The Senate

Legal and Constitutional Affairs Legislation Committee

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

August 2011

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CHAPTER 1

Introduction

Purpose of the Bill

1.1 On 25 March 2011, the Senate referred the provisions of the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 (Bill) to the Legal and Constitutional Affairs Legislation Committee for inquiry and report by 23 June 2011.[1] The Bill was introduced into the House of Representatives on 24 March 2011 by the Attorney-General, the Hon. Robert McClelland MP. The Senate extended the reporting date to allow the committee to table its report on 22 August 2011.[2]

1.2 The stated purpose of the Bill is to amend the *Family Law Act 1975* (Act) to provide better protection for children and families at risk of violence and abuse. The Bill also makes several technical amendments to correct drafting errors and minor policy oversights, and to provide efficiencies for the courts and litigants.[3]

1.3 The Explanatory Memorandum (EM) states that the Bill is the Australian Government's response to three reports regarding reforms introduced by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (2006 family law reforms) and how the family law system deals with family violence. These reports are:

- the Australian Institute of Family Studies, *Evaluation of the 2006 family law reforms*;[4]
- the Hon. Professor Richard Chisholm AM, *Family Courts Violence Review*; [5] and
- the 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*.[6]

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1 Journals of the Senate, No. 27-25 March 2011, p. 789.

2 Journals of the Senate, No. 31-14 June 2011, p. 941; Journals of the Senate, No. 42-16 August 2011, p. 1245; Journals of the Senate, No. 44-18August 2011, p. 1285.

3 Explanatory Memorandum, p. 1.

4 Australian Institute of Family Studies, *Evaluation of the 2006 family law reforms*, December 2009.

5 The Hon. Professor Richard Chisholm AM, *Family Courts Violence Review*, 27 November 2009.

6 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*, December 2009.

1.4 The EM acknowledges that there are other relevant research reports, which provide a strong evidence base for reform.[7] Many of these reports are listed but the October 2010 report, *Family Violence–A National Legal Response*, published jointly by the Australian Law Reform Commission (ALRC) and the New South Wales Law Reform Commission (NSWLRC), is not mentioned in the EM.[8]

1.5 In November 2010, the Attorney-General's Department (Department) released an Exposure Draft of the Bill (Exposure Draft) for public comment. The Consultation Paper also did not refer to the ALRC and NSWLRC research report.

1.6 In the Second Reading Speech, the Attorney-General stated that the measures proposed in the Bill received overwhelming support from the community, and bodies and professionals working within the family law system. The Attorney-General elaborated that, of the 400 submissions received by the Department, 73% of submitters supported the Exposure Draft and 10% of submitters offered information about their personal experience.[9]

1.7 The Attorney-General further advised that the Australian Government has taken into account all submissions that were received during the public consultation process, and that 'we have refined the measures that are proposed today in light of that process'.[10]

1.8 As rationale for the Bill, the EM states that the research reports indicate that the Act fails to adequately protect children and other family members from violence and abuse:

> The safety of children is of critical importance...The family law system must prioritise the safety of children to ensure the best interests of children are met.[11]

1.9 To address this concern, the key provisions of the Bill aim to:

- prioritise the safety of children in parenting matters;
- change the definitions of 'abuse' and 'family violence' to better capture harmful behaviour;

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7 Explanatory Memorandum, p. 1. For a comprehensive explanation of the evidence on which the Bill is based: see Attorney-General's Department, answer to question on notice, received 22 July 2011, pp 2-5.

8 The Attorney-General's Department subsequently indicated that some of the ALRC and NSWLRC's findings were considered in the formulation of the Bill: see Mrs Toni Pirani, Attorney-General's Department, *Committee Hansard*, 8 July 2011, p. 58.

9 The Hon. Robert McClelland MP, Attorney-General, *House Hansard*, 24 March 2011, p. 3141.

10 The Hon. Robert McClelland MP, Attorney-General, *House Hansard*, 24 March 2011, p. 3141.

11 Explanatory Memorandum, p. 1.

- strengthen the obligations of advisers 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.[12]

Conduct of the inquiry

1.10 The committee advertised its inquiry in *The Australian* on 30 March 2011, 13 April 2011 and 27 April 2011. Details of the inquiry, the Bill and associated documents were placed on the committee's website. The committee also wrote to 102 organisations and individuals, inviting submissions by 29 April 2011. The committee encouraged and continued to accept submissions and supplementary submissions up to, and including, 21 August 2011.

1.11 The committee received 275 submissions, which are listed at Appendix 1. Public versions of submissions authorised for publication are available online at http://www.aph.gov.au/senate/committee/legcon_ctte/index.htm.

1.12 The committee held a public hearing in Canberra on 8 July 2011.

1.13 A list of witnesses who appeared at the hearing is at Appendix 2, and copies of the *Hansard* transcript are available through the internet at http://www.aph.gov.au/hansard.

Acknowledgement

1.14 The committee thanks those organisations and individuals who made submissions and gave evidence at the public hearing.

Scope of the report

1.15 Chapter 2 provides a brief overview of the Bill. Chapter 3 discusses the key issues raised in submissions and evidence, as well as providing the committee's conclusions and recommendations.

Notes on references

1.16 References in this report are to individual submissions as received by the committee, not to a bound volume. References to the committee *Hansard* are to the proof *Hansard*: page numbers may vary between the proof and the official *Hansard*.

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12 Explanatory Memorandum, p. 2.

CHAPTER 2

Overview of the Bill

2.1 This chapter describes some of the main provisions in the Bill.

2.2 The Bill comprises two schedules of amendments. Part 1 of Schedule 1 sets out amendments relating to family violence in the Act. Part 1 of Schedule 2 sets out all other amendments to the Act and amendments to the *Bankruptcy Act 1966*. Part 2 of both schedules contain application and transitional provisions.

2.3 The EM and the Second Reading Speech clearly indicate that Part 1 of Schedule 1 contains the key provisions of the Bill.[1] For this reason, and due to the nature of the evidence received throughout the inquiry, Chapter 2 focuses on those provisions, and the application provision proposed in item 45 of Schedule 1.

Key provisions relating to family violence

2.4 The primary objective of the Bill is to 'positively address family violence and child abuse in the family law system'.[2] To achieve this objective, the Bill proposes five categories of key amendments and each of these is discussed below.

Prioritising the best interests of children in parenting matters

Convention on the Rights of the Child

2.5 Current section 60B of the Act sets out the objects and underlying principles of Part VII of the Act, which deals with child-related matters. The overarching objective is to ensure that the 'best interests of children' are met when making parenting orders and in applying other provisions which involve court proceedings.

2.6 Proposed new subsection 60B(4) adds as an additional object the Convention on the Rights of the Child (Convention) 'done' at New York on 20 November 1989. This Convention was ratified by Australia on 17 December 1990.[3]

2.7 The EM states:

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

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

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

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

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

Primary considerations in determining a child's best interests

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

2.9 Subsection 60CC(2) reads:

> Primary considerations
>
> (2) The primary considerations are:
>
> (a) the benefit to the child of having a meaningful relationship with both of the child's parents; and
>
> (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.
>
> Note: Making these considerations the primary ones is consistent with the objects of this Part set out in paragraphs 60B(1)(a) and (b).

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

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

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

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

Additional consideration – repeal of the 'friendly parent' provisions

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

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4 Explanatory Memorandum, p. 6.

5 Explanatory Memorandum, p. 7.

2.13 These provisions read as follows:

> Additional considerations
>
> (3) Additional considerations are:
>
> ...
>
> (c) the willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent;
>
> ...
>
> (4) Without limiting paragraphs (3)(c) and (i), the court must consider the extent to which each of the child's parents has fulfilled, or failed to fulfil, his or her responsibilities as a parent and, in particular, the extent to which each of the child's parents:
>
> (a) has taken, or failed to take, the opportunity:
>
> (i) to participate in making decisions about major long-term issues in relation to the child; and
>
> (ii) to spend time with the child; and
>
> (iii) to communicate with the child; and
>
> (b) has facilitated, or failed to facilitate, the other parent:
>
> (i) participating in making decisions about major long-term issues in relation to the child; and
>
> (ii) spending time with the child; and
>
> (iii) communicating with the child; and
>
> (c) has fulfilled, or failed to fulfil, the parent's obligation to maintain the child.
>
> (4A) If the child's parents have separated, the court must, in applying subsection (4), have regard, in particular, to events that have happened, and circumstances that have existed, since the separation occurred.

2.14 The Bill proposes to repeal all of the 'friendly parent' provisions. However, some of the repealed provisions are re-enacted and some are not:

- current paragraph 60CC(3)(c) is not re-enacted;
- current paragraph 60CC(4)(a) becomes new paragraph 60CC(3)(c);
- current paragraph 60CC(4)(b) is not re-enacted;
- current paragraph 60CC(4)(c) becomes new paragraph 60CC(3)(ca); and
- current paragraph 60CC(4A) is not re-enacted.

2.15 The Bill repeals and replaces paragraph 60CC(3)(c) (item 18) on the following grounds:

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

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

2.16 Proposed new paragraph 60CC(3)(c) requires courts to consider the extent to which each parent has taken, or failed to take, the opportunity to:

- participate in making decisions about major long-term issues in relation to a child;
- spend time with the child; and
- communicate with the child.

2.17 Proposed new paragraph 60CC(3)(ca) reads:

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

Additional consideration – family violence orders

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

> Additional considerations
>
> (3) Additional considerations are:
>
> ...
>
> (k) any family violence order that applies to the child or a member of the child's family, if:
>
> (i) the order is a final order; or
>
> (ii) the making of the order was contested by a person[.]

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

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

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

> ***abuse***, in relation to a child, means:
>
> (a) an assault, including a sexual assault, of the child; or

---

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

7 Explanatory Memorandum, p. 8.

(b) a person (the first person) involving the child in a sexual activity with the first person or another person in which the child is used, directly or indirectly, as a sexual object by the first person or the other person, and where there is unequal power in the relationship between the child and the first person; or

(c) causing the child to suffer serious psychological harm, including (but not limited to) when that harm is caused by the child being subjected to, or exposed to, family violence; or

(d) serious neglect of the child.

2.21 In relation to proposed paragraph (c), proposed new subsection 4AB(3) inserts the following definition of 'exposed' into the Act:

(3) For the purposes of this Act, a child is ***exposed*** to family violence if the child sees or hears family violence or otherwise experiences the effects of family violence.

