CHAPTER 2

Overview of the Bill

- 2.1 This chapter describes some of the main provisions in the Bill.
- 2.2 The Bill comprises two schedules of amendments. Part 1 of Schedule 1 sets out amendments relating to family violence in the Act. Part 1 of Schedule 2 sets out all other amendments to the Act and amendments to the *Bankruptcy Act 1966*. Part 2 of both schedules contain application and transitional provisions.
- 2.3 The EM and the Second Reading Speech clearly indicate that Part 1 of Schedule 1 contains the key provisions of the Bill. For this reason, and due to the nature of the evidence received throughout the inquiry, Chapter 2 focuses on those provisions, and the application provision proposed in item 45 of Schedule 1.

Key provisions relating to family violence

2.4 The primary objective of the Bill is to 'positively address family violence and child abuse in the family law system'. To achieve this objective, the Bill proposes five categories of key amendments and each of these is discussed below.

Prioritising the best interests of children in parenting matters

Convention on the Rights of the Child

- 2.5 Current section 60B of the Act sets out the objects and underlying principles of Part VII of the Act, which deals with child-related matters. The overarching objective is to ensure that the 'best interests of children' are met when making parenting orders and in applying other provisions which involve court proceedings.
- 2.6 Proposed new subsection 60B(4) adds as an additional object the Convention on the Rights of the Child (Convention) 'done' at New York on 20 November 1989. This Convention was ratified by Australia on 17 December 1990.³

2.7 The EM states:

The purpose of this object is to confirm, in cases of ambiguity, the obligation on decision makers to interpret Part VII of the Act, to the extent

Explanatory Memorandum, p. 1; the Hon. Robert McClelland MP, Attorney-General, *House Hansard*, 24 March 2011, p. 3140.

The Hon. Robert McClelland MP, Attorney-General, *House Hansard*, 24 March 2011, p. 3140.

Office of the United Nations High Commissioner for Human Rights, available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (accessed 29 July 2011).

its language permits, consistently with Australia's obligations under the Convention. The Convention may be considered as an interpretive aid to Part VII of the Act. To the extent that the Act departs from the Convention, the Act would prevail. This provision is not equivalent to incorporating the Convention into domestic law.⁴

Primary considerations in determining a child's best interests

2.8 Current section 60CC sets out how a court is to determine what is in a child's best interests. The court must invoke a two-tiered approach: two primary considerations specified in subsection 60CC(2); and the additional considerations listed in subsection 60CC(3).

2.9 Subsection 60CC(2) reads:

Primary considerations

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

Note: Making these considerations the primary ones is consistent with the objects of this Part set out in paragraphs 60B(1)(a) and (b).

2.10 Proposed new subsection 60CC(2A) (item 17) inserts the following provision into the Act:

(2A) If there is any inconsistency in applying the considerations set out in subsection (2), the court is to give greater weight to the consideration set out in paragraph (2)(b).

2.11 The EM states that, where child safety is a concern:

[T]his new provision will provide the courts with clear legislative guidance that protecting the child from harm is the priority consideration.⁵

Additional consideration – repeal of the 'friendly parent' provisions

2.12 One of the additional considerations for determining what is in a child's best interests (subsection 60CC(3)) are the so-called 'friendly parent' provisions. The 'friendly parent' provisions are paragraph 60CC(3)(c), subsection 60CC(4), and subsection 60CC(4A).

5 Explanatory Memorandum, p. 7.

⁴ Explanatory Memorandum, p. 6.

2.13 These provisions read as follows:

Additional considerations

(3) Additional considerations are:

...

(c) the willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent;

...

- (4) Without limiting paragraphs (3)(c) and (i), the court must consider the extent to which each of the child's parents has fulfilled, or failed to fulfil, his or her responsibilities as a parent and, in particular, the extent to which each of the child's parents:
 - (a) has taken, or failed to take, the opportunity:
 - (i) to participate in making decisions about major long-term issues in relation to the child; and
 - (ii) to spend time with the child; and
 - (iii) to communicate with the child; and
 - (b) has facilitated, or failed to facilitate, the other parent:
 - (i) participating in making decisions about major long-term issues in relation to the child; and
 - (ii) spending time with the child; and
 - (iii) communicating with the child; and
 - (c) has fulfilled, or failed to fulfil, the parent's obligation to maintain the child.
- (4A) If the child's parents have separated, the court must, in applying subsection (4), have regard, in particular, to events that have happened, and circumstances that have existed, since the separation occurred.
- 2.14 The Bill proposes to repeal all of the 'friendly parent' provisions. However, some of the repealed provisions are re-enacted and some are not:
 - current paragraph 60CC(3)(c) is not re-enacted;
 - current paragraph 60CC(4)(a) becomes new paragraph 60CC(3)(c);
 - current paragraph 60CC(4)(b) is not re-enacted;
 - current paragraph 60CC(4)(c) becomes new paragraph 60CC(3)(ca); and
 - current paragraph 60CC(4A) is not re-enacted.
- 2.15 The Bill repeals and replaces paragraph 60CC(3)(c) (item 18) on the following grounds:

