sound reasons why it may not be possible to provide access to a record within the 90 day period. Providing an ability to seek agreement to an extension from the applicant at the outset is likely to simplify the process and improve efficiency by avoiding the need to go to the AAT.

Extending the initial period—number of items exceeds the application cap

42. New subsection 40A(4) provides a new discretionary power for the Director-General (or his or her delegate) to extend the initial period (including the initial period as previously extended under section 40A) for one or more applications where the Director-General reasonably believes that the number of items that describe the records covered by one or more of those applications exceeds 25 items (or a larger number, if prescribed by regulation). The initial period may only be extended where the consideration period for the application (or applications) has not expired and the Director-General must provide written notice of the extension to the applicant. Under new paragraph 40A(4)(a), in determining whether the applicant has requested more than 25 items for the purposes of applying new subsection 40A(4), the Director-General may take into account any applications made by the applicant for which the consideration period has not ended.

43. The term '***item***' is defined in new subsection 40A(5) as the smallest discrete unit used by the Archives to describe a record in a series for purposes related to the care, management or retrieval of the record. In the archival context, 'describe' refers to ascribing information (often referred to as 'metadata') to particular records. This assists the Archives with managing those records and aids the general public in searching for and locating records. The Archives uses the Commonwealth Records Series (CRS) system to manage, locate, retrieve, describe and make accessible the records in its collection. Two of the main elements of the CRS system are 'series' and 'item'. A 'series' is a group of records created or maintained by an agency or person that are usually kept together because they result from the same activity. A series is ordinarily created by the Commonwealth institution from which the records originate, rather than the Archives. The Archives identifies each series by assigning it a CRS number and describes it in RecordSearch (the Archives' current index and guide to archival material). A series generally consists of one or more items. An 'item' consists of a record (e.g. a letter, email, image or sound recording) or group of records (e.g. a file) that is treated as a unit for archival control and retrieval. Generally, the term 'item' is interchangeable with the term 'file'. However, where a file is made up of many parts, each part of the file is considered to be an individual item. An item can also be, for example, a volume (such as a large bound ledger or ships log), map, plan, photograph, computer file or disc.

44. Where a record covered by an application is only described at the series level, the Director-General may still form a reasonable belief that the application covers more than 25 items based on the estimated metres of shelf space occupied by that series. The Archives uses this measure when determining how much space is required for an agency's physical records to be transferred to the Archives' custody. Currently the Archives estimates the

number of items on the basis that a metre of records contains 79 items. For example, series number A1838 includes Department of Foreign Affairs and Trade correspondence records from 1948 to 1989 and amounts to approximately 3414.1 shelf metres of records. The approximate calculation of the number of items in that series is therefore 269,714 items. As a general rule, a series will contain more than 25 items and the Director-General may extend the initial period under new subsection 40(4). The definition is drafted in a technology neutral manner to ensure it remains appropriate within the digital environment.

45. New paragraph 40A(4)(b) sets the maximum number of items a person may apply for without triggering subsection 40A(4) at 25 items, with the ability for the regulations to prescribe a larger number of items for the purposes of this section. The limit of 25 items is calculated based on the amount of items that, as a general rule, the Archives is realistically able to process within the statutory timeframe of 90 business days. Using the measure of 79 items per shelf metre of records, on average a single paper file (item) in the Archives' collection is approximately 1.2 shelf centimetres. The number of pages within a single paper file can vary significantly, for example:

- item 2/4/1 PART 10 from series A5462, titled 'Defence of South East Asia', consists of 192 pages and is approximately 1.5 shelf centimetres
- item 563/1/6 from series A1838, titled 'Communism - Material on Anti-Communist Propaganda - Received from individuals or organisations' consists of 286 pages and is approximately 2 shelf centimetres
- item 169/10/10/11 PART 1 from series A1838, titled 'India - Political - Relations with Australia - Visit of Mrs Ghandi to Australia', consists of 272 pages and is approximately 2.5 shelf centimetres
- item 3014/9/4 PART 19 from series A1838, titled 'South Vietnam - International Control Commission', consists of 378 pages and is approximately 3.25 shelf centimetres
- item 138/2/1 from series A5462, titled 'Uranium production (Australian) - general policy', consists of 136 pages and is approximately 0.5 shelf centimetres
- item 2/4/1/3 PART 1 from series A5462, titled 'South East Asia and Malaya - Defence - for Ambassador and Counsellor only', consists of 315 pages and is approximately 2.5 shelf centimetres, and
- 31/1/3 PART 3 from series A1838, titled 'Greece - Foreign policy - Relations with Australia - General', consists of 350 pages and is approximately 2.5 shelf centimetres; part 4 of that same file consists of 218 pages and is approximately 2 shelf centimetres.

Based on the examples above, if 200 pages were taken as an indicative average number of pages within an average item in the Archives' collection, then 25 items would likely consist of at least 5000 pages. Additionally, many of the items mentioned as examples above would have required detailed examination prior to release, including consultation with other Commonwealth institutions, to determine whether any exemptions under section 33 of the Archives Act applied.

46. The 25 item limit would only affect a small proportion of applicants seeking access to records. The vast majority of applicants to the Archives do not submit applications for more than 25 items in any given year. Over the last five years, it is estimated that less than 3% of applicants have submitted requests for more than 25 items. The ability to prescribe a larger number of items by regulation under new paragraph 40A(4)(b)(ii) provides flexibility to adjust the limit over time. For example, as more records are digitised and the Australian

Government increasingly uses digital record-keeping systems, it is likely to become easier for the Archives to process requests for access more quickly. This in turn may mean the limit on items could be increased over time.

47. The Director-General's power to extend the initial period under subsection 40A is discretionary and the Archives is therefore not prevented from processing requests for more than 25 items within the standard 90 business days if it wishes and is able to do so.

48. Decisions by the Director-General to extend the initial period under subsection 40A(4) are not subject to merits review, though judicial review will remain available. This is because these decisions are preliminary decisions which merely facilitate the substantive decision on whether access to records is permitted under the Archives Act (decisions on access to records are subject to merits review under the Archives Act; see sections 42 and 43).

Limit on extensions under subsection (4)

49. New subsection 40A(6) sets a maximum limit on the number of business days by which the Director-General may extend the initial period under new subsection 40A(4) by reference to a specific formula [***unextended initial period*** x (***items requested*** / ***application cap***)]. In applying this formula:

- '***unextended initial period***' is defined as the number of business days in the initial period under subparagraph 40A(1)(a)(i) or (ii), disregarding any extensions under section 40A; in practice this will always be 90 business days, unless the regulations prescribed a shorter period under subparagraph 40A(1)(a)(ii)

- '***items requested***' is defined as the number of items that the Director-General reasonably believes describe the records covered by the application or applications under paragraph 40A(4)(b); where the records covered by the application have not been described at the item level, the Director-General may form a reasonable belief as to the number of items (for example, by reference to the metres of shelf space occupied by that series), and

- '***application cap***' is defined as 25 under subparagraph 40A(4)(b)(i), unless the regulations prescribed a larger number under subparagraph 40A(4)(b)(ii).

50. This provision ensures that the Director-General may not extend the timeframe for one or more applications indefinitely. However, if the number of items that describe the records covered by those applications is very large, under the formula in subsection 40A(6) the maximum limit for the extension could be several years. In exercising his or her discretion under subsection 40A(4), the Director-General may choose not to extend the initial period by the maximum amount. The Director-General may make multiple extensions in relation to the same application or applications under subsection 40A(4), provided that the extensions, when taken together, do not have the effect of contravening the maximum limit in subsection 40A(6). As the maximum limit under subsection 40A(6) would be calculated at the time of each new extension, where a person had made additional applications for access to records the maximum limit would be higher.

51. As is currently the case under the standard 90 day timeframe, an extension of the initial period under subsection 40A(4) would not prevent the Archives from making access decisions for all records requested within a shorter timeframe if it is able to do so.

Varying or revoking extensions under subsection (4)

52. New subsection 40A(7) provides that the Director-General may vary or revoke an extension under subsection 40A(4) by written notice given to the applicant before the end of the extension period. It is not intended to limit subsection 33(3) of the *Acts Interpretation Act 1901*. New subsection 40A(8) makes clear that where the Director-General varies an extension under subsection 40A(7), for the purposes of applying the formula to determine the maximum limit for the extension the number of items mentioned in paragraph 40A(4)(b) is determined on the basis of applications made by the applicant at the time of the variation for which the consideration period has not ended.

53. The Director-General may decide to vary an extension where an applicant, who already has one or more applications with an extended consideration period under subsection 40A(4), submits further applications for access to records within that period. As the maximum limit is calculated based on the applications made at the time of the variation, this means the extension for the original applications could be further extended as the additional applications received would result in a higher maximum limit under subsection 40A(6). Conversely, the Director-General may decide to vary an extension to shorten the extended consideration period where an applicant withdraws a number of requests.

54. Decisions by the Director-General to vary or revoke an extension of the initial period under subsection 40A(7) are also not subject to merits review, though judicial review will remain available. This is because these decisions are preliminary decisions which merely facilitate the substantive decision on whether access to records is permitted under the Archives Act (decisions on access to records are subject to merits review under the Archives Act; see sections 42 and 43).

Examples—applying subsections 40A(4)–(8)

55. The following scenarios provide examples of how new subsections 40A(4) to (8) would operate in practice:

- Margaret submits an application for 30 items on 3 January 2018. As this amount is above the application cap, the Director-General decides to exercise his or her discretion under subsection 40A(4) to extend the initial period for Margaret's application. The Director-General provides written notice to Margaret that he or she has extended the initial period for her request (90 business days) by 108 business days (applying the formula in subsection 40A(6): 90 x (30/25)). The consideration period for Margaret's application will therefore end on 18 October 2018 (198 business days after 3 January 2018).

- Felix submits an application for 15 items on 3 January 2018. The consideration period of 90 business days for this application ends on 16 May 2018. Felix then submits an application for a further 20 items on 3 February 2018. The Archives has not yet made a decision on Felix's initial application. As the consideration period for Felix's initial period has not concluded and the total number of items Felix applied for (35 items)

now exceeds the application cap, the Director-General decides to exercise his or her discretion under subsection 40A(4) to extend the initial period for both of Felix's applications. Under subsection 40A(6), the Director-General may extend the initial period for each application (90 business days) by a maximum of 126 business days (applying the formula in subsection 40A(6): 90 x (35/25) = 126). In order to produce the same deadline for both applications, the Director-General provides written notice to Felix that he has extended the initial period for Felix's first application by 126 business days and the initial period for his second application by 104 business days. The consideration period for both of Felix's applications will therefore now end on 13 November 2018 (216 business days after 3 January 2018 and 194 business days after 3 February 2018).

- Samantha submits an application for 100 items on 3 January 2018. As this amount is above the application cap, the Director-General decides to exercise his or her discretion under subsection 40A(4) to extend the initial period for Samantha's application. The Director-General provides written notice to Samantha that he or she has extended the initial period for her request (90 business days) by the maximum 360 business days (applying the formula in subsection 40A(6): 90 x (100/25) = 360). The consideration period for Samantha's application will therefore end on 22 October 2019 (450 business days after 3 January 2018). Samantha subsequently advises the Archives on 9 March 2018 that she wishes to withdraw 50 items from her application. The Director-General decides to vary Samantha's extension under subsection 40A(7), reducing the extension to the initial period (90 business days) from 360 to 180 business days (applying the formula in subsection 40A(6): 90 x (50/25) = 180). The Director-General provides written notice to Samantha advising that the revised consideration period for her application will now end on 1 February 2019 (270 business days after 3 January 2018).

Matters to be taken into account for extensions under subsection (4)

56. New subsection 40A(9) provides for the regulations to prescribe matters (if any) the Director-General must take into account in extending an initial period under subsection 40A(4) or varying such an extension. At this stage there is no intention to prescribe any such matters by regulation. This provision is primarily intended as a safe-guard in the event it was considered necessary to ensure that the Director-General was exercising the discretion in subsection 40A(4) appropriately.

Applications for access to records made by persons acting in concert etc.

57. New subsection 40B(1) provides that the Director-General may determine in writing that an application under section 40 of the Archives Act made by a person (the ***first person***) is taken for the purposes of the Archives Act to have been made by another person if the Director-General reasonably suspects that the first person is acting (or intended, expected or accustomed to act) in accordance with the directions, instructions or wishes of, or in concert with, another person in relation to the making of such applications. This provision is intended to prevent persons from circumventing the application of the extension power in new subsection 40A(4) by arranging for one or more other persons to submit applications for access to records on the person's behalf. Such arrangements may be formal or informal and could include:

- a dependant or relative submitting an application for his mother, father, brother or sister etc
- an employee, consultant or agent submitting an application for a supervisor, whether or not there is a contractual or other obligation on the individual, or
- a group of researchers working together submitting applications for multiple records on the same topic to meet a common objective.

58. New subsection 40B(2) provides that a determination by the Director-General under new subsection 40B(1) has effect accordingly. One effect of such a determination is that another person is taken to be the applicant (instead of the first person). This will mean that any review rights in relation to the application under the Archives Act will apply to another person, rather than the first person.

59. Determinations by the Director-General under subsection 40B(1) are not subject to merits review, although judicial review remains available. This is because determinations under subsection 40B(1) are intended to support the operation of subsection 40A(4) (by ensuring it cannot be circumvented by a person using other persons to make additional applications) and are therefore considered to be preliminary decisions. Under subsection 33(3) of the *Acts Interpretation Act 1901*, the Director-General has the power to revoke a determination in the event that a person is able to demonstrate a determination under subsection 40B(1) was made in error.

Item 12—Paragraph 42(2)(b)

60. Item 12 of Schedule 2 would amend paragraph 42(2)(b) of the Archives Act to replace the current requirement for the Archives to notify an applicant of an internal reconsideration decision 'as expeditiously as practicable', with a requirement to notify an applicant 'as soon as practicable, and within 30 business days'. This amendment will provide greater clarity as the timeframe for internal reconsideration decisions will be explicitly included in section 42, which sets out the process for internal reconsideration applications. Currently the timeframe for internal reconsideration is only found in paragraph 43(3)(b) which relates to applications to the Administrative Appeals Tribunal. The change from 'as expeditiously as practicable' to 'as soon as practicable' is to align with the requirement in subsection 40(3) to respond to access applications under section 40 as soon as practicable.

Item 13—Paragraph 43(3)(b)

61. Item 13 of Schedule 2 would amend paragraph 43(3)(b) of the Archives Act to extend the current timeframe for notifying an applicant of an internal reconsideration decision from 14 calendar days to 30 business days.