2.22 A non-exhaustive list of examples of situations that may constitute a child being exposed to family violence are set out in proposed new subsection 4AB(4):

(a) overhearing threats of death or personal injury by a member of the child's family towards another member of the child's family; or

(b) seeing or hearing an assault of a member of the child's family by another member of the child's family; or

(c) comforting or providing assistance to a member of the child's family who has been assaulted by another member of the child's family; or

(d) cleaning up a site after a member of the child's family has intentionally damaged property of another member of the child's family; or

(e) being present when police or ambulance officers attend an incident involving the assault of a member of the child's family by another member of the child's family[.]

2.23 The Bill redefines 'family violence' in proposed new subsection 4AB(1) (item 8) to read:

(1) For the purposes of this Act, ***family violence*** means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the ***family member***), or causes the family member to be fearful.

2.24 A non-exhaustive list of examples of behaviour which might constitute family violence is set out in proposed new subsection 4AB(2):

(a) an assault; or

(b) a sexual assault or other sexually abusive behaviour; or

(c) stalking; or

(d) repeated derogatory taunts; or

(e) intentionally damaging or destroying property; or

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

Strengthening the obligations of advisers

2.25 Proposed new section 60D (item 22) outlines an adviser's obligations when giving advice or assistance to a person about matters concerning a child and Part VII of the Act. An adviser will be required to:

> (a) inform the person that the person should regard the best interests of the child as the paramount consideration; and
>
> (b) encourage the person to act on the basis that the child's bests interests are best met:
>
> > (i) by the child having a meaningful relationship with both of the child's parents; and
> >
> > (ii) by the child being protected from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and
> >
> > (iii) if there is any inconsistency in applying the considerations set out in subparagraphs (i) and (ii)–by giving greater weight to the consideration set out in subparagraph (ii).

2.26 An adviser is defined in proposed subsection 60D(2) as a legal practitioner, family counsellor, family dispute resolution practitioner or family consultant.

2.27 The EM explains:

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

8 Explanatory Memorandum, p. 10.

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

Informing the court

2.28 Proposed new section 60CH (item 21) requires parties to parenting proceedings to inform the court if a child, or another child who is a member of the child's family, is under the care of a person under a child welfare law.

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

2.30 The EM notes:

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

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

Allegations of 'abuse' or 'family violence'

2.32 Current section 67Z requires a party to proceedings to file and serve a prescribed form (currently a Family Court of Australia Form 4) if the party alleges that a child to whom the proceedings relate has been abused or is at risk of being abused. The Registry Manager (as defined in the Act) must then, as soon as practicable, notify a prescribed child welfare authority.

2.33 The Bill will apply section 67Z to an 'interested person' (items 30 and 31). Proposed new subsection 67Z(4) (item 32) defines 'interested person' to mean:

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

9 Explanatory Memorandum, p. 9.

2.34 Proposed new section 67ZBA (item 34) extends the obligation under section 67Z to proceedings for an order under Part VII where there is alleged, or a risk of, family violence.

2.35 Current section 60K requires the court to take prompt action in relation to allegations of child abuse or family violence. Proposed new section 67ZBB (item 34) replaces current section 60K. The EM states that the amendment effectively relocates section 60K to a more appropriate position in the Act.[10]

2.36 Proposed new section 67ZBB reads:

> (1) This section applies if:
>
> > (a) a notice is filed under subsection 67Z(2) or 67ZBA(2) in proceedings for an order under this Part in relation to a child; and
> >
> > (b) the notice alleges, as a consideration that is relevant to whether the court should make or refuse to make the order, that:
> >
> > > (i) there has been abuse of the child by one of the parties to the proceedings; or
> > >
> > > (ii) there would be a risk of abuse of the child if there were to be a delay in the proceedings; or
> > >
> > > (iii) there has been family violence by one of the parties to the proceedings; or
> > >
> > > (iv) there is a risk of family violence by one of the parties to the proceedings.
>
> (2) The court must:
>
> > (a) consider what interim or procedural orders (if any) should be made:
> >
> > > (i) to enable appropriate evidence about the allegation to be obtained as expeditiously as possible; and
> > >
> > > (ii) to protect the child or any of the parties to the proceedings; and
> >
> > (b) make such orders of that kind as the court considers appropriate; and
> >
> > (c) deal with the issues raised by the allegation as expeditiously as possible.
>
> (3) The court must take the action required by paragraphs (2)(a) and (b):
>
> > (a) as soon as practicable after the notice is filed; and
> >
> > (b) if it is appropriate having regard to the circumstances of the case– within 8 weeks after the notice is filed.

10 Explanatory Memorandum, p. 12.

A judicial duty to inquire

2.37 Current section 69ZN sets out five principles which a court must apply in the conduct of child-related proceedings. Subsection 69ZN(5) contains Principle 3:

> (5) The third principle is that the proceedings are to be conducted in a way that will safeguard:
>
> > (a) the child concerned against family violence, child abuse and child neglect; and
> >
> > (b) the parties to the proceedings against family violence.

2.38 The Bill repeals and replaces paragraph 69ZN(5)(a) (item 37) to read:

> (a) the child concerned from being subjected to, or exposed to, abuse, neglect or family violence[.]

2.39 According to the EM, this amendment aims to provide consistent terminology throughout Part VII of the Act.[11] It is also relevant to current section 69ZQ which details a court's general duties in giving effect to the principles established in section 69ZN.

2.40 The Bill amends the general duties by inserting a new obligation – paragraph 69ZQ(1)(aa) – for a court to:

> (aa) ask each party to the proceedings:
>
> > (i) whether the party considers that the child concerned has been, or is at risk of being, subjected to, or exposed to, abuse, neglect or family violence; and
> >
> > (ii) whether the party considers that he or she, or another party to the proceedings, has been, or is at risk of being, subjected to family violence[.]

2.41 The EM notes that this proactive obligation does not extend to 'other information which might be useful evidence from people or agencies other than parties to the proceedings'.[12]

Adverse costs orders

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

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

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11 Explanatory Memorandum, p. 14.

12 Explanatory Memorandum, p. 14.

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

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

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

2.44 Current section 91B provides that the court may request the intervention of federal, state or territory child welfare officers in any proceedings under the Act that affect, or may affect, the welfare of a child. In such cases, subsection 91B(2) deems the officer a party to the proceedings with all the rights, duties and liabilities of a party.

2.45 Proposed new subsection 117(4A) (item 42) introduces an immunity from adverse costs orders, or security for costs orders, for a federal, state or territory child welfare officer whose intervention has been requested under section 91B and who has acted in good faith in relation to those proceedings.

Application provision

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

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

2.47 The EM states:

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

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

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13 Explanatory Memorandum, p. 15.

14 Explanatory Memorandum, p. 15.

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

Financial implications

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

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

16 Explanatory Memorandum, p. 2.

CHAPTER 3

Key issues

3.1 Throughout the inquiry, the majority of participants expressed support for the Bill's stated objective, that is, to provide better protection for children and families at risk of violence and abuse.[1] However, submitters and witnesses expressed a diverse range of views about the proposed amendments, and provisions in the Act relating to equal shared parental responsibility.

3.2 This chapter discusses the key issues, including:

- addition of the Convention on the Rights of the Child as a new object of Part VII of the Act;
- primary considerations in determining a child's best interests;
- additional considerations of:
  - the 'friendly parent' provisions; and
  - family violence orders;
- new definitions of 'abuse' and 'family violence';
- provision of information to the Family Court of Australia by third parties;
- obligation of advisers to prioritise the safety of children;
- judicial duty to take prompt action in relation to allegations;
- judicial duty to inquire into abuse, neglect and family violence;
- repeal of the mandatory costs orders provision;
- retrospective effect of the application provision in item 45 of Schedule 1;
- resourcing implications for the Family Court of Australia;
- equal shared parental responsibility; and
- need for a public education campaign about the Bill's proposed measures.

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1 Explanatory Memorandum, p. 1.

Addition of the Convention on the Rights of the Child as a new object of Part VII of the Act

3.3 Proposed new subsection 60B(4) adds as an additional object of Part VII of the Act the Convention on the Rights of the Child (Convention) 'done' at New York on 20 November 1989.

3.4 Submissions commented briefly on this amendment, some expressing support for the proposed provision and others opposing its inclusion in the Act.[2]

3.5 Associate Professor Juliet Behrens and Professor Belinda Fehlberg, for example, welcomed proposed new subsection 60B(4) but noted that further legislation would be necessary to fully implement the Convention.[3]

3.6 The Women's Legal Centre (ACT and Region) considered it important for the Australian Government's international commitment to promote the best interests of children to 'be included in legislation [which] has such a profound impact on children'.[4]

3.7 As a minor matter of style, the Australian Law Reform Commission (ALRC) suggested:

> [Proposed new subsection 60B(4)] be amended so that the current reference to [the Convention] being 'done' in New York on 20 November 1989 is replaced with a reference to it being 'opened for signature' or words to similar effect.[5]

3.8 In response to this suggestion, the Attorney-General's Department (Department) noted:

> [P]roposed subsection 60B(4) reflects the wording of the Convention's formal attestation as well as the drafting practice of the Office of Parliamentary Counsel for referring to international instruments.[6]

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2 For example, Fairness In Child Support, *Submission 15*, pp 4-6; Women's Legal Centre (ACT and Region), *Submission 26*, pp 2-3; Salt Shakers, *Submission 157*, p. 3; Shared Parenting Council of Australia, *Submission 204*, p. 20; Anglicare Victoria, *Submission 253*, p. 3. Also see Australian Human Rights Commission who supported proposed subsection 60B(4), and the inclusion of a legislative note referencing the Convention on the Elimination of all forms of Discrimination against Women and the Convention on the Rights of Persons with Disabilities: *Submission 254*, pp 7-9.

3 *Submission 32*, p. 1.

4 *Submission 26*, p. 2.

5 *Submission 69*, Attachment 1, p. 2.

6 Answer to question on notice, received 22 July 2011, p. 9. A number of Commonwealth Acts using the same drafting convention were provided as examples.

