

Exposure Draft

Family Law Amendment (Family Violence) Bill 2010

Consultation Paper

November 2010

MESSAGE FROM THE ATTORNEY- GENERAL

The Hon Robert McClelland MP

I am pleased to release this Exposure Draft Family Law Amendment (Family Violence) Bill 2010 (the Family Violence Bill) for public consultation.

Family violence and child abuse cannot be tolerated. The safety of children is of critical importance in the family law system and the Gillard Government takes the issue of addressing and responding to violence very seriously. The family law system must prioritise the safety of children to ensure the best interests of children are met.



The Family Violence Bill proposes amendments to the *Family Law Act 1975* in the following key areas:

- prioritising the safety of children
- changing the meaning of ‘family violence’ and ‘abuse’ to better capture harmful behaviour
- strengthening the obligations of lawyers, family dispute resolution practitioners, family consultants and family counsellors
- ensuring courts have better access to evidence of family violence and abuse, and
- making it easier for state and territory child protection authorities to participate in family law proceedings where appropriate.

The Family Violence Bill sends a clear message that family violence and child abuse are unacceptable. I welcome your comments on this important legislative measure.

A handwritten signature in blue ink that reads "Robert McClelland".

Robert McClelland

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INTRODUCTION

The Exposure Draft Family Law Amendment (Family Violence) Bill 2010 focuses on prioritising the safety of children whose rights and interests are considered under the *Family Law Act 1975* (Cth). This Bill would amend the Family Law Act to strengthen the role of family courts, advisers and parents in preventing harm to children while continuing to support the concept of shared parental responsibility and shared care where these are safe.

The Family Violence Bill responds to recent reports commissioned into the 2006 family law reforms and how the family law system deals with family violence. These reports are the *Evaluation of the 2006 family law reforms* by the Australian Institute of Family Studies (AIFS), the *Family Courts Violence Review* by Professor Richard Chisholm AM and a report by the Family Law Council entitled *Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues*.

Other recent research reports on family violence, shared care and infant development help round out a strong evidence base for reform. These reports are: *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 New South Wales and James Cook University; *Shared Care Parenting Arrangements since the 2006 Family Law Reforms* by the Social Policy Research Centre of the University of New South Wales; and *Post-separation parenting arrangements and developmental outcomes for infants and children* by Jennifer McIntosh, Bruce Smyth, Margaret Kelaher, Yvonne Wills and Caroline Long.

Public comment is welcome on the proposed amendments to the Family Law Act. If you would like to make a submission on the Family Violence Bill please forward it to:

Public Consultation: Family Violence Bill
Family Law Branch
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

Email: familyviolencebill@ag.gov.au or Facsimile: (02) 6141 3248

Please note that the final date for making submissions is **14 January 2011**. Submissions may be the subject of a request for access under the *Freedom of Information Act 1982* (Cth).

PRIORITISING THE SAFETY OF CHILDREN

1. Children deserve to be protected from harm. The Family Law Act aims to uphold this principle in a number of ways—most notably by requiring family courts to regard the best interests of the child as the paramount consideration when making parenting orders and in other provisions involving court proceedings. A key challenge is to ensure that children are protected from harm where their parents make arrangements without going to court.

Convention on the Rights of the Child

2. In 1990 the Australian Government ratified the United Nations' Convention on the Rights of the Child (the Convention). This is an important international instrument which sets out the basic human rights of all children. In ratifying the Convention, the Australian Government agreed to develop and undertake all actions and policies to promote the best interests of the child.

Item 13 of the Family Violence Bill would place a new object in Part VII of the Family Law Act confirming that the Act gives effect to the Convention. The effect is that decision-makers, including family courts, must take account of the Convention of the Rights of the Child when dealing with matters in relation to children under Part VII of the Act.

Prioritising safety in the two primary considerations

3. Under the Family Law Act, family courts must consider two primary considerations when determining the best interests of the child. These 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 subjected to, or exposed to, abuse, neglect or family violence. The considerations have been described as 'the twin pillars'.

4. Recent reports into the family law system highlight tensions between the two primary considerations where there are concerns about family violence or abuse. The reports suggest that the apparent equal weighting of the primary considerations should be reassessed. The Family Law Council's report suggests that, in practice, parents may give greater attention to the benefit of a child having meaningful involvement with each parent which may, in turn, lead to decisions that are not in the best interests of the child.

Item 17 would amend section 60CC of the Act to direct family courts to give greater weight to the primary consideration of protecting the child from harm above the benefit of having a meaningful relationship with each parent where there is an inconsistency in applying the primary considerations. It would not affect the treatment of cases where abuse and family violence are not a concern.

REDEFINING ‘FAMILY VIOLENCE’

5. Being able to identify family violence is an important first step in responding appropriately to this often hidden problem. Understanding the way violent or coercive behaviour impacts upon children is crucial to informing views about the potential value or detriment to a child of an ongoing relationship with a family member who behaves in this way.
6. Presently, the Family Law Act defines ‘family violence’ to mean ‘conduct, whether actual or threatened by a person towards, or towards the property of, a member of the person’s family that causes that family member or any other member of the person’s family reasonably to fear for, or reasonably to be apprehensive about, his or her personal wellbeing or safety’. Recent reports have highlighted concerns about this definition.
7. The Family Law Council concluded that the definition is too narrow and does not reflect current understanding of what constitutes family violence. The AIFS Evaluation Report indicates that legal professionals consider the requirement for a person ‘reasonably to fear’ for their personal wellbeing or safety imposes a significant evidentiary burden on people who are already vulnerable. The Family Courts Violence Review recommended that the provisions relating to family violence be strengthened, so that the nature and consequences of family violence are clearly identified in the Act.

Item 3 of the Family Violence Bill proposes a new definition of ‘family violence’ that better specifies the types of behaviour that constitute family violence. The proposed definition recognises that family violence can take the form of physical assault, harassment, emotional manipulation, financial abuse and threatening behaviour.

IDENTIFYING ‘ABUSE’ OF A CHILD

8. The Family Law Act requires courts to protect children from abuse when making parenting orders and imposes mandatory obligations on court personnel, arbitrators, family dispute resolution practitioners and independent children’s lawyers to report child abuse to relevant State and Territory agencies.
9. Presently, the Family Law Act defines ‘abuse’ in relation to a child as including assault, sexual assault and sexual exploitation. Broadening this definition to cover other forms of abuse, including where serious harm is caused by exposure to family violence, is consistent with social science research understanding about what is damaging to children. For example, the National Association for the Prevention of Child Abuse and Neglect and the Australian Institute of Health and Welfare have recognised the serious, and often long-term, negative effects of exposure to violence on a child’s physical and social development. Serious neglect amounts to abuse by omission and should also be recognised and reportable.

Item 1 of the Family Violence Bill proposes a new definition of ‘abuse’ in relation to a child for the purposes of the Act. This would expand the existing definition to include the forms of abuse recognised in State and Territory laws such as physical abuse or non-accidental physical injury, sexual abuse and exploitation, psychological abuse (including where this is caused by exposure to family violence) and neglect.

STRENGTHENING ADVISER OBLIGATIONS

10. Advisers play an important role in the family law system. Advisers are family dispute resolution practitioners, legal practitioners, family counsellors and family consultants, each of whom assist parents to make arrangements for their children. The information that advisers convey to parents should be consistent with the focus of the Family Law Act.

11. Advisers have obligations under the Family Law Act to give advice in relation to parenting plans so that, among other things, these serve the best interests of the child. The Family Law Act does not currently impose obligations on advisers at a general level. Recent reports suggest that existing obligations in relation to parenting plans may lead advisers to place greater emphasis on the benefit of the child having a meaningful relationship with both parents and subordinate the protection of the child from harm.