62. The current timeframe for internal reconsideration by the Archives of decisions made under section 40 of the Archives Act is inadequate to operate an appropriate and effective internal reconsideration mechanism, which may often also require consultation with other Commonwealth agencies and can involve the review of a significant volume of records. Under the current timeframe for internal reconsideration, matters often go beyond the statutory timeframe. For example, for the financial year 2015–16 (within the Archives National Office in Canberra), approximately 40 internal reconsideration requests (representing 85% of all such requests) were not finalised within the statutory timeframe.

63. Extending the timeframe for internal reconsideration by the Archives of decisions made under section 40 of the Archives Act would provide the Archives with greater time to appropriately reconsider the original decision, resulting in a more effective internal reconsideration process. This would also provide greater scope to release more records to the public and is likely to reduce the need for the AAT to externally review some decisions.

Item 14—Application of amendments

64. Item 14 of Schedule 2 provides that sections 40, 40A and 40B of the Archives Act, as in force after commencement, would only apply in relation to applications made after commencement. This ensures that those amendments would not have retrospective effect. Item 14 also provides that paragraphs 42(2)(b) and 43(3)(b), as in force after commencement, would only apply to applications under section 42 for internal reconsideration of a decision which were made after commencement. This ensures that those amendments would not have retrospective effect.

Part 2—Other amendments

Item 15—Subsection 3(1) (definition of ***Commonwealth record***)

65. Item 15 of Schedule 2 would amend the definition of ***Commonwealth record*** in subsection 3(1) of the Archives Act to remove the reference to a 'register or guide maintained in accordance with Part VIII'. This amendment is consequential to the amendment in item 19, which would repeal Part VIII.

Item 16—Subsection 17(4)

66. Item 16 of Schedule 2 would amend subsection 17(4) of the Archives Act to insert 'for the time being holding office' after the second mention of 'Council'. Subsection 17(4) of the Archives Act sets out the quorum requirements for meetings of the National Archives of Australia Advisory Council. There is currently some ambiguity regarding the interpretation of the current quorum requirements in subsection 17(4). As there are often vacancies on the Advisory Council at any point in time, this amendment clarifies and puts beyond doubt that a quorum is the majority of members appointed to the Advisory Council at the time of the meeting, rather than a majority of all available positions on the Advisory Council.

Item 17—Paragraph 40(1)(d)

67. Item 17 of Schedule 2 would amend paragraph 40(1)(d) of the Archives Act to replace the current specific reference to the Australian National Guide to Archival Material with a general reference to 'any index or guide published by the Archives'. This amendment is consequential to item 19, which would repeal Part VIII of the Archives Act, including section 66 which provides for the Australian National Guide to Archival Material. As amended, paragraph 40(1)(d) would set out the requirement for applications for access to a record to include 'such particulars, if any, concerning the record to which it relates as are contained in any index or guide published by the Archives'. Currently the primary 'index or guide' for this purpose is RecordSearch, the Archives' online database. Under subsection 40(2) of the Archives Act, the Archives is required to give all reasonable assistance to applicants to enable them to comply with paragraph 40(1)(d).

Item 18—Application of amendment—particulars of records to be provided in application

68. Item 18 of Schedule 2 provides that paragraph 40(1)(d) of the Archives Act, as amended by this Schedule, would only apply in relation to applications made after the commencement of this Schedule. This ensures that the amendment would not have retrospective effect.

Item 19—Part VIII

69. Item 19 of Schedule 2 would repeal Part VIII—Registers and guide relating to Archives from the Archives Act. Part VIII currently provides for the establishment and maintenance of three separate registers or guides: the Australian National Register of Records (section 65), the Australian National Guide to Archival Material (section 66) and the Australian National Register of Research Involving Archives (section 67).

70. Part VIII was drafted on the basis of a paper-based archive and envisages physical, hard-copy registers and guides. Accordingly it is outdated and suitable for repeal. The Archives does not currently maintain any of the registers or guides in the manner specified in Part VIII. The specific form of a register or guide for records is more appropriately dealt with as a matter of policy rather than prescribed in legislation. Under paragraph 6(1)(g) of the Archives Act, the Archives has the power to publish indexes of, and other guides to, archival material. This approach will be more efficient and effective than continuing a prescriptive, legislative approach which may quickly become outdated.

71. The Archives currently administers 'RecordSearch', which is an online database to search Commonwealth records and other archival material held by the Archives that have been described (including barcode, series number, title, item details, controlling agency, and whether an item is open, closed (exempt in full) or open with some exemptions applied). RecordSearch therefore performs the essential functions required by sections 65 and 66 with respect to Commonwealth records and other archival resources of the Commonwealth. The Archives will continue to administer RecordSearch (or other indexes or guides to Commonwealth records and archival material), which facilitates public access to records under section 40 of the Archives Act. At February 2017, RecordSearch can be accessed at: http://recordsearch.naa.gov.au/SearchNRetrieve/Interface/SessionTimeout.aspx.

72. The Archives also does not currently maintain an Australian National Register of Research Involving Archives and is not resourced to do so as required by section 67. Any future decisions to establish such a register should be implemented as a matter of policy, supported by the existing functions and powers of the Archives in sections 5 and 6 of the Archives Act.

Schedule 3—Amendment of the *Bankruptcy Act 1966*

73. Items 1 and 2 would insert a new subparagraph (iia) after subparagraphs 35(1)(b)(ii) and 35(1A)(b)(ii) to clarify that the Family Court of Australia has bankruptcy jurisdiction in circumstances when a Trustee applies to the Family Court of Australia to set aside a financial agreement under sections 90K and 90UM of the *Family Law Act 1975*.

74. These amendments are not intended to change the Family Court's existing jurisdiction in respect of bankruptcy matters. The amendment is intended to make it clear, on the face of the provisions, that proceedings under sections 90K and 90UM are included in the Family Court's bankruptcy jurisdiction where a Trustee is the applicant.

75. The Family Court currently has such jurisdiction by virtue of the definition of 'property settlement proceedings', which is given the same meaning in section 35 of the Bankruptcy Act as in the Family Law Act (see subsection 35(3)) and covers proceedings under sections 90K and 90UM.

76. Section 4(1) of the Family Law Act defines 'property settlement proceeding' to mean:

(a) in relation to the parties to a marriage—proceedings with respect to:

(i) the property of the parties or either of them; or

(ii) the vested bankruptcy property in relation to a bankrupt party to the marriage; or

(b) in relation to the parties to a de facto relationship—proceedings with respect to:

(i) the property of the parties or either of them; or

(ii) the vested property in relation to a bankrupt party to the de facto relationship.

77. Subsection 35(1) of the *Bankruptcy Act 1966* deals with the Family Court's jurisdiction in bankruptcy where a party to a marriage is a bankrupt. Specifically, it provides that where a party to a marriage is a bankrupt and the trustee of the bankrupt's estate is:

- a party to property settlement proceedings in relation to either or both of the parties to the marriage, or
- an applicant under section 79A of the Family Law Act for the variation or setting aside of an order made under section 79 of the Family Law Act in property settlement proceedings in relation to either or both of the parties to the marriage, or
- a party to spousal maintenance proceedings in relation to the maintenance of a party to the marriage

then, at and after that time, the Family Court has jurisdiction in bankruptcy in relation to any matter connected with, or arising out of, the bankruptcy of the bankrupt.

78. Item 1 would insert a new subparagraph after subparagraph 35(1)(b)(ii) to make it clear that the Family Court has jurisdiction in bankruptcy where the party to a marriage is bankrupt and the trustee of the bankrupt's estate is an applicant for an order under

subsection 90K(1) or (3) of the Act for the setting aside of a financial agreement of the parties to the marriage.

79. Subsection 90K(1) provides the circumstances in which a court may make an order setting aside a financial agreement or termination agreement, and subsection 90K(3) provides that, on application, a court may make such orders as it considers just and equitable for the purposes of preserving or adjusting the rights of persons who were parties to that financial agreement, and any other interested persons.

80. Subsection 35(1A) of the Bankruptcy Act deals with the Family Court's jurisdiction in bankruptcy where a party to a de facto relationship is a bankrupt. It provides that the Family Court has jurisdiction in bankruptcy in relation to any matter connected with, or arising out of, the bankruptcy in equivalent circumstances to those listed for marriage in subsection 35(1). That is, where a party to the de facto relationship is a bankrupt and the trustee of the bankrupt's estate is:

- a party to property settlement proceedings in relation to either or both of the parties to the de facto relationship, or
- an applicant under section 90SN of the Family Law Act for the variation or setting aside of an order made under section 90SM of the Family Law Act in property settlement proceedings in relation to either or both of the parties to the de facto relationship, or
- a party to maintenance proceedings under Part VIIIAB of the Family Law Act in relation to the maintenance of one of the parties to the de facto relationship.

81. Item 2 would insert a new subparagraph after subparagraph 35(1A)(b)(ii) to make it clear that the Family Court has jurisdiction in bankruptcy where the party to a de facto relationship is bankrupt and the trustee of the bankrupt's estate is an applicant for an order under subsection 90UM(1) or (6) of the Act in relation to the setting aside of a financial agreement of the parties to the marriage.

82. Subsections 90UM(1) provides the circumstances in which a court may make an order setting aside a Part VIIIAB financial agreement or a Part VIIIAB termination agreement and subsection 90UM(6) provides that a court may, on application, make orders as it considers just and equitable for the purpose of preserving or adjusting the rights of persons who were parties to that financial agreement or any other interested person.

Schedule 4—Amendment of the *Domicile Act 1982*

Item 1—Subsection 3(6)

83. This item would repeal subsection 3(6) of the *Domicile Act 1982* and substitute a new subsection that extends the operation of the Act to the Australian Capital Territory, Norfolk Island, the Jervis Bay Territory, the Territory of Christmas Island, the Territory of Cocos (Keeling) Islands and any external Territory declared by the regulations to be a Territory to which the Act extends.

84. Currently, subsection 3(6) of the Domicile Act provides that the Act applies to the following territories:

> The Territories to which this Act applies are the Australian Capital Territory, the Jervis Bay Territory and the external Territories (if any) that are declared by the regulations to be Territories to which this Act extends.

85. Regulation 3 of the Domicile Regulations 1982 has prescribed such external Territories for the purposes of subsection 3(6). Regulation 3 provides that:

> For the purposes of sub-section 3(6) of the Act, the Territory of Christmas Island, the Territory of Cocos (Keeling) Islands and the Territory of Norfolk Island, being external Territories, are declared to be Territories to which the Act extends.

86. Regulation 3 is the only substantive provision of the Regulations.

87. Item 1 would provide for application of the Act to Norfolk Island, the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands within the Act itself.

88. It is not intended that the application of the Domicile Act will change as a result of the amendment. Rather, it is intended to simplify interpretation of the Act as there will no longer be a need to refer to the regulations, and it will enable the Domicile Regulations to be repealed (as they would be redundant).

89. The power to declare in the regulations that the Act extends to an external Territory would be retained.

Schedule 5—Amendment of the *Evidence Act 1995*

Item 1—Subsection 160(1)

90. This item would amend subsection 160(1) of the *Evidence Act 1995* to provide that a postal article is presumed to be received on the seventh working day after having been posted to align with current postal service timeframes.

91. Subsection 160(1) of the Evidence Act currently provides a rebuttable presumption when evidence is adduced in court that when postal articles sent by prepaid post to an address in Australia or in an external territory, those articles are received at that address on the fourth working day after having been posted. The purpose of this item is to align the presumption with current Australia Post service timeframes based on the maximum time a letter would take to be delivered on the regular service tier.

Item 2—Application of amendment

92. Item 2 would apply subsection 160(1) of the Evidence Act, as amended by Item 1, to postal articles sent after this item commences, being on the day after this Act receives Royal Assent.

Schedule 6—Amendment of the *Family Law Act 1975*

Part 1—Main amendments

Item 1—Subsection 4(1)

93. Item 1 would insert definitions of '***conveyance***' and '***dwelling house***' into subsection 4(1) of the *Family Law Act 1975* to support new section 122A, which would be inserted by Item 49 below.

94. These definitions are modelled on equivalent provisions in the *Crimes Act 1914*.

Item 2— Subsection 4(1) (definition of Registry Manager)

95. Item 2 would repeal the definition of '***Registry Manager***' in subsection 4(1) and substitute a new definition which defines the term as meaning:

- for the Family Court of Australia—the Registry Manger of a Registry of the Court or any other appropriate officer or staff member of the Court, and
- for any other court—the principal officer or staff member of the Court.

96. This amendment would simplify the definition of 'Registry Manager' so that a single definition applies throughout the Family Law Act. It would also provide for a broader range of persons to exercise the powers of Registry Managers. This would clarify that appropriate staff members of the Family Court, or any other court, may exercise the powers of Registry Managers.

Item 3—Subsection 4(1) (definition of *warrant issued under a provision of this Act*)

97. Item 3 would repeal the definition of warrant issued under a provision of the Act. The definition is no longer necessary as a result of the repeal of existing sections 122AA and 122A by item 35 below.

Item 4—At the end of section 10B

98. Existing section 10B of the Act defines 'family counselling' as a process in which a family counsellor helps people deal with personal and interpersonal issues in relation to a marriage, or people affected by separation or divorce to deal with personal and interpersonal issues relating to the care of children.

99. Item 4 would expand the definition of family counselling to also include a process by which a family counsellor helps one or more persons who may apply for a parenting order under section 65C to deal with issues relating to the care of children.

100. The existing definition of family counselling does not appropriately apply to all family arrangements—for example, parents who have never lived together or been married, and therefore cannot be said to be affected by separation or divorce. New paragraph 10B(c) would ensure that the definition aligns with existing section 65C (which specifies a broad range of parenting order applicants) and is sufficiently broad to capture the relevant parties involved in family disputes.

101. It is important the families involved in disputes can access quality family counselling services so they can attempt to resolve their disputes outside of the court and avoid the adversarial court system where possible.

102. This amendment was contained in Schedule 2 to the Family Law Amendment (Financial Agreements and Other Measures) Bill 2015, which was introduced into Parliament on 25 November 2015 and lapsed at the dissolution of Parliament on 9 May 2016.

Item 5—Paragraph 10F(a)

103. Existing section 10F of the Act defines 'family dispute resolution' as a process in which an independent family dispute resolution practitioner helps people affected, or likely to be affected, by separation or divorce to resolve disputes.

