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Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011

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Law and Bills Digest Section

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Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011

Date introduced: 24 March 2011

House: House of Representatives

Portfolio: Attorney-General

Commencement: Schedule 1, containing the provisions relating to family violence, commences the day after 6 months from Royal Assent, or earlier by Proclamation. The provisions in Schedule 2 commence on Royal Assent, apart from items 1, 2 and 30 that commence 28 days after Royal Assent.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill's home page, or through http://www.aph.gov.au/bills/. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose

Schedule 1 of the Bill primarily amends Part VII of the *Family Law Act 1975* (Family Law Act) dealing with children, to enable the courts and the family law system to respond more effectively to parenting cases involving violence or allegations of violence.

Schedule 2 contains more technical and procedural amendments to the Family Law Act and *Bankruptcy Act 1966*.

Note: The Bills Digest does not deal with Schedule 2. Further details of this Schedule can be found in the Explanatory Memorandum.

Background

The Family Law Act 1975 and children[1]

The provisions of the Family Law Act relating to so called 'parenting cases' are contained mainly in Part VII, which is titled 'Children'. Part VII was significantly changed by amendments in 1995[2] and changed again by amendments in 2006[3]. A brief overview of these amendments is provided below.

At the outset, it should be noted that the law relating to parenting cases has long been governed by the principle that the child's best interest must be treated as the paramount consideration. This principle was originally developed by courts' decisions in the nineteenth and early twentieth centuries, and then incorporated into legislation. It remains in the Family Law Act and section 60CA now provides:

> In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.

The 1995 reforms

1995 saw significant amendments to the Family Law Act under the initiative of the then Labor Government. The objectives of the legislation were said to be: to remove the proprietorial and `winner takes all' connotations of the old law of custody and access by emphasising the continued sharing of parental responsibility; to promote and encourage continued contact between both parents and their children post-separation; to promote private agreement of arrangements; and to shift attention to the rights of children and away from those of parents. The child's best interests remained the paramount consideration in decision-making, although there was a general statement in the opening part of the legislation that, subject to the best interests test, children had a right of contact on a regular basis with both parents and with significant others. For the first time, reference was made to family violence as a factor in decision-making on the best interests of the child[4], and

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1. This section relies heavily on two articles: J Dewar, 'Can the centre hold?: reflections on two decades of family law reform in Australia', *Australian Journal of Family Law*, vol. 24, 2010, pp. 140—142, viewed 10 May 2011, http://parlinfo.aph.gov.au/parlInfo/download/library/jrnart/213975/upload_binary/213975.pdf;fileType=application/pdf#search=%22dewar%20family%20law%20reform%22 and P Parkinson, 'Editorial: the family law reform pendulum', *Australian Journal of Family Law*, vol. 23, 2009, p. 155, viewed 13 May 2011, http://parlinfo.aph.gov.au/parlInfo/download/library/jrnart/WHFV6/upload_binary/WHFV6.pdf;fileType=application/pdf#search=%22family%20law%20reform%20pendulum%22
2. *Family Law Reform Act 1995*.
3. *Family Law Amendment (Shared Responsibility) Act 2006.*
4. Section 68F (as it was after 1995), *Family Law Act 1975*.

detailed provisions were introduced concerning the inter-relationship between family violence orders and orders for contact. Courts were instructed to endeavour not to make parenting orders that exposed a person to an unacceptable risk of family violence. [5]

The 2006 reforms

Just over a decade later, the Howard Government, in response to the House of Representatives Committee report, *Every picture tells a story*[6]*,* introduced the 2006 reforms. These went further than the 1995 reforms in a number of important respects and were the subject of considerable debate. Most notably, the legislation promotes equal sharing of time post-separation much more actively than its predecessor, in a number of ways:

- there is a presumption of `equal shared parental responsibility' (section 61DA). This presumption is not applicable in cases where there are reasonable grounds to believe one of the parties has engaged in family violence or child abuse (subsection 61DA(2)) and it is rebuttable on the basis of evidence that would satisfy a court that its application is not in the child's best interests (subsection 61DA(4))
- where an order for equal shared parental responsibility is made, a court must consider whether making an order for the child to spend equal time with both parents is in the best interests of the child and reasonably practicable (subsection 65DAA(1)). If so, then it must consider making such an order (paragraph 65DAA(I)(c)). If an order for equal time is not made, then a court must consider making an order for `substantial and significant time' with both parents (subsection 65DAA(2)).`Substantial and significant time' must include weekdays as well as weekends, and must be such as to allow both parents to be involved in the child's daily routine
- the traditional checklist for determining the best interests of the child is now divided into two tiers: primary considerations and additional considerations. The `primary' considerations are:
  - (a) the benefit to the child of having a meaningful relationship with both of its parents, and
  - (b) the need to protect the child from harm or from being exposed to abuse, neglect or violence (subsection 60CC(2))
- these primary considerations have been described as 'the twin pillars' of the parenting provisions in Part VII
- the `additional' considerations (subsection 60CC(3)), are those from the traditional checklist, with the notable addition of the so-called `friendly parent' provision (paragraph 60CC(3)(c)), which requires a court to take account of the willingness of each parent to facilitate a close relationship between the child and the other parent
- parents are required to attend family dispute resolution (FDR) and obtain a certificate from a family dispute resolution (FDR) practitioner before they can apply to court for parenting orders,

5. P Parkinson, Editorial: the family law reform pendulum, op. cit., p. 155.
6. House of Representatives Standing Committee on Family and Community Affairs, *Every picture tells a story: report on the inquiry into child custody arrangements in the event of family separation,* Parliament of the Commonwealth of Australia, 2003.

unless there are concerns about family violence and abuse or other exceptions, including urgency (section 60I).The legislation was accompanied by a significant investment in new community-based FDR services, including Family Relationship Centres, and in other specific forms of service provisions such as contact centres.

Review of the 2006 reforms

Since the introduction of the 2006 reforms, there have been a plethora of reviews and inquiries into family law matters including the issue of family violence and child abuse. In the context of this Bill, the more significant of these reports[7] include:

- the *Evaluation of the 2006 family law reforms,* by the Australian Institute of Family Studies (the AIFS Evaluation)[8]
- the *Family Courts Violence Review,* by the Honourable Professor Richard Chisholm (the Chisholm Review)[9]
- *Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues,* a report by the Family Law Council (the Family Law Council Report).[10]

On 28 January 2010, the Attorney-General, the Hon Robert McClelland released all three reports and described them as providing:

> a comprehensive and objective analysis of the family law system against the aim of providing fair and sustainable solutions for families, while ensuring the safety and wellbeing of children [11]

The first and most comprehensive of these reports was the AIFS Evaluation commissioned by the Howard Government, its purpose being to conduct a major evaluation of the 2006 changes to the

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7. Another relevant report, conducted by the Australian and New South Wales Law Reform Commissions addressed the issue of inconsistencies in the interaction and application of the Commonwealth and States regarding domestic violence, child protection, sexual assault and family law. Australian Law Reform Commission, 'Family violence: a national legal response', *Report*, no. 114, 2010, viewed 6 April 2011, http://www.alrc.gov.au/publications/family-violence-national-legal-response-alrc-report-114
8. R Kaspiew et al, *Evaluation of the 2006 family law reforms,* 2009*,* Australian Institute of Family Studies, viewed 22 May 2011, http://www.aifs.gov.au/institute/pubs/fle/index.html
9. R Chisholm, *Family Courts Violence Review, 2009,* viewed 23 May 2011*,* http://www.ag.gov.au/www/agd/agd.nsf/Page/Families_FamilyCourtsViolenceReview
10. Family Law Council, *Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues*, 2009, viewed 10 May 2010, http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3273BD3F76A7A5DEDAE36942A54D7D90)~Family_Violence_Report.pdf/$file/Family_Violence_Report.pdf
11. R McClelland, (Attorney-General), *Release of family law reviews*, media release, 28 January 2010, viewed 23 May 2011, http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/AKWV6/upload_binary/akwv60.pdf;fileType=application/pdf#search=%22chisholm%20FAMILIES%22

Family Law Act. The AIFS Evaluation was based on an extensive amount of empirical research, comprising 17 separate studies involving 28 000 people, 1724 court files, administrative data and legal analysis.[12]

The Chisholm Review and the Family Law Council Report both had a more specific focus and examined the effectiveness of legislation as well as court practices and procedures in cases involving family violence.

