

PROTECTION OVER PROMOTION

Marty Kavanagh, Kavanagh Lawyers WA

The *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (“the amendments”) received Royal Assent on 7 December 2011 and come into force as follows:¹

7 Dec 2011	Schedule 2- Miscellaneous Amendments
	<ul style="list-style-type: none">• 28 Amendments to the <i>Family Law Act 1975</i>• 8 Application and Transitional Provisions
4 Jan 2012	3 Amendments to the <i>Bankruptcy Act 1966</i>
7 June 2012	Schedule 1- Family Violence Provisions
	48 Amendments to the <i>Family Law Act 1975</i>

New and existing matters

It is important to note that the substantive amendments (particularly the new definitions in relation to family violence and child abuse) apply to matters initiated after 6 June 2012.

45 Amendments that apply to proceedings instituted on or after commencement

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

It's therefore very important to establish when proceedings were instituted.

However, please be aware that some less substantive provisions apply to all matters- even where proceedings were instituted before the dates detailed above.

Family Court Act 1997 (WA)

Whilst it is understood drafting is near complete in relation to similar provisions under the *Family Court Act 1997*, as at the time of writing, no bill has been introduced in the Western Australian parliament.

Safety of Children

Former Attorney General Robert McClelland explained the rationale underpinning the amendments as follows:

*The family law system must prioritise the safety of children to ensure the best interests of children are met. The Family Violence Bill sends a clear message that family violence and child abuse are unacceptable. These amendments address issues of significant community concern by strengthening the role of family courts, advisers and parents in preventing harm to children while continuing to support the concepts of shared parental responsibility and shared care, where this is safe for children.*²

The Purpose of the Key Amendments

¹ Preamble Cl 2.

² Explanatory Memorandum, Family Law Legislation Amendment (Family Violence and other Measures) Bill 2011 (Cth) 2, 4-5 per Hon Robert McClelland.

To give effect to the goal of: '*strengthening the role of family courts, advisers and parents in preventing harm to children*;³ the Attorney General characterised the key amendments as follows:⁴

- *change the definitions of 'abuse' and 'family violence' to better capture harmful behaviour;*
- *prioritise the safety of children in parenting matters;*
- *strengthen advisers obligations by requiring family consultants, family counsellors, family dispute resolution practitioners and legal practitioners to prioritise the safety of children;*
- *ensure the courts have better access to evidence of abuse and family violence by improving reporting requirements; and*
- *make it easier for state and territory child protection authorities to participate in family law proceedings where appropriate.*

Note on presentation of amendments

To assist the reader's assessment of significant amendments the writer has adopted the following format in terms of individual legislative changes:

1. The government's explanation/rationale for the amendment per the Replacement Explanatory Memorandum,
2. The old *Family Law Act*⁵ provisions ("struck through" where appropriate),
3. The text of the new amendment; and
4. Observations by the writer.

Change the definitions of 'abuse' and 'family violence' to better capture harmful behaviour

Item 1 repeals the definition of 'abuse' in relation to a child in subsection 4(1) of the Act and replaces it with a new definition of 'abuse'. The definition will include assault; sexual abuse and exploitation; causing a child to suffer serious psychological harm, including where the child is exposed to family violence; and serious neglect of the child.⁶

The term 'abuse' is picked up in various provisions in the *Family Law Act 1975* (Cth). In some instances, it is used in a stand-alone manner, for example, in defining what reports will give rise to mandatory reports to child welfare authorities per section 67ZA, or in determining the exceptions to the admissibility of certain communications made in family counselling and family dispute resolution (sections 10E and 10J). In other instances, for example, in the primary considerations set out for determining the best interests of a child, the term is used in conjunction with references to other and broader types of harm.

As with the existing definition of 'abuse', proposed paragraph (a) provides that an assault, including a sexual assault, amounts to abuse.⁷ However, the new definition will remove the requirement for the assault to be an offence under an enforceable law in a state or territory. This means that those working with the Act, including courts, legal practitioners and family members will not be required to have regard to the terms of

³ Ibid 2, 5.

⁴ Ibid.

⁵ *Family Law Act 1975* (Cth)

⁶ Replacement Explanatory Memorandum, Family Law Legislation Amendment (Family Violence and other Measures) Bill 2011 (Cth) 4, 4.

⁷ *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth) Pt I sub-s 4(1) (a).

state and territory laws when considering whether abuse has occurred. The new definition will remove uncertainty about knowing the elements of an offence and whether an offence has been committed.

Paragraph (b) of the definition, which deals with sexual exploitation, is based on the existing definition but contains minor drafting changes that reflect current drafting practice.⁸

New paragraph (c) of the definition provides that abuse involves causing the child to suffer serious psychological harm, including by the child being exposed to family violence.⁹ This reflects current social science and approaches to child protection, which indicate that exposure to violence threatens a child's physical, emotional, psychological, social, education and behavioural wellbeing.

New paragraph (d) of the definition, extends the definition to serious neglect of the child.¹⁰ The meaning of neglect is not defined and therefore takes its ordinary meaning. Neglect encompasses a range of acts of omission including failure to provide adequate food, shelter, clothing, supervision, hygiene or medical attention.

"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.~~

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.

The terms **"serious psychological harm"** and **"serious neglect"** are **not defined**. The Explanatory Memorandum states that neglect be given its "ordinary meaning";¹¹ and further states: "Neglect encompasses a range of acts of omission including failure to provide adequate food, shelter, clothing, supervision, hygiene or medical attention."¹²

There appears to be a **causal relationship** between the abuser's conduct and the serious psychological harm suffered by the child, which in evidentiary terms may be problematic.

⁸ Ibid (b).

⁹ Ibid (c).

¹⁰ Ibid (d).

¹¹ Explanatory Memorandum, Family Law Legislation Amendment (Family Violence and other Measures) Bill 2011 (Cth) 4,8.

¹² Ibid 4, 8.

Must the abuser **intend** to cause serious psychological harm or is the mere act of exposing the child to harm sufficient?

The term “**exposed**” to family violence is very generally defined in item 8 of the Amendment.¹³

An ‘**assault**’ no longer needs to be an offence under a State/Territory law thus lowering the standard of proof. However, it’s hard to imagine the Court completely ignoring the criminal definition.

Item 8: Re-defining ‘Family violence’ and ‘exposure’ to family violence.

Item 8 of the Amendment inserts new section 4AB which will define ‘*family violence*’ and when a child is ‘exposed’ to family violence.

New subsection 4AB(1) defines ‘*family violence*’ as violent, threatening or any other type of behaviour that coerces or controls a family member or which causes the family member to be fearful. Behaviour that fits within the general characterisation set out in the definition will be captured. The definition is intended to cover a wide range of behaviour including assault, sexual assault or other sexually abusive behaviour, stalking, emotional and psychological abuse, and economic abuse. The definition encompasses patterns of family violence and single violent events.

New subsection 4AB(2) provides a non-exhaustive list of examples that fit within the definition of ‘family violence’. The examples recognise the wider range of behaviour experienced by victims of family violence. The inclusion of examples will not exclude any behaviour that is within the general characterisation set out in subsection 4AB(1). For example, threats of suicide and self-harm are not mentioned in the definition or examples of ‘family violence’, but will be captured by the definition where the threat coerces, controls or causes a family member to be fearful.

