Australian Government
Attorney-General's Department

11/12138

22 July 2011

Ms Julie Dennett
Committee Secretary
Senate Legal and Constitutional Committees
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Ms Dennett

Family Law Legislation Amendment (Family Violence and Other Measures) Bill

This letter provides information to the Committee following my appearance as a witness for the Attorney-General's Department at the public hearing for the Committee inquiry into the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 on 8 July 2011.

In addition to answering the questions I took on notice at the hearing, the attachment responds to several matters raised by other witnesses in relation to provisions of the Bill.

Please thank the Committee on my behalf for the opportunity to provide evidence to the inquiry.

If the Committee has any further questions, I would be happy for you to contact me on (02) 6141 3160, or Sandra Henderson-Kelly ((02) 6141 3122) or Jean Lynch ((02) 6141 3164) of the Family Law Branch.

For your information, as of 25 July 2011, I will be moving to a new role within the Attorney-General's Department and Janet Power will be taking over as Assistant Secretary, Family Law Branch. Janet can be contacted on 02 6141 3638.

Yours sincerely

(...)

Toni Pirani
Assistant Secretary
Family Law Branch

FAMILY LAW LEGISLATION AMENDMENT (FAMILY VIOLENCE AND OTHER MEASURES) BILL 2011

ANSWERS TO QUESTIONS ON NOTICE AND ADDITIONAL INFORMATION ATTORNEY-GENERAL'S DEPARTMENT

This paper responds to matters raised during the course of the Senate Standing Committee on Legal and Constitutional Affairs' inquiry into provisions of the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 (the Bill). To assist the Committee in its deliberations, this paper answers questions taken on notice by the Attorney-General's Department at the Committee hearing on 8 July 2011, and provides additional information relevant to concerns raised with provisions in Schedule 1 of the Bill and related commencement issues.

General comments and evidence base for reforms

2. The measures proposed in Schedule 1 of the Bill draw on a range of reports commissioned into the 2006 family law reforms and how the family law system deals with family violence. Generally, the reports show that aspects of the *Family Law Act 1975* (the Act) fail to adequately protect children and other family members from family violence and child abuse. The Government has put forward the proposed measures as a package of complementary reforms that would provide better protection for children and families at risk of violence and abuse. The Department therefore suggests that individual provisions be considered as part of an overall package of measures and in the context of the evidence base for the reforms.

3. The reports that provide the evidence base for the reforms are:

- *Evaluation of the 2006 family law reforms* by the Australian Institute of Family Studies (AIFS) (the AIFS Evaluation)
- *Family Courts Violence Review* by the Hon Professor Richard Chisholm AM (the Chisholm Report)
- *Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues* by the Family Law Council (the Family Law Council Report)
- *Family Violence and Family Law in Australia: The Experiences and Views of Children and Adults from Families who Separated Post-1995 and Post-2006* collaboratively produced by Monash University, the University of South Australia and James Cook University (the Family Violence Experiences Report)
- *Shared Care Parenting Arrangements since the 2006 Family Law Reforms* by the Social Policy Research Centre of the University of New South Wales
- *Post-separation parenting arrangements and developmental outcomes for infants and children* by Jennifer McIntosh, Bruce Smyth, Margaret Kelaher, Yvonne Wills and Caroline Long, and
- *Parenting dynamics after separation and views of adolescents in separated families* by AIFS.

4. A later report that also supports the reforms is *Children's exposure to domestic violence in Australia* by the Australian Institute of Criminology.

5. The Bill also takes account of recommendations in relation to the definition of 'family violence' from a joint report by the Australian and New South Wales Law Reform Commissions entitled *Family Violence—A National Legal Response* (ALRC Report).

Question on Notice: What is the evidence base for including subsection 60CC(2A) in the Bill?

6. During the Committee hearing, Senator Fisher asked the Department if there was an evidentiary basis for Item 17 of the Bill, which amends section 60CC of the Act (Hansard transcript, pp. 60-61). Senator Fisher also asked the Law Council of Australia about these proposed amendments (Hansard transcript, pp. 54-55).

7. Under section 60CC of the Act, family courts must consider two primary considerations when determining the best interests of the child, as well as several additional considerations. The primary considerations set out in subsection 60CC(2) of the Act are: (a) the benefit to the child of having a meaningful relationship with both 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. The considerations are described as 'the twin pillars'. The 'additional considerations' are set out in paragraphs 60CC(3)(a) to (m) and include a range of matters.