Items 22-24 of the Family Violence Bill would introduce new obligations on advisers who discuss matters arising under Part VII of the Family Law Act and amend existing adviser obligations in relation to parenting plans. The adviser obligations would encourage parents to consider the child’s best interest as the paramount consideration. They would also require parents to prioritise protecting the child from harm where family violence and abuse are concerns.

BRINGING EVIDENCE OF VIOLENCE AND ABUSE TO COURT

12. Finding ways to encourage people to put forward evidence about family violence and abuse is a great challenge confronting family courts. Courts can only protect families where parents and others provide sound evidence of the family dynamics. Recent reports have recommended that new measures are required to get better evidence of family violence and abuse into family courts.

Requiring parties to disclose family violence

13. Recent reports indicate that family law practitioners and parties have been reluctant to report family violence to the court despite Family Law Rules requiring them to do so. This requirement is not currently included in the Family Law Act.

Item 29 of the Family Violence Bill would require parties to proceedings who allege family violence to file a Notice of Child Abuse or Family Violence with the court. Once reporting occurs, the court would be required to act promptly to ensure that the issues are dealt with expeditiously.

Requiring parties to disclose involvement of child welfare authorities

14. Information about whether a child is or has been the subject of a care order under a child welfare law is crucial in assisting the family courts to make decisions about children, including a decision to allow the relevant child welfare authority to protect the child from harm. Information about whether a child is the subject of child protection proceedings or is or has been the subject of a notification, investigation, inquiry, assessment or report by a child welfare authority is also important information for the family courts to consider in making an order in relation to the child.

Item 29 of the Family Violence Bill proposes new provisions that would impose obligations on parties to proceedings to tell the court if a care order under a child welfare law is in place for the child and if the child is or has been the subject of a notification to or investigation by a child welfare authority. The provisions would allow other people to tell the court that same information.

REMOVING DISINCENTIVES TO DISCLOSING VIOLENCE

15. When determining whether parenting arrangements are appropriate and in the child's best interest, family courts need accurate information about issues affecting the family. To help courts deal effectively with family violence and abuse, it is important that legislation does not create barriers to raising concerns about these issues.

Disclosure should not make a parent 'unfriendly'

16. Under the Family Law Act, the willingness and extent to which one parent has facilitated the child having a relationship with the other parent is taken into account in determining the best interests of the child and, ultimately, orders dealing with parenting arrangements and parental responsibility. This is known as the 'friendly parent' principle. Recent reports indicate that some lawyers caution parents against alleging family violence or abuse where there is limited evidence, to ensure that victims of family violence are not characterised as an 'unfriendly parent'.

Items 18 and 20 of the Family Violence Bill would remove the 'friendly parent' provisions of the Family Law Act, namely, paragraph 60CC(3)(c) and subsections 60CC(4) and (4A). Removing the 'friendly parent' provision would not prevent the court from considering a range of matters relevant to the care, welfare and development of the child such as a parent's attitude to the responsibilities of parenthood.

Cost orders

17. Recent reports have found that provisions that direct the court to order a party to pay the costs of another party to the proceedings in certain circumstances have operated as a disincentive to disclosing family violence, with vulnerable parents deciding not to raise legitimate safety concerns for fear they would be subject to a costs order if their claims cannot be substantiated. Family courts have a broad power to order costs against a party, and

the reports concluded that this power is adequate to deal with false allegations of family violence as well as false denials of family violence.

Item 37 of the Family Violence Bill would remove the mandatory cost order provision in section 117AB of the Family Law Act.

Courts must ask about family violence and abuse

18. The Family Courts Violence Review notes the difficulties victims face in disclosing and reporting violence. Victims of family violence are often reluctant to share their experiences but are more likely to do so if directly asked. Courts can play an active role in drawing out family violence and abuse concerns, and ensuring that child welfare authorities receive early notice of allegations of child abuse.

Item 21 of the Family Violence Bill proposes that courts who are dealing with applications for parenting orders should inquire about past or future risk or previous experience of the children concerned in relation to child abuse and family violence. In giving effect to Principle 3 of the Principles for Conducting Child-Related Proceedings, as set out in subsection 69ZN(5), this new provision would impose a duty on the court to take steps to identify the parties' views on past risk or experience or future risk to the children.

IMMUNITY FROM COSTS ORDERS FOR STATE AND TERRITORY CHILD WELFARE AUTHORITIES

19. In some circumstances a family court will invite a state or territory child welfare authority to become a party to family law proceedings. In many instances, the relevant authority will decline the court's request to intervene in proceedings. It is important to ensure that requests are not refused simply because of a possibility that a cost order might be made against the agency or its employees or agents.

Item 36 of the Family Violence Bill would amend section 117 of the Family Law Act to provide immunity from cost orders to child welfare authorities and officers of the State, Territory or Commonwealth who intervene to become a party to proceedings under the Family Law Act at the request of the court where the officers act in good faith in relation to the proceedings.

OTHER AMENDMENTS

20. A number of minor consequential amendments would be needed to introduce the above measures into the Family Law Act. These are discussed in full in the Appendix which provides detailed information about each item in the Bill.

Appendix

Information about individual amendments

INFORMATION ABOUT INDIVIDUAL AMENDMENTS

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Item 1—Subsection 4(1)—Definition of *abuse*—New provision

Description of amendment

Remove the definition of ‘abuse’ in subsection 4(1) of the Family Law Act and replace it with a new definition of ‘abuse’

Existing provision

abuse, in relation to a child, means:

- (a) an assault, including a sexual assault, of the child which is an offence under a law, written or unwritten, in force in the State or Territory in which the act constituting the assault occurs; or
- (b) a person involving the child in a sexual activity with that person or another person in which the child is used, directly or indirectly, as a sexual object by the first-mentioned person or the other person, and where there is unequal power in the relationship between the child and the first-mentioned person.

Proposed provision

abuse, in relation to a child, means:

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

1.1 This item would repeal the definition of ‘abuse’ in section 4(1) of the Family Law Act and replace it with a new definition of ‘abuse’. The definition has been expanded to include forms of abuse recognised in the State and Territory laws, namely, physical abuse or non-accidental physical injury; sexual abuse and exploitation; psychological abuse; and neglect.

1.2 As with the existing definition, paragraph (a) would provide that an assault, including a sexual assault, amounts to abuse. However, the new definition would remove the requirement for the assault to be an offence under a law in the force of the State or Territory. This means that family members would not have to have regard to the terms of State and Territory laws when considering whether abuse has occurred. It would remove uncertainty about knowing the elements of an offence and whether an offence has, in fact, been committed.

1.3 Paragraph (b) which deals with sexual exploitation contains minor drafting changes that reflect current drafting practice.

1.4 New paragraph (c) provides that abuse involves causing the child to suffer serious psychological harm including by being exposed to family violence. This reflects current social science and approaches to child protection.

1.5 New paragraph (d) of the definition of ‘abuse’ would extend the definition to serious neglect of the child. The meaning of neglect is not defined and therefore takes its ordinary meaning. Neglect encompasses a range of acts of omission and remission, including a failure to provide adequate food, shelter, clothing, supervision, hygiene or medical attention. Serious neglect amounts to abuse by omission (or remission) and should be recognised and reportable under the mandatory requirements in subsection 67ZA(2) of the Family Law Act.

1.6 The existing discretionary reporting requirements in subsection 67ZA(3) for ill-treatment would not be changed.

Item 2—Subsection 4(1)—Definition of *exposed* in relation to family violence—New provision

Description of amendment

Insert a definition for ‘exposed’ in subsection 4(1) of the Family Law Act which would point to a more expansive definition of ‘exposed’ elsewhere in the Act

Proposed provision

exposed: for when a child is ***exposed*** to family violence, see subsection (1AD) of this section.