104. Item 5 would repeal existing paragraph 10F(a) and substitute a broader definition that includes, in addition to people affected by separation or divorce, helping people who may apply for a parenting order under section 65C to resolve some or all of their dispute relating to the care of children.

105. The existing definition of family dispute resolution did not appropriately capture all family arrangements—for example, parents who have never lived together or been married. New paragraph 10F(a) would ensure that the definition aligns with section 65C (which specifies a broad range of parenting order applicants) and all family arrangements and parties who may be involved in family disputes are captured.

106. This amendment was contained in Schedule 2 to the Family Law Amendment (Financial Agreements and Other Measures) Bill 2015, which was introduced into Parliament on 25 November 2015 and lapsed at the dissolution of parliament on 9 May 2016.

Item 6—Subsection 11C(3)

107. Item 6 would repeal and substitute a new subsection 11C(3). Section 11C deals with the admissibility of communications with family consultants and referrals from family consultants.

108. Existing subsection 11C(1) provides that evidence of anything said, or any admission made, by or in the company of a family consultant performing the functions of a family consultant, or a person to whom a family consultant refers a person for medical or other professional consultation, while the professional is carrying out professional services for the persons, is admissible in proceedings under the Act.

109. Existing subsection 11C(2) provides that subsection (1) does not apply to a thing said or admission made by a person who, at the time of saying the thing or making the admission, had not been informed of the effect of subsection (1).

110. Existing subsection 11C(3) provides that, despite subsection (2), a thing said or admission made is admissible where an adult indicates that a child under 18 has been abused or is at risk of abuse, or if a child under 18 indicates that the child has been abused or is at risk of abuse. These exceptions apply unless, in the opinion of the court, there is sufficient evidence of the admission or disclosure available to the court from other sources.

111. The introductory paragraph of the existing and new subsection 11C(3) are identical, and provide that a thing said or admission made may be admissible despite subsection 11C(2) in certain circumstances. The relevant circumstances are outlined in paragraphs 11C(3)(a) and (b) of both the existing and new subsections.

112. Existing paragraph 11C(3)(a) provides that a thing said or admission made is admissible despite subsection 11C(2), where it is an admission by an adult that indicates that a child under 18 has been abused or is at risk of abuse. Existing paragraph 11C(3)(b) provides the same for a disclosure by a child under 18 that indicates that the child has been abused or is at risk of abuse.

113. New paragraph 11C(3)(a) combines and broadens the effect of existing paragraphs 11C(3)(a) and (b). The existing paragraphs only extend to a disclosure by a child if that disclosure is about the child. In other words, if a child were to make an admission that another child is being abused or at risk of abuse, existing subsection 11C(3) would not apply to make that admission admissible. New paragraph 11C(3)(a) would extend subsection 11C(3) so that it applies to an admission by any person (including a child) indicating that a child is being abused or at risk of abuse. This would include an admission by a child that indicates they are being abused or at risk of abuse.

114. The change in language from 'disclosure' in existing paragraph 11C(3)(b) to 'thing … said or the admission' in new paragraph 11C(3)(a) reflects the increased scope of the provision and is not intended to otherwise change the interpretation of the paragraph.

115. New paragraph 11C(3)(b) clarifies that a thing said or admission made that was obtained due to, or as a consequence of, impropriety or a contravention of Australian law would not be made admissible solely because it comes within the operation of paragraph 11C(3)(a). Such information would have to satisfy the rules for admissibility contained in section 138 of the *Evidence Act 1995*.

116. Section 138 of the Evidence Act provides that improperly or illegally obtained evidence is not admissible unless the desirability of admitting the evidence outweighs the undesirability of admitting the evidence. The court is not limited in the matters it may take into account to make this decision but may, for example, consider the probative value of the evidence and the importance of the evidence in the proceeding.

117. The addition of new paragraph 11C(3)(b) is not intended to change the interpretation of existing subsection 11C(3), but to clarify that the subsection operates as outlined in *Hazan v Elias* (2011) 255 FLR 338.

Item 7—Application of amendments

118. Item 7 would provide that the amendment made by Item 6 to section 11C of the Family Law Act applies to things said or admissions made if the thing or admission is to be admitted into proceedings after the Item commences. This is so whether the proceedings are instituted before or after the amendment commences.

Item 8—After subsection 21(2)

119. Existing subsection 21(2) of the Family Law Act establishes the Family Court of Australia as a superior court of record.

120. Item 8 would insert a new subsection 21(2A) to clarify that the Family Court of Australia is a court of law and equity, as well as a superior court of record.

121. This would ensure consistency with equivalent provisions relating to the Federal Court of Australia and the Federal Circuit Court of Australia, both of which are explicitly created as courts of law and equity. The constitution of the court is relevant in considering the scope of the court's implied powers—for example, the types of orders that a court can make in the absence of a specific statutory authority.

122. New subsection 21(2A) would provide that the Family Court is taken always to have been a court of law and equity. This reflects the long standing view of the Court's jurisdiction, and ensures finality of matters for parties who have been involved in proceedings before the Family Court.

123. This amendment was contained in Schedule 2 to the Family Law Amendment (Financial Agreements and Other Measures) Bill 2015, which was introduced into Parliament on 25 November 2015 and lapsed at the dissolution of parliament on 9 May 2016.

Item 9—Subsection 36(1)

124. Item 9 would omit '(1)' from existing subsection 36(1) as a consequence of the repeal of existing subsection 36(2) by Item 10. This is a technical amendment.

Item 10—Subsection 36(2)

125. Existing subsection 36(2) of the Family Law Act provides that, unless and until the regulations otherwise provide, the Principal Registry of the Family Court of Australia shall be located in Sydney.

126. Item 10 would repeal this subsection.

127. It is unnecessary to specify a location for the Principal Registry in the Act. This approach is consistent with equivalent provisions for the Federal Court of Australia.

128. This amendment was contained in Schedule 2 to the Family Law Amendment (Financial Agreements and Other Measures) Bill 2015, which was introduced into Parliament on 25 November 2015 and lapsed at the dissolution of Parliament on 9 May 2016.

Item 11—At the end of Division 4 of Part IVA

129. Division 4 of Part IVA of the Family Law Act sets out miscellaneous administrative matters.

130. Item 11 would insert new section 38Z into the Act to confer immunity on registrars of the Family Court, the Federal Circuit Court, or of a State family court conducting conferences with parties to a property settlement proceeding. The section confers on registrars the same protection and immunity that a Judge of the Family Court has in performing the functions of a Judge.

131. For the purposes of the new subsection, Registrar is defined in subsection 4(1) of the Act and includes Deputy Registrars.

132. The amendment is intended to remove any doubt that Registrars and Deputy Registrars of the Family Court, the Federal Circuit Court and the State Family Court have immunity when conducting conferences about property matters.

133. For avoidance of doubt, new subsection 38Z(2) would provide that the amendment is not intended to limit any other immunity or protection enjoyed by Registrars of those courts. Registrars will generally enjoy the protection of common law judicial immunity where they exercise delegated judicial power.

134. This amendment was contained in Schedule 2 to the Family Law Amendment (Financial Agreements and Other Measures) Bill 2015, which was introduced into Parliament on 25 November 2015 and lapsed at the dissolution of Parliament on 9 May 2016.

Item 12—Subsection 39(6) (note)

135. Item 12 would repeal the note in subsection 39(6). The reference to this provision of the Judiciary Act is no longer relevant as a result of the repeal of paragraph 39(2)(d) of the Judiciary Act by the *Judiciary Legislation Amendment Act 2006*.

Item 13—Before subsection 44(1A); Item 14—Before subsection 44(1B); Item 16—Before subsection 44(3)

136. Items 13, 14 and 16 would insert subheadings into section 44 to aid the readability of the provision. This insertion is not intended to affect the operation or meaning of the subsection and is simply intended as an editorial change to assist the reader in understanding the section.

Item 15—Subsection 44(2)

137. Item 15 would repeal subsection 44(2).

138. Section 44 sets out the requirements for instituting proceedings under the Act. Subsections 44(3), (3A), and (5) set out limitation periods for certain maintenance and property proceedings. Subsection 44(2) provides that, notwithstanding these limitation periods, a respondent may include an application for any decree or declaration under the Act in their response. This provides an advantage to the respondent, who is able to make an application for orders without leave of the court.

139. This issue was raised in *Hedley v Hedley* [2009] FAMCAFC 179. The Full Court of the Family Court of Australia found that subsection 44(2) permitted the wife to seek property orders in her response to the husband's application for parenting orders, and she did not require leave to do so. Finn J noted the distinction in rights between an applicant and a respondent:

> "I am mindful that this interpretation creates an imbalance because section 44(2) enables a respondent to raise any type of cross-application without being subject to the requirement for leave under section 44(3). This unfairly disadvantages the applicant. If the applicant is out of time he must get leave under section 44(3) for each type of proceeding he seeks to commence. In contrast, once the application is issued, the respondent can rely upon section 44(2) to bring without leave an application for "any decree or declaration" regardless of how limited the ambit of the orders sought

in the application or the leave granted to the applicant under section 44(3) in respect of that application."

140. Repealing subsection 44(2) would remove this relative advantage and put respondents in the same position as applicants—that is, respondents would require leave of the court under subsection 44(3) to initiate applications outside the limitation period.

Item 17—Subsection 44(5)

141. Item 17 would repeal existing subsection 44(5) and substitute a new subsection 44(5) to remedy two inconsistencies between de facto and married couples in relation to instituting proceedings.

Instituting proceedings out of time with consent

142. Existing subsection 44(3) of the Family Law Act allows formerly married couples to institute maintenance or property proceedings, after the 12 month limitation period has expired, with leave of the court or with the consent of both parties.

143. De facto couples, on the other hand, are not permitted to institute proceedings after expiration of the limitation period even if both parties consent. The parties must first seek leave of the court notwithstanding their mutual consent to the proceedings. This can result in an unnecessary financial burden for those couples, and prevents them from filing for consent orders (as opposed to filing an initiating application and having to appear before a judge to be granted leave).

Instituting proceedings out of time after a financial agreement has been dismissed

144. Existing subsection 44(3B) of the Family Law Act allows formerly married couples to institute maintenance or property proceedings within 12 months of the day the divorce or decree of nullity took effect, or within 12 months of the day on which a financial agreement between the parties was set aside under section 90K or found to be invalid under section 90KA.

145. There is no reference in section 44 to the institution of proceeding for de facto couples if they have been a party to a financial agreement that has been set aside or found to be invalid. This anomaly between the provisions for de facto and married couples, whereby married couples can institute proceedings where their financial agreement which has been set aside or found to be invalid, should be rectified.

The amendments to subsection 44(5)

146. To remedy the inconsistency in provisions between de facto and married couples, in relation to both consent and the setting aside of financial agreements, the new subsection 44(5) inserted by this item would provide that (subject to the court's power to grant leave in subsection 44(6)) a party to a de facto relationship may apply for an order under sections 90SE, 90SG or 90SM or a declaration under section 90SL if:

- the application is made within 2 years of the end of the de facto relationship
- the application is made within 12 months after the day a financial agreement between the parties was set aside, or found to be invalid, or

- both parties consent to the application.

147. The timeframe of 2 years after the end of the de facto relationship reflects the current provision, and appropriately differs from the 12 months requirement for married couples, because married couples are required to have been separated for 12 months prior to filing an application for a divorce order.

148. Subsection 44(5A) would provide that the court may dismiss proceedings that are instituted by an application with the consent of both parties if satisfied that, because the consent was obtained by fraud, duress or unconscionable conduct, allowing the proceedings to continue would be a miscarriage of justice. This is equivalent to the protections for married couples in the situation in subsection 44(3AA).

Item 18—Application of amendments

149. Item 18 would provide that the amendments to section 44 made by the Bill apply to applications made after the item commences. The repeal of subsection 44(2) applies to any application made before the amendments commence if the respondent has not yet filed a response to that application.

Item 19—Subsection 65L(1)

150. Item 21 would omit 'subsection (2)' and substitute 'subsection (2) and (3)' in section 65L as a consequence of the insertion of new subsection 65L(3) by Item 22.

Item 20—At the end of section 65L

151. Existing subsection 65L(1) empowers the court to make orders requiring a family consultant to supervise, or assist with, compliance of a parenting order.

152. Item 20 would insert a new subsection 65L(3) to provide that the court may only make an order under subsection 65L(1) in respect of a final parenting order where the court considers there are 'exceptional circumstances' which warrant the order.

153. It is necessary to limit the court's power in subsection 65L(1) to ensure that the courts are not unduly burdened with an ongoing and onerous obligation to supervise compliance with court orders. Compliance with parenting orders is managed through the separate compliance regime in Part VII, Division 13A of the Act.

154. This amendment was contained in Schedule 2 to the Family Law Amendment (Financial Agreements and Other Measures) Bill 2015, which was introduced into Parliament on 25 November 2015 and lapsed at the dissolution of parliament on 9 May 2016.

Item 21—Section 67Q (note 1)

155. Item 21 would omit "Section 122AA authorises the use of reasonable force" and substitute "Section 122A deals with use of reasonable force by certain persons". This is necessary to reflect the replacement of existing section 122AA by new section 122A by Item 49 and the different operation of new section 122A which, instead of authorising the use of reasonable force, describes when force must not be used by an arrester, and provides for a specific list of persons who may exercise force.

156. This amendment was contained in Schedule 2 to the Family Law Amendment (Financial Agreements and Other Measures) Bill 2015, which was introduced into Parliament on 25 November 2015 and lapsed at the dissolution of parliament on 9 May 2016.

Item 22—Subsection 67Z(4) (definition of Registry Manager); Item 23—Subsection 67ZBA(4) (definition of Registry Manager)

157. Item 22 would repeal the definition of 'Registry Manager' in subsection 67Z(4), and Item 23 would repeal the definition of Registry Manger in subsection 67ZBA(4).

158. The use of the term Registry Manager in those sections is no longer necessary, as the appropriate definition would be contained in subsection 4(1) (see Item 2).

Item 24—At the end of subsection 69ZH(2)

159. Existing section 69ZH is a technical provision, providing for additional application of Part VII of the Act. The section was inserted into the Act to ensure that, if certain provisions cannot apply to all children due to limitations in State referrals of power over ex-nuptial children, these provisions apply to the extent that they are supported by an alternative constitutional basis.

160. Item 24 would insert a note at the end of subsection 69ZH(2) to clarify the intended operation of the subsection. The provisions covered by subsection 69ZH(2) are expressed in terms of children generally, without a distinction between children of marriages and ex-nuptial children. The note would confirm that the subsection does not limit the operation of those provisions, but provides an alternative constitutional basis to enable the provisions to at least operate in relation to children of marriages even if they cannot also operate in relation to ex-nuptial children.