8. Item 17 of the Bill inserts new subsection 60CC(2A) which would require the court, when determining what is in a child's best interests, to give greater weight to the consideration that protects the child from harm where there is inconsistency in applying the primary considerations. Where child safety is a concern, this new provision will provide the courts with clear legislative guidance that protecting the child from harm is the priority consideration.

9. As stated in the Explanatory Memorandum to the Bill and at the beginning of this submission, there are several reports evaluating the 2006 family law reforms which provide the evidentiary basis for the reforms proposed in the Bill. The provisions of the Bill are structured as a package of measures designed to address the key themes expressed in the reports. It is not necessarily the case that each amendment is itself premised on a particular recommendation or piece of evidence. Nevertheless, there is evidence to support the need for additional legislative guidance to ensure that the safety of children is prioritised in determining parenting arrangements.

10. As the Department noted at the Committee hearing (Hansard transcript, p. 60), an important starting point is the incidence of violence among separating families. Among its various findings, the AIFS Report noted that:

- around two-thirds of mothers and one half of fathers who had separated since the 2006 reforms reported that their child's other parent had emotionally abused them prior to or during separation
- around one in four mothers and around one in six fathers reported that the other parent had hurt them physically prior to separation, and
- around one in five parents reported safety concerns associated with ongoing contact with the child's other parent. (see p.E2).

11. The Department notes that chapter 15 of the AIFS Report discusses the case law surrounding the primary and additional considerations.

12. Several reports discuss particular problems with the way that the primary and additional considerations interact, and are perceived by the community.

13. In the Chisholm Report, Professor Chisholm stated that difficult issues arise in determining what is in the best interests of the child and that 'the twin pillars formula is not an ideal guide' (see discussion at pp.129-134). Professor Chisholm noted that some submissions to his review pointed to conflict between the two primary considerations, and that a common theme of submissions critical of the law was that the law gives the impression that parental involvement is more important than protecting children and adults from family violence and abuse. One possible approach to this issue urged by some submitters was to build a more detailed and specific treatment of family violence in the law. Another approach suggested by Professor Chisholm (in his Report (p. 8) and submission to the inquiry (p. 23)) is to establish a single list of factors that are considered in determining a child's best interests.

14. The Family Law Council Report also discussed concerns about the operation of the 'twin pillars' (see discussion at pp.32-33 and 87-88). Council suggested that, following the release of the AIFS Report, some 'consideration should be given to reassessing the premise in s 60CC(2) that the two primary considerations – having a meaningful relationship with both parents, and the need to protect from harm, are of equal importance' (pp. 82-83). Council also said: '… that the public's misperceptions as to how these equally important considerations can impact on time spent with a parent has contributed significantly to decisions taken by parents which may not be in the best interests of the child. A consideration may be that child safety is prioritised over other factors' (p. 83).

15. The Family Violence Experiences Report examines the outcomes of 5 different surveys and interviews with adults and children. Aspects of the report highlight concerns about safety in shared care following separation from a relationship involving family violence. For example, the Report notes that: 'the main theme of responses to questions about shared parental care …was safety following separation from a relationship involving family violence; specifically the way in which shared parental care facilitated contact and physical access that compromised the safety of ex-partners (mainly women) and children' (p. 102).

16. In relation to a survey of 931 adults, the Family Violence Experiences Report states:

> Suggestions from the survey respondents in this section and other sections of the survey indicate that impediments to the disclosure of family violence should be removed from family law legislation and the emotional, psychological, physical, sexual and developmental safety of children should take precedence over the wishes, needs and rights of parents to contact in all parenting decisions after separation (p. 95).

17. The Report states:

> The findings of this study demonstrate that in many cases children's rights to safety had not been prioritised in family law legislation when the parents separated or divorced, or in the application of such legislation, rather the more recent trend appears to be for family law decision makers to focus on shared parental responsibility and the rights of parents to have a 'meaningful relationship' with their child(ren), with the overriding assumption that spending equal time with both parents is in the 'best interests' of children. ... Evidence is provided in our report to show that this emphasis has led to disastrous outcomes for some children who have been sent to live with a neglectful, abusive or

mentally ill parent, sometimes against their will. Considerable evidence has also been provided by parents in this study to suggest that some family law professionals have failed to take into consideration the impact of family violence on children and children's right to be protected from harm when making decisions about parenting arrangements after separation, both before and after 2006 (pp. 93-94).

18. The Report concludes:

> It is our considered view that family law professionals, policy makers and legislators should look beyond the rhetoric of parental responsibility, parental rights and parental equality to the actual experiences, safety needs, rights and expressed wishes of the *children* involved... . ...The child's needs should be the focus, not the parents', and the child's need for safety should be given priority over all other considerations (pp. 94-95).