The AIFS Evaluation found that the 2006 reforms have had a positive impact in some areas and a less positive impact in others.

In relation to the positive findings, it found for example, that the principle of shared parental responsibility is widely supported, although it is often misconstrued as requiring equal shared care time and, according to the AIFS, has led to unrealistic expectations among some parents.[13] There was also evidence that the majority of separated parents with a shared care arrangement enjoy cooperative relationships with one another, and there were also indications of improved screening and identification of violence cases within the family relationships sector.[14]

However, at the same time the AIFS Evaluation findings underline the existence of complex issues, including family violence, safety concerns, mental health problems and substance misuse issues. For example 26 per cent of mothers and 18 per cent of fathers reported experiencing physical hurt prior to separation, and 29 per cent of mothers and 4 per cent of fathers reported experiencing emotional abuse before, during and after separation. Families with complex needs are the predominant clients both of post-separation services and the legal sector.[15]

Importantly the AIFS Evaluation found that there was clear evidence that the family law system as a whole had a way to go in achieving an effective response to families presenting with family violence and child abuse. For example it noted that while children in shared care represent a minority overall, and while the majority of families with shared care appear to be doing well, there is

12. For a summary of the AIFS Evaluation see: R Kaspiew et al, 'The Australian Institute of Family Studies evaluation of the 2006 family law reforms: key findings', *Australian Journal of Family Law*, vol. 24, 2010, pp. 5-33, viewed 18 May 2011, http://parlinfo.aph.gov.au/parlInfo/download/library/jrnart/SD6X6/upload_binary/SD6X6.pdf;fileType=application/pdf#search=%22Evaluation%20of%20the%202006%20family%20law%20reforms%22 .
13. Ibid., p. 6.
14. Ibid., p. 25.
15. R Kaspiew et al, 'The AIFS evaluation of the 2006 family law reforms: a summary', *Family Matters*, no. 86, 2011, p. 9, viewed 23 May 2011, http://parlinfo.aph.gov.au/parlInfo/download/library/jrnart/544756/upload_binary/544756.pdf;fileType=application/pdf#search=%22AIFS%20family%20law%22

evidence that these arrangements are sometimes being made even in circumstances where parents have safety concerns, with adverse consequences for the well-being of children.[16]

The Evaluation found that families where violence had occurred, were no less likely to have shared care-time arrangements than those where violence had not occurred. Similarly families where safety concerns were reported, were no less likely to have shared care-time arrangements than families without safety concerns.[17]

The AIFS Evaluation, along with the Chisholm Review and the Family Law Council Report noted a range of issues involving specific concerns in relation to the system's handling of family violence. These included:

- the need for inter-professional communication and collaboration about cases where family violence and child abuse are involved. For example the finding that families who had ongoing safety concerns were no less likely than other families to have shared care, despite interaction with all parts of the system indicates a need for all professionals across the system to develop a common understanding about circumstances where shared care arrangements should not be encouraged or endorsed[18]
- evidence of all three reports indicated some aspects of the 2006 reforms have created impediments to effective handling of matters where family violence and child abuse are alleged. The misunderstanding of the law, in combination with a lack of awareness among some professionals of the implications of family violence and child abuse (and the effect this may have for post-separation parenting arrangements) raise concerns. All reports recommended that training and professional development be improved[19]
- two aspects of the legislative framework in particular may inhibit concerns about family violence and child abuse being raised at all or in a way that links them to the future involvement of a parent in a child's life. These are the cost orders for false allegations (section 117AB) and the 'friendly parent' provisions criterion (paragraph 60CC(3)(c) and also paragraph 60CC(4)(b)).[20] (These are both discussed in the 'Main issues and key provisions' section of the Bills Digest).

Basis of policy commitment

In November 2010, the Attorney-General, the Hon R McClelland released the Exposure Draft Family Law Amendment (Family Violence) Bill 2010 and a related consultation paper. The exposure draft

16. R Kaspiew et al, 'The Australian Institute of Family Studies evaluation of the 2006 family law reforms: key findings', op. cit., p. 5.
17. R Kaspiew et al, 'The AIFS evaluation of the 2006 family law reforms: a summary', op. cit., p. 12.
18. R Kaspiew et al, 'The Australian Institute of Family Studies evaluation of the 2006 family law reforms: key findings', op. cit., p. 26.
19. Ibid.
20. Ibid.

bill was described as responding to 'the recent reports commissioned into the 2006 family law reforms and how the family law system deals with family violence.[21]

The Attorney-General has indicated that the Department received over 400 submissions on the exposure draft bill, with 73 per cent of these being supportive of the proposed measures.[22]

This exposure draft bill, with some amendments, formed the basis for the Bill introduced into Parliament on 24 March 2011.

Committee consideration

The Bill has been referred to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report by 23 June 2011 ('the Senate Committee inquiry'). Details of the inquiry and copies of submissions are available at:
http://www.aph.gov.au/senate/committee/legcon_ctte/family_law_familyviolence/index.htm

In addition to the Senate Committee inquiry, on 11 May 2011, the House of Representatives Selection Committee referred the Bill to the House of Representatives Social Policy and Legal Affairs Committee for inquiry. However that Committee, noting the work already being undertaken by the Senate Committee, unanimously agreed not to further inquire into the Bill.[23]

Position of major interest groups

The interest, and at times passion, that this Bill has generated, is evident in the large number of submissions received by the Senate Committee inquiry. The more than 200 submissions include a diverse range of views about the benefits and shortcomings of the Bill from women's advocacy groups and fathers' advocacy groups, from welfare organisations, from the legal profession and academics, as well as from many individuals.

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21. Attorney-General's Department, *Family Law Amendment (Family Violence) Bill 2010, Exposure draft: consultation paper*, viewed 6 April 2011, http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(FC77CAE5F7A38CF2EBC5832A6FD3AC0C)~1+Family+Law+Amendment+(Family+Violence)+Bill+2010+-+Consultation+Paper+-+Final+version.pdf/$file/1+Family+Law+Amendment+(Family+Violence)+Bill+2010+-+Consultation+Paper+-+Final+version.pdf
22. R McClelland, 'Second reading speech: Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011', House of Representatives, *Debates*, 24 March 2011, p. 3141, viewed 23 May 2011, http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/2011-03-24/0044/hansard_frag.pdf;fileType=application%2Fpdf Note: The submissions received on the exposure draft bill are not publicly available.
23. House of Representatives Social Policy and Legal Affairs Committee, Advisory report of the inquiry into: Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011, 12 May 2011, viewed 13 May 2011, http://www.aph.gov.au/house/committee/spla/Bill%20Family%20Violence/report/Report.pdf

To give a sense of the diverse range of views, this section of the Bills Digest refers to only a small selection of these submissions. Further comments are also included in the 'Main issues and key provisions' section below. A strong reliance on the legal profession submissions, is due in part to their relevance to the parliamentary legislative process.