2.1 This amendment inserts a ‘signpost’ or ‘marker’ to new subsection 4(1AD) of the interpretation section of the Family Law Act. Item 8 proposes that new subsection 4(1AD) would provide a more detailed and particularised definition of what it means to be ‘exposed’ to family violence.

Item 3—Subsection 4(1)—Definition of *family violence*—New provision

Description of amendment

Remove the definition of ‘family violence’ in subsection 4(1) of the Family Law Act and replace it with a new definition

Existing provision

family violence means conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person’s family that causes that or any other member of the person’s family reasonably to fear for, or reasonably to be apprehensive about, his or her personal wellbeing or safety.

Note: A person reasonably fears for, or reasonably is apprehensive about, his or her personal wellbeing or safety in particular circumstances if a reasonable person in those circumstances would fear for, or be apprehensive about, his or her personal wellbeing or safety.

Proposed provision

family violence means behaviour by a person (the **first person**) towards a member of the person’s family (the **second person**) that:

- (a) causes death or personal injury; or
- (b) is an assault; or
- (c) is a sexual assault, or another form of sexually coercive behaviour; or
- (d) torments, intimidates or harasses the second person, including (for example) where that effect on the second person is caused by:
 - (i) repeated derogatory taunts, including racial taunts; or
 - (ii) intentionally causing damage to, or destruction of, property; or
 - (iii) intentionally causing death or injury to an animal; or
- (e) controls, dominates, deceives or coerces the second person unreasonably, including (for example) where that effect on the second person is caused by:
 - (i) denying the second person the financial autonomy that he or she would have had but for the conduct; or
 - (ii) withholding financial support, if the second person is entirely or predominantly dependent on the first person for financial support to meet his or her, or his or her child’s, reasonable living expenses; or
 - (iii) preventing the second person from making or keeping connections with his or her family, friends or culture; or
 - (iv) unlawfully depriving the second person, or any member of the second person’s family, of their liberty; or
- (f) causes the second person to feel fear for his or her safety or for the safety of another person; or
- (g) causes the second person to feel threatened (whether because of a threat to engage in conduct that would be covered by any of paragraphs (a) to (f), or for any other reason); or
- (h) involves the first person threatening to commit suicide or self-harm, with the intention of tormenting or intimidating the second person.

Note: None of the paragraphs of this definition is intended to limit any of the other paragraphs, and a particular incident of conduct may be covered by 2 or more of the paragraphs.

3.1 Item 3 replaces the existing definition of ‘family violence’ with one that better specifies the types of behaviour that constitute family violence. Identifying family violence is an important first step in responding appropriately to it.

3.2 The definition deals with behaviour by one family member towards another family member. Whether a person is ‘a member of the family’ is defined in subsection 4(1AB) of the Family Law Act. This definition includes people who are or were married or in a de facto relationship and relatives such as a parent, grandparent, step-parent, child, step-child; sibling, half-sibling, step sibling, uncle, aunt, cousin, niece, nephew and so on.

3.3 Paragraphs (a) to (h) set out behaviour that would be family violence for the purpose of the Family Law Act. The paragraphs cover physical abuse, sexual abuse and coercion, economic abuse as well as behaviour that torments, intimidates, harasses or unreasonably controls, dominates, deceives or coerces a family member or causes them to feel threatened or feel fear for safety.

3.4 Paragraphs (a) and (b) concern physically abusive behaviour. These would apply to behaviour that causes death or personal injury or constitutes an assault. The term ‘assault’ takes its ordinary meaning and is intended to encompass common law and criminal law assault.

3.5 Paragraph (c) provides that family violence includes a sexual assault or another form of sexually coercive behaviour.

3.6 Paragraph (d) concerns behaviour that is psychologically abusive. It provides a non-exhaustive list of examples that might meet this definition. This definition would generally encompass stalking of a family member which is a form of behaviour that torments, intimidates or harasses that person.

3.7 Paragraph (e) includes non-exhaustive examples of behaviour that could unreasonably control, dominate, deceive or coerce a person including behaviour that would be considered economic or financial abuse. This would include acts that result in the person’s access to financial resources being blocked or obstructed as well as manipulation that prevents the person from maintaining friendships and more aggressive behaviour like depriving another person of their liberty.

3.8 Paragraph (f) refers to behaviour that might not be covered by the preceding subparagraphs but would cause the person to feel fear for his or her safety or for the safety of another person. The element of ‘fear’ would be a subjective test based on the victim’s actual state of mind rather than an objective or semi-objective test of how a reasonable person in the street may react to the behaviour with or without the same history.

3.9 Paragraph (g) would cover behaviour that causes the family member to feel threatened irrespective of whether that behaviour causes harm. Paragraph (g) may apply to threats to engage in conduct covered in subparagraphs (a) to (f).

3.10 Paragraph (h) would apply to behaviour that involves a family member threatening to commit suicide or self harm with the intention of tormenting or intimidating another family member. This type of conduct is recognised under some other laws as emotional or psychological abuse.

Item 4—Subsection 4(1)—Definition of *member of the family*— New provision

Description of amendment

Remove the definition of *member of a family* in subsection 4(1) of the Family Law Act and replace it with a new signpost provision

Existing provision

member of the family, in relation to a person, has, for the purposes of the definition of ***step-parent***, paragraphs 60CC(3)(j) and (k) and section 60CF, the meaning given by subsection (1AB) of this section.

Proposed provision

member of the family: see subsection (1AB) of this section.

Note: The definition in subsection (1AB) applies for the purposes of the provisions specified in that subsection.

4.1 This item would repeal the existing definition of ‘member of the family’ and insert a new definition to act as a ‘signpost’ to subsection 4(1AB) which provides the more extensive definition of ‘member of the family’. This amendment combined with changes to subsection 4(1AB) proposed in items 6 and 7 would apply the definition to a broader range of provisions in the Family Law Act.

4.2 This amendment follows existing drafting of the Family Law Act which places more extensive definitions at the end of the interpretation section.

Item 5—Subsection 4(1)—Paragraph (a) of the definition of *Registry Manager*—Revised provision

Description of amendment

Remove the words ‘section 67Z’ from the definition of ‘Registry Manager’ in subsection 4(1) of the Family Law Act and insert the words ‘sections 67Z and 67ZBA’

Revised provision

Registry Manager:

- (a) except in Subdivision C of Division 8 of Part VII and sections 67Z and 67ZBA, means:
 - (i) in relation to the Family Court—the Registry Manager of a Registry of the Court; and
 - (ii) in relation to a court other than the Family Court—the principal officer of the court or any other appropriate officer of the court; and
- (b) in Subdivision C of Division 8 of Part VII, means:
 - (i) in relation to the Family Court—the Registry Manager of the Registry of the Court; and
 - (ii) in relation to the Family Court of Western Australia—the Principal Registrar, a Registrar or a Deputy Registrar, of the court; and
 - (iii) in relation to any other court—the principal officer of the court.

5.1 This item amends the definition of ‘Registry Manager’. The purpose of the revision is to ensure that a special definition of ‘Registry Manager’ in existing subsection 67Z(4) of the Family Law Act continues to apply to section 67Z (dealing with allegations of child abuse) and is extended to proposed section 67ZBA which deals with allegations of family violence.

5.2 Sections 67Z and 67ZBA set out what is required by a party to proceedings and the Registry Manager when a party makes an allegation of child abuse or family violence. The provisions, including references to ‘Registry Manager’, have been streamlined to ensure consistent reporting obligations and to avoid duplication.