Question on Notice: Will family courts receive additional funding for the reforms in the Bill?

19. During the Committee hearing, Senator Boyce questioned the adequacy of resources provided to the courts to deal with the proposed changes to the Act. The Department took Senator Boyce's questions on notice (Hansard transcript, pp. 59 and 60).

20. The family courts will need to adapt their practices to deal with the reform as no additional funding is to be allocated in respect of the Bill. The Bill will assist the courts by providing better guidance about what constitutes family violence and child abuse, and strengthening the requirement to safeguard the best interests of each child by prioritising safety where this is a concern.

21. The family courts receive substantial funding from the Australian Government. In 2011–12 the Government allocated funding of:

- $129,766,000 to the Family Court of Australia
- $52,025,000 to the Federal Magistrates Court, and
- $17,358,000 to the Family Court of Western Australia.

22. In addition, the Government has provided a temporary funding boost of $1,424,000 over 2010–11 and 2011–12 to allow the Family Court of WA to appoint an acting Magistrate to assist the Court deal with its back log of family matters.

Additional information

23. To assist the Committee in its deliberations on the Bill, the Department would like to provide the following additional information, which addresses issues raised during the Committee's inquiry.

Definition of 'abuse'

24. During the Committee hearing, some concerns were raised about the new definition of 'abuse' in the Bill. Notably, Professor Chisholm expressed reservations about expanding the definition of 'abuse' as proposed (Hansard transcript, p. 4); while the Family Law Council said that all child abuse is serious and that any event or abuse that a child experiences directly should be taken into account (Hansard transcript, pp.8-10).

25. The new definition of 'abuse' (Item 1, Schedule 1) includes: assault, including sexual assault; sexual exploitation; causing a child to suffer serious psychological harm, including when the harm is caused by family violence; and serious neglect of the child. Most of the concerns raised relate to the use of the word 'serious' in new paragraphs (c) and (d), and the inclusion of the term 'neglect' in new paragraph (d), of the definition.

26. New paragraph (c) of the definition provides that abuse involves causing the child to suffer serious psychological harm including by the child being subjected to or exposed to family violence. This reflects current social science and approaches to child protection, which indicate that exposure to violence threatens a child's physical, emotional, psychological, social, education and behavioural wellbeing.

27. New paragraph (d) of the definition extends the definition to serious neglect of the child. Neglect takes on its ordinary meaning and encompasses a range of acts of omission including failure to provide adequate food, shelter, clothing, supervision, hygiene or medical attention.

28. Family courts must have regard to all relevant circumstances when determining parenting arrangements in the best interests of the child. The family courts are best placed to identify what is 'serious' and what is not 'serious'. It is appropriate that the court consider all instances of neglect raised by the parties in relation to parenting arrangements.

29. The definition of 'abuse' is enlivened in a number of provisions in the Act, but has a particular impact where a party to proceedings makes an allegation of 'abuse' in relation to a child. The proposed changes to the definition will ensure that child welfare agencies will be notified where a child is at risk of serious psychological harm as a result of exposure to family violence or serious neglect. The mandatory reporting requirements are set out in section 67Z of the Act.

30. In amending the definition of 'abuse' to include new paragraphs (c) and (d), the word 'serious' was included in order to avoid over-reporting. The aim is to ensure that child welfare authorities only receive notification of serious cases of harm through exposure to family violence and neglect. Removing the word 'serious' would expand the definition to require a broader range of cases and may hinder these authorities from identifying and dealing with serious cases of harm due to excessive reporting.

String of words 'abuse, neglect or family violence'

31. The Law Council of Australia's submission to the inquiry recommends that the word 'neglect' be omitted from sections 60CC(2)(b), 60D(1)(b)(ii), 69ZN(5)(a), 69ZQ(1)(aa)(i) of the Act and other like provisions (p. 2 of their submission; Hansard transcript, p. 52). The Law Council suggests this amendment in light of their recommendation to remove the word 'serious' from 'serious neglect' in the definition of abuse. Consequently, it is suggested that the reference to 'neglect' in other areas of the Act would become redundant as the term would be covered in the definition of 'abuse'.

32. The string of words 'abuse, neglect or family violence' is used in a range of provisions in the Act. In the more general provisions, it is appropriate to retain the reference to 'neglect' which would encompass a broader range of omissions than 'serious neglect'. For example, subsection 60CC(2) of the Act provides that a primary consideration in determining the best interests of a child is 'the need to protect the child from physical or psychological harm from being subjected to, or

exposed to abuse, neglect or family violence'. It is appropriate that all behaviour that may cause a child to suffer physical or psychological harm be considered in this context.

