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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**FAMILY LAW AMENDMENT (FEDERAL FAMILY VIOLENCE ORDERS) BILL  
2021**

EXPLANATORY MEMORANDUM

(Circulated by authority of the  
Assistant Minister to the Attorney-General, Senator the Honourable Amanda Stoker)

## **FAMILY LAW AMENDMENT (FEDERAL FAMILY VIOLENCE ORDERS) BILL 2021**

### **GENERAL OUTLINE**

1. The *Family Law Amendment (Federal Family Violence Orders) Bill 2021* (the Bill) would amend the *Family Law Act 1975* (the Family Law Act) to establish new federal family violence orders which, if breached, can be criminally enforced. Federal family violence orders would offer stronger protection for victims of family violence than existing family law personal protection injunctions which can only be enforced civilly.
2. Family violence is unacceptable and has no place in our society. Australians expect a strong legislative response to address this behaviour. This Bill would strengthen the protections offered by the family law system from perpetrators of domestic violence by introducing criminally enforceable federal family violence orders.
3. The Bill would allow a listed court to make a federal family violence order where the court is satisfied that a person has been or there are reasonable grounds to suspect that it is likely that they will be subjected to family violence or, in the case of children, the child has been or there are reasonable grounds to suspect that it is likely that they will be subjected or exposed to family violence. The Bill would provide that where the federal family violence order is in relation to a child the order must be appropriate for the welfare of the child, and where the federal family violence order is in relation to party to a marriage, the order must be appropriate in the circumstances.
4. The order may require the person against whom the order is directed to comply with conditions which prohibit certain behaviours, restrict their contact with protected persons or limit their ability to go to certain locations or within a certain distance of a protected person.
5. Under the Bill, the orders could be made for the personal protection of a child, a parent of a child, a person who is to spend time, communicate, or live with a child under a parenting order, a person who has parental responsibility for a child, or a party to a marriage in specified circumstances. The Bill would establish the categories of persons who would be eligible to apply for a federal family violence order, the statutory tests for the making of a federal family violence order, the matters that the court must take into consideration and the obligations on the court when making a decision whether to make such an order.
6. The Bill would also set out the circumstances in which a federal family violence order may be varied, revoked or suspended by a court. It would allow State and Territory courts, in specified circumstances, to suspend or revoke federal family violence orders when issuing or varying a State or Territory family violence order.
7. The amendments would provide that a breach of a federal family violence order would be a criminal offence, carrying penalties of up to two years imprisonment, 120 penalty units or both. State and Territory police would have authority to enforce these breaches under the National Domestic Violence Order Scheme in which case local penalties would apply.
8. The Bill would prevent a perpetrator from relying on self-induced intoxication as a consideration for whether conduct was accidental or whether a person had a mistaken belief

about facts, and would ensure that victims cannot be charged with aiding and abetting the offence if their actions invite a breach.

9. The Bill would reinforce the Government's strong view that family violence is not a private matter, but a criminal offence of public concern. Currently, personal protection injunctions are enforceable only by civil action brought in the family law courts. These amendments would remove the onus on family violence victims to bring a private application for contravention of a protection order. Bringing a civil matter against the perpetrator can present a range of difficulties and challenges for the victim and, where they do initiate contravention proceedings, can lead to an escalation in conflict between parties to the order. By establishing criminally enforceable federal family violence orders, this Bill would send a message to family violence perpetrators that breaches of these protection orders will be taken seriously.

10. The Bill would reduce the need for families to interact with multiple courts across the federal family law and State or Territory family violence systems. Access to federal family violence orders would mean that persons before a family law court would not be required to initiate separate proceedings in a State or Territory court for a criminally enforceable protection order, but can seek the protections they need in the court where their existing matter is already being heard.

11. The Bill would align with Australia's continued obligations to protect women and children under the *Convention on the Elimination of All Forms of Discrimination Against Women* and the *Convention on the Rights of the Child*. Although family violence can be experienced by anyone, regardless of gender, women are overwhelmingly more likely to be subjected to family violence. Similarly, children are incredibly vulnerable to family violence. Federal family violence orders, though accessible to persons of any gender, would provide additional protections for women from family violence, and safeguard the wellbeing of children.

12. The Bill would implement recommendations to improve the family law system. Several recent reports and inquiries have considered the need for changes to the Family Law Act and the broader family law system. The Bill would address:

- a. Part of Recommendation 131 of Victoria's 2016 Royal Commission into Family Violence, and
- b. Recommendation 17-4 of the Australian and New South Wales Law Reform Commissions' 2010 report *Family Violence – A National Legal Response*.

13. The Bill would also support the Federal Circuit and Family Court of Australia (the FCFC)'s arrangements for the use of registrars and broadened use of conferencing beyond those relating to property settlement proceedings, by making clear that the Chief Executive Officer, a Senior Registrar or Registrar are provided with the same protection and immunity as a Judge of the Court in conducting conferences related to family law or child support proceedings. Explicitly broadening the immunity of Registrars in conducting conferences will support increased and broadened use of alternate dispute resolution (ADR).

14. The Bill would likewise provide the Registrars of a Family Court of a State with the same protection and immunity as a Judge of the Court in conducting a conference relating to a matter relevant to a proceeding.

## **FINANCIAL IMPACT**

1. There are no direct financial implications from implementing these amendments. As part of the 2020-21 Budget, the Australian Government has committed funding to ensure that key stakeholders and members of the public are aware of the commencement of the federal family violence order measures, develop training resources for police and judicial officers and ensure that information sharing and service arrangements are in place to enable the effective enforcement of federal family violence orders.

## STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

### **Family Law Amendment (Federal Family Violence Orders) Bill 2021**

1. This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview of the Bill**

2. The Bill would make amendments to the *Family Law Act 1975* (the Act) to improve the family law system's response to family violence.
3. In particular, the Bill would amend the Act to establish new federal family violence orders which, if breached, can be criminally enforced. Federal family violence orders would offer stronger protection for victims of family violence than existing family law personal protection injunctions which can only be enforced civilly.
4. The Bill would allow a prescribed court to make federal family violence orders for the personal protection of a child, a parent of a child, a person who is to spend time with, communicate with, or live with a child, a person who has parental responsibility for a child, or a party to a marriage from family violence, in specified circumstances.
15. The Bill would allow a listed court to make a federal family violence order where it is satisfied that a person has been or there are reasonable grounds to suspect that it is likely that they will be subjected to family violence or, in the case of children, the child has been or there are reasonable grounds to suspect that it is likely that they will be subjected or exposed to family violence. The Bill would provide that where the federal family violence order is in relation to a child the order must be appropriate for the welfare of the child, and where the federal family violence order is in relation to party to a marriage, the order must be appropriate in the circumstances.
5. The order may require the person against whom the order is directed to comply with conditions which prohibit certain behaviours, restrict their contact with protected persons or limit their ability to go to certain locations or within a certain distance of a protected person. Under the Bill, the orders could be made for the personal protection of a child, a parent of a child, a person who is to spend time, communicate, or live with a child, a person who has parental responsibility for a child, or a party to a marriage in specified circumstances.
6. The amendments would provide that a breach of a federal family violence order would be a criminal offence, carrying penalties of up to two years imprisonment, 120 penalty units or both. State and Territory police have agreed to enforce the orders under the National Domestic Violence Order Scheme. Once facilitating arrangements are in place, local penalties would apply for a breach of a federal family violence order enforced under the National Domestic Violence Order Scheme.
7. The Bill would amend the *Federal Circuit and Family Court of Australia Act 2021* and the Act to make clear that Registrars have the same protection and immunity as a Judge of the Court when conducting conferences.

## **Human rights implications**

8. The Bill engages the following human rights:
  - a. Rights of equality and non-discrimination: Articles 2, 3, 5 and 16 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).
  - b. Rights of parents and children: Article 3(1) of the Convention on the Rights of the Child (CRC).
  - c. Right to respect for the family: Articles 23(4) and 24(1) of the International Convention on Civil and Political Rights (ICCPR), and Article 3(2) of the CRC.
  - d. Protection from exploitation, violence and abuse: Articles 19(1) and 34 of the CRC.
  - e. Prohibition on retrospective criminal laws: Article 15 of the ICCPR.
  - f. Rights to security of the person and freedom from arbitrary detention: Article 9(1) of the ICCPR.
  - g. The right to a fair and public hearing: Article 14(1) of the ICCPR; and
  - h. The right to an effective remedy: Article 2(3) of the ICCPR.

### **Rights of equality and non-discrimination: Articles 2, 3, 5 and 16 of the CEDAW**

9. The CEDAW provides for key principles of equality which cover many aspects of women's lives, including political participation, health, education, employment, marriage, family relations and equality before the law. In particular:
  - a. Article 2 provides that parties agree to pursue the elimination of discrimination against women, including by introducing new laws or policies, changing existing discriminatory laws and providing sanctions for discrimination, where appropriate.
  - b. Article 3 requires parties to take appropriate measures to ensure women's full development and advancement, so that they can enjoy human rights and fundamental freedoms on the same basis as men.
  - c. Article 5 requires parties to take appropriate measures to modify the social and cultural patterns of conduct of men and women, to eliminate prejudices based on the idea of inferiority or superiority of either of the sexes.
  - d. Article 16 provides that parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations.
10. Discrimination against women includes gender-based violence – that is, violence that is directed against a woman because she is a woman, or that affects women disproportionately. Although family violence is perpetrated by and against both men and

women, and the Act is accordingly neutral, the majority of those who experience family violence are women. Therefore, the measures in the Bill which seek to better protect victims of family violence will, in turn, address the impacts of gender-based violence on women.

11. The Bill would enable the family law courts to provide additional protection for victims of family violence by enabling them to make an order for their personal protection, a breach of which will carry criminal penalties of up to two years imprisonment, 120 penalty units or both. The sanctions in the Bill are appropriate in response to gender-based violence (Articles 2, 5 and 16 CEDAW), and will better protect all people protected by orders, including women, to ensure their full development and advancement (Article 3 CEDAW). Family violence can have a significant impact on the health and well-being of women both in the immediate and longer term. Family violence can cause death, illness, injury and trauma, which can, in turn, restrict women from being able to fully engage in the community, limit their potential and prevent them from being able to live a fulfilling life.

Rights of parents and children: Article 3(1) of the CRC

12. Article 3(1) of the CRC provides that in all actions concerning children, including by courts, the best interests of the child shall be a primary consideration.
13. The Bill would require a court, in making a decision about a federal family violence order in relation to a child, to take into account as the primary consideration – the safety and welfare of the child, including the need to protect the child from being subjected or exposed to family violence. The Bill would also require the court to consider as an additional consideration – the matters set out in subsections 60CC(2) (applied in accordance with subsection 60CC(2A)) and (3) of the Act which are about determining what is in the best interests of a child. The Bill would require the court to take these matters into consideration regardless of whether the order is for the protection of the child or another person.

Right to respect for the family and Protection from exploitation, violence and abuse: Articles 23(4) and 24(1) of the ICCPR, and Articles 3(2), 19(1) and 34 of the CRC

14. The ICCPR provides for fundamental civil and political rights which derive from the inherent dignity of each person, and makes special provision for children. In particular:
  - a. Article 23(4) requires parties to take appropriate steps to ensure provision is made for the protection of children on the dissolution of a marriage.
  - b. Article 24(1) provides for protection for all children, without discrimination, by virtue of their status as minors.
15. The CRC recognises that children are entitled to special care and assistance, and that they should grow up in an atmosphere of happiness, love and understanding. In particular:
  - a. Article 3(2) provides that parties will take appropriate measures to ensure that children have the protection and care necessary for their well-being.

- b. Article 19(1) requires parties to take all appropriate legislative measures to protect children from all forms of physical or mental violence, injury or abuse, including negligent treatment and sexual abuse.
- c. Article 34 provides that parties will protect children from all forms of sexual abuse.

16. The Bill engages Article 24(1) of the ICCPR by establishing a new kind of family law order that provides criminally enforceable protections for children, recognising the particular vulnerabilities that minors have to the impacts of being subjected or exposed to family violence. In particular, by establishing federal family violence orders, this Bill would increase the available protections for vulnerable children from being subjected or exposed to physical, sexual and mental violence perpetrated in a family context, consistent with Articles 3(2), 19(1) and 34 of the CRC.

17. The Bill would allow for a person to apply for a federal family violence order in relation to a child where they are a party to proceedings before a listed court for an order or injunction in circumstances arising out of a marital relationship. This recognises the need to ensure that children can obtain appropriate protections from family violence on the dissolution of a marriage, consistent with Article 23(4) of the ICCPR, in the same court in which the matrimonial cause proceedings are being heard.

#### Prohibition on retrospective criminal laws: Article 15 of the ICCPR

- 16. The ICCPR provides under Article 15 that no one shall be held guilty of any criminal offence which did not constitute a criminal offence at the time it was committed.
- 17. The federal family violence order offence provisions would not constitute a retrospective criminal law, as they would only apply to conduct constituting a breach that takes place after the commencement of the amendments. Federal family violence orders will carry criminal penalties for those that breach the orders, but a breach of a personal protection injunction granted under existing sections 68B and 114 of the Act will not carry a criminal penalty. Conduct that breaches a personal protection injunction would remain civilly enforceable under the existing provisions in the Act.

#### Rights to security of the person and freedom from arbitrary detention: Article 9(1) of the ICCPR

- 18. The ICCPR provides under Article 9(1) that no one should be subjected to arbitrary arrest or detention, and a person should only have their liberty deprived in accordance with law.
- 19. The use of the term ‘arbitrary’ means that the detention, in all the circumstances, must be aimed at achieving a legitimate objective and also be reasonable, necessary and proportionate. Article 9 also provides for certain requirements in relation to arrest and detention, such as the requirement that an arrested person is brought promptly before an officer authorised by law to exercise judicial power.
- 20. The Bill engages this right by providing that a federal family violence order would be criminally enforceable, with arrest and detention as possible consequences of breaching such an order. Under the Bill, a breach of a federal family violence order carries penalties of up to two years imprisonment, 120 penalty units or both.



21. Allowing for the arrest and detention of an individual who has breached a federal family violence order is reasonable and necessary to achieve the legitimate objective of establishing a comprehensive criminal justice response to family violence. In particular, it is reasonable for a person to be arrested and detained for breaching an order that has been made to protect a vulnerable individual from being subjected or exposed to family violence, in circumstances where a court has been satisfied that a criminally enforceable order of this nature is required. Arresting and detaining the defendant in these circumstances would safeguard against further personal safety risks to protected persons, and hold the defendant accountable for their actions.
22. The penalty for breaching a federal family violence order under the Bill would be proportionate to the crime. Where a person engages in conduct that a court has restricted for the express purpose of preventing a vulnerable individual from being subjected or exposed to family violence, this is a serious matter that can, in the most severe cases, result in the physical injury or death of the protected person. Two years imprisonment or 120 penalty units, being the maximum penalty available under this Bill, is commensurate with a serious indictable offence, and comparable with the penalties available under State and Territory legislation for breaches of similar family violence orders. Acknowledging that federal family violence order breaches may range in severity, the Bill would allow for the punishment of less serious breaches – such as breaches resulting in no physical harm to the protected person – to be punished by shorter terms of imprisonment or financial penalties only.
23. The power for police to arrest defendants under the new offences would be contained in the general provisions of the *Crimes Act 1914* (Crimes Act). In particular, Division 4 of the Crimes Act sets out the law relating to arrests. Proportionality is provided by section 3W of the Crimes Act, which gives police officers the power to arrest a person, with or without warrant, for an offence if the officer believes on reasonable grounds that the person has committed or is committing an offence. Furthermore, section 23 of the Crimes Act provides that a person arrested for Commonwealth offences must be released within the investigation period, or, if they are not released, they must be brought before a judicial officer within the investigation period, or as soon as practicable at the end of that period.

Right to a fair and public hearing, and to an effective remedy – Article 14(1) and 2(3) of the ICCPR

24. Article 14(1) of the ICCPR enshrines the right of a person to have a fair and public hearing by a competent, independent and impartial tribunal established by law. Article 2(3) requires States to ensure that any person whose rights and freedoms as stipulated in the ICCPR are violated, that person shall have an effective remedy, which is to be determined by a competent judicial authority. The amendments in Schedule 4 of the Bill engage both of these rights.
25. The amendments will increase Australian families' access to justice and promote the right to a fair and public hearing by a competent, independent and impartial tribunal and the right to an effective remedy by strengthening the Federal Circuit and Family Court's (FCFC) case management approach and supporting the efficient operation of the FCFC. Further, they promote the right to a fair and public hearing and the right to an effective remedy by supporting the FCFC's use of early dispute resolution. To ensure consistency, this change will also be made with respect to Family Court of States.

26. Notably, the amendments in items 1 and 2 of Schedule 4 replicate an existing provision in the Act. Further, the amendment in item 4 of Schedule 4 broadens an existing provision of the Act, and regardless of these provisions, Registrars will generally enjoy the protection of common law judicial immunity where they exercise delegated judicial power. As such, there is minimal change in the treatment of most of the rights mentioned above.

## **Conclusion**

27. The Bill is compatible with human rights because it promotes the protection of human rights, gives effect to Australia's obligations under international conventions and does not limit any human rights with which it engages.

## NOTES ON CLAUSES

### Preliminary

#### Clause 1 – Short title

1. This clause provides for the short title of the Act to be the *Family Law Amendment (Federal Family Violence Orders) Act 2021* (the Act).

#### Clause 2 - Commencement

2. Subclause 2(1) provides for the commencement of each provision in the Bill, as set out in the table.
3. Item 1 in the table provides that sections 1 to 3 and anything in this Act that is not covered elsewhere in the table commences the day this Act receives Royal Assent.
4. Item 2 in the table provides that Schedule 1 of this Act – the main amendments and the transitional, saving and application provisions – will commence on a day to be fixed by Proclamation. However, if the provisions do not commence by Proclamation within the period of 12 months beginning on the day the Act receives Royal Assent, then they will commence on the day after the end of that period.
5. This maximum 12 month delay is required to allow appropriate State and Territory legislative amendments, information sharing mechanisms and training to be put in place to ensure that the offences are enforceable by State and Territory police as part of the National Domestic Violence Order Scheme.
6. Item 3 in the table provides that Schedule 2, Part 1 of this Act – the main consequential amendments – will commence on a day to be fixed by Proclamation. However, if the provisions do not commence by Proclamation within the period of 12 months beginning on the day the Act receives Royal Assent, then they will commence on the day after the end of that period.
7. Item 4 in the table provides that Schedule 2, Part 2, Division 1 of this Act – contingent amendments – will commence on a day to be fixed by Proclamation. However, if the provisions do not commence by Proclamation within the period of 12 months beginning on the day this Act receives Royal Assent, then they will commence on the day after the end of that period. If Schedule 3 to the *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Act 2021* commences before the commencement of Schedule 1 of this Act however, Schedule 2, Part 2, Division 1 of this Act will not commence at all.
8. Item 5 in the table provides that Schedule 2, Part 2, Division 2 of this Act – amendments consequential to the *Federal Circuit and Family Court of Australia Act 2021* – will commence the later of:
  - immediately after the commencement of Schedule 1 of this Act, that is, on a day to be fixed by Proclamation, or, if the provisions do not commence by Proclamation within the period of 12 months beginning on the day the Act receives Royal Assent, on the day after the end of that period, and

- immediately after the commencement of Schedule 1 to the *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Act 2021*.

9. Item 6 in the table provides that Schedule 3 of this Act commences on the day that this Act receives Royal Assent.

10. Item 7 in the table provides that Schedule 4, Part 1 of this Act commences on the later of (a) the start of the day this Act receives Royal Assent, and (b) immediately after the commencement of the *Federal Circuit and Family Court of Australia Act 2021* (FCFC Act). This is because the provisions in Schedule 4, Part 1 of this Act are intended to commence in alignment with the FCFC Act.

11. Item 8 in the table provides that Schedule 4, Part 2 of this Act commences on the later of (a) the start of the day this Act receives Royal Assent, and (b) immediately after the commencement of Schedule 1 to the *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Act 2021* (FCFC Consequential Act). This is because the provisions in Schedule 4, Part 2 of this Act are intended to commence in alignment with the FCFC Consequential Act.

### **Clause 3 – Schedules**

12. This is a formal clause that enables each Act specified in a Schedule to the Bill to be amended in accordance with the items set out in the relevant Schedule.

### **Schedule 1 – Main amendments**

#### **Part 1 - Amendments**

##### ***Family Law Act 1975***

#### **Item 1 – Subsection 4(1)**

13. Item 1 would insert a new definition into the *Family Law Act 1975* (Family Law Act) of ‘federal family violence order’. The term is defined by reference to new sections 68AC and 113AC, which would be inserted by items 13 and 38 respectively, and includes such an order as varied under new sections 68AI and 113AI. Federal family violence orders would be distinct from ‘family violence orders’, also defined under subsection 4(1), being an order (including an interim order) made under a prescribed law of a State or Territory to protect a person from family violence.

#### **Item 2 – Subsection 4(1)**

14. Item 2 would insert a definition of ‘listed court’. A listed court means the Family Court of Australia, the Federal Circuit Court of Australia, the Family Court of Western Australia and the Magistrates Court of Western Australia constituted by a Family Law Magistrate of Western Australia, sitting at any place in Western Australia.

Listed courts would have powers to make, vary, suspend and revoke federal family violence orders under new sections 68AC, 68AI, 113AC and 113AI (items 13 and 36). The creation of the label ‘listed court’ in item 2 is intended to streamline the legislation by removing the need

to separately list each of the above courts in each provision where they could more simply be referred to collectively.

**Item 3 – Subsection 4(1) (paragraph (e) of the definition of *matrimonial cause*)**

15. Item 3 would amend paragraph (e) of the definition of ‘matrimonial cause’ to replace the reference to existing section 114AB, which this Bill would repeal (item 44), with a reference to new paragraphs 68NA(1)(b), 68NA(2)(b), 114AB(1)(b) and 114AB(2)(b) (items 24 and 44). The amendment would clarify that proceedings under State and Territory laws prescribed for the purposes of any of these new paragraphs would not fall within the definition of ‘matrimonial cause’.

**Item 4 - Subsection 4(1) (paragraph (b) of the definition of *order under this Act affecting children*)**

16. Item 4 would repeal paragraph (b) of the definition of ‘order under this Act affecting children’ and substitute text to include orders or injunctions granted by the court under new section 68AC (item 13), section 68B or section 114 to the extent that it relates to the personal protection of a child. This amendment would ensure that federal family violence orders made under new section 68AC are also included in the definition of ‘an order under this Act affecting children’.

**Item 5 - Subsection 4(1) (paragraph (g) of the definition of *order under this Act affecting children*)**

17. Item 5 would omit from paragraph (g) of the definition of ‘order under this Act affecting children’ the words ‘and includes an order, injunction, plan or bond that:’ These words are then inserted before paragraph (h) of this definition by item 6.

18. The effect of items 5 and 6 would be to correct a minor technical error. These amendments would operate to ensure the words ‘and includes an order, injunction, plan or bond that:’ would apply correctly to the entire definition of ‘order under this Act affecting children’ rather than only to paragraph (g).

**Item 6 - Subsection 4(1) (before paragraph (h) of the definition of *order under this Act affecting children*)**

19. Item 6 would insert the words ‘and includes an order, injunction, plan or bond that’ before paragraph (h) of the definition of ‘order under this Act affecting children’.

20. The effect of items 5 and 6 would be to correct a minor technical error. These amendments would operate to ensure the words ‘and includes an order, injunction, plan or bond that:’ would apply correctly to the entire definition of ‘order under this Act affecting children’ rather than only to paragraph (g).

**Item 7 – Subsection 4(1)**

21. Item 7 would insert a definition of ‘protected person’.

22. Sub-item 7(a)(i) would provide that under this new definition, for a federal family violence order in relation to a child, ‘protected person’ means the person for whom the order provides personal protection under new subsection 68AC(3) (item 13) which applies when

the order is made, or new paragraph 68AI(3)(b) (item 13) which applies when the order is varied to add additional protected persons.

23. Sub-item 7(a)(ii) would provide that the meaning of ‘protected person’ is affected by new subsections 68AC(4) and 68AI(4) (item 13) which address when a person ceases to be a protected person. New subsections 68AC(4) and 68AI(4) would respectively apply when an order is made and when an order is varied to add additional protected persons.

24. Sub-item 7(b) would provide that under this new definition, for a federal family violence order in relation to a party to a marriage, ‘protected person’ means the person for whom the order provides personal protection under new subsection 113AC(3) (item 38).

#### **Item 8 – Section 60C (table item 9)**

25. Section 60C provides an outline of Part VII of the Family Law Act.

26. Item 8 would repeal existing table item 9, which provides an outline of existing ‘Division 9 – Injunctions’, and replace it with new table items 9A and 9.

27. New table item 9A would outline that new ‘Division 9A – Federal family violence orders in relation to children’, covers:

- applying for a federal family violence order in relation to a child
- the powers of a listed court to make a federal family violence order in relation to a child
- offence for breaching a federal family violence order in relation to a child, and
- varying, revoking or suspending a federal family violence order in relation to a child.

28. New table item 9 would outline that ‘Division 9 – Other orders and injunctions in relation to children (other than federal family violence orders)’, covers proceedings for orders and injunctions in relation to children other than federal family violence orders. The Note to new table item 9 would highlight that orders and injunctions in relation to parties to a marriage other than federal family violence orders are dealt with in Division 3 of Part XIV.

#### **Item 9 – Section 60C (table item 11)**

29. Section 60C provides an outline of Part VII of the Family Law Act.

30. Item 9 would repeal existing table item 11 (Division 11 – Family violence), and replace it with new table item 11.

31. New table item 11 would outline that new Division 11, ‘Relationship with family violence orders made under State and Territory laws’, covers:

- the concurrent operation of prescribed State and Territory laws
- the relationship between federal family violence orders and family violence orders made under a State or Territory law

- the relationship between other injunctions granted both under Part VII and under other parts of the Family Law Act (including Part XIV) that provide for personal protection and family violence orders made under a State or Territory law, and
- the relationship between orders and injunctions made under the Family Law Act that provide for a child to spend time with a person, or require or authorise a person to spend time with a child – which would include, but would not be limited to parenting orders – and family violence orders made under a State or Territory law.

#### **Item 10 – Subsection 60CB(2)**

32. Subsection 60CB(1) provides that Subdivision BA of Division 1 of Part VII applies to any proceedings under Part VII in which the best interests of the child are the paramount consideration. Existing subsection 60CB(2) sets out specific proceedings in relation to a child to which this Subdivision also applies. Subdivision BA relates to the best interests of the child and contains provisions about how a court determines what is in a child's best interests and other relevant matters.

33. Item 10 would repeal existing subsection 60CB(2) and replace it with a new iteration of the subsection that would add proceedings in which new subsection 68AD(6) (item 13) and section 68AJ (item 13) applies.

34. New subsection 68AD(6) would provide that a court is not to give a copy or explanation of a federal family violence order to a child unless the court is satisfied that it is in the child's best interests to receive the copy or explanation.

35. New section 68AJ provides that new subsection 68AD(6) applies to a decision to vary, revoke or suspend a federal family violence order under new section 68AI and any variation of a federal family violence order so made.

#### **Item 11 – Paragraph 60CC(3)(k)**

36. Item 11 would add to the list of additional consideration in subsection 60CC(3) that are relevant to a court's determination of what is in the best interests of a child, any relevant inferences that can be drawn from a federal family violence order that applies, or has applied, to the child or a member of the child's family.

#### **Item 12 – Subsection 67ZBB(5)**

37. Subsection 67ZBB(5) provides that where a notice is filed under subsection 67Z(2) or 67ZBA(2) in proceedings for an order under Part VII of the Family Law Act in relation to a child; and the notice alleges, as a consideration that is relevant to whether the court should make or refuse to make the order:

- that there has been abuse of the child or family violence by one of the parties to proceedings
- there would be a risk of abuse of the child if there were to be a delay in the proceedings, or
- there is a risk of family violence by one of the parties to the proceedings

the court must consider whether orders should be made, or an injunction granted, under section 68B.

38. Item 12 would repeal existing subsection 67ZBB(5) and replace it with a new subsection which would require that the court must also consider if a federal family violence order under new section 68AC (item 13) should be made. The requirement that the court must consider if an order or injunction under section 68B should be made or granted would continue to operate under the new subsection 67ZBB(5).

### **Item 13 – After Division 8 of Part VII**

39. Item 13 would insert a new Division, *Division 9A – Federal family violence orders in relation to children*, after Division 8 of Part VII.

### **New section 68AA – What this Division does**

40. New section 68AA would provide that new Division 9A would deal with federal family violence orders in relation to children.

### **New Section 68AB – Applying for federal family violence order**

41. New subsection 68AB(1) would list the persons who are eligible to apply to a listed court for a federal family violence order in relation to a child. The Bill would define listed courts in section 4. Listed courts are the only courts in which federal family violence orders can be made.

42. New paragraph 68AB(1)(a) would provide that a party to a proceeding under Part VII that relates to the child can apply for a federal family violence order in relation to a child under new section 68AC. This would include parties to proceedings in relation to the issuing of parenting orders, location and recovery orders, and determinations on parental responsibility. These proceedings would need to relate to the child or children in relation to whom the federal family violence order is being sought.

43. New paragraph 68AB(1)(b) would provide that a party to a proceeding of the kind referred to in paragraph (e) of the definition of matrimonial cause in subsection 4(1) (to the extent that the proceedings relate to the child) can apply for a federal family violence order in relation to a child under new section 68AC. This would include parties to a marriage in proceedings for an order or injunction in circumstances arising out of the marital relationship, including proceedings for a federal family violence order under section 113AC. It would not include parties to proceedings under a law of a State or Territory prescribed for the purposes of new paragraphs 68NA(1)(b), 68NA(2)(b), 114AB(1)(b) or 114AB(2)(b). The proceedings would need to relate to the child or children in relation to whom the federal family violence order is being sought. While proceedings of the kind referred to in paragraph (e) of the definition of matrimonial cause in subsection 4(1) are not proceedings in relation to children per se, the provision is intended to require a connection between the proceedings and the child, including but not limited to the fact that the child is a child of the marriage to which the proceedings relate, or that the order or injunction being sought in the proceedings would require or authorise a person to spend time with the child.

44. New paragraph 68AB(1)(b) would apply to certain circumstances in which persons are before a family law court with a proceeding other than under Part VII, and require a



federal family violence order to protect a child. For example, a party to a marriage may be before the court with a property matter. While there may be no Part VII issues to be resolved, the party may wish to seek a federal family violence order to protect their child from the other party to the marriage. The court would be expressly prohibited from using new section 113AC to make a federal family violence order for the protection of a child, as orders under this section would only be available in relation to parties to a marriage. In these circumstances, new paragraph 68AB(1)(b) would allow either parent to apply for a federal family violence order under new section 68AC to protect a child of the marriage, regardless of whether that parent was also seeking an order under new section 113AC to protect themselves against their spouse.

45. Under section 13B of the Family Law Act, a court exercising jurisdiction in Part VII proceedings instituted by a party to a subsisting marriage, must consider, from time to time, the possibility of a reconciliation between the parties to a marriage. While a reconciliation is likely to be inappropriate in family violence contexts, the Bill does not exclude section 13B from applying in proceedings for a federal family violence order. Subsection 13B(2) requires the court, before adjourning the proceedings to give the parties the opportunity to consider a reconciliation, to consider, from the evidence in the proceedings or the attitude of the parties to the marriage that there is a reasonable possibility of a reconciliation between the parties. This provision safeguards adequately against a court adjourning proceedings so parties can consider a reconciliation in circumstances in which this course of action would be contrary to the parties' wishes, potentially harmful to one or both of the parties, or otherwise not feasible.

46. New paragraph 68AB(1)(c) would provide that an independent children's lawyer who represents the interests of the child in proceedings under Part VII can apply for a federal family violence order in relation to a child. This would ensure an independent children's lawyer is able to apply for a federal family violence order to protect a child in circumstances where parties to proceedings have not done so. This may include situations in which the dynamics of power and control in the violent relationship have affected a party's willingness or ability to apply for a federal family violence order to protect a child.

47. New subsection 68AB(1) would allow eligible persons to apply for a federal family violence order at any time during the Part VII or matrimonial cause proceedings to which they are a party or, in the case of an independent children's lawyer, in which they are representing the child.

48. New subsection 68AB(2) would prohibit a person from applying for a federal family violence order where there is a family violence order in force that is for the protection of the protected person and is directed against the person against whom the federal family violence order is directed. A family violence order is defined in subsection 4(1) of the Family Law Act as an order made under a prescribed law of a State or Territory to protect a person from family violence, and includes an interim order.

49. Together with new paragraph 68AC(6)(c), new subsection 68AB(2) is intended to ensure that a federal family violence order is not made where there is already a family violence order in force that provides protection for the same protected person from the same person against whom a federal family violence order is being sought.

50. If the two orders were in existence at the same time, the family violence order (or any term thereof) that is inconsistent with a federal family violence order (or any term thereof) would be invalid to the extent of the inconsistency. This would create enforcement challenges

for police, particularly where multiple orders would need to be compared in order for a police officer to determine which terms of which orders they may lawfully enforce. It can also create confusion for the parties as to which terms are required to be complied with. Prohibiting persons from applying for a federal family violence order where there is already a family violence order in place between the same parties would safeguard against inconsistent orders arising, reduce confusion and reduce the risk of unlawful arrests.

51. New subsection 68AB(2) reflects the intention that federal family violence orders would be available to persons who are already before a listed court, are in need of protection, and do not have an existing State or Territory family violence order. The availability of a federal family violence order would mean that parties would not be required to initiate separate proceedings in a State or Territory court for a protection order, but could apply for a federal family violence order in the family law court in which their other matter is already being heard. Where a party already has a family violence order in place, this rationale no longer holds.

52. The prohibition in subsection 68AB(2) would only apply where there is a family violence order in place between the same parties for whom the federal family violence order is being sought. It would not apply if the protected person is protected by a family violence order that is directed against a different respondent.

### **New Section 68AC – Court may make federal family violence order**

#### *Power of court to make order*

53. New section 68AC would provide that a listed court may make federal family violence orders. The Bill would define listed courts in section 4 and they are the only courts in which federal family violence orders can be made.

54. New subsection 68AC(1) would allow the listed courts to make a federal family violence order in relation to a child. For an order to be made, it would need to be applied for as part of one of the following proceedings:

- proceedings under Part VII that relate to a child, which includes matters such as the issuing of parenting orders, location and recovery orders, and determinations on parental responsibility, and
- proceedings of the kind referred to in paragraph (e) of the definition of matrimonial cause in subsection 4(1) (to the extent that the proceedings relate to a child). These include proceedings between parties to a marriage for a federal family violence order under section 113AC or any other order or injunction in circumstances arising out of the marital relationship, excluding proceedings under a law of a State or Territory prescribed for the purposes of new paragraphs 68NA(1)(b), 68NA(2)(b), 114AB(1)(b) or 114AB(2)(b).

55. Federal family violence orders are intended to be available only to persons who are already before a listed court with a family law matter, are in need of protection, and do not have an existing State or Territory family violence order. The availability of a federal family violence order would mean that parties would not be required to initiate separate proceedings in a State or Territory court for a protection order, but could apply for a federal family violence order in the family law court in which their other matter is already being heard. This

is intended to reduce the need for parties to navigate multiple courts and systems to address their legal needs, which can create delay, confusion and prolonged exposure to risks of violence. It is intended that State and Territory courts remain the primary jurisdiction in which family violence protection orders are sought. State and Territory police and courts remain best placed to support individuals who do not have current family law proceedings on foot and/or are seeking urgent protection from family violence.

56. In addition to proceedings under Part VII, new subsection 68AC(1) would allow listed courts to make federal family violence orders in relation to a child in proceedings under paragraph (e) of the definition of matrimonial cause, such as proceedings declaring property interests, to the extent that the proceedings relate to a child. While there may be no Part VII issues to be resolved, the party may wish to seek a federal family violence order to protect their child from the other party to the marriage. The court would be prohibited from using new section 113AC (item 36) to make a federal family violence order for the protection of a child, as orders under this section would only be available in relation to parties to a marriage. In these circumstances, new subsection 68AC(1) would allow the court to make a federal family violence order under new section 68AC to protect a child of the marriage, regardless of whether that parent was also seeking an order under new section 113AC to protect themselves against their spouse.

57. New subsection 68AC(1) intentionally excludes State and Territory courts of summary jurisdiction from the list of courts that have jurisdiction to make federal family violence orders. While section 69J of the Family Law Act vests State and Territory courts of summary jurisdiction with federal jurisdiction to make orders under Part VII of the Family Law Act, the Bill would create an exception for federal family violence orders in relation to children. All State and Territory courts of summary jurisdiction have the power to make family violence orders under State and Territory legislation. Family violence orders are a civil order, made to protect people in domestic and family violence situations by prohibiting a person from committing certain behaviours. A breach of a family violence order is a criminal offence. There is no utility in State and Territory courts of summary jurisdiction issuing federal family violence orders when they have existing powers to make family violence orders, which would serve effectively the same purpose. Accordingly, with the exception of listed courts in Western Australia, the Bill would not grant State or Territory courts jurisdiction to make federal family violence orders.

58. New subsection 68AC(2) would provide that the court may make a federal family violence order in relation to a child on application under new section 68AB or of its own motion. New section 68AB would provide that an application for a federal family violence order can be made by a party to proceedings under Part VII that relate to the child, a party to proceedings of the kind referred to in paragraph (e) of the definition of matrimonial cause (to the extent that the proceedings relate to the child) or an independent children's lawyer who represents a child in proceedings under Part VII.

59. New subsection 68AC(2) would also allow the court to make, at any stage in the proceedings and in the absence of an application, a federal family violence order. This own motion power is intended to benefit a number of vulnerable cohorts. This may include self-represented litigants who may not be aware of the option to apply for a federal family violence order; persons who may not self-identify as a victim or potential victim of family violence due to a lack of understanding about the range of behaviours that constitute family violence; litigants who may be unwilling or unable to apply for a federal family violence order as a result of the dynamics of power and control in their relationship with the other

party or another person; and children who may not be independently represented in the proceedings and for whose protection neither party has applied for a federal family violence order. Given the family law courts have significant experience in working with litigants with limited legal backgrounds, the courts are well placed to identify persons who may be in need of a federal family violence order, but due to inexperience or trauma, have not applied for one.

### *Protected persons*

60. New subsection 68AC(3) sets out the categories of person for whose protection the court can make a federal family violence order in relation to a child. A federal family violence order in relation to a child can be made for the protection of a single person, or multiple persons. New subsection 68AC(3) provides that a person would be a protected person covered by the order, once the order has been made and is in force. The categories of protected person listed in this subsection are the same categories of person for whose protection the court can currently make a personal protection injunction under paragraphs 68B(1)(a)-(b).

61. New paragraph 68AC(3)(a) would allow the court to make a federal family violence order that provides for the protection of a child. This means a person who is under 18 years of age. Section 68AC would not permit the court to make a federal family violence order to protect a person who is 18 years or older, including where that adult's intellectual capacity is that of a child. In these circumstances, the person could seek a family violence order under a State or Territory law.

62. New paragraphs 68AC(3)(b)-(f) would allow the court to make federal family violence orders for the protection of certain persons where they are in one of a number of prescribed relationships with the child in relation to whom the order is made. If the protected person were an adult, this would allow the court to take action to protect the adult from the family violence, and thereby protect the child from the effects of exposure to it.

63. New paragraph 68AC(3)(b) would allow the court to make a federal family violence order that provides for the protection of a parent of the child. Where the child has been adopted, this would include an adoptive parent of the child. The relevant child for the purposes of new paragraph 68AC(3)(b) is the child for whose welfare the court is making the order under new paragraph 68AC(6)(a).

64. New paragraph 68AC(3)(c) would allow the court to make a federal family violence order that provides for the protection of a person with whom the child is to live under a parenting order. A parenting order is defined within existing section 64B of the Family Law Act.

65. New paragraph 68AC(3)(d) would allow the court to make a federal family violence order that provides for the protection of a person with whom the child is to spend time under a parenting order. The paragraph would apply irrespective of the amount of time for which the child is to spend time with the person under the parenting order.

66. New paragraph 68AC(3)(e) would allow the court to make a federal family violence order that provides for the protection of a person with whom the child is to communicate under a parenting order. This would include but would not be limited to a person with whom

the child is to engage in in-person or telephone conversations, emails, text messages, social media contact or communication via other electronic means.

67. New paragraph 68AC(3)(f) would allow the court to make a federal family violence order that provides for the protection of a person who has parental responsibility for the child within the definition of existing section 61B of the Family Law Act. This would include a person who has parental responsibility for a child under a child protection order under the law of a State or Territory.

68. New subsection 68AC(4) would set out when a person stops being a protected person covered by a federal family violence order. This provision would apply where a federal family violence order has been made, is in force and provides for the personal protection of the protected person. This provision would not address when a federal family violence order ceases to be in force. This matter would be addressed in new subsection 68AF(2).

69. Under new paragraph 68AC(3)(a) the court would be able to make a federal family violence order that provides for the protection of a child. This means a person who is under 18 years of age. Accordingly, new paragraph 68AC(4)(a) would provide that a person who is a protected person under a federal family violence order in their capacity as a child, would cease to be protected under that order when they turn 18, that is, on their 18<sup>th</sup> birthday.