Items 6 and 7—Paragraphs 4(1AD)(a) and (c)—Definition of *member of the family*—Revised provision

Description of amendments

For paragraph 4(1AD)(a) of the Family Law Act after ‘subsection (1)’ insert the words ‘, and of subsection (1AD)’, and

For paragraph 4(1AD)(c) of the Family Law Act omit the words ‘section 60CF’ and insert the words ‘sections 60CF, 60CH and 60CI’

Revised provision

(1AB) [***Where a person is a member of the family***] For the purposes of:

- (a) the definitions of ***family violence*** and ***step-parent*** in subsection (1), and of subsection (1AD); and
- (b) paragraphs 60CC(3)(j) and (k); and
- (c) section 60CF, 60CH and 60CI;

a person (the ***first person***) is a ***member of the family*** of another person (the ***second person***) if:

- (d) the first person is or has been married to, or in a de facto relationship with, the second person; or
- (e) the first person is or has been a relative of the second person (as defined in subsection (1AC)); or
- (f) an order under this Act described in subparagraph (i) or (ii) is or was (at any time) in force:
 - (i) a parenting order (other than a child maintenance order) that relates to a child who is either the first person or the second person and that is in favour of the other of those persons;
 - (ii) an order providing for the first person or the second person to have custody or guardianship of, or a right of access to, the other of those persons; or
- (g) an order under a law of a State or Territory described in subparagraph (i) or (ii) is or was (at any time) in force:
 - (i) an order determining that the first person or the second person is or was to live with the other of those persons, or is or was to have custody or guardianship of the other of those persons;
 - (ii) an order providing for contact between the first person and the second person, or for the first person or the second person to have a right of access to the other of those persons; or
- (h) the first person ordinarily or regularly resides or resided with the second person, or with another member of the family of the second person; or
- (i) the first person is or has been a member of the family of a child of the second person.

6.1 These amendments would ensure that new subsection 4(1AD), which defines the meaning of when a child is ‘exposed’ to family violence, picks up the definition of ‘member of the family’ in subsection 4(1AB). New sections 60CH and 60CI, which place new obligations on parties to proceedings to report certain matters to the court, would also rely on subsection 4(1AD) to define ‘member of the family’ and therefore must be mentioned in subsection 4(1AB).

6.2 These amendments are consequential to amendments set out in items 8 and 21.

Item 8—Paragraph 4(1AB)(c)—Definition of *exposed*—New provision

Description of amendment

Insert a new provision in the Family Law Act explaining what it means for a child to be *exposed* to family violence

Proposed provision

4(1AD) 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, including (for example) if the child:

- (a) overhears threats of death or personal injury by a member of the child's family towards another member of the child's family; or
- (b) sees or hears an assault of a member of the child's family by another member of the child's family; or
- (c) comforts or provides assistance to a member of the child's family who has been assaulted by another member of the child's family; or
- (d) cleans up a site after a member of the child's family has intentionally damaged property of another member of the child's family (if that damage constitutes family violence); or
- (e) is 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.

8.1 This item would include a new definition explaining what it means for a child to be 'exposed' to family violence.

8.2 This new term provides that 'exposed to family violence' means, among other things, behaviour that causes a child to hear, witness, or otherwise be exposed to the effects of, behaviour towards another family member. For the purposes of the Family Law Act, the examples listed in paragraphs (a) to (e) of the definition proposed by item 8 are examples only. The examples clarify that there does not need to be intent for a child to hear, witness or otherwise be exposed to family violence.

Item 9—Subsection 12E(3)(note)—Obligations on legal practitioners— Revised provision (note only)

Description of amendment

Repeal the existing note under subsection 12E(3) of the Family Law Act and include a new note pointing to new section 60D of that Act

Existing note

Note: Section 63DA also imposes information-giving obligations on legal practitioners dealing with people involved in Part VII proceedings.

Proposed note

Note: For other obligations of legal practitioners in relation to Part VII matters, see sections 60D and 63DA.

9.1 This item would repeal the note under existing subsection 12E(3) of the Family Law Act, which deals with the obligations on legal practitioners to give their clients documents containing information prescribed under section 12D of the Family Law Act.

9.2 The existing note refers the reader to additional information-giving obligations under section 63DA of the Family Law Act. The revised note would be reworded to include a reference to new general obligations for advisers to be introduced by new section 60D of the Family Law Act by item 22 of the Family Violence Bill.

Item 10—Subsection 12G(1) (note)—Obligations on family counsellors, FDR practitioners and arbitrators—Revised provision (note only)

Description of amendment

Repeal the existing note under subsection 12G(1) of the Family Law Act and include a new note pointing to new section 60D of that Act

Existing note

Note: Section 63DA also imposes information-giving obligations on family counsellors and family dispute resolution practitioners (not arbitrators) dealing with people involved in Part VII proceedings.

Proposed note

Note: For other obligations of family counsellors and family dispute resolution practitioners in relation to Part VII matters, see sections 60D and 63DA. Those sections do not apply to arbitrators.

10.1 This item would repeal the note under subsection 12G(1) of the Family Law Act which deals with obligations in family counsellors, family dispute resolution practitioners and arbitrators to give married persons (and in appropriate cases, that person's spouse) documents containing information prescribed under section 12C of the Family Law Act.

10.2 The existing note refers the reader to additional information-giving obligations for these professionals (except arbitrators) under section 63DA of the Family Law Act. The revised note would be reworded to include a reference to new general obligations for advisers to be introduced by new section 60D of the Family Law Act by item 22 of the Family Violence Bill.

Item 11—Paragraph 43(1)(ca)—Principles to be applied by courts— Revised provision

Description of amendment

In paragraph 43(1)(ca) of the Family Law Act change the word ‘safety’ to ‘protection’

Proposed provision

43 Principles to be applied by courts

(1) The Family Court shall, in the exercise of its jurisdiction under this Act, and any other court exercising jurisdiction under this Act shall, in the exercise of that jurisdiction, have regard to:

- (a) the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life;
- (b) the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while it is responsible for the care and education of dependent children;
- (c) the need to protect the rights of children and to promote their welfare;
- (ca) the need to ensure ~~safety~~ protection from family violence; and
- (d) the means available for assisting parties to a marriage to consider reconciliation or the improvement of their relationship to each other and to their children.

(2) Paragraph (1)(a) does not apply in relation to the exercise of jurisdiction conferred or invested by Division 2.

11.1 This amendment would promote consistency of terminology in the Family Law Act by replacing the word ‘safety’ with ‘protection’.

Item 12—Section 60CA—What Division 1 of Part VII does— Revised provision

Description of amendment

After paragraph 60A(a) of the Family Law Act insert new paragraphs (aa) and (ab) pointing to revised Subdivision BA and new Subdivision BB of Division 1 of Part VII of the Family Law Act

Proposed provision

60A What this Division does

This Division contains:

- (a) a statement of the object of this Part and the principles underlying it, and an outline of this Part (Subdivision B); and
- (aa) provisions dealing with the best interests of the child in court proceedings (Subdivision BA); and
- (ab) provisions dealing with an adviser's obligations in relation to the best interests of the child (Subdivision BB); and
- (b) provisions relevant to the interpretation and application of this Part (Subdivision C); and

12.1 This amendment would update section 60A of the Family Law Act which sets out the issues dealt with in Division I of Part VII of the Act (covering introductory issues relating to children's matters). The issues are drawn from the titles of the Subdivisions in Division 1. Under this amendment, section 60A would refer to retitled Subdivision BA and new Subdivision BB introduced into the Act by items 16 and 22 respectively.