Primary considerations in determining a child's best interests

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

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

3.10 In general, submitters agreed with the principle underpinning the proposed amendment, that is, the prioritisation of the protection of children from physical or psychological harm.[7] However, several submitters questioned the way in which the Bill seeks to give effect to this principle. The two main arguments concerned the practical application of the proposed provision and the wisdom of a two-tiered approach to determining what is in a child's best interests.[8]

3.11 Professor Richard Chisholm, author of one of the reports on which the Bill is based,[9] supported proposed new subsection 60CC(2A) but argued that it will not solve the current problems in balancing the two primary considerations. In addition, Professor Chisholm identified the following application problems:

> The decision-maker still needs to decide whether a consideration is 'primary' or merely 'additional', and decide what special weight, if any, should be given to the former. With the new (2A), the decision-maker will also have to decide whether there is an inconsistency between (2)(a) and (2)(b). If there is, 'greater weight' must be given to paragraph (b)–but how much greater? These may not be insuperable difficulties, but the proposed (2A) seems certain, unfortunately, to increase the amount of complication and technicality relating to determining what is best for children.[10]

3.12 In a similar vein, the Family Law Council remarked:

> [Proposed new subsection 60CC(2A)] assumes that the core failing of section 60CC is the relative weighting given by the courts to the primary considerations. Council considers this fails to recognise the broader problems associated with the two-tiered construction of section 60CC identified in the research reports. In Council's view, the addition of proposed subsection 60CC(2A) will not be adequate to challenge the present misperceptions of the law, and may add a further level of complexity to the process of decision-making.[11]

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7 Explanatory Memorandum, p. 7.

8 A third argument was that proposed new subsection 60CC(2A) fetters judicial discretion: see, for example, the Family Law Practitioners Association of WA, *Submission 91*, pp 3-4; Family Law Practitioners' Association of Queensland, *Submission 132*, p. 2.

9 The Hon. Professor Richard Chisholm AM, *Family Courts Violence Review*, 27 November 2009.

10 *Submission 203*, p. 8.

11 *Submission 113*, p. 9.

3.13 Professor Chisholm suggested that, if the proposed provision is to remain in the Bill, one layer of legislative complexity could be eliminated from section 60CC by redrafting proposed new subsection 60CC(2A) to eliminate the need for a determination of inconsistency between paragraphs 60CC(2)(a) and 60CC(2)(b). Professor Chisholm stated that the following proposal suggested by Ms Donna Cooper in a 2011 journal article merited careful consideration:

> (2A) That when applying the considerations set out in subsection (2), the court is to give greater weight to the consideration set out in paragraph (2)(b).[12]

3.14 Associate Professor Behrens and Professor Fehlberg preferred section 60CC to indicate that the overriding consideration in determining a child's best interests is the safety and protection of children from harm caused by family violence, neglect and abuse (effectively paragraph 60CC(2)(b)). In their view, proposed new subsection 60CC(2A) 'suggests that violent and abusive relationships can be meaningful and that children can benefit from them'.[13]

3.15 Dr Lesley Laing, a senior lecturer at the Faculty of Education and Social Work at the University of Sydney and a published author in the area of domestic violence, submitted:

> The safety and protection of children should be prioritised above all else. Its priority should not be subject to proving an 'inconsistency' with other considerations.[14]

3.16 Instead of redrafting proposed new subsection 60CC(2A), some submitters advocated either amending current subsection 60CC(2) or abandoning the distinction between current subsections 60CC(2) and 60CC(3) (the primary and additional considerations, respectively, for determining a child's best interests) as a means of achieving the Bill's objectives.

3.17 For example, Associate Professor Helen Rhoades and Professor John Dewar submitted:

> [T]he Government's aims would be better achieved by removing the demarcation between the two tiers of factors in section 60CC to create a single list of matters in which the safety of children is listed as the first consideration and given priority.[15]

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12 Ms Donna Cooper, *Continuing the critical analysis of 'meaningful relationships'*, (2011), 16 Aust J Fam Law 33, quoted in Professor Richard Chisholm, *Submission 203*, p. 8.

13 *Submission 32*, p. 3.

14 *Submission 197*, p. 4. For similar views, also see Relationships Australia, *Submission 71*, p. 2; Caxton Legal Centre, *Submission 72*, p. 4; Ms Bronwynne Luff, *Submission 164*, p. 1; Armadale Domestic Violence Intervention Project, *Submission 179*, p. 2; Immigrant Women's Support Service, *Submission 181*, p. 2; Delvena Women's Refuge, *Submission 182*.

15 *Submission 9*, p. 3. For an identical view, see Family Law Council, *Submission 113*, p. 4.

3.18 A number of submitters agreed, the common viewpoint being comprehensively expressed by Women's Legal Services Australia as follows:

> *Preference 1*
>
> There should be no primary considerations at all but one list of factors for consideration:
>
> - where the safety and protection of children is listed as the first consideration and given priority;
> - that having a meaningful relationship be listed as one of the many factors;
> - that the courts should weigh up all of the factors on the list depending on the circumstances of each individual case.
>
> *Preference 2*
>
> If primary considerations are retained, there should only be one primary consideration which should be the safety and protection of children.
>
> *Preference 3*
>
> If neither of those options are accepted, at a minimum, the proposed subsection 60CC(2A) should be redrafted as follows:
>
> *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).*[16]

3.19 Domestic Violence Victoria, the Domestic Violence Resource Centre Victoria, the Federation of Community Legal Centres Victoria, Women with Disabilities Victoria, and the Victorian Women's Trust favoured the second option identified by Women's Legal Services Australia. Their joint submission emphasised the pre-eminence of a child's right to safety:

> [T]he present Act, in its emphasis on shared parenting, often leads to contact orders that are inconsistent with expert knowledge about child development. Worse, where family violence is present, a child's right to safety can often come second. In practical effect, the Act currently tends to prioritise the first principle of meaningful involvement with each parent [paragraph 60CC(2)(a)] at the expense of children's and women's rights to safety [paragraph 60CC(2)(b)]. The framing of these criteria takes the focus

16 *Submission 62*, p. 10. Also see, for example, Northern Rivers Community Legal Centre, *Submission 23*, p. 3; Women's Legal Centre (ACT and Region), *Submission 26*, p. 3; Peninsula Community Legal Centre, *Submission 40*, p. 4; Wirringa Baiya Aboriginal Women's Legal Service, *Submission 65*, pp 2-3; Women's Legal Service Tasmania, *Submission 70*, p. 4; Caxton Legal Centre, *Submission 72*, p. 4; Australian Association of Social Workers, *Submission 69*, pp 3-4; Women Everywhere Advocating Violence Elimination, *Submission 114*, p. 5; Top End Women's Legal Service, *Submission 176*, p. 3; Shoalcoast Community Legal Centre, *Submission 177*, p. 3.

> away from the best interests of the child, and places the emphasis on parental rights.[17]

3.20 Family Relationship Services Australia also supported the need for current subsection 60CC(2) to place greater emphasis on a child's rights. However, its support was conditional on the child concerned being involved in the decision-making process:

> Research by Mudaly & Goddard (2006) emphasises the importance of giving children and young people who have experienced abuse or neglect by a parent the opportunity to tell their story and participate in decisions about whether to maintain the relationship, albeit with appropriate safety precautions. For some children, maintaining their relationship with a parent who has been violent or abusive can be very important to the child's sense of identity and healing.[18]

Departmental response

3.21 A representative from the Department reiterated that proposed new subsection 60CC(2A) is based on several reports concerning the way in which the family law system responds to violence. A common theme in these reports is that unsafe parenting arrangements are still being made in respect of some families. The key piece of evidence cited by the Department was the findings of the Australian Institute of Family Studies in an evaluation of the 2006 family law reforms. Of particular note was that '[a]round one in five parents reported safety concerns associated with ongoing contact with the child's other parent'.[19]

3.22 Accordingly, the Department's brief in preparing the Bill was:

> to come up with legislation that would prioritise the safety of children without winding back the shared care reforms. This is the balance that has been achieved to prioritise the safety of children without undermining the

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17 *Submission 130*, pp 3-4. Also see Victoria Police, *Submission 178*, p. 3; Sole Parents' Union, *Submission 183*, p. 3; Ms Kerry Davies, Project Worker, Council of Single Mothers and their Children, *Committee Hansard*, 8 July 2011, pp 28-29 (all of whom favoured the second option identified by Women's Legal Services Australia).

18 *Submission 163*, pp 7-8. Other submissions agreed with the concept that parental rights should be secondary to the rights of a child: see, for example, Name Withheld, *Submission 97*, p. 1; Name Withheld, *Submission 99*, p. 1; Ms Linda Tan, Ms Jennifer Walker, Ms Natalie Haddad, Ms Danielle Moglia and Ms Jessica Frearson, *Submission 106*, p. 3; Name Withheld, *Submission 122*, p. 1. Also see Justice for Children, *Supplementary Submission 2*, p. 1 which supported a child's right to participate in decision-making processes.

19 Australian Institute of Family Studies, *Evaluation of the 2006 family law reforms*, December 2009, p. E2. Also see Mrs Toni Pirani, Attorney-General's Department, *Committee Hansard*, 8 July 2011, pp 60-61; Attorney-General's Department, answer to question on notice, received 22 July 2011, p. 3; Australian Institute of Family Studies, *Submission 174*, p. 5.

> ability of children to have a meaningful relationship with both of their parents where that is safe.[20]

Additional consideration of the 'friendly parent' provisions

3.23 Many submitters supported the repeal of the facilitation aspect of the 'friendly parent' provisions (current paragraph 60CC(4)(b)) on the grounds that it discourages disclosures of family violence and child abuse.[21]

3.24 However, as observed by the Department, 'there are competing considerations with regard to the retention or removal' of current paragraph 60CC(4)(b).[22] Some inquiry participants did not support proposed new paragraph 60CC(3)(c), which re-enacts current paragraphs 60CC(4)(a) and (c) but not paragraph 60CC(4)(b). The two main reasons for this lack of support were the potential application of the proposed provision and the continuing relevance of the 'friendly parent' provisions.[23]

Opposition to removal of the 'friendly parent' provisions

3.25 In relation to the first argument, the Family Law Practitioners Association of WA, for example, submitted that proposed new paragraph 60CC(3)(c) does not take into account 'the potential, and capacity, of one parent to thwart the other's ability to take up the opportunities outlined'. The Family Law Practitioners Association of WA suggested redrafting the proposed provision to read:

> (c) the extent to which each of the child's parents has <u>facilitated the other taking</u>, and has themselves taken, or failed to take, the opportunity...[24]

3.26 An example of a potentially inequitable application of proposed new paragraph 60CC(3)(c) was cited by the Australian Association of Social Workers. Its

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20 Mrs Toni Pirani, Attorney-General's Department, *Committee Hansard*, 8 July 2011, p. 60.