70. Under new paragraphs 68AC(3)(b)-(f) the court would be able to make a federal family violence order that provides for the protection of certain persons where they are in a prescribed relationship with the child in relation to whom the order is made. Accordingly, new subparagraph 68AC(4)(b)(i) would provide that where the order relates to only one child, a person mentioned in any of paragraphs 68AC(3)(b)-(f) who is a protected person under a federal family violence order would cease to be a protected person covered by the order when the child turns 18. New subparagraph 68AC(4)(b)(ii) would provide that where the order relates to two or more children, a person mentioned in any of paragraphs 68AC(3)(b)-(f) who is a protected person under a federal family violence order would cease to be a protected person covered by the order when the youngest of those children turns 18. This is because a person mentioned in any of paragraphs 68AC(3)(b)-(f) can only be a protected person under a section 68AC federal family violence order while they are in the prescribed relationship with a child.

71. New subparagraph 68AC(4)(b)(ii) assumes that, where the order relates to multiple children, the protected person is protected in relation to all of those children. New paragraph 68AC(12)(c) however would provide that where the order relates to multiple children, the order must specify which child the person is protected in relation to. If the protected person is only protected in relation to one of the children, it is intended that if that child turns 18 before the order ceases to be in force, the protected person would cease to be a protected person covered by the order. If the protected person is protected in relation to two or more children, but not all of the children to whom the order relates, it is intended that the adult will cease to be a protected person covered by the order when the youngest of the children in relation to whom the protected person is protected turns 18.

#### *Person against whom the order is directed*

72. New subsection 68AC(5) would provide that the order must be directed against a single person. The effect of this provision is that an order made under section 68AC cannot be directed against a group of persons or persons generally. Where the court determines that

federal family violence orders should be directed against multiple persons, separate orders must be made for each respondent. The rationale for mandating that each federal family violence order must be directed against one person only is to ensure that any terms imposed are appropriate and adapted to that individual's circumstances. The level of compliance with the order is likely to be higher if the order is tailored in this way. This is consistent with the way that family violence orders are currently made in the States and Territories. Police have also advised that having a single person subject to an order would simplify enforcement as police information sharing systems could better accommodate federal family violence order information if the orders are made in this way.

*Matters court must be satisfied of before making order*

73. New subsection 68AC(6) would set out the statutory test for:

- the making of a federal family violence order in relation to a child, and
- the making of a federal family violence order that provides for the personal protection of a particular protected person.

74. The effect of the provision is that the court must be satisfied of all of the matters in paragraphs 68AC(6)(a)-(c) (noting that in paragraph (b), the court is only required to be satisfied of the matters in one of subparagraphs (i)-(ii)), in relation to all protected persons covered by the order. The court would not be permitted to make the order at all, if it is not satisfied of the matters in paragraphs 68AC(6)(a)-(c) in relation to any person. The court would not be permitted to provide for the personal protection of a particular person, if it is not satisfied of the matters in paragraphs 68AC(6)(a)-(c) in relation to that particular person.

75. New paragraph 68AC(6)(a) would provide that the court must not make a federal family violence order or provide for personal protection of a protected person under the order unless the court considers that it is appropriate for the welfare of the child. The requirement 'for the welfare of the child' is an element of existing section 68B of the Family Law Act, which provides for the grant of a personal protection injunction. It is intended that this linkage with the child is maintained in the new provisions. New paragraph 68AC(6)(a) is designed to be read together with the objects of Part VII in existing section 60B, particularly the object in paragraph 60B(1)(b) which is to ensure that the best interests of children are met by protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

76. New paragraph 68AC(6)(a) would make the welfare of the child a fundamental purpose of the order, whether the order is being made for the protection of a child or for the protection of a person close to the child, of the kind listed in new paragraphs 68AC(3)(b)-(f). Whether an order is appropriate for the welfare of the child is an objective consideration which would require the court to consider all the circumstances of the case.

77. New subparagraphs 68AC(6)(b)(i)-(ii) establish two alternative matters of which a court must be satisfied in order to make a federal family violence order in relation to a child. It is only necessary that the court is satisfied of the requirements in one of these two subparagraphs, on the balance of probabilities, to be able to make an order, provided that the court is also satisfied of the requirements in paragraphs (a) and (c).

78. New subparagraph 68AC(6)(b)(i) would require that for the court to make an order it must be satisfied on the balance of probabilities that the protected person has been subjected to family violence, or if the protected person is the child, subjected or exposed to family violence.

79. This would require the court to be satisfied on the balance of probabilities that family violence has occurred. Where the court is satisfied that the making of an order is appropriate for the welfare of the child, new subparagraph 68AC(6)(b)(i) would enable the court to make a federal family violence order in response to the family violence that has occurred, as a means of preventing the protected person from being subjected to or, in the case of a protected child, subjected or exposed to further violence.

80. According to the definition of family violence in existing subsection 4AB(1) of the Family Law Act, new subparagraph 68AC(6)(b)(i) would require the court to be satisfied on the balance of probabilities that the protected person has been subjected, or if the protected person is the child, subjected or exposed to violent, threatening or other behaviour that coerces or controls the protected person or causes the protected person to be fearful. The definition of family violence specifically provides that the conduct must be directed towards a member of the person's family. There are a range of behaviours that may constitute family violence, including the behaviours listed in subsection 4AB(2) of the Family Law Act.

81. Existing subsection 4AB(3) of the Family Law Act provides that a child is exposed to family violence if the child sees or hears family violence or otherwise experiences the effects of family violence. There are a range of situations that may constitute a child being exposed to family violence, including the situations listed in subsection 4AB(4) of the Family Law Act. Where the protected person is not the child in relation to whom the order is made, exposure to family violence alone would not be sufficient for the purposes of subparagraph 68AC(6)(b)(i).

82. New subparagraph 68AC(6)(b)(ii) would provide that the court must not make the order unless the court is satisfied on the balance of probabilities that there are reasonable grounds to suspect that the protected person is likely to be subjected to family violence, or if the protected person is the child, is likely to be subjected or exposed to family violence.

83. This provision would not require the court to be satisfied that these matters are in fact likely, or to make an assessment of the degree to which they are likely. It would require the court to be satisfied that there are reasonable grounds to suspect that they are likely.

84. Where the court is satisfied that the making of an order is appropriate for the welfare of the child, new subparagraph 68AC(6)(b)(ii) would enable the court to make a federal family violence order as a means of preventing the protected person from being subjected or, in the case of the protected child, subjected or exposed to family violence before it occurs.

85. New paragraph 68AC(6)(c) would prohibit the court from making a federal family violence order unless it is satisfied that there is no family violence order in force that is for the protection of the protected person (subparagraph 68AC(6)(c)(i)) and is directed against the person against whom the federal family violence order is directed (subparagraph 68AC(6)(c)(ii)). A family violence order is defined in subsection 4(1) of the Family Law Act as an order made under a prescribed law of a State or Territory to protect a person from family violence, and includes an interim order.

86. Together with new subsection 68AB(2), new paragraph 68AC(6)(c) is intended to ensure that a federal family violence order is not made where there is already a family violence order in force that provides protection for the same protected person from the person against whom a federal family violence order is being sought.

87. If the two orders were in existence at the same time, the family violence order (or any term thereof) that is inconsistent with a federal family violence order (or any term thereof) would be invalid to the extent of the inconsistency. This would create enforcement challenges for police, particularly where multiple orders would need to be compared in order for a police officer to determine which terms of which orders they may lawfully enforce. It can also create confusion for the parties as to which terms are required to be complied with. Prohibiting the court from issuing a federal family violence order where a family violence order is in place between the same parties would safeguard against inconsistent orders arising, reduce confusion and reduce the risk of unlawful arrests.

88. New paragraph 68AC(6)(c) reflects the intention that federal family violence orders would be available to persons who are already before a listed court, are in need of protection, and do not have an existing State or Territory family violence order. The availability of a federal family violence order would mean that parties would not be required to initiate separate proceedings in a State or Territory court for a protection order, but could apply for a federal family violence order in the family law court in which their other matter is already being heard. Where a party already has a family violence order in place, this rationale no longer holds.

89. The prohibition in paragraph 68AC(6)(c) would only apply where there is a family violence order in place between the same parties for whom the federal family violence order is being sought. It would not apply if the protected person is protected by a family violence order that is directed against a different respondent.

#### *Avoiding inconsistency with family violence orders*

90. Notwithstanding the disclosure obligations in existing section 60CF, in satisfying itself for the purposes of paragraph 68AC(6)(c), there would be inherent risks in the court relying on the parties to self-report the existence of a family violence order. There may be circumstances in which parties withhold this information from the court, for example, they are unaware that an old family violence order remains in existence, or do not understand their obligations to disclose information of this nature to the court. It is important that the court has a reliable basis on which to satisfy itself for the purposes of paragraph 68AC(6)(c) both to ensure that this paragraph can effectively safeguard against inconsistent orders arising, and to minimise the risk of a court refusing to make a federal family violence order under a mistaken assumption that there is a family violence order in place, leaving an individual without protection.

91. To address this, new subsection 68AC(7) would require the court to inspect any record, database or register that:

- contains information about family violence orders,
- is maintained by a Department, agency or authority of the Commonwealth, or of a State or Territory, and



- is, or can reasonably be made, available to the court.

92. New paragraph 68AC(7)(a) would expressly provide that the information about family violence orders contained in the record, database or register could be in any form, including electronic. It is intended that information in hard copy or other form would also be sufficient for the purposes of this provision, provided that the record, database or register also meets the requirements in paragraphs 68AC(7)(b) and (c).

93. New paragraph 68AC(7)(b) would require that any record, database or register inspected by the court for the purposes of satisfying itself of the existence of a family violence order under paragraph 68AC(7)(a) must be maintained by a Department, agency or authority of the Commonwealth, or a State or Territory. This would exclude records, databases or registers maintained by private companies or individuals, and is intended to capture official government information facilities only. New paragraph 68AC(7)(b) is intended to ensure the accuracy and reliability of the information on which the court relies.

94. New paragraph 68AC(7)(c) would require that any record, database or register inspected by the court for the purposes of satisfying itself of the existence of a family violence order under paragraph 68AC(6)(c) must be, or can reasonably be made available to the court. This provision is intended to clarify that the court is not expected to inspect records, databases or registers to which they do not have direct access or to which obtaining access would be unreasonably burdensome.

95. The Note under new subsection 68AC(7) would advise that the National Police Reference System, maintained by the Australian Criminal Intelligence Commission, is the database in which family violence order information is contained at the time of writing in 2021. The National Police Reference System supports the sharing of family violence order information across jurisdictions under the National Domestic Violence Order Scheme. The National Police Reference System enables Australian police agencies to share essential policing information with other police agencies. It is specifically designed to equip operational police, anywhere in the country, with the knowledge they need to make on-the-spot decisions when dealing with persons of interest. It provides key reference data to support police officers, investigators and analysts. Court Portal access to the National Police Reference System will be arranged for the federal family law courts which will allow these courts to access family violence order information. This will enable the courts to make the enquiries necessary to be satisfied of the requirements in paragraph 68AC(6)(c).

#### *Terms of order*

96. New subsection 68AC(8) would provide a non-exhaustive list of the kinds of terms that the court can impose when making a federal family violence order in relation to a child, and providing for the protection of a protected person thereunder.

97. The amendment would provide that the terms must be appropriate for the welfare of the child. This is an objective consideration which would require the court to consider all the circumstances of the case. New subsection 68AC(8) is intended to be read together with new paragraph 68AC(6)(a) which would make the welfare of the child a fundamental purpose of a section 68AC federal family violence order, whether the order is being made for the protection of a child or for the protection of a person close to the child of the kind listed in new paragraphs 68AC(3)(b)-(f). New subsection 68AC(8) is also designed to be read together with the objects of Part VII in existing section 60B, particularly the object in paragraph

60B(1)(b) which is to ensure that the best interests of children are met by protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

98. New section 68AC(8) is intended to remove any doubt about the court's authority to impose terms of the kind specified in paragraphs 68AC(8)(a)-(h). It is also intended, without fettering the court's discretion, to provide the court with some guidance about terms that may be suitable in a section 68AC matter. The kinds of terms listed in paragraph 68AC(8)(a)-(h) are based on standard family violence order terms used in the States and Territories and are reflected in the standalone template form that would be prescribed in the regulations under new subsection 68AC(11).

99. New paragraph 68AC(8)(a) would allow the court to make a federal family violence order prohibiting the person against whom the order is directed from subjecting the protected person to family violence. According to the definition of family violence in existing subsection 4AB(1) of the Family Law Act, such a term would prohibit the person against whom the order is made from engaging in violent, threatening or other behaviour that coerces or controls the protected person or causes the protected person to be fearful. There are a range of behaviours that may constitute family violence, including the behaviours listed in subsection 4AB(2) of the Family Law Act. It would be a matter for the court to determine whether family violence had occurred in any proceedings for a breach of a federal family violence order.

100. New paragraph 68AC(8)(a) would also allow the court to make a federal family violence order prohibiting the person against whom the order is directed from exposing the protected person to family violence, where the protected person is the child. The court could not make a term of this nature where the protected person is not the child in relation to whom the order is made. According to the definition of 'exposure to family violence' in existing subsection 4AB(3) of the Family Law Act, such a term would prohibit the person against whom the order is directed from engaging in conduct which causes the child to see or hear family violence or otherwise experience the effects of family violence. There a range of situations that may constitute a child being exposed to family violence, including the situations listed in subsection 4AB(4) of the Family Law Act. It would be a matter for the court to determine whether a child had been exposed to family violence in any proceedings for a breach of a federal family violence order.

101. New paragraph 68AC(8)(b) would allow the court to make a federal family violence order prohibiting the person against whom the order is directed from contacting the protected person. Such a term may assist to protect the protected person from control, physical, psychological and emotional abuse, stalking and harassment. Such a term could include a complete prohibition on contact in all circumstances and by all means, including physical contact, written or technological communication. It could also include a prohibition on contact with the protected person in specified circumstances or by specified means, or a general prohibition on contact with the protected person with limited exceptions.

102. Reasonable exceptions may include but would not be limited to: contact through a legal practitioner or police; contact in accordance with an order of a court exercising jurisdiction under Part VII of the Family Law Act; contact at a court or tribunal proceeding, or in the course of legal proceedings; contact at counselling, dispute resolution sessions or restorative justice conferences arranged with the protected person's permission; contact in writing for the purposes of facilitating contact with or organising to spend time with either

parties' child or children; or contact in writing for the purposes of discussing the safety or welfare of either parties' child or children. It will be a matter for the court making the order to determine the appropriate scope of the prohibition in the individual circumstances of the matter.

103. New paragraph 68AC(8)(b) is not intended to cover terms which would prohibit the person against whom the order is directed from maintaining contact with persons other than the protected person, including persons associated with the protected person.

104. New paragraph 68AC(8)(c) would allow the court to make a federal family violence order prohibiting the person against whom the order is directed from being within a specified distance of the protected person. In imposing a term of this nature, the court would be required to prescribe the distance within which the person against whom the order is directed cannot be, in relation to the protected person. The court would be well placed to make such a prescription based on the circumstances of the case, including the safety needs of the protected person. A term of this nature could be imposed to ensure that, regardless of their location, the protected person would not have to interact with the person against whom the order is made. It could thereby assist to protect that person from behaviours such as physical violence, stalking and harassment.

105. The court may make a term of the nature described in new paragraph 68AC(8)(c) on an absolute basis or with exceptions. Reasonable exceptions may include but would not be limited to coming within the otherwise prohibited distance of the protected person: in the company of a police officer; in accordance with an order of a court exercising jurisdiction under Part VII of the Family Law Act; at a court or tribunal proceeding; at a counselling, dispute resolution session or restorative justice conference arranged with the protected person's consent; or when facilitating contact handover of either parties' children.

106. New paragraph 68AC(8)(d) would allow the court to make a federal family violence order prohibiting the person against whom the order is directed from being within a specified distance of a specified place or area that the protected person is, or is likely to be. The purpose of such a term would be to protect the person from behaviours such as stalking and harassment when they engage in their everyday activities. In imposing a term of this nature, the court would be required to identify specific locations where the protected person is or is likely to be, and prescribe the distance within which the person against whom the order is directed cannot be in relation to those locations. The court could prescribe time periods within which the person against whom the order is directed is prohibited from attending a specified place, based on when the protected person is likely to frequent that place. The court could also make exceptions to the prohibition. Reasonable exceptions may include being within the specified distance of the specified place or area: in accordance with an order of a court exercising jurisdiction under Part VII of the Family Law Act, or in the company of police for the purposes of collecting or returning personal belongings.

107. The court would be well placed to prescribe the prohibited places or areas, the distances within which the person against whom the order is directed cannot be, the time periods in which prohibitions apply and any appropriate exceptions, based on the circumstances of the case. Relevant circumstances would include but would not be limited to the safety needs of the protected person, the kinds of places that they frequent, and the impacts of restricting access to those places on the livelihood, living arrangements and day to day activities of the person against whom the order is directed.

108. It is intended that a term of the nature described in new paragraph 68AC(8)(d) would be used to restrict the person against whom the order is directed from attending or approaching specific places including but not limited to the protected person's place of residence, workplace, education or care facility, local shopping centre or gym. It is not intended that such a term would be used to prohibit the person against whom the order is directed from being within a particular municipal area, state or township.

109. New paragraph 68AC(8)(e) would allow the court to make a federal family violence order prohibiting the person against whom the order is directed from attempting to locate the protected person. A term of this kind could be used to protect that person from behaviours such as physical violence, stalking and harassment. Such a term would prohibit the person against whom the order is directed from engaging in behaviours including but not limited to: asking others where the protected person is, researching their whereabouts, attempting to find the protected person physically or by technological means, or following their associates with the aim of finding the protected person.

110. New paragraph 68AC(8)(e) is not intended to permit terms which would prohibit the person against whom the order is directed from attempting to locate persons other than the protected person, including persons associated with the protected person.

111. New paragraph 68AC(8)(f) would allow the court to make a federal family violence order prohibiting the person against whom the order is directed from causing, or attempting to cause, another person to engage in conduct in relation to the protected person that would, if the conduct were done by the person against whom the order is directed, breach the order. A term of this kind could be used to prevent the person against whom the order is directed from causing or attempting to cause a third party to engage in violence or threatening behaviours directed towards the protected person on their behalf. It is intended that such a term would be used to prevent a person from circumventing orders by causing the protected person to be subjected to harmful behaviours by others, rather than by engaging in prohibited behaviours themselves. Paragraph 68AC(8)(f) would not impose obligations on third parties. The prohibited behaviour would be the person against whom the order is directed attempting to have or causing another person to engage in particular conduct, not that other person's conduct itself.

112. New paragraph 68AC(8)(g) would allow the court to make a federal family violence order requiring the person against whom the order is directed to leave a place or area in certain prescribed circumstances. This provision is intended to fill a gap in protection where, in making a federal family violence order, a court decides not to impose conditions under paragraphs 68AC(8)(c) or (d).

113. New subparagraph 68AC(8)(g)(i) would require the person against whom the order is directed to be at that place or area at a particular time. The effect of this provision is that a term of the kind described in paragraph 68AC(8)(g) could not require the person against whom the order is directed to leave any place or area at any indefinite time in the future. It would be limited to the place or area where the person against whom the order is directed is at the time the request referred to in subparagraph 68AC(8)(g)(iii) is made of them.

114. New subparagraph 68AC(8)(g)(ii) would require the protected person to be at the relevant place or area where the offender is located. The effect of this provision is that a term of the kind described in paragraph 68AC(8)(g) could not require the person against whom the order is directed to leave a place or area when the protected person is not at that place or area.

Where the protected person is not in the same place or area as the person against whom the order is directed, it would be unreasonable to require the latter to leave that place or area as a measure to provide personal protection to the protected person from family violence.

115. New subparagraph 68AC(8)(g)(iii) would require the protected person to request that the person against whom the order is directed leave the place or area. While it is anticipated, given the requirement in subparagraph 68AC(8)(g)(ii) that the protected person must be in the same place or area as the person against whom the order is directed, that such a request would most commonly be made verbally, the provision does not specify how the request must be made, or that it must be made directly to the person against whom the order is directed. Accordingly the request may be made in writing, by telephone or electronic communication, via a third person or by any other means. It is intended however that the person against whom the order is directed must reasonably be able to receive and comprehend the request. Where the protected person is a child, new subparagraph 68AC(8)(g)(iii) would allow the child's parent or guardian to make the request on the child's behalf, recognising that a child may lack the capacity or understanding to do so.

116. New subparagraph 68AC(8)(g)(iv) would require the person making the request to consider the protected person to be at imminent risk of being subjected to family violence - or if the protected person is a child, at risk of being subjected or exposed to family violence - at the time the request referred to in subparagraph 68AC(8)(g)(iii) is made. The effect of this provision is that a protected person (or a parent or guardian thereof) would not be empowered to request that the person against whom the order is directed leave a particular place or area at any time or for any reason. While it would not be necessary that the protected person was, as an objective matter, at imminent risk, it would be necessary that the person making the request held the view that the protected person was at imminent risk at that time.

117. New paragraph 68AC(8)(h) would clarify that the court could provide for any other matter that the court considers reasonably necessary to ensure the personal protection of the protected person. Whether a particular term is reasonably necessary to ensure the personal protection of the protected person is an objective consideration which would require the court to consider all the circumstances of the case. Any additional term would also need to be appropriate for the welfare of the child.

118. New paragraph 68AC(8)(h) is intentionally non-prescriptive, recognising the discretion that the court would have in making orders under this Part. As every family's experience of family violence is different, it would be undesirable for federal family violence orders to be made only on a limited set of standard terms. Paragraph 68AC(8)(h) is intended to confirm that the court is able and encouraged to customise federal family violence orders on a case by case basis to meet the unique needs of the individuals affected. In exercising this discretion, the court would need to consider the practical enforceability of the proposed terms from a policing perspective.

119. It is the intent of new subsection 68AC(8) that there be no limit on the number or combination of terms that a court can impose when issuing a federal family violence order in relation to a child, provided that the terms are internally consistent, reasonably capable of being complied with together, and practically enforceable. It is also expected that the terms of the order would be consistent with any parenting or other relevant order made by the court or, where that is not the case, that the terms of an existing order would be adjusted to be consistent with the federal family violence order.

*Court to take account of other matters*

120. New subsection 68AC(9) would provide that a court, in making a decision under new section 68AC about a federal family violence order in relation to a child, must take into account the matters set out in new paragraphs 68AC(9)(a) and 68AC(9)(b). A decision under new section 68AC would include a decision to make a federal family violence order, and decisions about the conditions to be applied to the order, when the order should expire and who should be protected persons in relation to the order.

121. New paragraph 68AC(9)(a) would provide that the court must take into account as the primary consideration the safety and welfare of the child, including the need to protect the child from being subjected to or exposed to family violence.

122. The effect of new paragraph 68AC(9)(a) is that the court must prioritise the safety and welfare of the child above all other considerations, including the matters prescribed in paragraph 68AC(9)(b). The safety and welfare of the child would include, but would not be limited to consideration of the child's actual or likely exposure to physical and psychological harm as well as the health, wellbeing and standard of care afforded to the child.

123. New paragraph 68AC(9)(a) would specifically provide that the safety and welfare of the child includes the need to protect the child from being subjected or exposed to family violence. According to the definition of family violence in existing subsection 4AB(1) of the Family Law Act, this would mean the need to protect the child from being subjected or exposed to threatening or other behaviour that coerces or controls the protected person or causes the protected person to be fearful. There are a range of behaviours that may constitute family violence, including the behaviours listed in subsection 4AB(2) of the Family Law Act. Drawing from the definition of 'exposed to family violence' in existing subsection 4AB(3) of the Family Law Act, it would also include the need to protect the child from seeing or hearing family violence or otherwise experiencing the effects of family violence. There are a range of situations that may constitute a child being exposed to family violence, including the situations listed in subsection 4AB(4) of the Family Law Act.

124. New paragraph 68AC(9)(a) would make the safety and welfare of the child the primary consideration in the making of a decision under section 68AC, whether the relevant order is for the protection of a child or for the protection of another person of the kind listed in new paragraphs 68AC(3)(b) to (f). Requiring the court to prioritise these considerations above all others recognises that the welfare of the child is the fundamental purpose of an order under section 68AC (see new paragraph 68AC(6)(a)), even where the protected person is an adult.

125. New paragraph 68AC(9)(b) would provide that the court must take into account as additional considerations, the matters prescribed in new subparagraphs 68AC(9)(b)(i) to (vi), but only if the court considers these matters relevant. These additional considerations are not to be prioritised as highly as the primary consideration.

126. New subparagraph 68AC(9)(b)(i) would direct the court to consider the matters set out in subsections 60CC(2) and (3) of the Family Law Act - which are about determining the best interests of the child - as an additional consideration when making a decision under section 68AC, if the court considers this relevant. The intent of this provision is to further emphasise the centrality of the child to any section 68AC federal family violence order. Section 60CC(2) makes the primary considerations, in the best interests of the child test, the

benefit to the child of having a meaningful relationship with both of the child's parents (paragraph 60CC(2)(a)), and the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence (paragraph 60CC(2)(b)). Subsection 60CC(2A), in accordance with which subparagraph 68AC(9)(b)(i) requires a court to consider the matters in subsection 60CC(2), provides that in applying the considerations set out in subsection 60CC(2) the court is to give greater weight to the consideration set out in paragraph 60CC(2)(b) – the need to protect the child from harm. Subsection 60CC(3) sets out additional considerations that the court can take into account when determining the best interests of the child.

127. There may be circumstances in which matters of the kind outlined in new subparagraph 68AC(9)(b)(i), are also relevant to the primary consideration in paragraph 68AC(9)(a). There may be circumstances in which matters of the kind outlined in new subparagraphs 68AC(9)(b)(ii)-(vi), are also relevant to the primary consideration in paragraph 68AC(9)(a). In those instances it is intended that the court would consider this information in the context of the primary consideration, rather than as additional considerations.

128. New subparagraph 68AC(9)(b)(ii) would require the court to take into account any criminal history of the person against whom the order is directed, if the court considers this relevant.

129. New subparagraph 68AC(9)(b)(ii) recognises that a history of criminal convictions may be relevant to the court in determining whether and on what terms to issue a federal family violence order. It may be relevant for example to the determination of whether a federal family violence order is appropriate for the welfare of the child (see paragraph 68AC(6)(a) if the person against whom the order is directed has recently been convicted of a violent crime against the protected person or the child. Similarly however, the court may consider that matters such as a history of non-violent crime or a criminal offence committed a significant time ago are not relevant to a decision under section 68AC about a federal family violence order in relation to a child. The court would be best placed to determine whether any criminal history of the person against whom the order is directed is a relevant consideration on a case by case basis. Criminal history may also be relevant to the determination of suitable terms for a federal family violence order where, for example, the person against whom the order is directed is currently subject to bail conditions or a good behaviour bond, or serving a gaol sentence.

130. New subparagraph 68AC(9)(b)(iii) would require the court, where it considers it relevant, to take into account whether the person against whom the order is directed has been charged with any criminal offences.

131. New subparagraph 68AC(9)(b)(iii) recognises that criminal charges, particularly where they relate to violent conduct, may be relevant to the court in determining whether and on what terms to issue a federal family violence order. It may be relevant for example to the determination of whether a federal family violence order is appropriate for the welfare of the child (see paragraph 68AC(6)(a)) because the person against whom the order is directed has been charged with a violent crime against the protected person or the child. Similarly however, the court may consider that criminal charges in relation to non-violent and unrelated criminal offences are not relevant to a decision under section 68AC about a federal family violence order in relation to a child. The court would be best placed to determine whether any criminal charge laid against the person against whom the order is directed is a relevant

consideration on a case by case basis. Criminal charges may also be relevant to the determination of suitable terms for a federal family violence order if for example the person against whom the order is directed is currently incarcerated or subject to bail conditions pending a criminal trial.

132. New subparagraph 68AC(9)(b)(iv) would require the court to take into account any previous violent conduct of the person against whom the order is directed towards the protected person.

133. New subparagraph 68AC(9)(b)(iv) recognises that previous violent conduct directed towards the protected person, whether physical, psychological or emotional in nature, may be relevant to the court in determining whether and on what terms to issue a federal family violence order. It may be relevant for example to the determination of whether a federal family violence order is appropriate for the welfare of the child (see paragraph 68AC(6)(a)) where the person against whom the order is directed has previously engaged in violent conduct towards the protected person. Similarly however, the court may consider that matters such as violent conduct perpetrated a significant time ago, are not relevant to a decision under section 68AC about a federal family violence order in relation to a child. The court would be best placed to determine whether any previous violent conduct on the part of the person against whom the order is directed is a relevant consideration on a case by case basis. New subparagraph 68AC(9)(b)(iv) is not intended to capture violent conduct that was directed towards a person other than the protected person. The provision does not specify the kinds of evidence required to support the court's consideration of this matter. Accordingly, the court can consider evidence in any form, including but not limited to physical, documentary and oral evidence.

134. New subparagraph 68AC(9)(b)(v) would require the court, if the protected person is a person mentioned in any of the paragraphs 68AC(3)(b) to (f), to take into account the effect of any family violence or risk of family violence on the protected person's ability to provide care for the child.

135. Family violence or the risk thereof may have an impact on a person's ability to provide an appropriate level of care for a child. For instance, physical violence may incapacitate or limit a carer's mobility, and the emotional and psychological effects of family violence may reduce the level of care or time available for a carer to provide care for the child. Where family violence or the risk of violence impacts negatively on the protected person's ability to provide care for the child, this may suggest that an order is necessary to ensure the welfare of the child.

136. New subparagraph 68AC(9)(b)(vi) would require the court to take into account any other matter that the court considers relevant, as an additional consideration in making a decision under new section 68AC for a federal family violence order in relation to a child. The court may exercise its discretion to determine whether any other matters are relevant to the making of a decision under section 68AC about a federal family violence order, on a case by case basis.

137. New paragraph 68AC(10) would provide that the court, in applying the considerations set out in subsection (9), must give greater weight to the consideration set out in paragraph 9(a) than the considerations set out in paragraph 9(b). The intent is to ensure that the primary consideration – the safety and welfare of the child, including the need to protect the child from being subjected or exposed to family violence – is prioritised over any additional



consideration that the court considers relevant, when the court is making a decision under section 68AC about a federal family violence order.

### *Form of order*

138. New subsection 68AC(11) would provide that a federal family violence order must be made in the form prescribed by the regulations. It is intended that the regulations would prescribe a standalone federal family violence order template form. The form would contain all of the information that a police officer would require to enforce the order, including, but not limited to, identification information for the person against whom the order is directed and all protected persons covered by the order, information about service of the order and the date on which the order came into force, the terms of the order and its expiration date. The form would be designed to be compatible with relevant police information sharing systems to ensure that federal family violence order information is readily accessible to police attending breach incidents.

139. The requirement in new subsection 68AC(11) is intended to ensure that federal family violence orders are made in a form that can be readily understood by the persons against whom an order is directed and protected persons. The form to be prescribed in the regulations would be in plain English and would contain important information for the parties about the effect of the order and the consequences of a breach.

140. New subsection 68AC(12) would set out six matters that the order must specify.

141. New paragraph 68AC(12)(a) would require the order to specify the child or children that the order relates to. All federal family violence orders made under section 68AC would be orders in relation to children, irrespective of whether the protected persons covered by the order are children and/or adults. The child or children that the order relates to, would be the child or children for whose welfare the order has been made (see paragraph 68AC(6)(a)) and the child or children for whose welfare the order and the terms thereof have been considered appropriate (see paragraph 68AC(6)(a) and subsection 68AC(8)). Paragraph 68AC(12)(a) would require the order to specify the child or children that the order relates to, even where the child or children are not protected persons covered by the order. The specification of the child or children to whom the order relates is important because unless an earlier expiry date is specified in the order or the order is revoked, new subsection 68AF(2) would provide that when the youngest of the children to whom the order relates turns 18, the order will cease to be in force.

142. New paragraph 68AC(12)(b) would require the order to specify each protected person covered by the order. The form that will be prescribed in the regulations for the purposes of subsection 68AC(11) will contain fields for the provision of identifying information for each protected person, including but not limited to their full name and date of birth. This information is necessary for enforcement purposes.

143. New paragraph 68AC(12)(c) would only apply where the order relates to two or more children and provides for the personal protection of a person mentioned in any of paragraphs 68AC(3)(b)-(f) - that is, an adult in one of the prescribed relationships with a child to whom the order relates. New paragraph 68AC(12)(c) would require the order to specify the child that the protected person is protected in relation to.

144. All federal family violence orders made under section 68AC would be orders in relation to children, irrespective of whether the protected persons covered by the order are children and/or adults. The child or children that the order relates to, would be the child or children for whose welfare the order has been made (see paragraph 68AC(6)(a)) and the child or children for whose welfare the order and the terms thereof have been considered appropriate (see paragraph 68AC(6)(a) and subsection 68AC(8)). New subsection 68AC(3) would allow a court to make a federal family violence order that provides for the personal protection of a person mentioned in any of paragraphs 68AC(3)(b)-(f). This would allow the court to take action to protect certain adults from family violence, and thereby protect the child with whom the adult is in a prescribed relationship, from the effects of exposure to it. An adult mentioned in any of paragraphs 68AC(3)(b)-(f) can only be a protected person under a section 68AC federal family violence order while they are in the prescribed relationship with the child. Where the order relates to multiple children, the order must specify which child the protected person is protected in relation to because, if that child turns 18 before the order ceases to be in force, new paragraph 68AC(4)(b) would provide that the protected person would cease to be a protected person covered by the order.

145. New paragraph 68AC(12)(d) would require the order to specify the person against whom the order is directed. The form that will be prescribed in the regulations for the purposes of subsection 68AC(11) will contain fields for the provision of identifying information for the person against whom the order is directed, including but not limited to their full name and date of birth. This information is necessary for enforcement purposes.

146. New paragraph 68AC(12)(e) would require the order to specify the terms of the order. The terms of the order are the criminally enforceable conditions that the court imposes on the person against whom the order is directed. New subsection 68AC(8) sets out a non-exhaustive list of the kinds of terms that a court can impose. These include terms restricting certain behaviours, contact or communication with the protected person. It is critical that the terms of the order are specified in the order, so that law enforcement can readily determine whether a breach has occurred.

147. When making an order that covers multiple protected persons, the court may impose terms that relate to all of the protected persons, and/or terms that relate to only one or some of the protected persons. A term would relate to a particular protected person if the term was made for that person's protection. An example of a term that relates to all of the protected persons covered by the order might be a term restricting the person against whom the order is directed from attending the home in which all of the protected persons live. An example of a term that relates to just one or some of the protected persons might be a term restricting the person against whom the order is directed from attending the school that one or some (but not all) of the protected persons attend. In these circumstances, new paragraph 68AC(12)(f) would require the order to specify which terms of the order apply to which protected persons.

148. This is important because, where a federal family violence order has been made that covers multiple protected persons, it is possible that some of the protected persons will cease to be protected persons under the order, before the order ceases to be in force. For example, where the order covers two protected children, and the order ceases to be in force on the younger child's 18<sup>th</sup> birthday (see new paragraph 68AF(2)(d)), the older child would nonetheless cease to be a protected person covered by the order on their 18<sup>th</sup> birthday (see new paragraph 68AC(4)(a) and subsection 68AI(4)). New paragraph 68AG(5)(b) would provide that conduct would not breach a term of the order for the purposes of new subsection 68AG(1) if the relevant term is in relation to a person who is no longer a protected person

covered by the order. By requiring the court to specify in the order which protected person or persons each term relates to, new paragraph 68AC(12)(f) would ensure that a court will be able to effectively determine whether particular conduct amounts to a breach of a term of the order in accordance with new paragraph 68AG(5)(b).

#### *Court to consider other injunctions*

149. New subsection 68AC(13) would impose an obligation on the court to consider whether a personal protection injunction under section 68B of the Family Law Act should be granted for the personal protection of a person in specified circumstances. The obligation applies where a federal family violence order has been applied for to protect a particular person, but the court has not provided for the personal protection of that person under the order because the threshold test for the issue of a federal family violence order has not been satisfied in relation to that person.

150. New paragraph 68AC(13)(a) would provide that in order for this obligation on the court to be enlivened, a person must have applied for a federal family violence order in relation to a child, under new section 68AB, and the order must have been applied for to provide for the personal protection of a specific person (known as the proposed protected person).

151. Additionally, new paragraph 68AC(13)(b) would provide that the court must not have provided for the personal protection of the proposed protected person under a federal family violence order for one or both the reasons set out in subparagraphs 68AC(13)(b)(i) and (ii).

152. The first specified reason is that the court does not consider that providing for the personal protection of the proposed protected person under the order is appropriate for the welfare of the child for the purposes of paragraph 68AC(6)(a) (see new subparagraph 68AC(13)(b)(i)). New paragraph 68AC(6)(a) would provide that the court must not make a federal family violence order or provide for personal protection of a protected person under the order unless the court considers that it is appropriate for the welfare of the child. Whether an order is appropriate for this purpose is an objective consideration which would require the court to consider all the circumstances of the case.

153. The second specified reason is that the court is not satisfied of either of the matters in paragraph 68AC(6)(b) in relation to the proposed protected person (see new subparagraph 68AC(13)(b)(ii)). New paragraph 68AC(6)(b) would provide that the court must be satisfied on the balance of probabilities that either:

- the proposed protected person has been subjected to family violence, or if the proposed protected person is the child, they have been subjected or exposed to family violence, or
- there are reasonable grounds to suspect that the protected person is likely to be subjected to family violence, or if the protected person is the child, is likely to be subjected or exposed to family violence.

154. The obligation on the court to consider whether an injunction under section 68B should be granted for the personal protection of the proposed protected person would not apply if the court decided not to make the federal family violence order for any reason other than those stipulated in paragraph 68AC(13)(b), including failure to be satisfied of the requirements in new paragraph 68AC(6)(c).

155. Where paragraphs 68AC(13)(a) and 68AC(13)(b) are satisfied, the court would be required to consider if a personal protection injunction under section 68B should be granted in relation to the child that is for the personal protection of the proposed protected person. This requirement is intended to safeguard against gaps in protection for persons who do meet the threshold for a federal family violence order, but would benefit from civil injunctive relief to address family safety concerns.

156. The Note under new subsection 68AC(13) would provide that the court may consider if an injunction under 68B should be granted that is for the personal protection of other persons. While the court would only be required to consider if an injunction should be granted that is for the personal protection of the proposed protected person, there may be circumstances in which the court could assist the proposed protected person by making an injunction that protects another person. For example, where the proposed protected person is a child who is being exposed to unsafe behaviour being perpetrated against a parent, the court may assist the child by making an injunction for the personal protection of that parent.

#### *Validity not affected*

157. New subsection 68AC(14) would provide that failure on the part of the court to comply with new paragraph 68AC(6)(c) or new subsections 68AC(7) or 68AC(11) would not affect the validity of any federal family violence order made under new section 68AC. This is because the obligations set out in these subsections are administrative in nature. Subsection 68AC(14) recognises that it is undesirable that administrative failures should invalidate an order made by the court otherwise in accordance with the law. However that failure on the part of the court to comply with any of the other subsections in section 68AC may invalidate a federal family violence order made under this section.

### **New Section 68AD – Court must give reasons for decision and copies of federal family violence order**

#### *Reasons for decision*

158. New subsection 68AD(1) would provide that as soon as practicable after making a decision whether to make a federal family violence order under section 68AC, the court must give reasons for the decision. Reasons would be required whether the court's decision is to make a federal family violence order or not.

159. Adequate reasons are required by the implied guarantee of procedural due process in the exercise of judicial power. The amendment would allow the court to give reasons for its decisions orally or in writing, provided that it complied with the obligation to ensure that those reasons are adequate.

#### *Copies of order*

160. New subsections 68AD(2), (3) and (4) are intended to ensure that parties to proceedings in which a federal family violence order is made, all protected persons covered by the order, and persons against whom federal family violence orders are directed are informed, as soon as practicable after the order is made, of that fact, and are provided with critical information about the order's effect and enforceability.

161. New paragraph 68AD(2)(a) would provide that, if the court makes an order under section 68AC, it must cause a copy of the order to be made available to each of the parties to the proceedings in which the order is made. This includes parties who are neither a protected person covered by the order nor the person against whom the order is directed.

162. Where the person against whom the order is directed is a party to the proceedings in which the order is made and not before the court when the order is made, the order would also need to be separately served on that person in accordance with regulations and/or Rules of Court made for the purposes of new section 68AE. It is intended that both paragraph 68AD(2)(a) and the service requirement in section 68AE would be complied with in matters of this nature. The provision of a copy of the order to the person against whom the order is directed in accordance with paragraph 68AD(2)(a) would not amount to service of the order for the purposes of new section 68AE.

163. New paragraph 68AD(2)(b) would provide that, if the court makes an order under section 68AC, it must cause a copy of the order to be made available to each protected person covered by the order, if that person is not a party to the proceedings in which the order is made. The amendment recognises that while not all protected persons will be parties to the proceedings in which the order is made (as a court will be authorised to make a section 68AC order for the protection of multiple persons), all protected persons should be provided with a copy of the order so they are aware of the conditions that have been made for their protection, and, once the order is in force, can seek to have the order enforced as necessary. Where a protected person is a party to the proceedings in which the order is made, the court would be required to provide them with a copy of the order under new paragraph 68AD(2)(a).

164. New paragraph 68AD(2)(c) would provide that, if the court makes an order under section 68AC, it must cause a copy of the order to be made available to the person against whom the order is directed, if that person is not a party to the proceedings in which the order is made. The amendment recognises that while not all persons against whom federal family violence orders are directed will be parties to the proceedings in which they are made, they should nonetheless be provided with a copy of the order so they are aware of the conditions that have been imposed on them, and of the consequences of breaching the order once it is in force. A person against whom an order is directed would not be a party to the proceedings if the court makes the order of its own motion, in the course of Part VII or matrimonial cause proceedings to which the person against whom the order is directed is not a party. Where the person against whom the order is directed is a party to the proceedings in which the order is made – including when that person is joined as a respondent after an application is made for a federal family violence order in the course of Part VII or matrimonial cause proceedings to which they were not originally a party – the court would be required to provide them with a copy of the order under new paragraph 68AD(2)(a).