161. The note would clarify the intended operation of the subsection while preserving existing policy.

162. This amendment was contained in Schedule 2 to the Family Law Amendment (Financial Agreements and Other Measures) Bill 2015, which was introduced into Parliament on 25 November 2015 and lapsed at the dissolution of Parliament on 9 May 2016.

Item 25—Section 116C

163. Existing section 116C of the Act provides that regulations may fix or limit, or provide for the fixing or limiting of, the amounts that may be paid by relevant authorities to legal practitioners acting in such matters.

164. Item 25 would repeal section 116C.

165. Existing section 116C is redundant because legal aid commissions are independent bodies with boards that agree fees. Accordingly, the section should be repealed.

166. This amendment was contained in Schedule 2 to the Family Law Amendment (Financial Agreements and Other Measures) Bill 2015, which was introduced into Parliament on 25 November 2015 and lapsed at the dissolution of Parliament on 9 May 2016.

Item 26—Subsection 117(2)

167. Item 26 would omit "and (5)" and substitute ", (5) and (6)" in subsection 117(2) as a consequence of the insertion of new subsection 117(6) by item 30.

Items 27—Before subsection 117(3); 28—Before subsection 117(4A); 29—Before subsection 117(5)

168. Items 27, 28 and 29 would insert the subheadings into section 117 to aid the readability of the provision. This insertion is not intended to affect the operation or meaning of the subsection and is simply intended as an editorial change to assist the reader in understanding the section.

Item 30—At the end of section 117

169. Existing section 117 of the Act sets out matters relating to costs, including the general principle that each party to a proceeding under the Act should bear his or her own costs. Subsection 117(2) provides an exception to this general principle by allowing the court to order costs if there are circumstances that justify doing so.

170. Item 30 would insert a new subsection 117(6) to prohibit the court from making an order under subsection 117(2) against a guardian *ad litem*, unless the court is satisfied that an act or omission of the guardian is unreasonable or has unreasonably delayed the proceedings.

171. The term 'guardian *ad litem*' is intended to include case guardians as described in Part 6.3 of the Family Law Rules and litigation guardians as described in Division 11.2 of the Federal Circuit Court Rules 2001.

172. If a person does not have the capacity to conduct litigation, a guardian *ad litem* may be appointed to act in the place of the person and make decisions relating to the proceedings that are in the best interests of that party. This is an important role that enables access to justice for vulnerable people involved in family law proceedings. If no suitable guardian *ad litem* can be appointed, the court may stay proceedings indefinitely, which frustrates access to justice for all parties involved in the proceedings.

173. Currently, persons who are appointed as a guardian ad litem may be personally liable for costs in proceedings. This discourages suitable people, who would otherwise be willing to undertake the role, from agreeing to appointment. To ensure that people are not discouraged from acting as a guardian *ad litem*, the amendment would provide protection from costs within appropriate limits.

174. Guardians *ad litem* would not be protected from a costs order if the guardian has acted unreasonably or has unreasonably delayed the proceedings. In these circumstances it would be open to the court to consider making a costs order under subsection 117(2). This provides the appropriate balance between protection for guardian *ad litem*, the parties they are appointed to represent, and the interests of other parties.

175. This amendment was contained in Schedule 2 to the Family Law Amendment (Financial Agreements and Other Measures) Bill 2015, which was introduced into Parliament on 25 November 2015 and lapsed at the dissolution of Parliament on 9 May 2016.

Item 31—Application of amendments

176. Item 31 provides that the amendments made by Items 26, 27, 28, 29 and 30 to section 117 would apply to persons who become guardian *ad litem* in proceedings on or after the commencement of the Division, whether or not the proceedings were instituted before, on or after the commencement.

177. The amendments would not apply to persons who became guardian *ad litem* before the commencement of the item. It would not be appropriate to change the legal framework operating in respect of guardian *ad litem* after the person has commenced the role.

Item 32—Subsection 117C(2)

178. Existing section 117C of the Act prohibits parties in certain proceedings from disclosing to the family law courts the fact that an offer of settlement has been made and the terms of any such offer, except for the purpose of considering a costs order under existing subsection 117(2). An offer to settle is a factor that must be taken into account when the court exercises its discretion in relation to costs (see existing paragraph 117(2A)(f) of the Act).

179. As specified in existing subsection 117C(1) of the Act, section 117C does not apply to proceedings in relation to divorce and nullity of marriage in Part VI, or proceedings in relation to parenting orders other than child maintenance orders (Division 6), injunctions (Division 9) and State, Territory and overseas orders (Division 13) in Part VII.

180. Item 32 would omit 'the fact that the offer has been made, or the terms of the offer' and substitute 'the terms of the offer' in subsection 117C(2). This amendment would allow parties to disclose to the courts the fact that an offer to settle has been made. Disclosing the terms of the offer would remain prohibited.

181. This amendment is intended to promote early settlement of matters.

182. This amendment was contained in Schedule 2 to the Family Law Amendment (Financial Agreements and Other Measures) Bill 2015, which was introduced into Parliament on 25 November 2015 and lapsed at the dissolution of Parliament on 9 May 2016.

Item 33—Subsection 117C(3)

183. Existing subsection 117C(3) provides that a judge of the court is not disqualified from sitting in the proceedings only because the fact that an offer has been made is disclosed to the court.

184. Item 33 would repeal this subsection.

185. As Item 32 would remove the prohibition on disclosing to the court that an offer has been made, existing subsection 117C(3) would serve no function and should be repealed.

Item 34—Application of amendments

186. Item 34 would provide that the amendments of section 117C of the Act made by Items 32 and 33 apply to offers made before, on or after the commencement of this Part. Where a matter is currently on foot before the family law courts, it is appropriate to allow the

court to consider whether an offer to settle has been made for case management and similar purposes.

187. It is very unlikely that parties would suffer any detriment as a result of the retrospective application of this amendment. While it would no longer be prohibited to disclose to the court that an offer of settlement has been made, this disclosure is already made (and will continue to be made) in the context of the court's consideration of costs. Importantly, the prohibition on disclosing the terms of the offer to the court is not amended by the Bill and would continue to apply in all cases. This strikes the appropriate balance between encouraging parties to negotiate and reach early settlement of matters on terms that are satisfactory to both parties, and the ability of the court to supervise matters. Further, given that under the existing law, disclosing the existence of an offer to the court does not disqualify the judge from sitting, there is unlikely to be any practical effect on existing cases by removing that requirement in its entirety.

Item 35—Sections 122AA and 122A

188. Existing section 122AA enables a person who is authorised by a provision of the Act, or by a warrant issued under the Act, to use such reasonable force as is necessary to arrest another person or to prevent their escape.

189. Existing section 122A(1) empowers authorised persons to enter and search a place without a warrant for the purposes of arresting another person. Existing subsection 122A(2) specifies that where a person may enter and search a vehicle, vessel or aircraft under subsection (1), the person may stop and detain the vehicle, vessel or aircraft.

190. Item 35 would repeal existing sections 122AA and 122A and substitute them with new sections 122A and 122AA.

191. The amendments would provide a more modern framework for arrests, with substantially improved safeguards. The powers reflect the arrest provisions in the Crimes Act and the *Federal Circuit Court of Australia Act 1999*, as well as the requirements of the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* in relation to powers to enter and search premises for the purposes of arresting a person.

192. These amendments were contained in Schedule 2 to the Family Law Amendment (Financial Agreements and Other Measures) Bill 2015, which was introduced into Parliament on 25 November 2015 and lapsed at the dissolution of Parliament on 9 May 2016

New section 122A—Making arrests under this Act or warrants

193. New section 122A would provide rules for making arrests under the Act, or under warrants authorised under the Act, and would provide substantially greater detail regarding:

- to whom the section applies
- when it is appropriate to use force to arrest a person, and
- how and when to inform the arrestee of the ground of arrest

194. Application: existing paragraph 122A(1)(a) empowers 'a person' (without specific limitation) authorised by the Act or by a warrant issued under the Act to exercise arrest powers. New subsection 122A(1) would explicitly set out the categories of persons, who are authorised by the Act or by a warrant issued under the Act to arrest another person, to whom

the section applies. This would limit the persons who may exercise arrest powers to only appropriate people. This reflects the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, which provides that 'arrest powers should only be granted to sworn police officers unless there are exceptional circumstances which clearly justify extending these powers to non-police'.

195. The list of arresters in new subsection 122A(1) would reflect the list of authorised persons in rule 21.17 of the Family Law Rules and Rule 25B.74 of the Federal Circuit Court Rules, except that it would not provide for 'any other person' to be authorised. To ensure that all the relevant officers would be authorised to exercise arrest powers under the Act, the list would also include the Australian Border Force Commissioner and an APS employee in the Department administered by the Minister administering the *Australian Border Force Act 2015*. This is intended to cover Australian Border Force officers who may be required to exercise powers of arrest in relation to, for example, a parent attempting to abduct their child overseas. The urgency of ensuring children are not abducted internationally warrants the extension of these powers to officers of the Australian Border Force.

196. Use of force: new subsection 122A(2) would replace existing section 122AA and provide greater restrictions around the use of force in arresting a person. The subsection reflects the equivalent provision applying in relation to the Federal Circuit Court (subsection 113A(4) of the Federal Circuit Court Act).

197. Specific limitations in new subsection 122A(2) would place restrictions on the use of force by providing that in the course of arresting the arrestee, the arrester must not use more force, or subject the arrestee to greater indignity, than is necessary and reasonable to make the arrest or prevent the arrestee's escape after the arrest. It would also provide that the arrester must not do anything that is likely to cause the death of, or grievous bodily harm to, the arrestee unless the arrester reasonably believes that doing that thing is necessary to protect the life or prevent serious injury to another person (including the arrester). It would also provide that if the arrestee is attempting to escape arrest by fleeing, the arrester must not do anything that is likely to cause the death of, or grievous bodily harm to, the arrestee unless the arrester reasonably believes that doing that thing is necessary to protect life or prevent serious injury to another person (including the arrester), and the arrestee has, if practicable, been called on to surrender and the arrester reasonably believes that the arrestee cannot be arrested in any other way. This subsection reflects the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* which provides that legislation should only allow an authorised officer to use such force against persons as is necessary and reasonable to execute a warrant.

198. Existing section 122AA does not provide specific rules governing the use of potentially lethal force.

199. Informing the arrestee of the grounds for arrest: new subsections 122A(3), (4) and (5) set out the requirements for the arrester to inform the arrestee of the grounds for arrest. This subsection reflects the equivalent provisions applying in relation to the Federal Circuit Court (subsections 113A(5),(6) and (7) of the Federal Circuit Court Act). Informing the arrestee of the grounds for arrest is not a requirement of existing section 122AA.

New section 122AA—Powers to enter and search premises, and stop conveyances, for making arrests under this Act or warrants

200. New section 122AA would provide for an arrester's power to enter and search premises, and stop and detain conveyances, for the purposes of making arrests under the Act or under warrants. The scope of the power conferred is similar to that in existing section 122A, but substantially greater safeguards are provided for the use of the power.

201. Power to enter premises: new subsection 122AA(1) reflects existing section 122A, which empowers a person specified in subsection 122A(1) to enter and search premises for the purpose of arresting a person. New subsection 122AA(1) would provide that if an arrester reasonably believes that the arrestee is on the premises, the arrester may enter the premises, using such force as is necessary and reasonable, at any time of the day or night, for the purpose of searching the premises for the arrestee or arresting the arrestee.
New subsection 122AA(1) would not authorise the use of force that was unreasonable or excessive in the circumstances.

202. New subsection 122AA(2) would provide a new prohibition on an arrester entering a dwelling house between 9pm one day and 6am the next day, unless it would not be practicable to arrest the arrestee there or elsewhere at another time. This prevents the unnecessary or unreasonable interference with privacy, noting that the purpose of the provision is to bring people before the court while balancing the need for arresters to take reasonable steps to arrest an arrestee. This prohibition would not apply to the power to stop and detain a vehicle, vessel or aircraft in new subsection (3). The privacy considerations relevant to dwelling houses at night-time are not relevant to vehicles in motion. The term 'dwelling house' would be defined in section 4(1) of the Act to include a conveyance, or a room in accommodation (see Item 27). This restriction on the power of arrest would reflect equivalent provisions applying in relation to the Federal Circuit Court (see subsection 113A(3) of the Federal Circuit Court Act).

203. Power to stop and detain conveyances: new subsection 122AA(3) empowers an arrester to stop and detain a conveyance, if they would be empowered by new subsection (1) to enter and search it. This reflects existing subsection 122A(2). However, new subsection (4) would provide new rules limiting the power to stop, detain, enter and search conveyances.

204. Rules about stopping, detaining, entering and searching conveyances: new subsection 122AA(4) would provide for prescriptive rules around stopping, detaining, entering and searching conveyances, including that the arrester must search the conveyance in a public place. This provision would reflect the rules in section 3U of the Crimes Act, and provides substantially greater safeguards on the use of this power than existing section 122A.

205. Definition of premises: new subsection 122AA(5) would define premises for the purposes of new section 122A to include both a place and a conveyance. This definition is consistent with the approach in section 113A of the Federal Circuit Court of Australia Act.

Item 36—Application of amendments

206. Item 36 would provide that the amendment by Item 49 applies in relation to arrests authorised by the Act, and arrests authorised by warrants, on or after the commencement of this Part.

Item 37—Subsection 124(1)

207. Item 37 would amend the procedure for appointing members of the Family Court of Australia Rules Advisory Committee as set out in subsection 124 of the Act.

208. Existing subsection 124(3) of the Act requires members of the Family Court of Australia Rules Advisory Committee to be appointed by the Governor-General on the nomination of the Attorney-General after consultation with the Chief Judge of the Family Court of Australia.

209. The current process for appointing members is too onerous. Item 29 would amend subsection 124(1) to provide that the Rules Advisory Committee shall consist of such Judges of the Family Court of Australia and the Family Courts of State and such other persons as are appointed by the Chief Justice of the Family Court of Australia.

210. This would align the process with the equivalent process for forming the Rules Advisory Committee for the Federal Circuit Court. Subsection 93(2) of the *Federal Circuit Court Act 1999* provides that the Chief Judge of the Federal Circuit Court may appoint committees consisting of Judges, or of Judges and other persons, for the purpose of advising the Chief Judge in relation to the management of the administrative affairs of the Federal Circuit Court of Australia.