New subsection 4AB(3) defines the term ‘exposed’. This new term provides that a child is ‘exposed’ to family violence if the child sees or hears or otherwise experiences the effects of family violence. Proposed subsection 4AB(4) provides a non-exhaustive list of example situations where a child may be exposed to family violence. The examples clarify that there does not have to be intent for a child to hear, witness or otherwise be exposed to family violence.

Item 3: section 4(1) definition of family violence repealed

~~“**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.~~

8 After section 4AA

Insert:

¹³ See generally *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth) sub-s 4AB (3).

4AB Definition of *family violence* etc.

- (1) For the purposes of this Act, **family violence** means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the **family member**), or causes the family member to be fearful.
- (2) Examples of behaviour that may constitute family violence include (but are 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.
- (3) For the purposes of this Act, a child is **exposed** to family violence if the child sees or hears family violence or otherwise experiences the effects of family violence.
- (4) Examples of situations that may constitute a child being exposed to family violence include (but are not limited to) the child:
 - (a) overhearing threats of death or personal injury by a member of the child's family towards another member of the child's family; or
 - (b) seeing or hearing an assault of a member of the child's family by another member of the child's family; or
 - (c) comforting or providing assistance to a member of the child's family who has been assaulted by another member of the child's family; or
 - (d) cleaning up a site after a member of the child's family has intentionally damaged property of another member of the child's family; or
 - (e) being present when police or ambulance officers attend an incident involving the assault of a member of the child's family by another member of the child's family.

Family violence

Significant shift in emphasis from **conduct** that causes a person to fear for their wellbeing or safety to **behaviour that "coerces" and "controls"**.

It has been suggested that the "**Coercion and Control**" requirement does not explicitly require **intention**.¹⁴

"Repeated derogatory taunts" may prove fertile ground for allegations of family violence.

Emphasis on **economic** abuse, which may have associated evidentiary issues.

Not an exhaustive list: definition includes "**threatening or other behaviour by a person that coerces or controls**"

The examples recognise the wider range of behaviour experienced by victims of family violence. The inclusion of examples will not exclude any behaviour that is within the general characterisation set out in subsection 4AB(1). For example, threats of suicide and self-harm are not mentioned in the definition or

¹⁴ Per Prof Parkinson, P, *The Australian*, 3 May 2011.

examples of ‘family violence’, but will be captured by the definition where the threat coerces, controls or causes a family member to be fearful.¹⁵

“Exposed” to family violence

The examples suggest that there does not have to be **intent** – simply that a child sees, hears or “experiences the effects” of family violence.

Prioritisation of the Safety of Children in Parenting Matters

Item 11: Terminology and priority

Item 11 of the Amendment amends s 43(1)(ca) *Family Law Act 1975* (Cth), which sets out the principles to be applied by courts in the exercise of their jurisdiction, by replacing the word ‘safety’ with ‘protection’. This promotes terminological consistency in the construction of the Act.¹⁶

FAMILY LAW ACT 1975 - SECT 43

Principles to be applied by courts

(ca) the need to ensure **safety protection** from [family violence](#); and

11 Paragraph 43(1)(ca)

Omit “safety”, substitute “protection”.

Item 13: Convention on the Rights of the Child:

Item 13 of the Amendment inserts a new subsection into section 60B of the Act to provide that a further object of Part VII of the Amendment is to give effect to the *United Nations Convention on the Rights of the Child*, (the *Convention*)¹⁷. The purpose of this object is to confirm, in cases of ambiguity, the obligation on decision makers to interpret Part VII of the Act, to the extent its language permits, consistently with Australia’s obligations under the Convention. The Convention may be considered as an interpretive aid to Part VII of the Act. To the extent that the Act departs from the Convention, the Act would prevail. This provision is not equivalent to incorporating the Convention into domestic law.

Australia ratified the Convention in 1990 and, in doing so, committed to protecting and ensuring children’s rights. The Convention contains the full range of human rights – civil, cultural, economic, political and social rights. These rights can be broadly grouped as protection rights, participation rights and survival and development rights. One of the main principles on which the Convention is based is the obligation to have regard to the best interests of the child as a primary consideration in decision-making. Part VII of the Act is based on this same principle; although the best interests of the child are elevated to ‘paramount’ status in several provisions. The reference to the Convention in section 60B does not adversely affect these provisions in Part VII or dilute the meaning of ‘paramount consideration’. Nothing in the Convention prevents Australia enacting stronger protections for the rights of the child than the Convention itself prescribes.

¹⁵ Explanatory Memorandum, Family Law Legislation Amendment (Family Violence and other Measures) Bill 2011 (Cth) 17, 5.

¹⁶ See generally Explanatory Memorandum, Family Law Legislation Amendment (Family Violence and other Measures) Bill 2011 (Cth) 17, 5.

¹⁷ *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, entered into force 2 September 1990.

The note provides the reader with a reference for accessing the Convention in accordance with current drafting practice.

13 At the end of section 60B

Add:

- (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 2011, 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).

The Convention may be considered as an interpretive aid to Part VII of the Act. To the extent that the Act departs from the Convention, the Act would prevail. This provision is not equivalent to incorporating the Convention into domestic law.

Item 17: Protection over Promotion: Protecting children is the priority consideration

Item 17 of the Amendment inserts new subsection 60CC(2A) which requires the court, when determining what is in a child's best interests, to give greater weight to the primary consideration that protects the child from harm in cases if there is inconsistency in applying the considerations. Subsection 60CC(2) of the Act provides that the two 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.

Where child safety is a concern, this new provision will provide the courts with clear legislative guidance that protecting the child from harm is the priority consideration.

Primary considerations

60CC(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).

17 After subsection 60CC(2)

Insert:

(2A) 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).

Where child safety is a concern, this new provision will provide the courts with clear legislative guidance that the protection of minors from harm is the priority consideration.

This provision may do little more than reflect the current approach taken the Court.

Items 23 & 34: Obligation on Court to take prompt action

Item 23 of the Amendment repeals section 60K of the Act, which requires the court to take prompt action in relation to allegations of child abuse or family violence.

Section 60K will be substantially re-enacted in proposed section 67ZBB (Court to take prompt action in relation to allegations of child abuse or family violence) to be inserted by item 34 of the Amendment.