33. The Department acknowledges that there is overlap in the string of words, but notes that the overlap is incomplete and does not result in total redundancy unless the word 'serious' is removed from the definition of 'abuse'.

Definition of 'family violence'

34. During the Committee hearing, Professor Chisholm said that the opening words of proposed subsection 4AB(1) are 'perhaps over-inclusive' (Hansard transcript, p. 3). In particular, Professor Chisholm commented on the breadth of meaning that could be given to the phrase 'causes a family member to be fearful'. Professor Chisholm noted the solution proposed by Professor Patrick Parkinson AM who, in his submission to the inquiry, recommended the use of the limiting phrase 'aggressive, threatening or other such behaviour' to qualify the meaning of the phrase 'causes a family member to be fearful' (Hansard transcript, p.3).

35. In his written submission to the Committee, Professor Chisholm made other suggestions for narrowing the meaning of the phrase 'causes a family member to be fearful', including a requirement to establish an intention to cause fear (p. 6 of his submission). At the hearing, the Women's Legal Service Australia did not support including the issue of intention as part of the definition (Hansard transcript, p.24).

36. At the Committee hearing, the Department said that it did not consider the definition of 'family violence' to be over-inclusive (Hansard transcript, p. 57). The proposed definition of 'family violence' in the Bill (Items 3 and 8, Schedule 1) is closely aligned with the definition recommended by the ALRC Report. It includes a more descriptive and subjective test which requires decision makers to consider the personal experiences of family members.

37. In his speech in reply to amendments to the Bill moved by Mr Michael Keenan MP, the Attorney-General said:

> The Government rejects any proposal that would require family violence to be hinged on how a reasonable person might react in a particular situation or what the violent perpetrator might have intended. To require reasonableness or intent as a precondition to family violence is to take a narrow approach to what is an insidious problem and would be particularly concerning in the context of a controlling relationship (House of Representatives Hansard, 30 May 2011, p. 5002).

Inclusion of examples

38. At the Committee hearing, the ALRC suggested several additional examples for the definition of family violence, including kidnapping (Hansard transcript, p. 5). Dads in Distress Support Services suggested denial of access and child abduction should be added to the list of examples (Hansard transcript, p. 16).

39. The proposed new definition of 'family violence' better specifies the types of behaviour that may constitute family violence. Subsection 4AB(1) of the Bill sets out a general 'test' for family violence, which is the substantive definition, and a non-exhaustive list of example behaviour that may constitute family violence at subsection 4AB(2). This definition recognises that family

violence can take many forms including physical assault, harassment, emotional manipulation, financial abuse and threatening behaviour.

40. The Explanatory Memorandum to the Bill explains that 'the inclusion of examples will not exclude any behaviour that is within the general characterisation set out in subsection 4AB(1)'. The Department is of the view that the provision includes a sufficient range of examples and that other examples of behaviour that were suggested at the Committee hearing would be caught under subsection 4AB(1) where the behaviour fits within the general characterisation 'test'.

41. At the Committee hearing, Senator Boyce noted that some of the submissions suggested that the examples in subsection 4AB(2) were too broad and could encourage vexatious and malicious claims (Hansard transcript, pp. 4, 24 and 58).

42. The Department agrees with Professor Chisholm that the examples in subsection 4AB(2) only apply if the circumstances pass the 'test' in subsection 4AB(1) (Hansard transcript, p. 4). That is, for a court to determine whether behaviour in the list of examples amounts to 'family violence' in a particular case, the court would need to 'filter' the behaviour through the general characterisation 'test' in subsection 4AB(1).

The United Nations Convention on the Rights of the Child

43. During the Committee hearing, Senator Humphries asked how the inclusion of proposed subsection 60B(4) (Item 13, Schedule 1), which gives effect to the United Nations *Convention on the Rights of the Child* (the Convention), would help decision-makers to make better decisions (Hansard transcript, p. 30).

44. The Convention sets out the rights of children including the obligation to have regard to the best interests of the child as a primary consideration in decision-making and ensuring that children are protected from physical and emotional harm. Australia ratified the Convention in 1990 and, in doing so, committed to protecting and ensuring these rights.

45. The purpose of including the Convention as an additional object in section 60B is to confirm, in cases of ambiguity, the obligation on decision makers to interpret Part VII of the Act, to the extent its language permits, consistently with Australia's obligations under the Convention. The provision is not equivalent to incorporating the Convention into domestic law and, to the extent that the Act departs from the Convention, the Act would prevail.