165. Where the person against whom the order is directed is neither a party to the proceedings in which the order is made nor before the court when the order is made, the order would also need to be separately served on that person in accordance with regulations and/or Rules of Court made for the purposes of new section 68AE. It is intended that both paragraph 68AD(2)(c) and the service requirement in section 68AE would be complied with in matters of this nature. The provision of a copy of the order to the person against whom the order is directed in accordance with paragraph 68AD(2)(c) would not amount to service of the order for the purposes of new section 68AE.

166. New subsection 68AD(2) would require the court to cause a copy of the order to be made available to the person listed in paragraphs (a)-(c) as soon as practicable after making the order. This requirement is intended to safeguard against delay in providing these persons with information about orders made in their proceedings, for their protection, or that are directed against them.

167. A federal family violence order will only come into force at the time it is made if the person against whom the order is directed is before the court at that time. Otherwise, the order will come into force when it is served on that person (see new subsection 68AF(1)). The order will have no legal effect and will be unenforceable until it comes into force. It is important that parties to proceedings, and parties to the order, are made aware of the point in time at which the order comes into force, so that their expectations that police will act upon a breach are informed and realistic. To address this, new subsection 68AD(3) would provide that the copy of the order provided to parties, protected persons and persons against whom federal family violence orders are directed under subsection 68AD(2) must include a statement about when the order comes into force.

168. New paragraph 68AD(3)(a) would provide that if the person against whom the order is directed is before the court when the order is made, the statement must provide that the order comes into force at that time.

169. New paragraph 68AD(3)(b) would provide that if the person against whom the order is directed is not before the court when the order is made, the statement must provide that the order comes into force when it is served on the person against whom the order is directed in accordance with the requirements in section 68AE. In these circumstances, the statement must also provide that the order has no effect and is unenforceable unless and until it is served on the person against whom the order is directed.

#### *Explanation of order*

170. There is a risk that parties to a federal family violence order may not understand when, and for what period the order can be enforced. This risk is particularly pertinent where persons have English language difficulties or a disability which affects their ability to understand the text of the order in the written form in which it is provided to them by the court. Failure to understand matters relating to the enforceability of the order may increase the likelihood that the order will be breached, resulting in heightened safety risks to the protected person. It may also result in a protected person seeking police assistance with an alleged breach in circumstances in which police will not be authorised to take enforcement action, causing confusion and distress.

171. To address this, new subsection 68AD(4) would require the court, if it makes a federal family violence order under section 68AC, to explain to the parties to the proceedings, in a language that they are likely to readily understand, when the order comes into force and the period for which it is in force.

172. New subsection 68AD(4) would note that the explanation must be in a language the party is likely to readily understand. It may be necessary for the court to arrange for an interpreter to communicate the explanation to a party if the party has English language difficulties, or arrange for the explanation to be provided in an accessible format to accommodate a disability. The subsection would not specify the circumstances in which the court would be required to provide the explanation itself, rather than arrange for another

person to do so. Family law judges would be well placed to determine the most appropriate method of having the explanation provided, in light of the circumstances of the case and the needs of the relevant individuals.

173. New paragraph 68AD(5)(a) would specify that subsection 68AD(4) does not apply to a party who has not appeared before the court in relation to the order, and new paragraph 68AD(5)(b) would specify that subsection 68AD(4) does not apply in relation to a party who is represented by a legal practitioner. The effect of these provisions is that the court is only required to explain the matters in new paragraphs 68AD(4)(a) and (b) to parties who are before the court and self-represented when the order is made. Where a party has not appeared before the court in relation to the order, information about when, and for what period the order can be enforced will be available to them in the statement that will be included on the copy of the order that the court will provide to them under subsections 68AD(2) and (3). It is expected that a party who is legally represented will receive an explanation about these matters from their legal representative.

*Order not to be made available etc to child unless in best interests*

174. In practice, it may be inappropriate for the court to comply with the requirements of sections 68AD(2) and 68AD(4) where the protected person is a child. For instance, young children covered by the order, such as infants and toddlers, are unlikely to be able to grasp the concepts to be conveyed in the explanation. For older children it may not be in their best interests, and indeed may be distressing, to be exposed to parental controversy to the extent necessary to comply with the requirements.

175. To address this, new subsection 68AD(6) would specify that the court is not to cause a copy of the order to be made available to the child under subsection (2) or explained under subsection (4) to the child unless the court is satisfied that it is in the child's best interests to receive a copy or an explanation.

176. New subsection 68AD(6)(a) would provide that, if the court decides it is not in the best interests of the child to receive a copy of the order, the court may instead cause the order to be made available to an independent children's lawyer representing the child's interests in the proceedings or another person that the court considers appropriate. The court will be best placed to decide who the appropriate person is to receive this information, including, but not limited to the child's parent, guardian or care-giver.

177. New subsection 68AD(6)(b) would provide that, if the court decides it is not in the best interests of the child to receive an explanation of the matters in paragraphs 68AD(4)(a) or (b), the court may instead cause the explanation to be given to another person that the court considers appropriate. The court will be best placed to decide who the appropriate person is to receive this information, including, but not limited to the child's parent, guardian or care-giver.

178. New paragraph 68AD(7)(a) would provide that when determining what is in a child's best interests for the purposes of new subsection 68AD(6), the court is required to consider the matters in existing subsection 60CC(2), applied in accordance with subsection 60CC(2A). New paragraph 68AD(7)(b) however would provide that the court is not required (but may choose) to consider any or all of the matters listed in existing subsection 60CC(3), despite the requirement in subsection 60CC(1).

179. Subsections 60CC(2) and (3) provide considerations to be taken into account in determining the best interests of a child. Subsection 60CC(2) provides that the primary considerations are the benefit to the child of having a meaningful relationship with both parents, and the need to protect the child from physical or psychological harm from being exposed to family violence. These would be relevant and beneficial considerations in a judge's decision about whether to provide a child with an explanation of an order made which affects them. Subsection 60CC(2) is to be applied in accordance with subsection 60CC(2A) which requires that the court must give greater weight to the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence. Subsection 60CC(3) provides an extensive list of additional considerations, not all of which would be relevant to such a decision. To require consideration of all those matters in the context of section 68AD would be excessive and unnecessary.

180. This subsection is intended to strike an appropriate balance between ensuring that judges do not dispense with an explanation lightly, and avoiding an excessive burden on judges to consider an extensive range of matters, given the relatively confined scope of the decision required of the court under new subsection 68AD(6).

181. While part of the rationale for subsections 68AD(6) and 68AD(7) is that the requirements in subsections 68AD(2) and 68AD(4) may be difficult for the court to comply with in the case of a very young child, the new subsections do not specifically exclude the requirement on the basis of a child being 'too young' or under a certain age. The age and maturity of the child would be a relevant consideration under paragraph 60CC(3)(g). Under this provision, the court could consider 'the maturity... of the child... and any other characteristics of the child that the court thinks are relevant'. The effect of this paragraph is that the court is able to take into account the age or maturity of a child as one factor in considering the best interests of the child.

#### *Validity not affected*

182. New subsection 68AD(8) would provide that failure on the part of the court to comply with section 68AD would not affect the validity of any federal family violence order made under new section 68AC. While the court is required to comply with section 68AD, the obligations set out in this section are administrative in nature. Subsection 68AD(8) recognises that it is undesirable that administrative failures should invalidate an order made by the court otherwise in accordance with the law.

183. The Note under new subsection 68AD(8) would provide that while failure to comply with this section, including by not giving copies of the order, does not affect the validity of the order, failure to serve the order on the person against whom the order is directed in accordance with new section 68AE will affect the order's enforceability (new subsection 68AF(1)). If the person against whom the order is directed is not before the court when the order is validly made, the valid order would not come into force or be enforceable until and unless it is served on the person against whom the order is directed.

#### **New section 68AE - Service of federal family violence order**

184. New subsection 68AE(1) would provide that a federal family violence order must be served on the person against whom the order is directed in accordance with the requirements prescribed for the purposes of subsection 68AE(2).



185. The requirement in subsection 68AE(1) would only apply where the person against whom the order is directed is not before the court at the time the order is made. Where the person against whom the order is directed is before the court, the order comes into force at the time it is made (see new paragraph 68AF(1)(a)).

186. The requirement in new subsection 68AE(1) is intended to provide a high level of assurance that a person against whom a federal family violence order is directed is made aware of the order. Service will promote compliance, accountability and the safety of the protected person. It is intended to safeguard against situations in which a person is charged with a criminal offence for conduct, which in the absence of the order would be lawful, but which they are not aware is prohibited. While it is not necessary that the person has knowledge that their conduct is in breach of a federal family violence order in order for that person to be guilty of a breach offence under new section 68AG, service would ensure that the person against whom the order is directed has the information that they require in order to comply with the order and a fair warning about the consequences of a breach.

187. The requirement in new subsection 68AE(1) would not apply to the protected persons in relation to the order or parties to the proceedings in which the order is made other than the person against whom the order is directed.

188. New subsection 68AE(2) would allow for the prescription in the *Family Law Regulations 1984* (the Family Law Regulations) or the Family Law Rules of Court of requirements for and in relation to the service of a federal family violence order. These requirements would include, but would not be limited to permissible methods of serving federal family violence orders, persons or bodies responsible for effecting service, timeframes within which service must be effected, any substituted or deemed service options available to the courts and any reporting or record-keeping requirements in relation to service. Service of orders is not required where the person against whom the order is directed is before the court at the time the order is made.

189. New subsection 68AE(3) would specifically, but not exclusively, allow for the prescription in the Family Law Regulations or Rules of Court of matters regarding who is to bear the cost of service of federal family violence orders, without limiting subsection 68AE(2).

190. Rules of court and regulations are particularly suitable for matters of detail and matters of uncertainty or that are liable to frequent or urgent changes (including changes to reflect future technological advances or in response to developments in other jurisdictions). Both rules and regulations under the Family Law Act are subject to scrutiny by the Senate Standing Committee on Regulations and Ordinances and can be disallowed—this means that the requirements in relation to service would be subject to robust, objective review when included in subordinate legislation.

191. New subsection 68AE(4) would provide that failure on the part of the court to comply with subsection 68AE(1) would not affect the validity of any federal family violence order made under new section 68AC. This is because the obligation set out in this subsection is administrative in nature. Subsection 68AE(4) recognises that it is undesirable that administrative failures should invalidate an order made by the court otherwise in accordance with the law.

192. The Note under new subsection 68AE(4) would clarify that while failure to comply with the requirement in subsection 68AE(1) – that is a failure to serve a federal family violence order on the person against whom the order is directed in accordance with the prescribed requirements – would not affect the *validity* of the order, it would affect the *enforceability* of the order. The Note refers to section 68AF which provides that a federal family violence order will only come into force (that is, become enforceable) at the time it is made if the person against whom the order is directed is before the court at that time. Otherwise, the order will come into force when it is served on the person against whom the order is directed. The effect of subsection 68AE(4) is that an order that has been made in accordance with section 68AC, but has not yet been served, would not for that reason be an invalid order.

### **New section 68AF – When federal family violence order is in force**

#### *When order comes into force*

193. New paragraph 68AF(1)(a) would provide that a federal family violence order only comes into force at the time it is made if the person against whom the order is directed is before the court at that time. The person against whom the order is directed may be before the court in person, or via audio-visual link or telephone. If the person against whom the order is directed is not before the court when the order is made, new paragraph 68AF(1)(b) would provide that the order comes into force when the order is served on the person against whom the order is directed.

194. The effect of the order being in force is that it can be validly enforced. A breach of a federal family violence order that has been made by the court but has not yet come into force would not be a criminal offence under new section 68AG. Accordingly, paragraph 68AF(1)(b) would clarify that the order will have no legal effect and will be unenforceable until it is served on the person against whom the order is directed.

#### *When order ceases to be in force*

195. New subsection 68AF(2) would set out the points in time at which a federal family violence order would cease to be in force. The effect of an order ceasing to be in force would be that the order is no longer enforceable. Where an order ceases to be in force, it would not be able to come back into force at any future time. This is distinguished from the circumstances in which the order is suspended on a time limited basis and will come back into force when it is no longer suspended. The effect of suspension is addressed in new subsection 68AF(3).

196. New subsection 68AF(2) would provide that a federal family violence order would cease to be in force at the earlier of the times described in paragraphs 68AF(2)(a)-(d).

197. It is intended that the form prescribed in regulations for the purposes of new subsection 68AC(11) would contain a field for the order's expiry date. While subsection 68AC(12) would not expressly require the court to specify an expiry date for the order, the effect of new paragraph 68AF(2)(a) is that if such a date is specified, the order would cease to be in force on that date, if that date is earlier than the dates mentioned in paragraphs 68AF(2)(a)-(d).

198. The effect of new paragraph 68AF(2)(b) is that a federal family violence order would cease to be in force when a court revokes the order under new sections 68AI or 68NB (items 13 and 24), if that date is earlier than the dates mentioned in paragraphs 68AF(2)(a), (c) and (d). Nothing in this provision would require that a federal family violence order must be revoked. It would only apply in the event that the order is revoked.

199. New paragraph 68AF(2)(c) would only apply if the order relates to only one child. The effect of new paragraph 68AF(2)(c) is that a federal family violence order would cease to be in force when the child turns 18, if that date is earlier than the dates mentioned in paragraphs 68AF(2)(a)-(b). This provision acknowledges that all federal family violence orders made under section 68AC would be orders in relation to children, irrespective of whether the protected persons covered by the order are children and/or adults. The child that the order relates to, would be the child for whose welfare the order has been made (see paragraph 68AC(6)(a)) and the child for whose welfare the order and the terms thereof have been considered appropriate (see paragraph 68AC(6)(a) and subsection 68AC(8)). Once that child has reached the age of 18, the order can no longer continue to operate, as it would no longer relate to a child.

200. New paragraph 68AF(2)(d) would only apply if the order relates to more than one child. The effect of new paragraph 68AF(2)(d) is that a federal family violence order would cease to be in force when the youngest of those children turns 18, if that date is earlier than the dates mentioned in paragraphs 68AF(2)(a)-(b). This provision acknowledges that all federal family violence orders made under section 68AC would be orders in relation to children, irrespective of whether the protected persons covered by the order are children and/or adults. The children that the order relates to, would be the children for whose welfare the order has been made (see paragraph 68AC(6)(a)) and the children for whose welfare the order and the terms thereof have been considered appropriate (see paragraph 68AC(6)(a) and subsection 68AC(8)). Once the youngest of those children has reached the age of 18, the order can no longer continue to operate, as it would no longer relate to a child.

#### *Effect of suspension*

201. A court could suspend a federal family violence order under new sections 68AI and 68NB. New subsection 68AF(3) would provide that the effect of a suspension is that the order ceases to have effect and would be unenforceable while it is suspended. Subsection 68AF(3) indicates that a suspension would be time limited, and the order would come back into force, and would be enforceable again, once the order is no longer suspended.

### **New section 68AG - Offence for breaching federal family violence order**

#### *Offence*

202. New subsection 68AG(1) creates the offence of breaching a federal family violence order made under new section 68AC (item 13). For a person to commit the offence:

- there must be a federal family violence order made under new Division 9A which is in force,
- the order must be directed against the person,
- the person must engage in conduct, and

- the conduct must breach the terms of the order.

203. The default fault elements set out in Division 5 of Chapter 2 of the *Criminal Code Act 1995* (the Criminal Code) would apply to the new offences. For the conduct in new paragraph 68AG(1)(c) (the person engaging in conduct), the fault element is intention under subsection 5.6(1) of the Criminal Code. For the circumstances or results in new paragraphs 68AG(1)(a) (the order being made under Division 9A and in force), 68AG(1)(b) (the order being directed against the person), and 68AG(1)(d) (the conduct breaching a term of the order), the fault element is recklessness under subsection 5.6(2) of the Criminal Code. Under subsection 5.4(4) of the Criminal Code, recklessness can be established by proving intention, knowledge or recklessness.

204. Note 1 under new subsection 68AG(1) would highlight that conduct breaching a federal family violence order may also constitute a criminal offence under State or Territory law.

205. At the time of writing, all Australian States and Territories had agreed in-principle to recognise federal family violence orders made under new Division 9A under the National Domestic Violence Order Scheme. The National Domestic Violence Order Scheme is a legislative scheme under which family violence orders are mutually recognised and enforced across jurisdictions. Each State and Territory has its own National Domestic Violence Order Scheme legislation, which provides that a family violence order issued in another Australian jurisdiction is to be treated as a local order for the purposes of enforcement. This means that the law of the State or Territory in which the breach occurred can govern the arrest and detention of the person, the classification of the offence, and the applicable penalties where those State or Territory police seek to enforce the order.

206. Recognising federal family violence orders on this scheme - which is expected to occur by way of State and Territory legislative amendments commencing simultaneously with this Bill - would result in federal family violence orders being treated as a local order in the State and Territory in which the breach occurs. An offence under new section 68AG therefore could be prosecuted as a State offence in the jurisdiction in which the breach occurred. The penalty of the State or Territory in which the offence is prosecuted would apply, meaning that penalties may differ. It would also be possible for the Australian Federal Police to enforce the breach using Commonwealth enforcement powers, with the offence being prosecuted as a Commonwealth offence, and with the penalties and defences stipulated in new section 68AG applying.

207. Note 2 would direct the reader to subsection 68AG(5) which deals with when conduct does not breach a term of the order. This includes where the order is suspended or where the term of the order that is breached relates to a person who is no longer a protected person covered by the order.

208. The maximum penalty for the offence under the Family Law Act would be imprisonment for a period of up to two years or 120 penalty units, or both. The penalty for imprisonment is comparable to the length of imprisonment for breaches of family violence orders in the States and Territories, under State and Territory law.

209. Breaches of orders made under new Division 9A would not be enforceable as civil matters. This reflects the Government's view that family violence is not a private matter but a criminal offence of public concern. Civil action would continue to be available under State

and Territory legislation if the conduct breaching the federal family violence order also constituted a tort.

*No consideration of evidence of self-induced intoxication*

210. The defences available in respect of this offence are the default defences prescribed in the Criminal Code.

211. However, new subsections 68AG(2) and 68AG(3) would provide that the provisions relating to lack of criminal responsibility for intoxication in subsections 8.2(3) and (4) and 8.4(1) of the Criminal Code would not apply to this offence. This means that evidence of self-induced intoxication would not be able to be considered in determining whether the conduct was accidental, or a person had a mistaken belief about the facts, or whether a person had certain knowledge or belief (in the context of establishing a possible defence). The defence of intoxication would still be available where the intoxication was not self-induced.

212. These provisions reflect that the consumption of alcohol is a significant contributing factor in incidents of intimate partner homicide and incidents of non-fatal family violence<sup>1</sup>. It would not be appropriate for a perpetrator to self-induce intoxication, and then have that fact relevant to a defence against charges relating to family violence. These provisions send a strong message that perpetrators of family violence will be held accountable for their actions.

*No extension of criminal responsibility*

213. New subsection 68AG(4) would provide that criminal responsibility does not extend to the person protected by the order if their conduct results in a breach of the order. This is intended to address situations where a protected person invites the person subject to an order to act in a way that would breach the order, either because they have reconciled, or because of ongoing power and control dynamics. If sections 11.2 (which deals with aiding, abetting, counselling or procuring the commission of an offence) and 11.2A (which deals with joint commission of an offence) of the Criminal Code were allowed to operate, the protected person could have committed an offence under new section 68AG. While it is unlikely in practice that the protected person would be charged or prosecuted, new subsection 68AG(4) would ensure that a victim of family violence would not be at risk of criminal responsibility. Where the protected person did invite the breach, the perpetrator would remain criminally responsible for their conduct in breaching the order against them. Whether the protected person's actions should reduce the penalty against the perpetrator would be a matter for the court to consider in light of the facts of the case.

*Conduct where order suspended etc.*

214. Conduct would only breach a term of a federal family violence order for the purposes of new subsection 68AG(1) if the order is in force, and the person in relation to whom the term was made is a protected person covered by the order at the time the breach occurs. New subsection 68AG(5) is intended to clarify this.

215. New paragraph 68AG(5)(a) would provide that conduct would not breach a term of the order for the purposes of subsection 68AG(1) if the order is suspended under sections 68AI or 68NB at the time the breach occurs. A suspended order ceases to have effect and is

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<sup>1</sup> Australian Institute of Criminology, 2009

unenforceable for the period that the suspension is in force (see new subsection 68AF(3)). Accordingly, conduct that would otherwise breach a term of a suspended order would not be criminally enforceable, in the same way that conduct that would otherwise breach a term of an order that has not come into force in the first instance would not be criminally enforceable.

216. A federal family violence order made under Division 9A may cover multiple protected persons. When making an order that covers multiple protected persons, the court may impose terms that relate to all of the protected persons, and/or terms that relate to only one or some of the protected persons. A term would relate to a particular protected person if the term was made for that person's protection. An example of a term that relates to all of the protected persons covered by the order might be a term restricting the person against whom the order is directed from attending the home in which all of the protected persons live. An example of a term that relates to just one or some of the protected persons might be a term restricting the person against whom the order is directed from attending the school that one or some (but not all) of the protected persons attend.

217. Where a federal family violence order has been made that covers multiple protected persons, it is possible that some of the protected persons will cease to be protected persons under the order, before the order ceases to be in force. For example, where the order covers two protected children, and the order ceases to be in force on the younger child's 18<sup>th</sup> birthday, the older child would nonetheless cease to be a protected person covered by the order on his/her 18<sup>th</sup> birthday (see new subsections 68AC(4) and 68AI(4)).

218. New paragraph 68AG(5)(b) would provide that conduct would not breach a term of the order for the purposes of subsection 68AG(1) if the relevant term is in relation to a person who is no longer a protected person covered by the order. Using the example above, if one of the terms of the order restricts the person against whom the order is directed from attending the school that the older protected child (but not the younger protected child) attends, that term would relate to the older child only. If after the older child's 18<sup>th</sup> birthday (that is, after the older child has ceased to be a protected person covered by the order), but before the younger child's 18<sup>th</sup> birthday (that is before the order has ceased to be in force), the person against whom the order is directed attends the school that the older child (but not the younger child) attends, this conduct would not amount to a breach of a term of the order for the purposes of subsection 68AG(1). In other words, if a person engages in conduct that would otherwise breach a term of a federal family violence order that relates to a person who is no longer a protected person covered by the order, it cannot be criminally enforced. New paragraph 68AC(12)(f) would require the court to specify in the order which protected person or persons each term relates to. This would allow a court to effectively determine whether particular conduct amounts to a breach of a term of the order in accordance with this amendment.

### *Definitions*

219. New subsection 68AG(6) would provide that conduct in this section includes an act or omission. An example of where an omission may breach a federal family violence order would be where the person against whom the order is directed fails to leave a place or area at the request of the protected person, contrary to a term of the kind described in new paragraph 68AC(8)(g).

### **New Section 68AH - Applying to vary, revoke or suspend federal family violence order**

220. New section 68AH would list the persons who are eligible to apply to a listed court to have a federal family violence order in relation to a child varied, revoked or suspended. The Bill would define listed courts in section 4 and they are the only courts in which federal family violence orders can be made.

221. An implication of new section 68AH is that a person who was a party to the original proceedings in which the federal family violence order was made could not apply to a listed court to have the order varied, revoked or suspended unless that person falls within one of the categories of persons in paragraphs 68AH(a)-(d). Additionally, new section 68AH would allow a person who was not a party to the original proceedings in which the federal family violence order was made to apply to a listed court to have the order varied, revoked or suspended if that person falls within one of the categories of persons in paragraphs 68AH(a)-(d).

222. New paragraphs 68AH(a)-(c) would apply regardless of whether the protected persons covered by the order are children or adults or both. These paragraphs would allow the following persons to apply to a listed court for the order to be varied, revoked or suspended:

- a protected person covered by the order,
- the person against whom the order is directed, or
- an independent children's lawyer who represents the interests of the child in proceedings under Part VII.

223. Under these provisions, an application to vary, revoke or suspend a federal family violence order can be made by the protected person or the person against whom the order is directed as a stand-alone application or as part of other Part VII proceedings or proceedings of the kind described in paragraph (e) of the definition of 'matrimonial cause'. An independent children's lawyer however can only make such an application as part of the proceedings in which they are representing the interests of the child under Part VII.

224. New paragraph 68AH(d) would apply only if the child is a protected person covered by the order. It would allow additional persons to apply to a listed court for the order to be varied, revoked or suspended.

225. New subparagraph 68AH(d)(i) would provide that a party to proceedings under Part VII of the Family Law Act that relate to the child may apply to vary, revoke or suspend the federal family violence order in relation to a child. This would include parties to proceedings in relation to the issuing of parenting orders, location and recovery orders, and determinations on parental responsibility. These proceedings would need to relate to the child or children in relation to whom the federal family violence order is in place. It is expected that, when varying a federal family violence order, the court would ensure that the varied order is consistent with any other order it has made under Part VII, which may impact contact between persons.

226. New subparagraph 68AH(d)(ii) would provide that a party to proceedings of the kind referred to in paragraph (e) of the definition of matrimonial cause in subsection 4(1) (to the extent that the proceedings relate to the child) may apply to vary, revoke or suspend the federal family violence order in relation to a child. Paragraph (e) of the definition of matrimonial cause in subsection 4(1) provides for proceedings between the parties to a

marriage for an order or injunction in circumstances arising out of the marital relationship (other than proceedings under a law of a State or Territory prescribed for the purposes of section 114AB).

227. New subparagraph 68AH(d)(ii) could be relied upon in circumstances in which persons are before a family law court with a proceeding other than under Part VII, and need to have a federal family violence order to protect a child varied, revoked or suspended. For example, a party to a marriage may be before the court with a property matter. While there may be no Part VII issues to be resolved, the party may wish to seek to have a federal family violence order varied, revoked or suspended to continue to protect their child from the other party to the marriage, or alleviate restrictions based on a change of circumstances.

228. New subparagraph 68AH(d)(iii) would provide that a parent of the child could apply to vary, revoke or suspend the federal family violence order in relation to a child as a standalone matter. Where the child has been adopted, this would include an adoptive parent of the child.

229. New subparagraph 68AH(d)(iv) would provide that a person with whom the child is to live under a parenting order could apply to vary, revoke or suspend the federal family violence order in relation to a child as a standalone matter. A parenting order is defined within existing section 64B of the Family Law Act.

230. New subparagraph 68AH(d)(v) would provide that a person with whom the child is to spend time under a parenting order could apply to vary, revoke or suspend the federal family violence order in relation to a child as a standalone matter. The paragraph would apply irrespective of the amount of time for which the child is to spend with the person under the parenting order.

231. New subparagraph 68AH(d)(vi) would provide that a person with whom the child is to communicate under a parenting order could apply to vary, revoke or suspend the federal family violence order in relation to a child as a standalone matter. This would include but would not be limited to a person with whom the child is to engage in in-person or telephone conversations, emails, text messages, social media contact or communication via other electronic means.

232. New subparagraph 68AH(d)(vii) would provide that a person who has parental responsibility for the child within the definition of existing section 61B of the Family Law Act could apply to vary, revoke or suspend the federal family violence order in relation to a child as a standalone matter. This would include a person who has parental responsibility for a child under a child protection order under the law of a State or Territory.

### **New Section 68AI – Court may vary, revoke or suspend federal family violence order**

#### *Power of court to vary, revoke or suspend order*

233. New section 68AI would provide that a listed court may vary, revoke or suspend a federal family violence order in relation to a child made under section 68AC, and the circumstances in which this can be done. This would allow the courts that make federal family violence orders to amend those orders to meet the needs and circumstances of the parties, should they change during the life of the order.



234. Note 1 under new subsection 68AI(1) would refer the reader to subsection 4(1) for the definition of ‘listed court’. Note 1 would also refer readers to new subsection 68AI(10) which clarifies that subsection 68AI(1) would not apply in proceedings to make or vary a family violence order in the Family Court of Western Australia or the Magistrates Court of Western Australia constituted by a Family Law Magistrate of Western Australia. However, these courts would be able to revoke or suspend (but not vary) a federal family violence order in certain circumstances in proceedings to make or vary a family violence order under new section 68NB.

235. Note 2 under new subsection 68AI(1) would refer the reader to new section 68NB, which would allow State or Territory courts in proceedings for family violence orders to revoke or suspend federal family violence orders. Section 68AI would not apply in proceedings to make or vary a family violence order in a State or Territory court.

236. New subsection 68AI(2) would allow the court to determine, on application under new section 68AH or of its own motion during proceedings, that a federal family violence order should be varied, revoked or suspended and make an order to that effect. Permitting a court to vary, revoke or suspend an order on its own motion is intended to benefit a number of vulnerable cohorts. This may include self-represented litigants who may not be aware of the option to apply for a variation, revocation or suspension of a federal family violence order; litigants who may be unwilling or unable to apply for a variation of a federal family violence order as a result of the dynamics of power and control in their relationship with the other party or another person; and children who may not be independently represented in the proceedings and for whose protection neither party has applied for a variation of a federal family violence order. Given the the family law courts have significant experience in working with litigants with limited legal backgrounds, the courts are well placed to identify persons who may be in need of a variation of a federal family violence order, but due to inexperience or trauma, have not applied for one.

#### *Protected persons*

237. New paragraph 68AI(3)(a) would provide that a court may vary a federal family violence order in relation to the protected person covered by the order. It is crucial that a court may vary a federal family violence order in relation to the protected person. Due to changes in circumstances the order may no longer adequately or appropriately protect the protected person. For example, the protected person may change their place of residence or employment, or they may require additional protection as there may have been an escalation in violence on behalf of the person against whom the order is directed. The federal family violence order could be amended to ensure the order continues to adequately and appropriately protect the protected person. New subsection 68AI(6) would provide for the matters a court must be satisfied of before varying, revoking or suspending the order.

238. New paragraph 68AI(3)(b) would provide that a court may vary the federal family violence order to provide for the personal protection of a new protected person. The new protected person must not already be a protected person covered by the order and must be a person mentioned in any of paragraphs 68AC(3)(a)-(f), that is:

- the child
- a parent of the child

- a person with whom the child is to live under a parenting order
- a person with whom the child is to spend time under a parenting order
- a person with whom the child is to communicate under a parenting order
- a person who has parental responsibility for the child.

239. New subsection 68AI(4) would set out - if the court varies the order to provide for the personal protection of a new protected person under paragraph 68AI(3)(b) - when the new protected person would stop being a protected person covered by the order.

240. Under new subparagraph 68AI(3)(b)(i) the court would be able to vary a federal family violence order to provide for the protection of a child. This means a person who is under 18 years of age. Accordingly, new paragraph 68AI(4)(a) would provide that a person who is a protected person under a federal family violence order in their capacity as a child, would cease to be protected under that order when they turn 18, that is, on their 18<sup>th</sup> birthday.

241. Under new subparagraph 68AI(3)(b)(i) the court would be able to vary a federal family violence order to provide for the protection of certain persons where they are in a prescribed relationship with the child in relation to whom the order is made (that is, persons mentioned in new paragraph 68AC(3)(b)-(f). New subparagraph 68AI(4)(b)(i) would provide that where the order relates to only one child, a person mentioned in any of paragraphs 68AC(3)(b)-(f) who is a protected person under a federal family violence order would cease to be a protected person covered by the order when the children turns 18. New subparagraph 68AI(4)(b)(ii) would provide that where the order relates to two or more children, a person mentioned in any of paragraphs 68AC(3)(b)-(f) who is a protected person under a federal family violence order would cease to be a protected person covered by the order when the youngest of those children turns 18. This is because a person mentioned in any of paragraphs 68AC(3)(b)-(f) can only be a protected person under a section 68AC federal family violence order while they are in a prescribed relationship with a child.

242. New subparagraph 68AI(4)(b)(ii) assumes that, where the order relates to multiple children, the protected person is protected in relation to all of those children. New paragraph 68AC(12)(c) however would provide that where the order relates to multiple children, the order must specify which child the protected person is protected in relation to. If the protected person is only protected in relation to one of the children, it is intended that if that child turns 18 before the order ceases to be in force, the protected person would cease to be a protected person covered by the order. If the protected person is protected in relation to two or more children, but not all of the children to whom the order relates, it is intended that the protected person will cease to be a protected person covered by the order when the youngest of the children in relation to whom the protected person is protected turns 18.

#### *Person against whom the order is directed*

243. New subsection 68AI(5) would provide that a court must not vary a federal family violence order to direct the order against another person. If a federal family violence order is sought against a new person, the court would need to make a new order rather than a variation.

244. This is consistent with new subsection 68AC(5) which would provide that a federal family violence order must be directed against a single person. The effect of this provision is that the order cannot be made against a group of persons or persons generally. Where the court determines that federal family violence orders should be directed against multiple persons, separate orders must be made for each respondent. The rationale for mandating that each federal family violence order must be directed against one person only is to ensure that any conditions imposed are appropriate and adapted to that individual's circumstances. This will ensure certainty around the specific conditions placed on the person to whom the order is directed for all parties to the order and police. It is intended that better compliance with the order would result if the order is tailored in this way and the order would be easier to enforce. This is consistent with the way that family violence orders are currently made in States and Territories.

*Matters court must be satisfied of before varying, revoking or suspending order*

245. New subsection 68AI(6) sets out the matters that the court must be satisfied of before it can vary, revoke or suspend a federal family violence order.

246. New paragraph 68AI(6)(a) would provide that a listed court must not vary, revoke or suspend the federal family violence order unless the court considers that it is appropriate for the welfare of the child. The requirement 'for the welfare of the child' is an element of existing section 68B of the Family Law Act, which provides for the grant of a personal protection injunction. It is intended that this linkage with the child is maintained in the new provisions. New paragraph 68AI(6)(a) is designed to be read together with the objects of Part VII in existing section 60B, particularly the object in paragraph 60B(1)(b) which is to ensure that the best interests of children are met by protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

247. New paragraph 68AI(6)(a) would make the welfare of the child a fundamental consideration in making a decision to vary, revoke or suspend a federal family violence order made under section 68AC, whether the order is for the protection of a child or for the protection of a person close to the child of the kind listed in new paragraphs 68AC(3)(b)-(f). Whether the variation, revocation or suspension of a federal family violence order is appropriate for the welfare of the child is an objective consideration which would require the court to consider all the circumstances of the case.

248. New paragraph 68AI(6)(b) would provide that the court must not vary, revoke or suspend the federal family violence order unless it is satisfied that either there is a change in circumstances since the order was made (subparagraph 68AI(6)(b)(i)) or the court has before it material that was not before the court that made the order (subparagraph 68AI(6)(b)(ii)).

249. The circumstances that gave rise to the making of an order may have changed during the life of the order, resulting in the order being inadequate or inappropriate for the protected person's continued protection, or necessitating the addition of additional protected persons to the order. A change in circumstance under subparagraph 68AI(6)(b)(i) may include, but would not be limited to, the nature or severity of the family violence changing or escalating, a change in the relationship between the protected person and the person against whom the order is directed, a change in location of the protected person's work or residential address, the person against whom the order is directed breaching the order, or a new child being born or coming into the protected person's care after the original order was made.

250. Similarly, the person against whom the order is directed may consider that the circumstances that gave rise to the making of the order have changed during the life of the order, resulting in the order being too challenging to comply with, unnecessarily restrictive, or no longer required. A change in circumstance may include but would not be limited to circumstances in which compliance with the order (for example conditions restricting access to certain places) impinges on the person's ability to fulfil their employment, educational, parenting or other responsibilities which may have changed since the order was made; or circumstances in which the person wishes to demonstrate to the court that they have changed their behaviour, eliminating or reducing the risk of subjecting or exposing the protected person to family violence.

251. New paragraph 68AH(c) would also permit an independent children's lawyer to apply for a federal family violence order in relation to a child to be varied, revoked or suspended where parties to the order have not done so – this would include where there has been a change in circumstances in relation to the child. A change in circumstance may mean that it is desirable or necessary to alter conditions so that the order more appropriately meets the safety needs of the protected child.

252. New subparagraph 68AI(6)(b)(ii) recognises the possibility that, had the court which made the federal family violence order had all relevant material before it at the time, the court may have made the order on different terms, or not made the order at all.

253. Where the court is not satisfied that there is a change in circumstances since the order was made or that it has before it material that was not before the court that made the order, the court could not vary, revoke or suspend the order.

254. New paragraph 68AI(6)(c) would provide that, where the court is satisfied under new paragraph 68AI(6)(a) and new paragraph 68AI(6)(b), and the court wishes to vary the order to provide for the personal protection of a new protected person, two additional requirements must be satisfied.

255. New subparagraph 68AI(6)(c)(i) would provide that paragraph 68AC(6)(b) applies in relation to the new protected person. This means that the court must not provide for the personal protection of a new protected person under the order, unless the court is satisfied on the balance of probabilities that:

- the new protected person has been subjected to family violence or, if the new protected person is the child, subjected or exposed to family violence; or
- there are reasonable grounds to suspect that the new protected person is likely to be subjected to family violence or, if the new protected person is the child, is likely to be subjected or exposed to family violence

256. The rationale for subparagraph 68AI(6)(c)(i) is that if a court is varying a federal family violence order to include a new protected person, the court should be satisfied that the new protected person requires protection from family violence. New paragraph 68AC(6)(b) would provide the framework for the court to determine this matter.

257. In addition to the requirement in new subparagraph 68AI(6)(c)(i), the court would also need to be satisfied that there is no family violence order in force that is for the

protection of the new protected person and is directed against the person against whom the federal family violence order is directed (new subparagraph 68AI(6)(c)(ii)).

258. A family violence order is defined under subsection 4(1) of the Family Law Act as an order made under a prescribed law of a State or Territory to protect a person from family violence and includes an interim order.

259. A family violence order (or any condition thereof) that is inconsistent with a federal family violence order (or any condition thereof) would be invalid to the extent of the inconsistency. If the requirement in new subparagraph 68AI(6)(c)(ii) did not exist, this would create enforcement challenges for police, particularly where multiple orders would need to be compared in order for a police officer to determine which conditions of which orders they may lawfully enforce. Prohibiting the court from adding a new protected person to a federal family violence order where a family violence order is in place between that new protected person and the person against whom the federal family violence order is directed would safeguard against inconsistent orders arising, reduce confusion amongst the parties to the order and police as to which conditions must be complied with, and reduce the risk of unlawful arrests.

260. The prohibition on the court adding a new protected person to a federal family violence order where a family violence order is in place would only apply where there is a family violence order in place between the new protected person and the person against whom the federal family violence order is directed. It would not apply if the new protected person is protected by a family violence order that is directed against a different respondent.

#### *Avoiding inconsistency with family violence orders*

261. Notwithstanding the disclosure obligations in existing section 60CF, in satisfying itself for the purposes of subparagraph 68AI(6)(c)(ii), there would be inherent risks in the court relying on the parties to self-report the existence of a family violence order. There may be circumstances in which parties withhold this information from the court, for example, they are unaware that an old family violence order remains in existence, or do not understand their obligations to disclose information of this nature to the court. It is important that the court has a reliable basis on which to satisfy itself for the purposes of subparagraph 68AI(6)(c)(ii) both to ensure that this subsection can effectively safeguard against inconsistent orders arising, and to minimise the risk of a court refusing to make a federal family violence order under a mistaken assumption that there is a family violence order in place, leaving an individual without protection.

262. To address this, new subsection 68AI(7) would require the court to inspect any record, database or register that:

- contains information about family violence orders,
- is maintained by a Department, agency or authority of the Commonwealth, or of a State or Territory, and
- is, or can reasonably be made, available to the court.

263. New paragraph 68AI(7)(a) would expressly provide that the information about family violence orders contained in the record, database or register could be in any form, including

electronic. It is intended that information in hard copy or other form would also be sufficient for the purposes of this provision provided that the record, database or register also meets the requirements in paragraphs 68AI(7)(b) and (c).

264. New paragraph 68AI(7)(b) would require that any record, database or register inspected by the court for the purposes of satisfying itself of the existence of a family violence order under paragraph 68AI(7)(a) must be maintained by a Department, agency or authority of the Commonwealth, or a State or Territory. This would exclude records, databases or registers maintained by private companies or individuals, and is intended to capture official government information facilities only. New paragraph 68AI(7)(b) is intended to ensure the accuracy and reliability of the information on which the court relies.

265. New paragraph 68AI(7)(c) would require that any record, database or register inspected by the court for the purposes of satisfying itself of the existence of a family violence order under subparagraph 68AI(6)(c)(ii) is, or can reasonably be made available to the court. This provision is intended to clarify that the court is not expected to inspect records, databases or registers to which they do not have direct access or to which obtaining access would be unreasonably burdensome.

266. The Note under new subsection 68AI(7) would advise that the National Police Reference System, maintained by the Australian Criminal Intelligence Commission, is the database in which family violence order information is contained at the time of writing in 2021. The National Police Reference System supports the sharing of family violence order information across jurisdictions under the National Domestic Violence Order Scheme (see commentary regarding the Note under new subsection 68AG(1) in this Explanatory Memorandum). The National Police Reference System enables Australian police agencies to share essential policing information with other police agencies. It is specifically designed to equip operational police, anywhere in the country, with the knowledge they need to make on-the-spot decisions when dealing with persons of interest. It provides key reference data to support police officers, investigators and analysts. Court Portal access to the National Police Reference System will be arranged for the federal family law courts, which will allow these courts to access family violence order information. This will enable the courts to make the enquiries necessary to be satisfied of the requirements in subparagraph 68AI(6)(c)(ii).