Item 38—Subsection 124(3)

211. Item 38 would repeal subsection 124(3). This subsection is no longer necessary as the procedure for appointing members of the Rules Advisory Committee would be consolidated into subsection 124(1) by item 37.

Item 39—Subsection 124(4)

212. Item 39 would amend subsection 124(4) of the Act to refer to refer to section 122B rather than section 112 of the Family Law Act.

213. Subsection 124(4) of the Act provides that a Judge of a Family Court of a State shall not be appointed as a member of the Rules Advisory Committee unless the Governor-General has made an arrangement with the Governor of the State under section 112 in relation to the performance, by that Judge, of functions as a member of the Rules Advisory Committee.

214. Section 112 dealt with the Governor-General making an arrangement with the states and territories for the performance by an officer of the state or territory of a function under the Family Law Act. Section 112 was repealed in 2000 and re-enacted in section 122B. Accordingly, it is necessary to update subsection 124(4) to refer to section 122B.

Item 40—Subsection 124(6)

215. Item 40 would amend subsection 124(6) to provide that members of the Rules Advisory Committee may resign by writing to the Chief Justice of the Family Court of Australia.

216. This amendment reflects the change in procedure for appointing members to the Committee that would be made by item 37.

Item 41—Application of amendments

217. Item 41 would provide for the application of the amendments that would be made by items 37 to 40.

218. Items 37 to 39 would apply to persons appointed as a member of the Rules Advisory Committee after the items commence.

219. The amendment made by item 40 would apply in relation to any appointment as a member of the Rules Advisory Committee, whether the appointment is made before or after the item commences).

Part 2—Amendments commencing up to 6 months after Royal Assent

Division 1—Offence of retaining child overseas

Items 42 and 43—Subsection 65X(2)

220. Existing subsection 65X(2) provides that for the purposes of Subdivision E of Division 6 of Part VII of the Act, if an appeal against a decision of a court in proceedings has been instituted and is pending, the proceedings are taken to be pending and sections 65Z and 65ZB, which provide offences where proceedings are pending (rather than sections 65Y and 65ZA, which provide offences where parenting orders have been made) apply.

221. Subsection 65X(2) provides certainty as to which offence will apply when a decision has been made, but there is an appeal pending.

222. Items 42 and 43 would amend subsection 65X(2) to include references to the offences that would be inserted by Items 45 and 47 (sections 65YA and 65ZAA respectively). The amendment will provide the same certainty for the new offences of retaining a child overseas (sections 65YA and 65ZAA) as currently exists for the offences of taking or sending a child outside Australia.

Item 44—Section 65Y (heading)

223. Item 44 would omit and substitute the heading to section 65Y. This amendment is consequential to the insertion of section 65YA by Item 45. The current title of section 65Y is "Obligations if certain parenting orders have been made". After the insertion of section 65YA, the current title would be misleading as section 65YA will also contain obligations that apply if certain parenting orders have been made.

224. This new title substituted by this item would be "Obligations if certain parenting orders have been made: taking or sending a child outside Australia". This more specific title better clarifies the purpose and effect of section 65Y.

Item 45—After section 65Y

225. Item 45 would insert a new section 65YA after section 65Y. New section 65YA would provide that a person commits an offence where:

- a parenting order to which Subdivision E of Division 6 of Part VII of the Act applies is in force in relation to a child, and
- that child has been taken or sent from Australia to a place outside Australia, by or on behalf of a party to the proceedings in which the parenting order was made:
  - with the consent in writing (authenticated as prescribed) of each person in whose favour the parenting order was made, or
  - in accordance with an order of a court made, under this Part or under a law of a State or Territory, at the time, or after, the parenting order was made, and
- the person retains the child outside Australia otherwise than in accordance with the consent or order, and
- the person was a party to the proceedings in which the parenting order was made, or is retaining the child on behalf of, or at the request of, such a party.

226. Section 65YA would also specify that the penalty for an offence against new section 65YA is 3 years imprisonment; this penalty is identical to the penalties specified for the similar offences against sections 65Y, and 65Z and the proposed penalty for an offence against new section 65ZAA.

227. These amendments were contained in Schedule 2 to the Family Law Amendment (Financial Agreements and Other Measures) Bill 2015, which was introduced into Parliament on 25 November 2015 and lapsed at the dissolution of parliament on 9 May 2016.

228. This new offence would remedy an identified gap in the existing legislation, as while under section 65Y it is currently an offence to remove a child in relation to whom a parenting order is in force if there is no relevant court order or consent in writing from other parties, a person does not currently commit an offence if they retain a child beyond the expiry of an order or consent. In its report on the Family Law Amendment (Financial Agreements and Other Measures) Bill, the Senate Standing Committee on Legal and Constitutional Affairs agreed that this legislative gap should be closed. The report noted that "the committee feels strongly that Australian law must enable authorities to take action and recover children being retained overseas, a situation already fraught with practical difficulties and complications" (page 27).

229. This new section would be similar to existing section 65Y. Where section 65Y makes it an offence to unlawfully remove a child under a parenting order from Australia, new section 65YA would make it an offence to retain a child in another country, where the child is under a parenting order and has been removed from Australia. The offences are otherwise identical. Both offences are intended to act together to ensure that parental abduction of a child to another country is a punishable offence, regardless of whether or not the person initially removed the child from Australia lawfully.

230. The new section 65YA would complement the new section 65ZAA in the same way that existing section 65Y complements existing section 65Z. That is, where section 65Y and 65YA would apply when a parenting order is in place, sections 65Z and 65ZAA would apply when there are proceedings for a parenting order pending, or an appeal is being made on a parenting order.

231. Item 45 would also insert a note to new section 65YA stating that the ancillary offence provisions of the *Criminal Code*, including section 11.1 (attempt), apply in relation to the offence in new section 65YA. 'Ancillary offence' is a defined term in the dictionary of the *Criminal Code*, and the specific mention of the offence of attempt is not intended to exclude the application of any other ancillary offence.

Item 46—Section 65Z (heading)

232. Item 46 would omit and substitute the heading to section 65Z. This amendment is consequential to the insertion of section 65ZAA by Item 47. The current title of section 65Z is "Obligations if proceedings for the making of certain parenting orders are pending". After the insertion of section 65ZAA, the current title would be misleading as section 65ZAA will also contain obligations that apply if certain parenting orders are pending.

233. This item would substitute the new title "Obligations if proceedings for the making of certain parenting orders are pending: taking or sending a child outside Australia". This more specific title better clarifies the purpose and effect of section 65Z.

Item 47—After section 65Z

234. Item 47 would insert a new section 65ZAA after section 65Z. New section 65ZAA would provide that a person commits an offence where:

- proceedings for the making, in relation to a child, of a parenting order to which this Subdivision applies are pending, and
- the child has been taken or sent out of Australia with:
  - the consent in writing of each party to the Part VII proceedings, or
  - in accordance with an order of the court made under Part VII of the Act, or under a law of a State or Territory, after the institution of the Part VII proceedings, and
- the person retains the child outside of Australia otherwise than in accordance with the consent or order, and
- the person is a party to the proceedings, or is retaining the child on behalf of, or at the request of, such a party.

235. Section 65ZAA would also specify that the penalty for an offence against new section 65ZAA is 3 years imprisonment; this penalty is identical to the penalties specified for the similar offences against sections 65Y and 65Z and the proposed penalty for an offence against new section 65YA.

236. This new offence would remedy an identified gap in the existing legislation, as while under section 65Z it is currently an offence to remove a child in relation to whom proceedings for a parenting order are pending, if there is no relevant court order or consent in writing from other parties, a person does not currently commit an offence if they retain a child beyond the expiry of that order or consent.

237. New section 65ZAA would be similar to existing section 65Z. Where section 65Z makes it an offence to unlawfully remove a child in relation to whom proceedings for a parenting order are pending, new section 65ZAA would make it an offence to retain a child in another country, where proceedings for a parenting order are pending. The offences are otherwise identical. Both offences are intended to act together to ensure that parental abduction of a child to another country is a punishable offence, regardless of whether or not the person initially removed the child from Australia lawfully.

238. New section 65ZAA would complement the new section 65YA in the same way that existing section 65Z complements existing section 65A. That is, where section 65Y and 65YA apply when a parenting order is in place, sections 65Z and 65ZAA apply when there are proceedings for a parenting order pending, or an appeal is being made on a parenting order.

239. Item 61 would also insert a note to new section 65ZAA stating that the ancillary offence provisions of the *Criminal Code*, including section 11.1 (attempt), apply in relation to the offence in section 65ZAA. 'Ancillary offence' is a defined term in the dictionary of the *Criminal Code*, and the specific mention of the offence of attempt is not intended to exclude the application of any other ancillary offence.

Items 48—Paragraph 65ZD(a); 49—Paragraph 65ZD(b)

240. The purpose of existing section 65ZD is to ensure that Subdivision E of Division 6 of Part VII of the Act does not conflict with the operation of State and Territory laws that would

prevent a child from leaving, or being taken or sent outside, Australia. That is, the section makes it explicit that the Commonwealth does not intend to supplant or interfere with State or Territory laws that have a similar purpose. The requirements in Subdivision E are additional to any provided by state and territory laws.

241. The current text of section 65ZD applies to state or territory laws under which:

- action may be taken to prevent a child from leaving Australia or being taken or sent outside Australia, or
- a person may be punished in respect of the taking or sending of a child outside Australia.

242. However, they do not currently relate to laws which relate to a child being retained outside Australia. The offences in new sections 65YA and 65ZAA are not intended to prevent or restrict the operation of any relevant state or territory laws.

243. Items 48 and 49 would amend section 65ZD so that it additionally refers to state and territory laws relating to retaining a child overseas. This would ensure that the new offences in 65YA and 65ZAA will not interfere with any similar state laws.

Item 50—At the end of Subdivision E of Division 6 of Part VII

244. Item 50 would insert new section 65ZE. Section 65ZE would provide that Section 15.4 of the Criminal Code (extended geographical jurisdiction—category D) applies to an offence against any of sections 65Y to 65ZB (taking, sending, or retaining a child outside Australia).

245. The gravity of the effects of wrongful retention on a child's wellbeing, irrespective of who commits the offence or in which country the child is retained, can be devastating and long-lasting. The new offences contained in new sections 65YA and 65ZAA (inserted by items 45 and 47 respectively) are intended to be a deterrent to the wrongful retention of a child and apply to any person (regardless of whether they have Australian citizenship or residency) who wrongfully retains a child, irrespective of whether there is an equivalent offence in the law of the local jurisdiction where the child is being retained.

246. Item 50 would also ensure, in respect of existing offences contained in sections 65Y, 65Z, 65ZA and 65ZB, that there is no doubt that these offence provisions apply to conduct taking place both within Australia and overseas. In the Family Law Amendment (Financial Agreements and Other Measures) Bill 2015, section 15.4 was only applied to the new offences in section 65YA and 65ZAA. In this Bill, section 15.4 has also been applied to the existing offences based on advice from the Commonwealth Department of Public Prosecutions in the Senate Standing Committee on Legal and Constitutional Affairs' hearing in respect of the Family Law Amendment (Financial Agreements and Other Measures) Bill.

Item 51—Paragraph 117A(1)(b)

247. Existing section 117A allows a person or the Commonwealth to apply for a court order that another person make reparations for certain losses and expenses relating to recovering a child and returning a child to a person. In particular existing paragraph 117A(1)(b) relevantly provides that where a person has been convicted of an offence under section 65Y or 65Z in respect of a child, the court may, subject to certain requirements, order the person to pay to the Commonwealth or another person, reparation for

any loss suffered, or any expense incurred, in recovering the child and returning the child to a person.

248. Item 51 would extend this so that paragraph 117(1)(b) also requires a person convicted of an offence under new sections 65YA or 65ZAA, on the order of the court, to pay reparations for the recovery and return of the child.

249. The proposed offences included in new sections 65YA and 65ZA are offences related to retaining a child outside Australia. They complement the existing offences in sections 65Y and 65Z; where the existing offences deal with circumstances where a person has unlawfully removed a child from Australia, the proposed offences would deal with the circumstance where a person has lawfully removed a child from Australia and has then unlawfully retained that child outside Australia.

250. When a child is retained outside Australia, similar costs and losses would be incurred to recover the child as when the child is unlawfully removed from Australia, and it is appropriate that the person who is responsible for the removal or retention of the child is liable to pay reparations to a person or the Commonwealth when costs or losses have been incurred in recovering or returning the child.

251. This amendment was contained in Schedule 2 to the Family Law Amendment (Financial Agreements and Other Measures) Bill 2015, which was introduced into Parliament on 25 November 2015 and lapsed at the dissolution of Parliament on 9 May 2016.

Item 52—Application of amendments

252. Item 52 relates to when the amendments proposed in Division 2 of Part 2 of Schedule 2 to the Bill would apply.

253. The amendments would apply in relation to children taken or sent from Australia to a place outside Australia without consent, or in contravention of an order, after the commencement of the amendments.

254. The offences would apply in cases where a child is taken or sent from Australia prior to commencement of the amendments, if the date that the wrongful retention commences is after the commencement of the amendments. The offences would not apply in cases where the wrongful retention commenced prior to the commencement of the amendments. For example, if the amendments were to commence on 1 July, and a child, who was authorised to be removed from Australia (by consent or order) from 20 June – 2 July, it would be an offence for the child to be retained outside Australia on or after 3 July; however, if a child was authorised to be removed from Australia (by consent or order) from 20 June – 30 June, was retain the child outside Australia beyond 30 June.

255. Subitem 52(2) would provide that subitem 52(1) does not apply to the amendments of sections 65Y, 65Z and 65ZD of the Act made by this Division. These amendments (the amendments made by Items 44, 46, 48 and 49) would apply immediately from commencement.

Division 2—Other amendments

Item 53—At the end of subsection 12F(1)

256. Existing section 12F places an obligation on the principal executive officer of a court to provide prescribed information and respond to requests for information. Existing subsection 12F(1) requires the principal executive officer to ensure that any person considering initiating proceedings be given documents containing information prescribed under section 12B (non-court based family services and court's processes and services) and section 12C (reconciliation). The subsection does not require the principal executive officer to provide information prescribed under section 12D (information about Part VII proceedings).

257. Item 53 would add a new paragraph into subsection 12F(1) to require the principal executive officer to provide information prescribed under section 12D.

258. Regulation 8B of the *Family Law Regulations 1984* prescribes information for the purposes of section 12D of the Act as "information about family counselling services available to assist the parties and the child or children concerned in the proceedings to adjust to the consequences of orders made under Part VII of the Act".