21 For example, see Associate Professor Helen Rhoades and Professor John Dewar, *Submission 9*, p. 1; Professor Patrick Parkinson, *Submission 14*, p. 1; Associate Professor Juliet Behrens and Professor Belinda Fehlberg, *Submission 32*, p. 3; National Peak Body for the Safety and Protection of Parents and Children, *Submission 33*, p. 8; Redfern Legal Centre and Sydney Women's Domestic Violence Court Advocacy Service, *Submission 48*, p. 4; Women's Domestic Violence Court Advocacy Service Network, *Submission 66*, p. 3; Name Withheld, *Submission 99*, p. 3; Women's Information and Referral Exchange, *Submission 112*, p. 2; Name Withheld, *Submission 160*, p. 2; Ms Bronwynne Luff, *Submission 164*, p. 4; Victims of Crime Assistance League, *Submission 166*, p. 9; Dr Lesley Laing, *Submission 197*, p. 4; Professor Richard Chisholm, *Submission 203*, p. 12. However, note that Mr Geoff Sinclair reported that his professional experience did not accord with the findings of the Australian Institute of Family Studies: Law Council of Australia, *Committee Hansard*, 8 July 2011, p. 52.

22 Answer to question on notice, received 22 July 2011, p. 10.

23 A third argument was that proposed new paragraph 60CC(3)(c) is not substantially different from the 'friendly parent' provision: see Ms Zoe Rathus AM, *Submission 201*, p. 26.

24 *Submission 91*, p. 3 with emphasis in the original document.

submission described the situation where a violent parent has obtained primary care of a child and a victim parent has been denied contact with that child:

> We recognise that in such situations, the parent who is the victim of violence is in a powerless position as the cycle of control and coercion continue[s] to be perpetuated by the violent parent. This then can create unfair and unintended consequences as the victim is deemed to have 'failed' in their duties as a parent, without consideration of the complexity of the situation.[25]

3.27 Another three submitters argued that repealing the 'friendly parent' provisions rewards those parents who actively prevent non-resident parents from having contact with their children.[26]

3.28 The Hawkesbury Nepean Community Centre, among others, expressed particular concern with how proposed new paragraph 60CC(3)(c) might be applied in cases where a parent has restricted contact as a means of protection, rather than with malicious intent.[27] The Council of Single Mothers and their Children and The Benevolent Society, shared this concern, as did the Women's Legal Service Queensland who submitted:

> [T]he proposed provision will still be used against women in domestic violence cases, where the mother will be forced to explain why she has chosen to limit her communications with the other parent about long-term decisions, spending time or communicating with the child or maintaining the child, when in fact the mother is acting to protect the child.[28]

3.29 A representative of the Council of Single Mothers and their Children contemplated that 'it would be understandable that the parent would not be required to facilitate the relationship' where family violence allegations had been made.[29] In its view, proposed new paragraph 60CC(3)(c) should be amended to clearly refer only to a parent's personal efforts regarding their relationship with, and obligations to, a child.[30]

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25 *Submission 173*, pp 4-5.

26 Mr Roger Smith, *Submission 45*, p. 1; Men's Health Australia, *Submission 60*, p. 2; Name Withheld, *Submission 134*, pp 1-2.

27 *Submission 107*, p. 10.

28 *Submission 80*, p. 7. Also see Council of Single Mothers and their Children, *Submission 74*, p. 4; The Benevolent Society, *Submission 131*, p. 6.

29 Ms Kerry Davies, Council of Single Mothers and their Children, *Committee Hansard*, 8 July 2011, p. 30.

30 Answer to question on notice, received 22 July 2011.

Continuing relevance of the 'friendly parent' provisions

3.30 In relation to the argument that the 'friendly parent' provisions remain a relevant consideration, the Joint Parenting Association argued that it is good parenting for one parent to foster and maintain a child's relationship with a non-resident parent:

> The removal of the factor regarding the willingness of each parent to encourage the child's relationship with the other parent moves in the opposite direction from comparable overseas jurisdictions and flies in the face of solid research about the importance of parents encouraging the child's relationship with both parents. Helping the child maintain a positive relationship with the other parent when the parents live apart from each other is considered a sign of good parenting, just as encouraging the child to achieve in school is a sign of good parenting. It falls within the category of meeting a child's emotional needs, which is one factor that courts consider in fashioning the parenting decree and the repeal of s60CC(3)(c) is not supported.[31]

3.31 FamilyVoice Australia likewise submitted:

> This valuable provision [current paragraph 60CC(3)(c)] encourages each parent of a child to cooperate with the other parent to serve the best interests of the child in accordance with the objects and underlying principles of the Act set out in [section] 60B.[32]

3.32 The Non-Custodial Parents Party (Equal Parenting) concurred, submitting that proposed new paragraph 60CC(3)(c) 'reveals a diminished view of the importance of maintaining a healthy relationship between both parents and the child'.[33]

3.33 The Caxton Legal Centre acknowledged that the 'friendly parent' provision could unduly affect victims of family violence attempting to protect themselves and their children, and parties who, through no fault of their own or due to the actions of the other party, have lost contact with the other parent. Its submission suggested:

> At the risk of burdening judicial officers with overly prescriptive legislative pathways, it is recommended that a parent's willingness and ability to facilitate children's relationship with the other parent be retained as a consideration in determining the best interests of a child, provided that, if the relationship has not been facilitated, consideration be granted to the reasons for this, including child abuse or family violence.[34]

3.34 At the public hearing, the Deputy Chief Justice of the Family Court of Australia, the Hon. John Faulks (Deputy Chief Justice) commented on the 'friendly parent' provisions as follows:

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31 *Submission 146*, p. 7.

32 *Submission 184*, p. 6.

33 *Submission 1*, p. 3.

34 *Submission 72*, p. 5.

> [T]he difficulty is that you have a section that would appear to be substantially aspirational, in the sense that it sets out a principle which would seem logically supportable by almost everyone involved in the family law system. It may be having consequences–which are at present undocumented but which are said to exist–which would be undesirable. If you choose to abolish the section to overcome those suggested consequences, it may send a message that is different from the aspiration that was previously encountered.[35]

Departmental response

3.35 The Department noted the importance of facilitation in separated families where parents are able to agree on parenting arrangements and families where safety is not a concern, but stated:

> The benefits of retaining the 'facilitation' aspects of the 'friendly parent' provision are outweighed by the importance of protecting children from harm.[36]

3.36 The Department further noted that current paragraph 60CC(3)(m) allows the Family Court of Australia to take into consideration 'any other fact or circumstance which the court thinks relevant'. The Department suggested that the Explanatory Memorandum could be revised to state that the repeal of any paragraph is not intended to restrict the matters to which the court may have regard under paragraph 60CC(3)(m).[37] This means that paragraph 60CC(3)(m) would continue to allow the court to have regard to 'facilitation' as an additional consideration.

Additional consideration of family violence orders

3.37 Proposed new paragraph 60CC(3)(k) requires the court to have regard to any family violence order that applies to a child or a member of the child's family.

3.38 The Family Law Council supported the proposed amendment. Its submission argued that proposed new paragraph 60CC(3)(k) removes an unnecessary distinction between particular types of orders (interim/final, contested/consensual) and enables the court to consider all relevant matters in determining the best interests of the child:

> Council is aware of the history of this provision and arguments that family violence orders are used to gain a strategic advantage in family law proceedings. However, evidence of family violence orders is relevant in determining safe parenting arrangements for the child.
>
> ...

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35 *Committee Hansard*, 8 July 2011, p. 33.

36 Answer to question on notice, received 22 July 2011, p. 10. Also see Professor Richard Chisholm, *Submission 203*, p. 12.

37 Answer to question on notice, received 22 July 2011, p. 10.

> It is important when assessing future risk that the court is able to consider all of the relevant information about the history of the parents' relationship, including past family violence orders.[38]

3.39 Associate Professor Behrens and Professor Fehlberg drew attention to an apparent contradiction between the word, 'any', and the word, 'applies', in proposed new paragraph 60CC(3)(k) in that the word 'applies' might:

> result in the exclusion of information about orders that are no longer in place, which may be of relevance in determining possible risk to the child and understanding the type of parenting provided to a child and the nature of the relationship between the child's parents.[39]

3.40 Although there was some debate concerning the inclusion of past family violence orders, the main point of contention was whether proposed new paragraph 60CC(3)(k) should refer to family violence orders themselves or the factual circumstances giving rise to those orders.

3.41 In 2009-2010, the ALRC and NSWLRC conducted a major inquiry into family violence throughout Australia.[40] The inquiry examined the practical interaction between the Act and state and territory family violence and child protection laws, along with relevant federal, state and territory criminal laws.

3.42 In the course of its joint inquiry, the ALRC and NSWLRC examined current paragraph 60CC(3)(k) and ultimately recommended that the paragraph be amended to read:

> **Recommendation 17-1** The 'additional consideration' in [section] 60CC(3)(k) of the *Family Law Act 1975* (Cth), which directs courts to consider only final or contested protection orders when determining the best interests of a child, should be amended to provide that a court, when determining the best interests of the child, must consider evidence of family violence given, or findings made, in relevant family violence protection order proceedings.[41]

3.43 The ALRC reiterated Recommendation 17-1 in its submission to this inquiry.[42] However, at the public hearing, the ALRC conceded that an alternate

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38 *Submission 113*, p. 12.

39 *Submission 32*, p. 3.

40 The Standing Committee of Attorneys-General has agreed to develop a national response to this inquiry. See Communiqué, 21-22 July 2011, available at: http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/vwFiles/SCAG_Communique_21-22_July_2011_FINAL.pdf/$file/SCAG_Communique_21-22_July_2011_FINAL.pdf (accessed 25 July 2011).

41 Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Legal Response*, October 2010, p. 29.