Fathers' advocacy groups and the Lone Fathers Association

Several fathers' groups have submitted that they oppose the Bill. The Lone Fathers Association states that the Bill is one-sided in a gender-ideological way and if implemented would increase litigation and complaints and have widespread damaging effects on Australian families. They argue that the Bill is a backdoor way of winding back shared parenting arrangements, using the safety of children as an excuse. In particular they say the Bill, if enacted would increase the number of children whose relations and contact with non-resident parents (usually the father) is terminated, postponed, reduced, or curtailed due to false or exaggerated claims of family violence. It would increase the chances for success of manipulative parents, increase friction between the parties, increase the potential for actual violence between the parties where previously there would have been little or none, and would hamper the courts' ability to identify real and acutely dangerous situations. [24]

Shared Parenting Council of Australia

The Shared Parenting Council of Australia states that it supports any improvements that ensure the rights of the child to have a meaningful relationship with both their mother and father are maintained, and in an environment of safety and security. The Council does not, however,

> support changes to that extend definitions to a point that normal and everyday conduct can arguably be put forward as family violence, or conduct or "conflict" that is a normal part of some family breakdowns, which often dissipates over time, be terminating relationship events for children. [25]

It is their view that the courts have been and will continue to put the best interests of the child first, especially in matters pertaining to family violence and they argue that some of the proposed amendments seem to ignore the protections that currently exist in the legislation, particularly paragraphs 60CC(2)(b) and 61DA(2)(a). [26]

Their submission also lists a range of other provisions in the Family Law Act where the courts are required to take account of any family violence that applies to the child or the child's family and they

24. Lone Fathers Association, *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011,* Submission to the Senate Legal and Constitutional Affairs Legislation Committee*,* April 2011, p. 3.
25. Shared Parenting Council of Australia, *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011,* Submission to the Senate Legal and Constitutional Affairs Legislation Committee*,* May 2011, p. 34.
26. Ibid.

argue that the effect of these combined sections, provides a rigorous and supportable process whereby judicial officers can act appropriately to protect children. The submission states:

> We have not sighted any research that suggests the Courts have failed to enact or consider these provisions, nor have we seen any evidence to suggest that such provisions have not been effective in dealing with the types of issues that may arise, and which is the subject of further amendment in this proposed Family Law Amendment Bill. However, with consideration and adoption of the recommendations provided in this submission, the SPCA would be supportive of some legislative amendments in this regard.[27]

Women's advocacy groups

Several advocacy groups representing women support the Bill, although many would argue that it does not go far enough.

Women's Legal Centre

The Women's Legal Centre (WLC) submits that it strongly supports the Federal Government's moves to provide better protections for people who have experienced family violence within the family law system. It sees the proposed amendments are an essential first step to place safety and protection of children and family members at the forefront of the Family Law Act. [28]

However the WLC argues that further amendments are necessary to implement the intentions of the Government in an understandable and consistent way. In particular they argue for further amendment in relation to the provisions dealing with equal shared parental responsibility and with the 'one size fits all' approach in which it is assumed that equal time and substantial and significant time arrangements are best for children. They also express concern about the lack of understanding about the dynamics of family violence and recommend ways that the Government can address this concern. [29]

Redfern Legal Centre and Sydney Women's Domestic Violence Court Advocacy Service

Similarly, the Redfern Legal Centre (RLC) and Sydney Women's Domestic Violence Court Advocacy Service (WDVCAS) submit there is an urgent need for change in response to a strong body of evidence that suggests the 2006 amendments have failed to keep victims of family violence and their children safe. They note that Sydney WDVCAS case files provide further evidence that shared care can be unsafe and inappropriate for young children in situations of high conflict. They believe the expeditious implementation of the Bill will greatly assist in protecting the rights and interests of

27. Ibid.
28. Women's Legal Centre, *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011,* Submission to the Senate Legal and Constitutional Affairs Legislation Committee, April 2011.
29. Ibid.

children while continuing to support the concept of shared parental responsibility and shared care where safe. [30]

Legal profession

While the legal profession generally supports some form of reform, individuals and organisations within the profession have expressed a range of views on how this should be achieved. Some of these views are set out immediately below, whereas others, including the views of the Chief Justice of the Family Court and the Law Society of New South Wales, are contained under specific headings in the 'Main issues and key provisions' section of this Digest.

Law Council of Australia

The Law Council submission recommends further refinement of some of the provisions in the Bill. However its main argument is that the Bill responds only in part to the range of important issues raised in the three reports. It argues that while the language of the Family Law Act acknowledges the problems of family violence, this is not reflected in the resources provided to the courts to realistically deal with violence and its effects. The submission states:

> From the basic issue of feeling and being safe at court, to the resources available to investigate allegations and risk, and access to services to support victims of violence the system is under-funded. The proposed amendments will only increase the complexity of litigation and overwhelm an already under resourced court system. The issue of family violence cannot be addressed in a way which assists Australian families and children without proper and consistent funding. [31]

Professor Richard Chisholm

Professor Richard Chisholm, former Family Court Judge and author of the Chisholm Review, supports the Bill overall. He says it is a cautious but sensible set of measures that can be expected to provide needed protection for children and adults subject to family violence without changing the legislative emphasis of 2006 on the value of shared parental involvement after family separation. While the Bill would improve the law, Professor Chisholm also believes there are ways in which it could be improved. Some of these recommendations are referred to under the 'Main issues and key provisions' section.

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30. Redfern Legal Centre and Sydney Women's Domestic Violence Court Advocacy Service, *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011,* Submission to the Senate Legal and Constitutional Affairs Legislation Committee*,* May 2011, p. 1.
31. Law Council of Australia, *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011,* Submission to the Senate Legal and Constitutional Affairs Legislation Committee*,* April 2011, p. 6.

Professor Chisholm also recommends that there be more major overhaul of Part VII of the Family Law Act arguing that the present law is unnecessarily complex and confusing, regardless of what a person's view of shared parenting might be. [32]

Professor Patrick Parkinson

Professor Patrick Parkinson, family law academic who was heavily involved in the 2006 reforms, supports many features of this Bill which he considers will lead to an improvement of the law as it affects victims of violence. In particular, he supports the removal of the 'friendly parent' provision in subsection 60CC(3)(c) and the costs provision in section 117AB, not because he thinks the courts have improperly applied these provisions over the past four years, but because advocacy groups have been worried by them and these groups have offered anecdotal evidence to the effect that lawyers have advised clients not to raise domestic violence issues because of these provisions. Professor Parkinson states:

> The removal of such provisions will not in any way impair the capacity of the courts to resolve cases justly, but will have benefits in terms of community understanding of the legislation. [33]

Some of Professor Parkinson's suggestions for further amendment are referred to below.

Associate Professor Helen Rhoades and Professor John Dewar

Associate Professor Helen Rhoades and Professor John Dewar, both of the University of Melbourne, state that the Bill represents an important step in addressing a number of the problems identified by the recent AIFS Evaluation of Part VII of the Family Law Act. While supporting the aims and substance of many provisions in the Bill they also believe that the Government's response could be strengthened. They argue for further amendments including removal of the presumption of equal shared parental responsibility from the Act, and a redrafting of the best interest factors in section 60CC so that a child's safety is given priority. They also support the Family Law Council's recommendation for the development and dissemination of a 'common knowledge base' regarding family violence and its impact on child and adult wellbeing to support the Government's risk assessment framework. [34]

32. R Chisholm, *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011,* Submission to the Senate Legal and Constitutional Affairs Legislation Committee, April 2011, p. 2.
33. P Parkinson, *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011,* Submission to the Senate Legal and Constitutional Affairs Legislation Committee, April 2011, p. 1.
34. H Rhoades and J Dewar, *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011,* Submission to the Senate Legal and Constitutional Affairs Legislation Committee, April 2011, p. 6.