259. Information about Part VII proceedings (that is, proceedings for parenting orders) is highly relevant to individuals who are considering initiating, or who are otherwise involved, in litigation on children's matters.

260. This amendment was contained in Schedule 2 to the Family Law Amendment (Financial Agreements and Other Measures) Bill 2015, which was introduced into Parliament on 25 November 2015 and lapsed at the dissolution of Parliament on 9 May 2016.

Item 54—Paragraph 67K(2)

261. Item 54 would omit "(including the Commonwealth central authority)" in subsection 67K(2) and would insert "(including one appointed as the Central Authority for the Commonwealth, a State or a Territory for the purposes of Article 29 of the Convention)". Existing subsection 67K(2) allows a person to apply to a court for a location order for the purposes of the Child Protection Convention.

262. Item 54 would ensure consistency with new subsection 67K(4) and expressly clarify that the Central Authority for the Commonwealth, a State or a Territory may apply to a court for a location order for the purposes of the Child Protection Convention.

Item 55—Paragraph 67K(3)

263. Item 55 would repeal existing subsection 67K(3) and insert new subsections 67K(3) and 67K(4). New subsection 67K(3) provides that for the purposes of the Child Abduction Convention, a person may apply to the court for a location order.

264. Location orders allow the court to make orders requiring a person to provide to the Registry Manager of the court information that the person has or obtains about the child's location.

265. This provision also clarifies that 'a person' includes a person appointed as the Central Authority (CA) for the Commonwealth, a State or a Territory for the purposes of Article 6 of the Child Abduction Convention. This will assist the CAs in fulfilling their obligations under Article 7(a) of the Child Abduction Convention to discover the whereabouts of a child who has been wrongfully removed or retained.

266. Existing subsection 67K(2) allows a person to apply to a court for a location order for the purposes of the Child Protection Convention but there is no similar mechanism available for the Child Abduction Convention. This amendment will overcome that deficiency.

267. While the CAs already have access to location orders for the purposes of the Child Protection Convention, they currently have limited mechanisms available to them to obtain information from entities and individuals within Australia that could be used to assist in locating children wrongfully removed from, or retained outside Australia. By providing the CAs with the ability to apply for location orders for the purposes of the Child Abduction Convention the CAs would be able to access information that may significantly improve their ability to locate children abducted from Australia, both to convention and non-convention countries.

268. New subsection 67K(4) would define Child Abduction Convention for the purposes of new subsection 67K(3). Child Abduction Convention is defined as the Convention on the Civil Aspects of International Child Abduction done at The Hague on 25 October 1980. New subsection 67K(4) would also define Child Protection Convention for the purposes of section 67 to have the same meaning as in section 111CA.

269. This is a technical amendment, and is intended to enhance the flow of new subsection 67K(3).

270. The item would also insert a note to 67K(4) to provide a link to the Child Abduction Convention for the reader.

Item 55—At the end of section 67K

271. New subsection 67K(4) would provide that for the purposes of the Child Abduction Convention, a person may apply to the court for a location order.

272. Location orders allow the court to make orders requiring a person to provide to the Registry Manager of the court information that the person has or obtains about the child's location.

273. This provision would also clarify that 'a person' includes a person appointed as the Central Authority (CA) for the Commonwealth, a State or a Territory for the purposes of Article 6 of the Child Abduction Convention. This will assist the CAs in fulfilling their obligations under Article 7(a) of the Child Abduction Convention to discover the whereabouts of a child who has been wrongfully removed or retained.

274. Existing subsection 67K(2) allows a person to apply to a court for a location order for the purposes of the Child Protection Convention but there is no similar mechanism available for the Child Abduction Convention. This amendment will overcome that deficiency.

275. While the CAs already have access to location orders for the purposes of the Child Protection Convention, they currently have limited mechanisms available to them to obtain

information from entities and individuals within Australia that could be used to assist in locating children wrongfully removed from, or retained outside Australia. By providing the CAs with the ability to apply for location orders for the purposes of the Child Abduction Convention the CAs would be able to access information that may significantly improve their ability to locate children abducted from Australia, both to convention and non-convention countries.

276. New subsection 67K(5) would define Child Abduction Convention for the purposes of new subsection 67K(4) as the Convention on the Civil Aspects of International Child Abduction done at The Hague on 25 October 1980. This is a technical amendment, and is intended to enhance the flow of new subsection 67K(4).

277. The item would also insert a note to subsection 67K(5) to provide a link to the Convention for the reader.

Part 3—Renumbering Part VIIIB of the *Family Law Act 1975*

Division 1—Renumbering Part VIIIB of the *Family Law Act 1975*

Item 56—Amendments of listed provisions—renumbering

278. When a marriage or de facto relationship breaks down, property can be divided between the parties. Part VIIIB of the Act gives a court the power to deal with the superannuation interests of separating married or de facto couples, including make orders as to how superannuation should be split between the couple.

279. The existing numbering of Part VIIIB is not consecutive with the surrounding parts of the Act. Subitem 56(1) would renumber the provisions to rectify the discontinuous numbering and improve the readability and ease of use of the Part.

280. The consequential amendment described in Part 3, Division 2 would update reference to the renumbered provisions that have been identified in primary law

281. Subitem 56(2) would provide that a reference to any of the provisions to be renumbered by item 56 appearing in:

- a Commonwealth law, or
- a notice or other document given under Commonwealth law, or
- a contract, agreement, deed, judgment or other instrument

that is in force immediately before item 69 commences is to be treated as a reference to the renumbered provision.

282. The consequential amendments described in Part 3, Division 2 would update references to the renumbered provisions that have been identified in primary law.

Division 2—Consequential amendments of the *Family Law Act 1975*

Item 57—Amendments of listed provisions

283. Item 57 would make a number of consequential amendments to the Family Law Act as a consequence of the renumbering of Part VIIIB by item 56.

284. These amendments would not change policy. Rather, the amendments are merely intended to reflect the renumbering of section of Part VIIIB by item 56.

Division 3—Consequential amendments of other Acts: definitions

Items 58–65—Amendments of definitions

285. Items 58–65 would make consequential amendments to definitions in a number of Acts as a consequence of the renumbering of Part VIIIB by item 56.

286. Items 58 would amend the provisions in the :

- *Defence Force Retirement and Death Benefits Act 1973*
- *Defence Forces Retirement Benefits Act 1948*
- *Governor-General Act 1974*
- *Judges' Pensions Act 1968*
- *Parliamentary Contributory Superannuation Act 1948*
- *Superannuation Act 1922*, and
- *Superannuation Act 1976*

287. The definitions would not be changed by these Items. Rather, the amendments merely reflect the renumbering of section of Part VIIB by item 56.

Division 4—Consequential amendments of other Acts: other amendments

Items 66–70—Consequential amendments of other Acts

288. Items 66–70 would make consequential amendments to the *Income Tax Assessment Act 1997* and the *Superannuation (Unclaimed Money and Lost Members) Act 1999*.

289. These amendments would not change policy. Rather, the amendments are merely intended to reflect the renumbering of section of Part VIIIB by item 56.

Schedule 7—Amendments of the *International Arbitration Act 1974*

Item 1—Subsection 3(1)

290. Item 1 of Schedule 7 would amend subsection 3(1) of the *International Arbitration Act 1974* (IAA) to provide definitions of the terms 'Convention on Transparency' and 'Transparency Rules'. These terms are necessary components of item 11 which would set out a limitation to the confidentiality provisions, being sections 23C to 23G, preventing their default application to Treaty-based Investor-State arbitrations seated in Australia.

Item 2—Subsection 8(1)

291. Item 2 of Schedule 7 would amend subsection 8(1) of the IAA to clarify that a foreign award is binding between the 'parties to the award' rather than between the 'parties to the arbitration agreement' pursuant to which it is made.

292. The current text makes an award binding between the 'parties to the arbitration agreement' in pursuance of which the arbitration was conducted. One of the purposes of the IAA is to implement the United Nations *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (1958) (the New York Convention). The New York Convention and equivalent legislative provisions in other leading arbitration jurisdictions make an award binding between the 'parties to the award' rather than the parties to the arbitration agreement.

293. There is conflicting authority on whether, by reason of subsection 8(1), the award creditor has an onus to prove that an award debtor, who is not named in the arbitration agreement, was a party to the arbitration agreement. In *Altain Khuder*,[1] the Victorian Court of Appeal held that subsection 8(1) may require the award creditor seeking to enforce an award against a non-signatory to the arbitration agreement to do more than simply produce the award and the putative arbitration agreement in an application to enforce a foreign award, for the onus to shift onto the award debtor to demonstrate why the award should not be enforced.

294. The wording of subsection 8(1) differs from that of equivalent provisions in the United Kingdom, Singapore and Hong Kong. In those jurisdictions leading decisions such as *Dallah*,[2] have made clear that the process contemplated by the New York Convention is that an award creditor would be able to obtain orders for enforcement simply by production of an arbitral award and the arbitration agreement in pursuance of which the award was made. No further inquiry is to be undertaken by the enforcing court, nor is the award creditor seeking enforcement obliged to furnish further evidence. The award debtor may then object to enforcement by proving one of the grounds set out in Article V of the New York Convention (incorporated in subsections 8(5) and (7) of the Act). In these foreign jurisdictions, and in line with accepted international arbitral practice,[3] an award creditor is not required to prove that the arbitration agreement is valid; rather, this is to be presumed by the court and, correspondingly, the award debtor bears the onus of proving an Article V defence, such as the arbitration agreement's invalidity under the law to which the parties subjected it.

295. In *Dampskibsselskabet*,[4] Foster J declined to follow the Victorian Court of Appeal in *Altain Khuder,* holding that the simple evidential onus cast upon the award creditor by

[1] *Altain Khuder LLC v IMC Mining Inc & Anor* (2011) 282 ALR 717.
[2] *Dallah* [2011] 1 AC 763.
[3] Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2009) vol 2, 2705–6.
[4] *Dampskibsselskabet Norden AIS v Beach Building & Civil Group Pty Ltd* (2012) 292 ALR 161.

sections 8 and 9 of the Act is to produce the award and the putative arbitration agreement without more, even if the award debtor is not named in the arbitration agreement relied on. This decision is in line with international practice and represents the approach which should be adopted in all Australian jurisdictions.

296. An award debtor has multiple opportunities to challenge either the arbitral proceedings commenced under an arbitral agreement or the arbitral award made as a result of such proceedings.

297. Firstly, a party to an arbitration agreement may argue before the arbitral tribunal that it does not have jurisdiction to hear the dispute because the parties are not those bound by the arbitration agreement. Typically, an arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the validity of an arbitration agreement. For example, this principle is reflected in Article 16 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, as amended in 2006 (Model Law), which is set out in schedule 2 to the IAA.

298. Secondly, at the conclusion of proceedings the award debtor can usually apply to a court of the country in which the arbitration is seated, to have the award set aside. See for example Article 34 of the Model Law. Where an award is set aside in the country in which it is made, Article V(e) of the New York Convention and Article 36(1)(a)(v) of the Model Law permits an enforcing court in another State to decline enforcement.

299. Finally, the award debtor can typically challenge any application for recognition and enforcement of an award in a second country. In this case, the award debtor may oppose an enforcement application on the basis of the grounds set out in Article 36 of the Model Law in countries which have adopted the Model Law or through provisions giving effect to Article V of the New York Convention.

300. Given these opportunities to challenge the proceedings or the award, requiring the award creditor to provide proof that the award does in fact bind the award debtor when initiating an enforcement application introduces an added and unnecessary procedural step, which creates an opportunity for the award debtor to improperly delay enforcement.

301. This amendment would remove the inconsistency between the IAA and the New York Convention, and improve the efficiency of recognition and enforcement proceedings in line with the New York Convention and international arbitration practice.

Item 3—At the end of paragraphs 8(5)(a) to (d)

302. Item 3 of Schedule 7 would amend paragraphs 8(5)(a) to (d) of the IAA to add the word ‘or’ between all items in the list, in line with current drafting style.

Item 4—Paragraph 8(5)(f)

303. Item 4 of Schedule 7 would amend paragraph 8(5)(f) of the IAA to clarify that a party may apply to the court to resist enforcement of a foreign arbitral award on the basis that the award has not yet become binding on the ‘parties to the award’ rather than the parties to the ‘arbitration agreement’. This amendment aligns the provisions setting out the grounds for resisting enforcement of foreign awards in Australia, with those in the New York Convention and with equivalent implementing provisions in other jurisdictions. This amendment is

consequential on that set out in Item 2, as it preserves the consistency of the amended enforcement power in section 8(1) and the defences in section 8(5).

Item 5—Application of amendments

304. Item 5 of Schedule 7 would provide for the application of amendments to section 8 of the IAA to arbitral proceedings whether or not they commenced before the amendments commence.

Item 6—Section 18 (heading)

305. Item 6 of Schedule 7 would repeal and replace the heading of section 18 of the IAA to better align it with the amended functions after the amendments set out in items 7 and 8. The heading 'Court or authority taken to have been specified in Article 6 of the Model Law' would be replaced with 'Courts and authorities in the Model Law'.

Item 7—At the end of section 18

306. Item 7 of Schedule 7 would add a new subsection 18(4) of the IAA to provide expressly that both the Federal Court and the State and Territory Supreme Courts are a 'competent court' for the purpose of enforcing awards under Articles 35 and 36, and for the recognition and enforcement of interim measures under Article 17H, and for the provision of court assistance in the taking of evidence in support of arbitral tribunals under Article 27 of the Model Law, as given effect to the IAA.

307. The Act does not define the term 'competent court' for the purposes of functions under the Model Law, set out in Schedule 2 to the IAA. This has led to costly and confusing litigation as to which courts have jurisdiction for these purposes. This amendment would resolve this uncertainty.

Item 8—Application of amendments

308. Item 8 of Schedule 7 would provide for the application of amendments to section 18 of the IAA, to arbitral proceedings commenced after this item commences.

Item 9—Subsection 21(2)

309. Item 9 of Schedule 7 would remove a redundant expression in subsection 21(2).

Item 10—Subsection 22(2)

310. Item 10 of Schedule 7 would subject subsection 22(2) to subsection 22(3), which would be inserted by item 11.

Item 11—After subsection 22(2)

311. Item 11 of Schedule 7 would amend section 22 to clarify that the opt-out confidentiality provisions in sections 22C to 22G of the Act do not apply where parties to an arbitration seated in Australia have agreed to apply the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (the Transparency Rules).