Proposed section 67ZBB is located more appropriately near sections 67Z and 67ZBA which, respectively, impose obligations to report child abuse and family violence to the courts.¹⁸

FAMILY LAW ACT 1975 – SECT 60K

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

~~_____ (1) This section applies if:~~

~~_____ (a) an application is made to a court for a Part VII order in relation to a child; and~~

~~_____ (b) a document is filed in the court, on or after the commencement of this section, in relation to the proceedings for the order; and~~

~~_____ (c) the document alleges, as a consideration that is relevant to whether the court should grant or refuse the application, that:~~

~~_____ (i) there has been abuse of the child by one of the parties to the proceedings; or~~

~~_____ (ii) there would be a risk of abuse of the child if there were to be a delay in applying for the order; or~~

~~_____ (iii) there has been family violence by one of the parties to the proceedings; or~~

~~_____ (iv) there is a risk of family violence by one of the parties to the proceedings; and~~

~~_____ (d) the document is a document of the kind prescribed by the applicable Rules of Court for the purposes of this paragraph.~~

~~_____ (2) The court must:~~

~~_____ (a) consider what interim or procedural orders (if any) should be made:~~

~~_____ (i) to enable appropriate evidence about the allegation to be obtained as expeditiously as possible; and~~

~~_____ (ii) to protect the child or any of the parties to the proceedings; and~~

¹⁸ See generally Replacement Explanatory Memorandum, Family Law Legislation Amendment (Family Violence and other Measures) Bill 2011 (Cth) 10, 47.

~~(b) make such orders of that kind as the [court](#) considers appropriate; and~~

~~(c) deal with the issues raised by the allegation as expeditiously as possible.~~

~~(2A) The [court](#) must take the action required by paragraphs (2)(a) and (b):~~

~~(a) as soon as practicable after the document is filed; and~~

~~(b) if it is appropriate having regard to the circumstances of the case within 8 weeks after the document is filed.~~

~~(3) Without limiting subparagraph (2)(a)(i), the [court](#) must consider whether orders should be [made](#) under [section 69ZW](#) to obtain reports from [State](#) and [Territory](#) agencies in relation to the allegations.~~

~~(4) Without limiting paragraph (2)(a)(ii), the [court](#) must consider whether orders should be [made](#), or an injunction granted, under [section 68B](#).~~

~~(5) A failure to comply with a provision of this section in relation to an application does not affect the validity of any order [made](#) in the [proceedings](#) in relation to the application.~~

23 Section 60K

Repeal the section.

Item 34

Section 67ZBA – Where interested person makes allegation of family violence

Item 34 supplements the *Act* by inserting new section 67ZBA, which creates obligations upon an ‘*interested person*’ in proceedings for an order under Part VII of the Act who makes an allegation of family violence. This provision is based on section 67Z of the Act which creates similar obligations in relation to allegations of child abuse. It is intended to ensure that family courts receive the best possible evidence of family violence.

Subsection 67ZBA(1) applies if family violence has been alleged by an interested party, as a consideration that is relevant to whether the court should make or refuse to make an order sought under Part VII of the Act.

Subsection 67ZBA(2) provides that where an interested person makes an allegation of family violence, that person must file a notice in the prescribed form in the court, and serve a true copy of the notice on the party to proceedings to whom the allegation referred to in paragraph 67ZBA(1)(a) or (b) relates. It would be open to the courts to prescribe the same notice for the purposes of subsection 67ZBA(2) as is prescribed for the purposes of subsection 67Z(2). Currently, the notice prescribed by the Family Court for the purposes of subsection 67Z(2) is a Notice of Child Abuse or Family Violence (‘Form 4’ under the Family Law Rules).

Subsection 67ZBA(3) sets out the obligations where the alleged family violence (or risk of family violence) is also abuse of a child (or risk of abuse of a child). This subsection clarifies that, in such cases, only one notice is required to be filed and served, either under subsection 67Z(2) or subsection 67ZBA(2). If the notice is filed under subsection 67ZBA(2) the Registry Manager must deal with the notice as if it has been filed under subsection 67Z(2).

Subsection 67ZBA(3) contains a note to clarify that the notice must be filed and served under the requirements in subsection 67Z(2) if the allegation of abuse of a child (or a risk of abuse of a child) relates to a person who is not a party to the proceedings.

Subsection 67ZBA(4) defines the terms ‘interested person’, ‘prescribed form’ and ‘Registry Manager’ for the purposes of section 67ZBA.

An 'interested person' is defined to mean: a party to the proceedings; an independent children's lawyer who represents the interests of a child in the proceedings; and any other person prescribed by the regulations for the purpose of that paragraph. The prescription is intended to provide flexibility.

To ensure that a consistent approach to the reporting of child abuse is taken, the definition of 'Registry Manager' is defined to have the same meaning as in section 67Z of the Act.

The intent of section 67ZBA is to provide for the filing of a written notice when an interested person wishes to make an allegation of child abuse or family violence in proceedings under Part VII of the Family Law Act. This is essential to allow the court to deal efficiently and effectively with the allegation. An allegation may itself be set out in a prescribed notice. The prescribed notice must be filed in the court hearing the proceedings and served on the person against whom the allegation is made.

Section 67ZBB – Court to take prompt action in relation to allegations of child abuse or family violence

Item 34 inserts new section 67ZBB. Section 67ZBB substantially re-enacts existing section 60K. The proposed provision will be located in Subdivision D of Division 8 of Part VII of the Act, which is a more appropriate position as that subdivision deals with allegations of child abuse and family violence.

As with section 60K, proposed section 67ZBB will place an obligation on the court to take prompt action in relation to allegations of child abuse or family violence. The new provision operates in broadly in the same way as section 60K.

New subsection 67ZBB(1) sets out the application of section 67ZBB. It applies where a notice is filed under subsection 67Z(2) or 67ZBA(2) in proceedings for an order under Part VII in relation to a child and the notice alleges, as a consideration relevant to whether the court should make or refuse to make the order, that: there has been abuse of the child or would be a risk of such abuse if the proceedings were delayed; or there has been family violence by one of the parties to proceedings or there is a risk of such family violence.

Importantly, new paragraph 67ZBB(2)(c) requires the court to deal with the issues raised by the allegation of child abuse or family violence (or risk thereof) as expeditiously as possible.

In addition, the combined effect of new subsections 67ZBB(2) and (3) is that the court must, as soon as practicable and, if appropriate, within eight weeks after the notice is filed, consider what interim or procedural orders (if any) should be made to enable appropriate evidence about the allegations to be obtained expeditiously as possible and to protect the child or any of the parties to proceedings. The kinds of orders encompassed by paragraphs 67ZBB(2)(a) and (b) include orders for the preparation of a family report, orders requiring the appointment of an independent children's lawyer; and orders to obtain documents or information from a prescribed State or Territory agency under section 69ZW. Paragraph 67ZBB(2)(b) states that the court must make such orders where appropriate.

New subsection 67ZBB(4) requires the court, which has to consider what orders (if any) it should make under subparagraph 67ZBB(2)(a)(i) to enable appropriate evidence about the allegation to be obtained as expeditiously as possible, to specifically consider whether it should make orders under section 69ZW to obtain documents or information relating to the allegation from a prescribed State or Territory agency. This new subsection will not limit the powers of the court under subparagraph 67ZBB(2)(a)(i).

New subsection 67ZBB(5) requires the court, which has to consider what orders (if any) it should make under subparagraph 67ZBB(2)(a)(ii) to protect the child or any of the parties to proceedings, to specifically consider whether it should make orders or grant an injunction under section 68B. This new subsection will not limit the powers of the court under subparagraph 67ZBB(2)(a)(ii).

New subsection 67ZBB(6) provides that the validity of an order will not be affected by a failure to comply with proposed section 67ZBB.