46. Part VII of the Act is based on the obligation to have regard to the best interests of the child as a primary consideration in decision-making, although the best interests of the child are elevated to 'paramount' status in several provisions. The reference to the Convention in subsection 60B(4) does not adversely affect the provisions in Part VII or dilute the meaning of 'paramount consideration'. Nothing in the Convention prevents Australia enacting stronger protections for the rights of the child than the Convention itself prescribes.

Use of the word 'done' in the Bill

47. At the Committee hearing, the ALRC suggested amending the proposed wording of subsection 60B(4) by replacing the reference to the Convention being 'done' at New York on

20 November 1989 with a reference to it being 'opened for signature' or words to similar effect (Hansard transcript, p. 6-7).

48. The Department does not express a view on the ALRC's suggestion but notes that proposed subsection 60B(4) reflects the wording of the Convention's formal attestation as well as the drafting practice of the Office of Parliamentary Counsel (OPC) for referring to international instruments. Other examples of the use of this wording are:

- *Geneva Conventions Act 1957* (subsection 5(1A))
- *Admiralty Act 1988* (subsection 22(5))
- *Carriage of Goods by Sea Act 1991* (subsection 4(1) and paragraph 12(b))
- *Protection of the Sea (Oil Pollution Compensation Fund) Act 1993* (section 3)
- *Australian Sports Anti-Doping Authority Act 2006* (section 4), and
- *International Tax Agreements Act 1953* (section 3AAA).

Friendly parent provisions

49. Senator Siewart and Senator Humphries asked questions of several witnesses at the hearing about the 'friendly parent provisions' (Hansard transcript, pp. 29, 30, 33, 49 and 51).

50. In her opening statement to the Committee at the hearing, Mrs Nicola Davies, on behalf of the Family Law Council, stated that: 'Council and others have expressed concern that a vulnerable parent may elect not to disclose family violence or child abuse for fear of falling foul of what have become known as the 'friendly parent' provisions ... . Council therefore supports the proposed repeal of those provisions' (Hansard transcript, p. 8).

51. However, Mr Dean Mason, Dad's in Distress Support Services recommended deletion of 'the items that would remove what are commonly referred to as the 'friendly parent' provisions' on the basis that the provisions 'encourage everybody going through a family breakdown to support the relationship between the children and the other parent'. He was of the view that their removal would 'provide more tools and more incentives for people to be mischievous and to use the law for mischievous advantage' (Hansard transcript, p. 16).

52. Items 18 and 20 of the Bill propose the repeal of aspects of the 'friendly parent provisions' concerning the extent to which each parent has facilitated or failed to facilitate the other parent's relationship with the child in terms of participation in long term decision making regarding, and spending time and communicating with, the child.

53. Section 60CC of the Act sets out the criteria by which a court must determine what is in a child's best interests when it makes a parenting order. The 'friendly parent provisions' are contained in paragraph 60CC(3)(c) and subsections 60CC(4) and (4A) as an 'additional consideration' when determining what is in a child's best interests. The provisions require the courts to consider: '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' (paragraph 60CC(3)(c)); the extent to which each of the child's parents has fulfilled, or failed to fulfil responsibilities as a parent (subsection 60CC(4)); and, where the child's parents have separated, 'events that have happened, and circumstances that have existed, since the separation occurred' (subsection 60CC(4A)).

54. Proposed paragraph 60CC(3)(c) would substantially re-enact paragraphs 60CC(4)(a) and (c) to ensure that the court must, in determining a child's best interest, consider the extent to which each of the child's parents has taken, or failed to take, the opportunity: to participate in making decisions about major long-term issues in relation to the child; communicated and spent time with the child; and fulfilled or failed to fulfil obligations to maintain the child.

55. These changes respond to research and other reports which indicate that the 'friendly parent' provision may have operated as a disincentive to disclosure, including: the Chisholm Report (see discussion at pp. 103-106); the AIFS Evaluation (p. 250); the Family Law Council Report (p. 83); and the Family Violence Experiences Report (see pp. 72, 73, 113 and 146).

56. At the Committee hearing the Deputy Chief Justice of the Family Court of Australia, the Hon John Faulks, likened the effect of the repeal of paragraph 60CC(4)(b) to that described by Professor Chisholm in relation to paragraph 60CC(3)(k), that is, its removal may send a message that facilitation is never relevant to the determination of a child's best interests (Hansard transcript, p. 33).

57. The research reports demonstrate that there are competing considerations with regard to the retention or removal of both of these paragraphs. The Department considers that paragraphs 60CC(3)(k) and (4)(b) are not strictly analogous. Paragraph 60CC(3)(k) is considered below.