#### *Terms of variation*

267. New subsection 68AI(8) would provide that if the court varies the federal family violence order, the court may make the variation on the terms it considers appropriate for the welfare of the child, including any of the terms mentioned in new subsection 68AC(8).

268. Whether a particular term is appropriate for the welfare of the child is an objective consideration which would require the court to consider all the circumstances of the case. New subsection 68AI(8) is intended to be read together with new paragraph 68AC(6)(a) which would make the welfare of the child a fundamental purpose of a section 68AC federal family violence order, whether the order is being made for the protection of a child or for the protection of a person close to the child of the kind listed in new subparagraphs 68AC(3)(b)-(f). New subsection 68AI(8) is also designed to be read together with the objects of Part VII in existing section 60B, particularly the object in paragraph 60B(1)(b) which is to ensure that the best interests of children are met by protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

269. New subsection 68AI(8) is intended to remove any doubt about the court's authority to impose terms of the kind specified in paragraphs 68AC(8)(a)-(h). It is also intended, without fettering the court's discretion, to provide the court with some guidance about terms that may be suitable in a section 68AC matter. The terms mentioned in new subsection 68AC(8) include but are not limited to terms restricting certain behaviours, contact and communication with the protected person.

*Court to take account of other matters*

270. New subsection 68AI(9) would provide that in making a decision to vary, revoke or suspend a federal family violence order under new section 68AI, a court must take into account the matters set out in new subsection 68AC(9), in accordance with subsection 68AC(10). These would include, as the primary consideration, the safety and welfare of the child, including the need to protect the child from being subjected or exposed to family violence (paragraph 68AC(9)(a)), and any of the considerations listed in subparagraphs 68AC(9)(b)(i)-(vi) that the court considers relevant, including the best interests of the child under subparagraph 68AC(9)(b)(i).

271. New subsection 68AC(10) would provide that in applying the considerations set out in subsection 68AC(9), the court is to give greater weight to the consideration set out in paragraph 68AC(9)(a) than the considerations set out in paragraph 68AC(9)(b). This means that the court is to give greater consideration to the safety and welfare of the child, including the need to protect the child from being subjected or exposed to family violence, than the other considerations set out in paragraph 68AC(9)(b).

*Family Court of Western Australia and Magistrates Court of Western Australia constituted by a Family Law Magistrate of Western Australia*

272. New subsection 68AI(10) would provide that the Family Court of Western Australia and the Magistrates Court of Western Australia constituted by a Family Law Magistrate of Western Australia may not vary, revoke or suspend a federal family violence order in relation to a child under section 68AI in proceedings to make or vary a family violence order.

273. Western Australia is unique amongst Australian States in being the only State with its own family court. The Family Court of Western Australia was established in 1976 as a State court exercising both state and federal jurisdiction. Family Court judges and registrars, and co-located specialist family law magistrates service the whole of the State. The Court and the family law magistrates have exclusive jurisdiction in the Perth metropolitan area and circuit to five major regional centres. The Family Law Magistrates and registrars provide advice and support to regional magistrates who also deal with some family law matters.

274. The effect of new subsection 68AI(10) is that the jurisdiction of the Family Court of Western Australia and the Magistrates Court of Western Australia constituted by a Family Law Magistrate of Western Australia to vary, suspend or revoke federal family violence orders under new subsection 68AI(1) is limited to proceedings other than those for the making or variation of a State family violence order.

275. The Note under new subsection 68AI(10) would clarify that in proceedings to make or vary a family violence order, the Family Court of Western Australia and the Magistrates Court of Western Australia constituted by a Family Law Magistrate of Western Australia

may revoke or suspend (but not vary) a federal family violence order in certain circumstances and would direct the reader to new section 68NB in this regard.

276. New subsection 68AI(10) is intended to safeguard against persons having both a family violence order and a federal family violence order in force at the same time in relation to the same matter. A family violence order (or any condition thereof) that is inconsistent with a federal family violence order (or any condition thereof) would be invalid to the extent of the inconsistency. This would create enforcement challenges for police, particularly where multiple orders would need to be compared in order for a police officer to determine which conditions of which orders they may lawfully enforce.

#### *Form of variation, revocation or suspension*

277. New subsection 68AI(11) would provide that any variation, revocation or suspension of a federal family violence order must be in the form prescribed by the regulations. It is intended that the regulations would prescribe a standalone federal family violence order template form. The form would contain all of the information that a police officer would require to enforce the order, including identification information for the person against whom the order is directed and all protected persons in relation to the order, information about service of the order and the date on which the order came into force, the conditions of the order, its expiration date and the dates on which the order ceases to apply to any of the protected persons. The form would be designed to be compatible with relevant police information sharing systems to ensure that federal family violence order information is readily accessible to police attending breach incidents.

278. The requirement in new subsection 68AI(11) is intended to ensure that variations, revocations and suspensions of federal family violence orders are made in a form that can be readily understood by the persons against whom the order is directed and protected persons. The form to be prescribed in regulations would be in plain English and would contain important information for the parties about the effect of the changes to the order and, where relevant, the consequences of a breach.

279. New subsection 68AI(12) would provide that if the court varies the federal family violence order, the variation must specify the matters mentioned in new subsection 68AC(12) as so varied. New subsection 68AC(12) would set out six matters that the order must specify (see content on new subsection 68AC(12) in this Explanatory Memorandum).

280. This information is critical to enable the effective enforcement of the varied order.

#### *Court to consider other injunctions*

281. New subsection 68AI(13) would impose an obligation on the court to consider whether a personal protection injunction under section 68B of the Family Law Act should be granted for the personal protection of a person in specified circumstances. The obligation applies where a variation of a federal family violence order has been applied for to provide for the protection of a particular person who is not already a protected person under the order, but the court has not provided for the personal protection of that person under the order because the threshold test for the issue of a federal family violence order has not been satisfied in relation to that person.



282. New paragraph 68AI(13)(a) would provide that in order for this obligation on the court to be enlivened, a person must have applied for the variation of a federal family violence order in relation to a child, under new section 68AH, to provide for the personal protection of a specific person (known as the proposed protected person), who is not already a protected person under the order.

283. Additionally, new paragraph 68AI(13)(b) would provide that the court must not have varied the order to provide for the personal protection of the proposed protected person for one or both of the reasons set out in subparagraphs 68AI(13)(b)(i) and (ii).

284. The first specified reason is that the court does not consider that varying the order to provide for the personal protection of the proposed protected person is appropriate for the welfare of the child for the purposes of paragraph 68AI(6)(a) (see new subparagraph 68AI(13)(b)(i)). New paragraph 68AI(6)(a) would provide that the court must not vary, revoke or suspend a federal family violence order unless the court considers that it is appropriate for the welfare of the child. Whether a variation is appropriate for this purpose is an objective consideration which would require the court to consider all the circumstances of the case.

285. The second specified reason is that the court is not satisfied of either of the matters in paragraph 68AC(6)(b) in relation to the proposed protected person (see new subparagraph 68AI(13)(b)(ii)). New paragraph 68AC(6)(b) would provide that the court must be satisfied on the balance of probabilities that either:

- the proposed protected person has been subjected to family violence, or if the proposed protected person is the child, they have been subjected or exposed to family violence, or
- there are reasonable grounds to suspect that the proposed protected person is likely to be subjected to family violence, or if the proposed protected person is the child, is likely to be subjected or exposed to family violence.

286. The obligation on the court to consider whether an injunction under section 68B should be granted for the personal protection of the proposed protected person would not apply if the court decided not to vary the federal family violence order to provide for the personal protection of the proposed protected person for any reason other than those stipulated in paragraph 68AI(13)(b), including failure to be satisfied of the requirements in new paragraph 68AC(6)(c).

287. Where paragraphs 68AI(13)(a) and 68AI(13)(b) are satisfied, the court would be required to consider if a personal protection injunction under section 68B should be granted in relation to the child that is for the personal protection of the proposed protected person. This requirement is intended to safeguard against gaps in protection for persons who do not meet the threshold for a federal family violence order, but would benefit from civil injunctive relief to address family safety concerns.

288. The Note under new subsection 68AI(13) would provide that the court may consider if an injunction under 68B should be granted that is for the personal protection of other persons. While the court would only be required to consider if an injunction should be made that is for the personal protection of the proposed protected person, there may be circumstances in which the court could assist the proposed protected person by making an

injunction that protects another person. For example, where the proposed protected person is a child who is being exposed to unsafe behaviour being perpetrated against a parent, the court may assist the child by making an injunction for the personal protection of that parent.

#### *Validity not affected*

289. New subsection 68AI(14) would provide that failure on the part of the court to comply with the requirements in subparagraph 68AI(6)(c)(ii), subsection 68AI(7) or subsection 68AI(11) does not affect the validity of the variation, revocation or suspension made under new subsection 68AI(1). This is because the obligations set out in these provisions are administrative in nature. New subsection 68AI(14) recognises that it is undesirable that administrative failures should invalidate a variation, revocation or suspension made by the court otherwise in accordance with the law. However, a failure on the part of the court to comply with any of the other subsections in section 68AI may invalidate a variation, revocation or suspension made under this section.

290. New subsection 68AI(15) would provide that to avoid doubt, the court may vary or revoke a federal family violence order even if the order is not in force in accordance with subsection 68AF(1) (see new paragraph 68AI(15)(a)) or suspended under section 68AI or section 68NB (see new paragraph 68AI(15)(b)).

291. New subsection 68AF(1) provides that if the person against whom the order is directed is not before the court when the order is made, the order comes into force when it is served on that person, and the order has no effect and is unenforceable unless and until it is served. This means that an order that has been made other than in the presence of the person against whom the order is directed, and has not been served, has no effect and is unenforceable. The effect of new paragraph 68AI(15)(a) is that a listed court may vary or revoke a federal family violence order that has neither been made in the presence of the person against whom the order is directed nor served on that person, and therefore has no legal effect and is unenforceable. If an order of this nature is varied, the varied order would come into force when the variation has been served in accordance with new section 68AK. If an order of this nature is revoked, the order would not come into force.

292. New sections 68AI and 68NB would provide that a federal family violence order, once made, can be suspended in certain circumstances. Section 68AI would provide for, amongst other things, the power of a listed court to suspend the federal family violence order, the matters the court must be satisfied of before suspending the order and the form of the suspension. Section 68NB would provide for, amongst other things, the power of a State or Territory court to suspend a federal family violence order, the matters the court must take into account when suspending the order, when the suspension comes into force and for the registration of the suspension. The effect of new paragraph 68AI(15)(b) is that a listed court may vary or revoke an order that has been suspended and is therefore neither currently in force nor enforceable. If an order of this nature is varied, the varied order would come into force when the variation has been served in accordance with new section 68AK. If an order of this nature is revoked, the order would not come back into force at the conclusion of the suspension.

#### **New section 68AJ - Court must give reasons for decision and copies of variation**

293. New section 68AJ would provide that the requirements in section 68AD in relation to providing reasons for decisions, copies of orders, explanations of orders and giving copies of

the order to the child apply when the court makes a decision to vary, revoke or suspend a federal family violence order under section 68AI, and if the court varies the order under section 68AI, the variation, in the same way as they would apply to a decision or order made under section 68AC.

### **New section 68AK - Service of variation**

294. New section 68AK would provide for service of the variation of the federal family violence order in relation to a child. New subsection 68AK(1) would provide that a variation of a federal family violence order must be served on the person against whom the order is directed in accordance with the requirements prescribed for the purposes of subsection 68AK(2). The requirement in subsection 68AK(1) would only apply where the person against whom the order is directed is not before the court at the time the order is varied. Where the person against whom the order is directed is before the court, the variation of the order comes into force at the time the variation is made (see new subparagraph 68AL(1)(a)(i)).

295. New subsection 68AK(2) would allow for the prescription in the Family Law Regulations or the Family Law Rules of Court, or both, of requirements for and in relation to the service of a variation of a federal family violence order. These requirements would include, but would not be limited to permissible methods of serving variations of federal family violence orders, persons or bodies responsible for effecting service, timeframes within which service must be effected, any substituted or deemed service options available to the courts, any reporting or record-keeping requirements in relation to service and who is to bear the cost of service (see subsection 68AK(3)). Service of orders is not required where the person against whom the order is directed is before the court at the time the order is made.

296. Rules of court and regulations are particularly suitable for matters of detail and matters of uncertainty or that are liable to frequent or urgent changes, including changes to reflect future technological advances or in response to developments in other jurisdictions. Both rules and regulations under the Family Law Act are subject to scrutiny by the Senate Standing Committee on Regulations and Ordinances and can be disallowed. This means that the requirements in relation to service would be subject to robust, objective review prior to their prescription in subordinate legislation.

297. New subsection 68AK(3) would specifically, but not exclusively, allow for the prescription in the Family Law Regulations or Rules of Court matters regarding who is to bear the cost of service of federal family violence orders.

298. New subsection 68AK(4) would provide that failure on the part of the court to comply with subsection 68AK(1) would not affect the validity of the variation made under new section 68AI. This is because the obligation set out in this subsection is administrative in nature. Subsection 68AK(4) recognises that it is undesirable that administrative failures should invalidate an order made by the court otherwise in accordance with the law.

299. The Note under subsection 68AK(4) would clarify that while failure to comply with the requirements in subsection 68AK(1) – that is a failure to serve a variation of a federal family violence order on the person against whom the order is directed in accordance with the prescribed requirements – would not affect the *validity* of the order, it would affect the *enforceability* of the order. The Note refers to subsection 68AL(1) which provides that a variation of a federal family violence order will only come into force (that is, become

enforceable) at the time it is made if the person against whom the order is directed is before the court at that time. Otherwise, the variation will come into force when it is served on the person against whom the order is directed. The effect of subsection 68AK(4) is that a variation that has been made in accordance with section 68AI, but has not yet been served, would not for that reason be an invalid order.

#### **New section 68AL - When variation, revocation or suspension is in force**

300. New section 68AL would provide for when a variation, revocation or suspension is in force. New subparagraph 68AL(1)(a)(i) would provide that a variation of a federal family violence order will only come into force at the time it is made if the person against whom the order is directed is before the court at that time. Otherwise, new subparagraph 68AL(1)(a)(ii) would provide that the variation will come into force when is served on the person against whom the order is directed.

301. The effect of a variation being in force is that the order, as varied, can be validly enforced. A breach of a varied federal family violence order that has been made by the court but has not yet come into force would not be a criminal offence. Accordingly, subparagraph 68AL(1)(a)(ii) would clarify that the variation will have no legal effect and will be unenforceable until it is served.

302. New paragraph 68AL(1)(b) would provide that a revocation or suspension of a federal family violence order would come into force when the court revokes or suspends the order.

303. The effect of a revocation or suspension being in force is that the order would no longer be enforceable. A revocation cancels a federal family violence order. The terms of the order would have no further effect and would not be enforceable. A revoked federal family violence order could not come back into force.

304. The effect of a suspension is that the order would not be in force and would be unenforceable while it is suspended. A suspension would be time limited, and the order would come back into force, and would be enforceable again once the order is no longer suspended.

305. New subsection 68AL(2) would set out the points in time at which a suspension of a federal family violence order would cease to be in force, and the order would come back into force. New subsection 68AL(2) would provide that a federal family violence order would cease to be in force at the earlier of the times described in paragraphs 68AL(2)(a) and 68AL(2)(b).

306. New paragraph 68AL(2)(a) would provide that a suspension of a federal family violence order would cease to be in force at the time specified in the suspension - that is, the time specified in the order as the time at which the suspended order ceases to be in force - if that time is earlier than the time specified at paragraph 68AL(2)(b).

307. New paragraph 68AL(2)(b) would provide that a suspension of a federal family violence order would cease to be in force when a court revokes the suspension, if that time is earlier than the time specified at paragraph 68AL(2)(a).

#### **Item 14 – Division 9 of Part VII (heading)**

308. Item 14 would repeal the existing heading of Division 9 of Part VII and substitute it with ‘Division 9 – Orders and injunctions in relation to children (other than federal family violence orders)’. This amendment would provide additional clarity about the purpose of the Division.

#### **Item 15 – Section 68A**

309. Item 15 would repeal existing section 68A and replace it with a new section 68A titled ‘What this Division does’. New section 68A would set out the matters that Division 9 of Part VII covers. New section 68A would provide that Division 9 of Part VII deals with proceedings for orders and injunctions in relation to children, other than federal family violence orders.

#### **Item 16 – Section 68B (heading)**

310. Item 16 would repeal the existing heading of section 68B and substitute it with the heading ‘Orders and injunctions (other than federal family violence orders)’. This amendment would provide additional clarity about the purpose of section 68B as amended. The amended section 68B would not permit a court to make an order or injunction to provide personal protection from family violence if the court could make a federal family violence order providing for the personal protection of the person (see new paragraph 68B(1A)(b)).

#### **Item 17 – Before subsection 68B(1)**

311. Item 17 would insert the heading ‘Power of court to make orders and injunctions’ before subsection 68B(1). This amendment would provide additional clarity about the purpose of subsection 68B(1).

#### **Item 18 – After subsection 68B(1)**

312. Item 18 would insert subsections 68B(1A), (1B), (1C) and (1D), which address the limits on the power of the court in relation to the granting of personal protection injunctions where there is family violence.

#### *Limit on power of the court where there is family violence*

313. New subsection 68B(1A) would limit the ability of a listed court to grant an injunction under paragraphs 68B(1)(a) and (b) where there is family violence. Paragraphs 68B(1)(a) and (b) provide that if proceedings are instituted in a court having jurisdiction under Part VII for an injunction in relation to a child, the court may make such order or grant such injunction as it considers appropriate for the welfare of the child, including an injunction for the personal protection of the child (paragraph (a)) or certain persons in a prescribed relationship with the child (paragraph (b)).

314. New paragraph 68B(1A)(a) would provide that before granting an injunction under paragraphs 68B(1)(a) or 68B(1)(b) that is for the personal protection of a person from family violence, a listed court must first consider if it would be appropriate to make a federal family violence order under section 68AC providing for the personal protection of the person. Read together with paragraph 68B(1A)(b), the effect of new paragraph 68B(1A)(a) is to require a listed court, before granting an injunction for personal protection under paragraph 68B(1)(a) or (b), to turn its mind to whether in fact a criminally enforceable order can be made to protect the person. Only where the person would not be eligible for a federal family violence

order under section 68AC, should the court consider granting a civilly enforceable injunction, which would afford the person a lower standard of personal protection.

315. There is a known lack of public awareness about the various forms family violence can take, and it is foreseeable that a person may apply for a personal protection injunction where they would be eligible for a federal family violence order. Requiring a listed court to consider whether it would be appropriate to make a federal family violence order before making a personal protection injunction, is designed to ensure that parties who are experiencing family violence and meet the relevant statutory requirements, will receive a criminally enforceable federal family violence order, rather than a civilly enforceable personal protection injunction. This reflects the Government's intention to improve the protections available to people in the family law system who are experiencing family violence.

316. New paragraph 68B(1A)(b) would provide that the court must not grant an injunction under 68AB(1)(a) or (b) for the personal protection of a person from family violence if the court could make a federal family violence order providing for the personal protection of the person. This means that, where a federal family violence order may be issued, personal protection injunctions would only be issuable under paragraphs 68B(1)(a) or (b) to provide personal protection in relation to matters other than family violence, including child abuse that does not constitute family violence, violence being perpetrated by a non-family member or other conduct that would otherwise not fall within the definition of 'family violence' in section 4AB.

317. The effect of new paragraph 68B(1A)(b) is that injunctions for personal protection under paragraphs 68B(1)(a) and 68B(1)(b) cannot be issued in the same kinds of circumstances or for the same purpose as a federal family violence order, where a federal family violence order may be issued. Where a federal family violence order is issuable, a personal protection injunction could not be made to protect the person from family violence, but could be made to protect the person from matters other than family violence.

318. Where the court is unable to issue a federal family violence order in accordance with section 68AC, the court would retain the ability to issue a personal protection injunction under 68B(1)(a) or (b) for the personal protection of a person from family violence.

319. The requirement in new paragraph 68B(1A) would only apply to listed courts, being the only courts that have jurisdiction to make federal family violence orders.

#### *Avoiding inconsistency with family violence orders*

320. New subsection 68B(1B) would prohibit a person from applying for a personal protection injunction under paragraph 68B(1)(a) or (b) where there is a family violence order in force that is for the protection of the protected person and is directed against the person against whom the federal family violence order is directed, in relation to the same matter that is the subject of the application. A family violence order is defined in subsection 4(1) of the Family Law Act as an order made under a prescribed law of a State or Territory to protect a person from family violence, and includes an interim order.

321. 68B(1B) is intended to safeguard against inconsistent personal protection injunctions and family violence orders being in force at the same time. If the two orders were in existence at the same time, the family violence order (or any term thereof) that is inconsistent with a

personal protection injunction (or any term thereof) would be invalid to the extent of the inconsistency. This would create challenges for police in enforcing the family violence order particularly where the family violence order (which is a criminally enforceable order) would need to be compared with a civilly enforceable personal protection injunction (which would not be readily accessible to police) in order for a police officer to determine which terms of the family violence order they may lawfully enforce. It could also create confusion for the parties as to which terms are required to be complied with. Prohibiting persons from applying for a personal protection injunction where there is already a family violence order in place between the same parties and in relation to the same matter would safeguard against inconsistent orders arising, reduce confusion and reduce the risk of unlawful arrests.

322. The prohibition in subsection 68B(1B) would only apply where there is a family violence order in place between the same parties for whom the personal protection injunction is being sought, and where the family violence order is in place in relation to the same matter for which the personal protection injunction is being sought. It would not apply if the protected person is protected by a family violence order that is directed against a different respondent, or if the personal protection injunction is being sought in relation to a different matter from that to which the family violence order relates. Whether a personal protection injunction is being sought in relation to the same matter as that to which a family violence order relates would be a matter for the court to determine in light of the circumstances of the case. Given that the purpose of subsection 68B(1B) is to prevent an inconsistent personal protection injunction and family violence order being in place at the same time, it is intended that the court would consider the terms being sought as part of the personal protection injunction and whether they could be complied with alongside the conditions of the family violence order.

323. New subsection 68B(1C) would provide that the court must not grant an injunction, under paragraphs 68B(1)(a) or (b) unless it is satisfied that the injunction is not inconsistent with a State or Territory family violence order that is in force for the personal protection of the person seeking the injunction, and directed against the same person against whom the injunction would be directed. The prohibition would not apply where the State or Territory family violence order is no longer in force, or where the State or Territory family violence order has been made for the protection of a different person.

324. This Bill seeks to safeguard against persons having a family violence order and a personal protection injunction in force at the same time that cannot be simultaneously complied with. In these circumstances, the family violence order (or any term thereof) that is inconsistent with a personal protection injunction (or any term thereof) would be invalid to the extent of the inconsistency. This would create challenges for police in enforcing the family violence order particularly where the family violence order (which is a criminally enforceable order) would need to be compared with a civilly enforceable personal protection injunction (which would not be readily accessible to police) in order for a police officer to determine which terms of the family violence order they may lawfully enforce. It could also create confusion for the parties as to which terms are required to be complied with. Prohibiting a court from making a personal protection injunction unless it is satisfied that the injunction is not inconsistent with a family violence order would safeguard against inconsistent orders arising, reduce confusion and reduce the risk of unlawful arrests.

325. There may be circumstances in which an individual does have a family violence order and an inconsistent personal protection injunction in force at the same time. This would include situations in which the court fails to comply with the requirement in new subsection

68B(1C), which in accordance with new subsection 68B(4) would not affect the validity of the personal protection injunction, or circumstances in which a person who has a personal protection injunction subsequently obtains an inconsistent family violence order.

326. Notwithstanding the disclosure obligations in existing section 60CF, in satisfying itself for the purposes of subsection 68B(1C), there would be inherent risks in the court relying on the parties to self-report the existence of a family violence order. There may be circumstances in which parties withhold this information from the court, for example, they are unaware that an old family violence order remains in existence, or do not understand their obligations to disclose information of this nature to the court. It is important that the court has a reliable basis on which to satisfy itself for the purposes of subsection 68B(1C), both to ensure that this subsection can effectively safeguard against inconsistent orders arising, and to minimise the risk of a court refusing to make a personal protection injunction, or impose particular terms under a personal protection injunction, under a mistaken assumption that the injunction would be consistent with a family violence order, leaving an individual without protection.

327. To address this, new subsection 68B(1D) would provide that in satisfying itself for the purposes of subsection 68B(1C), the court must inspect any record, database or register that:

- contains information about family violence orders,
- is maintained by a Department, agency or authority of the Commonwealth, or of a State or Territory, and
- is, or can reasonably be made, available to the court.

328. New paragraph 68B(1D)(a) expressly provides that the information about a family violence order contained in the record, database or register could be in any form, including electronic. It is intended that information in hard copy or other form would also be sufficient for the purposes of this provision provided that the record, database or register also meets the requirements in paragraphs 68B(1D)(b) and (c).

329. New paragraph 68B(1D)(b) would require that any record, database or register inspected by the court for the purposes of satisfying itself of the existence of a family violence order under subsection 68B(1D) must be maintained by a Department, agency or authority of the Commonwealth, or of a State or Territory. This would include any record, database or register maintained by an Australian federal government department or portfolio agency. New subsection 68B(1D) is intended to ensure the accuracy and reliability of the information on which the court relies.

330. New paragraph 68B(1D)(c) would require that any record, database or register inspected by the court for the purposes of satisfying itself of the existence of a family violence order under subsection 68B(1D) must be, or can reasonably be made available to the court. This provision is intended to clarify that the court is not expected to inspect records, databases or registers to which they do not have direct access or to which obtaining access would be unreasonably burdensome.

331. The Note under new subsection 68B(1D) would advise that the National Police Reference System, maintained by the Australian Criminal Intelligence Commission, is the database in which family violence order information is contained at the time of writing in



2021. The National Police Reference System supports the sharing of State and Territory family violence order information across jurisdictions under the National Domestic Violence Order Scheme. The National Police Reference System enables Australian police agencies to share essential policing information with other police agencies. It is specifically designed to equip operational police, anywhere in the country, with the knowledge they need to make on-the-spot decisions when dealing with persons of interest. It provides key reference data to support police officers, investigators and analysts. Access to the National Police Reference System will be arranged for the federal family law courts which will allow these courts to access family violence order information.

332. After subsection 68B(1D), the heading ‘Court may make other injunctions’ would be inserted. This amendment would provide additional clarity about the content of paragraphs 68B(1)(c) and (d) which provide that a court can make an injunction restraining a person from entering or remaining in a place of residence, employment or education of a protected person or a specified area, and subsection 68B(2), which allows a court to make an injunction under section 68B by interlocutory orders or otherwise, in any case in which it appears to the court to be just or convenient to do so, outside of proceedings under Part VII for an injunction in relation to a child.

#### **Item 19 – Before subsection 68B(3)**

333. Item 19 would insert the heading ‘Terms and conditions’ before subsection 68B(3). This amendment would provide additional clarity about the content of subsection 68B(3) which provides that an injunction under section 68B may be granted unconditionally or on such terms and conditions as the court considers appropriate.

#### **Item 20 – At the end of section 68B**

334. Item 20 would insert the heading ‘Validity not affected’ at the end of section 68B, and below it new subsection 68B(4). The heading would provide additional clarity about the content of new subsection 68B(4).

335. New subsection 68B(4) would provide that failure to comply with subsections 68B(1A), (1B), (1C) or (1D) does not affect the validity of the injunction. This is because the obligations set out in subsections 68B(1A), (1B), (1C) and (1D) are administrative in nature. New subsection 68B(4) recognises that it is undesirable that administrative failures should invalidate an injunction issued by the court otherwise in accordance with the law.

#### **Item 21 – Section 68C**

336. Item 21 would repeal section 68C. Existing section 68C gives police the power to arrest a person if they breach an injunction for personal protection issued under section 68B by engaging in prescribed conduct. The effect of the repeal of this provision is that police would no longer be able to arrest a person in relation to a breach of a personal protection injunction under section 68B. This arrest power is not currently utilised in practice, because personal protection injunctions are not issued in a format that is compatible with police information sharing systems.

337. The Bill would create federal family violence orders under Division 9A of Part VII, which, if breached, can be criminally enforced. Federal family violence orders would offer stronger protections for people experiencing family violence than personal protection

injunctions. Currently, to enforce a family law personal protection injunction under paragraphs 68B(1)(a) and (b), the protected person must bring a private action against the offender in a family law court.

338. With the repeal of section 68C, policing agencies would not have a role to play in the enforcement of personal protection injunctions under section 68B. The onus would remain on the protected person to initiate civil proceedings in a family law court to have a personal protection injunction enforced. Civil penalties, under Division 13A of Part VII of the Family Law Act for injunctions in relation to children may include fines, good behaviour bonds or gaol time.

339. The power for police to arrest a person for breaching a federal family violence order would be contained in the general provisions of the Crimes Act. In particular, Division 4 of the Crimes Act sets out the law relating to arrests.

340. Section 3W of the Crimes Act gives police officers the power to arrest a person, with or without warrant, for an offence if the officer believes on reasonable grounds that the person has committed or is committing an offence. Section 23C of the Crimes Act provides that a person arrested for Commonwealth offences must be released within the investigation period, or, if they are not released, they must be brought before a judicial officer within the investigation period, or as soon as practicable at the end of that period.

341. Recognising federal family violence orders on the National Domestic Violence Order Scheme would result in these orders being treated as a local order in the state or territory in which the breach occurs. This means that the law of the State or Territory in which the breach occurred can govern the arrest of the person, among other enforcement matters.

## **Item 22 – Division 11 of Part VII (heading)**

342. Item 22 would repeal the heading and substitute it with ‘Division 11 – Relationship with family violence orders made under State and Territory laws’. This amendment would provide additional clarity about the purpose of the Division.

## **Item 23 – Section 68N**

343. Item 23 would repeal existing section 68N, which provides for the purposes of Division 11 of Part VII, and would substitute this provision with new section 68N. New section 68N would set out a list of matters with which Division 11 deals and its purposes.

### **Subdivision A – What this Division does**

#### **New section 68N – What this Division does**

344. New paragraph 68N(1)(a) would provide that Division 11 deals with the relationship between new Division 9A, which addresses federal family violence orders in relation to children, and other laws. The other laws would refer to laws of the States and Territories that allow for the issue of family violence orders.

345. New paragraph 68N(1)(b) would provide that Division 11 deals with the relationship between existing Division 9, which addresses injunctions in relation to children, and other laws. The other laws would refer to laws of the States and Territories that allow for the issue of family violence orders.

346. New paragraph 68N(1)(c) would clarify that Division 11 would include provisions dealing with the concurrent operation of new Division 9A and existing Division 9 with prescribed State and Territory laws. These provisions would be located in new Subdivision B.

347. New paragraph 68N(1)(d) would clarify that Division 11 would include provisions dealing with the relationship between federal family violence orders made under Part VII and family violence orders. These provisions would be located in new Subdivision C.

348. New paragraph 68N(1)(e) would clarify that Division 11 would include provisions dealing with the relationship between injunctions granted under Part VII or under certain other provisions of this Act (which would include section 114 as amended by this Bill) that provide for personal protection (other than federal family violence orders) and family violence orders. These provisions would be located in new Subdivision D.

349. New paragraph 68N(1)(f) would clarify that Division 11 would include provisions dealing with the relationship between orders and injunctions made or granted under Part VII or under certain other provisions of this Act that provide for a child to spend time with a person, or require or authorise a person to spend time with a child – this would include but would not be limited to parenting orders and certain injunctions issued under sections 68B or 114 – and family violence orders. These provisions would be located in new Subdivision D.

350. New paragraph 68N(2)(a) would provide one of the purposes of Division 11 is to resolve inconsistencies between federal family violence orders made under Part VII – which refers to federal family violence orders issued under new section 68AC – and family violence orders. Provisions addressing this issue would be located in new Subdivision C.

351. New paragraph 68N(2)(b) would provide one of the purposes of Division 11 is to resolve inconsistencies between injunctions granted under Part VII and other parts of the Family Law Act that provide for personal protection (other than federal family violence orders) – this would include injunctions issued under paragraphs 68B(1)(a) and (b) and subsection 114(1) as amended – and family violence orders. Provisions addressing this issue would be located in new Subdivision D.

352. New paragraph 68N(2)(c) would provide one of the purposes of Division 11 is to resolve inconsistencies between orders, injunctions and arrangements made or granted under the Family Law Act that provide for a child to spend time with a person, or require or authorise a person to spend time with a child – this would include but would not be limited to parenting orders and certain injunctions issued under sections 68B or 114 – and family violence orders. Provisions addressing this issue would be located in new Subdivision D.

353. New paragraph 68N(2)(d) would provide one of the purposes of Division 11 is to ensure that orders, injunctions and arrangements made under the Family Law Act that provide for a child to spend time with a person – this would include but would not be limited to parenting orders and certain injunctions issued under existing sections 68B or 114 – do not expose people to family violence. Provisions addressing this issue would be located in new Subdivision D.

354. New paragraph 68N(2)(e) would provide one of the purposes of Division 11 is to achieve the objects and principles in section 60B. The overarching objective in section 60B is to ensure that the best interests of the child are met. The principles relate to the rights of children to know and be cared for by their parents, spend time and communicate regularly

with both parents and other significant adults and enjoy their culture; and the responsibilities of parents to jointly share duties concerning the care, welfare and development of their children and agree about the future parenting of their children.

#### **Item 24 – After section 68N**

355. Item 24 would insert after section 68N, new Subdivisions B, C and D, which would respectively address the concurrent operation of laws, and the relationship between family violence orders and federal family violence orders.

#### **Subdivision B – Concurrent operation of laws**

##### **New section 68NA – Concurrent operation of certain State and Territory Laws**

356. Subdivision B would contain new section 68NA, which would provide for the concurrent operation of certain State and Territory laws with federal family violence orders and injunctions other than for personal protection.

##### *State or Territory laws and federal family violence orders*

357. New subsection 68NA(1) would provide that Division 9A, establishing federal family violence orders, does not intend to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with that Division and is prescribed by the regulations for the purposes of this paragraph. Section 68NA reproduces the effect of existing subsection 114AB(1).

358. The introduction of this subsection would reinforce that the Commonwealth does not seek to limit the ability for a validly made State or Territory law, and any order made thereunder, to operate in conjunction with Division 9A and any order made thereunder, to the extent that they are not directly inconsistent.

359. All States and Territories have enacted legislation enabling their jurisdictions to issue family violence orders. A family violence order is a civil order, issued by the relevant State or Territory to protect people in domestic and family violence situations by prohibiting a person from committing certain behaviours. A breach of these orders is a criminal offence. It is intended that the State and Territory laws to be prescribed under new paragraph 68NA(1)(b) would be the laws under which family violence orders are issuable.

360. The introduction of federal family violence orders would supplement the existing State and Territory system. It is critical that persons seeking protection from family violence are able to access enforceable protection orders in whichever jurisdiction they are in. Federal family violence orders would be an option for persons in the family law system.

361. Paragraph 68NA(1)(a) would clarify that it is intended that, provided that the State and Territory legislation allowing for the issue of family violence and other orders can operate concurrently with Division 9A, both pieces of legislation would be valid and enforceable. To the extent that a law of a State or Territory is not able to operate concurrently with Division 9A because provisions are directly inconsistent, section 109 of the Constitution would operate to invalidate the State or Territory law to the extent of that inconsistency.

362. This Bill seeks to safeguard against persons having both a family violence order and federal family violence order in force at the same time in relation to the same matter. New

paragraph 68AC(6)(c) provides that the court must not make the order unless it is satisfied that there is no family violence order in force for the protection of the protected person. There may be circumstances however, in which an individual does have both a family violence order and a federal family violence order in force at the same time. This would include situations in which the court fails to comply with the requirements in new paragraph 68AC(6)(c), which in accordance with new subsection 68AC(14) would not affect the validity of the federal family violence order or circumstances in which a person who has a federal family violence order subsequently obtains a family violence order.

363. Paragraph 68NA(1)(a) would clarify that it is intended that in circumstances of this nature, provided that the family violence order and federal family violence order can operate concurrently, both orders would be valid and enforceable. To the extent that an order made under the law of a State or Territory is not able to operate concurrently with an order issued under Division 9A because the terms of those orders are directly inconsistent, section 109 of the Constitution would operate to invalidate the State or Territory order to the extent of that inconsistency. New section 68ND would state this explicitly.

364. Prescribing State and Territory laws in regulations under paragraph 68NA(1)(b) is intended to make clear the Government's intention that Division 9A and any orders made thereunder are to operate concurrently with the prescribed State and Territory laws and orders made thereunder, to the extent that this is possible. The absence of any piece of State or Territory legislation allowing for the issue of family violence orders from the regulations under paragraph 68NA(1)(b) should not be interpreted as an attempt by the Commonwealth to limit the operation of that legislation beyond the limits imposed by section 109 of the Constitution.

365. Nothing in subsection 68NA(1) intends to restrict the jurisdiction of the States and Territories to make laws concerning family violence orders.

366. The Note under subsection 68NA(1) would direct readers to section 68ND which clarifies that to the extent that a law of a State or Territory is not able to operate concurrently with Division 9A because provisions are directly inconsistent, section 109 of the Constitution would operate to invalidate the state law to the extent of that inconsistency.

*State or Territory laws and other orders and injunctions made under this Part or certain other provisions of this Act*

367. New subsection 68NA(2) would provide that Division 9, dealing with injunctions in relation to children other than federal family violence orders, does not intend to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with that Division and is prescribed by the regulations for the purposes of this paragraph. Section 68NA reproduces the effect of existing subsection 114AB(1).

368. The introduction of this subsection would reinforce that the Commonwealth does not seek to limit the ability for a validly made State or Territory law, and any order made thereunder, to operate in conjunction with Division 9 and any order made thereunder, to the extent that they are not directly inconsistent.

369. All States and Territories have enacted legislation enabling their jurisdictions to issue family violence orders. A family violence order is a civil order, issued by the relevant State or Territory to protect people in domestic and family violence situations by prohibiting a person

from committing certain behaviours. A breach of these orders is a criminal offence. It is intended that the State and Territory laws to be prescribed under paragraph 68NA(2)(b) would be the laws under which family violence orders are issuable.

370. Paragraph 68NA(2)(a) would clarify that it is intended that provided that the State and Territory legislation allowing for the issue of family violence and other orders can operate concurrently with Division 9, both pieces of legislation would be valid and enforceable.

371. Under Division 9, as amended by this Bill, a court can issue injunctions in relation to children for purposes other than personal protection. Such injunctions may restrain a person from entering or remaining in a specified area or restrain a person from entering or remaining in a place of residence, employment or education of prescribed persons.

372. This Bill seeks to safeguard against persons having both an injunction under Division 9 and a family violence order in force at the same time in relation to the same matter (see subsections 68B(1B) and 68B(1C)). There may be circumstances however in which an individual has an order issued under Division 9 and a family violence order in force at the same time. This would include circumstances in which a person who has a Division 9 order subsequently obtains a family violence order.

373. Paragraph 68NA(2)(a) would clarify that it is intended that in circumstances of this nature, provided that the family violence order and Division 9 injunction can operate concurrently, both orders would be valid and enforceable. To the extent that an order made under the law of a State or Territory is not able to operate concurrently with an order issued under Division 9 because the terms of those orders are directly inconsistent, section 109 of the Constitution would operate to invalidate the State or Territory order to the extent of that inconsistency.

374. Prescribing State and Territory laws in regulations under paragraph 68NA(2)(b) is intended to make clear the Government's intention that Division 9 and any orders made thereunder are to operate concurrently with the prescribed State or Territory laws and orders made thereunder, to the extent that this is possible. The absence of any piece of State or Territory legislation allowing for the issue of family violence orders from the regulations under paragraph 68NA(2)(b) should not be interpreted as an attempt by the Commonwealth to limit the operation of that legislation beyond the limits imposed by section 109 of the Constitution.

375. Nothing in subsection 68NA(2) intends to restrict the jurisdiction of the States and Territories to make laws concerning family violence orders.

376. The Note under subsection 68NA(2) would clarify that to the extent that a law of a State or Territory is not able to operate concurrently with Division 9 of Part VII because provisions are directly inconsistent, section 109 of the Constitution would operate to invalidate the State or Territory law to the extent of that inconsistency. The Note would direct the reader to new section 68PB which addresses the situation in which a personal protection injunction issued under Division 9 is inconsistent with a family violence order.

#### **Subdivision C – Relationship between federal family violence orders and family violence orders**

## **New section 68NB - State or Territory court in proceedings for family violence order may revoke or suspend federal family violence order**

377. New section 68NB would allow State and Territory courts with jurisdiction under Part VII of the Family Law Act, to revoke or suspend a federal family violence order in proceedings to make or vary a State or Territory family violence order. This provision is intended to operate similarly to existing section 68R, which allows State and Territory courts to vary, revoke or suspend certain orders issued under Part VII or section 114 of the Family Law Act when the court is issuing or varying a family violence order. Unlike section 68R, new section 68NB would apply only to federal family violence orders, and would not permit State and Territory courts to vary a federal family violence order.

### *Application of this section*

378. New paragraph 68NB(1)(a) would limit the application of 68NB to proceedings in a State or Territory court to make or vary a family violence order that is for the protection of a person (the first person) and is directed against another person (the second person). This paragraph is designed to be read in conjunction with new subsections 68NB(2) and 68NB(4) which would require that the persons to be protected by the family violence order issued or varied by the State or Territory court be the same persons that are currently protected by the federal family violence order and the person against whom the family violence order is directed be the same person against whom the federal family violence order is directed.