34 At the end of Subdivision D of Division 8 of Part VII

Add:

67ZBA Where interested person makes allegation of family violence

- (1) This section applies if an interested person in proceedings for an order under this Part in relation to a child alleges, as a consideration that is relevant to whether the court should make or refuse to make the order, that:
 - (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 interested person 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 interested person 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 section, the Registry Manager must deal with the notice as if it had been filed under subsection 67Z(2).

Note: If an allegation of abuse of a child (or a risk of abuse of a child) relates to a person who is not a party to the proceedings, the notice must be filed in the court and served on the person in accordance with subsection 67Z(2).

- (4) In this section:

interested person in proceedings for an order under this Part in relation to a child, means:

- (a) a party to the proceedings; or
- (b) an independent children's lawyer who represents the interests of the child in the proceedings; or
- (c) any other person prescribed by the regulations for the purposes of this paragraph.

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

Registry Manager has the same meaning as in section 67Z.

67ZBB Court to take prompt action in relation to allegations of child abuse or family violence

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

- (i) to enable appropriate evidence about the allegation to be obtained as expeditiously as possible; and
 - (ii) to protect the child or any of the parties to the proceedings; and
 - (b) make such orders of that kind as the court considers appropriate; and
 - (c) deal with the issues raised by the allegation as expeditiously as possible.
- (3) The court must take the action required by paragraphs (2)(a) and (b):
- (a) as soon as practicable after the notice is filed; and
 - (b) if it is appropriate having regard to the circumstances of the case—within 8 weeks after the notice is filed.
- (4) Without limiting subparagraph (2)(a)(i), the court must consider whether orders should be made under section 69ZW to obtain documents or information from State and Territory agencies in relation to the allegation.
- (5) Without limiting subparagraph (2)(a)(ii), the court must consider whether orders should be made, or an injunction granted, under section 68B.
- (6) A failure to comply with a provision of this section does not affect the validity of any order made in the proceedings for the order.

FAMILY LAW ACT 1975 - SECT 67Z

Subdivision D--Allegations of [child abuse](#)

67ZBA Where interested person makes allegation of family violence

- (1) This section applies if an interested person in proceedings for an order under this Part in relation to a child alleges, as a consideration that is relevant to whether the court should make or refuse to make the order, that:
- (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 interested person 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 interested person 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 section, the Registry Manager must deal with the notice as if it had been filed under subsection 67Z(2).

Note: If an allegation of abuse of a child (or a risk of abuse of a child) relates to a person who is not a party to the proceedings, the notice must be filed in the court and served on the person in accordance with subsection 67Z(2).

- (4) In this section:

interested person in proceedings for an order under this Part in relation to a child, means:

- (a) a party to the proceedings; or

- (b) an independent children’s lawyer who represents the interests of the child in the proceedings; or
- (c) any other person prescribed by the regulations for the purposes of this paragraph.

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

Registry Manager has the same meaning as in section 67Z.

67ZBB Court to take prompt action in relation to allegations of child abuse or family violence

- (1) This section applies if:
 - (a) a notice is filed under subsection 67Z(2) or 67ZBA(2) in proceedings for an order under this Part in relation to a child; and
 - (b) the notice alleges, as a consideration that is relevant to whether the court should make or refuse to make the order, that:
 - (i) there has been abuse of the child by one of the parties to the proceedings; or
 - (ii) there would be a risk of abuse of the child if there were to be a delay in the proceedings; or
 - (iii) there has been family violence by one of the parties to the proceedings; or
 - (iv) there is a risk of family violence by one of the parties to the proceedings.
- (2) The court must:
 - (a) consider what interim or procedural orders (if any) should be made:
 - (i) to enable appropriate evidence about the allegation to be obtained as expeditiously as possible; and
 - (ii) to protect the child or any of the parties to the proceedings; and
 - (b) make such orders of that kind as the court considers appropriate; and
 - (c) deal with the issues raised by the allegation as expeditiously as possible.
- (3) The court must take the action required by paragraphs (2)(a) and (b):
 - (a) as soon as practicable after the notice is filed; and
 - (b) if it is appropriate having regard to the circumstances of the case—within 8 weeks after the notice is filed.
- (4) Without limiting subparagraph (2)(a)(i), the court must consider whether orders should be made under section 69ZW to obtain documents or information from State and Territory agencies in relation to the allegation.
- (5) Without limiting subparagraph (2)(a)(ii), the court must consider whether orders should be made, or an injunction granted, under section 68B.
- (6) A failure to comply with a provision of this section does not affect the validity of any order made in the proceedings for the order.

Where there has been an allegation of domestic violence or abuse in light of the Amendment an “*interested person*”;¹⁹ must file and serve a Notice in the prescribed form and serve a true copy of that notice upon the party referred to.²⁰

In cases of abuse AND family violence only one notice need be filed.²¹

¹⁹ *Family Law Legislation Amendment (Family Evidence and other Measures) Act 2011 s 67ZBA.*

²⁰ *Ibid S 67ZBA (2).*

²¹ *Ibid S 67ZBA (3).*

The Amendment defines an “interested person” as a party, ICL or any other prescribed person under the regulations.²²

The Court’s duties in relation to the prompt taking of action in relation to such allegations have been substantially re-enacted in new s.67ZBB which supplants s 60k of the old Act.

Item 37 – Terminology: Protection against abuse and family violence

Item 37 of the Amendment amends paragraph 69ZN of the *Family Law Act*, which outlines the principles for conducting child related proceedings. Paragraph 69ZN(5)(a) will be repealed and replaced with a new sub-principle based on terminology consistent with other provisions in Part VII of the Act. The proposed sub-principle is to safeguard ‘the child concerned from being subjected to, or exposed to, abuse, neglect or family violence’.²³ This amendment does not change the substance of paragraph 69ZN(5)(a).²⁴

FAMILY LAW ACT 1975 - SECT 69ZN

Principles for conducting child-related proceedings

Application of the principles

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

~~(a) the child concerned from being subjected to, or exposed to, abuse, neglect or family violence; and~~

~~(a) the [child](#) concerned against [family violence](#), [child abuse](#) and [child](#) neglect; and~~

(b) the parties to the [proceedings](#) against [family violence](#).

37 Paragraph 69ZN(5)(a)

Repeal the paragraph, substitute:

~~(a) the child concerned from being subjected to, or exposed to, abuse, neglect or family violence; and~~

Item 43: Mandatory cost order for false allegations repealed

Item 43 of the Amendment repeals existing section 117AB of the *Family Law Act*. Section 117AB 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.

²² Ibid S 67ZBA (4).

²³ Replacement Explanatory Memorandum, Family Law Legislation Amendment (Family Violence and other Measures) Bill 2011 (Cth) 14, 79.

²⁴ Ibid.

The AIFS *Evaluation of the 2006 Family Law Reforms*,²⁵ the *Family Courts Violence Review* by the Hon Professor Chisholm AM,²⁶ and the Family Law Council report to the Attorney-General, *Improving Responses to Family Violence in the Family Law System*²⁷, indicate 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 Act allows family courts to make cost orders in response to false statements in appropriate cases. This power was affirmed by the Hon Robert McClelland in the Replacement Explanatory Memorandum to the Amendments²⁸, in relation to the decision in *Claringbold & James (Costs)*.²⁹

43 Section 117AB

Repeal the section.