The [Australian Institute of Family Studies] *Evaluation of the 2006 Family Law Reforms* and the Family Law Council report to the Attorney-General,

Improving responses to family violence in the family law system, noted the impact this provision had in discouraging disclosures of family violence and child abuse. These reports indicate that parties were not disclosing concerns of family violence and child abuse for fear of being found to be an 'unfriendly parent'.⁶

- 2.16 Proposed new paragraph 60CC(3)(c) requires courts to consider the extent to which each parent has taken, or failed to take, the opportunity to:
 - participate in making decisions about major long-term issues in relation to a child;
 - spend time with the child; and
 - communicate with the child.
- 2.17 Proposed new paragraph 60CC(3)(ca) reads:

(ca) the extent to which each of the child's parents has fulfilled, or failed to fulfil, the parent's obligations to maintain the child[.]

Additional consideration – family violence orders

2.18 Another additional consideration for determining what is in a child's best interests (subsection 60CC(3)) is set out in paragraph 60CC(3)(k):

Additional considerations

(3) Additional considerations are:

...

- (k) any family violence order that applies to the child or a member of the child's family, if:
 - (i) the order is a final order; or
 - (ii) the making of the order was contested by a person[.]
- 2.19 The Bill repeals and replaces paragraph 60CC(3)(k) (item 19) to require the court to have regard to *any* family violence order that applies to a child or a member of the child's family. This means that the court must consider not only final and contested orders, but also interim, uncontested and police-issued orders.⁷

Changing the definitions of 'abuse' and 'family violence'

2.20 The Bill redefines 'abuse' in subsection 4(1) (item 1) to read:

abuse, in relation to a child, means:

(a) an assault, including a sexual assault, of the child; or

6 Explanatory Memorandum, p. 8. Also see Attorney-General's Department, answer to question on notice, received 22 July 2011, p. 10.

⁷ Explanatory Memorandum, p. 8.

- (b) a person (the first person) involving the child in a sexual activity with the first person or another person in which the child is used, directly or indirectly, as a sexual object by the first person or the other person, and where there is unequal power in the relationship between the child and the first person; or
- (c) causing the child to suffer serious psychological harm, including (but not limited to) when that harm is caused by the child being subjected to, or exposed to, family violence; or
- (d) serious neglect of the child.
- 2.21 In relation to proposed paragraph (c), proposed new subsection 4AB(3) inserts the following definition of 'exposed' into the Act:
 - (3) For the purposes of this Act, a child is *exposed* to family violence if the child sees or hears family violence or otherwise experiences the effects of family violence.
- 2.22 A non-exhaustive list of examples of situations that may constitute a child being exposed to family violence are set out in proposed new subsection 4AB(4):
 - (a) overhearing threats of death or personal injury by a member of the child's family towards another member of the child's family; or
 - (b) seeing or hearing an assault of a member of the child's family by another member of the child's family; or
 - (c) comforting or providing assistance to a member of the child's family who has been assaulted by another member of the child's family; or
 - (d) cleaning up a site after a member of the child's family has intentionally damaged property of another member of the child's family; or
 - (e) being present when police or ambulance officers attend an incident involving the assault of a member of the child's family by another member of the child's family[.]
- 2.23 The Bill redefines 'family violence' in proposed new subsection 4AB(1) (item 8) to read:
 - (1) For the purposes of this Act, *family violence* means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the *family member*), or causes the family member to be fearful.
- 2.24 A non-exhaustive list of examples of behaviour which might constitute family violence is set out in proposed new subsection 4AB(2):
 - (a) an assault; or
 - (b) a sexual assault or other sexually abusive behaviour; or
 - (c) stalking; or
 - (d) repeated derogatory taunts; or
 - (e) intentionally damaging or destroying property; or

- (f) intentionally causing death or injury to an animal; or
- (g) unreasonably denying the family member the financial autonomy that he or she would otherwise have had; or
- (h) unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support; or
- (i) preventing the family member from making or keeping connections with his or her family, friends or culture; or
- (j) unlawfully depriving the family member, or any member of the family member's family, of his or her liberty.