379. Relevant family violence orders for the purposes of new paragraph 68NB(1)(a) are orders that fall within the definition of family violence order, in subsection 4(1) of the Family Law Act, including interim orders.

380. New paragraph 68NB(1)(b) would limit the application of 68NB to proceedings in a State or Territory court that has jurisdiction under Part VII of the Family Law Act. This would include a State or Territory court of summary jurisdiction which would have jurisdiction under Part VII by reason of existing section 69J, and the Family Court of Western Australia which would have jurisdiction under Part VII by reason of existing section 41 of the Family Law Act.

### *Power of court to revoke or suspend federal family violence orders*

381. New subsection 68NB(2) would give the State and Territory courts described in paragraph 68NB(1)(b), in matters of the kind described in paragraph 68NB(1)(a), power to revoke or suspend a federal family violence order made under Division 9A. This provision specifically notes that the courts' power is subject to new subsections 68NB(3) to (5) which would respectively provide that a court must not revoke a federal family violence order when it is making or varying an interim family violence order, and the court must take into account certain matters when making a decision to revoke or suspend a federal family violence order.

382. New paragraph 68NB(2)(a) would restrict the power of a State or Territory court to revoke or suspend a federal family violence order to matters in which persons to be protected by the family violence order issued or varied by the State or Territory court are the same persons that are protected by the federal family violence order.

383. New paragraph 68NB(2)(b) would restrict the power of a State or Territory court to revoke or suspend a federal family violence order to matters in which the person against

whom the family violence order that is issued or varied by the State or Territory court is directed is the same person against whom the federal family violence order is directed.

384. The rationale for new subsection 68NB(2) is that persons who have been issued with a federal family violence order may, at a later date, seek alternative or additional protection orders in a State or Territory court. This may include, but would not be limited to emergency situations or in the course of federal family violence order breach proceedings. State and Territory courts would not have jurisdiction to issue or amend a federal family violence order, but may assist the parties before them by issuing a family violence order, under local laws. A family violence order however (or any condition thereof) that is inconsistent with a federal family violence order (or any condition thereof) would be invalid to the extent of the inconsistency. This would mean in many cases that a family violence order would lack utility. It would also create enforcement challenges for police, particularly where multiple orders would need to be compared in order for a police officer to determine which conditions of which orders they may lawfully enforce. For this reason, together with the requirement in new paragraph 68AC(6)(c) that a court must not issue a federal family violence order where there is a family violence order in force in relation to the same matter, new subsection 68NB(2) is intended to safeguard against circumstances arising in which a person has both a federal family violence order and a family violence order directed against the same individual, unless it is clear that multiple orders can operate concurrently.

385. A revocation of a federal family violence order, for the purposes of this section, is taken to be a complete repeal of the federal family violence order. The terms of the order would have no further effect and would not be enforceable. A revoked federal family violence order could not come back into force. A suspension of a federal family violence order however, would be time-limited and could not be ordered for an indefinite period.

386. Although new subsection 68NB(2) would provide State and Territory courts with the power to revoke or suspend a federal family violence order, it does not purport to impose an obligation on these courts to do so when issuing a family violence order. Subsection 68NB(2) is not intended to limit a State or Territory court's ability to issue a family violence order that can operate concurrently with an existing federal family violence order. Where a State or Territory court is issuing or varying a family violence order that would be inconsistent with a federal family violence order, it is intended that the court would revoke or suspend the federal family violence order in accordance with this provision.

387. New subsection 68NB(2) would not give a State or Territory court power to vary a federal family violence order. State and Territory courts and police have consistently advised that it is preferable that a court would replace a federal family violence order with a family violence order in circumstances where new protections are required. This is due both to the relative familiarity that State and Territory agencies have with local family violence orders, and the practical challenges that varying federal family violence orders would have created for State and Territory courts in terms of ensuring that varied orders are served on the parties and are made in the standard form federal family violence order template, which State and Territory court IT systems would not be able to readily accommodate.

388. New paragraph 68NB(3)(a) would provide that the State or Territory court may suspend a federal family violence order, only when it is making or varying an interim family violence order. The implication is that the court cannot suspend a federal family violence order when it is making or varying a final family violence order. The rationale for new paragraph 68NB(3)(a) is to avoid circumstances in which the federal family violence order is



suspended, a final family violence order is made, but the federal family violence order recommences during the period of time the final family violence order is in force. This would result in an overlap of orders and section 109 of the Constitution would operate to invalidate the State or Territory order to the extent of that inconsistency. This would create challenges for police officers seeking to enforce the orders. It is intended that where a federal family violence order is suspended, the order would cease to be suspended at the time the interim family violence order expires (see new subsection 68NB(7)).

389. New paragraph 68NB(3)(b) would provide that the State or Territory court may revoke a federal family violence order, only when it is making or varying a final family violence order. The implication is that the court cannot revoke a federal family violence order when it is making or varying an interim family violence order. The rationale for new paragraph 68NB(3)(b) is to avoid circumstances in which an interim family violence order is issued, the pre-existing federal family violence order is revoked, and the interim family violence order subsequently expires and is not replaced with a final family violence order. This would leave a gap in protection for persons previously covered by the federal family violence order.

390. New subsection 68NB(4) would provide that the State or Territory court may revoke or suspend a federal family violence order only if it also makes or varies a family violence order. It would not be sufficient if a family violence order or variation thereof has merely been applied for. Relevant family violence orders for the purposes of new subsection 68NB(4) are orders that fall within the definition of family violence order, in subsection 4(1) of the Family Law Act, including interim orders.

391. New paragraph 68NB(4)(a) would provide that the State or Territory court may revoke or suspend a federal family violence order only if the family violence order that the court makes or varies is for the personal protection of all protected persons in relation to the federal family violence order. This provision recognises that there may be multiple protected persons in relation to a federal family violence order. It would be undesirable for a State or Territory court to be able to revoke or suspend a federal family violence order when issuing or varying a family violence order that is only for the protection of one or some of the individuals protected by the federal family violence order, as this would create a gap in protection for the other protected persons.

392. New paragraph 68NB(4)(b) would provide that the State and Territory court may revoke or suspend a federal family violence order only if the family violence order that the court makes or varies is directed against the same person against whom the federal family violence order is directed.

393. Any decision regarding the making or variation of a family violence order would be made under State or Territory legislation. In some States and Territories, local legislation may not allow a court to issue a family violence order for the protection of certain categories of persons who may be protected persons under a federal family violence order. If a State or Territory court is unable, or unwilling, within the applicable State or Territory legislative framework, to issue a family violence order that protects all of the individuals protected by the federal family violence order, new subsection 68NB(4) would prohibit the State or Territory court from revoking or suspending the federal family violence order. In these circumstances, it would be open to the State or Territory court to issue a family violence order that can operate concurrently with the federal family violence order. It would also be

open to protected persons under the federal family violence order to apply to a prescribed court to have the federal family violence order varied under new section 68AI.

*Matters court must take into account*

394. New subsection 68NB(5) would set out the matters that a State or Territory court must take into consideration when exercising the power to revoke or suspend a federal family violence order under new subsection 68NB(2). It is not intended that the requirements in subsection 68NB(5) would apply when the court exercises jurisdiction under State or Territory law to issue or vary a family violence order. The requirements in subsection 68NB(5) would only apply when the court is exercising power under the Family Law Act to revoke or suspend a federal family violence order. This is the case notwithstanding that the court's power to revoke or suspend a federal family violence order would be contingent on the court issuing or varying a family violence order and the decisions are likely to be made in tandem.

395. New paragraph 68NB(5)(a) would provide that, when exercising power to revoke or suspend a federal family violence order under new subsection 68NB(2), the court must have regard to whether the federal family violence order is adequate or is appropriate for the welfare of the child. It is intended that this provision is read together with new paragraph 68AC(6)(a). It is intended that if the court considers that the federal family violence order is adequate to provide personal protection of protected persons from family violence, and is appropriate for the welfare of the child in the current circumstances, the court would not revoke or suspend the order. If the court considers that the order is inadequate or is inappropriate for the welfare of the child, for example, because the terms of the order are insufficiently stringent, do not expressly prohibit particular violent conduct to which the protected person is vulnerable, or the order is due to expire imminently, it is intended that the court may revoke or suspend the order. It is intended that the court would consider the adequacy and appropriateness of the order in light of all the circumstances of the case.

396. New paragraph 68NB(5)(b) would provide that, when exercising its power to revoke or suspend a federal family violence order under new subsection 68NB(2), the court must have regard to the purposes of Division 11. It is intended that the court would have particular regard to the purposes set out in paragraphs 68N(2)(a) and (d), noting that paragraphs 68N(2)(b) and (c) relate to orders other than federal family violence orders.

*Reasons for decision*

397. New subsection 68NB(6) would provide that a State or Territory court must give reasons for a decision to revoke or suspend a federal family violence order as soon as practicable after making the decision. Adequate reasons are required by the implied guarantee of procedural due process in the exercise of judicial power. The amendment would allow the court to give reasons for its decisions orally or in writing, provided that it complied with the obligation to ensure that those reasons are adequate. A State or Territory court would not be required to give reasons for a decision not to do so.

*When revocation or suspension comes into force*

398. New subsection 68NB(7) would provide that a revocation or suspension of a federal family violence order made under section 68NB would come into force at the later of the time when the State or Territory court revokes or suspends the order (paragraph 68NB(7)(a)) and

the time when the family violence order, or variation of the family violence order comes into force and is enforceable (paragraph 68NB(7)(b)). The precise point in time at which the relevant State or Territory order comes into force would be determined by State or Territory legislation. In all States and Territories, the person against whom the family violence order is directed must have been served with the order in order for the order to become enforceable. New subsection 68NB(7) is intended to ensure that a federal family violence order that has been revoked or suspended would continue to operate until the State or Territory order with which it is being replaced can be enforced. This would ensure that there is no gap in protection for protected persons.

*When suspension ceases to be in force*

399. New subsection 68NB(8) would provide that if the State or Territory court suspends a federal family violence order, the suspension ceases to be in force when the interim family violence order ceases to have effect. The rationale for new subsection 68NB(8) is to avoid circumstances in which an interim family violence order is issued, the pre-existing federal family violence order is suspended, the interim family violence order subsequently expires and the federal family violence order remains suspended. This would leave a gap in protection for persons previously covered by the federal family violence order. New subsection 68NB(8) is also intended to avoid circumstances in which a suspended federal family violence order ceases to be suspended before an interim family violence order expires, leaving the parties with two potentially inconsistent orders in place at the same time.

*Registration of revocation or suspension*

400. New subsection 68NB(9) would provide that the regulations may require a copy of the State or Territory court's decision to revoke or suspend a federal family violence order to be registered in accordance with the regulations. The rationale for this provision is to ensure that family law courts are made aware of decisions by State and Territory courts to revoke and suspend federal family violence orders in the course of making or varying family violence orders.

401. Arrangements are also being developed, outside of the legislative framework, under which the family law courts would have a role in ensuring that information about federal family violence orders, including that they have been revoked or suspended, is accessible to police attending breach incidents. It would not be the responsibility of the State or Territory court to do this. Accordingly, it would be critical that State and Territory courts are required to inform the family law courts about any revocations or suspensions made.

402. It is intended that the regulations under this subsection would be modelled on existing regulation 12CC of the Family Law Regulations. They would require the State or Territory court to register the revocation or suspension as soon as practicable after it comes into force, with the court that made the federal family violence order in the first instance.

403. Failure on the part of the court to comply with the requirement in subsection 68NB(9) would not affect the validity of the court's decision to revoke or suspend a federal family violence order.

**New section 68NC - Application of Act etc. when exercising section 68NB power**

404. New section 68NC would set out a number of requirements and provisions of the Family Law Act and subordinate legislation thereunder that would not apply to a State or Territory court exercising the power to revoke or suspend a federal family violence order under new section 68NB. This provision is designed to simplify the process for a State or Territory court exercising jurisdiction under section 68NB, noting that any decision to revoke or suspend a federal family violence order would be ancillary to a decision to issue or vary a family violence order which would be the primary matter at hand.

405. New paragraph 68NC(a) would clarify that the requirements in existing section 69N would not apply to a State or Territory court exercising the power to revoke or suspend a federal family violence order under new section 68NB. Section 68N requires that proceedings for an order under Part VII of the Family Law Act must be transferred from a court of summary jurisdiction to a family law court unless both parties consent to the exercise of family law jurisdiction by that State or Territory court. The implication of new paragraph 68NC(a) is that the consent of both parties would not be required in order for a State or Territory court to exercise jurisdiction under new section 68NB.

406. New paragraph 68NC(b) would provide that any provision that would otherwise make the best interests of the child the paramount consideration, would not apply to a court exercising the power to revoke or suspend a federal family violence order under new section 68NB. The provision is intended to clarify that the best interests of the child is not the paramount consideration in decisions to revoke or suspend a federal family violence order under section 68NB. The best interests of the child would be a relevant matter that the court would need to take into consideration under new subsection 68NB(2), which would require the court to have regard to the purposes of Division 11. New paragraph 68N(2)(e) would provide that one of the purposes of Division 11 is to achieve the objectives and principles in section 60B, which includes ensuring that the best interests of the child are met.

407. New paragraph 68NC(c) would set out a number of requirements and provisions of the Family Law Act and subordinate legislation thereunder that would not apply to a State or Territory court exercising the power to revoke or suspend a federal family violence order under new section 68NB. This provision is designed to simplify the process for a State or Territory court exercising jurisdiction under section 68NB, noting that any decision to revoke or suspend a federal family violence order would be ancillary to a decision to issue or vary a family violence order which would be the primary matter at hand.

408. Existing subsection 123(1) gives judges the power to make Rules of Court to be followed in the Family Court and any other courts exercising jurisdiction under the Family Law Act. Therefore, when State and Territory courts of summary jurisdiction are exercising jurisdiction under the Family Law Act, they are generally required to follow the Family Law Rules made under section 123. New paragraph 68NC(c) would allow a State or Territory court exercising jurisdiction under section 68NB to utilise State or Territory court rules. Given that State and Territory courts would be applying local rules of court when exercising jurisdiction to make or vary a family violence order, it would be unreasonable to require these courts to apply a different set of rules when making an ancillary decision to revoke or suspend a federal family violence order.

**New section 68ND - Family violence order that is inconsistent with federal family violence order**

409. This Bill seeks to safeguard against persons having both a family violence order and federal family violence order in force at the same time in relation to the same matter. New paragraph 68AC(6)(c) provides that the court must not make the order unless it is satisfied that there is no family violence order in force for the protection of the protected person. There may be circumstances however in which an individual does have both a family violence order and a federal family violence order in force at the same time. This would include situations in which the court fails to comply with the requirements in new paragraph 68AC(6)(c), which in accordance with new subsection 68AC(14) would not affect the validity of the federal family violence order, or circumstances in which a person who has a federal family violence order subsequently obtains a family violence order.

410. New section 68ND would clarify that to the extent that a family violence order is not able to operate concurrently with a federal family violence order made under Division 9A because the terms of those orders are directly inconsistent, section 109 of the Constitution would operate to invalidate the State or Territory order to the extent of that inconsistency. There would be a direct inconsistency if it would not be possible to comply with a condition of the family violence order without breaching a condition of the federal family violence order, or vice versa.

411. Where some of the terms of a family violence order are directly inconsistent with the terms of a federal family violence order, but other terms are not directly inconsistent, the family violence order would continue to be valid to the extent that it is not inconsistent. The conditions of the family violence order that are not inconsistent with the federal family violence order would remain enforceable.

#### **Subdivision D – Relationship between orders and injunctions under this Act (other than federal family violence orders) and family violence orders**

412. The Bill would create new Subdivision D - Relationship between orders and injunctions under this Act (other than federal family violence orders) and family violence orders.

#### **New section 68PA – Application of this Subdivision**

413. New section 68PA would provide that Subdivision D does not apply to federal family violence orders.

414. The Note under new section 68PA would highlight Subdivision C of Division 11 which deals with the relationship between federal family violence orders made Part VII and family violence orders.

#### **New section 68PB - Family violence order that is inconsistent with injunction for personal protection (other than federal family violence orders)**

415. This Bill seeks to safeguard against persons having a family violence order and a family law personal protection injunction in force at the same time that cannot be simultaneously complied with. New subsection 68B(1C) for example provides that the court must not grant such an injunction unless it is satisfied that the injunction is not inconsistent with a family violence order that is in force between the same parties. There may be circumstances however in which an individual does have both a family violence order and a personal protection injunction in force at the same time. This would include situations in

which the court fails to comply with the requirements in new subsection 68B(1C), which in accordance with new subsection 68B(4) would not affect the validity of the personal protection injunction order, or circumstances in which a person who has a personal protection injunction subsequently obtains a family violence order.

416. New section 68PB would clarify that to the extent that a family violence order is not able to operate concurrently with a personal protection injunction order made under Division 9 because the terms of those orders are directly inconsistent, section 109 of the Constitution would operate to invalidate the State order to the extent of that inconsistency. There would be a direct inconsistency if it would not be possible to comply with a condition of the family violence order without breaching a condition of the personal protection injunction, or vice versa.

417. Where some of the terms of a family violence order are directly inconsistent with the terms of a personal protection injunction, but other terms are not directly inconsistent, the family violence order would continue to be valid to the extent that it is not inconsistent. The conditions of the family violence order that are not inconsistent with the personal protection injunction would remain enforceable.

#### **Item 25 – Subsection 68P(1)**

418. Item 25 would amend subsection 68P(1) to make the application of section 68P subject to new subsection 68P(1A).

#### **Item 26 – After subsection 68P(1)**

419. Item 26 would insert new subsection 68P(1A) after subsection 68P(1). New subsection 68P(1A) would provide that section 68P does not apply in relation to an injunction issued under section 68B or 114 that expressly or impliedly requires or authorises a person to spend time with a child, if the injunction provides for the personal protection of a person. Section 68P sets out obligations on a court when it issues a family law order that is inconsistent with a State or Territory family violence order. As new subsections 68B(1C) and 114(1C) would expressly prohibit a court from issuing a personal protection injunction unless it is satisfied that the injunction is not inconsistent with a family violence order, it would not be appropriate for this provision to apply to orders of this nature.

#### **Item 27 – Before subsection 68Q(1)**

420. Item 27 would insert new subsection 68Q(1A) before subsection 68Q(1). New subsection 68Q(1A) would provide that section 68Q does not apply in relation to an order or injunction under section 68B or 114 that expressly or impliedly requires or authorises a person to spend time with a child, if the injunction provides for the personal protection of a person. Section 68Q governs the relationship between such a family law order and an inconsistent family violence order. As new subsections 68B(1C) and 114(1C) would expressly prohibit a court from issuing a personal protection injunction unless it is satisfied that the injunction is not inconsistent with a family violence order, it would not be appropriate for this provision to apply to orders of this nature.

#### **Item 28 – At the end of subsection 70NAA(1)**

421. Item 28 would amend subsection 70NAA(1) by adding to the end of the subsection the words ‘(other than federal family violence orders)’.

422. Item 28 would have the effect of clarifying that Division 13A of Part VII, which provides the framework for civil remedies for failure to comply with orders that affect children, does not apply to federal family violence orders. There are a range of reasons why bringing a civil matter against a perpetrator of family violence can be difficult for the victim and, where they do initiate contravention proceedings, can lead to an escalation in conflict between parties to the order. The exclusion of federal family violence orders from Division 13A would reinforce the fact that family violence is not a private matter, but a criminal offence of public concern. Federal family violence orders would be enforceable by criminal mechanisms (see new section 68AG at item 13); removing the onus on victims to bring contravention proceedings in a family law court in relation to orders of this nature.

#### **Item 29 – Section 70NAB**

423. Item 29 would amend section 70NAB to delete the word ‘Despite’ and replace it with ‘(1) Despite’. This amendment would make the existing text in section 70NAB subsection 70NAB(1), noting that item 30 would introduce new subsection 70NAB(2).

#### **Item 30 – At the end of section 70NAB**

424. Item 30 would insert new subsection 70NAB(2) which would provide that Division 13A of Part VII, which provides the framework for civil remedies for failure to comply with orders that affect children, does not apply to federal family violence orders. There are a range of reasons why bringing a civil matter against a perpetrator of family violence can be difficult for the victim and, where they do initiate contravention proceedings, can lead to an escalation in conflict between parties to the order. The exclusion of federal family violence orders from Division 13A would reinforce the fact that family violence is not a private matter, but a criminal offence of public concern. Federal family violence orders would be enforceable by criminal mechanisms (see new section 68AG at item 13); removing the onus on victims to bring contravention proceedings in a family law court in relation to orders of this nature.

425. Division 13A would continue to apply to orders or injunctions issued under section 68B.

#### **Item 31 – After subparagraph 102NA(1)(c)(ii)**

426. Item 31 would insert subparagraph 102NA(1)(c)(iia) which would provide that if a party (the examining party) intends to cross-examine the other party (the witness party) and there is an allegation of family violence between the parties and a federal family violence order made under sections 68AC or 113AC applies for the personal protection of either party and is directed against the other party, then subsection 102NA(2) applies. Subsection 102NA(2) provides that the examining party must not cross-examine the witness party and the cross-examination must be conducted by a legal practitioner.

427. Item 31 would have the effect of mandatorily banning cross-examination where a federal family violence order relating to the same parties is in force. Where a federal family violence order applies between parties, the court has determined that a party is in need of protection in relation to family violence, from the other party. It is therefore appropriate that the mandatory requirements apply so that the victim is protected from being personally

cross-examined by the alleged perpetrator, or from having to personally cross-examine the alleged perpetrator.

428. Procedural fairness for both parties would be ensured, as both parties may still conduct cross-examination through a legal representative.

### **Item 32 – Before Division 1 of Part XIII A**

#### **New Division 1A – Application of this Part**

429. Item 32 would insert the new heading ‘Division 1A – Application of this Part’ and a new section 112AAA ‘Application of this Part’, before Division 1 of Part XIII A. New section 112AAA would state that Part XIII A, which provides for sanctions for failing to comply with orders, and other obligations, that do not affect children, does not apply in relation to federal family violence orders.

430. There are a range of reasons why bringing a civil matter against a perpetrator of family violence can be difficult for the victim and, where they do initiate contravention proceedings, can lead to an escalation in conflict between parties to the order. The exclusion of federal family violence orders from Part XIII A would reinforce the fact that family violence is not a private matter, but a criminal offence of public concern. Federal family violence orders would be enforceable by criminal mechanisms (see new section 113AG at item 36); removing the onus on victims to bring contravention proceedings in a family law court in relation to orders of this nature. This is because new section 113AG at item 36 will make it a criminal offence for breaching a federal family violence order in relation to a party to the marriage.

### **Item 33 – Part XIV (heading)**

431. Item 33 would repeal the heading ‘Part XIV – Declarations and injunctions’ and replace it with the heading ‘Part XIV – Orders, declarations and injunctions in relation to parties to a marriage.’ The inclusion of the term ‘orders’ reflects the inclusion in this Part of the new federal family violence orders and clarifies that these orders apply in relation to parties to a marriage. This is in contrast with the new federal family violence orders in Part VII that apply in relation to children.

### **Item 34 – Before section 112A**

432. Item 34 would insert ‘Division 1– Preliminary’ into Part XIV. New Division 1 would contain section 112A and new section 113A.

### **Item 35 – After section 112A**

433. Item 35 would insert new section 113A after section 112A. New section 113A, which would apply in proceedings under Divisions 2 and 3 of Part XIV, is modelled on existing section 60CF which applies in proceedings under Part VII. It is intended, together with new subsections 113AC(5) and 114(1D) to ensure that the court is provided with the information required to fulfil its obligations under new paragraph 113AC(4)(c) and subsection 114(1C). It is also intended to facilitate the sharing of other information with the court that may assist it to properly assess the full circumstances of a case in which an order or injunction for personal protection is being sought.



434. New subsection 113A(1) would apply in proceedings under Division 2 of Part XIV – that is, proceedings for a federal family violence order in relation to parties to a marriage, or under Division 3 of Part XIV – that is, proceedings for an order, declaration or injunction in relation to parties to a marriage (other than federal family violence orders). It would require a party to a marriage (the first party), if the first party is aware that there is a family violence order in force that applies to either party, to inform the court of the family violence order. This provision would apply where the family violence order of which the first party is aware is in force for the protection of one party to the marriage and directed against the other. It would also apply where the family violence order of which the first party is aware is in force between one of the parties to the marriage and a person who is not a party to the marriage. In the latter case, this provision would apply whether the party to the marriage is the protected person under the family violence order or the person against whom the order is directed.

435. A family violence order is defined in subsection 4(1) of the Family Law Act as an order made under a prescribed law of a State or Territory to protect a person from family violence, and includes an interim order.

436. New subsection 113A(2) would apply in proceedings under Division 2 of Part XIV – that is, proceedings for a federal family violence order in relation to parties to a marriage, or under Division 3 of Part XIV – that is, proceedings for an order, declaration or injunction in relation to parties to a marriage (other than federal family violence orders). It would allow a person who is not a party to the marriage to which the proceedings relate (the first person), if the first person is aware that there is a family violence order in force that applies to either party to the marriage, to inform the court of the family violence order. This provision would apply where the family violence order of which the first person is aware is in force for the protection of one party to the marriage and directed against the other. It would also apply where the family violence order of which the first person is aware is in force between one of the parties to the marriage and a person who is not a party to the marriage. In the latter case, this provision would apply whether the party to the marriage is the protected person under the family violence order or the person against whom the order is directed.

437. New subsection 113A(3) would provide that failure to inform the court of a family violence order in accordance with subsection 113A(1) or (2) would not affect the validity of any order made by the court, including but not limited to a federal family violence order under Division 2 or a personal protection injunction under Division 3.

### **Item 36 – Before section 113**

438. Item 36 would insert a new Division into Part XIV, *Division 2 – Federal family violence orders in relation to parties to a marriage*, before section 113.

439. New section 113AA would provide that new Division 2 of Part XIV would deal with federal family violence orders in relation to parties to a marriage.

### **New Section 113AB - Applying for federal family violence order**

440. New section 113AB would provide that, in proceedings of the kind referred to in paragraph (e) of the definition of matrimonial cause in subsection 4(1), between the parties to a marriage, either party to the marriage is eligible to apply to a listed court for a federal family violence order in relation to a party to the marriage. The Bill would define listed

courts in section 4 and they are the only courts in which federal family violence orders can be made.

441. Note 1 under new section 113AB would provide that this would include parties to a marriage in proceedings for an order or injunction in circumstances arising out of the marital relationship. It would not include parties to proceedings under a law of a State or Territory prescribed for the purposes of new paragraphs 68NA(1)(b), 68NA(2)(b), 114AB(1)(b) or 114AB(2)(b). The proceedings would need to be between the parties to the same marriage in relation to which the federal family violence order is being sought. New section 113AB would not apply to parties to a de facto relationship.

442. Under section 13B of the Family Law Act, a court exercising jurisdiction in proceedings for a divorce order or financial or Part VII proceedings instituted by a party to a subsisting marriage, must consider, from time to time, the possibility of a reconciliation between the parties to a marriage. While a reconciliation is likely to be inappropriate in family violence contexts, the Bill does not exclude section 13B from applying in proceedings for a federal family violence order. Subsection 13B(2) requires the court, before adjourning the proceedings to give the parties the opportunity to consider a reconciliation, to consider, from the evidence in the proceedings or the attitude of the parties to the marriage that there is a reasonable possibility of a reconciliation between the parties. This provision safeguards adequately against a court adjourning proceedings so parties can consider a reconciliation in circumstances in which this course of action would be contrary to the parties' wishes, potentially harmful to one or both of the parties or otherwise not feasible.

443. New subsection 113AB(2) would prohibit a person from applying for a federal family violence order where there is a family violence order in force that is for the protection of the protected person and is directed against the person against whom the federal family violence order is directed. A family violence order is defined in subsection 4(1) of the Family Law Act as an order made under a prescribed law of a State or Territory to protect a person from family violence, and includes an interim order.

444. Together with new paragraph 113AC(4)(c), new subsection 113AB(2) is intended to ensure that a federal family violence order is not made where there is already a family violence order in force that provides protection for the same protected person from the person against whom a federal family violence order is being sought.

445. If the two orders were in existence at the same time, the family violence order (or any term thereof) that is inconsistent with a federal family violence order (or any term thereof) would be invalid to the extent of the inconsistency. This would create enforcement challenges for police, particularly where multiple orders would need to be compared in order for a police officer to determine which terms of which orders they may lawfully enforce. It can also create confusion for the parties as to which terms are required to be complied with. Prohibiting persons from applying for a federal family violence order where there is already a family violence order in place between the same parties would safeguard against inconsistent orders arising, reduce confusion and reduce the risk of unlawful arrests.

446. New subsection 113AB(2) reflects the intention that federal family violence orders would be available to persons who are already before a listed court, are in need of protection, and do not have an existing State or Territory family violence order. The availability of a federal family violence order would mean that parties would not be required to initiate separate proceedings in a State or Territory court for a protection order, but could apply for a

federal family violence order in the family law court in which their other matter is already being heard. Where a party already has a family violence order in place, this rationale no longer holds.

447. The prohibition in subsection 113AB(2) would only apply where there is a family violence order in place between the same parties for whom the federal family violence order is being sought. It would not apply if the protected person is protected by a family violence order that is directed against a different respondent.

### **New Section 113AC – Court may make federal family violence order**

#### *Power of court to make order*

448. New section 113AC would provide that listed courts may make federal family violence orders in relation to parties to a marriage. The Bill would define listed courts in section 4 and they are the only courts in which federal family violence orders can be made.

449. New section 113AC would not allow the court to issue a federal family violence order for the protection of a party to a de facto relationship. This is currently the case with personal protection injunctions under existing paragraph 114(1)(a). This Bill does not seek to expand the categories of persons for whose protection federal family violence orders can be issued, beyond the categories of persons for whose protection the court can currently issue personal protection injunctions. It is intended that persons in de facto relationships, who do not fit within the categories of persons for whose protection a federal family violence order under new subsection 68AC(3) can be made, but who are in need of a court order protecting them from family violence, would seek a family violence order in a State or Territory court. It is intended that State and Territory courts remain the primary jurisdiction in which family violence protection orders are sought.

450. New section 113AC would not allow the court to issue a federal family violence order for the protection of a child of the marriage. In situations where married parents are before the court with a matter other than under Part VII of the Family Law Act, new section 68AB (item 13) would allow either party to apply for a federal family violence order under new section 68AC for the personal protection of a child of the marriage. New section 68AB would permit a party to a marriage to do this, whether or not that party was also seeking a federal family violence order under new 113AC to protect themselves against their spouse. It is desirable that federal family violence orders for the protection of a child are only issued under section new 68AC, due to the additional requirements imposed on the court when issuing orders under this provision, to ensure that the order is made for the child's welfare.

451. New subsection 113AC(1) would allow a listed court to make a federal family violence order in relation to a party to the marriage under new section 113AC. The amendment limits the classes of proceedings in which a federal family violence order can be issued to proceedings of the kind referred to in paragraph (e) of the definition of matrimonial cause in subsection 4(1), which are proceedings between parties to a marriage for a federal family violence order under section 113AC or any other order or injunction in circumstances arising out of the marital relationship, excluding proceedings under a law of a State or Territory prescribed for the purposes of the proposed new paragraphs 68NA(1)(b), 68NA(2)(b) and 114AB(1)(b) and 114AB(2)(b). The proceedings would need to be between the parties to the same marriage in relation to which the federal family violence order is being sought.

452. Federal family violence orders are intended to be available to persons who are already before a listed court with a family law matter, are in need of protection, and do not have an existing State or Territory family violence order. The availability of a federal family violence order would mean that parties would not be required to initiate separate proceedings in a State or Territory court for a protection order, but could apply for a federal family violence order in the family law court in which their other matter is already being heard. This is intended to reduce the need for parties to navigate multiple courts and systems to address their legal needs, which can create delay, confusion and prolonged exposure to risks of violence. It is intended that State and Territory courts remain the primary jurisdiction in which family violence protection orders are sought. State and Territory police and courts remain best placed to support individuals who do not have current family law proceedings on foot and/or are seeking urgent protection from family violence.

453. New subsection 113AC(1) would allow the listed courts to issue a federal family violence order at any time during the relevant matrimonial cause proceedings, subject to the requirements in new subsection 113AC(4). It would not limit a court's ability to issue a federal family violence order in matters in which it has issued another order in those proceedings.

454. New subsection 113AC(1) intentionally excludes State and Territory courts of summary jurisdiction from the list of courts that have jurisdiction to make federal family violence orders. While subsection 39(2) of the Family Law Act vests State and Territory courts of summary jurisdiction with federal jurisdiction to make orders in matrimonial causes under Family Law Act, the Bill would create an exception for federal family violence orders in relation to parties to a marriage. All State and Territory courts of summary jurisdiction have the power to issue family violence orders under State and Territory legislation. Family violence orders are a civil order, issued by the relevant State or Territory to protect people in domestic and family violence situations by prohibiting a person from committing certain behaviours. A breach of a family violence order is a criminal offence. There is no utility in State and Territory courts of summary jurisdiction issuing federal family violence orders when they have existing powers to make family violence orders, which would serve effectively the same purpose. Accordingly, with the exception of listed courts in Western Australia, the Bill would not grant State or Territory courts jurisdiction to issue federal family violence orders.

455. The Note under new subsection 113AC(1) clarifies that a federal family violence order can only be made in a listed court. Accordingly, a federal family violence order cannot be made in a State or Territory court with the exception of the Family Court of Western Australia and the Magistrates Court of Western Australia constituted by a Family Law Magistrate of Western Australia. The Note highlights that in certain circumstances, a State or Territory court may revoke or suspend a federal family violence order and it directs the reader to new section 114AC in this regard.

456. New subsection 113AC(2) would provide that the court may make a federal family violence order in relation to a party to a marriage on application under new section 113AB or on its own motion. New section 113AB would provide that an application for a federal family violence order can be made by a party to proceedings of the kind referred to in paragraph (e) of the definition of matrimonial cause, between the parties to a marriage.

457. New subsection 113AC(2) would also allow the court to make, at any stage in the proceedings and in the absence of an application, a federal family violence order. This own

motion power is intended to benefit a number of vulnerable cohorts. This may include self-represented litigants who may not be aware of the option to apply for a federal family violence order; persons who may not self-identify as a victim or potential victim of family violence due to a lack of understanding about the range of behaviours that constitute family violence; or litigants who may be unwilling or unable to apply for a federal family violence order as a result of the dynamics of power and control in their relationship with the other party or another person. Given the family law courts have significant experience in working with litigants with limited legal backgrounds, the courts are well placed to identify persons who may be in need of a federal family violence order, but due to inexperience or trauma, have not applied for one.

*Protected person and person against whom the order is directed*

458. New subsection 113AC(3) would clarify that a federal family violence order made under new section 113AC can only be made for the protection of one party to the marriage, and be directed against the other party to the marriage. Unlike federal family violence orders made under new section 68AC, a federal family violence order made under new section 113AC can only provide protection for one protected person.

459. New subsection 113AC(3) would not allow the court to issue a section 113AC federal family violence order for the protection of a child of the marriage. In situations where married parents are before the court with a matter other than under Part VII of the Family Law Act, new section 68AB (item 13) would allow either party to apply for a federal family violence order under new section 68AC for the personal protection of a child of the marriage. New section 68AB would permit a party to a marriage to do this, whether or not that party was also seeking a federal family violence order under new 113AC to protect themselves against their spouse. It is desirable that federal family violence orders for the protection of a child are only issued under section new 68AC, due to the additional requirements imposed on the court when issuing orders under this provision, to ensure that the order is made for the child's welfare.

*Matters court must be satisfied of before making order*

460. New subsection 113AC(4) would set out the statutory test for the making of a federal family violence order in relation to a party to a marriage. The effect of the provision is that the court must be satisfied of all of the matters in paragraphs 113AC(4)(a)-(c) (noting that in paragraph (b), the court is only required to be satisfied of the matters in one of subparagraphs (i)-(ii)), in relation to the protected person covered by the order. The court would not be permitted to make the order at all, if it is not satisfied of the matters in paragraphs 113AC(4)(a)-(c) in relation to the protected person.

461. New paragraph 113AC(4)(a) would provide that the court must not make a federal family violence order or provide for the personal protection of a protected person under the order unless the court considers that it is appropriate in the circumstances. It is intended that the purpose for which the order must be considered appropriate is to provide personal protection to the protected person from family violence. Whether an order is appropriate for this purpose is an objective consideration which would require the court to consider all the circumstances of the case.

462. New subparagraphs 113AC(4)(b)(i)-(ii) would establish two alternative matters of which a court must be satisfied in order to make a federal family violence order in relation to

a party to a marriage. It is only necessary that the court is satisfied of the requirements in one of these two paragraphs, on the balance of probabilities, to be able to make an order, provided that court is also satisfied of the requirements in paragraphs (a) and (c).

463. New subparagraph 113AC(4)(b)(i) would require that for the court to make an order it must be satisfied on the balance of probabilities that the protected person has been subjected to family violence. This would require the court to be satisfied on the balance of probabilities that family violence has occurred. Where the court is satisfied that the making of an order is appropriate in the circumstances, new subparagraph 113AC(4)(b)(i) would enable the court to make a federal family violence order in response to the family violence that has occurred, as a means of preventing the protected person from being subjected to further violence.

464. According to the definition of family violence in existing subsection 4AB(1) of the Family Law Act, new subparagraph 113AC(4)(b)(i) would require the court to be satisfied on the balance of probabilities that the protected person has been subjected to threatening or other behaviour that coerces or controls the protected person or causes the protected person to be fearful. The definition of family violence specifically provides that the conduct must be directed towards a member of the person's family. There are a range of behaviours that may constitute family violence, including the behaviours listed in subsection 4AB(2) of the Family Law Act. Where the protected person is exposed, but not subjected to family violence, this would not be sufficient for the purposes of new subparagraph 113AC(4)(b)(i).

465. New subparagraph 113AC(4)(b)(ii) would provide that the court must not make the order unless the court is satisfied on the balance of probabilities that there are reasonable grounds to suspect that the protected person is likely to be subjected to family violence.

466. This provision would not require the court to be satisfied that this matter is in fact likely, or to make an assessment of the degree to which it is likely. It would require the court to be satisfied that there are reasonable grounds to suspect that it is likely.

467. Where the court is satisfied that the making of an order is appropriate in the circumstances, new subparagraph 113AC(4)(b)(ii) would enable the court to make a federal family violence order as a means of preventing the protected person from being subjected to family violence before it occurs.

468. New paragraph 113AC(4)(c) would prohibit the court from making a federal family violence order unless it is satisfied that there is no family violence order in force that is for the protection of the protected person (subparagraph 113AC(4)(c)(i)) and is directed against the person against whom the federal family violence order is directed (subparagraph 113AC(4)(c)(ii)). A family violence order is defined in subsection 4(1) of the Family Law Act as an order made under a prescribed law of a State or Territory to protect a person from family violence, and includes an interim order.

469. Together with new subsection 113AB(2), new paragraph 113AC(4)(c) is intended to ensure that a federal family violence order is not made where there is already a family violence order in force that provides protection for the same protected person from the same person against whom a federal family violence order is being sought.

470. If the two orders were in existence at the same time, the family violence order (or any term thereof) that is inconsistent with a federal family violence order (or any term thereof) would be invalid to the extent of the inconsistency. This would create enforcement challenges

for police, particularly where multiple orders would need to be compared in order for a police officer to determine which terms of which orders they may lawfully enforce. It can also create confusion for the parties as to which terms are required to be complied with. Prohibiting the court from issuing a federal family violence order where a family violence order is in place between the same parties would safeguard against inconsistent orders arising, reduce confusion and reduce the risk of unlawful arrests.

471. New paragraph 113AC(4)(c) reflects the intention that federal family violence orders would be available to persons who are already before a listed court, are in need of protection, and do not have an existing State or Territory family violence order. The availability of a federal family violence order would mean that parties would not be required to initiate separate proceedings in a State or Territory court for a protection order, but could apply for a federal family violence order in the family law court in which their other matter is already being heard. Where a party already has a family violence order in place, this rationale no longer holds.

472. The prohibition in subsection paragraph 113AC(4)(c) would only apply where there is a family violence order in place between the same parties for whom the federal family violence order is being sought. It would not apply if the protected person is protected by a family violence order that is directed against a different respondent.

#### *Avoiding inconsistency with family violence orders*

473. Notwithstanding the disclosure obligations in new section 113A, in satisfying itself for the purposes of paragraph 113AC(4)(c), there would be inherent risks in the court relying on the parties to self-report the existence of a family violence order. There may be circumstances in which parties withhold this information from the court, for example, they are unaware that an old family violence order remains in existence, or do not understand their obligations to disclose information of this nature to court. It is important that the court has a reliable basis on which to satisfy itself for the purposes of paragraph 113AC(4)(c) both to ensure that this subsection can effectively safeguard against inconsistent orders arising, and to minimise the risk of a court refusing to make a federal family violence order under a mistaken assumption that there is a family violence order in place, leaving an individual without protection.

474. To address this, new subsection 113AC(5) would require the court to inspect any record, database or register that:

- contains information about family violence orders,
- is maintained by a Department, agency or authority of the Commonwealth, or of a State or Territory, and
- is, or can reasonably be made, available to the court.

475. New paragraph 113AC(5)(a) would expressly provide that the information about family violence orders contained in the record, database or register could be in any form, including electronic. It is intended that information in hard copy or other form would also be sufficient for the purposes of this provision provided that the record, database or register also meets the requirements in paragraphs 113AC(5)(b) and (c).