FAMILY LAW ACT 1975 - SECT 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.~~

Based on the **AIFS review of the 2006 reforms** and other research it was concluded 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.”

The focus of s.117AB was on **knowingly making a false allegation or statement**- not on whether the claim could be substantiated – s117AB was still repealed.

Item 45: Main changes apply to proceedings instituted on or after commencement of Schedule 1.

Item 45 provides that certain new provisions in Schedule 1 apply to all proceedings that are **instituted before, on or after commencement**. This application rule prioritises the safety of children in Part VII proceedings including those that are before the courts at commencement. It is subject to sub-item 47(1), which provides the amendments made by Schedule 1 do not affect an order made under, or a certificate given under subsection 60I(8) of, the Act as in force immediately before commencement.

²⁵ Karpiew, Rae et al, *Australian Institute of Family Studies Evaluation of the 2006 Family Law Reforms*, Australian Institute of Family Studies (2009).

²⁶ Chisholm, Richard, *Family Courts Violence Review*, Attorney General's Department (2009).

²⁷ Family Violence Committee, *Improving Responses to family Violence in the Family Law System*, Family Law Council (2009).

²⁸ Replacement Explanatory Memorandum, Family Law Legislation Amendment (Family Violence and other Measures) Bill 2011 (Cth) 15, 86-87.

²⁹ [2008] FamCA 57.

Proposed provisions that will be subject to this application rule are: definitions related to ‘*abuse*’, ‘*family violence*’, ‘*exposed*’ and ‘*family member*’ (items 1 to 3); principles to be applied by courts exercising jurisdiction under the Act (item 11); the introduction of a new object underlying Part VII of the Act (item 13); the prioritisation of safety within primary considerations, and changes to additional considerations, in section 60CC of the Act (items 17 to 20); requirements to inform the courts of certain matters relating to child welfare (item 21); requirements to file notices relating to allegations of child abuse or family violence or risk of child abuse or family violence and for the court to take prompt action in relation to allegations of child abuse or family violence (items 30 to 34); principles for, and general duties on the court when, conducting child-related court proceedings (items 37 and 38); and the removal of the mandatory cost order provision (item 40 to 43).

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. To assist the transition process, clause 3 of the Family Violence Bill provides that the measures in Schedule 1 will commence upon a single date to be fixed by Proclamation but no later than 6 months after the day the Act receives the Royal Assent. This would allow for a delayed commencement and, in turn, help the courts to anticipate new requirements in proceedings during the lead up to commencement.³⁰

45 Amendments that apply to proceedings instituted on or after commencement

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

In very general terms the substantive provisions (definitions) apply to all matters initiated on or after 7 June 2012. However, some less substantive provisions apply to all applications pre or post 7 June 2012.

Strengthen advisers obligations by requiring family consultants, family counsellors, family dispute resolution practitioners and legal practitioners to prioritise the safety of children

Item 22: - Obligations on advisers in dealings with clients to prioritise child safety

Item 22 inserts new Subdivision BB in Division 1 of Part VII which outlines the obligations on advisers when working with parents to reach parenting arrangements for their children. As with current section 63DA of the Act, an adviser is defined as a legal practitioner, family counsellor, family dispute resolution practitioner or a family consultant.

Proposed subdivision BB creates new section 60D. It directs advisers, when providing advice about parenting and other arrangements under Part VII of the Act, to inform people they are assisting, whether parents or not, of the need to focus on the best interests of the child and encourage them to consider this by looking at specific matters.

Where there is inconsistency in applying the primary considerations of a child’s right to a meaningful relationship with each parent and the child’s right to be protected from harm, advisers are required to encourage parents to prioritise the child’s safety. This approach is consistent with the amendments made by item 17 which concerns the best interests of a child in court proceedings. The new adviser obligations help parents to consider the protection of their children from harm as a priority at an early stage of discussions with the assistance of their advisers.³¹

22. After Subdivision BA of Division 1 of Part VII

Insert:

³⁰ Replacement Explanatory Memorandum, Family Law Legislation Amendment (Family Violence and other Measures) Bill 2011 (Cth) 16, 89-91.

³¹ Replacement Explanatory Memorandum, Family Law Legislation Amendment (Family Violence and other Measures) Bill 2011 (Cth) 9-10, 44-46.

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) 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.

Items 24 & 25- new adviser obligations are additional

Item 24 amends section 63DA to provide that new adviser obligations set out in new Subdivision BB (section 60D) are in addition to obligations on advisers under section 63DA of the Act to give certain advice in connection with the making of parenting plans in relation to a child. This item should be read in conjunction with item 22 of this Schedule, which requires advisers to encourage parents to take account of the child’s best interests and prioritising the child’s safety.³²

24 Before subsection 63DA(1)

Insert:

- (1A) The obligations of 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.

*Item 25 repeals paragraph 63DA(2)(c), which requires advisers to inform their clients that decisions made in developing **parenting plans should be made in the best interests of the child**. This obligation is expanded upon in new Subdivision BB to be inserted by item 22, which applies to all advice by advisers about matters under Part VII of the Act (dealing with children’s matters), not just advice given in connection with the making of a parenting plan. The new obligations in Subdivision BB are additional to those set out in section 63DA, which concerns the obligations of advisers in relation to parenting plans.*³³

(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:

³²Ibid 10, 48.

³³ Ibid 49.

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

25 Paragraph 63DA(2)(c)

Repeal the paragraph.

Item 33: obligations to notify child welfare authorities under sub sections 67ZA (2) & (3)

Item 33 inserts a note at the end of existing subsection **67ZA(3)**, which authorises certain persons (such as lawyers, family dispute resolution practitioners, family consultants, family counsellors and certain Registrars) to notify a prescribed child welfare authority of reasonable suspicions that a child has been ill treated, is at risk of being ill-treated, or is at risk of, or has been exposed or subjected to, behaviour which psychologically harms the child. The note clarifies that a person who is authorised to report their suspicions under subsection **67ZA(3)** is not excused from mandatory reporting obligations arising under subsection **67ZA(2)** where that person has reasonable grounds for suspecting that a child has been abused or is at risk of abuse.³⁴

33 At the end of subsection 67ZA(3)

Add:

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.

FAMILY LAW ACT 1975 - SECT 67Z

3) If a notice under subsection (2) is filed in a [court](#), the [Registry Manager](#) must, as soon as practicable, notify a [prescribed child welfare authority](#).

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.

Item 38: New duty on court to ‘actively ask’ re existence or risk of child abuse or family violence

Item 38 inserts new paragraph 69ZQ(1)(aa), which imposes a new duty on the court to actively ask each party to child-related proceedings about the existence, or risk, of child abuse or family violence. The imposition of this duty supports 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.

³⁴ Ibid 12, 49.