312. The Transparency Rules provide that certain information relating to arbitrations to which they apply are not confidential (subject to certain exceptions). The Transparency Rules apply to investor-State arbitrations commenced pursuant to a treaty concluded after 1 April 2014, if that treaty provides for arbitration under the UNCITRAL Arbitration Rules (as revised in 2010). However, the application of the Transparency Rules to investment arbitrations commenced pursuant to investment treaties concluded prior to this date is governed by the *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration* (2014) (Transparency Convention). The Transparency Convention provides that States parties agree to apply the Transparency Rules to investment arbitrations to which they are a party where the claimant investor's State is also a party, or where the investor agrees to their application.

313. Australia is not presently a party to the Transparency Convention. However, should the parties to an investment arbitration, which is to be conducted subject to the Transparency Convention, agree that the seat of the arbitration should be in Australia, this amendment would prevent any conflict between the IAA and the Transparency Convention. This broadens the scope of arbitration work which can be conducted in Australia under the IAA.

Item 12—Application of amendments

314. Item 12 of Schedule 7 would provide for the application of amendments to section 22 of the IAA, to arbitral proceedings commenced after this item commences.

Items 13, 14, 15 and 16—Section 27

315. Items 13 and 16 of Schedule 7 would amend section 27 to remove the term 'tax' from paragraph 27(2)(b) and 'taxed or' subsection 27(3).

316. Item 14 would repeal paragraph 27(2)(c).

317. Item 15 would insert a new subsection 27(2) providing that the arbitral tribunal is not obliged to follow the scales and practices adopted by the court on taxation when assessing the amount of costs.

318. Currently section 27 refers to an arbitral tribunal's power to make an award as to costs and to tax or settle the amount of costs to be paid and to award costs as between party and party or solicitor and client. The references to taxing costs on a party and party or solicitor and client basis are outmoded and inflexible in contrast to current practice in international arbitration. This amendment would align Australian practice with international standards and provide Australian arbitral tribunals with more flexibility in making costs awards. It would be a matter for the tribunal to settle an appropriate approach to awarding costs.

Item 17—Application of amendments

319. Item 17 of Schedule 7 would provide for the application of amendments to section 27 of the IAA, to arbitral proceedings commenced after this item commences.

Schedule 8—Amendments of the *Legislation Act 2003*

Items 1 and 2—Paragraph 15Q(1)(c) and (2)(e)

320. Items 1 and 2 of Schedule 8 would omit ", lapses, expires or otherwise ceases to be in force" from paragraphs 15Q(1)(c) and (2)(e) of the *Legislation Act 2003*. Subsections 15Q(1) and (2) provide for the definition of a required compilation event and a discretionary compilation event. These items would clarify that compilations are not prepared when provisions of Acts or instruments, or Acts or instruments, cease to be in force unless the provisions, Acts and instruments are actually repealed by an Act or instrument. For example, a finding by a court that a provision is invalid will not in itself require a compilation to be prepared; the provision must be expressly repealed in order for a compilation to be required. The purpose of the amendments is to provide greater certainty about when provisions of Acts or legislative instruments are textually removed from the "In Force" part of the Federal Register of Legislation. These amendments will also assist in maintaining the quality of the statute book by encouraging the express amendment of legislation to repeal provisions that have ceased to be in force.

Item 3—Subsection 15Q(3)

321. Item 3 of Schedule 8 would insert "(subject to subsection (4))" after "instrument is" in subsection 15Q(3). Subsection 15Q(3) provides that for the purposes of Division 2 of Part 2 under Chapter 2 of the Legislation Act, an Act, instrument or provision is amended when the amending provision commences. This would be a consequential amendment to take into account new subsection 15Q(4), to be inserted by item 4 of this Schedule.

Item 4—At the end of section 15Q

322. Item 4 of Schedule 8 would insert new subsection 15Q(4), which would clarify that compilations of Acts and instruments are not required to be prepared or lodged for registration to take account of retrospective amendments. The Office of Parliamentary Counsel and other agencies preparing compilations will retain the flexibility to prepare compilations that take account of retrospective amendments when it is appropriate to do so. Amending legislation will continue to be available to the public in the most current and correct versions.

Item 5—Paragraph 15T(7)(a)

323. Item 5 of Schedule 8 would omit ", expires, lapses or otherwise ceases to be in force" from paragraph 15T(7)(a). Subsection 15T(7) provides for circumstances in which the First Parliamentary Counsel must ensure that a registered compilation of an Act, legislative instrument or notifiable instrument is no longer shown on the Federal Register of Legislation as currently in force. Similar to amendments made by items 1 and 2 to subsections 15Q(1) and 15Q(2), this amendment would only require an Act or instrument to be removed from the "In Force" part of the Register if it is expressly repealed by other legislation. This amendment would align subsection 15T(7) with amendments made to subsections 15Q(1) and 15Q(2), the purpose of which is to provide greater certainty about when provisions of Acts or legislative instruments are textually removed from the statute book. If the Act or instrument ceases to have effect for any other reason, this amendment will encourage the express repeal of the Act or instrument.

Item 6—Subsection 15U(1) (heading)

324. Item 6 of Schedule 8 would repeal the heading of subsection 15U(1). This would be a consequential amendment to the repeal of subsection 15U(2) by item 5 of this Schedule.

Item 7—Subsection 15U(1)

325. Item 7 of Schedule 8 would remove the subsection numbering of "(1)" from subsection 15U(1). This would be a consequential amendment to the repeal of subsection 15U(2) by item 8 of this Schedule.

Item 8—Subsection 15U(2)

326. Item 8 of Schedule 8 would repeal subsection 15U(2). This subsection currently provides that the rules under the Legislation Act may provide for the lodgement or registration of compilations reflecting retrospective amendments, 'in addition to any other requirement or power under this Division'. This subsection would be incompatible with the insertion made by item 4 of this Schedule, which would clarify that compilations of Acts and instruments are not required to be prepared or lodged for registration to take account of retrospective amendments. It would therefore be repealed as a consequential amendment to amendments made by item 4 of this Schedule.

Item 9—Paragraph 15ZA(5)(h)

327. Item 9 of Schedule LA would insert "subject to subsection 15Q(4)" before "an authorised version" in paragraph 15ZA(5)(h). Paragraph 15ZA(5)(h) provides for a prima facie assumption that an authorised version of a registered compilation of an Act or instrument shows the text of the Act or instrument as amended (if at all) and in force on the compilation date. This item would make a consequential amendment to take into account new subsection 15Q(4), to be inserted by item 4 of this Schedule.

Item 10—Subsection 15ZB(4)

328. Item 10 of Schedule 8 would insert "subject to subsection 15Q(4)" before "explanatory statement is" in subsection 15ZB(4). Subsection 15ZB(4) provides that for the purpose of a court or tribunal's consideration as to whether a source of information provides reliable information about the issues listed under subsection 15ZB(1) (such as the dates that a legislative instrument commenced), an authorised version of a registered law or explanatory statement is a reliable source of information. This item would make a consequential amendment to take into account new subsection 15Q(4), to be inserted by item 4 of this Schedule.

Schedule 9—Amendment of the *Marriage Act 1961*

Item 1—Subsection 5(1)

329. This item would insert a definition of 'medical practitioner' into subsection 5(1) of the Marriage Act and provide that the meaning of medical practitioner is the same as that in the *Health Insurance Act 1973*. The definition ensures that the reference to medical practitioner in the Act is consistent with other Commonwealth legislation and supplements the changes at item 2.

Item 2—Subparagraph 13(2)(a)(v)

330. The Marriage Act provides that a 'legally qualified medical practitioner' may witness the consent of a person to the marriage of a minor under subparagraph 13(2)(a)(v), and may witness a notice of intention to marry under subparagraph 42(2)(c)(v) (see item 30). Item 2 would amend the term 'legally qualified medical practitioner' in subparagraph 13(2)(a)(v) to 'medical practitioner'. This is intended to simplify the language in the Act and ensure consistency with other Commonwealth legislation. Item 1 would insert a definition of medical practitioner.

Item 3—Section 14

331. This item is a consequential amendment arising from changes to Schedule 1 outlined below at item 37. Subsection 14(1) of the Marriage Act provides that, subject to this section, the person or persons whose consent is required for the marriage of a minor is as set out in Schedule 1. Subsections (2) through (4) clarify the consent required for adopted minors and minors under guardianship orders.

332. Item 3 would replace section 14 with a new provision providing that the person or persons whose consent is required to the marriage of a minor is set out in Schedule 1.

333. Schedule 1 to the Marriage Act would be updated by item 42 to remove the outdated distinction between parents and adoptive parents, and to reflect the concept of parental responsibility contained in the *Family Law Act 1975*. As such, subsection 14(2) can be repealed as there would no longer be a distinction in Schedule 1 between a minor who is and is not an adopted child. References to 'parent' in the amended Schedule would have their ordinary meaning, which includes references to adoptive parents.

334. The new Schedule 1 would comprehensively list the persons whose consent is required before a minor may marry. All circumstances where the consent of a guardian or guardians of a child pursuant to a guardianship order or law will be required are intended to be captured under the proposed new Schedule 1. As such, existing subsections 14(3) and (4) are redundant.

Item 4—subparagraph 23B(1)(d)(iii)

335. The Australian Law Reform Commission report, Equality, Capacity and Disability in Commonwealth Laws (ALRC 124) recommended that the Marriage Act should be amended to remove the references to a person being 'mentally incapable' of providing consent, to better reflect the National Decision-Making Principles proposed in the report, and to ensure that persons with a disability are not unnecessarily prevented from entering a marriage. This

item would amend subparagraph 23B(1)(d)(iii) to focus on the requirement for a person to understand the nature and effect of the marriage ceremony in order for the marriage to be valid, rather than focus on the person's disability.

336. The reference to 'mentally incapable' in subparagraph 23(1)(d)(iii) has not been amended because section 23 only operates in respect of marriages solemnised on or after 20 June 1977 and before the commencement of section 13 of the *Marriage Amendment Act 1985* (7 April 1986). This amendment is not intended to operate retrospectively.

Item 5—Application of amendment

337. The purpose of this item is to clarify that the amendment to the meaning of 'real consent' in amended subparagraph 23B(1)(d)(iii) does not operate retrospectively. Capacity to consent is to be determined according to the legal test that is current at the time a marriage is solemnised.

Item 6—At the end of section 39

338. This item would insert a new subsection 39(4) which would clarify that an authorisation by the Minister of a State or Territory officer to solemnise marriages is not a legislative instrument. This new provision is included to assist readers, as the instrument is not a legislative instrument within the meaning of section 8 of the *Legislation Act 2003.*

Item 7—Subsection 39B(1)

339. As a consequence of item 9, section 39B would comprise a single provision. Accordingly, this item removes the sub-section numbering from subsection 39B(1).

Item 8—Subsection 39B(1)

340. This item is intended to clarify that the register of marriage celebrants is the publicly available register that is maintained on the internet. Under the Marriage Act, a person is a registered marriage celebrant when their details are entered on the Register of Marriage Celebrants; and a person is deregistered when their details are removed from the Register. This amendment would provide certainty around what constitutes the Register for these purposes.

Item 9—Subsections 39B(2) to (5)

341. Subsections 39B(2) to (5) allow the Registrar of Marriage Celebrants to: keep and make available for inspection the register of marriage celebrants in any way he or she considers appropriate; require the information on the register to be made available on the internet; and allow the Registrar to disseminate this information in any other way he or she considers appropriate.

342. The amendment to section 39B in item 8 would establish that the Register of Marriage Celebrants is the Register published on the internet. As a consequence, subsections 39B(2) to (5) are considered redundant, and would be repealed by this item.

Item 10—Subparagraph 39FA(1)(a)(i)

343. This item is related to item 13. The purpose of the amendment is to provide an exception to liability to pay the annual celebrant registration charge where a celebrant is registered on 1 July in a financial year and the circumstances in the proposed paragraphs (1A)(b) and (c) apply (see item 13). The effect of the amendment is to ensure that a celebrant who is the subject of proceedings in the Administrative Appeals Tribunal (AAT), or related court proceedings, in respect of a decision to deregister the celebrant in a prior financial year, is not liable to pay the annual celebrant registration charge until the AAT or court proceedings have been finalised.

Item 11—Subparagraph 39FA(1)(a)(ii)

344. This item is a consequential amendment arising from item 12 and inserts the word 'or' rather than 'and' in subparagraph 39FA(1)(a)(ii). Item 12 inserts a new subparagraph after subparagraph 39FA(1)(a)(ii).

Item 12—At the end of paragraph 39FA(1)(a)

345. This item is a consequential amendment arising from item 13 and provides that the circumstances described in new subsection (1A) are additional criteria for liability to pay the annual celebrant registration charge.

Item 13—After subsection 39FA(1)

346. This item would insert a new subsection 39FA(1A), to provide that a celebrant who is registered on 1 July of a financial year and has an application for review on foot in the AAT or related court proceedings in respect of an earlier decision to deregister the celebrant, is only liable to pay the annual celebrant registration charge where that decision is overturned by the AAT or court, such that the person is not deregistered. The provision would enable the Registrar of Marriage Celebrants to defer issuing a charge payment notice pending the resolution of the AAT or court proceedings. This provision would only apply to marriage celebrants who have received an order staying the implementation of the deregistration decision.

347. The effect of the amendment is to suspend a celebrant's liability for the duration of the proceedings. The celebrant would not have to pay the celebrant registration charge until the AAT or court proceedings are finalised. If the decision to deregister the celebrant was overturned by the AAT or court, the celebrant's liability would resume, and the celebrant would be liable to pay the annual charge as from 1 July of the financial year in which the proceedings are finalised. Where the deregistration decision is upheld, the person will not be liable under section 39FA for the celebrant registration charge.

348. This amendment respects the legal process and enhances the administrative efficiency of the marriage celebrants programme by enabling the Registrar to defer issuing a charge notice for a new financial year until the AAT or related court proceedings are finalised.

349. This item would also insert new subheadings into subsection 39FA(1) to assist the reader.

Item 14—Subsection 39FA(2)

350. This item is a consequential amendment arising from item 13, and is intended to simplify the language of the provision which lists each circumstance of liability that requires the Registrar of Marriage Celebrants to send a notice.

351. The provision also changes the reference to 'notice' in subsection 39FA(2) to be 'written notice', to ensure consistency with other notice provisions in the Act.

Item 15—Before subsection 39FA(3)

352. This item would insert a heading to assist the reader.

Item 16—Before subsection 39FA(6)

353. This item would insert a heading to assist the reader.

Item 17—Application of amendments

354. The purpose of this item is to clarify that the changes to celebrant liability in amended section 39FA apply in relation to financial years beginning at the same time as, or after, this amendment commences and do not operate retrospectively.