476. New paragraph 113AC(5)(b) would require that any record, database or register inspected by the court for the purposes of satisfying itself of the existence of a family violence order under paragraph 113AC(5)(a) must be maintained by a Department, agency or authority of the Commonwealth, or a State or Territory. This would exclude records, databases or registers maintained by private companies or individuals, and is intended to capture official government information facilities only. New paragraph 113AC(5)(b) is intended to ensure the accuracy and reliability of the information on which the court relies.

477. New paragraph 113AC(5)(c) would require that any record, database or register inspected by the court for the purposes of satisfying itself of the existence of a family violence order under paragraph 113AC(5)(c) must be, or can reasonably be made available to the court. This provision is intended to clarify that the court is not expected to inspect records, databases or registers to which they do not have direct access or to which obtaining access would be unreasonably burdensome.

478. The Note under new subsection 113AC(5) would advise that the National Police Reference System, maintained by the Australian Criminal Intelligence Commission, is the database in which family violence order information is contained at the time of writing in 2021. The National Police Reference System supports the sharing of family violence order information across jurisdictions under the National Domestic Violence Order. The National Police Reference System enables Australian police agencies to share essential policing information with other police agencies. It is specifically designed to equip operational police, anywhere in the country, with the knowledge they need to make on-the-spot decisions when dealing with persons of interest. It provides key reference data to support police officers, investigators and analysts. Read access to the National Police Reference System will be arranged for the federal family law courts which will allow these courts to access family violence order information. This will enable the courts to make the enquiries necessary to be satisfied of the requirements in paragraph 113AC(4)(c).

#### *Terms of order*

479. New subsection 113AC(6) would provide a non-exhaustive list of the kinds of terms that the court can impose when making, and providing for the personal protection of a protected person under, a federal family violence order in relation to a party to a marriage. The amendment would provide that the terms must be appropriate in the circumstances. The purpose for which it is intended that the terms of the order must be considered appropriate to is provide personal protection to the protected person from family violence. This is an objective consideration which would require the court to consider all the circumstances of the case.

480. New subsection 113AC(6) is intended to remove any doubt about the court's authority to impose terms of the kind specified in paragraphs 113AC(6)(a)-(h). It is also intended, without fettering the court's discretion, to provide the court with some guidance about terms that may be suitable in a section 113AC matter. The kinds of terms listed in paragraphs 113AC(6)(a)-(g) are based on standard family violence order terms in the States and Territories.

481. New paragraph 113AC(6)(a) would allow the court to issue a federal family violence order prohibiting the person against whom the order is directed from subjecting the protected person to family violence. According to the definition of family violence in existing subsection 4AB(1) of the Family Law Act, such a term would prohibit the person against



whom the order is made from engaging in violent, threatening or other behaviour that coerces or controls the protected person or causes the protected person to be fearful. There are a range of behaviours that may constitute family violence, including the behaviours listed in subsection 4AB(2) of the Family Law Act. It would be a matter for the court to determine whether family violence had occurred in any proceedings for a breach of a federal family violence order. New paragraph 113AC(6)(a) would not allow the court to issue a federal family violence order prohibiting the person against whom the order is directed from exposing the protected person to family violence.

482. New paragraph 113AC(6)(b) would allow the court to issue a federal family violence order prohibiting the person against whom the order is directed from contacting the protected person. Such a term may assist to protect the protected person from control, physical, psychological and emotional abuse, stalking and harassment. Such a term could include a complete prohibition on contact in all circumstances and by all means, including physical contact, written or technological communication. It could also include a prohibition on contact with the protected person in specified circumstances or by specified means, or a general prohibition on contact with the protected person with limited exceptions.

483. Reasonable exceptions may include but would not be limited to: contact through a legal practitioner or police; contact in accordance with an order of a court exercising jurisdiction under Part VII of the Family Law Act; contact at a court or tribunal proceeding, or in the course of legal proceedings; contact at counselling, dispute resolution sessions or restorative justice conferences arranged with the protected person's permission; contact in writing for the purposes of facilitating contact with or organising to spend time with either parties' child or children; or contact in writing for the purposes of discussing the safety or welfare of either parties' child or children. It will be a matter for the court making the order to determine the appropriate scope of the prohibition in the individual circumstances of the matter.

484. New paragraph 113AC(6)(b) is not intended to cover terms which would prohibit the person against whom the order is directed from maintaining contact with persons other than the protected person, including persons associated with the protected person.

485. New paragraph 113AC(6)(c) would allow the court to issue a federal family violence order prohibiting the person against whom the order is directed from being within a specified distance of the protected person. In imposing a term of this nature, the court would be required to prescribe the distance within which the person against whom the order is directed cannot be, in relation to the protected person. The court would be well placed to make such a prescription based on the circumstances of the case, including the safety needs of the protected person. A term of this nature could be imposed to ensure that, regardless of their location, the protected person would not have to interact with the person against whom the order is issued. It could thereby assist to protect that person from behaviours such as physical violence, stalking and harassment.

486. The court may issue a term of the nature described in new paragraph 113AC(6)(c) on an absolute basis or with exceptions. Reasonable exceptions may include but would not be limited to coming within the otherwise prohibited distance of the protected person: in the company of a police officer; in accordance with an order of a court exercising jurisdiction under Part VII of the Family Law Act; at a court or tribunal proceeding; at a counselling, dispute resolution session or restorative justice conference arranged with the protected person's consent; or when facilitating contact handover of either parties' children.

487. New paragraph 113AC(6)(d) would allow the court to issue a federal family violence order prohibiting the person against whom the order is directed from being within a specified distance of a specified place or area that the protected person is, or is likely to be. The purpose of such a term would be to protect the protected person from behaviours such as stalking and harassment while they engage in their everyday activities. In imposing a term of this nature, the court would be required to identify specific locations where the protected person is or is likely to be, and prescribe the distance within which the person against whom the order is directed cannot be in relation to those locations. The court could prescribe time periods within which the person against whom the order is directed is prohibited from attending a specified place, based on when the protected person is likely to frequent that place. The court could also make exceptions to the prohibition. Reasonable exceptions may include being within the specified distance of the specified place or area: in accordance with an order of a court exercising jurisdiction under Part VII of the Family Law Act, or in the company of police for the purposes of collecting or returning personal belongings.

488. The court would be well placed to prescribe the prohibited places or areas, the distances within which the person against whom the order is directed cannot be, the time periods in which prohibitions apply and any appropriate exceptions based on the circumstances of the case. Relevant circumstances would include but would not be limited to the safety needs of the protected person, the kinds of places that they frequent, and the impacts of restricting access to those places on the livelihood, living arrangements and day to day activities of the person against whom the order is directed.

489. It is intended that a term of the nature described in new paragraph 113AC(6)(d) would be used to restrict the person against whom the order is directed from attending or approaching specific places including but not limited to the protected person's place of residence, workplace, education or care facility, local shopping centre or gym. It is not intended that such a term would be used to prohibit the person against whom the order is directed from being within a particular municipal area, state or township.

490. New paragraph 113AC(6)(e) would allow the court to issue a federal family violence order prohibiting the person against whom the order is directed from attempting to locate the protected person. A term of this kind could be used to protect that person from behaviours such as physical violence, stalking and harassment. Such a term would prohibit the person against whom the order is directed from engaging in behaviours including but not limited to: asking others where the protected person is, researching their whereabouts, attempting to find the protected person physically or by technological means, or following their associates with the aim of finding the protected person.

491. New paragraph 113AC(6)(e) is not intended to cover terms which would prohibit the person against whom the order is directed from attempting to locate persons other than the protected person, including persons associated with the protected person.

492. New paragraph 113AC(6)(f) would allow the court to issue a federal family violence order prohibiting the person against whom the order is directed from causing, or attempting to cause, another person to engage in conduct in relation to the protected person that would, if the conduct were done by the person against whom the order is directed, breach the order. A term of this kind could be used to prevent the person against whom the order is directed from causing or attempting to cause a third party to engage in violence or threatening behaviours directed toward the protected person on their behalf. It is intended that such a term would be used to prevent a person from circumventing orders by causing the protected person to be

subjected to harmful behaviours by others, rather than by engaging in prohibited behaviours themselves. Paragraph 113AC(6)(f) would not impose obligations on third parties. The prohibited behaviour would be the person against whom the order is directed attempting to have or cause another person to engage in particular conduct, not that other person's conduct itself.

493. New paragraph 113AC(6)(g) would allow the court to make a federal family violence order requiring the person against whom the order is directed to leave a place or area in certain prescribed circumstances. This provision is intended to fill a gap in protection where, in making a federal family violence order, a court decides not to impose terms under paragraphs 113AC(6)(c) or (d).

494. New subparagraph 113AC(6)(g)(i) would require the person against whom the order is directed to be at that place or area at a particular time. The effect of this provision is that a term of the kind described in paragraph 113AC(6)(g) could not require the person against whom the order is directed to leave any place or area at any indefinite time in the future. It would be limited to the place or area where the person against whom the order is directed is at the time the request referred to in subparagraph 113AC(6)(g)(iii) is made of them.

495. New subparagraph 113AC(6)(g)(ii) would require the protected person to be at the relevant place or area where the offender is located. The effect of this provision is that a term of the kind described in paragraph 113AC(6)(g) could not require the person against whom the order is directed to leave a place or area when the protected person is not at that place or area. Where the protected person is not in the same place or area as the person against whom the order is directed, it would be unreasonable to require the latter to leave that place or area as a measure to provide personal protection to the protected person from family violence.

496. New subparagraph 113AC(6)(g)(iii) would require the protected person to request that the person against whom the order is directed leave the place or area. While it is anticipated, given the requirement in subparagraph 113AC(6)(g)(ii) that the protected person must be in the same place or area as the person against whom the order is directed, that such a request would most commonly be made verbally, the provision does not specify how the request must be made, or that it must be made directly to the person against whom the order is directed. Accordingly the request may be made in writing, by telephone or electronic communication, via a third person or by any other means. It is intended however that the person against whom the order is directed must reasonably be able to receive and comprehend the request.

497. New subparagraph 113AC(6)(g)(iv) would require the protected person to consider that they are at imminent risk of being subjected to family violence at the time the request referred to in subparagraph 113AC(6)(g)(iii) is made. The effect of this provision is that a protected person would not be empowered to request that the person against whom the order is directed leave a particular place or area at any time or for any reason. While it would not be necessary that the protected person was, as an objective matter, at imminent risk, it would be necessary that the protected person held the view that they were at imminent risk at the relevant time.

498. New paragraph 113AC(6)(h) would clarify that the court could provide for any other matter that the court considers reasonably necessary to ensure the personal protection of the protected person. Whether a particular term is reasonably necessary to ensure the personal protection of the protected person is an objective consideration which would require the court

to consider all the circumstances of the case. Any additional term would also need to be appropriate in the circumstances.

499. New paragraph 113AC(6)(h) is intentionally non-prescriptive, recognising the discretion that the court would have in making orders under this Part. As every family's experience of family violence is different, it would be undesirable for federal family violence orders to be made only on a limited set of standard terms. Paragraph 113AC(6)(h) is intended to confirm that the court is able and encouraged to customise federal family violence orders on a case by case basis to meet the unique needs of the individuals affected. In exercising this discretion, the court would need to consider the practical enforceability of the proposed terms from a policing perspective.

500. It is the intent of new subsection 113AC(6) that there be no limit on the number or combination of terms that a court can impose when issuing a federal family violence order in relation to a party to a marriage, provided that the terms are internally consistent, reasonably capable of being complied with together, and practically enforceable. It is also expected that the terms of the order would be consistent with any parenting or other relevant order made by the court or, where that is not the case, that the terms of an existing order would be adjusted to be consistent with the federal family violence order.

#### *Court to take account of other matters*

501. New subsection 113AC(7) would provide that a court, in making a decision under new section 113AC about a federal family violence order in relation to a party to a marriage, must take into account the matters set out in new paragraph 113AC(7)(a) and any of the matters prescribed in paragraph 113AC(7)(b) that the court considers relevant. A decision under new section 113AC would include a decision to make a federal family violence order in relation to a party to a marriage, and decisions about the conditions to be applied and when the order should expire.

502. New paragraph 113AC(7)(a) would provide that the court must take into account as the primary consideration the safety and welfare of the protected person, including the need to protect the person from being subjected to family violence.

503. The effect of new paragraph 113AC(7)(a) is that the court must prioritise the safety and welfare of the protected person above all other considerations, including the matters prescribed in paragraphs 113AC(7)(b), and the safety and welfare of any other person, including a child of the marriage. Where the safety or welfare of the child is also in issue, it would be expected that the protected person would seek an order under new section 68AC. The safety and welfare of the protected person would include, but would not be limited to, consideration of the person's actual or likely exposure to physical and psychological harm as well as the person's health and wellbeing.

504. New paragraph 113AC(7)(a) would specifically provide that the safety and welfare of the protected person includes the need to protect that person from being subjected to family violence. According to the definition of family violence in existing subsection 4AB(1) of the Family Law Act, this would mean the need to protect the person from being subjected to threatening or other behaviour that coerces or controls the protected person or causes the protected person to be fearful. There are a range of behaviours that may constitute family violence, including the behaviours listed in subsection 4AB(2) of the Family Law Act.

505. In requiring the court to prioritise the safety and welfare of the protected person in the making of a decision under section 113AC, paragraph 113AC(7)(a) recognises that the personal protection of the protected person is the fundamental purpose of an order under section 113AC.

506. New paragraph 113AC(7)(b) would provide that the court must take into account as additional considerations, the matters prescribed in new subparagraphs 113AC(7)(b)(i) to (iv) where the court considers these to be relevant. The additional considerations are not to be prioritised as highly as the primary consideration.

507. It is intended that where there is information available to the court about matters of the kind outlined in new paragraph 113AC(7)(b), and which is also relevant to the primary consideration in paragraph 113AC(7)(a), the court would consider this information in the context of the primary consideration, rather than as additional considerations.

508. New subparagraph 113AC(7)(b)(i) would require the court, where it considers it to be relevant, to take into account any criminal history of the person against whom the order is directed.

509. New subparagraph 113AC(7)(b)(i) recognises that a history of criminal convictions may be relevant to the court in determining whether and on what terms to issue a federal family violence order. It may be relevant, for example, to the determination of whether a federal family violence order is appropriate in the circumstances (see paragraph 113AC(4)(a)) if the person against whom the order is directed has recently been convicted of a violent crime against the protected person. Similarly however, the court may consider that matters such as a history of non-violent crime or a criminal offence committed a significant time ago are not relevant to a decision under section 113AC about a federal family violence order in relation to a party to a marriage. The court would be best placed to determine whether any criminal history of the person against whom the order is directed is a relevant consideration on a case by case basis. Criminal history may also be relevant to the determination of suitable terms for a federal family violence order, if for example the person against whom the order is directed is currently subject to bail conditions or a good behaviour bond, or serving a gaol sentence.

510. New subparagraph 113AC(7)(b)(ii) would require the court, where relevant, to take into account whether the person against whom the order is directed has been charged with any criminal offences.

511. New subparagraph 113AC(7)(b)(ii) recognises that criminal charges, particularly where they relate to violent conduct, may be relevant to the court in determining whether and on what terms to issue a federal family violence order. It may be relevant, for example, to the determination of whether a federal family violence order is appropriate in the circumstances (see paragraph 113AC(4)(a)) if the person against whom the order is directed has been charged with a violent crime against the protected person. Similarly however, the court may consider a criminal charge in relation to non-violent and unrelated criminal offences is not relevant to a decision under section 113AC about a federal family violence order in relation to a party to a marriage. The court would be best placed to determine whether any criminal charge laid against the person against whom the order is directed is a relevant consideration on a case by case basis. Criminal charges may also be relevant to the determination of suitable terms for a federal family violence order if for example the person against whom the

order is directed is currently incarcerated or subject to bail conditions pending a criminal trial.

512. New subparagraph 113AC(7)(b)(iii) would require the court to take into account any previous violent conduct of the person against whom the order is directed towards the protected person as an additional consideration in making a decision under section 113AC about a federal family violence order in relation to a party to a marriage, if the court considers this relevant.

513. New subparagraph 113AC(7)(b)(iii) recognises that previous violent conduct directed towards the protected person, whether physical, psychological or emotional in nature, may be relevant to the court in determining whether and on what terms to issue a federal family violence order. It may be relevant, for example, to the determination of whether a federal family violence order is appropriate in the circumstances (see paragraph 113AC(4)(a)) if the person against whom the order is directed has previously engaged in violent conduct directed towards the protected person. Similarly however, the court may consider that matters such as violent conduct perpetrated a significant time ago, are not relevant to a decision under section 113AC about a federal family violence order in relation to a party to a marriage. The court would be best placed to determine whether any previous violent conduct on the part of the person against whom the order is directed is a relevant consideration on a case by case basis. New subparagraph 113AC(7)(b)(iii) is not intended to capture violent conduct that was directed towards a person other than the protected person, including a child of the marriage or any other family member.

514. New subparagraph 113AC(7)(b)(iv) would require the court to take into account any other matter that the court considers relevant, as an additional consideration in making a decision under new section 113AC for a federal family violence order in relation to a party to a marriage. The court may exercise its discretion to determine whether any other matters are relevant to the making of a decision under 113AC about a federal family violence order, on a case by case basis.

515. New subsection 113AC(8) would provide that the court, in applying the considerations set out in subsection (7), must give greater weight to the consideration set out in paragraph (7)(a) than the considerations set out in paragraph (7)(b). The intent is to ensure that the safety and welfare of the protected person is prioritised over any additional consideration that the court considers relevant, when the court is making a decision under section 113AC about a federal family violence order.

#### *Form of order*

516. New subsection 113AC(9) would provide that a federal family violence order must be made in the form prescribed by the regulations. It is intended that the regulations would prescribe a standalone federal family violence order template form. The form would contain all of the information that a police officer would require to enforce the order, including identification information for the person against whom the order is directed and the protected person in relation to the order, information about service of the order and the date on which the order came into force, the terms of the order, its expiration date and the dates on which the order ceases to apply to the protected person. The form would be designed to be compatible with relevant police information sharing systems to ensure that federal family violence order information is readily accessible to police attending breach incidents.

517. The rationale for the requirement in new subsection 113AC(9) is to ensure that federal family violence orders are made in an easy-to-read, standalone form that police can use for enforcement purposes. Currently family law personal protection injunctions are issued as part of a suite of family law orders. The injunction may be contained in a single paragraph among numerous pages of other orders and may be difficult to identify quickly. Additionally, information that would be required to identify the parties and determine whether the order is enforceable may not be co-located with the terms. Police have advised that issuing federal family violence orders in this way would create significant enforcement challenges for police. This would include a need for police to undertake lengthy and time consuming reviews of civil family law orders in order to determine whether a criminally enforceable term has been breached. In situations where an urgent police response is required this would be highly undesirable. In the absence of certainty about the existence, enforceability and terms of a federal family violence order, police would not be able to take action to enforce a breach without a high risk of unlawful arrest. The requirement in new subsection 113AC(9) is intended to address these issues by ensuring that the court issues federal family violence orders in a form that would provide police with the information they require.

518. The requirement in new subsection 113AC(9) is also intended to ensure that federal family violence orders are made in a form that can be readily understood by the person against whom the order is directed and the protected person. It is intended that the form to be prescribed in regulations would be in plain English and would contain important information for the parties about the effect of the order and the consequences of a breach.

519. New subsection 113AC(10) would set out three matters that the order must specify.

520. New paragraph 113AC(10)(a) would require the order to specify the protected person covered by the order. The form that will be prescribed in the regulations for the purposes of subsection 113AC(9) will contain fields for the provision of identifying information for the protected person, including but not limited to their full name and date of birth. This information is necessary for enforcement purposes.

521. New paragraph 113AC(10)(b) would require the order to specify the person against whom the order is directed. The form that will be prescribed in the regulations for the purposes of subsection 113AC(9) will contain fields for the provision of identifying information for the person against whom the order is directed, including, but not limited to their full name and date of birth. This information is necessary for enforcement purposes.

522. New paragraph 113AC(10)(c) would require the order to specify the terms of the order. The terms of the order are the criminally enforceable conditions that the court imposes on the person against whom the order is directed. New subsection 113AC(6) sets out a non-exhaustive list of the kinds of terms that a court can impose. These include terms restricting certain behaviours, contact or communication with the protected person. It is critical that the terms of the order are specified in the order, so that law enforcement can readily determine whether a breach has occurred.

#### *Court to consider other injunctions*

523. New subsection 113AC(11) would impose an obligation on the court to consider whether a personal protection injunction under section 114 of the Family Law Act should be granted for the personal protection of a person in specified circumstances. The obligation applies where a federal family violence order has been applied for to protect a particular

person, but the court has not provided for the personal protection of that person under the order because the threshold test for the issue of a federal family violence order has not been satisfied in relation to that person.

524. New paragraph 113AC(11)(a) would provide that in order for this obligation on the court to be enlivened, a person must have applied for a federal family violence order in relation to the parties to a marriage, under new section 113AB, and the order must have been applied for to provide for the personal protection of a specific person (known as the proposed protected person).

525. Additionally, new paragraph 113AC(11)(b) would provide that the court must not have provided for the personal protection of the proposed protected person under a federal family violence order for one or both the reasons set out in subparagraphs 113AC(11)(b)(i) and (ii).

526. The first specified reason is that the court does not consider that providing for the personal protection of the proposed protected person under the order is appropriate in the circumstances for the purposes of paragraph 113AC(4)(a) (see new subparagraph 113AC(11)(b)(i)). New paragraph 113AC(4)(a) would provide that the court must not make a federal family violence order or provide for personal protection of a protected person under the order unless the court considers that it is appropriate in the circumstances. It is intended that the purpose for which the order must be considered appropriate is to provide personal protection to the protected person from family violence. Whether an order is appropriate for this purpose is an objective consideration which would require the court to consider all the circumstances of the case.

527. The second specified reason is that the court is not satisfied of either of the matters in paragraph 113AC(4)(b) in relation to the proposed protected person (see new subparagraph 113AC(11)(b)(ii)). New paragraph 113AC(4)(b) would provide that the court must be satisfied on the balance of probabilities that either:

- the proposed protected person has been subjected to family violence, or
- there are reasonable grounds to suspect that the protected person is likely to be subjected to family violence.

528. The obligation on the court to consider whether an injunction under section 114 should be granted for the personal protection of the proposed protected person would not apply if the court decided not to make the federal family violence order for any reason other than those stipulated in paragraph 113AC(11)(b), including failure to be satisfied of the requirements in new paragraph 113AC(4)(c).

529. Where paragraphs 113AC(11)(a) and 113AC(11)(b) are satisfied, the court would be required to consider if a personal protection injunction under section 114 should be granted in relation to the parties to the marriage that is for the personal protection of the proposed protected person. This requirement is intended to safeguard against gaps in protection for persons who do meet the threshold for a federal family violence order, but would benefit from civil injunctive relief to address family safety concerns.



### *Validity not affected*

530. New subsection 113AC(12) would provide that failure on the part of the court to comply with new paragraph 113AC(4)(c) or new subsections 113AC(5) or (9) would not affect the validity of any federal family violence order made under new section 113AC. This is because the obligations set out in these provisions are administrative in nature. Subsection 113AC(12) recognises that it is undesirable that administrative failures should invalidate an order issued by the court otherwise in accordance with the law. It is intended however that failure on the part of the court to comply with any of the other subsections in section 113AC would invalidate a federal family violence order issued under this section.

### **New Section 113AD – Court must give reasons for decision and copies of federal family violence order**

#### *Reasons for decision*

531. New subsection 113AD(1) would provide that as soon as practicable after making a decision whether to make a federal family violence order under section 113AC, the court must give reasons for the decision. Reasons would be required whether the court's decision is to make a federal family violence order or not.

532. Adequate reasons are required by the implied guarantee of procedural due process in the exercise of judicial power. The amendment would allow the court to give reasons for its decisions orally or in writing, provided that it complied with the obligation to ensure that those reasons are adequate.

#### *Copies of order*

533. New subsections 113AD(2), (3) and (4) are intended to ensure that parties to a federal family violence order are informed, as soon as practicable after the order is made, of that fact, and are provided with critical information about the order's effect and enforceability.

534. New subsection 113AD(2) would provide that, if the court makes an order under section 113AC, it must cause a copy of the order to be made available to both of the parties. The words 'both of the parties' are intended to refer both to the parties to the proceedings in which the order is made and the parties to the order. A federal family violence order in relation to a party to a marriage can neither be made for the protection of a person who is not a party to the proceedings in which the order is made, nor directed against a person who is not a party to those proceedings. The parties to the order can only be the parties to the marriage to which the relevant proceedings relate.

535. New subsection 113AD(2) would require the court to cause a copy of the order to be made available to the parties as soon as practicable after making the order. This requirement is intended to safeguard against delay in providing the parties with information about orders made for their protection.

536. A federal family violence order will only come into force at the time it is made if the person against whom the order is directed is before the court at that time. Otherwise, the order will come into force when it is served on that person (see new subsection 113AF(1)). The order will have no legal effect and will be unenforceable until it comes into force. It is

important that both parties are made aware of the point in time at which the order comes into force, so that their expectations that police will act upon a breach are informed and realistic.

537. To address this, new subsection 113AD(3) would provide that the copy of the order provided to the parties under new subsection 113AD(2) must include a statement about when the order comes into force.

538. New paragraph 113AD(3)(a) would provide that if the person against whom the order is directed is before the court when the order is made, the statement must provide that order comes into force at that time.

539. New paragraph 113AD(3)(b) would provide that if the person against whom the order is directed is not before the court when the order is made, the statement must provide that the order comes into force when it is served on the person against whom the order is directed. In these circumstances, the statement must also provide that the order has no effect and is unenforceable unless and until it is served on the person against whom the order is directed.

#### *Explanation of order*

540. There is a risk that parties to a federal family violence order may not understand when, and for what period the order can be enforced. This risk is particularly pertinent where persons have English language difficulties or a disability which affects their ability to understand the text of the order in the written form in which it is provided to them by the court. Failure to understand matters relating to the enforceability of the order may increase the likelihood that the order will be breached, resulting in heightened safety risks to the protected person. It may also result in a protected person seeking police assistance with an alleged breach in circumstances in which police will not be authorised to take enforcement action, causing confusion and distress.

541. To address this, new subsection 113AD(4) would require the court, if it makes a federal family violence order under section 113AC, to explain to the parties to the proceedings, in a language that they are likely to readily understand, when the order comes into force and the period for which it is in force.

542. New subsection 113AD(4) would note that the explanation must be in a language the party is likely to readily understand. It may be necessary for the court to arrange for an interpreter to communicate the explanation to a party if the party has English language difficulties, or arrange for the explanation to be provided in an accessible format to accommodate a disability. The subsection would not specify the circumstances in which the court would be required to provide the explanation itself, rather than arrange for another person to do so. Family law judges would be well placed to determine the most appropriate method of having the explanation provided, in light of the circumstances of the case and the needs of the relevant individuals.

543. New paragraph 113AD(5)(a) would specify that subsection (4) does not apply to a party who has not appeared before the court in relation to the order, and new paragraph 113AD(5)(b) would specify that subsection (4) does not apply in relation to a party who is represented by a legal practitioner. The effect of these provisions is that the court is only required to explain the matters in new paragraphs 113AD(4)(a) and (b) to parties who are before the court and self-represented when the order is made. Where a party has not appeared before the court in relation to the order, information about when, and for what period the

order can be enforced will be available to them in the statement that will be included on the copy of the order that the court will provide to them under subsections 113AD(2) and (3). It is expected that a party who is legally represented will receive an explanation about these matters from their legal representative.

*Validity not affected*

544. New subsection 113AD(6) would provide that failure on the part of the court to comply with section 113AD would not affect the validity of any federal family violence order made under new section 113AC. While the court is required to comply with section 113AD, the obligations set out in this section are administrative in nature. Subsection 113AD(6) recognises that it is undesirable that administrative failures should invalidate an order made by the court otherwise in accordance with the law.

545. The Note under new subsection 113AD(6) would provide that while failure to comply with this section, including by not giving copies of the order, does not affect validity of the order, failure to serve the order on the person against whom the order is directed in accordance with new section 113AE will affect the order's enforceability (113AF(1)). If the person against whom the order is directed is not before the court when the order is validly made, the valid order would not come into force or be enforceable until and unless it is served on the person against whom the order is directed.

**New section 113AE - Service of federal family violence order**

546. New subsection 113AE(1) would provide that a federal family violence order must be served on the person against whom the order is directed, in accordance with the requirements prescribed for the purposes of subsection 113AE(2).

547. It is intended that the requirement in subsection 113AE(1) would only apply where the person against whom the order is directed is not before the court at the time the order is made. Where the person against whom the order is directed is before the court, the order comes into force at the time it is made (see new paragraph 113AF(1)(a)).

548. The requirement in new subsection 113AE(1) is intended to provide a high level of assurance that a person against whom a federal family violence order is directed is made aware of the order. Service will promote compliance, accountability and the safety of the protected person. It is intended to safeguard against situations in which a person is charged with a criminal offence for conduct, which in the absence of the order would be lawful, but which they are not aware is prohibited. While it is not necessary that the person has knowledge that their conduct is in breach of a federal family violence order in order for that person to be guilty of a breach offence under new section 113AG, service would ensure that the person against whom the order is directed has the information that they require in order to comply with the order and a fair warning about the consequences of a breach.

549. The requirement in new subsection 113AE(1) would not apply to the protected person in relation to the order or parties to the proceedings in which the order is made other than the person against whom the order is directed.

550. New subsection 113AE(2) would allow for the prescription in the Family Law Regulations or the Family Law Rules of Court of requirements in relation to the service of federal family violence orders. These requirements would include, but would not be limited

to, permissible methods of serving federal family violence orders, persons or bodies responsible for effecting service, timeframes within which service must be effected, any substituted or deemed service options available to the courts and any reporting or record-keeping requirements in relation to service. It is not intended that the requirements prescribed in regulations under this subsection would apply where the person against whom the order is directed is in court at the time the order is made.

551. New subsection 113AE(3) would specifically, but not exclusively, allow for the prescription in the Family Law Regulations or the Family Law Rules of Court of matters regarding who is to bear the cost of service of federal family violence orders, without limiting subsection 113AE(2).

552. Rules of court and regulations are particularly suitable for matters of detail and matters of uncertainty or that are liable to frequent or urgent changes, including changes to reflect future technological advances or in response to developments in other jurisdictions. Both rules and regulations under the Family Law Act are subject to scrutiny by the Senate Standing Committee on Regulations and Ordinances and can be disallowed. This means that the requirements in relation to service would be subject to robust, objective review prior to their prescription in subordinate legislation.

553. New subsection 113AE(4) would provide that failure on the part of the court to comply with subsection 113AE(1) would not affect the validity of any federal family violence order made under new section 113AC. This is because the obligation set out in this subsection is administrative in nature. Subsection 113AE(4) recognises that it is undesirable that administrative failures should invalidate an order made by the court otherwise in accordance with the law.

554. The Note under new subsection 113AE(4) would clarify that while failure to comply with the requirement in subsection 113AE(1) – that is a failure to serve a federal family violence order on the person against whom the order is directed in accordance with the prescribed requirements – would not affect the *validity* of the order, it would affect the *enforceability* of the order. The Note refers to section 113AF which provides that a federal family violence order will only come into force (that is, become enforceable) at the time it is made if the person against whom the order is directed is before the court at that time. Otherwise, the order will come into force when it is served on the person against whom the order is directed. The effect of subsection 113AE(4) is that an order that has been made in accordance with section 113AC, but has not yet been served, would not for that reason be an invalid order.

### **New section 113AF – When federal family violence order is in force**

#### *When order comes into force*

555. New paragraph 113AF(1)(a) would provide that a federal family violence order only comes into force at the time it is made if the person against whom the order is directed is before the court at that time. The person against whom the order is directed may be before the court in person, or via audio-visual link or telephone. If the person against whom the order is directed is not before the court when the order is made, new paragraph 113AF(1)(b) would provide that the order comes into force when the order is served on the person against whom the order is directed.

556. The effect of the order being in force is that it can be validly enforced. A breach of a federal family violence order that has been made by the court but has not yet come into force would not be a criminal offence under new section 113AG. Accordingly, paragraph 113AF(1)(b) would clarify that the order will have no legal effect and will be unenforceable until it is served on the person against whom the order is directed.

#### *When order ceases to be in force*

557. New subsection 113AF(2) would set out the points in time at which a federal family violence order would cease to be in force. The effect of an order ceasing to be in force would be that the order is no longer enforceable. Where an order ceases to be in force, it would not be able to come back into force at any future time. This is distinguished from the circumstances in which the order is suspended on a time limited basis and will come back into force when it is no longer suspended. The effect of suspension is addressed in new subsection 113AF(3).

558. New subsection 113AF(2) would provide that a federal family violence order would cease to be in force at the earlier of the times described in paragraphs 113AF(2)(a)-(b).

559. It is intended that the form prescribed in regulations for the purposes of new subsection 113AC(9) would contain a field for the order's expiry date. While subsection 113AC(10) would not expressly require the court to specify an expiry date for the order, the effect of new paragraph 113AF(2)(a) is that if such a date is specified, the order would cease to be in force on that date, if that date is earlier than the date mentioned in paragraphs 113AF(2)(b).

560. The effect of new paragraph 113AF(2)(b) is that a federal family violence order would cease to be in force when a court revokes the order under new sections 113AI or 114AC (items 36 and 44), if that date is earlier than the date mentioned in paragraph 113AF(2)(a). Nothing in this provision would require that a federal family violence order must be revoked. It would only apply in the event that the order is revoked.

#### *Effect of suspension*

561. A court could suspend a federal family violence order under new sections 113AI and 114AC. New subsection 113AF(3) would provide that the effect of a suspension is that the order ceases to have effect and would be unenforceable while it is suspended. Subsection 113AF(3) indicates that a suspension would be time limited, and the order would come back into force, and would be enforceable again, once the order is no longer suspended.

### **New section 113AG - Offence for breaching federal family violence order**

#### *Offence*

562. New subsection 113AG(1) creates the offence of breaching a federal family violence order made under new section 113AC (item 36). For a person to commit the offence:

- there must be a federal family violence order made under Division 2 which is in force
- the order must be directed against the person

- the person must engage in conduct, and
- the conduct must breach the terms of the order.

563. The default fault elements set out in Division 5 of Chapter 2 of the Criminal Code would apply to the new offences. For the conduct in new paragraph 113AG(1)(c) (the person engaging in conduct), the fault element is intention under subsection 5.6(1) of the Criminal Code. For the circumstances or results in new paragraphs 113AG(1)(a) (the order being made under Division 2 and in force), 113AG(1)(b) (the order being directed against the person), and 113AG(1)(d) (the conduct breaching a term of the order), the fault element is recklessness under subsection 5.6(2) of the Criminal Code. Under subsection 5.4(4) of the Criminal Code, recklessness can be established by proving intention, knowledge or recklessness.

564. Note 1 under new subsection 113AG(1) would highlight that conduct breaching a federal family violence order may also constitute a criminal offence under State or Territory law.

565. At the time of writing, all Australian States and Territories have agreed to recognise federal family violence orders issued under Division 2 as part of the National Domestic Violence Order Scheme. The National Domestic Violence Order Scheme is a legislative scheme under which family violence orders are mutually recognised and enforced across jurisdictions. Each State and Territory has its own National Domestic Violence Order Scheme legislation, which provides that a family violence order issued in another Australian jurisdiction is to be treated as a local order for the purposes of enforcement. This means that the law of the State or Territory in which the breach occurred can govern the arrest and detention of the person, the classification of the offence, and the applicable penalties where those State or Territory police seek to enforce the order.

566. Recognising federal family violence orders on this scheme - which is expected to occur by way of State and Territory legislative amendments commencing simultaneously with this Bill - would result in federal family violence orders being treated as a local order in the State and Territory in which the breach occurs. An offence under new section 113AG therefore could be prosecuted as a State or Territory offence in the jurisdiction in which the breach occurred. The penalty of the State or Territory in which the offence is prosecuted would apply, meaning that penalties may differ. It would also be possible for the Australian Federal Police to enforce the breach using Commonwealth enforcement powers, with the offence being prosecuted as a Commonwealth offence, and with the penalties and defences stipulated in new section 113AG applying.

567. Note 2 would direct the reader to subsection 113AG(5) which deals with when conduct does not breach a term of the order. This includes where the order is suspended or where the term of the order that is breached relates to a person who is no longer a protected person.

568. The maximum penalty for this offence under the Family Law Act would be imprisonment for a period of up to two years or 120 penalty units, or both. The penalty for imprisonment is comparable to the length of imprisonment for breaches of family violence orders in the States and Territories, under State and Territory law.

569. Breaches of orders made under Division 2 would not be enforceable as civil matters. This reflects the Government's view that family violence is not a private matter but a criminal offence of public concern. Civil action would continue to be available under State and Territory legislation if the conduct breaching the federal family violence order also constituted a tort.

*No consideration of evidence of self-induced intoxication*

570. The defences available in respect of this offence are the default defences prescribed in the Criminal Code.

571. However, new subsections 113AG(2) and 113AG(3) would provide that the provisions relating to lack of criminal responsibility for intoxication in subsections 8.2(3) and (4) and 8.4 (1) of the Criminal Code would not apply to this offence. This means that evidence of self-induced intoxication would not be able to be considered in determining whether the conduct was accidental, or a person has a mistaken belief about the facts, or whether a person had certain knowledge or belief (in the context of establishing a possible defence). The defence of intoxication would still be available where the intoxication was not self-induced.

572. These provisions reflect that the consumption of alcohol is a significant contributing factor to incidents of intimate partner homicide and incidents of non-fatal family violence.<sup>2</sup> It would not be appropriate for a perpetrator to self-induce intoxication, and then have that fact relevant to a defence against charges relating to family violence. These provisions send a strong message that perpetrators of family violence will be held accountable for their actions.

*No extension of criminal responsibility*

573. New subsection 113AG(4) would provide that criminal responsibility does not extend to the person protected by the order if their conduct results in a breach of the order. This is intended to address situations where a protected person invites the person subject to an order to act in a way that would breach the order, either because they have reconciled, or because of ongoing power and control dynamics. If sections 11.2 (which deals with aiding, abetting, counselling or procuring the commission of an offence) and 11.2A (which deals with joint commission of an offence) of the Criminal Code were allowed to operate, the protected person could have committed an offence under new section 113AG. While it is unlikely in practice that the protected person would be charged or prosecuted, new subsection 113AG(4) would ensure that a victim of family violence would not be at risk of criminal responsibility. Where the protected person did invite the breach, the perpetrator would remain criminally responsible for their conduct in breaching the order against them. Whether the protected person's actions should reduce the penalty against the perpetrator would be a matter for the court to consider in light of the facts of the case.

*Conduct where order suspended*

574. Conduct would only breach a term of a federal family violence order for the purposes of new subsection 113AG(1) if the order is in force. New subsection 113AG(5) is intended to clarify this. New subsection 113AG(5) would provide that conduct would not breach a term of the order for the purposes of subsection 113AG(1) if the order is suspended under sections

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<sup>2</sup> Australian Institute of Criminology, 2009

113AI or 114AC at the time the breach occurs. A suspended order ceases to have effect and is unenforceable for the period that the suspension is in force (see new subsection 113AF(3)). Accordingly, conduct that would otherwise breach a term of a suspended order would not be criminally enforceable, in the same way that conduct that would otherwise breach a term of an order that has not come into force in the first instance would not be criminally enforceable.

### *Definitions*

575. New subsection 113AG(6) would provide that conduct in this section includes an act or omission. An example of where an omission may breach a federal family violence order would be where the person against whom the order is directed fails to leave a place or area at the request of the protected person, contrary to a term of the kind described in new paragraph 113AC(6)(g).

### **New Section 113AH - Applying to vary, revoke or suspend federal family violence order**

576. New section 113AH would list the persons who are eligible to apply to a listed court to have a federal family violence order in relation to a party to the marriage varied, revoked or suspended. The Bill would define listed courts in section 4 and they are the only courts in which federal family violence orders can be made.

577. New section 113AH would allow the protected person covered by the order and the person against whom the order is directed - that is, either party to the marriage - to apply to a listed court to have a federal family violence order in relation to a party to the marriage to be varied, revoked or suspended.

578. New section 113AH would not require the relevant party to bring an application for the order to be varied, revoked or suspended in the context of other matrimonial cause proceedings. The provision would allow a party to make a standalone application for a variation, revocation or suspension.

### **New Section 113AI – Court may vary, revoke or suspend federal family violence order**

#### *Power of court to vary, revoke or suspend order*

579. New section 113AI would provide that a listed court may vary, revoke or suspend a federal family violence order made under section 113AC (see new subsection 113AI(1)), and the circumstances in which this can be done. This would allow the courts that make federal family violence orders to amend those orders to meet the needs and circumstances of the parties, should they change during the life of the order.

580. Note 1 under new subsection 113AI(1) would refer the reader to subsection 4(1) for the definition of ‘listed court’. Note 1 under new subsection 113AI(1) would also refer the reader to new subsection 113AI(7) which clarifies that subsection 113AI(1) would not apply in proceedings to make or vary a family violence order in the Family Court of Western Australia or the Magistrates Court of Western Australia constituted by a Family Law Magistrate of Western Australia. However, these courts would be able to revoke or suspend (but not vary) a federal family violence order in certain circumstances in proceedings to make or vary a family violence order under new section 114AC.