42 *Submission 69*, p. 10.

proposal put forward by Professor Chisholm 'captures very well the gist of the idea that the ALRC was putting forward'.[43]

3.44 In a supplementary submission, Professor Chisholm described current and proposed new paragraph 60CC(3)(k) as having an underlying problem. In his view, family violence orders themselves are an item of evidence, not a consideration or factor. Accordingly, family violence orders do not belong in subsection 60CC(3). In addition, Professor Chisholm noted that there is a problem with the drawing of inferences from family violence orders: the making of a family violence order does not tell the court anything about the evidentiary basis for the order.[44]

3.45 Professor Chisholm submitted:

> If a family violence order has been made, it is important that the family law court should know about it (section 60CF, appropriately, requires parties to inform the court of such orders). It should be treated as something that requires investigation, because it might well be an indicator of violence. What the family law court wants, of course, is evidence about the circumstances in which the order was made, and, most importantly, evidence about whether there really was violence, and if so what was its nature. The law should encourage people to provide that sort of evidence.
>
> ...
>
> [P]aragraph (k) should be amended to read something like this:
>
> (k) any relevant inferences that can be drawn from any family violence order that applies, or has applied, to the child or a member of the child's family, taking into account the nature of the order, the circumstances in which it was made, any evidence admitted and any findings made by the court that made the order, and any other relevant matter.[45]

3.46 The Deputy Chief Justice and Justice the Hon. Steven Strickland from the Family Court of Australia described Professor Chisholm's proposal as 'sensible',[46] but Women's Legal Services Australia was concerned with its complexity and expressed a preference for a more straightforward approach:

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43 Professor Rosalind Croucher, Australian Law Reform Commission, *Committee Hansard*, 8 July 2011, p. 2.

44 *Supplementary Submission 203*, p. 2.

45 *Supplementary Submission 203*, p. 4. Also see Professor Patrick Parkinson who did not support proposed new paragraph 60CC(3)(k) due to the public perception of family violence orders being sought as a tactic only in family law proceedings: see *Submission 14*, pp 6 and 9.

46 *Committee Hansard*, 8 July 2011, p. 31. For similar expressions of support see Council of Single Mothers and their Children, answer to question on notice, received 20 July 2011; Family Law Council, answer to question on notice, received 22 July 2011.

> Any relevant family violence order as applies to the child or a member of the child's family [should be considered], including a consideration of the circumstances in which the order was made.[47]

Departmental response

3.47 When asked for its view on Professor Chisholm's proposed new paragraph 60CC(3)(k), the Department stated that the existence of current family violence orders is directly relevant to concerns about a child's safety. Further, the courts routinely 'look behind' family violence orders to consider their supporting evidence:

> [Proposed new paragraph 60CC(3)(k)] arises from an objective fact that has a real connection to protecting the child from harm and ensuring the child's best interest. Retention of this factor does not constrain the court from considering the circumstances in which the order was made or apportioning certain weight in light of those circumstances.[48]

3.48 Consistent with its earlier advice, the Department noted that the Family Court of Australia could still have regard to past family violence orders under current paragraph 60CC(3)(m).[49]

New definitions of 'abuse' and 'family violence'

3.49 Submitters and witnesses provided the committee with considerable commentary regarding the proposed new definitions of 'abuse' and 'family violence'.

Definition of 'abuse'

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

> ***abuse***, in relation to a child, means:
>
> ...
>
> (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.

3.51 Many submissions supported a broader definition and understanding of 'abuse', including, in particular, exposure to family violence.[50] However, proposed new paragraphs (c) and (d) drew comment in relation to the high threshold required by

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47 Answer to question on notice, received 22 July 2011, p. 2.

48 Answer to question on notice, received 22 July 2011, p. 11.

49 Answer to question on notice, 22 July 2011, p. 11.

50 For example, Name Withheld, *Submission 28*, p. 2; Name Withheld, *Submission 92*, p. 1; Family Law Council, *Submission 113*, p. 6; Name Withheld, *Submission 118*, p. 3; NSW Women's Refuge Movement, *Submission 207*, p. 5.

the inclusion of the word 'serious' and perceived inconsistencies with other provisions of the Act.

3.52 The Law Council of Australia, for example, did not support the inclusion of the qualifier 'serious' in proposed new paragraph (c):

> Why should [psychological harm] be serious? How much psychological harm is acceptable? Removal of the word 'serious' would not affect the intent of the provision, as it would still be necessary to show that there was harm caused by family violence, and that should be enough to amount to abuse of a child.[51]

3.53 Men's Health Australia similarly submitted:

> The proposed changes define abuse, in relation to a child, as meaning "causing the child to suffer *serious* psychological harm" or "*serious* neglect of the child" (our emphasis). We would argue that *any* psychological harm or neglect of children should be considered child abuse. Why does the government believe that only "serious" psychological abuse or neglect should be defined as child abuse, while physical assault and sexual abuse are defined as child abuse whatever their level of seriousness?[52]

3.54 The Family Law Council cautioned:

> [A] message could be given to the general public that some forms of child abuse are not serious, whereas Council's view is that any form of child abuse – whether it be physical, emotional, psychological, sexual or neglect – is serious and therefore if a qualifier is put in, there is a concern some types of child abuse would become accepted in the community.[53]

3.55 The Law Council of Australia also drew attention to the apparently inconsistent use of the phrase 'serious neglect' in proposed new paragraph (d) and the use of the term 'neglect' in other key provisions of the Act:

> Given that the new definition of 'abuse' in relation to a child encompasses assault, exposure to family violence and serious neglect, it is difficult to understand why the court is directed to examine 'abuse, neglect or family violence' [in other key provisions]. Given the broad definition of 'abuse' the court should in each case seemingly only have to take into account 'abuse

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51 *Submission 200*, p. 2. Also see Australian Law Reform Commission, *Submission 69*, Attachment 1, p. 7; Ms Samantha Page, Family Relationship Services Australia, *Committee Hansard*, 8 July 2011, p. 50.

52 *Submission 60*, p. 2. Also see The One in Three Campaign, *Submission 61*, p. 6; Joint Parenting Association, *Submission 146*, p. 4.

53 Mrs Nicola Davies, Family Law Council, *Committee Hansard*, 8 July 2011, p. 9. Also see Family Law Council, *Submission 113*, p. 10.

> and family violence' and [omit] the word 'neglect' (which is at odds with the phrase 'serious neglect' in the definition of 'abuse' and so contradictory).[54]

Departmental response

3.56 The Department's response to these concerns was that the word 'serious' has been included in the proposed new definition of 'abuse' to avoid over-reporting:

> The aim is to ensure that child welfare authorities only receive notification of serious cases of harm through exposure to family violence and neglect. Removing the word 'serious' would expand the definition to require a broader range of cases and may hinder these authorities from identifying and dealing with serious cases of harm due to excessive reporting.[55]

3.57 The Department agreed that the string of words, 'abuse, neglect or family violence' is used in a range of provisions throughout the Act. However, the Department told the committee that it is appropriate to retain references to the word 'neglect' as that term encompasses a broader range of omissions than 'serious neglect':

> The Department acknowledges that there is overlap in the string of words, but notes that the overlap is incomplete and does not result in total redundancy unless the word 'serious' is removed from the definition of 'abuse'.[56]

Meaning of 'exposed'

3.58 Proposed new subsection 4AB(3) defines the meaning of the word 'exposed' in proposed new paragraph (c) of the new definition of 'abuse' in subsection 4(1):

> (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.

3.59 Examples of situations that might constitute a child being exposed to family violence are non-exhaustively listed in proposed new subsection 4AB(4). Some submitters considered that the examples, or threats, of physical violence specified in proposed new subsection 4AB(4) might be interpreted in such a way as to restrict the meaning of 'experiences the effects of family violence' in proposed new subsection 4AB(3).

3.60 Women's Legal Services Australia, for example, warned:

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54 *Submission 200*, p. 2. Also see Associate Professor Juliet Behrens and Professor Belinda Fehlberg, *Submission 32*, p. 2. The relevant provisions are paragraph 60C(2)(b), proposed subparagraph 60D(1)(b)(ii), proposed paragraph 69ZN(5)(a) and proposed subparagraph 69ZQ(1)(i).

55 Answer to question on notice, received 22 July 2011, p. 6. Also see Mrs Toni Pirani, Attorney-General's Department, *Committee Hansard*, 8 July 2011, p. 58.

56 Answer to question on notice, received 22 July 2011, p. 7.

> Importantly, the proposed definition of exposure to family violence does not recognise the broader impact on children just from living in a family environment where their parent is the victim of family violence, in all its forms (as identified in the proposed new definition of family violence).
>
> ...
>
> [Women's Legal Services Australia] recommends that the definition of 'exposure' to family violence include a specific reference to all the forms of family violence as defined in proposed [new subsections 4AB(1) and (2)].[57]

Definition of 'family violence'

3.61 Proposed new subsection 4AB(1) defines 'family violence' as follows:

> (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.

Support for the new definition of 'family violence'

3.62 Many submitters and witnesses supported a new definition of 'family violence' within the Act. Among these supporters was the ALRC, which, together with the NSWLRC, recently examined the issue. In their 2010 report, *Family Violence – A National Legal Response*, the ALRC and the NSWLRC made the following recommendation:

> **Recommendation 6-4** The *Family Law Act 1975* (Cth) should adopt the same definition as recommended to be included in state and territory family violence legislation (Rec 5-1). That is, 'family violence' should be defined as violent or threatening behaviour, or any other form of behaviour, that coerces or controls a family member or causes that family member to be fearful. Such behaviour may include but is not limited to:
>
> (a) physical violence;
>
> (b) sexual assault and other sexually abusive behaviour;
>
> (c) economic abuse;
>
> (d) emotional or psychological abuse
>
> (e) stalking;
>
> (f) kidnapping or deprivation of liberty;
>
> (g) damage to property, irrespective of whether the victim owns the property;
>
> (h) causing injury or death to an animal, irrespective of whether the victim owns the animal; and

57 *Submission 62*, p. 8. Also see Council of Single Mothers and their Children, *Submission 74*, p. 3; Hawkesbury Nepean Community Legal Centre, *Submission 107*, p. 5; Top End Women's Legal Service, *Submission 176*, p. 3.