Financial implications

The Explanatory Memorandum, states that the amendments in this Bill have negligible financial implications.[35]

However the Chief Justice of the Family Court, the Honourable Diana Bryant, states that she is not convinced that is the case. She believes that 'the confluence of amendment, by way of expanded definitions and categories of persons who can engage special court processes,' will have resource implications for the Court.[36] Her Honour states:

> [...] no additional funding to assist the Court in managing an increased workload arising from the amendments is being proposed. Certainly the Family Court has not been consulted about the operational effect of the amendments.[37]

Main issues and key provisions

Schedule 1—Amendments relating to family violence

Defining and measuring the extent of family violence

It has been said that getting the definition of 'family violence' right is both important and difficult. Important because the term 'family violence' has consequences in terms of the operation of various matters whether something is or is not family violence. Difficult, because family violence research is permeated by fundamental definitional issues about what is meant by violence and abuse. For example, there is a tension between a general recognition that all violence and abuse is unacceptable, and an acknowledgement that not all violence and abuse is the same.[38]

As the Chisholm Review notes:

> it is difficult to assess the extent of family violence in a community generally, or for example cases coming to the family courts. This is partly because of the difficulty in determining what happened in any particular case (family violence may often happen behind closed doors, and there may be little corroborative evidence), and partly because of the wide range of behaviour

35. Explanatory Memorandum, Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011, p. 2.
36. D Bryant, *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011,* Submission to the Senate Legal and Constitutional Affairs Legislation Committee, April 2011, p. 5.
37. Ibid., p. 6.
38. Family Law Council, op. cit., paragraph 3.

> that can be included as family violence: when one does find research evidence, different studies are often measuring different things.[39]

Definition of 'family violence'

Central to the amendments in Schedule 1 of the Bill is the new definition of 'family violence' (**item 8, proposed section 4AB).**

The existing definition of 'family violence' in the Family Law Act, introduced in 2006, refers to conduct, whether actual or threatened, that causes a family member 'reasonably to fear for, or reasonably to be apprehensive about, his or her personal wellbeing or safety'.[40]

The proposed definition of 'family violence' in the Bill refers to conduct that is 'violent, threatening or other behaviour by a person that coerces or controls a [family member] or causes the family member to be fearful' (**proposed subsection 4AB(1)**).

Proposed subsection 4AB(2) spells out the sort of behaviour that can constitute family violence and includes but is not limited to:

> (a) an assault; or (b) a sexual assault or other sexually abusive behaviour; or (c) stalking; or (d) repeated derogatory taunts; or (e) intentionally damaging or destroying property; or (f) intentionally causing death or injury to an animal; or (g) unreasonably denying the family member the financial autonomy that he or she would otherwise have had; or (h) unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support; or (i) preventing the family member from making or keeping connections with his or her family, friends or culture; or (j) unlawfully depriving the family member, or any member of the family member's family, of his or her liberty.

Comment

The new definition of 'family violence' is based closely on the definition recommended by the Australian Law Reform Commission (ALRC) Report into Family Violence (ALRC report 114).[41] The ALRC recommended that there should be a core definition of family violence describing the context in which behaviour takes place, as well as a shared understanding of the types of conduct— both physical and non-physical that may fall within the definition of family violence. The Report also

39. R Chisholm, *Family Courts Violence Review,* op cit., p. 41.
40. In subsection 4(1) (to be repealed by **item 3).**
41. Australian Law Reform Commission, *Family violence: a national legal response*, 2010, Report, no. 114, viewed 6 April 2011, http://www.alrc.gov.au/publications/family-violence-national-legal-response-alrc-report-114

recommended that this definition should apply in state and territory family violence legislation, the Family Law Act and the criminal law in order to provide a common interpretative framework.[42]

It is of note that this new definition is considerably broadened, and that it removes the requirement for a person '*reasonably* to fear' for their personal wellbeing or safety. The Explanatory Memorandum does not give a reason for the removal of the 'reasonable person' test. However the consultation paper for the exposure draft bill relies on the AIFS Evaluation that argued it should be removed on the basis that the reasonable person test imposes a significant evidentiary burden on people who are already vulnerable.[43] The ALRC submission to the Senate Committee inquiry notes that in the ALRC report 114, the Commission expressed the view that the reasonablesness test should be removed, as it is inappropriate to apply such a test to the experience of fear in determining whether conduct is violent. To do so ignores the psychological impact of family violence, especially within the context of a controlling relationship.[44]

Reaction in submissions to this new definition of 'family violence' has covered a wide range of views.

As noted above, the Shared Parenting Council of Australia does not support the new definition. The Council argues that it extends the definition to a point that normal and everyday conduct can arguably be put forward as family violence. Furthermore, the Council's concern is that this conduct, or 'conflict', that is a normal part of some family breakdowns and which often dissipates over time, can then be a 'terminating relationship event' for children.[45]

Amongst those generally supportive of the definition, some question the rationale of including a denial of financial autonomy in the definition (paragraph (g))[46], arguing that it may have unintended consequences. The Law Society of New South Wales Family Issues Committee states the inclusion takes the issue of violence beyond 'safety' (physical or psychological) and into the realms of legitimate argument between the parties.[47] It could also have the effect of causing family violence (as it is more generally understood to apply to physical/psychological issues) be treated less seriously rather than more seriously. Furthermore their submission states:

> While the Committee acknowledges that the definition of family violence is not meant to be exhaustive, it could be considered that one of the regular incidents of family violence includes

42. Ibid.
43. Attorney-General's Department, op cit., p. 4.
44. Australian Law Reform Commission, *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011,* Submission to the Senate Legal and Constitutional Affairs Legislation Committee, April 2011, p. 3.
45. Shared Parenting Council of Australia, op. cit., p. 34.
46. See paragraph 4AB(2)(g) above: 'unreasonably denying the family member the financial autonomy that he or she would otherwise have had'.
47. Law Society of New South Wales, *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011,* Submission to the Senate Legal and Constitutional Affairs Legislation Committee, April 2011, [p. 2].

> the manipulation of the children in terms of the time they are 'allowed' to spend with the other party. This situation, arguably is abusive of the children in any event (although not currently treated as such) and could be considered as much 'family violence' as financial manipulation.[48]

Professor Parkinson, also questions the inclusion of paragraph (g) arguing that it is far too broad and could open up endless arguments by self-represented litigants.[49]

Professor Parkinson has another argument about whether the concept of intent should be included in the definition of family violence. The opening words of the definition require that the behaviour complained of 'coerces or controls' a family member but Professor Parkinson argues that there is no requirement that the person accused of coercing or controlling a family member needs to have *the intention* of coercing or controlling. He states:

> It would certainly be problematic if someone could be held to have engaged in 'violent' behaviour without intending to do so, because his or her former partner felt coerced or controlled.
>
> It is also not clear how to prove that the behaviour had the effect of coercing or controlling. Does the person complaining of the behaviour need to demonstrate that she would have made different choices about something but for the alleged coercive or controlling behaviours, or is it sufficient that a person *says* that they felt coerced or controlled by the behaviour? If the latter, what if no reasonable person would have felt coerced or controlled?
>
> I think it would be helpful for the Parliament to refine the definition further to indicate what needs to be proven here. In my view, it would make the law clearest to focus on intent, because intent can be inferred from the behaviour and this resolves the other problems of interpretation. For this reason I recommend the following formulation:
>
> "...behaviour by a person that is intended to coerce or control a member of the person's family (the ***family member***), or that causes the family member to be fearful."[50]

It is reported today that the Coalition may push for changes to the Bill as it has concerns with three areas, including this definition of 'family violence.[51]

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48. Ibid, p. 3.
49. P Parkinson, *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011, Submission,* op. cit., p. 4.
50. Ibid., p. 3.
51. P Karvelas, Fears persist after separation, *The Australian*, 25 May 2011, viewed 25 May 2011, http://www.theaustralian.com.au/national-affairs/fears-persist-after-separation/story-fn59niix-1226062259682

Definition of 'abuse' in relation to a child

Item 1 repeals the existing definition of '*abuse'* and replaces it with the following:

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.