The proposed new paragraph 69ZQ(1)(aa) is intended to work in tandem with proposed new section 67ZBA, being inserted by item 34, which seeks to ensure that wherever an interested person makes an allegation of child abuse or family violence the allegation must be supported by a prescribed notice (which may be in the form of the existing Form 4 under the Family Law Rules). The provision responds to research findings that victims of violence are unlikely to disclose violence unless they are directly asked about their experiences. It will be a matter for the courts to develop practices around when and how this duty would be discharged.³⁵

38 Before paragraph 69ZQ(1)(a)

Insert:

- (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

FAMILY LAW ACT 1975 - SECT 69ZQ

General duties

(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

Ensure the courts have better access to evidence of abuse and family violence by improving reporting requirements

Items 18 & 20- ‘ Friendly Parent Provision’ repealed:

Item 18 repeals paragraph 60CC(3)(c) of the Act and replaces it with new paragraphs 60CC(3)(c) and (ca).

Current paragraph 60CC(3)(c) is commonly referred to as the ‘friendly parent provision’. This provision required the family courts to consider the willingness of one parent towards the other in facilitating a child’s relationship with the other parent. The AIFS *Evaluation of the 2006 Family Law Reforms*, the *Family Courts Violence Review* by the Hon Professor Chisholm AM and the Family Law Council report to the Attorney-General, *Improving responses to family violence in the family law system*, noted the impact this provision had in discouraging disclosures of family violence and child abuse. These reports indicate that parties were not disclosing concerns of family violence and child abuse for fear of being found to be an ‘unfriendly parent’.

The repeal of paragraph 60CC(3)(c) is intended to remove this disincentive and enable all relevant information to be put before the courts for consideration in making parenting orders. Removal of the ‘friendly parent’ provision will 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.

New paragraphs 60CC(3)(c) and (ca) will substantially re-enact the content of current paragraphs 60CC(4)(a) and (c) which are to be repealed by item 20. The purpose of these provisions was to ensure that, when determining the best interests of the child, the court takes into account whether a person has failed to fulfil their parental responsibility obligations in the past.

³⁵ Ibid 14, 80 -81.

Proposed paragraph 60CC(3)(c) will require the court to consider the extent to which each of the child's parents has fulfilled, or failed to fulfil, his or her responsibilities as a parent. This will include the extent to which each parent has taken, or failed to take, the opportunity to spend time with the child, communicate with the child, and participate in decision-making about major long-term issues in relation to the child.

Proposed paragraph 60CC(3)(ca) will require the court to consider the extent to which each parent has fulfilled, or failed to fulfil, his or her obligation to maintain the child.

The proposed amendments to paragraph 60CC(3)(c) and the new paragraph 60CC(3)(ca) are not intended to restrict the matters to which the court may have regard under paragraph 60CC(3)(m).

Additional considerations

(3) Additional considerations are:

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

18 Paragraph 60CC(3)(c)

Repeal the paragraph, substitute:

- (c) the extent to which each of the child's parents 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;

(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;

'Friendly Parent' provision repealed.

AIFS report concluded that **s.60CC(3)[c] discouraged disclosures of child abuse and family violence** for fear of being found and 'unfriendly parent'.

Is the repeal of **costs order penalties** for knowingly making false allegations (s.117AB) and **removal of the Friendly parent provision s.60CC(3)[c]** likely to lead to increased disclosure re family violence and child abuse? If so, is there a risk of a Form 4 **further becoming a sword?**

Item 20 will repeal subsections 60CC(4) and (4A) of the Act. As explained in item 18, paragraphs 60CC(4)(1)(a) and (c) will be substantially re-enacted in paragraph 60CC(3)(c).

Subsection 60CC(4A) is to be repealed on the basis that it currently qualifies subsection 60CC(4) and will therefore become redundant with the repeal of that subsection. The repeal of subsections 60CC(4) and (4A) will not inhibit the courts' ability to consider events and circumstances since parental separation which may be considered under paragraph 60CC(3)(m).³⁶

20 Subsections 60CC(4) and (4A)

Repeal the subsections.

³⁶ Ibid 9, 40.

~~(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.~~

Item 19: Nature and scope of Family Violence Orders:

Item 19 deletes paragraph 60CC(3)(k) and replaces it with a similar provision which removes the requirement that a family violence order must be final or contested. The effect of this new paragraph is the courts must have regard to any family violence order made—including interim, non-contested and police issued order—and give appropriate weight to these orders. ³⁷

~~_____ (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;~~

19 Paragraph 60CC(3)(k)

Repeal the paragraph, substitute:

³⁷ Ibid 38-39.

- (k) if a family violence order applies, or has applied, to the child or a member of the child's family—any relevant inferences that can be drawn from the order, taking into account the following:
 - (i) the nature of the order;
 - (ii) the circumstances in which the order was made;
 - (iii) any evidence admitted in proceedings for the order;
 - (iv) any findings made by the court in, or in proceedings for, the order;
 - (v) any other relevant matter;

"family violence order" means an order (including an interim order) made under a prescribed law of a State or Territory to protect a person from family violence.

More detailed consideration of Family Violence orders- but no major change.

Item 21: New obligations on parties re risk to children

Item 21 inserts 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. Information about whether a child is or has been the subject of a care order, notification or investigation under a child welfare law is crucial in assisting the family courts to make decisions about children.³⁸

21 At the end of Subdivision BA of Division 1 of Part VII

Add:

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.

³⁸ Ibid 9, 41-43.

- (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.

Make it easier for state and territory child protection authorities to participate in family law proceedings where appropriate.

Item 33: obligations to notify child welfare authorities under sub sections 67ZA (2) & (3)

Item 33 inserts a note at the end of existing subsection **67ZA(3)**, which authorises certain persons (such as lawyers, family dispute resolution practitioners, family consultants, family counsellors and certain Registrars) to notify a prescribed child welfare authority of reasonable suspicions that a child has been ill treated, is at risk of being ill-treated, or is at risk of, or has been exposed or subjected to, behaviour which psychologically harms the child. The note clarifies that a person who is authorised to report their suspicions under subsection **67ZA(3)** not excused from mandatory reporting obligations arising under subsection **67ZA(2)** where that person has reasonable grounds for suspecting that a child has been abused or is at risk of abuse.³⁹

33 At the end of subsection 67ZA(3)

Add:

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.

FAMILY LAW ACT 1975 - SECT 67Z

- 3) If a notice under subsection (2) is filed in a [court](#), the [Registry Manager](#) must, as soon as practicable, notify a [prescribed child welfare authority](#).

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.

³⁹ Ibid 12, 59.

Schedule 2 amendments

Schedule 2 amendments generally came into force on 7 December 2011⁴⁰ and the 3 amendments in relation to the *Bankruptcy Act 1966* came into force on 4 January 2012.⁴¹ The amendments are largely procedural or consequential.

However, item 27 introduced new powers in relation to appeals.

FAMILY LAW ACT 1975 - SECT 96AA

Appeal may be dismissed if no reasonable prospect of success

(1) If:

(a) an [appeal](#) has been [instituted](#) in a [court](#) under this Part; and

(b) having regard to the grounds of [appeal](#) as disclosed in the notice of [appeal](#), it appears to the [court](#) that the [appeal](#) has no reasonable prospect of success (whether generally or in relation to a particular ground of [appeal](#));

the [court](#) may, at any time, order that the [proceedings](#) on the [appeal](#) be dismissed (either generally or in relation to that ground).