Item 18—Subsection 39FB(1)

355. Subection 39FB(1) requires the Registrar of Marriage Celebrants to send a notice of deregistration to a person who has not paid the celebrant registration charge, unless the Registrar considers that the person's liability to pay could be affected by:

(a) the outcome of an application for internal review of a decision to refuse to grant an exemption; or
(b) any other circumstance of which the Registrar is aware.

356. Item 18 would expand the circumstances in which a notice of deregistration for non-payment of the annual registration charge need not be sent to include where a marriage celebrant's name has already been removed from the register under paragraph 39I(2)(d) or paragraph 39K(a). This would encompass circumstances where a celebrant no longer wishes to be registered, has died, has become a minister of religion of a recognised denomination, or has been deregistered as a consequence of a disciplinary measure before the notice is sent. This amendment would enhance the efficiency of the marriage celebrants' programme by not requiring the Registrar to send a deregistration notice to a celebrant who has already been removed from the register.

357. The provision would also change the reference to 'notice' in subsection 39FB(1) to 'written notice', to ensure consistency with other notice provisions in the Act.

Item 19—Application of amendment

358. The purpose of this item is to clarify that the changes to administrative processes in amended subsection 39FB(1) only apply where the charge payment date occurs on or after the commencement of the amended provision, and do not operate retrospectively.

Item 20—Paragraph 39FB(2)(a)

359. The purpose of this amendment is to provide certainty around the date that a celebrant is deregistered for non-payment of the annual celebrant registration charge. Paragraph 39FB(2)(a) currently provides that the person will be deregistered as a marriage celebrant **after** the day specified in the notice (being a day that is at least 7 days after the day on which the notice is sent). Subsection 39(3) then requires that the Registrar of Marriage Celebrants must deregister the person as a marriage celebrant by removing his or her details from the register of marriage celebrants as soon as practicable after the day specified under paragraph (2)(a). As such, celebrants are not certain of the precise date their deregistration will take effect.

360. Item 20 would replace the reference to 'after' in the phrase 'after the day specified' with the word 'on'. The effect of this amendment is that the notice would state that the celebrant's deregistration will take effect **on** the day specified, being at least 7 days after the day that a notice of deregistration is sent.

Item 21— Subsection 39FB(3)

361. Item 21 is consequential to the amendment at item 20.

362. Item 21 would repeal the current subsection 39FB(3) and replace it with new subsections 39FB(3) and (4). The effect of amended subsection 39FB(3) will be that the deregistration takes effect at the start of the day specified in the notice of deregistration, regardless of whether the person's name still appears on the register of marriage celebrants.

363. Item 21 would retain the note in current subsection 39FB(3) to clarify that a deregistered celebrant may apply to be re-registered under section 39D of the Act.

364. New subsection 39FB(4) requires the Registrar to remove the celebrant's details from the register. In practice, while the Registrar would endeavour to remove the celebrant's details from the register on the same day that the deregistration takes effect, a failure to remove the celebrant from the register on that day will not invalidate the deregistration because the celebrant is taken to have been deregistered at the start of the day specified in the notice, by virtue of new subsection 39FB(3).

Item 22—Application of amendments

365. The purpose of this item is to clarify that the amendments made to section 39FB (except subsection 39FB(1)) in relation to issuing deregistration notices as a consequence of non-payment of the celebrant registration charge, apply only to notices issued after the commencement of the amended provisions and do not operate retrospectively.

Item 23—After paragraph 39G(1)(b)

366. This item would insert a new paragraph into section 39G and provide that a celebrant has an obligation to comply with all disciplinary measures imposed on them by the Registrar of Marriage Celebrants under section 39I of the Act. This amendment is intended to ensure the Registrar has authority to take additional disciplinary action if a celebrant does not comply with a disciplinary measure that is imposed on him or her, such as undertaking additional ongoing professional development.

Item 24—Application of amendment

367. The purpose of this item is to clarify that the insertion of an obligation to comply with a disciplinary measure in paragraph 39G(1)(ba) will apply to disciplinary measures imposed after this item commences and does not operate retrospectively.

Item 25—Subparagraph 39G(1)(c)(i)

368. This item is related to item 8, which clarifies that that Register is the list of celebrants published on the internet. Subparagraph 39G(1)(c)(i) requires celebrants to notify the Registrar, in writing, within 30 days of a change that results in the details "entered on" the Register in relation to the person being no longer correct. Item 25 would amend this provision to require notification within 30 days of a change in the details "provided to" the Registrar by the person to be kept up to date. The details typically provided to the Registrar, which must be kept up to date, are identity and contact details such as a person's title, full name, residential and/or postal addresses, telephone numbers, any relevant email addresses and, where appropriate, the religious body or organisation to which they belong. The Bill provides that specific details required to be kept updated may be prescribed in regulations (item 29).

369. Without the amendment at item 25, the effect of item 8 would be that celebrants would only have to advise the Registrar of changes to the information about them that is publicly available on the internet. For privacy reasons, the amount of information required to be published on the Register is limited to those matters listed in regulation 37I of the *Marriage Regulations 1963*. However, the Registrar retains additional information about celebrants (for example, full postal address, alternative email addresses and telephone numbers) which, although not required to be published, is necessary to enable the Registrar to effectively administer the Marriage Celebrants Programme. Item 25 will ensure those details are also kept up to date.

Item 26—Application of amendments

370. The purpose of this item is to clarify that the obligation to notify the Registrar within 30 days of changes to details previously provided to the Registrar applies to any changes that occur after this item commences and does not apply retrospectively.

Item 27—Subsection 39G(1)(note)

371. This item arises from item 28, and inserts the numeral 1 after the word 'Note' under subsection 39G to indicate that it is the first of two notes.

Item 28—At the end of subsection 39G(1)

372. This item inserts a new note after subsection 39G(1) to clarify that the obligation in subparagraph 39G(1)(c)(i) for a marriage celebrant to provide written notice to the Registrar of changes to his or her details is satisfied by the celebrant entering updated details into the online portal provided by the Registrar, where available. The amendment is intended to improve the efficiency of the marriage celebrants programme by enabling celebrants to update their details independently, without the need to contact the Registrar.

Item 29—At the end of section 39G

373. This item inserts a new subsection 39G(3) which provides that the regulations may prescribe the specific information which a celebrant must keep current with the Registrar for the purposes of subparagraph 39G(1)(c)(i).

Item 30—Subparagraph 39I(4)(a)(iv)

374. Under subsection 39J(1) of the Marriage Act, an application for review can only be made to the AAT in respect of decisions made to not register a person as a celebrant, 'to suspend a person's deregistration', or to deregister a marriage celebrant. The right of review does not apply in relation to the other disciplinary measures that may be taken under subsection 39I(2). However, the Marriage Act requires that a notice in relation to disciplinary measures sent under subparagraph 39I(4)(a)(iv) must inform the celebrant of his or her right to apply for review, even where no right to apply for review exists.

375. This item will ensure that the requirement to provide notice of a marriage celebrant's right of review only applies in circumstances where a right of review exists (that is, the circumstances set out in subsection 39J(1)).

Item 31—Application of amendment

376. The purpose of this item is to clarify that the amended requirements in respect of giving notice of a right of review under subparagraph 39I(4)(a)(iv) do not operate retrospectively. However, the amended notice provision does apply to notices sent after this item commences in respect of a decision to take a disciplinary measure that was made prior to the commencement of the new notice provision.

Item 32—Paragraph 39J(1)(c)

377. This item is a consequential amendment arising from items 20 and 21. It substitutes a reference to 'subsection 39FB(3)' with a reference to 'section 39FB', as a result of amendments to section 39FB in items 20 and 21. The item does not change the effect of the previous provision. It continues to clarify that notification of a right of review includes reviews of actions to deregister a celebrant for non-payment of the annual registration charge.

Item 33—Subparagraph 42(2)(c)(v)

378. The Marriage Act provides that a 'legally qualified medical practitioner' may witness the consent of a person to the marriage of a minor under subparagraph 13(2)(a)(v) (see item 2), and may witness a notice of intention to marry under subparagraph 42(2)(c)(v). Item 33 would amend the term 'legally qualified medical practitioner' in subparagraph 42(2)(c)(v) to 'medical practitioner'. This is intended to simplify the language in the Act and ensure consistency with other Commonwealth legislation. Item 1 inserts a definition of medical practitioner.

Item 34—Before Division 3 of Part V

379. The Marriage Act was amended by Act No. 77 of 2002 to remove the ability of Australian consular officers to solemnise marriages overseas according to Australian law. The amendments made to the Marriage Act in 2002 included repealing Division 1 of Part V, which was concerned with administrative matters, including the establishment of the office of

Registrar of Overseas Marriages. It appears that the repeal of Division 1 was done in error, and that certain provisions in the Division should have been retained. For example, references to the Registrar of Overseas Marriages were retained and still appear elsewhere in the Marriage Act, and all short-hand references to 'the Registrar' and 'register' in Part V of the Act that were enacted to refer to the Registrar/Register of Overseas Marriages are still in the Act.

380. Item 34 would restore the effect of repealed sections 60, 61, 63 and 64 of the Marriage Act to provide for the office of Registrar of Overseas Marriages. The intention is for the provisions to have the same effect as the previous Division 1 provisions, however, they have been updated in this Bill to reflect current drafting conventions and simplified language.

381. The former section 61, which provided for a Registrar and Deputy Registrar, is now remade in two separate provisions – sections 61 and 62. Rather than a Deputy Registrar, the Minister would be able to appoint a person to act as the Registrar. This approach is in line with current drafting conventions, which separate appointment provisions from acting appointment provisions.

Item 35—Validation of things purportedly done under the *Marriage Act 1961*

382. Certain marriages may have been solemnised overseas by Australian Defence Force chaplains, and purportedly registered with the Registrar of Overseas Marriages, since the repeal of Division 1 of Part V in 2002. Item 35 provides a validating provision to ensure that things purportedly done by the Registrar of Overseas Marriages during the period when Division 1 of Part V was repealed are valid.

Items 36–39—Amendments to section 115

383. Subsection 5(3) of the Marriage Act provides that an appointment or authorisation under this Act may be an appointment or authorisation of a named person only or of every person from time to time holding or acting in a specified office of the Commonwealth or of a State or Territory. In practice, State and Territory officers authorised under subsection 39(2) of the Marriage Act to solemnise marriages are authorised according to a specified office, rather than a specific officer's name. Similarly, prescribed authorities appointed pursuant to subsection 5(1) are appointed according to a specified office, rather than a specific officer's name.

384. Section 115 requires that the Minister cause to be published a list of persons who are authorised celebrants and a list of persons who are prescribed authorities in relation to marriages in Australia. Section 115 currently requires the full name of State or Territory officers or prescribed authorities to be recorded in the published list, which is inconsistent with paragraph 5(3)(b) which provides for authorisations and appointments to be made by reference to an office.

385. Items 36–39 would amend section 115 to provide that the published list of State or Territory officers or prescribed authorities may include a description of the officer's position or the officer's name. This would allow only the position to be recorded where the authorisation was made in accordance with paragraph 5(3)(b) to apply to every person from time to time holding or acting in a specified office.

386. Item 39 would also amend the information required to be listed for marriage celebrants so that the details required accord with the information required to be published in the register of marriage celebrants for the purposes of subsection 39D(5).

Items 40 and 41—Paragraphs 116(1)(c) and (d)

387. These items are consequential to item 34. The re-instated Division 1 of Part V would provide for the office of Registrar of Overseas Marriages. The previously legislated office of Deputy Registrar would not be reinstated – instead a separate acting appointments provision would be included. The reference in paragraph 116(1)(d) to the Deputy Registrar would therefore no longer required.

Item 42—The Schedule

388. The existing Schedule to the Marriage Act provides a list of who may give consent under section 14 for the marriage of minor (that is, a person aged 16 or 17 years of age). The Schedule, which was written in the 1960s and last amended in 1988, provides different rules for giving consent, based on outdated considerations such as whether a minor was adopted, or whether the minor's parents were married. The Schedule also uses concepts and terminology, such as 'custody', which are not used in family law today.

389. Item 42 would amend the Schedule to ensure it reflects current terminology and principles of family law as provided in the *Family Law Act 1975*. New Item 1 of Schedule 1 to the Marriage Act would comprehensively set out who must consent to a marriage.

390. Table item 1 would apply in circumstances where at least one parent of the minor is alive, there are no court orders in force in relation to parental responsibility for the minor, and exclusive guardianship of the minor has not been allocated to a person or persons under an Act, Ordinance or order of a court or tribunal. In these circumstances, the consent of each living parent would be required for the purposes of section 13 of the Act.

391. Table item 2 would apply in circumstances where there is a court order in force granting parental responsibility for the minor to one or more persons, whether or not they are the minor's parents. This may cover a situation, for example, where the minor's parents are alive, but a court has made orders that parental responsibility for the minor rests with only one parent, or with the minor's grandparents or another relative. In these circumstances, the consent required under section 13 would be required to be given by the person or persons with parental responsibility for the minor. Court orders may specify that one person has parental responsibility for some matters in relation to the minor, and that another person has parental responsibility for other matters in relation to the minor. Where this has occurred, table item 2 would provide that the person with parental responsibility for matters pertaining to the minor's marriage would be the person whose consent is required.

392. Table items 3–5 are intended to apply in circumstances where there is a guardianship order or law in place that relates to the minor. Where there is a guardianship order or law in operation, each guardian of the minor is the person who must give consent for the purposes of section 13, either alone (items 3 and 4) or jointly with any other person whose consent is required by the Schedule (item 5).

393. Finally, table item 6 is intended to apply in rare circumstances where none of the other categories apply. A prescribed authority under the Act would assume the role of

providing consent. It is envisaged that, given the small number of underage marriages, and the small number of cases which would not be covered by the preceding five table items, this catch-all provision would not be used frequently.

Schedule 10—Amendment of the *Sex Discrimination Act 1984*

Item 1—Section 43

394. Item 1 would repeal section 43 of the *Sex Discrimination Act 1984*.

395. Section 43 exempts discrimination against women in connection with employment, engagement or appointment in Australian Defence Force (ADF) positions involving combat duties.

396. This amendment is consistent with the removal of gender restrictions from ADF combat roles, which took full effect from 1 January 2016, and would ensure women have equal opportunities to apply and be considered for ADF positions.

Item 2—Application of amendment

397. Item 2 would specify that the amendments would apply in relation to acts or omissions occurring after the commencement of this item.