58. Paragraph 60CC(4)(b) deals with the facilitation aspect of the friendly parent provisions and has a more subjective content. The Department notes Professor Chisholm's assessment of the importance of facilitation in intact families and families where safety is not a concern. However, as outlined above, the research reports show that the identification and disclosure of family violence is a core part of the system's failure to respond to violence, and that the friendly parent provisions may be inhibiting disclosure of family violence. That is, the provision has a strong normative effect on how a party might approach family law proceedings.

59. The Government agreed with Professor Chisholm's assessment that the benefits of retaining the 'facilitation' aspects of the 'friendly parent' provision are outweighed by the importance of protecting children from harm (Submission, p. 12; Chisholm Report, p. 105).

60. The Department notes that the family courts continue to have a power under paragraph 60CC(3)(m) of the Act to take into account 'any other fact or circumstance that the court thinks is relevant.' This is a broad power which allows the court to consider any factors not expressly mentioned. If the Committee thinks it would be helpful, the Explanatory Memorandum could be revised to state that the repeal of any paragraph is not intended to restrain the matters to which the court may have regard under paragraph 60CC(3)(m).

Paragraph 60CC(3)(k)

61. Professor Chisholm, in his submission to the inquiry (pp. 1, 13-15) and in the Chisholm Report (p. 140), suggested the repeal of paragraph 60CC(3)(k). Subsequently, Professor Chisholm has suggested that paragraph 60CC(3)(k) be further amended, rather than be repealed (Supplementary Submission, pp. 1-4; Hansard transcript, p. 2).

62. According to Deputy Chief Justice Faulks, the Chief Justice of the Family Court of Australia, the Hon Diana Bryant QC agrees that Professor Chisholm's suggestion is sensible (Hansard

transcript, p. 31). The ALRC also stated in the Committee hearing that Professor Chisholm's suggestion is very constructive and 'captures the gist of the idea perhaps a little better than the language of the existing provision as it appears in the bill' (Hansard transcript, p. 2).

63. Professor Chisholm's concern with the paragraph is that, in his view, it includes something that is an item of evidence, rather than a consideration or factor relevant to what is in the child's best interests. His view is that the court should look behind the order to see what relevant inference can be drawn from the existence of the family violence order and its relevance to the child's best interests. He therefore believes that the paragraph needs more expansive qualification than is currently proposed.

64. The Bill replaces paragraph 60CC(3)(k) in the Act with a similar provision which removes the requirement that a family violence order must be final or contested (Item 19, Schedule 1). The effect of this new paragraph is that the courts must have regard to any family violence order made – including interim, non-contested and police issued orders – and give appropriate weight to these orders.

65. In determining the best interests of the child, it is crucial for the family courts to have evidence concerning family dynamics, including family violence orders. The existence of current family violence orders is directly relevant to concerns about a child's safety. The courts routinely look behind state and territory family violence orders to consider the evidence of family violence and the 'family violence orders' themselves.

66. Paragraph 60CC(3)(k) is concerned with family violence orders that apply to a child or a member of the child's family. This consideration arises from an objective fact that has a real connection to protecting the child from harm and ensuring the child's best interest. Retention of this factor does not constrain the court from considering the circumstances in which the order was made or apportioning certain weight in the light of those circumstances.

67. It is also open to the court to have regard to any fact or circumstance the court thinks is relevant to determining the child's best interests, including past family violence orders (paragraph 60CC(3)(m) of the Act).

Reporting allegations of family violence—section 67ZBA, repeal of section 60K, and paragraph 69ZQ(1)(aa)

68. In her submission to the inquiry, Chief Justice Diana Bryant noted concerns about the operation of section 67ZBA and, specifically:

- the breadth of the expression 'interested person' in section 67ZBA
- a preference for the current drafting in section 60K which requires the court to act only on an allegation of violence contained in a 'document', and
- the possibility of having, for a transitional period, two reporting requirements operating in tandem under repealed section 60K and proposed section 67ZBA.

69. The Chief Justice also suggested that paragraph 69ZQ(1)(aa) could be omitted on the basis that it imposes an obligation on the court that is without consequence.

70. The *Family Law Rules 2004* create an obligation on certain people to disclose allegations of family violence in a *Notice of Child Abuse or Family Violence* (Form 4). Presently, this is the only document that is prescribed under the Family Law Rules for triggering reporting allegations (Rule 2.04D).

71. The Chisholm Report mentioned anecdotal and other evidence that this obligation is not routinely observed. That is, Form 4s are under-utilised. The Bill responds to this concern through Items 23, 34 and 38 which are designed to improve the court's interaction with parties about family violence concerns in children's matters.