Strengthening the obligations of advisers

- 2.25 Proposed new section 60D (item 22) outlines an adviser's obligations when giving advice or assistance to a person about matters concerning a child and Part VII of the Act. An adviser will be required to:
 - (a) inform the person that the person should regard the best interests of the child as the paramount consideration; and
 - (b) encourage the person to act on the basis that the child's bests interests are best met:
 - (i) by the child having a meaningful relationship with both of the child's parents; and
 - (ii) by the child being protected from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and
 - (iii) if there is any inconsistency in applying the considerations set out in subparagraphs (i) and (ii)—by giving greater weight to the consideration set out in subparagraph (ii).
- 2.26 An adviser is defined in proposed subsection 60D(2) as a legal practitioner, family counsellor, family dispute resolution practitioner or family consultant.

2.27 The EM explains:

The new adviser obligations help parents to consider the protection of their children from harm as a priority at an early stage of discussions with the assistance of their advisers.⁸

⁸ Explanatory Memorandum, p. 10.

Ensuring the courts have better access to evidence of abuse and family violence

Informing the court

- 2.28 Proposed new section 60CH (item 21) requires parties to parenting proceedings to inform the court if a child, or another child who is a member of the child's family, is under the care of a person under a child welfare law.
- 2.29 Proposed new section 60CI (item 21) requires parties to parenting proceedings to inform the court whether a child, or another child who is a member of the child's family, is or has been the subject of a notification or report to, or investigation, inquiry or assessment by, a prescribed child welfare authority. The notification, report, investigation, inquiry or assessment must relate to abuse, or an allegation, suspicion, or risk of abuse.

2.30 The EM notes:

This information is an indicator of the risks of harm to the child and may alert the court to other evidence relevant to the child's welfare and best interests. In addition, the information will assist the court in determining whether jurisdictional matters under section 69ZK [child welfare laws not affected] arise and whether to request the involvement of relevant child welfare authorities.⁹

2.31 Proposed new subsections 60CH(2) and 60CI(2) enable, but do not require, third parties to report the same information to the court.

Allegations of 'abuse' or 'family violence'

- 2.32 Current section 67Z requires a party to proceedings to file and serve a prescribed form (currently a Family Court of Australia Form 4) if the party alleges that a child to whom the proceedings relate has been abused or is at risk of being abused. The Registry Manager (as defined in the Act) must then, as soon as practicable, notify a prescribed child welfare authority.
- 2.33 The Bill will apply section 67Z to an 'interested person' (items 30 and 31). Proposed new subsection 67Z(4) (item 32) defines 'interested person' to mean:
 - a party to the proceeding; or
 - an independent children's lawyer who represents the interests of a child in the proceedings; or
 - any other person prescribed by the regulations for the purposes of this paragraph.

⁹ Explanatory Memorandum, p. 9.

- 2.34 Proposed new section 67ZBA (item 34) extends the obligation under section 67Z to proceedings for an order under Part VII where there is alleged, or a risk of, family violence.
- 2.35 Current section 60K requires the court to take prompt action in relation to allegations of child abuse or family violence. Proposed new section 67ZBB (item 34) replaces current section 60K. The EM states that the amendment effectively relocates section 60K to a more appropriate position in the Act. ¹⁰

2.36 Proposed new section 67ZBB reads:

- (1) This section applies if:
 - (a) a notice is filed under subsection 67Z(2) or 67ZBA(2) in proceedings for an order under this Part in relation to a child; and
 - (b) the notice alleges, as a consideration that is relevant to whether the court should make or refuse to make the order, that:
 - (i) there has been abuse of the child by one of the parties to the proceedings; or
 - (ii) there would be a risk of abuse of the child if there were to be a delay in the proceedings; or
 - (iii) there has been family violence by one of the parties to the proceedings; or
 - (iv) there is a risk of family violence by one of the parties to the proceedings.