581. Note 2 under new subsection 113AI(1) would refer the reader to new section 114AC which would allow State or Territory courts, in proceedings for a family violence order, to



revoke or suspend (but not vary) federal family violence orders. Section 113AI would not apply in proceedings to make or vary a family violence order in a State or Territory court.

582. New subsection 113AI(2) would allow the court to determine, on application under new section 113AH or of its own motion during proceedings, that a federal family violence order should be varied, revoked or suspended and make an order to that effect. Permitting a court to vary, revoke or suspend an order on its own motion is intended to benefit a number of vulnerable cohorts. This may include self-represented litigants who may not be aware of the option to apply for a variation, revocation or suspension of a federal family violence order and litigants who may be unwilling or unable to apply for a variation of a federal family violence order as a result of the dynamics of power and control in their relationship with the other party or another person. Given the family law courts have significant experience in working with litigants with limited legal backgrounds, the courts are well placed to identify persons who may be in need of a variation of a federal family violence order, but due to inexperience or trauma, have not applied for one.

*Protected person and person against whom the order is directed*

583. New subsection 113AI(3)(a) would provide that a court must not vary a federal family violence order made under new section 113AC to provide for any additional or alternative protected persons. Unlike federal family violence orders made under new section 68AC, which can be made for the protection of multiple persons, federal family violence orders made under new section 113AC can only be made for the protection of one person – the party to a marriage that is not the person against whom the order is directed.

584. Similarly, new subsection 113AI(3)(b) would provide that a court must not vary a federal family violence order to direct the order against another person. As these orders are made between parties to a marriage, there should only be one person against whom the order can be directed.

585. The Note under subsection 113AI(3) would highlight that, where the parties to a marriage have a child who may also be in need of personal protection, the court could make a federal family violence order in relation to that child of the marriage under new section 68AC (item 13). New section 113AC would not allow the court to make a federal family violence order for the protection of a child of the marriage. In situations where married parents are before the court with a matter other than under Part VII of the Family Law Act, new section 68AB would allow either party to apply for a federal family violence order under new section 68AC for the personal protection of a child of the marriage. It is desirable that federal family violence orders for the protection of a child are only made under new section 68AC, due to the additional requirements imposed on the court when issuing orders under this provision, to ensure that the order is made for the child's welfare.

*Matters court must be satisfied of before varying, revoking or suspending order*

586. New subsection 113AI(4) sets out the matters that the court must be satisfied of before it can vary, revoke or suspend a federal family violence order.

587. New paragraph 113AI(4)(a) would provide that a listed court must not vary, revoke or suspend the federal family violence order unless the court considers that it is appropriate in the circumstances. It is intended that the purpose for which the variation, revocation or suspension must be considered appropriate is to ensure the personal protection of the

protected person from family violence. Whether a variation, revocation or suspension is appropriate for this purpose is an objective consideration which would require the court to consider all the circumstances of the case.

588. New paragraph 113AI(4)(b) would provide that the court must not vary, revoke or suspend the federal family violence order unless it is satisfied that either there is a change in circumstances since the order was made (subparagraph 113AI(4)(b)(i)) or the court has before it material that was not before the court that made the order (subparagraph 113AI(4)(b)(ii)).

589. The circumstances that gave rise to the making of an order may have changed during the life of the order, resulting in the order being inadequate or inappropriate for the protected person's continued protection. A change in circumstance under subparagraph 113AI(4)(b)(i) may include, but would not be limited to, the nature or severity of the family violence changing or escalating, a change in the relationship between the protected person and the person against whom the order is directed, a change in location of the protected person's work or residential address, or the person against whom the order is directed breaching the order.

590. Similarly, the person against whom the order is directed may consider that the circumstances that gave rise to the making of the order have changed during the life of the order, resulting in the order being too challenging to comply with, unnecessarily restrictive, or no longer required. A change in circumstance may include but would not be limited to circumstances in which compliance with the order (for example conditions restricting access to certain places) impinges on the person's ability to fulfil their employment, educational, parenting or other responsibilities which may have changed since the order was made; or circumstances in which the person wishes to demonstrate to the court that they have changed their behaviour, eliminating or reducing the risk of subjecting the protected person to family violence.

591. New subparagraph 113AI(4)(b)(ii) recognises the possibility that, had the court which made the federal family violence order had all relevant material before it at the time, the court may have made the order on different terms, or not made the order at all.

592. Where the court does not consider that the variation, revocation or suspension is appropriate in the circumstances and is not satisfied that there is either a change in circumstances since the order was made or that it has before it material that was not before the court that made the order, the court would not be able to vary, revoke or suspend the order.

#### *Terms of variation*

593. New subsection 113AI(5) would provide that if the court varies the federal family violence order, the court may make the variation on the terms it considers appropriate in the circumstances, including any of the terms mentioned in new subsection 113AC(6).

594. The purpose for which it is intended that the terms of the order must be considered appropriate to is provide personal protection to the protected person from family violence. This is an objective consideration which would require the court to consider all the circumstances of the case.

595. New subsection 113AC(6) is intended to remove any doubt about the court's authority to impose terms of the kind specified in paragraphs 113AC(6)(a)-(h). It is also intended, without fettering the court's discretion, to provide the court with some guidance about terms that may be suitable in a section 113AC matter. The terms mentioned in new subsection 113AC(6) include but are not limited to terms restricting certain behaviours, contact and communication with the protected person.

*Court to take account of other matters*

596. New subsection 113AI(6) would provide that in making a decision to vary, revoke or suspend a federal family violence order under new section 113AI, a court must take into account the matters set out in new subsection 113AC(7), in accordance with subsection 113AC(8). These would include, as the primary consideration, the safety and welfare of the protected person, including the need to protect the protected person from being subjected to family violence (paragraph 113AC(7)(a)), and any of the considerations listed in subparagraphs 113AC(7)(b)(i)-(iv) that the court considers relevant.

597. New subsection 113AC(8) would provide that in applying the considerations set out in subsection 113AC(7), the court is to give greater weight to the consideration set out in paragraph 113AC(7)(a) than the considerations set out in paragraph 113AC(7)(b). This means that the court is to give greater consideration to the safety and welfare of the protected person, including the need to protect the protected person from being subjected to family violence, than the other considerations set out in paragraph 113AC(7)(b).

*Family Court of Western Australia and Magistrates Court of Western Australia constituted by a Family Law Magistrate of Western Australia*

598. New subsection 113AI(7) would provide that the Family Court of Western Australia and the Magistrates Court of Western Australia constituted by a Family Law Magistrate of Western Australia may not vary, revoke or suspend a federal family violence order in relation to a party to a marriage under section 113AI in proceedings to make or vary a family violence order.

599. Western Australia is unique amongst Australian States in being the only State with its own family court. The Family Court of Western Australia was established in 1976 as a State court exercising both state and federal jurisdiction. Family Court judges and registrars, and co-located specialist family law magistrates service the whole of the State. The Court and the family law magistrates have exclusive jurisdiction in the Perth metropolitan area and circuit to five major regional centres. The Family Law Magistrates and registrars provide advice and support to regional magistrates who also deal with some family law matters.

600. The effect of new subsection 113AI(7) is that the jurisdiction of the Family Court of Western Australia and the Magistrates Court of Western Australia constituted by a Family Law Magistrate of Western Australia to vary, suspend or revoke federal family violence orders under subsection 113AI(1) is limited to proceedings other than those for the making or variation of a State family violence order.

601. The Note under new subsection 113AI(7) would clarify that in proceedings to make or vary a family violence order, the Family Court of Western Australia and the Magistrates Court of Western Australia constituted by a Family Law Magistrate of Western Australia

may revoke or suspend (but not vary) a federal family violence order in certain circumstances and would refer the reader to new section 114AC (item 44) in this regard.

602. New subsection 113AI(7) is intended to safeguard against persons having both a family violence order and federal family violence order in force at the same time in relation to the same matter. A family violence order (or any condition thereof) that is inconsistent with a federal family violence order (or any condition thereof) would be invalid to the extent of the inconsistency. This would create enforcement challenges for police, particularly where multiple orders would need to be compared in order for a police officer to determine which conditions of which orders they may lawfully enforce.

*Form of variation, revocation or suspension*

603. New subsection 113AI(8) would provide that any variation, revocation or suspension of a federal family violence order must be in the form prescribed by the regulations. It is intended that the regulations would prescribe a standalone federal family violence order template form. The form would contain all of the information that a police officer would require to enforce the order including identification information for the person against whom the order is directed and the protected person, information about service of the order and the date on which the order came into force, the conditions of the order and its expiration date. The form would be designed to be compatible with relevant police information sharing systems to ensure that federal family violence order information is readily accessible to police attending breach incidents.

604. The requirement in new subsection 113AI(8) is intended to ensure that variations, revocations and suspensions of federal family violence orders are made in a form that can be readily understood by the persons against whom the order is directed and the protected person. The form to be prescribed in regulations would be in plain English and would contain important information for the parties about the effect of the changes to the order and, where relevant, the consequences of a breach.

605. New subsection 113AI(9) would provide that if the court varies the federal family violence order, the variation must specify the matters mentioned in new subsection 113AC(10) as so varied. New subsection 113AC(10) would set out three matters that the order must specify (see content on new subsection 113AC(10) in this Explanatory Memorandum).

606. This information is critical to enable the effective enforcement of the varied order.

*Validity not affected*

607. New subsection 113AI(10) would provide that failure on the part of the court to comply with the requirements in subsection 113AI(8), does not affect the validity of the variation, revocation or suspension made under new subsection 113AI(1). This is because the obligation set out in this provision is administrative in nature. New subsection 113AI(10) recognises that it is undesirable that administrative failures should invalidate a variation, revocation or suspension made by the court otherwise in accordance with the law. It is intended however that failure on the part of the court to comply with any of the other subsections in section 113AI would invalidate a variation, revocation or suspension made under this section.

608. New subsection 113AI(11) would provide that to avoid doubt, the court may vary or revoke a federal family violence order even if the order is not in force in accordance with subsection 113AF(1) (see new paragraph 113AI(11)(a)) or suspended under section 113AI or section 114AC (see new paragraph 113AI(11)(b)).

609. New subsection 113AF(1) provides that if the person against whom the order is directed is not before the court when the order is made, the order comes into force when it is served on that person, and the order has no effect and is unenforceable unless and until it is served. This means that an order that has been made other than in the presence of the person against whom the order is directed, and has not been served, has no effect and is unenforceable. The effect of new paragraph 113AI(11)(a) is that a listed court may vary or revoke a federal family violence order that has neither been made in the presence of the person against whom the order is directed nor served on that person, and therefore has no legal effect and is unenforceable. If an order of this nature is varied, the varied order would come into force when the variation has been served in accordance with new section 113AK. If an order of this nature is revoked, the order would not come into force.

610. New sections 113AI and 114AC would provide that a federal family violence order, once made, can be suspended in certain circumstances. New section 113AI would provide for, amongst other things, the power of a listed court to suspend a federal family violence order, the matters the court must be satisfied of before suspending the order and the form of the suspension. New section 114AC would provide for, amongst other things, the power of a State or Territory court to suspend the federal family violence order, the matters the court may take into account when suspending the order, when the suspension comes into force and for the registration of the suspension. The effect of new paragraph 113AI(11)(b) is that a listed court may vary or revoke an order that has been suspended and is therefore neither currently in force nor enforceable. If an order of this nature is varied, the varied order would come into force when the variation has been served in accordance with new section 113AK. If an order of this nature is revoked, the order would not come back into force at the conclusion of the suspension.

#### **New section 113AJ - Court must give reasons for decision and copies of variation**

611. New section 113AJ would provide that the requirements in section 113AD in relation to providing reasons for decisions, copies of orders and explanations of orders apply when the court makes a decision to vary, revoke or suspend a federal family violence order under section 113AI, and if the court varies the order under section 113AI, the variation, in the same way as they would apply to a decision or order made under section 113AC.

#### **New section 113AK - Service of variation**

612. New section 113AK would provide for service of the variation of the federal family violence order in relation to parties to a marriage. New subsection 113AK(1) would provide that a variation of a federal family violence order must be served on the person against whom the order is directed in accordance with the requirements prescribed for the purposes of subsection 113AK(2). The requirement in subsection 113AK(1) would only apply where the person against whom the order is directed is not before the court at the time the order is varied. Where the person against whom the order is directed is before the court, the variation of the order comes into force at the time the variation is made (see new subparagraph 113AL(1)(a)(i)).

613. New subsection 113AK(2) would allow for the prescription in the Family Law Regulations or the Family Law Rules of Court, or both, of requirements for and in relation to the service of a variation of a federal family violence order. These requirements would include, but would not be limited to permissible methods of serving variations of federal family violence orders, persons or bodies responsible for effecting service, timeframes within which service must be effected, any substituted or deemed service options available to the courts, any reporting or record-keeping requirements in relation to service and who is to bear the cost of service (see subsection 113AK(3)). Service of orders is not required where the person against whom the order is directed is before the court at the time the order is made.

614. Rules of court and regulations are particularly suitable for matters of detail and matters of uncertainty or that are liable to frequent or urgent changes, including changes to reflect future technological advances or in response to developments in other jurisdictions. Both rules and regulations under the Family Law Act are subject to scrutiny by the Senate Standing Committee on Regulations and Ordinances and can be disallowed. This means that the requirements in relation to service would be subject to robust, objective review prior to their prescription in subordinate legislation.

615. New subsection 113AK(3) would specifically, but not exclusively, allow for the prescription in the Family Law Regulations or the Rules of Court or both of matters regarding who is to bear the cost of service of federal family violence orders.

616. New subsection 113AK(4) would provide that failure on the part of the court to comply with subsection 113AK(1) would not affect the validity of the variation made under new section 113AI. This is because the obligation set out in this subsection is administrative in nature. Subsection 113AK(4) recognises that it is undesirable that administrative failures should invalidate an order made by the court otherwise in accordance with the law.

617. The Note under subsection 113AK(4) would clarify that while failure to comply with the requirements in subsection 113AK(1) – that is a failure to serve a variation of a federal family violence order on the person against whom the order is directed in accordance with the prescribed requirements – would not affect the *validity* of the order, it would affect the *enforceability* of the order. The Note refers to subsection 113AL(1) which provides that a variation of a federal family violence order will only come into force (that is, become enforceable) at the time it is made if the person against whom the order is directed is before the court at that time. Otherwise, the variation will come into force when it is served on the person against whom the order is directed. The effect of subsection 113AK is that a variation that has been made in accordance with section 113AI, but has not yet been served, would not for that reason be an invalid order.

#### **New section 113AL - When variation, revocation or suspension is in force**

618. New section 113AL would provide for when a variation, revocation or suspension is in force. New subparagraph 113AL(1)(a)(i) would provide that a variation of a federal family violence order will only come into force at the time it is made if the person against whom the order is directed is before the court at that time. Otherwise, new subparagraph 113AL(1)(a)(ii) would provide that the variation will come into force when the variation is served on the person against whom the order is directed.

619. The effect of a variation being in force is that the order, as varied, can be validly enforced. A breach of a varied federal family violence order that has been made by the court

but has not yet come into force would not be a criminal offence. Accordingly, subparagraph 113AL(1)(a)(ii) would clarify that the variation will have no legal effect and will be unenforceable until it is served.

620. New paragraph 113AL(1)(b) would provide that a revocation or suspension of a federal family violence order would come into force when the court revokes or suspends the order.

621. The effect of a revocation or suspension being in force is that the order would no longer be enforceable. A revocation cancels a federal family violence order. The terms of the order would have no further effect and would not be enforceable. A revoked federal family violence order could not come back into force.

622. The effect of a suspension is that the order would not be in force and would be unenforceable while it is suspended. A suspension would be time limited, and the order would come back into force, and would be enforceable again once the order is no longer suspended.

623. New subsection 113AL(2) would set out the points in time at which a suspension of a federal family violence order would cease to be in force, and the order would come back into force. New subsection 113AL(2) would provide that that a federal family violence order would cease to be in force at the earlier of the times described in paragraphs 113AL(2)(a) and 113AL(2)(b).

624. New paragraph 113AL(2)(a) would provide that a federal family violence order would cease to be in force at the time specified in the suspension - that is, the time specified in the order as the time at which the suspended order ceases to be in force - if that time is earlier than the time specified at paragraph 113AL(2)(b).

625. New paragraph 113AL(2)(b) would provide that a federal family violence order would cease to be in force when a court revokes the order, if that time is earlier than the time specified at paragraph 113AL(2)(a).

### **Division 3 – Orders, declarations and injunctions in relation to parties to a marriage (other than federal family violence orders)**

626. Item 36 would insert the heading ‘Division 3 – Orders, declarations and injunctions in relation to parties to a marriage (other than federal family violence orders)’. This amendment would provide additional clarity about the purpose of the Division.

#### **New section 113AM – What this Division does**

627. New section 113AM – ‘What this Division does’ would set out the matters that Division 3 of Part XIV covers. New section 113AM would provide that Division 3 of Part XIV deals with proceedings for orders and injunctions in relation to parties to a marriage, other than federal family violence orders.

#### **Item 37 – Section 114 (heading)**

628. Item 37 would repeal the existing heading of section 114 and substitute it with the heading ‘Orders and injunctions (other than federal family violence orders)’. This amendment would provide additional clarity about the purpose of section 114 as amended. The amended

section 114 would not permit a court to make an order or injunction to provide personal protection from family violence where a federal family violence order can be issued (see new paragraph 114(1A)(b)).

### **Item 38 – Before subsection 114(1)**

629. Item 38 would insert the heading ‘Power of court to make orders and injunctions’ before subsection 114(1). This amendment would provide additional clarity about the purpose of subsection 114(1).

### **Item 39 – After subsection 114(1)**

630. Item 39 would insert subsections 114(1A), (1B), (1C) and (1D) which address the limit on the power of the court in relation to the granting of personal protection injunctions where there is family violence.

#### *Limit on power of the court where there is family violence*

631. New subsection 114(1A) would limit the ability of a listed court to grant an injunction under paragraph 114(1)(a) where there is family violence. Paragraph 114(1)(a) provides that if proceedings are instituted in a court in proceedings of the kind referred to in paragraph (e) of the definition of matrimonial cause in subsection 4(1), the court may make such order or grant such injunction as it considers proper with respect to the matter to which the proceedings relate, including an injunction for the personal protection of a party to the marriage.

632. New paragraph 114(1A)(a) would provide that before making an order or granting an injunction under paragraph 114(1)(a) for the personal protection of a protected person from family violence, a listed court must first consider if it would be appropriate to make a federal family violence order under section 113AC providing for the personal protection of the person. Read together with paragraph 114(1A)(b), the effect of new paragraph 114(1A)(a) is to require a listed court, before granting an injunction for personal protection under paragraph 114(1)(a), to turn its mind to whether in fact a criminally enforceable order can be made to protect the person. Only where the person would not be eligible for a federal family violence order under section 113AC, should the court consider granting a civilly enforceable injunction, which would afford the person a lower standard of personal protection.

633. There is a known lack of public awareness about the various forms family violence can take, and it is foreseeable that a person may apply for a personal protection injunction where they would be eligible for a federal family violence order. Requiring a listed court to consider whether it would be appropriate to make a federal family violence order before making a personal protection injunction, is designed to ensure that parties who are experiencing family violence and meet the relevant statutory requirements, will receive a criminally enforceable federal family violence order, rather than a civilly enforceable personal protection injunction. This reflects the Government’s intention to improve the protections available to people in the family law system who are experiencing family violence.

634. New paragraph 114(1A)(b) would provide that the court must not grant an injunction under new paragraph 114(1)(a) for the personal protection of a person from family violence if the court could make a federal family violence order providing for the personal protection of



that person. This means that, where a federal family violence order may be issued, a personal protection injunction would only be issuable under paragraph 114(1)(a) to provide personal protection in relation to matters other than family violence, that is, conduct that would not fall within the definition of ‘family violence’ in section 4AB.

635. The effect of new paragraph 114(1A)(b) is that injunctions for personal protection under paragraph 114(1)(a) cannot be issued in the same kinds of circumstances or for the same purpose as a federal family violence order, where a federal family violence order may be issued. Where a federal family violence order is issuable, a personal protection injunction could not be granted to protect the person from family violence but could be made to protect the person from matters other than family violence.

636. Where the court is unable to issue a federal family violence order in accordance with 113AC, the court would retain the ability to issue a personal protection injunction under 114(1)(a) for the personal protection of a person from family violence.

637. The requirement in new paragraph 114(1A) would only apply to listed courts, being the only courts that have jurisdiction to make federal family violence orders.

#### *Avoiding inconsistency with family violence orders*

638. New subsection 114(1B) would prohibit a person from applying for a personal protection injunction under paragraph 114(1)(a) where there is a family violence order in force that is for the protection of the protected person and is directed against the person against whom the federal family violence order is directed, in relation to the same matter that is the subject of the application. A family violence order is defined in subsection 4(1) of the Family Law Act as an order made under a prescribed law of a State or Territory to protect a person from family violence, and includes an interim order.

639. 114(1B) is intended to safeguard against inconsistent personal protection injunctions and family violence orders being in force at the same time. If the two orders were in existence at the same time, the family violence order (or any term thereof) that is inconsistent with a personal protection injunction (or any term thereof) would be invalid to the extent of the inconsistency. This would create challenges for police in enforcing the family violence order particularly where the family violence order (which is a criminally enforceable order) would need to be compared with a civilly enforceable personal protection injunction (which would not be readily accessible to police) in order for a police officer to determine which terms of the family violence order they may lawfully enforce. It could also create confusion for the parties as to which terms are required to be complied with. Prohibiting persons from applying for a personal protection injunction where there is already a family violence order in place between the same parties and in relation to the same matter would safeguard against inconsistent orders arising, reduce confusion and reduce the risk of unlawful arrests.

640. The prohibition in subsection 114(1B) would only apply where there is a family violence order in place between the same parties for whom the personal protection injunction is being sought, and where the family violence order is in place in relation to the same matter for which the personal protection injunction is being sought. It would not apply if the protected person is protected by a family violence order that is directed against a different respondent, or if the personal protection injunction is being sought in relation to a different matter from that to which the family violence order relates. Whether a personal protection injunction is being sought in relation to the same matter as that to which a family violence

order relates would be a matter for the court to determine in light of the circumstances of the case. Given that the purpose of subsection 114(1B) is to prevent an inconsistent personal protection injunction and family violence order being in place at the same time, it is intended that the court would consider the terms being sought as part of the personal protection injunction and whether they could be complied with alongside the conditions of the family violence order.

641. New subsection 114(1C) would provide that the court must not grant an injunction, under paragraph 114(1)(a) unless it is satisfied that the injunction is not inconsistent with a State or Territory family violence order that is in force for the personal protection of the person seeking the section 114 injunction, and directed against the same person against whom the section 114 injunction would be directed. The prohibition would not apply where the State or Territory family violence order is no longer in force, or where the State or Territory family violence order has been made for the protection of a different person.

642. This Bill seeks to safeguard against persons having a family violence order and a personal protection injunction in force at the same time that cannot be simultaneously complied with. In these circumstances, the family violence order (or any term thereof) that is inconsistent with a personal protection injunction (or any term thereof) would be invalid to the extent of the inconsistency. This would create challenges for police in enforcing the family violence order particularly where the family violence order (which is a criminally enforceable order) would need to be compared with a civilly enforceable personal protection injunction (which would not be readily accessible to police) in order for a police officer to determine which terms of the family violence order they may lawfully enforce. It could also create confusion for the parties as to which terms are required to be complied with. Prohibiting a court from making a personal protection injunction unless it is satisfied that the injunction is not inconsistent with a family violence order would safeguard against inconsistent orders arising, reduce confusion and reduce the risk of unlawful arrests.

643. There may be circumstances in which an individual does have a family violence order and an inconsistent personal protection injunction in force at the same time. This would include situations in which the court fails to comply with the requirement in new subsection 114(1C), which in accordance with new subsection 114(8) would not affect the validity of the personal protection injunction, or circumstances in which a person who has a personal protection injunction subsequently obtains an inconsistent family violence order.

644. Notwithstanding the disclosure obligations in new section 113A, in satisfying itself for the purposes of subsection 114(1C), there would be inherent risks in the court relying on the parties to self-report the existence of a family violence order. There may be circumstances in which parties withhold this information from the court, for example, they are unaware that an old family violence order remains in existence, or do not understand their obligations to disclose information of this nature to the court. It is important that the court has a reliable basis on which to satisfy itself for the purposes of subsection 114(1C), both to ensure that this new subsection can effectively safeguard against inconsistent orders arising, and to minimise the risk of a court refusing to make a personal protection injunction, or impose particular terms under a personal protection injunction, under a mistaken assumption that the injunction would be consistent with family violence order, leaving an individual without protection.

645. To address this, new subsection 114(1D) would provide that in satisfying itself for the purposes of subsection 114(1C), the court must inspect any record, database or register that:

- contains information about family violence orders,
- is maintained by a Department, agency or authority of the Commonwealth, or of a State or Territory, and
- is, or can reasonably be made, available to the court.

646. New paragraph 114(1D)(a) expressly provides that the information about a family violence order contained in the record, database or register could be in any form, including electronic. It is intended that information in hard copy or other form would also be sufficient for the purposes of this provision provided that the record, database or register also meets the requirements in paragraphs 114(1D)(b) and (c).

647. New paragraph 114(1D)(b) would require that any record, database or register inspected by the court for the purposes of satisfying itself of the existence of a family violence order under paragraph 114(1D) must be maintained by a Department, agency or authority of the Commonwealth, or of a State or Territory. This would include any record, database or register maintained by an Australian federal government department or portfolio agency. New subsection 114(1D) is intended to ensure the accuracy and reliability of the information on which the court relies.

648. New paragraph 114(1D)(c) would require that any record, database or register inspected by the court for the purposes of satisfying itself of the existence of a family violence order under subsection 114(1D) must be, or can reasonably be made available to the court. This provision is intended to clarify that the court is not expected to inspect records, databases or registers to which they do not have direct access or to which obtaining access would be unreasonably burdensome.

649. The Note under new subsection 114(1D) would advise that the National Police Reference System, maintained by the Australian Criminal Intelligence Commission, is the database in which family violence order information is contained at the time of writing in 2021. The National Police Reference System supports the sharing of State and Territory family violence order information across jurisdictions under the National Domestic Violence Order Scheme. The National Police Reference System enables Australian police agencies to share essential policing information with other police agencies. It is specifically designed to equip operational police, anywhere in the country, with the knowledge they need to make on-the-spot decisions when dealing with persons of interest. It provides key reference data to support police officers, investigators and analysts. Court Portal access to the National Police Reference System will be arranged for the federal family law courts which will allow these courts to access family violence order information.

#### **Item 40 – Before subsection 114(2A)**

650. Item 40 would insert the heading ‘De facto financial causes’ before subsection 114(2A). This amendment would provide additional clarity about the content of subsection 114(2A) which deals with the powers of the court to make orders and grant injunctions in de facto financial causes.

#### **Item 41 – Before subsection 114(3)**

651. Item 41 would insert the heading ‘Court may make other injunctions’ before subsection 114(3). This amendment would provide additional clarity about the content of subsection 114(3) which deals with the granting of injunctions by interlocutory order.

#### **Item 42 – Before subsection 114(4)**

652. Item 42 would insert the heading ‘Bankrupt or insolvent parties’ before subsection 114(4). This amendment would provide additional clarity about the content of subsection 114(4) which deals with the making of injunctions where a party to the marriage is a bankrupt.

#### **Item 43 – At the end of section 114**

##### *Validity not affected*

653. Item 43 would insert the heading ‘Validity not affected’ at the end of section 114, and below it, insert new subsection 114(8). The heading would provide additional clarity about the content of new subsection 114(8).

654. New subsection 114(8) would provide that failure to comply with subsections 114(1A), (1B), (1C) or (1D) does not affect the validity of the injunction. This is because the obligations set out in subsections 114(1A), (1B), (1C) and (1D) are administrative in nature. New subsection 114(8) recognises that it is undesirable that administrative failures should invalidate an order issued by the court otherwise in accordance with the law.

#### **Item 44 – Sections 114AA and 114AB**

655. Item 44 would repeal sections 114AA and 114AB.

656. Existing section 114AA currently gives police the power to arrest a person if they breach an injunction for personal protection issued under section 114 by engaging in prescribed conduct. The effect of the repeal of this provision is that police would no longer be able to arrest a person in relation to a breach of a personal protection injunction under section 114. This arrest power is not currently utilised in practice, because personal protection injunctions under paragraph 114(1)(a) are not issued in a format that is compatible with police information sharing systems.

657. The Bill would create federal family violence orders under Division 2 of Part XIV, which, if breached, can be criminally enforced. Federal family violence orders would offer stronger protections for people experiencing family violence than personal protection injunctions. Currently, to enforce a family law personal protection injunction under paragraph 114(1)(a), the protected person must bring a private action against the offender in a family law court.

658. With the repeal of section 114AA, policing agencies would not have a role to play in the enforcement of personal protection injunctions under section 114. The onus would remain on the protected person to initiate civil proceedings in a family law court to have a personal protection injunction enforced. Civil penalties, under Part XIII A for injunctions in relation to parties to a marriage, may include fines, good behaviour bonds or gaol time.

659. The power for police to arrest a person for breaching a federal family violence order would be contained in the general provisions of the Crimes Act. In particular, Division 4 of Part IAA of the Crimes Act sets out the law relating to arrests.

660. Section 3W of the Crimes Act gives police officers the power to arrest a person, with or without warrant, for an offence if the officer believes on reasonable grounds that the person has committed or is committing an offence. Section 23 of the Crimes Act provides that a person arrested for Commonwealth offences must be released within the investigation period, or, if they are not released, they must be brought before a judicial officer within the investigation period, or as soon as practicable at the end of that period.

661. Recognising federal family violence orders on the National Domestic Violence Order Scheme would result in these orders being treated as a local order in the State or Territory in which the breach occurs. This means that the law of the State or Territory in which the breach occurred can govern the arrest of the person, among other enforcement matters.

662. Section 114AB, which would also be repealed by item 44, deals with the Operation of State and Territory laws. Existing section 114AB would be replaced by new Division 4 of Part XIV – ‘Relationship with family violence orders made under State and Territory laws.’

#### **Division 4 – Relationship with family violence orders made under State and Territory Laws**

##### **Subdivision A – What this Division does**

##### **New section 114A – What this Division does**

663. New section 114AA would set out a list of matters with which Division 4 deals and its purposes.

664. New paragraph 114AA(1)(a) would provide that Division 4 deals with the relationship between new Division 2, which addresses federal family violence orders in relation to a party to a marriage, and other laws. The other laws would refer to laws of the States and Territories that allow for the issue of family violence orders.

665. New paragraph 114AA(1)(b) would provide that Division 4 deals with the relationship between new Division 3, which addresses orders, declarations and injunctions in relation to a party to a marriage (other than federal family violence orders), and other laws. The other laws would refer to laws of the States and Territories that allow for the issue of family violence orders.

666. New paragraph 114AA(1)(c) would clarify that Division 4 would include provisions dealing with the concurrent operation of new Division 2 and Division 3 with prescribed State and Territory laws. These provisions would be located in new Subdivision B.

667. New paragraph 114AA(1)(d) would clarify that Division 4 would include provisions dealing with the relationship between federal family violence orders in relation to parties to a marriage and family violence orders. These provisions would be located in new Subdivision C.

668. New paragraph 114AA(1)(e) would clarify that Division 4 would include provisions dealing with the relationship between injunctions granted under Part XIV that provide for

personal protection other than federal family violence orders – that is personal protection injunctions granted under section 114 as amended – and family violence orders. These provisions would be located in new Subdivision D.

669. New paragraph 114AA(2)(a) would provide one of the purposes of Division 4 is to resolve inconsistencies between federal family violence orders made under Part XIV - which refers to federal family violence orders issued under new section 113AC - and family violence orders. Provisions addressing this issue would be located in new Subdivision C.

670. New paragraph 114AA(2)(b) would provide one of the purposes of Division 4 is to resolve inconsistencies between injunctions granted under Part XIV that provide for personal protection (other than federal family violence orders) – that is, personal protection injunctions granted under section 114 as amended – and family violence orders. Provisions addressing this issue would be located in new Subdivision D.

### **Subdivision B – Concurrent operation of laws**

#### **New section 114AB - State and Territory laws and federal family violence orders**

##### *State or Territory laws and federal family violence orders*

671. New subsection 114AB(1) would provide that Division 2, establishing federal family violence orders, does not intend to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with that Division and is prescribed by the regulations for the purposes of this paragraph.

672. The introduction of this subsection would reinforce that the Commonwealth does not seek to limit the ability for a validly made State or Territory law, and any order made thereunder, to operate in conjunction with Division 2 and any order made thereunder, to the extent that they are not directly inconsistent.

673. All States and Territories have enacted legislation enabling their jurisdictions to issue family violence orders. A family violence order is a civil order, issued by the relevant State or Territory to protect people in domestic and family violence situations by prohibiting a person from committing certain behaviours. A breach of these orders is a criminal offence. It is intended that the State and Territory laws to be prescribed under new paragraph 114AB(1)(b) would be the laws under which family violence orders are issuable.

674. The introduction of federal family violence orders would supplement the existing State and Territory system. It is critical that persons seeking protection from family violence are able to access enforceable protection orders in whichever jurisdiction they are in. Federal family violence orders would be an option for persons in the family law system.

675. New paragraph 114AB(1)(a) would clarify that it is intended that, provided that the State and Territory legislation allowing for the issue of family violence and other orders can operate concurrently with Division 2, both pieces of legislation would be valid and enforceable. To the extent that a law of a State or Territory is not able to operate concurrently with Division 2 because provisions are directly inconsistent, section 109 of the Constitution would operate to invalidate the State or Territory law to the extent of that inconsistency.

676. This Bill seeks to safeguard against persons having both a family violence order and federal family violence order in force at the same time in relation to the same matter. New

paragraph 113AC(4)(c) provides that the court must not make the order unless it is satisfied that there is no family violence order in force for the protection of the protected person and that is directed against the other party to the marriage. There may be circumstances however, in which an individual does have both a family violence order and a federal family violence order in force at the same time. This would include situations in which the court fails to comply with the requirements in new paragraph 113AC(4)(c), which in accordance with new subsection 113AC(11) would not affect the validity of the federal family violence order or circumstances in which a person who has a federal family violence order subsequently obtains a family violence order.

677. New paragraph 114AB(1)(a) would clarify that it is intended that in circumstances of this nature, provided that the family violence order and federal family violence order can operate concurrently, both orders would be valid and enforceable. To the extent that an order made under the law of a State or Territory is not able to operate concurrently with an order issued under Division 2 because the terms of those orders are directly inconsistent, section 109 of the Constitution would operate to invalidate the State or Territory order to the extent of that inconsistency. New section 114AE would state this explicitly.

678. Prescribing State and Territory laws in regulations under paragraph 114AB(1)(b) is intended to make clear the Government's intention that Division 2 and any orders made thereunder are to operate concurrently with the prescribed State and Territory laws and orders made thereafter, to the extent that this is possible. The absence of any piece of State or Territory legislation allowing for the issue of family violence orders from the regulations under paragraph 114AB(1)(b) should not be interpreted as an attempt by the Commonwealth to limit the operation of that legislation beyond the limits imposed by section 109 of the Constitution.

679. Nothing in subsection 114AB(1) intends to restrict the jurisdiction of the States and Territories to make laws concerning family violence orders.

*State or Territory laws and other orders and injunctions made under this Part*

680. New subsection 114AB(2) would provide that Division 3, dealing with orders, declarations and injunctions other than federal family violence orders, does not intend to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with that Division and is prescribed by the regulations for the purposes of this paragraph. New section 114AB reproduces the effect of existing subsection 114AB(1).

681. The introduction of this subsection would reinforce that the Commonwealth does not seek to limit the ability for a validly made State or Territory law, and any order made thereunder, to operate in conjunction with Division 3 and any order made thereunder, to the extent that they are not directly inconsistent.

682. All States and Territories have enacted legislation enabling their jurisdictions to issue family violence orders. A family violence order is a civil order, issued by the relevant State or Territory to protect people in domestic and family violence situations by prohibiting a person from committing certain behaviours. A breach of these orders is a criminal offence. It is intended that the State and Territory laws to be prescribed under new paragraph 114AB(2)(b) would be the laws under which family violence orders are issuable.

683. New paragraph 114AB(2)(a) would clarify that it is intended that provided that the State and Territory legislation allowing for the issue of family violence and other orders can operate concurrently with Division 3, both pieces of legislation would be valid and enforceable. To the extent that a law of a State or Territory is not able to operate concurrently with Division 3 because provisions are directly inconsistent, section 109 of the Constitution would operate to invalidate the state law to the extent of that inconsistency.

684. Under Division 3, as amended by this Bill, a court can issue injunctions in matrimonial cause proceedings for purposes other than personal protection. Such injunctions may restrain a person from entering or remaining in a specified area or restrain a person from entering or remaining in a place of residence, employment or education of prescribed persons.

685. This Bill seeks to safeguard against persons having both an injunction under Division 3 and a family violence order in force at the same time in relation to the same matter. New subsection 114(1B) would provide that a person must not apply for a personal protection injunction under paragraph 114(1)(a) if the injunction would protect the same person, be directed against the same person and relate to the same matters as is the subject of the family violence order. There may be circumstances however, in which an individual has an injunction issued under Division 3 and a family violence order in force at the same time. This would include circumstances in which a person who has a Division 3 injunction subsequently obtains a family violence order.

686. Prescribing State and Territory laws in regulations under paragraph 114AB(2)(b) is intended to make clear the Government's intention that Division 3 and any orders made thereunder are to operate concurrently with the prescribed State and Territory laws and orders made thereafter, to the extent that this is possible. The absence of any piece of State or Territory legislation allowing for the issue of family violence orders from the regulations under paragraph 114AB(2)(b) should not be interpreted as an attempt by the Commonwealth to limit the operation of that legislation beyond the limits imposed by section 109 of the Constitution.

687. Nothing in subsection 114AB(2) intends to restrict the jurisdiction of the States and Territories to make laws concerning family violence orders.

### **Subdivision C – Relationship between federal family violence orders and family violence orders**

#### **New section 114AC - State or Territory court in proceedings for family violence order may revoke or suspend federal family violence order**

##### *Application of this section*

688. New section 114AC would allow State and Territory courts with jurisdiction under Part XIV of the Family Law Act, to revoke or suspend a federal family violence order in proceedings to make or vary a State or Territory family violence order. This provision is intended to operate similarly to existing section 68R, which allows State and Territory courts to vary, revoke or suspend certain orders issued under Part VII or section 114 of the Family Law Act when the court is issuing or varying a family violence order. Unlike section 68R, new section 114AC would apply only to federal family violence orders, and would not permit State and Territory courts to vary a federal family violence order.



689. New paragraph 114AC(1)(a) would limit the application of new section 114AC to proceedings in a State or Territory court to make or vary a family violence order that is for the protection of a person (the first person) and is directed against another person (the second person). This paragraph is designed to be read in conjunction with new paragraph 114AC(2)(a) and new subsection 114AC(4) which would require that the person to be protected by the family violence order issued or varied by the State or Territory court must be the same person that is currently protected by the federal family violence order.

690. Relevant family violence orders for the purposes of new paragraph 114AC(1)(a) are orders that fall within the definition of family violence order, in subsection 4(1) of the Family Law Act, including interim orders.

691. New paragraph 114AC(1)(b) would limit the application of new section 114AC to proceedings in a State or Territory court that has jurisdiction under Part XIV of the Family Law Act. This would include a State or Territory court of summary jurisdiction which would have jurisdiction under Part XIV by reason of existing subsection 39(2), and the Family Court of Western Australia which would have jurisdiction under Part XIV by reason of existing section 41 of the Family Law Act.

*Power of court to revoke or suspend federal family violence order*

692. New subsection 114AC(2) would give the State and Territory courts described in paragraph 114AC(1)(b), in matters of the kind described in paragraph 114AC(1)(a), power to revoke or suspend a federal family violence order made under Division 2. This provision specifically notes that the courts' power is subject to new subsections 114AC(3) to (5) which would respectively provide that a court may suspend a federal family violence order only when it is making or varying an interim family violence order and revoke a federal family violence order only when making or varying a final family violence order; and that the court must take into account certain matters when making a decision to suspend or revoke a federal family violence order.

693. New paragraph 114AC(2)(a) would restrict the power of a State or Territory court to revoke or suspend a federal family violence order to matters in which persons to be protected by the family violence order issued or varied by the State or Territory court are the same persons that are protected by the federal family violence order.

694. New paragraph 114AC(2)(b) would restrict the power of a State or Territory court to revoke or suspend a federal family violence order to matters in which the person against whom the family violence order that is issued or varied by the State or Territory court is directed is the same person against whom the federal family violence order is directed.

695. The rationale for new subsection 114AC(2) is that persons who have been issued with a federal family violence order may, at a later date, seek alternative or additional protection orders in a State or Territory court. This may include, but would not be limited to emergency situations or in the course of federal family violence order breach proceedings. State and Territory courts would not have jurisdiction to issue or amend a federal family violence order, but may assist the parties before them by issuing a family violence order, under local laws. A family violence order however (or any condition thereof) that is inconsistent with a federal family violence order (or any condition thereof) would be invalid to the extent of the inconsistency. This would mean in many cases that a family violence order would lack utility. It would also create enforcement challenges for police, particularly where multiple orders

would need to be compared for a police officer to determine which conditions of which orders they may lawfully enforce. For this reason, together with the requirement in new paragraph 113AC(4)(c) that a court must not issue a federal family violence order where there is a family violence order in force in relation to the same matter, new subsection 114AC(2) is intended to safeguard against circumstances arising in which a person has both a federal family violence order and a family violence order directed against the same individual, unless it is clear that multiple orders can operate concurrently.