Item 13—Section 60B—Objects of Part VII—Revised provision

Description of amendment

At the end of section 60B of the Act insert new subsection 60B(4) to include a new object

Proposed provision

60B Objects of Part and principles underlying it

- (1) The objects of this Part are to ensure that the best interests of children are met by:
 - (a) ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and
 - (b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and
 - (c) ensuring that children receive adequate and proper parenting to help them achieve their full potential; and
 - (d) ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.
- (2) The principles underlying these objects are that (except when it is or would be contrary to a child's best interests):
 - (a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and
 - (b) children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives); and
 - (c) parents jointly share duties and responsibilities concerning the care, welfare and development of their children; and
 - (d) parents should agree about the future parenting of their children; and
 - (e) children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).
- (3) For the purposes of subparagraph (2)(e), an Aboriginal child's or Torres Strait Islander child's right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right:
 - (a) to maintain a connection with that culture; and
 - (b) to have the support, opportunity and encouragement necessary:
 - (i) to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and
 - (ii) to develop a positive appreciation of that culture.
- (4) An additional object of this Part is to give effect to the Convention on the Rights of the Child done at New York on 20 November 1989.

Note: The text of the Convention is set out in Australian Treaty Series 1991 No. 4 ([1991] ATS 4). In 2010, the text of a Convention in the Australian Treaty Series was accessible through the Australian Treaties Library on the AustLII website (www.austlii.edu.au).

13.1 Item 13 would insert a new provision into section 60B, Objects of Part and principles underlying it, to provide that a further object of Part VII of the Act is to give effect to the United Nations' Convention on the Rights of the Child. This is an important international instrument which sets out the basic human rights of all children. In ratifying the Convention, the Australian Government agreed to develop and undertake all actions and policies to promote the best interests of the child.

13.2 The proposed provision reinforces this obligation on decision-makers and courts to interpret the Act, to the extent that its language permits, consistently with Australia's obligations under the Convention. To the extent that the Act departs from the Convention, the Act would prevail.

13.3 The note provides the reader with an internet reference for accessing the Convention.

Items 14 and 15—Section 60C (cell at table item 1, column headed ‘Divisions and coverage’) (cell at table item 8, column headed ‘Divisions and coverage’)—Revised provision

Description of amendment

In section 60C of the Family Law Act (cell at table item 1, column headed ‘Divisions and coverage’) after ‘object of Part and principles underlying it, and outline of Part’ insert:

- best interests of the child: court proceedings
- best interests of the child: adviser’s obligations

In section 60C of the Family Law Act (cell at table item 8, column headed “Divisions and coverage”) after ‘reporting of allegations of child abuse’ insert:

- reporting of allegations of family violence

Proposed provision

OUTLINE OF PART	
Item	Divisions and coverage
1	<p>Division 1—Introductory</p> <ul style="list-style-type: none"> • object of Part and principles underlying it, and outline of Part • best interests of the child: court proceedings • best interests of the child: adviser’s obligations • interpretation and application of this Part • how this Act applies to certain children <p>Note: The extension and application of this Part is also dealt with in Subdivision F of Division 12.</p>
8	<p>Division 8—Other matters relating to children</p> <ul style="list-style-type: none"> • liability of a father to contribute towards child bearing expenses if he is not married to the child’s mother • orders for the location and recovery of children • reporting of allegations of child abuse • reporting of allegations of family violence • other orders about children

14.1 This item would update the table in section 60C of the Family Law Act which provides an outline of issues dealt with by Part VII of the Family Law Act (dealing with children’s matters). New issues would be included for Division 1 as a result of items 16 and 22, and in Division 8 as a result of item 29.

Item 16—Subdivision BA of Division 1 of Part VII—(heading) Best interests of the child: Court proceedings—Revised provision

Description of amendment

Repeal the heading of Subdivision BA of Division 1 of Part VII of the Family Law Act and insert a revised heading

Existing provision

Subdivision BA—Best interests of the child

Proposed provision

Subdivision BA—Best interests of the child: court proceedings

16.1 This proposed amendment would change the heading of Subdivision BA of Division 1 of Part VII of the Family Law Act to indicate that the issues dealt with in that subdivision relate to court proceedings. This is necessary to distinguish between existing Subdivision BA which deals with matters a court must consider when dealing with a children's matter and new Subdivision BB which would deal with adviser's obligations in relation to children's matters which is to be introduced by item 22 of the Family Violence Bill.

16.2 Advisers communicate with parents and other people about their children, and these communications may occur before, during or after court proceedings. Accordingly, matters relating to courts and advisers warrant separate treatment.

Item 17—Subsection 60CC(2A)—Determining a child’s best interests— New provision

Description of amendment

After subsection 60CC(2) of the Family Law Act include a new subsection 60C(2A) which would ensure that the protection of children from harm is given greater weight where there is inconsistency in applying the primary considerations

Proposed provision

60CC How a court determines what is in a child’s best interests

Determining child’s best interests

(1) Subject to subsection (5), in determining what is in the child’s best interests, the court must consider the matters set out in subsections (2) and (3).

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).

(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).

17.1 Under the Family Law Act, family courts must consider two primary considerations when determining the best interests of the child. These 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 subjected to, or exposed to, abuse neglect or family violence.

17.2 Presently, in deciding what is in the child’s best interests, there are two primary considerations for the court. Recent reports suggest that the apparent equal weighting of the primary considerations should be reassessed. The reports also describe perceptions that, in practice, greater attention is given to the benefit of a child having meaningful involvement with each parent.

17.3 Item 17 proposes a new subsection 16(2A) which would require the court to give greater weight to the primary consideration that protects the child from harm in cases where there is inconsistency in applying the considerations. In cases where child safety is a concern, this new provision would provide the courts with clear legislative guidance.

Items 18, 19 and 20—Section 60CC—‘Friendly parent provisions’— Revised provision (revision and repeal)

Description of amendments

Remove paragraph 60CC(3)(c) and subsections 60CC(4) and (4A) of the Family Law Act

Remove paragraph 60CC(3)(k) and insert new paragraph 60CC(3)(k) of the Family Law Act

Proposed provision

Additional considerations

60CC (3) Additional considerations are:

- (a) any views expressed by the child and any factors (such as the child’s maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child’s views;
- (b) the nature of the relationship of the child with:
 - (i) each of the child’s parents; and
 - (ii) other persons (including any grandparent or other relative of the child);
- ~~(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;~~
- (d) the likely effect of any changes in the child’s circumstances, including the likely effect on the child of any separation from:
 - (i) either of his or her parents; or
 - (ii) any other child, or other person (including any grandparent or other relative of the child), with whom he or she has been living;
- (e) the practical difficulty and expense of a child spending time with and communicating with a parent and whether that difficulty or expense will substantially affect the child’s right to maintain personal relations and direct contact with both parents on a regular basis;
- (f) the capacity of:
 - (i) each of the child’s parents; and
 - (ii) any other person (including any grandparent or other relative of the child);to provide for the needs of the child, including emotional and intellectual needs;
- (g) the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child’s parents, and any other characteristics of the child that the court thinks are relevant;

(continued over page)

Section 60CC(3) continued

- (h) if the child is an Aboriginal child or a Torres Strait Islander child:
 - (i) the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture); and
 - (ii) the likely impact any proposed parenting order under this Part will have on that right;
- (i) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;
- (j) any family violence involving the child or a member of the child's family;
- ~~(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;~~~~
- (k) any family violence order that applies to the child or a member of the child's family;**
- (l) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;
- (m) any other fact or circumstance that the court thinks is relevant.

~~(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.~~

(continued over page)

Section 60CC(3) continued

Consent orders

(5) If the court is considering whether to make an order with the consent of all the parties to the proceedings, the court may, but is not required to, have regard to all or any of the matters set out in subsection (2) or (3).