> (i) behaviour by the person using violence that causes a child to be exposed to the effects of behaviour referred to in (a)-(h).[58]

3.63 In submitting to this inquiry, the ALRC stated that the Bill substantially implements the definition of 'family violence' recommended by it and the NSWLRC. However, the ALRC, and other submitters, noted the omission and urged the inclusion of exposure to family violence in the Bill's definition of 'family violence'. Further:

> The definition of family violence should also clarify that a child is exposed to the effects of family violence by the behaviour of the person using family violence, and not due to the failure of the victim parent to protect that child from such exposure.[59]

3.64 Many submitters supported proposed new subsection 4AB(1) due to its breadth and the removal of the objective test of 'reasonableness'.[60] In explaining the reasons for its support, the Victims of Crime Assistance League submitted:

> [W]hat may be acceptable as reasonable to a person, professional, judge or magistrate as creating fear, on the evidence available, will not, and cannot incorporate all that frightens a victim. Much of it is not tangible, easily described. It is often the cumulative effect of many threats, actual violence, etc and issues, generally over time. A [knowledge] of what someone is actually capable of, from experience, a [knowledge] of what they are really like when not 'on show', a [knowledge] about their reliability and responsibility in practice, understanding the other's capacity for dishonesty, manipulation...all feed into that intangible fear.[61]

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58 Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Legal Response*, October 2010, p. 19.

59 *Submission 69*, p. 5. Also see, for example, Women's Legal Centre (ACT and Region), *Submission 26*, p. 2; Redfern Legal Centre and Sydney Women's Domestic Violence Court Advocacy Service, *Submission 48*, p. 2; Women's Legal Services Australia, *Submission 62*, p. 6; Hawkesbury Nepean Community Legal Centre, *Submission 107*, pp 5-7; The Benevolent Society, *Submission 131*, pp 3-4; Australian Association of Social Workers, *Submission 173*, pp 2-3; Shoalcoast Community Legal Centre, *Submission 177*, p. 2; Immigrant Women's Support Service, *Submission 181*, p. 2; Ms Zoe Rathus AM, *Submission 201*, p. 21; Young Lawyers, NSW Law Society, *Submission 206*, p. 3.

60 For example, Northern Rivers Community Legal Centre, *Submission 23*, p. 2; Name Withheld, *Submission 47*, p. 7; Women's Domestic Violence Court Advocacy Service Network, *Submission 66*, p. 2; Ms Elisabeth Peters, *Submission 78*, p. 1; Hawkesbury Nepean Community Legal Centre, *Submission 107*, p. 5; Women's Information and Referral Exchange, *Submission 112*, pp 1-2; Name Withheld, *Submission 119*, pp 2-3; Top End Women's Legal Service, *Submission 176*, p. 2; Shoalcoast Community Legal Centre, *Submission 177*, p. 1; Queensland Government, *Submission 188*, p. 1; Support Help & Empowerment, *Submission 208*, p. 2.

61 *Submission 166*, p. 8.

Opposition to the new definition of 'family violence'

3.65 However, there were submitters opposed to the amendment on precisely the same grounds – its breadth and the lack of objectivity.[62] For example, the Family Law Practitioners Association of WA argued that proposed new subsection 4AB(1) is over-inclusive:

> The proposed definition is simply too wide and captures behaviour that goes well beyond that which most members of the community would define as "violence". The types of behaviour captured by the proposed definition are, in our experience, engaged in to a greater or lesser degree by one or both of the parties in the majority of relationship breakdowns and in almost every matter before the Court.[63]

3.66 Other submitters foreshadowed the potential misuse of the proposed provision. Dads on the Air Australia, for example, considered that proposed new subsection 4AB(1) facilitates the making of vexatious claims,[64] and the One in Three Campaign likewise argued:

> Without [the element of reasonableness], anyone can claim to be in fear or apprehension of their (ex-)partner without any reasonable basis for this emotion.[65]

3.67 The Non-Custodial Parents Party (Equal Parenting) identified, as a further complication, the inability of a respondent to refute allegations of family violence:

> [The new definition] will include any behaviour a party claims makes them feel threatened 'irrespective of whether that behaviour causes harm', or to feel unsafe. Such fears need not be reasonable but instead are to be totally subjective, based only on the complainant's claimed state of mind. The normal legal standard of the reasonable person test will not apply. Thus, it will be almost impossible for an accused to refute such claims.[66]

3.68 The Dads4Kids Fatherhood Foundation submitted:

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62 For example, Non-Custodial Parents Party (Equal Parenting), *Submission 1*, p. 2; Joint Parenting Association, *Submission 146*, p. 2; Mr Howard Beale, *Submission 155*, pp 4-5; FamilyVoice Australia, *Submission 184*, p. 3; Name Withheld, *Submission 185*, p. 1. A few submitters also commented that the amendment does not cover intimate partner violence (persons in – or previously in – a relationship but not living together): see, for example, Inner City Legal Centre, *Submission 79*, p. 2; ACON, *Submission 93*, p. 1.

63 *Submission 91*, p. 2. Also see Mr Roger Smith, *Submission 45*, p. 2; Name Withheld, *Submission 134*, p. 2; Joint Parenting Association, *Submission 146*, p. 3; Lone Fathers Association, *Submission 190*, p. 6 for similar comments.

64 *Submission 3*, p. 1. Also see Family Law Practitioners of WA, *Submission 91*, p. 2.

65 *Submission 61*, p. 5.

66 *Submission 1*, p. 2. Also see Fairness in Child Support, *Submission 15*, pp 3-4; Australian Family Association, Victoria Branch, *Submission 31*, p. 2; Joint Parenting Association, *Submission 146*, pp 2-3; Mr Howard Beale, *Submission 155*, p. 6.

> These amendments are so broad that they may lead to the resources of the court being misused to assess how the parents behaved towards each other during the relationship, rather than examining the best interests of the child into the future and the child's right to a meaningful relationship with both of their parents. Children will suffer as a result.[67]

General characterisation test

3.69 The Law Council of Australia also expressed concern with the capacity of three examples listed in proposed subsection 4AB(2) to misdirect the Family Court of Australia:

> Three of the examples contain what might be described as broadly framed scenarios that expand the concept of 'family violence' beyond that which has traditionally been its focus. The concern is that this expansion may lead the resources of the court being subsumed into an examination of incidents in individual matters which do not constitute a long term pattern of controlling or coercive behaviour.[68]

3.70 Two of the examples mentioned by the Law Council of Australia – proposed paragraphs 4AB(2)(g) and (i) relating to financial autonomy and financial support, respectively – drew comment from some inquiry participants.[69]

3.71 Professor Chisholm, for example, acknowledged that it is difficult to deal with issues of financial dependency – such as proposed paragraph 4AB(2)(i) – but that it is critical to bear in mind the 'filter' effect of proposed new subsection 4AB(1):

> The critical thing is to look at those opening words in subsection (1) that define what family violence is. If you have words like 'coercive' and 'oppressive' or whatever those adjectives are, one view is that then it is okay to have the fairly open ended financial thing in the examples because it is only going to be family violence if it falls within those strong words of subsection (1). The main point I would make is that, if you read those examples on their own, you might think that could include all sorts of stuff that is not family violence but you have to read them together with the definition in subsection (1) and so it is very important to get that right.[70]

3.72 On this point, the Department noted the commentary contained in the Explanatory Memorandum:

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67 *Submission 95*, p. 11.

68 *Submission 200*, p. 2. Also see Mr Geoff Sinclair, Law Council of Australia, *Committee Hansard*, 8 July 2011, p. 53.

69 The ALRC submitted that these two examples should comprise non-exclusive examples in a more generic category of economic abuse: see *Submission 69*, p. 4.

70 Professor Richard Chisholm, *Committee Hansard*, 8 July 2011, p. 4. Also see Ms Sara Peel, Australian Law Reform Commission, *Committee Hansard*, 8 July 2011, p. 5; Mrs Toni Pirani, Attorney-General's Department, *Committee Hansard*, 8 July 2011, pp 57-58; Attorney-General's Department, answer to question on notice, received 22 July 2011, p. 8.

> The Explanatory Memorandum to the Bill explains that 'the inclusion of examples will not exclude any behaviour that is within the general characterisation set out in [proposed new] subsection 4AB(1)'. The Department is of the view that the provision includes a sufficient range of examples of behaviour that were suggested at the Committee hearing would be caught under [proposed new] subsection 4AB(1) where the behaviour fits within the general characterisation 'test'.[71]

Issue of over-inclusiveness

3.73 From a drafting perspective, Professor Chisholm considered that the overall structure of proposed new subsection 4AB(1) is 'pretty good' but, in his view, the opening words are over-inclusive:

> Take the example of a family member who tells another family member correctly that the house is on fire causing the second person to become fearful. Obviously that is not family violence, as the house really is on fire. But let us look at the [proposed new definition]:
>
> 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.
>
> If you focus on the 'other behaviour', you have got 'family violence' means other behaviour – that is, behaviour – that causes a family member to be fearful. So any behaviour that causes a family member to be fearful literally really fits in with this definition.[72]

3.74 Professor Chisholm suggested that proposed new subsection 4AB(1) could be redrafted to read:

> For the purposes of this Act, family violence means behaviour by a person towards a member of the person's family that is violent, threatening, coercive or controlling, or is intended to cause the family member to be fearful.[73]

3.75 At the public hearing, Professor Chisholm also referred to the 'interesting' solution proposed by Professor Parkinson:

> Item 8:
>
> (a) Rewrite the opening words of the definition of family violence in [subsection] 4AB(1) as follows:

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71 Answer to question on notice, received 22 July 2011, p. 8. Also see Explanatory Memorandum, p. 5.

72 *Committee Hansard*, 8 July 2011, p. 3. Also see Family Law Practitioners' Association of Queensland, *Submission 132*, pp 2-3.

73 *Submission 203*, p. 5. Also see Family Law Council, answer to question on notice, received 22 July 2011, p. 2 (who supported Professor Chisholm's proposal).