In substance, paragraphs (c) and (d) are new. The change is the addition of causing children to suffer serious psychological harm by exposure to family violence, and 'serious neglect'. The concept of exposure to family violence is spelled out in **proposed subsections 4AB(3) and (4)** and includes a non-exhaustive list of examples such as the child hearing threats of death or serious injury, and providing assistance to a family member who has been assaulted by another family member.

Comment

Like the definition of 'family violence', this definition is important as it has consequences in terms of the operation of various provisions in the Family Law Act.

Professor Chisholm has reservations about these new additions to the definition of abuse. He acknowledges that they are intended to reflect current understanding about the diverse ways in which children can be damaged by violence but his concern is that these definitions may be more troublesome than helpful. [52] In order to determine whether exposure to family violence will constitute abuse it will be necessary to determine if it causes the child 'to suffer serious psychological harm'. Determining this issue he argues, will involve difficult legal and evidential issues.[53]

Professor Chisholm also sees a problem with defining serious neglect as abuse as he argues there is a useful distinction between neglect and abuse and that neglect is already appropriately included in

52. R Chisholm, *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011,* Submission*,* op cit., pp. 6–7.
53. Ibid.

the Family Law Act, for example in section 60B and section 60CC.[54] However, it is of note that there is no definition of 'neglect' in the Family Law Act.

Convention on the Rights of the Child

Item 13 inserts **proposed subsection 60B(4)** of the Family Law Act to provide that an additional object of Part VII is to give effect to the United Nations Convention on the Rights of the Child (the Convention).

Comment

It is of interest that the Convention entered into force for Australia on 16 January 1991. The Explanatory Memorandum states that the effect of this provision is to allow the Convention to be used as an interpretive aid to Part VII of the Family Law Act but that it is not equivalent to incorporating the Convention into domestic law.[55]

In those submissions that commented on this provision, there were mixed reactions.

The Shared Parenting Council of Australia recommends against the inclusion of the Convention arguing that, amongst other things, the Convention would 'operate to create a parental rights free zone in Family Law'. Furthermore, the Council questions the Explanatory Memorandum's denial that this amendment is not equivalent to incorporating the Convention into domestic law.[56]

Associate Professor Juliet Behrens and Professor Belinda Fehlberg note that further legislation is necessary to fully implement this Convention and that the practical implications of the reference to the Convention in the Bill are not clear.[57]

The Law Society of New South Wales Family Issues Committee suggests that the wording 'give effect to' be changed to 'is to have regard to' as this more accurately reflects the current status of the Convention.[58]

Considering a child's best interests—primary considerations—prioritising safety

As already noted, an underlying principle of Part VII of the Family Law Act dealing with children is a requirement that family courts regard the best interests of the child as the paramount consideration when making parenting orders and in other provisions involving court proceedings. The checklist for

54. Ibid.
55. Explanatory Memorandum, op. cit., p. 6.
56. Shared Parenting Council of Australia, op. cit., p. 20.
57. J Behrens and B Fehlberg, *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011,* Submission to the Senate Legal and Constitutional Affairs Legislation Committee, April 2011, p. 1.
58. Law Society of New South Wales, op. cit., [p. 3].

determining the best interests of the child is divided into two tiers: primary considerations (subsection 60CC(2)) and additional considerations (subsection 60CC(3)).

Subsection 60CC(2) provides that the primary considerations 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.

Item 17 inserts **proposed subsection 60CC(2A)** so that a court would be required, when determining what is in a child's best interests, if there is any inconsistency in applying these two primary considerations, to give greater weight to the primary consideration that protects the child from harm.

Comment

This is a critical amendment, in that as the legislation currently stands, the interplay of the Act's two primary considerations are central to the determination of orders which are in the best interests of the child.

Again, there are a wide range of views about this provision.

FamilyVoice Australia, argues the phrase 'any inconsistency' invites the court to ignore the requirement to consider benefit to the child of having a meaningful relationship with both parents, once it decides to entertain an allegation of any kind about abuse or exposure to family violence.[59]

Amongst the legal profession, the Family Law Practitioners' Association of Queensland (FLPA) is one submission that does not support the insertion that mandates a court to give greater weight to the second of the primary considerations in the event of conflict between the two primary considerations. FLPA states:

> Such a provision removes the Court's licence to assess in each individual case the degree of risk, its probability or in the case of family violence its context in terms of frequency, intensity and recency in the determination of the weight to be given to such risk or harm.[60]

FLPA submits that caution has to be exercised, that in reviewing the need to protect children from the risk of harm, the legislation does not become 'too specific, descriptive, prescriptive or presumptive' with respect to the treatment of risk.[61]

59. FamilyVoice Australia, *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011,* Submission to the Senate Legal and Constitutional Affairs Legislation Committee*,* April 2011, p. 4.
60. Family Law Practitioners' Association of Queensland, *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011,* Submission to the Senate Legal and Constitutional Affairs Legislation Committee*,* April 2011, p. 3.

Professor Chisholm agrees that this provision would significantly improve the law but that there could be difficulties applying this new subsection 60CC(2A) as it adds yet another technical complication. With the new subsection, the decision-maker will have to decide if there is an inconsistency. If there is, greater weight must be given to paragraph (b) but how much greater? He argues the proposed subsection 60CC(2A) seems certain to increase the amount of complication and technicality relating to determining what is best for children.[62] He suggests removing the concept of inconsistency and giving more weight to paragraph 60CC(2)(b) per se.

Professor Chisholm in fact argues the problems in Part VII are too pervasive to be entirely solved by a single adjustment such as this one. His view and his recommendation in the Chisholm Review were to:

- revise a number of provisions
- remove the distinction between 'primary' and 'additional' considerations, and
- emphasise the need to choose whatever arrangement would be best for the child.[63]

Nevertheless, despite this view, Professor Chisholm supports subsection 60CC(2A) as a definite improvement on the present law. He states that it would certainly help to avoid the risk that decision-makers might put the safety of children at risk in seeking to implement the legislative emphasis on parental involvement. Doing this would be a valuable measure to increase the safety of family members, especially children.[64]

Considering a child's best interests —additional considerations—repeal of the 'friendly parent' provisions

The `additional' considerations (subsection 60CC(3)), for determining the best interests of the child include amongst other things, the so-called `friendly parent' provision (paragraph 60CC(3)(c) and also paragraph 60CC(4)(b)). These provisions mean that 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.

Item 18 repeals the 'friendly parent' provision, **paragraph 60CC(3)(c),** and **item 20** repeals **subsections 60CC(4)** and **(4A)**.

Item 18 also adds a **replacement paragraph 60CC(3)(c)** and a **new paragraph 60CC(3)(ca)**. Essentially these paragraphs are to ensure that when determining the best interests of the child, the court takes into account:

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61. Ibid, p. 2.
62. R Chisholm, *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011,* Submission*,* op. cit., p. 8.
63. Ibid., pp. 8–9.
64. Ibid.