(2) This section does not limit any powers that the [court](#) has apart from this section.

<p>27</p> <p>Increased powers to dismiss an appeal</p>	<p>s. 96AA appealed. The new provision is more in line but not identical to other Commonwealth Acts dealing with federal courts.</p> <ul style="list-style-type: none"> • Timing of dismissal: Court's power to dismiss an appeal (or a particular ground of appeal) is now available at times other than, as well as during the hearing i.e. an appeal (or particular ground of appeal) may be dismissed-where having regard to the grounds detailed in the Appeal Notice the appeal (or any other time) the court is satisfied the appeal or an appeal ground has "no reasonable prospect of success." • Basis of dismissal: prior to amendment the court could only dismiss an appeal where there are no proper grounds for appeal. The new position is that on the test of "prospects of success" the Court could dismiss an appeal founded on a proper ground, but which has no reasonable prospect of success." <p>According to the CCH note the new power applies to appeals instituted before, on or after the commencement of this provision.</p>
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⁴⁰ s 2 *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth).

⁴¹ *Ibid.*

Trends emerging from the 2006 Family Law Reforms

The amendments are a legislative response to a major review of the 2006 family law reforms undertaken by several agencies, but very significantly the Australian Institute of Family Law Studies (“the Institute”). In seeking to gauge the response to the reforms and based on very comprehensive surveys and examinations of court records the Institute concluded.

- Shared parental responsibility and shared care were overwhelmingly supported by parents, legal system professionals and family relationship service professionals.⁴²
- The changes have encouraged more creativity in making arrangements that involve fathers in children’s everyday routines.
- Although only a minority of children had shared care, the proportion of children with these arrangements has increased. This is part of a longer term trend in Australia and Internationally.
- When calculated as a proportion of cases where contact hours were specified, shared care time increased from 16% pre-reform to 23% post-reform.
- When calculated as a proportion of all cases, shared care time increased from 9% to 14%.
- The proportion of judicial determination cases resulting in shared care time increased from 4% pre-reform to 34% post-reform, when calculated as a proportion of cases where contact hours are specified.
- When calculated as a proportion of all judicial determination cases, shared care time increased from 2% pre-reform to 13% post-reform.⁴³
- The majority of parents with shared care-time arrangements thought that the arrangements were working well both for parents and the child.
- Generally, shared care time did not appear to have a negative impact on the wellbeing of children except where mothers had safety concerns.⁴⁴

Court filings decrease

There has been a marked overall decrease in the total number of applications for final orders (in the FCoA, FMC and FCoWA) relating to children’s matters since 1 July 2006 as follows⁴⁵:

Court	2005/06	2008/09	Change	% Change
Family Court of Australia	7,479	2,086	-5393	-72%
Federal Magistrates Court	9,405	10,987	+1582	+17%
Family Court of WA	1,868	1,476	-392	-21%

⁴² Australian institute of Family Law Studies: *Evaluation of the 2006 Family Law Reforms* E3, (2009).

⁴³ Ibid p 132.

⁴⁴ Ibid, E3.

⁴⁵ Ibid p 304.

Total	18,752	14,549	-4,203	-22%
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The very dramatic decrease in the number of Family Court of Australia filings is better understood in the context of a continuation of the pre-reform trend of an increasingly greater proportion of filings being made in the Federal Magistrates Court rather than the Family Court of Australia. The proportion of filings made in the FMC (as distinct from the FCoA) has increased from 50% in 2005/06 to 76% in 2008/09.⁴⁶ However, an overall decrease in filings seeking final orders of 22% across the three courts is significant.

Legal representation and self-representation

Generally, the number of self-represented litigants in the FCoA and the FMC decreased from 10,405 in 2005–06 to 7,114 in 2008–09 (32%) and this fall continues a pre-reform trend.⁴⁷ Analysis of post-reform files in parenting matters across all three courts reveals that:

- *applicants as well as respondents were significantly more likely to use a private solicitor in “consent” [applications] (65% for applicants and 46% for respondents); and*
- *“consent after initiated proceedings” cases (61% for applicants and 48% for respondents).*⁴⁸

Given the cost of litigation, it is not surprising that lawyers were not used in the same numbers at trial (44% for applicants and 31% for respondents).⁴⁹ In very broad terms it seems that post 2006 the trend has been for parents to increasingly use lawyers to document consent orders and initiate proceedings but less so if matters proceed to trial.

Reforms largely favour fathers

The overwhelming view of all professionals involved in the family law system concluded that the reforms favoured fathers. It is interesting to note that in a 2008 survey commissioned by the Institute not a single male family lawyer believed that mothers were favoured over fathers.⁵⁰ However, significant differences of opinion on key aspects of the reforms emerged between ‘legal sector’ and ‘service system’ professionals. This is perhaps unsurprising given the different professional obligations of lawyers and service system professionals.

... a substantial majority of family lawyers said that the legal framework did not facilitate the making of arrangements that were developmentally appropriate for children; however, family relationship professionals were more positive about the policy framework’s ability to facilitate this. This probably reflects the strong belief among many... of the expanded services sector, [that] the reforms have brought more emphasis on developmental appropriateness and child-focused practices.

Many legal sector professionals believed the reforms have favoured fathers over mothers and parents over children, and that the post-reform bargaining dynamics are such that mothers are “on the back foot”.⁵¹

⁴⁶ Ibid p 305.

⁴⁷ Ibid p 310.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid p 219.

⁵¹ Ibid p 2229-30.

Whilst lawyers generally felt that there was a strong connection between child support liability/entitlement and care-time arrangements, service system professionals indicated child support considerations were a motivating factor for fewer than a quarter of their clients.⁵²

There seems to be some factual support for the view among many lawyers that post separation division of property is a significant factor motivating fathers in seeking equal care arrangements.

Overall, the data suggest there may have been a decrease in the average share of property allocated to mothers in post-separation property settlement after the reforms, with varying estimates of the shift, but most being in the region of a five per cent decrease (i.e. from 70–30 in favour of mother pre-reform to perhaps 65–35 in favour of the mother post-reform).⁵³

There also appears to be significant factual evidence to support the view of many lawyers that the ‘bargaining’ positions of mothers and fathers have significantly changed since the 2006 reforms. More fathers (but by no means all, as the evidence suggests many fathers remain disappointed that shared care is not an ‘automatic’ right) see themselves in a relatively better negotiating position after the reforms. The perceived financial benefits of shared care (increased property share and lower child support) have not been lost on fathers (and their lawyers).