(2) The court must:

- (a) consider what interim or procedural orders (if any) should be made:
 - (i) to enable appropriate evidence about the allegation to be obtained as expeditiously as possible; and
 - (ii) to protect the child or any of the parties to the proceedings; and
- (b) make such orders of that kind as the court considers appropriate; and
- (c) deal with the issues raised by the allegation as expeditiously as possible.
- (3) The court must take the action required by paragraphs (2)(a) and (b):
 - (a) as soon as practicable after the notice is filed; and
 - (b) if it is appropriate having regard to the circumstances of the case—within 8 weeks after the notice is filed.

A judicial duty to inquire

- 2.37 Current section 69ZN sets out five principles which a court must apply in the conduct of child-related proceedings. Subsection 69ZN(5) contains Principle 3:
 - (5) The third principle is that the proceedings are to be conducted in a way that will safeguard:
 - (a) the child concerned against family violence, child abuse and child neglect; and
 - (b) the parties to the proceedings against family violence.
- 2.38 The Bill repeals and replaces paragraph 69ZN(5)(a) (item 37) to read:
 - (a) the child concerned from being subjected to, or exposed to, abuse, neglect or family violence[.]
- 2.39 According to the EM, this amendment aims to provide consistent terminology throughout Part VII of the Act.¹¹ It is also relevant to current section 69ZQ which details a court's general duties in giving effect to the principles established in section 69ZN.
- 2.40 The Bill amends the general duties by inserting a new obligation paragraph 69ZQ(1)(aa) for a court to:
 - (aa) ask each party to the proceedings:
 - (i) whether the party considers that the child concerned has been, or is at risk of being, subjected to, or exposed to, abuse, neglect or family violence; and
 - (ii) whether the party considers that he or she, or another party to the proceedings, has been, or is at risk of being, subjected to family violence[.]
- 2.41 The EM notes that this proactive obligation does not extend to 'other information which might be useful evidence from people or agencies other than parties to the proceedings'. 12

Adverse costs orders

2.42 The Bill repeals section 117AB (item 43), which requires the court to make a costs order against a party if satisfied that the party knowingly made a false allegation or statement in the proceedings. The EM explains:

The [Australian Institute of Family Studies] *Evaluation of the 2006 Family Law Reforms* and the Family Law Council report to the Attorney-General, *Improving responses to family violence in the family law system*, indicate

¹¹ Explanatory Memorandum, p. 14.

¹² Explanatory Memorandum, p. 14.

that section 117AB has operated as a disincentive to disclosing family violence. Vulnerable parents may choose to not raise legitimate safety concerns for themselves and their children due to fear they will be subject to a costs order if they cannot substantiate the claims.¹³

2.43 The Bill does not affect subsection 117(2), which comprises the general costs provision in the Act, enabling the court discretion, subject to certain limitations, to order costs and security for costs as the court considers just in appropriate circumstances.

Making it easier for state and territory child protection authorities to participate

- 2.44 Current section 91B provides that the court may request the intervention of federal, state or territory child welfare officers in any proceedings under the Act that affect, or may affect, the welfare of a child. In such cases, subsection 91B(2) deems the officer a party to the proceedings with all the rights, duties and liabilities of a party.
- 2.45 Proposed new subsection 117(4A) (item 42) introduces an immunity from adverse costs orders, or security for costs orders, for a federal, state or territory child welfare officer whose intervention has been requested under section 91B and who has acted in good faith in relation to those proceedings.

Application provision

2.46 Part 2 of Schedule 1 contains application and transitional provisions. Among these is item 45 which reads:

Amendments that apply to proceedings instituted on or after commencement

Subject to item 47, the amendments made by items 1 to 8, 11, 13, 17 to 21, 30 to 34, 37, 38 and 40 to 43 of this Schedule apply in relation to proceedings whether instituted before, on or after commencement.

2.47 The EM states:

This application rule prioritises the safety of children [in Part VII proceedings] over the cost and convenience to the courts, witnesses and the parties who may have matters part or fully heard.¹⁴

2.48 The rule is subject to sub-item 47(1), which provides that the amendments made by Schedule 1 do not affect an order made under, or a certificate given under, subsection 60I(8) of the Act as in force immediately before commencement. Under sub-item 47(2), the amendments contained in the Bill do not constitute 'changed

Explanatory Memorandum, p. 15.

Explanatory Memorandum, p. 15.

circumstances' that would justify making an order to discharge, vary, suspend or revive the full or partial operation of a parenting order made before commencement.¹⁵

Financial implications

2.49 The EM states that the Bill will have negligible financial implications. 16

For the meaning of 'changed circumstance' see *Rice and Asplund* (1979) FLC 90-725.

¹⁶ Explanatory Memorandum, p. 2.