(c) 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; to spend time with the child; and to communicate with the child
(ca) the extent to which each of the child's parents has fulfilled, or failed to fulfil, the parent's obligations to maintain the child.

Note that these are not new considerations as they substantially re-enact the content of paragraphs 60CC(4)(a) and (c) (to be repealed by **item 20)**. However the 'friendly parent' provision is gone entirely.

Comment

This so called 'friendly parent' provision has arguably been contentious since its introduction in 2006. One conclusion of the Chisholm Review was that this provision has acted as a disincentive to some litigants making a full disclosure of evidence of family violence and abuse.

The Review states:

> On the material available, it seems likely that the friendly parent provision, s 60CC(3)(c), while it might have had a beneficial effect in many situations, has had the undesirable consequence in some cases of discouraging some parents affected by violence from disclosing that violence to the family court. It is appropriate, therefore, to consider whether some amendment would remove this undesirable consequence while retaining the value of the provision in encouraging parents in ordinary circumstances to facilitate the child's relationship with the other parent.[65]

Several submissions, including the Law Society of New South Wales, note that the amendments go beyond the Chisholm Review's recommendation as they do not retain the value of the provisions in situations where family violence and abuse do not exist.

FLPA recommends that subsection 60CC(4) remain, but there be an amendment to subsection 60CC (4A) to read:

> s.60CC(4A) If the child's parents have separated, the Court must, in applying subsection (4) have regard, in particular to the protection of the child from abuse, neglect or family violence and to events that have happened, and circumstances that have existed, since separation occurred.

The Shared Parenting Council of Australia questions the rationale for the repeal of the 'friendly parent' provision as being unsustainable and based on mean spirited ideology. The submission quotes Professor Parkinson, who acknowledges that the courts have not been acting improperly, but argues for the repeal of this provision only because of community attitudes about its impact. [66] The Council argues that repeal of the provision will send a message to divorcing parents in advance that

65. R Chisholm, *Family Courts Violence Review,* op. cit., p. 103.
66. Shared Parenting Council of Australia, op. cit., p. 26. (see above at p. 13 of the Digest for Professor Parkinson's view).

the court is likely to tolerate power-play for exclusive child residence or for the 'purposes of intimidation or to force subservience in divorce negotiation'.[67]

As noted above, it is reported today that the Coalition may push for changes to the Bill. The removal of the 'friendly parent' provision is one of the three areas of concern.[68]

Considering a child's best interests— additional considerations— family violence orders

Currently, the `additional' considerations for determining the bests of the child also include any final or contested family violence orders that apply to the child or the child's family (**paragraph 60CC(3)(k)**).

Item 19 proposes to replace **paragraph 60CC(3)(k)** with a new paragraph to provide that the court when determining the best interest of the child, must consider *any* family violence order that applies to the child or the child's family. In other words, the court must consider not only final and contested orders, but also interim and uncontested orders.

Comment

Several submitters, such as FLPA, argue that this provision should be repealed entirely.

FLPA, while agreeing that it is important for the Court to be aware of any current Domestic Violence Orders so the Court does not inadvertently make an order contrary to it, FLPA notes that the current section 60CF of the Family Law Act mandates parties to inform the Court of such orders.[69]

FLPA agrees with Professor Chisholm that what is to be avoided is the impression that the Order itself infers risk. Such impression would encourage litigants to obtain state based Protection or AVO Orders in order to gain some advantage in the Federal family courts. The assessment of risk should be based upon the factual examination by courts exercising family law jurisdiction determining parenting disputes of the circumstances it is alleged gives rise to the risk.[70]

Professor Parkinson also argues for deletion of this provision. He says:

> [...] the belief that family violence orders are a weapon in the war between parents is fuelled by the fact that judges are required under the Family Law Act to consider such family violence orders in determining the best interests of the child. The proposed clause in the Bill takes the law back to what it was before 2006, without any explanation for why Parliament should reverse its

67. Ibid.
68. P Karvelas, op. cit.
69. Family Law Practitioners' Association of Queensland, op. cit., p. 7.
70. Ibid.

> previous decision at least to limit the provision [to final orders]. It really doesn't matter whether this belief that family violence orders are used tactically is true or not. The fact is that the perception is out there and it is held by state magistrates and family lawyers, as well as the wider community. The retention of this provision in the Family Law Act simply fuels the suspicion that family violence orders are being misused. This is damaging to the credibility of the family violence order system and the courts.[71]
>
> The second reason why the requirement to consider family violence orders ought to be removed is that this serves absolutely no purpose. Yes, the court needs to know about the existence of a current family violence order in order to consider how to frame its own orders (s.60CG), but that is dealt with by requiring people to inform the court of such orders (s.60CF). Why consider them again in deciding what is in the best interests of a child (s.60CC(3))? The court is already required to consider the history of violence. What does it add to require the court also to consider a family violence order? The impression given by the legislation is that these orders are somehow evidence that there has been violence. However, that is a misunderstanding. Family violence orders have absolutely no evidential value in the vast majority of cases.
>
> [...]
>
> In the light of these considerations, I think a compelling case has to be presented for the continuing inclusion of this provision about family violence orders in the Family Law Act. I recommend that this para be replaced instead with a paragraph that requires the court to consider 'any concerns a parent has for the child's safety'. This goes beyond concerns about violence and abuse to require consideration also of other threats to safety as a consequence of mental illness, drug and alcohol abuse or even concerns about issues such as driving. The source of the threat is less important than the fact of it, and parents may be particularly concerned about safety issues with young children, as a parent's protective instincts are very strong.[72]

Advisers' obligations in relation to the best interests of the child

Under existing section 63DA of the Family Law Act, advisers have certain obligations when giving particular advice in connection with the making of parenting plans in relation to a child. An adviser is defined as a legal practitioner, family counsellor, family dispute resolution practitioner or a family consultant.

Item 22 inserts **proposed section 60D** and sets out a new set of obligations for advisers concerning the best interest of the child. It provides that when giving advice in relation to children and Part VII matters, the adviser must:

- inform the person that they are to regard the best interests of the child as the paramount consideration
- encourage the person to act on the basis that the best interests are met by

71. P Parkinson, *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011,* Submission*,* op. cit., p. 6.
72. Ibid, pp. 6-8.

- the child having a meaningful relationship with both parents, and
- by the child being protected from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence, and
- if there is inconsistency in applying these two considerations to give greater weight to the consideration that protects the child from harm.

Comment

It should be noted that this provision is modelled closely on proposed subsection 60CC(2A) (described above) which concerns the best interests of a child in court proceedings.