72. Broadly, the proposed measures will: impose a duty on family courts to ask each party to proceedings about issues of family violence in children's matters arising under Part VII of the Act (paragraph 69ZQ(1)(aa)); impose an obligation on interested persons, including the parties to proceedings, to provide a written notice in respect of any allegations of family violence relevant to the orders being sought (section 67ZBA); and require the court to act promptly in relation to such allegations (section 67ZBB). Section 67Z of the Act is to be amended (by Items 30-33 of the Bill) to ensure that it fits neatly with proposed section 67ZBB.

73. The proposed measures are complementary and retain key aspects of existing section 60K of the Act. Importantly, the reporting requirements are given greater prominence by relocating them to the Act from the Family Law Rules.

74. At the hearing, Senator Siewart asked representatives of the Family Court of Australia to clarify Chief Justice Bryant's thoughts on proposed section 67ZBA (Hansard transcript, p. 35). Senator Boyce also asked the Department questions in relation to this proposed section (Hansard transcript, pp. 61-62)

75. Section 67ZBA essentially provides that where an interested person makes an allegation of family violence that is relevant to the proceedings, he or she must file a notice in the prescribed form. The term 'interested person' is defined as: (a) a party to the proceedings; (b) an independent children's lawyer in the proceedings; or (c) any other person prescribed by the regulations …'. This approach adopts a similar position to that set out in Rule 2.04B of the Family Law Rules.

76. The key difference between the two approaches is that the Family Law Rules extend the obligation to report to 'a person seeking to intervene in a case', while proposed section 67ZBA extends to 'any other person prescribed by the regulations'. The latter approach was taken to allow flexibility as well as for drafting reasons. If a better prescription could be agreed with the courts and this were given effect through the regulations, the possibility for further prescriptions would remain open if these were ever considered appropriate.

77. The Department is not aware that the Government has any plans to extend reporting obligations to any other class of persons such as child welfare authorities or police. The Department notes that reporting obligations can only be extended by regulation and that such regulations would have to be tabled in Parliament and would be subject to disallowance.

78. In her submission to the inquiry, Chief Justice Bryant states that the obligation to report allegations of child abuse or family violence is and should be a one-step process in which an allegation of family violence ought to be set out in a document (section 60K). Justice Strickland reiterated this position at the hearing (Hansard transcript, p. 31).

79. As outlined, the measures proposed in sections 67ZBA, 67ZBB and 69ZQ(1)(aa) are intended to intermesh and to address under-reporting of family violence. Paragraph 69ZQ(1)(aa) aims to help elicit genuine allegations of family violence by requiring the family courts to ask parties about whether they have any safety concerns for themselves or the child who is the subject of the proceedings. That process may give rise to oral allegations which, in turn, would trigger the reporting obligations arising under proposed section 67ZBA.

80. The Department confirms that the courts would be required to act promptly under section 67ZBB on oral allegations or written allegations made in a document that is before the court. Under this revised provision, the allegation could be made in *any* document including an application or affidavit or a Form 4.

81. The Department notes Chief Justice Bryant's submission to the inquiry that dual requirements may arise under these provisions. As noted by the Attorney-General in his response to the Senate Committee for the Scrutiny of Bills, the regulation-making power could be enlivened to remove any duplication of reporting.

Paragraph 69ZQ(1)(aa)

82. Chief Justice Bryant's submission also considered the application of new paragraph 69ZQ(1)(aa) (p. 4), which imposes a duty on the court to actively ask each party to child-related proceedings about the existence, or risk of, child abuse or family violence.

83. During the Committee hearing Senator Humphries asked Deputy Chief Justice Faulks and Justice Strickland, representing the Family Court of Australia, to clarify the Chief Justice's comments on paragraph 69ZQ(1)(aa) (Hansard transcript, p. 32). The Department notes that the provision does not dictate when the court is required to actively inquire into issues of family violence and child abuse. It will be a matter for the courts to develop practices around when and how this duty would be discharged.

84. Division 12A of Part VII of the Act, in which section 69ZQ is placed, was introduced by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* and was intended to enable a more flexible and focussed approach to managing child-related proceedings. These provisions involve what is generally known as the 'less adversarial' approach, which give the courts a range of powers that increase the ability of the court to control the proceedings, including the ability to gather some evidence that is important to the child's interests, whether or not the parties seek to put it before the court.