Right to enjoy Aboriginal or Torres Strait Islander culture

(6) For the purposes of paragraph (3)(h), an Aboriginal child's or a Torres Strait Islander child's right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right:

(a) to maintain a connection with that culture; and

(b) to have the support, opportunity and encouragement necessary:

(i) to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and

(ii) to develop a positive appreciation of that culture.

Item 18—repeal of paragraph 60CC(3)(c)

18.1 Item 18 repeals paragraph 60CC(3)(c) which, in combination with paragraph 60CC(4)(b), is commonly known as the 'friendly parent provision'. These provisions require the family courts to consider the attitude or conduct exhibited by one parent towards the other in facilitating a child's relationship with both parents. Recent reports have found that these provisions can prevent evidence of violence and abuse being brought to court.

Item 19—amendment of paragraph 60CC(3)(k)

19.1 Item 19 would delete paragraph 60CC(3)(k) and replace it with a similar provision which removes the requirement for family violence orders to have been final or contested. The effect of this new paragraph is the courts may have regard to any family violence order made and give appropriate weight to these orders including interim, non-contested and police issued orders. The definition of 'family violence order' in subsection 4(1) of the Family Law Act would remain unchanged. It is noted that this is an extensive definition relying on prescribed State and Territory legislation. It is intended to encompass all family violence orders recognised in the States and Territories.

Item 20—repeal of subsections 60CC(4) and (4A)

20.1 Item 20 would remove subsections 60CC(4) and (4A). The proposed deletion of paragraph 60CC(3)(c) warrants the removal of subsection 60CC(4) given the connection between those provisions. Subsection 60CC(4A) is a consequential amendment to the repeal of subsection 60CC(4).

Item 21—Subdivision BB and sections 60CH and 60CI—New provisions

Proposed provisions

60CH Informing court of care arrangements under child welfare laws

(1) If a party to the proceedings is aware that the child, or another child who is a member of the child's family, is under the care (however described) of a person under a child welfare law, that party must inform the court of the matter.

(2) If a person who is not a party to the proceedings is aware that the child, or another child who is a member of the child's family, is under the care (however described) of a person under a child welfare law, that person may inform the court of the matter.

(3) Failure to inform the court of the matter does not affect the validity of any order made by the court. However, this subsection does not limit the operation of section 69ZK (child welfare laws not affected).

60CI Informing court of notifications to, and investigations by, prescribed State or Territory agencies

(1) If:

(a) a party to the proceedings is aware that the child, or another child who is a member of the child's family, is or has been the subject of:

(i) a notification or report (however described) to a prescribed State or Territory agency; or

(ii) an investigation, inquiry or assessment (however described) by a prescribed State or Territory agency; and

(b) the notification, report, investigation, inquiry or assessment relates to abuse, or an allegation, suspicion or risk of abuse;

that party must inform the court of the matter.

(2) If:

(a) a person who is not a party to the proceedings is aware that the child, or another child who is a member of the child's family, is or has been the subject of:

(i) a notification or report (however described) to a prescribed State or Territory agency; or

(ii) an investigation, inquiry or assessment (however described) by a prescribed State or Territory agency; and

(b) the notification, report, investigation, inquiry or assessment relates to abuse, or an allegation, suspicion or risk of abuse;

that person may inform the court of the matter.

(3) Failure to inform the court of the matter does not affect the validity of any order made by the court.

(4) In this section:

prescribed State or Territory agency means an agency that is a prescribed State or Territory agency for the purpose of section 69ZW.

21.1 Item 21 inserts two new obligations on parties to provide the court with information regarding risks to the child, or another child who is a member of the child's family. Section 60CH will require parties to parenting proceedings to notify the court of any orders or arrangements under child welfare laws relating to the children of one or both of the parties. Section 60CI will require parties to disclose to the court whether the child has been the subject of notifications to, or investigations by, child welfare authorities.

21.2 Information about whether a child is or has been the subject of a care order under a child welfare law is crucial in assisting the family courts to make decisions about children. The 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 if the jurisdictional matters under section 69ZK arise and whether to request the involvement of relevant child welfare authorities. For example, the court may order the authorities to provide information relating to the notifications and investigations.

Item 22—New Subdivision BB (after Subdivision BA)—Best interests of the child: adviser’s obligations—New provision

Description of amendment

Insert a new provision in the Family Law Act relating to adviser obligations when giving advice about matters concerning the child and how child safety should be prioritised

Proposed provision

Subdivision BB—Best interests of the child: adviser’s obligations

60D Adviser’s obligations in relation to best interests of the child

- (1) If an adviser gives advice or assistance to a person about matters concerning a child and this Part, the adviser must:
- (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 best 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) In this section:
- adviser** means a person who is:
- (a) a legal practitioner; or
 - (b) a family counsellor; or
 - (c) a family dispute resolution practitioner; or
 - (d) a family consultant.

22.1 Item 22 would insert new Subdivision BB in Division 1 of Part VII that would outline the obligations on advisers when working with parents to reach parenting arrangements for their children. As with current section 63DA of the Family Law Act, an adviser would be defined as a legal practitioner, family counsellor, family dispute resolution practitioner and family consultant.

22.2 The new subdivision would direct advisers to focus on the best interests of the children when providing advice about parenting arrangements and other matters relating to children under Part VII of the Family Law Act.

22.3 Where there is inconsistency in applying the primary considerations of a child's right to a meaningful relationship with parents and the child's right to be protected from harm, advisers would be required to encourage parents to prioritise a child's wellbeing and right to safety. This approach is consistent with the amendments proposed at item 17. The new adviser obligations would enable parents to consider the protection of their children from harm as a priority at an early stage of discussions and with the assistance of their advisers.

Items 23 and 24—Section 63DA including new subsection 63DA(1A) and repeal of paragraph 63DA(2)(c) —Obligations of advisers—New provision

Description of amendment

Before subsection 63DA(1) of the Family Law Act insert new subsection 63DA(1A) highlighting adviser obligations in section 60D of that Act

Remove paragraph 63DA(2)(c) of the Family Law Act

Proposed provision

63DA Obligations of advisers

(1A) The obligations on an adviser under this section are in addition to the adviser's obligations under section 60D.

Note: Section 60D deals with an adviser's obligations in relation to the best interests of the child.

(1) If an adviser gives advice or assistance to people in relation to parental responsibility for a child following the breakdown of the relationship between those people, the adviser must:

- (a) inform them that they could consider entering into a parenting plan in relation to the child; and
- (b) inform them about where they can get further assistance to develop a parenting plan and the content of the plan.

(2) If an adviser gives advice to people in connection with the making by those people of a parenting plan in relation to a child, the adviser must:

- (a) inform them that, if the child spending equal time with each of them is:
 - (i) reasonably practicable; and
 - (ii) in the best interests of the child;they could consider the option of an arrangement of that kind; and

(b) inform them that, if the child spending equal time with each of them is not reasonably practicable or is not in the best interests of the child but the child spending substantial and significant time with each of them is:

- (i) reasonably practicable; and
- (ii) in the best interests of the child;

they could consider the option of an arrangement of that kind; and

~~(c) inform them that decisions made in developing parenting plans should be made in the best interests of the child; and~~

(d) inform them of the matters that may be dealt with in a parenting plan in accordance with subsection 63C(2); and...

23.1 Items 23 and 24 would provide that the adviser obligations in new Subdivision BB are in addition the obligations of advisers in section 63DA which (under item 22) would include taking account of the child's best interests and prioritising the child's safety.