Professors Rhoades and Dewar are supportive of this provision and state:

> We support the aim of this proposal, which will require legal practitioners and family dispute resolution practitioners, among others, to encourage clients to prioritise the child's safety from (physical or psychological) harm when this is not consistent with the child having a meaningful relationship with both parents. However, for the reasons given above in relation to subsection 60CC(2A), we are concerned that the proposed 3-step approach to this advice is overly complicated and likely to confuse clients. As noted above, a central message of the recent evaluations of the Family Law Act was that advisers have found the 2006 reforms 'complex and difficult to apply', and that their key principles are 'hard for lay people to understand' (Kaspiew et al, 2009: 335-336). The research indicates that this complexity has made it more difficult for advisers, especially legal practitioners, to achieve developmentally appropriate arrangements for children's care. In our view, a less complicated formulation of the proposed obligation, which requires advisers to inform clients that the child's safety should be their highest priority when settling parenting arrangements, is preferable.[73]

In contrast, the FLPA supports the proposed insertion of section 60D but does not support giving priority to the consideration that protects the child from harm in the case of inconsistency (paragraph 60D(1)(b)(iii)). FLPA argues that this priority mandates advice that may be influenced by misinformation or manipulation with unintended consequences contrary to the best interests of the child.[74]

Requiring interested persons to disclose family violence

Item 34 inserts **proposed section 67ZBA.** It requires interested persons in proceedings who allege family violence to file a Notice of Child Abuse or Family Violence with the court.[75] The obligation to file the notice arises if the family violence is alleged 'as a consideration that is relevant to whether the court should make or refuse to make the order'. Interested persons are defined as parties to the

73. H Rhoades and D Dewar, op. cit., p. 4.
74. Family Law Practitioners' Association of Queensland, op. cit., p. 5.
75. The exposure draft Bill had a similar provision, although it only placed obligations on 'parties to proceedings' rather than 'interested persons' (see item 29 of the exposure draft Bill).

proceedings, an independent children's lawyer representing the child in the proceedings, or any other person prescribed by regulation (**proposed subsection 67ZBA(4), item 32**).

Comment

The consultation paper on the exposure draft bill notes that 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.[76] This requirement is not currently included in the Family Law Act, (although there is currently a requirement to report child abuse).[77]

Professor Chisholm supports lifting the obligation to file the notice from the obscurity of the Family Law Rules into the Act itself as section 67ZBA does. He argues:

> I hope that this will have the desired effect that people will file such notices when they are obliged to do so—which would be striking change from the non-compliance that seems to be the present norm.[78]

The Chief Justice of the Family Court is critical of this provision. Amongst other things, she queries the use and meaning of the term 'interested person'. Her Honour notes that the Bill and Explanatory Memorandum provide no illumination as to who the Government may be intending to prescribe by regulation as an 'interested person' and she remains uncertain as to what the proposed expansion of the 'pool' of persons able to file a prescribed notice will actually achieve.[79]

Courts to take prompt action in relation to allegations of child abuse or family violence

Proposed section 67ZBB, the provision requiring courts to take prompt action in relation to allegations of child abuse or family violence, is not new but rather it re-enacts **existing section 60K** (which is repealed by **item 34**). The reason given for this change is to locate it more appropriately close to the provision requiring interested persons to report family violence.[80]

Courts must ask about child abuse or family violence

The consultation paper for the 2010 exposure draft bill stated that the Chisholm Review noted the difficulties victims face in disclosing and reporting violence. It stated: 'Victims of family violence are often reluctant to share their experiences but are more likely to do so if directly asked. Courts can

76. Attorney-General's Department, op. cit., paragraph 13.
77. Ibid.
78. R Chisholm, *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011,* Submission, op. cit., p. 10.
79. D Bryant, op. cit., pp. 2-3.
80. Explanatory memorandum, op. cit., p. 12.

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.'[81]

Item 38 amends **subsection 69ZQ(1)** to insert a new provision, **paragraph (aa)**. Its effect is to require the Court to ask each party to child-related proceedings about the existence or risk of child abuse or family violence.

Comment

The Chief Justice of the Family Court questions what this amendment is trying to achieve, noting that the Explanatory Memorandum provides little assistance. She argues that the provision seems to imply a yes or no answer with no assistance on what the Court should do with the response. She suggests that the amendment appears to impose an obligation on the Court that is without consequence and could be removed from the Bill with no ill effects.[82]

Professor Rhoades and Dewar, while supporting this provision, argue that it will only be effective if judicial officers are familiar with the dynamics of family violence and skilled at using this knowledge to inform their practice.

> We believe it will be critical to the success of this initiative for it to be supported by a dedicated training and professional development program for judicial officers, as recommended by various reports including the ALRC and the Chisholm Review.[83]

FamilyVoice Australia argues the Family Law Act has adequate provisions for allowing parties to submit allegations or evidence of child abuse or family violence and that this proposed amendment is unnecessary. It is also potentially dangerous since it could encourage parties 'to make ill-considered claims or to exaggerate risks of child abuse or family violence and thereby foment avoidable strife between the parties'. [84]

Reporting information regarding risks to the child

Item 21 inserts **proposed sections 60CH and 60CI** that impose new obligations on parties to provide the court with information regarding risks to the child.

Proposed **subsections 60CH(1)** requires a party to parenting proceedings to notify the court if the child or another child who is a member of the child's family is under the care of a person under a child welfare law. **Proposed subsection 60CH(2)** provides that a person other than a party to proceedings *may* also inform the court of any such matter.

81. Attorney-General's Department, op. cit., paragraph 18.
82. D Bryant, op. cit., pp. 4–5.
83. H Rhoades and J Dewar, op. cit., p. 5.
84. FamilyVoice Australia, op. cit., p. 7.

Proposed subsection 60CI(1) requires a party to parenting proceedings to inform the court of any relevant child protection notifications or reports to a prescribed child welfare authority, as well as any inquires, investigations and assessments about abuse by such an agency. **Proposed subsection 60CI(2)** provides that a person other than a party to proceedings *may* also inform the court of any such matter.

Comment

Professor Patrick Parkinson is critical of proposed section 60CI suggesting that what the court really needs to know is whether there has been a child protection investigation, not whether there has been a notification. He argues:

> In Australia, hundreds of thousands of notifications or reports now occur each year (339,454 in 2008-09). Only about half are investigated and in some cases even that investigation may be cursory. There is a great deal of room for argument about what is a notification and what is not. Does it have to meet the statutory criteria to be classified as a notification or report? Is any phonecall expressing concern about a child a notification or report? I think it is best to avoid that conundrum and also avoid swamping the court with information it may be able to do little with. Often one parent has made a report about the other, and there is no shortage of complaints of abuse in parents' affidavits. They will tell the court without being mandated.[85]

National Legal Aid, while supporting section 60CI, argues that from their experience, courts should not rely on self-disclosure. There must be processes (including memoranda of understanding, with other courts, child protection authorities and the police) to obtain copies of relevant orders.[86]

The Law Society of New South Wales generally supports both these provisions stating 'They will improve the ability of courts to identify any risk of harm to children, and allow an early consideration of whether child protection authorities should be invited to intervene in proceedings.' However the Law Society's submission has concerns about why a person who is not a party to proceedings, should be allowed to inform the court of this information and questions what standing these notifiers would have in proceedings. [87]

Cost orders and false allegations

Item 43 would repeal **section 117AB** of the Family Law Act. This provision, inserted in 2006, requires the court to make a mandatory cost order against a party to the proceedings, for some or all of the costs of another party, where the court is satisfied that the first party knowingly made a false allegation or statement in the proceedings.

85. P Parkinson, *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011,* Submission*,* op. cit., p. 9.
86. National Legal Aid, *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011,* Submission to the Senate Legal and Constitutional Affairs Legislation Committee*,* April 2011, p. 6.
87. Law Society of New South Wales, op. cit., [pp. 4–5].

Comment

As noted above, all three reports (the AIFS Evaluation, the Chisholm Review and the Family Law Council Report) argued that that there was no evidence that this provision had achieved its purpose in relation to false allegations of family violence.

The Chisholm Review notes:

> Enquiries of legal practitioners and judicial officers made in connection with the review indicate that costs orders under s 117AB are in practice rarely sought and rarely made.[88] This is consistent with all other information received during the Review: it is clear that orders under s 117AB are rare in practice.[89]

However all three reports indicate that 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.[90]

The Chisholm Review, in particular provides a detailed consideration of the history and operation of section 117AB and also of the wider issue of false allegations.