696. A revocation of a federal family violence order, for the purposes of this section, is taken to be a complete repeal of the federal family violence order. The terms of the order would have no further effect and would not be enforceable. A revoked federal family violence order could not come back into force. A suspension of a federal family violence order however, would be time-limited and could not be ordered for an indefinite period.

697. Although new subsection 114AC(2) would provide State and Territory courts with the power to revoke or suspend a federal family violence order, it does not purport to impose an obligation on these courts to do so when issuing a family violence order. Subsection 114AC(2) is not intended to limit a State or Territory court's ability to issue a family violence order that can operate concurrently with an existing federal family violence order. Where a State or Territory court is issuing or varying a family violence order that would be inconsistent with a federal family violence order, it is intended that the court would revoke or suspend the federal family violence order in accordance with this provision.

698. New subsection 114AC(2) would not give a State or Territory court power to vary a federal family violence order. State and Territory courts and police have consistently advised that it is preferable that a court would replace a federal family violence order with a family violence order in circumstances where new protections are required. This is due both to the relative familiarity that State and Territory agencies have with local family violence orders, and the practical challenges that varying federal family violence orders would have created for State and Territory courts in terms of ensuring that varied orders are served on the parties and made in the standard form federal family violence order template, which State and Territory court IT systems would not be able to readily accommodate.

699. New paragraph 114AC(3)(a) would provide that the State or Territory court may suspend a federal family violence order, only when it is making or varying an interim family violence order. The implication is that the court cannot suspend a federal family violence order when it is making or varying a final family violence order. The rationale for new subsection 114AC(3)(a) is to avoid circumstances in which the federal family violence order is suspended, a final family violence order is made, but the federal family violence order recommences during the period of time the final family violence order is in force. This would result in an overlap of orders and section 109 of the Constitution would operate to invalidate the State or Territory order to the extent of that inconsistency. This would create challenges for police officers seeking to enforce the orders. It is intended that where a federal family violence order is suspended, the order would cease to be suspended at the time the interim family violence order expires (see new subsection 114AC(7)).

700. New paragraph 114AC(3)(b) would provide that the State or Territory court may revoke a federal family violence order, only when it is making or varying a final family violence order. The implication is that the court cannot revoke a federal family violence order when it is making or varying an interim family violence order. The rationale for new paragraph 114AC(3)(b) is to avoid circumstances in which an interim family violence order

is issued, the pre-existing federal family violence order is revoked, and the interim family violence order subsequently expires and is not replaced with a final family violence order. This would leave a gap in protection for persons previously covered by the federal family violence order.

701. New subsection 114AC(4) would provide that the court may revoke or suspend a federal family violence order only if it also makes or varies a family violence order. It would not be sufficient if a family violence order or variation thereof has merely been applied for. Relevant family violence orders for the purposes of new subsection 114AC(4) are orders that fall within the definition of family violence order in subsection 4(1) of the Family Law Act, including interim orders.

702. New paragraph 114AC(4)(a) would provide that the court must not revoke or suspend a federal family violence order unless the family violence order that the court makes or varies is for the protection of the same individual who is the protected person in relation to the federal family violence order.

703. New paragraph 114AC(4)(b) would provide that the court must not revoke or suspend a federal family violence order unless the family violence order that the court makes or varies is directed against the same individual against whom the federal family violence order is directed.

704. Any decision regarding the making or variation of a family violence order would be made under State or Territory legislation. If a State or Territory court is unable, or unwilling, within the applicable State or Territory legislative framework, to issue a family violence order that protects the individual currently protected by the federal family violence order, new subsection 114AC(4) would prohibit the State or Territory court from revoking or suspending the federal family violence order. In these circumstances, it would be open to the State or Territory court to issue a family violence order that can operate concurrently with the federal family violence order. It would also be open to the protected person under the federal family violence order to apply to a listed court to have the federal family violence order varied under new section 113AI.

*Matters court must take into account*

705. New subsection 114AC(5) would set out the matters that a State or Territory court must take into consideration when exercising power to revoke or suspend a federal family violence order under new subsection 114AC(2). It is not intended that the requirements in subsection 114AC(5) would apply when the court exercises jurisdiction under State or Territory law to issue or vary a family violence order. The requirements in subsection 114AC(5) would only apply when the court is exercising power under the Family Law Act to revoke or suspend a federal family violence order. This is the case notwithstanding that the court's power to revoke or suspend a federal family violence order would be contingent on the court issuing or varying a family violence order and the decisions are likely to be made in tandem.

706. New paragraph 114AC(5)(a) would provide that, when exercising power to revoke or suspend a federal family violence order under new subsection 114AC(2), the court must have regard to whether the federal family violence order is adequate or is appropriate in the circumstances. It is intended that this provision is read together with new subsection 113AC(3) and paragraph 113AC(4)(a) and accordingly, the court would consider whether the

terms of the order provide for the personal protection of a party to a marriage and are appropriate in the circumstances for this purpose. It is intended that if the court considers that the family violence order is adequate and is appropriate in the circumstances, the court would not revoke or suspend the order. If the court considers that the order is inadequate or inappropriate for these purposes, for example, because the terms of the order are insufficiently stringent, do not expressly prohibit particular violent conduct to which the protected person is vulnerable, or the order is due to expire imminently, it is intended that court may revoke or suspend the order. It is intended that the court would consider the adequacy and appropriateness of the order in light of all the circumstances of the case.

707. New paragraph 114AC(5)(b) would provide that, when exercising its power to revoke or suspend a federal family violence order under new subsection 114AC(2), the court must have regard to the purpose of Division 4. It is intended that the court would have particular regard to the purposes set out in paragraphs 114AA(2)(a), noting that paragraphs 114AA(2)(b) relates to orders other than federal family violence orders.

#### *Reasons for decision*

708. New subsection 114AC(6) would provide that a State or Territory court must give reasons for a decision to revoke or suspend a federal family violence order as soon as practicable after making the decision. A State or Territory court would not be required to give reasons for a decision not to do so. Adequate reasons are required by the implied guarantee of procedural due process in the exercise of judicial power. The amendment would allow the court to give reasons for its decisions orally or in writing, provided that it complied with the obligation to ensure that those reasons are adequate.

#### *When revocation or suspension comes into force*

709. New subsection 114AC(7) would provide that a revocation or suspension of a federal family violence order made under section 114AC would come into force at the later of the time when the State or Territory court revokes or suspends the order (paragraph 114AC(7)(a)) and the time when the family violence order, or variation of the family violence order comes into force and is enforceable (paragraph 114AC(7)(b)). The precise point in time at which the relevant State or Territory order comes into force would be determined by State or Territory legislation. In all States and Territories, the person against whom the family violence order is directed must have been served with the order in order for the order to become enforceable. New subsection 114AC(7) is intended to ensure that a federal family violence order that has been revoked or suspended would continue to operate until the State or Territory order with which it is being replaced can be enforced. This would ensure that there is no gap in protection for protected persons.

#### *When suspension ceases to be in force*

710. New subsection 114AC(8) would provide that if the court suspends a federal family violence order, the suspension ceases to be in force when the interim family violence order ceases to have effect. The rationale for new subsection 114AC(8) is to avoid circumstances in which an interim family violence order is issued, the pre-existing federal family violence order is suspended, the interim family violence order subsequently expires and the federal family violence order remains suspended. This would leave a gap in protection for persons previously covered by the federal family violence order. New subsection 114AC(8) is also intended to avoid circumstances in which a suspended federal family violence order ceases to

be suspended before an interim family violence order expires, leaving the parties with two, potentially inconsistent orders in place at the same time.

#### *Registration of revocation or suspension*

711. New subsection 114AC(9) would provide that the regulations may require a copy of the court's decision to revoke or suspend a federal family violence order to be registered in accordance with the regulations. The rationale for this provision is to ensure that family law courts are made aware of decisions by State and Territory courts to revoke and suspend federal family violence orders in the course of making or varying family violence orders.

712. Arrangements are also being developed, outside of the legislative framework, under which the family law courts would have a role in ensuring that information about federal family violence orders, including that they have been revoked or suspended, is accessible to police attending breach incidents. It would not be the responsibility of the State or Territory court to do this. Accordingly, it would be critical that State and Territory courts are required to inform the family law courts about any revocations or suspensions made.

713. It is intended that the regulations under this subsection would be modelled on existing regulation 12CC of the Family Law Regulations. They would require the State or Territory court to register the revocation or suspension as soon as practicable after it comes into force, with the court that made the federal family violence order in the first instance.

714. Failure on the part of the court to comply with the requirement in subsection 114AC(9) would not affect the validity of the court's decision to revoke or suspend a federal family violence order.

#### **New section 114AD - Application of the Act etc. when exercising section 114AC power**

715. New section 114AD would set out a number of requirements and provisions of the Family Law Act and subordinate legislation thereunder that would not apply to a State or Territory court exercising the power to revoke or suspend a federal family violence order under new section 114AC. This provision is designed to simplify the process for a State or Territory court exercising jurisdiction under section 114AC, noting that any decision to revoke or suspend a federal family violence order would be ancillary to a decision to issue or vary a family violence order which would be the primary matter at hand.

716. Existing subsection 123(1) gives judges the power to make Rules of Court to be followed in the Family Court and any other courts exercising jurisdiction under the Family Law Act. Therefore, when State and Territory courts of summary jurisdiction are exercising jurisdiction under the Family Law Act, they are generally required to follow the Family Law Rules made under section 123. New subsection 114AD would allow a State or Territory court exercising jurisdiction under section 114AC to utilise State or Territory court rules. Given that State and Territory courts would be applying local rules of court when exercising jurisdiction to make or vary a family violence order, it would be unreasonable to require these courts to apply a different set of rules when making an ancillary decision to revoke or suspend a federal family violence order.

#### **New section 114AE – Family violence order that is inconsistent with federal family violence order**

717. This Bill seeks to safeguard against persons having both a family violence order and federal family violence order in force at the same time in relation to the same matter. New paragraph 113AC(4)(c) provides that the court must not make the order unless it is satisfied that there is no family violence order in force for the protection of the protected person. There may be circumstances however in which an individual does have both a family violence order and a federal family violence order in force at the same time. This would include situations in which the court fails to comply with the requirements in new paragraph 113AC(4)(c), which in accordance with new subsection 113AC(12) would not affect the validity of the federal family violence order, or circumstances in which a person who has a federal family violence order subsequently obtains a family violence order.

718. New section 114AE would clarify that to the extent that a family violence order is not able to operate concurrently with a federal family violence order made under Division 2 because the terms of those orders are directly inconsistent, section 109 of the Constitution would operate to invalidate the State or Territory order to the extent of that inconsistency. There would be a direct inconsistency if it would not be possible to comply with a condition of the family violence order without breaching a condition of the federal family violence order, or vice versa.

719. Where some of the terms of a family violence order are directly inconsistent with the terms of a federal family violence order, but other terms are not directly inconsistent, the family violence order would continue to be valid to the extent that it is not inconsistent. The conditions of the family violence order that are not inconsistent with the federal family violence order would remain enforceable.

#### **Subdivision D – Relationship between orders and injunctions (other than federal family violence orders) and family violence orders**

720. The Bill would create new Subdivision D - Relationship between orders and injunctions (other than federal family violence orders) and family violence orders.

#### **New section 114AF - Family violence order that is inconsistent with injunction for personal protection (other than federal family violence orders)**

721. This Bill seeks to safeguard against persons having a family violence order and a family law personal protection injunction in force at the same time that cannot be simultaneously complied with. New subsection 114(1C) for example provides that the court must not make such an injunction unless it is satisfied that the injunction is not inconsistent with a family violence order that is in force between the same parties. There may be circumstances however in which an individual does have both a family violence order and a personal protection injunction in force at the same time. This would include situations in which the court fails to comply with the requirements in new subsection 114(1C), which in accordance with new subsection 114(8) would not affect the validity of the personal protection injunction order, or circumstances in which a person who has a personal protection injunction subsequently obtains a family violence order.

722. New section 114AF would clarify that to the extent that a family violence order is not able to operate concurrently with a personal protection injunction granted under section 114 because the terms of those orders are directly inconsistent, section 109 of the Constitution would operate to invalidate the State order to the extent of that inconsistency. There would be a direct inconsistency if it would not be possible to comply with a condition of the family

violence order without breaching a condition of the personal protection injunction, or vice versa.

723. Where some of the terms of a family violence order are directly inconsistent with the terms of a personal protection injunction, but other terms are not directly inconsistent, the family violence order would continue to be valid to the extent that it is not inconsistent. The conditions of the family violence order that are not inconsistent with the personal protection injunction would remain enforceable.

724. The Note under new section 114AF would highlight that certain provisions of Subdivision D of Division 11 of Part VII, which deal with the relationship between orders and injunctions under this Act (other than federal family violence orders) and family violence orders, also apply in relation to orders and injunctions made or granted under section 114 that provide for a child to spend time with a person. These include sections 68R, 68S and 68T (which set out the powers of State and Territory courts to vary, revive, revoke or suspend certain family law orders in proceedings to make or vary a family violence order), but do not include sections 68P or 68Q (which set out obligations on a court when it makes certain family orders that are inconsistent with a State or Territory family violence order).

## **Part 2 – Transitional, saving and application provisions**

### **Item 45 – Definitions**

725. Item 45 would provide definitions of ‘Act’, ‘amended Act’ and ‘commencement’ that would apply to Part 2 of Schedule 1 - Transitional, saving and application provisions.

726. Item 2 in the table at subclause 2(1) (item 2) would provide that Schedule 1 of this Act – which includes Item 45 – will commence on a day to be fixed by Proclamation. However, if the provisions do not commence by Proclamation within the period of 12 months beginning on the day the Act receives Royal Assent, then they will commence on the day after the end of that period.

### **Item 46 – Transitional provision – varying or revoking old PPIs in relation to a child and replacing with new FFVOs**

727. New sub-item 46(1) would provide that item 46 would apply if an order or injunction in relation to a child, that was granted under paragraphs 68B(1)(a) or (b) of the Family Law Act before commencement, is in force, and provides for the personal protection of a person (the first person) from family violence and is directed against another person (the second person). Such an order or injunction would be referred to in item 46 as ‘the old PPI’, (that is the old personal protection injunction).

728. New sub-item 46(2) would set out two courses of action that would be available to a listed court, as defined in subsection 4(1) of the amended Family Law Act, in matters in which there is an old PPI in force and provides for the personal protection of the first person from family violence and is directed against the second person. It would provide that the courses of action set out in this sub-item would be available to a listed court exercising jurisdiction in any proceedings under the Family Law Act. This is despite subsection 68AC(1) of the amended Act, which would only empower a listed court to make a federal family violence in proceedings of the following kind:

- proceedings under Part VII that relate to a child, which includes matters such as the issuing of parenting orders, location and recovery orders, and determinations on parental responsibility, and
- proceedings of the kind referred to in paragraph (e) of the definition of matrimonial cause in subsection 4(1) (to the extent that the proceedings relate to a child). These include proceedings between parties to a marriage for a federal family violence order under section 113AC or any other order or injunction in circumstances arising out of the marital relationship, excluding proceedings under a law of a State or Territory prescribed for the purposes of new paragraphs 68NA(1)(b), 68NA(2)(b), 114AB(1)(b) or 114AB(2)(b).

729. The effect is that sub-item 46(2) creates an exemption to the restrictions in subsection 68AC(1) of the amended Family Law Act for matters in which there is an old PPI in force and provides for the personal protection of the first person from family violence and is directed against the second person. Where there is an old PPI of this nature in force, the court can make orders of the kind outlined in sub-items 46(2)(a) and 46(2)(b) outside of Part VII proceedings and proceedings of the kind referred to in paragraph (e) of the definition of matrimonial cause in subsection 4(1).

730. New sub-item 46(2)(a) would provide that a listed court may do both of the following in any proceedings under the Family Law Act, where there is an old PPI in force and provides for the personal protection of a person (the first person) from family violence and is directed against another person (the second person):

- revoke the old PPI, and
- make, in accordance with Division 9A of Part VII of the amended Act, a federal family violence order in relation to the child that is for the personal protection of the first person and that is directed against the second person.

731. This sub-item would effectively allow a listed court to replace a civilly enforceable personal protection injunction with a criminally enforceable federal family violence order between the same parties. The rationale is that parties who, before commencement, obtained a personal protection injunction to address family violence, may, after commencement be eligible for a federal family violence order, which would afford them a greater level of protection. Accordingly, it is desirable that where there is an old PPI in force that provides an individual with personal protection from family violence, a listed court should, after commencement, be able to revoke that injunction and replace it with a federal family violence order, in the course of any family law proceedings, including proceedings solely for an order of this kind.

732. The requirement in sub-item 46(2)(a) that the court must make the federal family violence order in accordance with Division 9A of Part VII of the amended Act means that the court can only do so if it is satisfied of the statutory test for the issue of a federal family violence order in new subsection 68AC(6), and considers all of the relevant matters and complies with all of the obligations on the court that are set out in that Division and apply to the making of a federal family violence order under new section 68AC.

733. New sub-item 46(2)(b) would provide that a listed court may do both of the following in any proceedings under the Family Law Act, where there is an old PPI in force and provides



for the personal protection of a person (the first person) from family violence and is directed against another person (the second person):

- vary the old PPI to remove the personal protection of the first person from family violence, and
- make, in accordance with Division 9A of Part VII of the amended Act, a federal family violence order in relation to the child that is for the personal protection of the first person and that is directed against the second person.

734. Accordingly new sub-item 46(2)(b) would effectively allow a listed court to replace the part of a civilly enforceable personal protection injunction that provides personal protection from family violence, with a criminally enforceable federal family violence order between the same parties. The rationale is that parties who, before commencement, obtained a personal protection injunction to address family violence and other matters, may, after commencement be eligible for a federal family violence order, which would afford them a greater level of protection in relation to the family violence. Accordingly, it is desirable that where there is an old PPI in force that provides an individual with personal protection from family violence, a listed court should, after commencement, be able to vary that injunction and replace the family violence protections afforded under that injunction with a federal family violence order, in the course of any family law proceedings, including proceedings solely for an order of this kind.

735. This sub-item acknowledges that an old PPI may be in force that provides personal protection from family violence and personal protection in relation to other matters. Given that federal family violence orders will only be available under the amended Act to provide personal protection from family violence, it would be undesirable for a court to revoke an old PPI that contains protections in relation to matters other than family violence, and replace it with a federal family violence order that deals with family violence exclusively. Sub-item 46(2)(b) would allow the court to replace the parts of an old PPI that provided personal protection from family violence, with a criminally enforceable federal family violence order, while retaining the civil protections afforded under the old PPI in relation to other matters.

736. The requirement in sub-item 46(2)(b) that the court must make the federal family violence order in accordance with Division 9A of Part VII of the amended Act means that the court can only do so if it is satisfied of the statutory test for the issue of a federal family violence order in new subsection 68AC(6), and considers all of the relevant matters and complies with all of the obligations on the court that are set out in that Division and apply to the making of a federal family violence order under new section 68AC.

737. New sub-item 46(3) would provide that a listed court may revoke or vary the old PPI under sub-item 46(2) and make the federal family violence order under Division 9A of Part VII of the amended Act on application or of its own motion.

738. An application for orders of the kind set out under sub-item 46(2) can be made in the course of family law proceedings, including, but not limited to proceedings under Part VII and proceedings of the kind referred to in paragraph (e) of the definition of matrimonial cause in subsection 4(1). An application for orders of the kind set out in under sub-item 46(2) can also be made as a standalone application, without the applicant being a party to existing family law proceedings.

739. The own motion power in sub-item 46(3) is intended to benefit a number of vulnerable cohorts. This may include self-represented litigants who may not be aware of the option to apply for orders of the kind set out in sub-item 46(2); persons who may not self-identify as a victim or potential victim of family violence due to a lack of understanding about the range of behaviours that constitutes family violence; and litigants who may be unwilling or unable to apply for such orders as a result of the dynamics of power and control in their relationship with the other party or another person. Given the family law courts have significant experience in working with litigants with limited legal backgrounds, the courts are well placed to identify persons who may be in need of orders of the kind set out in sub-item 46(2), but due to inexperience, trauma or a lack of awareness of the availability of new federal family violence orders have not applied for them.

740. New sub-item 46(4)(a) would provide that if the federal family violence order is made by the court on application, subsection 68AB(1) of the amended Family Law Act does not apply in relation to the application. Subsection 68AB(1) of the amended Act limits the persons who can apply for a federal family violence order in relation to a child to persons who are parties to proceedings under Part VII that relate to a child; parties to proceedings of the kind referred to in paragraph (e) of the definition of matrimonial cause in subsection 4(1) (to the extent that the proceedings relate to a child); or independent children's lawyers representing the interests of the child in proceedings under Part VII. The effect of sub-item 46(4)(a) is that an application for orders of the kind set out in sub-item 46(2) can be made in the course of any family law proceedings, or as a standalone application, without the applicant being a party to existing family law proceedings.

741. Sub-item 46(4)(b) would provide that if the federal family violence order is made by the court on application, subsection 68AB(2) of the amended Family Law Act does apply in relation to the application. Subsection 68AB(2) of the amended Family Law Act prohibits a person from applying for a federal family violence order where there is a family violence order in force that is for the protection of the protected person and is directed against the person against whom the federal family violence order is directed. The effect of sub-item 46(4)(b) is that a person cannot apply for an order of the kind set out in sub-item 46(2) where there is a family violence order in force that is for the protection of the protected person and is directed against the person against whom the federal family violence order being sought under sub-item 46(2) is directed.

742. A family violence order is defined in subsection 4(1) of the Family Law Act as an order made under a prescribed law of a State or Territory to protect a person from family violence, and includes an interim order. Together with new paragraph 68AC(6)(c) of the amended Act, subsection 68AB(2) and sub-item 46(4)(b) are intended to ensure that a federal family violence order is not made where there is already a family violence order in force that provides protection for the same protected person from the person against whom a federal family violence order is being sought.

743. If the two orders were in existence at the same time, the family violence order (or any term thereof) that is inconsistent with a federal family violence order (or any term thereof) would be invalid to the extent of the inconsistency. This would create enforcement challenges for police, particularly where multiple orders would need to be compared in order for a police officer to determine which terms of which orders they may lawfully enforce. It can also create confusion for the parties as to which terms are required to be complied with. Prohibiting persons from applying for a federal family violence order where there is already a

family violence order in place between the same parties would safeguard against inconsistent orders arising, reduce confusion and reduce the risk of unlawful arrests.

744. New sub-item 46(5) would clarify that item 46 does not limit or otherwise affect any powers that a court may have under any other provision of the Family Law Act to vary or revoke an injunction granted under paragraphs 68B(1)(a) and (b).

**Item 47 – Transitional provision – varying or revoking old PPIs in relation to parties to a marriage and replacing with new FFVOs**

745. New sub-item 47(1) would provide that item 47 would apply if an order or injunction in relation to a party to a marriage, that was made or granted under paragraph 114(1)(a) of the Family Law Act before commencement, is in force, and provides for the personal protection of a person (the first person) from family violence and is directed against another person (the second person). Such an order or injunction would be referred to in item 47 as ‘the old PPI’, (that is the old personal protection injunction).

746. New sub-item 47(2) would set out two courses of action that would be available to a listed court, as defined in subsection 4(1) of the amended Family Law Act, in matters in which there is an old PPI in force and provides for the personal protection of the first person from family violence and is directed against the second person. It would provide that the courses of action set out in this sub-item would be available to a listed court exercising jurisdiction in any proceedings under the Family Law Act. This is despite subsection 113AC(1) of the amended Act, which would only empower a listed court to make a federal family violence order in proceedings of the kind referred to in paragraph (e) of the definition of matrimonial cause in subsection 4(1). These include proceedings between parties to a marriage for a federal family violence order under section 113AC or any other order or injunction in circumstances arising out of the marital relationship, excluding proceedings under a law of a State or Territory prescribed for the purposes of new paragraphs 68NA(1)(b), 68NA(2)(b), 114AB(1)(b) or 114AB(2)(b).

747. The effect is that sub-item 47(2) creates an exemption to the restrictions in new subsection 113AC(1) for matters in which there is an old PPI in force and provides for the personal protection of the first person from family violence and is directed against the second person. Where there is such an old PPI in force, the court can make orders of the kind outlined in sub-item 47(2)(a) or 47(2)(b) outside of proceedings of the kind referred to in paragraph (e) of the definition of matrimonial cause in subsection 4(1).

748. New sub-item 47(2)(a) would provide that a listed court may do both of the following in any proceedings under the Family Law Act, where there is an old PPI in force and provides for the personal protection of a person (the first person) from family violence and that is directed against another person (the second person):

- revoke the old PPI, and
- make, in accordance with Division 2 of Part XIV of the amended Act, a federal family violence order in relation to a party to the marriage that is for the personal protection of the first person and that is directed against the second person.

749. This sub-item would effectively allow a listed court to replace a civilly enforceable personal protection injunction with a criminally enforceable federal family violence order

between the same parties. The rationale is that parties who, before commencement, obtained a personal protection injunction to address family violence, may, after commencement be eligible for a federal family violence order, which would afford them a greater level of protection. Accordingly, it is desirable that where there is an old PPI in force that provides an individual with personal protection from family violence, a listed court should, after commencement, be able to revoke that injunction and replace it with a federal family violence order, in the course of any family law proceedings, including proceedings solely for an order of this kind.

750. The requirement in sub-item 47(2)(a) that the court must make the federal family violence order in accordance with Division 2 of Part XIV of the amended Family Law Act means that the court can only do so if it is satisfied of the statutory test for the issue of a federal family violence order in new subsection 113AC(4), and considers all of the relevant matters and complies with all of the obligations on the court that are set out in that Division and apply to the making of a federal family violence order under new section 113AC.

751. New sub-item 47(2)(b) would provide that a listed court may do both of the following in any proceedings under the Family Law Act, where there is an old PPI in force and provides for the personal protection of a person (the first person) from family violence and is directed against another person (the second person):

- vary the old PPI to remove the personal protection of the first person from family violence, and
- make, in accordance with Division 2 of Part XIV of the amended Act, a federal family violence order in relation to a party to the marriage that is for the personal protection of the first person and that is directed against the second person.

752. Accordingly new sub-item 47(2)(b) would effectively allow a listed court to replace the part of a civilly enforceable personal protection injunction that provides personal protection from family violence, with a criminally enforceable federal family violence order between the same parties. The rationale is that parties who, before commencement, obtained a personal protection injunction to address family violence and other matters, may, after commencement be eligible for a federal family violence order, which would afford them a greater level of protection in relation to the family violence. Accordingly, it is desirable that where there is an old PPI in force that provides an individual with personal protection from family violence, a listed court should, after commencement, be able to vary that injunction and replace any family violence protections afforded under that injunction with a federal family violence order, in the course of any family law proceedings, including proceedings solely for an order of this kind.

753. This sub-item acknowledges that an old PPI may be in force that provides personal protection from family violence and personal protection in relation to other matters. Given that federal family violence orders will only be available under the amended Act to provide personal protection from family violence, it would be undesirable for a court to revoke an old PPI that contains protections in relation to matters other than family violence, and replace it with a federal family violence order that deals with family violence exclusively. Sub-item 47(2)(b) would allow the court to replace the parts of an old PPI that provided personal protection from family violence, with a criminally enforceable federal family violence order, while retaining the civil protections afforded under the old PPI in relation to other matters.

754. The requirement in sub-item 47(2)(b) that the court must make the federal family violence order in accordance with Division 2 of Part XIV of the amended Family Law Act means that the court can only do so if it is satisfied of the statutory test for the issue of a federal family violence order in new subsection 113AC(4), and considers all of the relevant matters and complies with all of the obligations on the court that are set out in that Division and apply to the making of a federal family violence order under new section 113AC.

755. New sub-item 47(3) would provide that a listed court may revoke or vary the old PPI under sub-item 47(2) and make the federal family violence order under Division 2 of Part XIV of the amended Act on application or of its own motion.

756. An application for orders of the kind set out under sub-item 47(2) can be made in the course of family law proceedings, including, but not limited to proceedings of the kind referred to in paragraph (e) of the definition of matrimonial cause in subsection 4(1). An application for orders of the kind set out in sub-item 47(2) can also be made as a standalone application, without the applicant being a party to existing family law proceedings.

757. The own motion power in sub-item 47(3) is intended to benefit a number of vulnerable cohorts. This may include self-represented litigants who may not be aware of the option to apply for orders of the kind set out in sub-item 47(2); persons who may not self-identify as a victim or potential victim of family violence due to a lack of understanding about the range of behaviours that constitutes family violence; and litigants who may be unwilling or unable to apply for such orders as a result of the dynamics of power and control in their relationship with the other party or another person. Given the family law courts have significant experience in working with litigants with limited legal backgrounds, the courts are well placed to identify persons who may be in need of orders of the kind set out in under sub-item 47(2), but due to inexperience, trauma or a lack of awareness of the availability of new federal family violence orders have not applied for them.

758. New sub-item 47(4)(a) would provide that if the federal family violence order is made by the court on application, subsection 113AB(1) of the amended Family Law Act does not apply in relation to the application. Subsection 113AB(1) of the amended Family Law Act limits the persons who can apply for a federal family violence order in relation to a party to a marriage to persons who are parties to proceedings of the kind referred to in paragraph (e) of the definition of matrimonial cause in subsection 4(1). The effect of sub-item 47(4)(a) is that an application for orders of the kind set out in under sub-item 47(2) can be made in the course of any family law proceedings, or as a standalone application, without the applicant being a party to existing family law proceedings.

759. Sub-item 47(4)(b) would provide that if the federal family violence order is made by the court on application, subsection 113AB(2) of the amended Act does apply in relation to the application. Subsection 113AB(2) of the amended Family Law Act prohibits a person from applying for a federal family violence order where there is a family violence order in force that is for the protection of the protected person and is directed against the person against whom the federal family violence order is directed. The effect of sub-item 47(4)(b) is that a person cannot apply for an order of the kind set out in sub-item 47(2) where there is a family violence order in force that is for the protection of the protected person and is directed against the person against whom the federal family violence order being sought under sub-item 47(2) is directed.

760. A family violence order is defined in subsection 4(1) of the Family Law Act as an order made under a prescribed law of a State or Territory to protect a person from family violence, and includes an interim order. Together with new paragraph 113AC(4)(c) of the amended Act, subsection 113AB(2) and sub-item 47(4)(b) are intended to ensure that a federal family violence order is not made where there is already a family violence order in force that provides protection for the same protected person from the person against whom a federal family violence order is being sought.

761. If the two orders were in existence at the same time, the family violence order (or any term thereof) that is inconsistent with a federal family violence order (or any term thereof) would be invalid to the extent of the inconsistency. This would create enforcement challenges for police, particularly where multiple orders would need to be compared in order for a police officer to determine which terms of which orders they may lawfully enforce. It can also create confusion for the parties as to which terms are required to be complied with. Prohibiting persons from applying for a federal family violence order where there is already a family violence order in place between the same parties would safeguard against inconsistent orders arising, reduce confusion and reduce the risk of unlawful arrests.

762. New sub-item 47(5) would clarify that item 47 does not limit or otherwise affect any powers that a court may have under any other provision of the Family Law Act to vary or revoke an injunction granted under paragraph 114(1)(a).

#### **Item 48 – Application provision – allegations of family violence etc.**

763. New item 48 would provide that section 67ZBB of the amended Family Law Act applies in relation to a proceeding regardless of whether the notice mentioned in that section was filed before, on or after commencement. Section 67ZBB of the amended Act requires the court to take prompt action in relation to allegations of child abuse or family violence. Specifically, this section provides that where a notice is filed under subsection 67Z(2) or 67ZBA(2) in proceedings for an order under Part VII of the Family Law Act in relation to a child, and the notice alleges, as a consideration that is relevant to whether the court should make or refuse to make the order:

- that there has been abuse of the child or family violence by one of the parties to proceedings,
- there would be a risk of abuse of the child if there were to be a delay in the proceedings, or
- there is a risk of family violence by one of the parties to the proceedings

the court must consider if a federal family violence order should be made under new section 68AC (item 13) or an order or an injunction should be made or granted under section 68B.

764. The effect of item 48 is that section 67ZBB of the amended Act would apply:

- where the relevant notice was filed under subsection 67Z(2) or 67ZBA(2) before commencement, and
- where the relevant notice was filed under subsection 67Z(2) or 67ZBA(2) on commencement, and

- where the relevant notice was filed under subsection 67Z(2) or 67ZBA(2) after commencement.

#### **Item 49 – Application provision – applying for and making FFVOs**

765. Item 49 would provide that new sections 68AB, 68AC, 113AB and 113AC of the amended Act apply in relation to a proceeding regardless of whether the proceeding commenced before, on or after commencement. Sections 68AB and 113AB would list the persons who are eligible to apply to a listed court for a federal family violence order in relation to a child or a party to marriage respectively, and prohibit a person from applying for a federal family violence order where there is a family violence order in force that is for the protection of the protected person and is directed against the person against whom the federal family violence order is directed. Sections 68AC and 113AC would allow listed courts to make federal family violence orders in relation to a child and parties to a marriage, respectively. The effect of item 49 is that sections 68AB, 68AC, 113AB and 113AC would apply:

- where a federal family violence order is being applied for or made in the course of proceedings that commenced before commencement, and
- where a federal family violence order is being applied for or made in the course of proceedings that commenced on commencement, and
- where a federal family violence order is being applied for or made in the course of proceedings that commenced after commencement.

766. Subsections 68AB(1) and 113AB(1) would not however apply where the federal family violence order is being sought under sub-items 46(2) and 47(2) respectively (see sub-items 46(4)(a) and 47(4)(a)).

#### **Item 50 – Application provision – limits on making new PPIs etc.**

767. Item 50 would provide that subsections 68B(1A) to (1D) and 114(1A) to (1D) of the amended Act apply in relation to an injunction granted on or after commencement, regardless of whether the injunction was applied for or the proceedings commenced before, on or after commencement. Subsections 68B(1A) to (1D) and 114(1A) to (1D) of the amended Act set out the requirements on a court when granting a personal protection injunction under paragraphs 68B(1)(a) and (b) and 114(1)(a). The effect of item 50 is that these requirements would apply:

- where a personal protection injunction was applied for or proceedings commenced before commencement, and
- where a personal protection injunction was applied for or proceedings commenced on commencement, and
- where a personal protection injunction was applied for or proceedings commenced after commencement

provided that the personal protection injunction is being made on or after commencement.

768. The Note under item 50 would clarify that an order or injunction that was made or granted under paragraphs 68AB(1)(a) and (b) and 114(1)(a) before commencement and is in force after commencement is valid and enforceable under Division 13A of Part VII and Part XIII A of the Family Law Act. The purpose of this Note is to highlight that injunctions made before commencement of the amending Act under these provisions will continue to be valid and civilly enforceable after commencement.

### **Schedule 3 – Other amendments commencing on Royal Assent**

#### ***Family Law Act 1975***

##### **Item 1 – Subsection 4(1) (at the end of the definition of *family violence order*)**

769. Item 1 would insert a Note at the end of the definition of family violence order in subsection 4(1) which would provide a non-exhaustive list of examples of the kinds of orders that are covered by that definition. Specifically, the Note would clarify that orders issued by bodies or persons such as courts, tribunals and police in the nature of a domestic violence order, a family violence safety notice, a police protection notice and a police order are among the kinds of orders that are to be considered family violence orders for the purposes of the definition in subsection 4(1).

770. The Note would clarify that the definition of family violence orders is intended to be construed broadly. The definition is not intended to cover orders issued by courts or tribunals only, or orders that are expressly titled as such. It is however only intended to cover enforceable orders made under prescribed State or Territory legislation.

### **Schedule 4 – Protection for Registrars**

#### **Part 1 – Amendments to the Federal Circuit and Family Court of Australia Act 2021**

##### ***Federal Circuit and Family Court of Australia Act 2021***

##### **Item 1 - paragraph 101(1)(a)**

771. This amendment relates to the Chief Executive Officer, Senior Registrars and Registrars in the Federal Circuit and Family Court (FCFC) (Division 1). The purpose of this amendment is to explicitly broaden the protection for the Chief Executive Officer, Senior Registrar and Registrar under section 101. At present, section 101 provides immunity for these officers in conducting conferences with parties to a property settlement proceeding, as well as in exercising a power of the FCFC (Division 1) referred to in section 98.

772. This amendment would make the protection of Registrars explicitly broader in two ways. Firstly, the protection would not be limited to conferences relating to property settlement proceedings. This protection would be extended to Registrars conducting any conference relating to a matter relevant to a proceeding, for example parenting matters.

773. Secondly, the amendment would ensure Registrars are protected in conducting conferences that involve people who are not parties to the proceedings. Family law proceedings may sometimes benefit from the inclusion of support persons (such as grandparents) who are not parties to the proceedings.



774. Explicitly broadening the immunity of Registrars in conducting conferences will support increased and broadened use of alternative dispute resolution (ADR). ADR can provide a more tailored and flexible resolution that is more likely to remain in place and reduce recurring litigation, support early resolution of matters, or if resolution is not reached, narrow the issues in contention.

775. This amendment would not limit any other immunity or protection enjoyed by the Chief Executive Officer, a Senior Registrar or Registrar. Further, Registrars will generally enjoy the protection of common law judicial immunity where they exercise delegated judicial power.

### **Item 2 - paragraph 257(1)(a)**

776. This amendment relates to the Chief Executive Officer, Senior Registrars and Registrars in the FCFC (Division 2). The purpose of this amendment is to explicitly broaden the protection for Registrars and Senior Registrars provided under section 257. At present, section 257 provides immunity for these officers in conducting conferences with parties to a property settlement proceeding, as well as in exercising a power of the FCFC (Division 1) referred to in section 257.

777. This amendment would explicitly make the protection of Registrars broader in two ways. Firstly, the protection would not be limited to conferences relating to property settlement proceedings. This protection would be extended to Registrars conducting any conference relating to a matter relevant to a family law or child support proceeding.

778. Secondly, the amendment would ensure Registrars are protected in conducting conferences that involve people who are not parties to the proceedings. Family law proceedings may sometimes benefit from the inclusion of support persons (such as grandparents) who are not parties to the proceedings.

779. An equivalent provision for the FCFC (Division 1), new paragraph 101(1)(a), would be inserted by Item 1, with one key difference. To avoid unintended application to the FCFC (Division 2)'s general federal law jurisdiction, paragraph 205(1)(a) would be limited to conferences relating to a matter relevant to a 'family law or child support proceeding', a key term defined in section 7 of the FCFC Act.

780. Broadening the immunity of Registrars in conducting conferences will support increased and broadened use of ADR. ADR can provide a more tailored and flexible resolution would that is more likely to remain in place and reduce recurring litigation, support early resolution of matters, or if resolution is not reached, narrow the issues in contention.

781. This amendment would not limit any other immunity or protection enjoyed by the Chief Executive Officer, a Senior Registrar or Registrar. Registrars will generally enjoy the protection of common law judicial immunity where they exercise delegated judicial power.

### **Item 3 - Application provisions**

782. This provision clarifies that sections 101 and 257 of the FCFC Act, as amended by this Schedule, apply in relation to the performance of functions and the exercise of powers by the Chief Executive Officer, Senior Registrars or Registrars from the commencement of the FCFC Act, notwithstanding if the commencement of this Act occurs after the commencement

of the FCFC Act. If this Act commences after the commencement of the FCFC Act, this provision is intended to apply from the time the FCFC Act commenced, to ensure the broadening of the protections and immunities provided by Item 1 and Item 2 apply from the time the FCFC Act commenced.

## **Part 2 – Amendments to the Family Law Act 1975**

### ***Family Law Act 1975***

#### **Item 4 - paragraph 122AAA(1), page 33 (lines 3 to 8)**

783. The purpose of this amendment is to explicitly broaden the protection for Registrars of a Family Court of a State set out at section 122AAA of the Family Law Act. At present, section 122AAA provides immunity for these officers in conducting conferences with parties to a property settlement proceeding.

784. This amendment would make the protection of Registrars broader in two ways. Firstly, the protection would not be limited to conferences relating to property settlement proceedings. This protection would be extended to Registrars conducting any conference relating to a matter relevant to a proceedings, for example parenting matters. Secondly, the amendment would explicitly ensure Registrars are protected in conducting conferences that involve people who are not parties to the proceedings. Family law proceedings may sometimes benefit from the inclusion of support persons (such as grandparents) who are not parties to the proceedings.

785. Explicitly broadening the immunity of Registrars in conducting conferences will support increased and broadened use of alternative dispute resolution (ADR). ADR can provide a more tailored and flexible resolution that is more likely to remain in place and reduce recurring litigation, support early resolution of matters, or if resolution is not reached, narrow the issues in contention.

786. This amendment would not limit any other immunity or protection enjoyed by the Registrars of a Family Court of a state. Further, Registrars will generally enjoy the protection of common law judicial immunity where they exercise delegated judicial power.

787. This amendment would ensure consistency in the immunity provided to a Registrar of a Family Court of a State, and a Senior Registrar or Registrar of the FCFC, in conducting a conference relating to a matter relevant to a proceeding.

#### **Item 5 – Application provisions**

788. This provision clarifies that section 122AAA of the Family Law Act, as amended by this Schedule, applies in relation to the performance of functions and the exercise of powers by Registrars from the commencement date of the FCFC Consequential Act, notwithstanding if the commencement of this Act occurs after the commencement of the FCFC Consequential Act. If this Act commences after the commencement of the FCFC Consequential Act, this provision is intended to ensure the broadening of the protections and the broadened immunities provided by Item 4 apply from the time the FCFC Consequential Act commenced.