Items 25 and 26—Repeal of Note 1 of subsection 65DAA(5) and revision to Note 2—Court to consider equal time or substantial and significant time in certain circumstances—Revised provision (notes only)

Description of amendment

Remove Note 1 under subsection 65DAA(5) of the Family Law Act
In Note 2 65DAA(5) omit the words ‘Note 2:’ and substitute the words ‘Note:’

Proposed provision

Reasonable practicality

65DAA (5) In determining for the purposes of subsections (1) and (2) whether it is reasonably practicable for a child to spend equal time, or substantial and significant time, with each of the child’s parents, the court must have regard to:

- (a) how far apart the parents live from each other; and
- (b) the parents’ current and future capacity to implement an arrangement for the child spending equal time, or substantial and significant time, with each of the parents; and
- (c) the parents’ current and future capacity to communicate with each other and resolve difficulties that might arise in implementing an arrangement of that kind; and
- (d) the impact that an arrangement of that kind would have on the child; and
- (e) such other matters as the court considers relevant.

~~Note 1: Behaviour of a parent that is relevant for paragraph (c) may also be taken into account in determining what parenting order the court should make in the best interests of the child. Subsection 60CC(3) provides for considerations that are taken into account in determining what is in the best interests of the child. These include:~~

- ~~(a) 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));~~
- ~~(b) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child’s parents (paragraph 60CC(3)(i)).~~

Note: ~~Note 2:~~ Paragraph (c) reference to future capacity—the court has power under section 13C to make orders for parties to attend family counselling or family dispute resolution or participate in courses, programs or services.

Item 25—repeal of Note 1

25.1 This item would remove Note 1. Note 1 would no longer be necessary given the proposed repeal of subsection 60CC(3) of the Family Law Act as proposed by item 18.

Item 26—amendment to Note 2

26.1 Note 2 would be renamed as ‘Note’. This is a consequential amendment.

Item 27—New paragraph 67A(ca)—What Division 8, Part VII deals with— Revised provision

Description of amendment

After section 67A(c) of the Family Law Act insert a new paragraph 67A(ca)

Proposed provision

67A What this Division does

67A This Division deals with:

- (a) the liability of a father to contribute towards child bearing expenses if he is not married to the child's mother (Subdivision B); and
- (b) orders for the location and recovery of children (Subdivision C); and
- (c) the reporting of allegations of child abuse (Subdivision D); and
- (ca) reporting of allegations of family violence (Subdivision DA); and**
- (d) other orders about children (Subdivision E).

27.1 Section 67A of the Family Law Act outlines the matters that are addressed in Division 8 of Part VII of that Act matters relate to children such as child maintenance, location and recovery of children and reporting of allegations of child abuse. Item 27 would amend section 67A of the Act to inform the reader that Division 8 also contains provisions introduced by item 29 relating to the reporting of family violence.

Item 28—New note to subsection 67ZA(3)—Suspicion of abuse— Revised provision (note only)

Description of amendment

After section 67ZA(3) of the Family Law Act add a new note to deal to confirm mandatory reporting requirements

Proposed provision

67ZA Where member of the Court personnel, family counsellor, family dispute resolution practitioner or arbitrator suspects child abuse etc.

(1) This section applies to a person in the course of performing duties or functions, or exercising powers, as:

- (a) the Registrar or a Deputy Registrar of a Registry of the Family Court of Australia; or
- (b) the Registrar or a Deputy Registrar of the Family Court of Western Australia; or
- (c) a Registrar of the Federal Magistrates Court; or
- (d) a family consultant; or
- (e) a family counsellor; or
- (f) a family dispute resolution practitioner; or
- (g) an arbitrator; or
- (h) a lawyer independently representing a child's interests.

(2) If the person has reasonable grounds for suspecting that a child has been abused, or is at risk of being abused, the person must, as soon as practicable, notify a prescribed child welfare authority of his or her suspicion and the basis for the suspicion.

(3) If the person has reasonable grounds for suspecting that a child:

- (a) has been ill treated, or is at risk of being ill treated; or
- (b) has been exposed or subjected, or is at risk of being exposed or subjected, to behaviour which psychologically harms the child;

the person may notify a prescribed child welfare authority of his or her suspicion and the basis for the suspicion.

Note: The obligation under subsection (2) to notify a prescribed child welfare authority of a suspicion that a child has been abused or is at risk of being abused must be complied with, regardless of whether this subsection also applies to the same situation.

28.1 Item 28 responds to the scenario where the facts of a case may trigger multiple reporting obligations. The note confirms that a person who is authorised to report ill-treatment under subsection 67ZA(3) of the Family Law Act is not excused from mandatory reporting obligations which arise under subsection 67ZA(2) of the Act where that person has reasonable grounds for suspecting that a child has been abused or is at risk of being abused.

Item 29—Subdivision D of Division 8 of Part VII—Allegations of family violence—New provision

Description of amendment

Insert a new provision in the Family Law Act that requires parties alleging family violence to bring it to the attention of the court

Proposed provision

Subdivision DA—Allegations of family violence

67ZBA Where party to proceedings makes allegation of family violence

(1) This section applies if a party to proceedings under this Part alleges:

- (a) there has been family violence by one of the parties to the proceedings; or
- (b) there is a risk of family violence by one of the parties to the proceedings.

(2) The party making the allegation must file a notice in the prescribed form in the court hearing the proceedings, and serve a true copy of the notice upon the party referred to in paragraph (1)(a) or (b).

(3) If the alleged family violence (or risk of family violence) is abuse of a child (or a risk of abuse of a child):

- (a) the party making the allegation must either file and serve a notice under subsection (2) of this section or under subsection 67Z(2) (but does not have to file and serve a notice under both those subsections); and
- (b) if the notice is filed under subsection (2) of this subsection, the Registry Manager must deal with the notice as if it had been filed under subsection 67Z(2).

(4) In this section:

prescribed form means the form prescribed by the applicable Rules of Court.

29.1 Item 29 would insert new section 67ZBA into the Family Law Act to require parties to proceedings who allege that there has been or is a risk of family violence to file a notice of family violence with the court. It is anticipated that the existing Form 4 Notice of Child Abuse or Family Violence which is prescribed for the purposes of paragraph 60K(1)(d) would be prescribed also for proposed section 67ZBA.

29.2 The Family Law Council noted that there is currently no requirement in the Family Law Act to report family violence, and that the Family Law Rules which provide for a similar rule are not followed by legal practitioners or litigants other than in cases of sexual abuse or serious physical abuse of a child. This provision would act as a clear flag to parties and their representatives that the court must be told about family violence.

29.3 Section 67Z of the Family Law Act provides for a similar requirement in relation to allegations of child abuse and was used as a guide for this provision.

**Item 30—Note in section 68N—Purposes of Division 11—
Repealed provision (note only)**

Description of amendment

Repeal the note in section 68N of the Family Law Act

Proposed provision

68N Purposes of this Division

The purposes of this Division are:

- (a) to resolve inconsistencies between:
 - (i) family violence orders; and
 - (ii) certain orders, injunctions and arrangements made under 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; and
- (aa) to ensure that orders, injunctions and arrangements of the kind referred to in subparagraph (a)(ii) do not expose people to family violence; and
- (b) to achieve the objects and principles in section 60B.

~~Note: Other provisions dealing with family violence and family violence orders are section 4 (definitions), paragraphs 60B(1)(b) and 60CC(2)(i) and (j), sections 60CF and 60CG, subsection 60I(9), section 60K, subsection 61DA(2), paragraph 65F(2)(b) and section 65P.~~

30.1 Item 30 would repeal the note at the end of section 68N of the Family Law Act which signposts other provisions dealing with family violence. This note is unnecessary and risks becoming unwieldy with the addition of new family violence provisions. The outline of Part VII at section 60C already provides guidance to the reader about provisions relating to family violence.