> "***family violence*** means aggressive, threatening or other such 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".[74]

3.76 Professor Parkinson's suggested approach incorporates an element of intent to address the perceived ambiguity of the proposed phrase, 'coerces or controls'.[75] However, Women's Legal Services Australia argued against incorporating intent, or any objective element, into the proposed new definition of 'family violence': instead, there needs to be more of a connection between the element of fear and the coercive or controlling behaviour. As one representative explained:

> What Women's Legal Services Australia is really trying to do by emphasising that connection between coercion and control, and fear,...is to attempt to define and obtain a nuanced understanding of what is family violence. As legal professionals working within the court system, we often see cases where the court grapples to clearly define or understand what is family violence.
>
> ...
>
> [W]e will not be opening up the floodgates [to vexatious or malicious claims], because, if we do have a very nuanced understanding and definition of family violence, there are certain guidelines and evidence that each party would be required to present to the court through their practitioner or in their capacity as self-represented litigants in order for the court to determine that there is a risk of family violence.[76]

An increase in vexatious and malicious claims?

3.77 Professor Chisholm told the committee that it would be hard, if not impossible, to predict whether the proposed new definition of 'family violence' will precipitate the making of vexatious and malicious claims:

> The effect of this bill could easily be that there would be more allegations of family violence and that there would be more detailed ones, but that might be revealing real violence which has previously not been attended to. Whether the Act would produce a new set of false claims, I could not assert that it will not happen; other people cannot assert that it will happen. It is actually very difficult to predict.[77]

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74 *Submission 14*, pp 1-2.

75 *Submission 14*, p. 3. Also see Australian Family Association, Victoria Branch, *Submission 31*, p. 2 for its comments regarding intent.

76 Ms Adut Ngor, Women's Legal Services Australia, *Committee Hansard*, 8 July 2011, p. 24. Also see Ms Angela Lynch, Women's Legal Services Australia, *Committee Hansard*, 8 July 2011, pp 23-24.

77 Professor Richard Chisholm, *Committee Hansard*, 8 July 2011, p. 5.

3.78 When questioned by the committee, other witnesses concurred with Professor Chisholm's comments,[78] and Women's Legal Services Australia referred to 'the clear and succinct synopsis of the research in this area' prepared and 'appropriately referenced' by Dr Michael Flood, a sociologist at the University of Wollongong:

> He concludes that child abuse allegations in the context of family law proceedings have been researched in four Australian studies and have found that:
>
> - The allegations rarely are made for tactical advantage;
>
> - False allegations are rare;
>
> - The child abuse often takes place in families where there is domestic violence;
>
> - Any such allegation rarely results in the denial of parental contact.
>
> In relation to [the] myth about false accusations of domestic violence and misuse of protection orders he again analyses the research succinctly and concludes:
>
> - The risk of domestic violence increases at the time of separation;
>
> - Most allegations of domestic violence in the context of family law proceedings are made in good faith and with support and evidence of their claims;
>
> - Women living with domestic violence often do not take out protection orders and do so only as a last resort;
>
> - Protection orders provide an effective means of reducing women's vulnerability to violence.[79]

Departmental response

3.79 In evidence, the Department informed the committee that the proposed new definition of 'family violence' was a policy decision based on evidence and closely aligned with the ALRC and NSWLRC recommendation in their 2010 report. The Department did not consider the proposed new definition of 'family violence' to be

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78 Mrs Nicola Davies, Family Law Council, *Committee Hansard*, 8 July 2011, p. 11; Ms Kerry Davies, Council of Single Mothers and their Children, *Committee Hansard*, 8 July 2011, p. 29.

79 Women's Legal Services Australia, answer to question on notice, received 22 July 2011, pp 3-4. Also see Dr Michael Flood, 'Fact Sheet #2: The myth of women and false accusations of domestic violence and rape and misuse of protection orders', available at: http://www.xyonline.net/content/fact-sheet-2-myth-women%E2%80%99s-false-accusations-domestic-violence-and-misuse-protection-orders (accessed 26 July 2011); Dr Michael Flood, 'Fact Sheet #1: The myth of false accusations of child abuse', available at: http://www.xyonline.net/content/fact-sheet-1-myth-false-accusations-child-abuse (accessed 26 July 2011).

over-inclusive,[80] or that it would lead to an increase in vexatious or false allegations of family violence.[81]

3.80 Further, the Department referred to amendments proposed by Mr Michael Keenan MP in the House of Representatives,[82] noting the Attorney-General's response as follows:

> The Government rejects any proposal that would require family violence to be hinged on how a reasonable person might react in a particular situation or what the violent perpetrator might have intended. To require reasonableness or intent as a precondition to family violence is to take a narrow approach to what is an insidious problem and would be particularly concerning in the context of a controlling relationship.[83]

Provision of information to the Family Court of Australia by third parties

3.81 Proposed new subsections 60CH(2) and 60CI(2) allow third parties to parenting proceedings to inform the court of care arrangements under child welfare laws; and to inform the court of notifications to, and investigations by, prescribed state and territory child welfare authorities.

3.82 Submitters and witnesses commenting on these two provisions supported their objectives – to indicate risks of harm to a child, to alert the court to evidence relevant to a child's welfare and best interests, and to assist the court in determining whether jurisdictional issues arise under section 69ZK of the Act.[84]

3.83 However, some inquiry participants considered that the amendments will not achieve their objectives. In their view, the proposed provisions will not adequately ensure that the Family Court of Australia has better access to evidence of abuse and family violence.

3.84 The Australian Family Association, Victoria Branch, for example, appeared to suggest that proposed new subsections 60CH(2) and 60CI(2) should specifically cover child protection and child welfare authorities:

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80 Mrs Toni Pirani, Attorney-General's Department, *Committee Hansard*, 8 July 2011, p. 57; Answer to question on notice, received 22 July 2011, p. 7.

81 Mrs Toni Pirani, Attorney-General's Department, *Committee Hansard*, 8 July 2011, p. 58.

82 *House Hansard*, 30 May 2011, pp 5001-5004, available at: http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query%3DId%3A%22legislation%2Fbillhome%2Fr4562%22 (accessed 1 August 2011).

83 Answer to question on notice, received 22 July 2011, p. 7.

84 For example, Associate Professor Juliet Behrens and Professor Belinda Fehlberg, *Submission 32*, p. 1; Australian Law Reform Commission, *Submission 69*, p. 8; Family Law Council, *Submission 113*, p. 6. Section 69ZK of the Act sets out the interaction between family court orders and child welfare laws.

> It should be the relevant child protection and child welfare authorities who present such information to the court, not just a 'person' who is 'aware'. Immediately any allegation of abuse or family violence in relation to a child is made all child protection and child welfare agencies should be informed and asked to inform the court of any dealings with the child or any member of the child's family.[85]

3.85 Women Everywhere Advocating Violence Elimination went one step further calling for 'an obligation on State Child Protective Services to provide any files and reports to the Family Court'.[86] This view was shared by the Council of Single Mothers and their Children:

> [I]f such care orders, notifications or investigations are made known to the Family Court, child welfare authorities must then be required to make available to the Family Court copies of files and orders pertaining to the child. Similarly children's representatives and child welfare authorities need to be required to give information to the Family Court.[87]

3.86 National Legal Aid cautioned that there must be processes in place to obtain copies of relevant orders, citing the current arrangements in Western Australia as a practical example:

> In Western Australia the Family Court of WA (FCWA) has memoranda of understanding (MOU) in place with the Department of Child Protection (DCP) and Legal Aid WA (LAWA) for information sharing in relation to child welfare issues and with the Department of the Attorney-General, the Magistrates Courts, the Department of Corrective Services and LAWA for information sharing in relation to family violence issues. The experience of LAWA is that these memoranda of understanding work well, particularly with respect to the FCWA['s] access to information from DCP and the Magistrates' Court's database. In addition, DCP now has an officer permanently located at the FCWA to facilitate the information sharing process.[88]

3.87 The ALRC pointed out that, if information sharing arrangements were implemented, legislative amendments would be required at the state and territory level to allow the flow of information to the Family Court of Australia:

> Family violence legislation in all states and territories prohibits the publication of certain information about persons involved in, or associated with, family violence order proceedings. In addition, child welfare legislation in all states and territories contains provisions for protecting the

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85 *Submission 31*, p. 4. Also see National Council for Children Post Separation, *Submission 172*, p. 6.

86 *Submission 114*, p. 12.

87 *Submission 74*, p. 5.

88 *Submission 202*, p. 6. Also see Mrs Nicola Davies, Family Law Council, *Committee Hansard*, 8 July 2011, p. 8.

> confidentiality of information collected by child welfare authorities or for precluding such information from being admissible in another proceeding. These provisions in state and territory legislation may constitute inappropriate legislative barriers to federal family courts in accessing information about family violence orders and related proceedings, and information held by child welfare authorities.[89]

3.88 To address such problems, the ALRC and NSWLRC have previously recommended:

> **Recommendation 30-3** Non-publication provisions in state and territory family violence legislation should expressly allow disclosure of information in relation to protection orders and related proceedings that contains identifying information in appropriate circumstances, including disclosure of family violence protection orders to the federal family courts under [section] 60CF of the *Family Law Act 1975* (Cth).
>
> **Recommendation 30-4** State and territory child protection legislation should not prevent child protection agencies from disclosing to federal family courts relevant information about children involved in federal family court proceedings in appropriate circumstances.
>
> **Recommendation 30-5** Federal family courts and state and territory child protection agencies should develop protocols for:
>
> (a) dealing with requests for documents and information under s 69ZW of the *Family Law Act 1975* (Cth); and
>
> (b) responding to subpoenas issued by federal family courts.[90]

Departmental response

3.89 A representative of the Department advised that the Commonwealth and the states and territories are currently working toward improved interaction between the federal family law system, and the state and territory child protection systems. One particular measure being examined is information sharing between the Family Court of Australia and child protection authorities:

> An upcoming initiative in relation to that is that there is going to be a national meeting on 22 July between officers from each of the state and territory child protection authorities and the relevant local registrars of the Family Court. We will be hosting that here in Canberra. We certainly are aware of some of the issues that have been raised in relation to child

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89 *Submission 69*, p. 9. Also see Ms Samantha Page, Family Relationship Services Australia, *Committee Hansard*, 8 July 2011, p. 50.

90 Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Legal Response*, ALRC Report No. 114, October 2010, pp 72-73. Section 69ZW of the Act deals with evidence relating to child abuse or family violence.