In relation to the issue of 'false allegations' the Chisholm Review notes that widely different views have been expressed, both in the literature and in the submissions to the Review, about the incidence of 'false allegations'. The review states:

> [...] although much opinion was expressed on the subject, I am not aware of any good evidence to suggest that allegations of violence are more or less likely to be untrue, or to be fabricated, than denials; or that any evidence about family violence is more or less likely to be unreliable than evidence about anything else.[91]

And again Professor Chisholm states:

> The cliché that violence is 'easy to allege' is in my opinion misleading. It fails to recognise the serious inhibitions people often have about publicly disclosing the fact that they have been in a

88. The Chisholm Review footnote at this point states: The Federal Magistrates Court submission notes that of the 28 Federal Magistrates who responded to a question asked in connection with this Review, 26 had never been asked to make an order under 117AB and had never done so; the two other Federal Magistrates, both at the Parramatta registry, had made one each, in both cases on application by a party.
89. R Chisholm, *Family Courts Violence Review,* op. cit., p. 103.
90. Attorney-General's Department, op. cit., p. 7.
91. R Chisholm, *Family Courts Violence Review,* op. cit., p. 47.

> violent or abusive relationship, and the variety of reasons why they might be reluctant to do so in family law proceedings.
>
> […]
>
> In short, the law should try to encourage people to tell the truth without making, or appearing to make, any pre-judgment. In my view this requires repealing s 117AB, which still carries with it the suggestion that the system is suspicious of those who allege violence, and which (as the former government recognised) does not significantly change the ordinary law of costs under s 117. [92]

As noted above, it is reported today that the Coalition may push for changes to the Bill. The removal of the false allegations provisions is one of the three areas of concern.[93]

Application and transitional provisions

Item 45 of Schedule 1 provides that all the substantive provisions in Schedule 1 apply to all proceedings that are instituted before, on or after commencement. The effect is that as of the day of commencement, the amendments will apply to proceedings that are part heard and where a hearing has concluded and judgment reserved but not delivered.

Comment

The Explanatory Memorandum states that this application rule prioritises the safety of children over the cost and convenience to the courts, witnesses and the parties who may have matters part or fully heard. Furthermore, it notes that the possible six month delay of commencement should assist this transition process.[94]

The Chief Justice of the Family Court, the Honourable Diana Bryant, states that she is troubled by this application provision as she believes litigants in proceedings will be put to additional cost and be subject to delay as a result.[95]

Her Honour states:

> […] it seems to me that the requirements of procedural fairness dictate that the parties, the Independent Children's Lawyer ("ICL") where one has been appointed, and any interveners (for example, a state child welfare agency) would need to be given the opportunity to consider and make submissions as to the effect of the amendments on the proceedings and the implications

92. Ibid, pp. 117–118.
93. P Karvelas, op. cit.
94. Explanatory Memorandum, op. cit., p. 15.
95. D Bryant, op. cit., p. 5.

> for determining what arrangements are in the best interests of the child. In the ordinary course of events I would think that parties, any ICL, and any intervener would need to be permitted to amend the orders sought and to file further evidence. Updated family reports and other expert evidence could also be required. In part-heard matters, this would necessitate applications for adjournments and I would have thought such applications would be granted. Parties to proceedings where judgment is reserved presumably would need to have the same opportunities afforded to them, or at the very least be able to make submissions about the effect of the amendments. On this issue the Committee may be assisted by the Full Court of the Family Court's decision in *Newlands & Newlands* (2007) 37 Fam LR 103.[96]

The Senate Standing Committee for the Scrutiny of Bills (the Scrutiny of Bills Committee) also raises questions regarding the application provisions, particularly **items 45** and **48**.

The Committee notes the retrospective operation of **item 45** and the potential for the application of the amendments to have a detrimental effect on a party to family law proceedings commenced before the new law takes effect. However the Committee chooses to leave the question of the appropriateness of this approach to the Senate as a whole.[97]

Item 48 is a Henry VII clause which is a provision enabling a regulation to amend primary legislation and as such may be considered an inappropriate delegation of legislative power. In this case, the effect of **item 48** is to allow regulations to modify the transitional provisions in Part 2 of Schedule 1, the stated purposed being to deal with unexpected issues which could arise in relation to part heard proceedings or reserved judgments.[98] In order to better evaluate the need for this delegation of legislative power the Scrutiny of Bills Committee seeks the Minister's advice as to the general nature of any such unexpected issues and possible reasons why it might be considered appropriate to modify the statutory provisions.[99] At the time of writing, the Minister's response has not been published.

Concluding comments

It has been said that there are few more difficult or more important challenges for the family law system than dealing with cases where family violence is an issue. As the recent evaluations indicate, families with complex needs, including violence, are the predominant clients of the family law system.

The Bill therefore is both important and challenging, and the diverse range of views about its benefits and shortcomings, expressed in the large number of submissions to the Senate Committee inquiry, reflect this.

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96. Ibid., pp. 1-2.
97. Senate Standing Committee for the Scrutiny of Bills, *Alert Digest*, no. 4, 2011, p. 32, viewed 24 May 2011, http://www.aph.gov.au/Senate/committee/scrutiny/alerts/2011/d04.pdf
98. Explanatory Memorandum, op. cit., p. 17.
99. Senate Standing Committee for the Scrutiny of Bills, op. cit., p. 33.

Despite the concerns of some advocacy groups, the Government's approach in the Bill is relatively conservative and cautious.

The Bill does not change the emphasis of 2006 on the value of shared parental involvement after family separation and the provisions which actively promote equal sharing of time post separation have largely been retained. The law will still support children maintaining meaningful relationships with both parents where there are no significant safety concerns. At the same time, in response to the concerns raised in the recent reports, family violence has been given more prominence and priority. It is hoped that the new subsection 60CC(2A) will not cause an increased complexity in the litigation process but rather will help to avoid the risk that decision-makers might put the safety of children at risk in seeking to implement the legislative emphasis on parental involvement.

An area of strong contention on both sides of the debate appears to be the removal of the costs orders for false allegations provision and the 'friendly parent' provision. However these amendments may not be as significant as some would argue. As one commentator has argued, their removal will not impair the capacity of the courts to resolve cases justly, but may have benefits in helping community understanding of the legislation.[100]

Possibly the most significant and challenging amendments relate to the new definitions of 'family violence' and 'abuse'. These definitions are important as they form the basis for many of the outcomes imposed under the Family Law Act. As many submitters have commented, the definition of 'family violence' proposed in the Bill is broad and will encompass a much greater range of behaviour. Parliament and the Senate Committee in particular, may need to look more closely at these definitions to ensure that while encompassing expert views on the scope of harmful behaviour, they do not have unexpected consequences such as increasing the complexity and amount of litigation.

A final question that could be asked is how much difference can these amendments make? The three recent reports referred to in the Digest have all found that impediments to effective handling of family violence and child abuse allegations include a misunderstanding of the law and a lack of awareness among some system professionals of the implications of family violence and child abuse. These reports indicate that any legislative change must be supported by improved training and professional development.

While it is beyond the scope of this Digest, parliamentarians should also be aware of the concerns about funding raised by significant members of the legal profession including the Family Court Chief Justice and the Law Council of Australia. As the Law Council states, the language of the Family Law Act does already acknowledge the problems of family violence but this is not reflected in the resources provided to the courts to realistically deal with violence and its effect. Their fear is that the

100. P Parkinson, *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011,* Submission, op. cit., p. 1.

proposed amendments will only increase the complexity of litigation and overwhelm an already under resourced court system.

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