Item 31—New paragraph 69ZN(5)(a)—Principles for child related proceedings—Revised provision

Description of amendment

Remove paragraph 69ZN(5)(a) of the Family Law Act and insert a new paragraph 69ZN(5)(a)

Proposed provision

69ZN Principles for conducting child-related proceedings

Application of the principles

(1) The court must give effect to the principles in this section:

- (a) in performing duties and exercising powers (whether under this Division or otherwise) in relation to child-related proceedings; and
- (b) in making other decisions about the conduct of child-related proceedings.

Failure to do so does not invalidate the proceedings or any order made in them.

(2) Regard is to be had to the principles in interpreting this Division.

...

Principle 3

69ZN (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~~
- (a) the child concerned from being subjected to, or exposed to, abuse, neglect or family violence; and
- (b) the parties to the proceedings against family violence.

31.1 Item 31 would amend paragraph 69ZN(5)(a) of the Family Law Act to provide consistency in terminology throughout Part VII. There is no change to the intent of the provision.

Item 32—New paragraph 69ZQ(1)(aa)—General duties of the court— New provision

Description of amendment

Before paragraph 69ZQ(1)(a) of the Family Law Act insert new paragraph 69ZQ(1)(aa) requiring the court to ask questions about abuse, neglect and family violence

Proposed provision

- (1) In giving effect to the principles in section 69ZN, the court must:
- (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; and
 - (a) decide which of the issues in the proceedings require full investigation and hearing and which may be disposed of summarily; and
 - (b) decide the order in which the issues are to be decided; and
 - (c) give directions or make orders about the timing of steps that are to be taken in the proceedings; and
 - (d) in deciding whether a particular step is to be taken—consider whether the likely benefits of taking the step justify the costs of taking it; and
 - (e) make appropriate use of technology; and
 - (f) if the court considers it appropriate—encourage the parties to use family dispute resolution or family counselling; and
 - (g) deal with as many aspects of the matter as it can on a single occasion; and
 - (h) deal with the matter, where appropriate, without requiring the parties' physical attendance in court.

32.1 Item 32 would impose a new duty on the court to actively inquire into the existence of abuse or family violence. Imposition of this duty would implement the family courts' obligation under subsection 68ZN(5) to conduct proceedings in a way that will safeguard the child and the parties to the proceedings from harm. The duty does not currently extend to requiring the court to proactively inquire about other information which might be useful evidence from people or agencies other than parties to the proceedings.

32.2 The family courts have general powers to order expert evidence, including evidence from child welfare authorities, and may seek additional information from persons or agencies not party to the proceedings where the court determines this is appropriate.

Item 33—New Note at the end of subsection 91B(2)—Intervention by child welfare officer—New provision (note only)

Description of amendment

Insert a new note at the end of section 91B to reference new subsection 117(4A)

Proposed provision

91B Intervention by child welfare officer

- (1) In any proceedings under this Act that affect, or may affect, the welfare of a child, the court may request the intervention in the proceedings of an officer of a State, of a Territory or of the Commonwealth, being the officer who is responsible for the administration of the laws of the State or Territory in which the proceedings are being heard that relate to child welfare.
- (2) Where the court has, under subsection (1), requested an officer to intervene in proceedings:
 - (a) the officer may intervene in those proceedings; and
 - (b) where the officer so intervenes, the officer shall be deemed to be a party to the proceedings with all the rights, duties and liabilities of a party.

Note: If an officer intervenes in proceedings and acts in good faith in relation to the proceedings, an order for costs, or for security for costs, cannot be made under subsection 117(2) against the officer: see subsection 117(4A).

33.1 Item 33 would insert a new note under section 91B of the Family Law Act. The purpose of this note would be to alert the reader to the immunity for costs provision where the intervention occurs at the request of the court and officer acts in good faith. This note would provide a signpost to proposed subsection 117(4A) of the Family Law Act discussed in item 36.

Item 34, 35 and 36—Subsection 117AB costs—New provision and revisions

Description of amendments

In subsection 117(1) remove the words ‘117AB,’

In subsection 117(2) remove the words ‘and (5)’ and insert the words ‘, (4A) and (5)’

After subsection 117(4) insert new subsection 117(4A) providing a cost immunity for certain officers

Revised provision

117 Costs

(1) Subject to subsection (2), subsection 70NFB(1) and sections 117AA, ~~117AB~~, 117AC and 118, each party to proceedings under this Act shall bear his or her own costs.

(2) If, in proceedings under this Act, the court is of opinion that there are circumstances that justify it in doing so, the court may, subject to subsections (2A), (4), (4A) and (5) ~~and (5)~~ the applicable Rules of Court, make such order as to costs and security for costs, whether by way of interlocutory order or otherwise, as the court considers just.

(2A) In considering what order (if any) should be made under subsection (2), the court shall have regard to:

- (a) the financial circumstances of each of the parties to the proceedings;
- (b) whether any party to the proceedings is in receipt of assistance by way of legal aid and, if so, the terms of the grant of that assistance to that party;
- (c) the conduct of the parties to the proceedings in relation to the proceedings including, without limiting the generality of the foregoing, the conduct of the parties in relation to pleadings, particulars, discovery, inspection, directions to answer questions, admissions of facts, production of documents and similar matters;
- (d) whether the proceedings were necessitated by the failure of a party to the proceedings to comply with previous orders of the court;
- (e) whether any party to the proceedings has been wholly unsuccessful in the proceedings;
- (f) whether either party to the proceedings has made an offer in writing to the other party to the proceedings to settle the proceedings and the terms of any such offer; and
- (g) such other matters as the court considers relevant...

(4A) If:

- (a) under section 91B, an officer intervenes in proceedings; and
- (b) the officer acts in good faith in relation to the proceedings;

the court must not make an order under subsection (2) of this section, because of the intervention, against the officer, or against an entity (including the Commonwealth or a State or Territory) by or on behalf of whom the officer was engaged or employed.

(5) In considering what order (if any) should be made under subsection (2) in proceedings in which an independent children’s lawyer has been appointed, the court must disregard the fact that the independent children’s lawyer is funded under a legal aid scheme or service established under a Commonwealth, State or Territory law or approved by the Attorney-General.

Item 34—remove reference to section 117AB

34.1 Item 34 is a consequential change that would arise because of the repeal of section 117AB of the Family Law Act proposed by item 37. Accordingly, the reference to section 117AB in subsection 117(1) should also be removed.

Item 35—insert reference to new subsection 117(4AB)

35.1 Item 35 is a consequential amendment which would insert a reference to the new subsection 117(4A) introduced by item 36 which introduces a new cost immunity for certain officers.

Item 36—provide cost immunity to certain officers

36.1 Item 36 would introduce a cost immunity for State and Territory child welfare authorities, and their officers, who intervene in family law proceedings following a request by the court and act in good faith throughout the proceedings. Intervention by state and territory child welfare authorities can be essential for the family courts to have comprehensive information about violence and abuse affecting the child. It can also provide the family courts additional options to protect the child from harm when determining parenting orders.

Item 37—Section 117AB—False allegations and statements— Repealed provision

Description of amendment

Remove section 117AB which deals with false allegations or statements made in proceedings

Repealed provision

117AB Costs where false allegation or statement made

(1) This section applies if:

- (a) proceedings under this Act are brought before a court; and
- (b) the court is satisfied that a party to the proceedings knowingly made a false allegation or statement in the proceedings.

(2) The court must order that party to pay some or all of the costs of another party, or other parties, to the proceedings.

37.1 Item 37 would repeal existing section 117AB of the Family Law Act.

37.2 Section 117AB requires the court to make a mandatory cost order where it is satisfied that parties have knowingly made a false allegation or statement in the proceedings. Recent reports suggest 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. Section 117 of the Family Law Act would remain. This provision allows family courts to make cost orders in response to false statements in appropriate cases.