Importantly, shared care does not appear to be associated with worse outcomes for children. Children in a shared care-time arrangement fared marginally better.⁵⁴ The majority of parents with shared care-time arrangements thought that the arrangements were working well for both the parents and the child. Generally shared care did not appear to have a negative impact on the well being of children except where mothers had safety concerns.⁵⁵

Significant increase in Form 4 Notice filings

The Institute, in its report is at pains to stress that great caution should be exercised in interpreting pre and post reform data in relation to Form 4 filings for the following reasons:

- 1 *... prior to the reforms, the Form 4 notice was required to be filed in cases where there were allegations of child abuse only, while post-reform it was applicable in cases where allegations of child abuse or family violence were being made.*
- 2 *... the Family Court of Western Australia requires a Form 4 notice to be filed when a matter is to be dealt with under one of the violence/ child abuse exceptions to the requirement to attend FDR (s60I(9)(b)).*
- 3 *... therefore, the nature of written documentation on the court files is different in each court and has changed pre- and post-reform. This means that any change in patterns of allegations may be related to changes and differences in procedures between courts. For these reasons, these data offer tentative insights into pre- and post-reform shifts, but the reasons for such shifts may be due to a number of factors, including changes to the legislation, changes to procedure and changes in the nature of matter reaching the courts due to the operation of FDR with exceptions.⁵⁶*

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Ibid 273.

⁵⁵ Ibid E3.

⁵⁶ Ibid p 311.

These reservations notwithstanding, a 53% increase in Form 4 filings (as a total across all three courts) is very significant. Such growth in the number of Form 4 notices has reversed a downward pre-reform trend.⁵⁷

Court	2005/06	2008/09	Change	% Change
Family Court of Australia	607	441	-166	-27%
Federal Magistrates Court	242	830	+588	+242%
Family Court of WA	205	340	+135	+66%
Total	1054	1611	+557	+53%

Analysis of the proportion of matters in which Form 4 Notices were filed is quite revealing.⁵⁸

Court	2005/06 % Cases F.4 Filed	2008/09 % Cases F.4 Filed
Family Court of Australia	8%	21%
Federal Magistrates Court	3%	8%
Family Court of WA	11%	23%

The reasons for such an increase are important to understand- particularly as to:

- (a) whether there is an actual increase in the incidence of abuse/family violence or whether there is an increase of the reporting of such incidents;
- (b) whether, in an attempt to rebut the presumption of Equal Shared Parental Responsibility parties are raising allegations of abuse and family violence as a tool or sword;
- (c) whether (perhaps more so in the Western Australian context) parties are raising abuse/domestic violence to obtain exemption from FDR.

There is no conclusive explanation. However, it is significant that the trend in terms of the filing of Form 4s pre 2006 was downward. Post 2006 there has been a 53% year on year increase. Whilst there is probably an increase in the reporting rate, the desire of many parents to avoid the emotional costs and time delays associated with challenges of FDR may partly account for the dramatic rise in Form 4 filings.

Separating parents

The Institute's profile of the socio-economic demographic characteristics of separating parents post 1 July 2006 is unlikely to surprise service system professionals, the judiciary, and lawyers:

While the family law system deals with families from all sectors of society, separated parents have, on

⁵⁷ Ibid p 313.

⁵⁸ Ibid p 313.

average, a lower level of education and lower income and are more likely to have a preschool-aged child when they separate than parents who stay together.⁵⁹

Interim decisions

Interpreting and applying the 2006 reforms has presented many challenges for lawyers and the bench alike post *Goode and Goode* as explained by a judicial officer as follows:

*The real difficulties are that there are often many contested questions of fact, typically in the area of family violence. Some of the allegations are really in the nature of criminal offences. So to make a finding that the ground has been substantiated, to rebut the presumption of equal shared parental responsibility on an interim hearing, the theory... sounds good, the reality is different. Because of the constraints on time and the nature of an interim hearing rarely permit that issue to be looked at in real depth.*⁶⁰

It would appear two strategies have developed in the face of such challenges:

- (a) litigants not seeking Equal Shared Parental Responsibility on an interim basis, as absent an order to the contrary parental responsibility is presumed pursuant to section 61C; and
- (b) an increasing preference amongst judicial officers to exercise their discretion not to apply the presumption and to make arrangements that prioritise the safety of the children.⁶¹

Not surprisingly some lawyers have suggested that such a judicial approach is inconsistently applied in interim proceedings particularly in the Federal Magistrates Court:

*A community legal centre lawyer noted that, even when allegations were raised and supported by evidence—including family violence orders made under state legislation—“we’re finding that is not making a great deal of difference to the arrangements that have been put in place for children”.*⁶²

Conclusions

Arising from the comprehensive research of the Institute the following conclusions can be made with some confidence in the context of the 2006 reforms:

- (a) the reforms and particularly the philosophy of shared parental responsibility and shared care have been overwhelmingly welcomed by parents, legal system professionals and relationship service professionals;
- (b) the proportion of children in shared care arrangements has significantly increased and absent the 2011 amendments would have been likely to further increase in line with Australian and international trends;
- (c) the reforms have largely favoured fathers;
- (d) in very global terms Fathers have received approximately 5% (2006/07 vs. 2008/09) more in asset distributions post reform;

⁵⁹ Ibid Table 2.2 p 26.

⁶⁰ Ibid p 337.

⁶¹ Ibid.

⁶² Ibid.

- (e) the reforms have focused the minds of more fathers on the potential financial connection between child support and contact;
- (f) shared care does not appear to have a negative impact on the wellbeing of children, except where mothers had safety concerns;
- (g) court filings have decreased by 22% (2006/07 vs. 2008/09) and parents are increasingly using the services of lawyers to draft consent orders and to initiate proceedings but less so in determined matters;
- (h) the number of form 4 filings across the Family Court of Australia; the Federal Magistrates Court and the Family Court of WA have increased dramatically by 53% (2006/07 vs. 2008/09) as have the percentage of cases where Form 4s are filed; and
- (i) children's law post the reforms and *Goode and Goode* is increasingly complex to the bench, practitioners and parents alike.

The future

Against this background it is difficult to predict whether the amendments in practice will meet the government's stated objectives. Some commentators have suggested the government's true purpose was to repeal the shared parenting provisions introduced by the Howard government.⁶³ However, all bills introduced into the federal parliament retained the shared parenting provisions. It is difficult to see, absent some check, how the more broadly (and in some cases) loosely defined concepts of child abuse and family violence are likely to lead to anything other than:

- further significant increases in Form 4 filings and the resultant strain on already scarce court resources;
- dramatically increased filing of interim and trial affidavit material re allegations that by their very nature and statutory definition (or lack thereof) are very difficult to prove and determine;
- increased orders for interim supervision on fathers (in the main) and a resultant hardening of the parties positions;
- increased waiting lists at third party supervision agencies;
- a real risk of reversing reversal of the increasing trend (in Australia and overseas) toward shared care arrangements.

This is not to minimise the importance of child abuse or family violence and the devastating consequences for its victims. However, in the view of the writer the practice of the Court has generally been to prioritise protection over promotion. The inclusion of s.60CC(2A) does no more than enshrine in legislation the general practice of the Court. It would be a perverse outcome if the ultimate consequence of the 2011 amendments was to halt or hinder the increased trend towards (and the widely acclaimed benefits of) shared care and Equal Shared Parental Responsibility. Unless of course, the government's true purpose was to derail the 2006 amendments by stealth. Some would suggest that after the 2011 amendments mothers are now 'on the front foot'. Machiavellian ponderings aside, it is to the Court in the exercise of its legitimate and broad discretion in the context of relevant evidence that parents can rely upon to apply the 2011 amendments.

⁶³ *Family Law Change Puts Kids at Risk*, The Australian, 3 May 2011.

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