85. New paragraph 69ZQ(1)(aa) responds to a number of concerns raised in recent reports, in particular that victims of violence are unlikely to disclose violence unless they are directly asked about their experiences. Evidence from the AIFS Report (pp. 328-9 and 334) and the Chisholm Report (p. 57) indicates that it is relatively rare that judicial officers use the powers provided to them by Division 12A to actively inquire into issues of family violence and child abuse when these have not been presented in evidence to the court. The AIFS Report observed that where these powers are used this is done inconsistently, observing that some judicial officers were interventionist while others were more traditional in their approach (p. 334).

86. In line with the above research and the intent of Division 12A, paragraph 69ZQ(1)(aa) has been included in the Bill to encourage information about issues of child abuse and family violence to be presented to the court so the court can make appropriate and safe parenting arrangements.

Commencement and the 'Henry VIII' clause (Clause 2 and Item 48, Part 2, Schedule 1)

87. At the Committee hearing, Deputy Chief Justice Faulks affirmed the Family Court's preference that the Bill commence on Royal Assent and 'not affect matters that are already before the courts' (Hansard transcript, p. 31).

88. Clause 2 of the Bill provides that the family violence measures are to commence on a single day fixed by proclamation or, if no date is fixed, on the day 6 months after the day on which the Act receives the Royal Assent.

89. At the Committee proceedings, the Department noted that it was mindful of allowing the courts some time, once the legislation was enacted but before it commenced, to look at what processes would need to be put in place for the new measures (Hansard transcript, p.57).

90. A key object of the Bill is to prioritise the safety of those children and their families who are suffering or at risk of family violence or child abuse. Accordingly, the Bill was drafted to apply to as many family law cases as possible with Item 45 providing for the amendments in Schedule 1 to 'apply in relation to proceedings whether instituted before, on or after commencement'.

91. In relation to the amendments applying to proceedings instituted before, on and after commencement, in her submission to the Committee, Chief Justice Bryant noted that 'the requirements of procedural fairness dictate that the parties...would need to be given the opportunity to consider and make submissions as to the effect of the amendments on [existing] proceedings' (p. 1). The Chief Justice noted that 'this has the potential to put the parties to considerable expense in obtaining legal advice about the effect of the amendments and in the preparation and presentation of updating evidence' (p. 2).

92. The Department notes that the Explanatory Memorandum states that the commencement arrangement 'prioritises the safety of children over the cost and convenience to the courts, witnesses and parties who may have matters part or fully heard'.

93. The Bill does, however, provide flexibility to assist with the transition process. The regulation making power at Item 48 would enable part heard, reserved judgment, and appeal matters to be excluded from the operation of the new family violence measures.

94. The Senate Standing Committee for the Scrutiny of Bills wrote to the Attorney-General about the use of the 'Henry VIII' clause at Item 48 noting that it may be considered to delegate legislative powers inappropriately. The Attorney-General responded to the Committee's concerns by explaining the purpose of the clause and that the nature of the transitional, application and savings issues do not affect the substantive operation of the measures proposed by the Bill (See Scrutiny of Bills Reports No. 6 of 2011, p. 295-297).

95. At the Committee hearing, Justice Strickland referred to the issue of regulations potentially overriding legislation (Hansard transcript, p. 32). At the time of drafting the Bill, the OPC advised the Department that regulation-making powers for matters of a transitional, savings and application nature are relatively common in Commonwealth legislation. These powers are conferred in complex legislation and often in circumstances in which the Government is still to finalise transitional, savings or application arrangements or where there is a strong possibility that unexpected issues may arise after enactment of the legislation.

96. Examples of other Commonwealth laws in which similar clauses are used are:

- *Fair Work (State Referral and Consequential and Other Amendments) Act 2009* (Item 1, Schedule 20)
- *Competition and Consumer Act 2010* (section 44AAK)
- *Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010* (Item 12, Schedule 7)
- *AusCheck Act 2007* (Item 11, Schedule 3), and
- *Workplace Relations Amendment (Work Choices) Act 2005* (Item 1, Schedule 4)

97. The OPC and the Office of Legislative Drafting and Publishing have indicated views that Item 48 of the Bill could be enlivened to carve out part-heard matters, matters in which judgment has been reserved and appeal matters. If such matters were carved out, a small number of cases instituted before commencement would be subject to the new measures, notably, filed matters (that are not appeal matters) in which no substantive hearing has occurred.

98. The Department considers that this approach is not substantially different to the approach proposed by the court. However, the approach taken by the Government does allow the new family violence measures to be applied to more matters and potentially protect more children and their families. The approach taken in the Bill also allows the Government to deal expeditiously with matters that may arise during the implementation of the new law.