> protection and there is some work going on to try to address some of those issues.[91]

3.90 Specifically in relation to reporting obligations, the Department advised that it is not aware that the Australian Government has any plans to extend reporting obligations to any other class of person, for example, child welfare authorities or police.[92]

Obligation of advisers to prioritise the safety of children

3.91 Proposed new section 60D outlines an adviser's obligations when giving advice or assistance to a person about matters concerning a child and Part VII of the Act.

3.92 Although the proposed amendment is a composite of current section 60B, current subsection 60CC(2) and proposed new subsection 60CC(2A), it attracted less comment than did those provisions, with submitters again remarking on the legislative complexity.

3.93 Associate Professor Rhoades and Professor Dewar, for example, submitted:

> We are concerned that the proposed 3-step approach to this advice is overly complicated and likely to confuse clients...[C]omplexity 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.[93]

3.94 Ms Zoe Rathus AM similarly remarked:

> Although I understand the idea behind ensuring that advisers talk to parents about the best interests of children – I am not sure that this obvious requirement of professionals in the family law system needs to be legislated. One of the very clear messages of all of the reviews and evaluations is that the legislation is too complex and misunderstood by the community. Prescribing longer and longer 'scripts' that professionals are required to rehearse to parents will not make the law more comprehensible to them. These required statements stultify the nature of professional advice and detract from the nuanced tenor required when providing advice in the real dynamics of a family law interview.[94]

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91 Mrs Toni Pirani, Attorney-General's Department, *Committee Hansard*, 8 July 2011, p. 57.

92 Answer to question on notice, received 22 July 2011, p. 12.

93 *Submission 9*, p. 4. Also see Family Law Council, *Submission 113*, p. 11.

94 *Submission 201*, p. 27.

Judicial duty to take prompt action in relation to allegations

3.95 Proposed new section 67ZBB requires the court to take prompt action in relation to allegations of abuse or family violence. As noted in Chapter 2, the proposed provision replaces current section 60K of the Act.

3.96 Associate Professor Rhoades and Professor Dewar, the Council of Single Mothers and their Children, and Professor Chisholm supported the amendment.[95] However, the Chief Justice of the Family Court of Australia, the Hon. Diana Bryant (Chief Justice) drew the committee's attention to an apparent 'overlap' between current section 60K and the proposed new provision.

3.97 Item 46 of Schedule 1 of the Bill states:

> **Section 60K of old Act to continue to apply to certain documents**
>
> Despite the repeal of section 60K of the old Act by item 23 of this Schedule, that section continues to apply in relation to a document that was, before commencement, filed in a court in accordance with subsection 60K(1) of the old Act.

3.98 The Chief Justice submitted that the effect of this item is to ensure that the obligation placed on the Family Court of Australia by section 60K to act promptly will continue to apply to any document filed in the court prior to the commencement of Schedule 1 of the Bill. However, the Chief Justice pointed out that the Bill does not clearly indicate whether a party having made that application would be also be required to file a prescribed notice under [proposed new] section 67ZBA in respect of the same allegation.[96]

3.99 The Chief Justice suggested that, to avoid confusion and provide delineation, the transitional provisions should be amended to state that (new) section 67ZBA does not apply to ongoing section 60K proceedings and applies only to those proceedings initiated on or after the commencement date.[97]

3.100 In response, the Department advised that 'the regulation-making power [item 48 of Schedule 1] could be enlivened to remove any duplication of reporting'.[98]

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95 *Submission 9*, pp 1-2; *Submission 74*, p. 5; *Submission 203*, p. 10, respectively.

96 *Submission 39*, p. 3.

97 *Submission* 39, p. 3. The Law Council of Australia similarly called for greater clarity in relation to the interaction between the repealed current section 60K and the proposed new section 67ZBB: see *Submission 200*, p. 4.

98 Answer to question on notice, received 22 July 2011, p. 13.

Judicial duty to inquire into abuse, neglect and family violence

3.101 Proposed new paragraph 69ZQ(1)(aa) imposes an obligation on the Family Court of Australia to ask each party to proceedings about the existence or risk of abuse, neglect and family violence.

Purpose of the new judicial duty

3.102 According to evidence provided by the Department:

> New paragraph 69ZQ(1(aa) responds to a number of concerns raised in recent reports, in particular that victims of violence are unlikely to disclose violence unless they are directly asked about their experiences. Evidence from the [Australian Institute of Family Studies] Report (pp 328-9 and 334) and the Chisholm Report (p. 57) indicates that it is relatively rare that judicial officers use the powers provided to them by Division 12A to actively inquire into issues of family violence and child abuse...[The proposed provision] has been included in the Bill to encourage information about issues of child abuse and family violence to be presented to the court so the court can make appropriate and safe parenting arrangements.[99]

3.103 In general, submitters expressed reservations about the proposed judicial duty to inquire. The Chief Justice, for example, queried the objectives of the amendment. In Her Honour's view, the question to be posed by the court contemplates either an affirmative or negative answer but does not clearly state what action the court is to take if an affirmative answer is received:

> All that section 69ZQ(1)(aa) appears to me to do is impose an obligation on the Court that is without consequence. I do not consider that the general duties in section 69ZQ, which are designed to give effect to the principles for the conduct of child related proceedings, are strengthened by the inclusion of sub-section (1)(aa) and in my view it could be removed from the Bill with no ill effects.[100]

3.104 In evidence, the Deputy Chief Justice acknowledged that it is implicit in proposed new paragraph 69ZQ(1)(aa) that the court would pursue an inquiry, if required to do so by an affirmative answer. However:

> The Chief Justice's concern is that the legislation does not require it or tell the court what it should do in those circumstances...I could not imagine a judicial officer hearing a positive response leaving it at that. It simply would not happen. There would then be further questions and where they may lead we do not know, of course. Also one of the issues is at what time

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99 Answer to question on notice, received 22 July 2011, p. 13. Also see Anglicare Victoria, *Submission 253*, p. 4 which remarks on victims' reluctance to share their experiences.

100 *Submission 39*, p. 5. The Law Council of Australia also considered that proposed new paragraph 69ZQ(1)(aa) lacks clarity: see *Submission 200*, p. 4. The Family Law Council queried whether the amendment will achieve any additional benefit: see *Submission 113*, p. 11.

> these questions are asked. Logically they should be asked at the very earliest stage of the matter but the legislation does not say that either.[101]

3.105 A further issue raised in respect of proposed new paragraph 69ZQ(1)(aa) is whether the proposed provision is too broad and should be narrowed to encompass only future acts of abuse and family violence. Professor Chisholm, for example, submitted:

> This new provision would require the court to ask the parties about child abuse and family violence. I think there is merit in the idea of requiring the court to ask about these matters...But in its present form the provision requires the court to ask about every act of *past* abuse or family violence. This provision may prompt parties to bring up all sorts of old complaints that they might otherwise have decided not to raise, perhaps for good reasons. Raising such matters could increase the hostility and acrimony and length of the proceedings, and reduce the chances of settlement.[102]

Departmental response

3.106 A departmental representative responded to the concerns of the Family Court of Australia by explaining that proposed new paragraph 69ZQ(1)(aa) works in tandem with proposed new section 67ZBA, which requires a party making an allegation of family violence to file a prescribed form (currently Form 4):

> [I]f the court asks the question about family violence and they get an answer to that question that indicates that, yes, there has been family violence and that that is relevant to the orders that are being made by the court...they would then go back to this section [67ZBA]...It would basically force people to file the Form 4s.[103]

3.107 The Department elaborated on the need for this mechanism:

> The reports that the government commissioned indicated that there was a very low incidence of people alleging family violence using the Form 4s, which is the current mechanism for making those allegations. In fact people make the allegations in affidavits. They file documents that indicate that there has been family violence but they do not actually use the Form 4 process which is the process that the court uses to highlight that a case involves family violence and to deal with [it] expeditiously.[104]

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101 Deputy Chief Justice the Hon. John Faulks, *Committee Hansard*, 8 July 2011, p. 32.

102 *Submission 203*, pp 10-11. Also see Australian Family Association, Victoria Branch, *Submission 31*, p. 4; FamilyVoice Australia, *Submission 184*, p. 7.

103 Mrs Toni Pirani, Attorney-General's Department, *Committee Hansard*, 8 July 2011, p. 61.

104 Mrs Toni Pirani, Attorney-General's Department, *Committee Hansard*, 8 July 2011, p. 62. The Attorney-General's Department reiterated this evidence in Answer to question on notice, received 22 July 2011, pp 12-13.

3.108 As to when the court should make the inquiry, the Department advised 'it will be a matter for the courts to develop practices around when and how this duty would be discharged'.[105]

3.109 Associate Professor Rhoades and Professor Dewar supported proposed new paragraph 69ZQ(1)(aa). However, their joint submission stated that the amendment will be effective only if judicial officers are familiar with the dynamics of family violence and skilled at using this knowledge to inform their practice:

> [W]ithout specific training of judicial officers, non-disclosure may continue to occur, and...a mutualising approach to the parties' responses to the proposed questioning may play out. This potential is likely to be exacerbated in proceedings in the Federal Magistrates Court, where busy duty lists place considerable time pressures on the ability of Federal Magistrates to engage directly with the parties. 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.[106]

Training and education in the field of family violence

3.110 The sufficiency of specialist training and education for professional persons involved with the family law system, including judicial officers, family law consultants, family dispute resolution practitioners and legal practitioners, was a consistent theme in many submissions.[107]

3.111 A representative from Women's Legal Services Australia spoke about the creation of a uniform understanding of family violence and its dynamics as a beneficial training outcome:

> At the current moment, as a legal practitioner who engages quite readily with the family law system, I feel there is a difference of understanding, if I may say so, between judicial officers. They sometimes apply different understandings of family violence, so the way they determine cases may differ depending on how they interpret family violence and what they consider to be the elements of family violence. Even different legal practitioners have different understandings of family violence. If a comprehensive training package were provided to all participants, there

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105 Answer to a question on notice, received 22 July 2011, p. 13.

106 *Submission 9*, p. 5. Also see Ms Zoe Rathus AM, *Submission 201*.

107 For example, National Peak Body for Safety and Protection of Parents and Children, *Submission 33*, pp 10-11; Women's Legal Services Australia, *Submission 62*, p. 15; Women's Domestic Violence Court Advocacy Service Network, *Submission 66*, p. 4; Council of Single Mothers and their Children, *Submission 74*, p. 8; Hawkesbury Nepean Community Legal Centre, *Submission 107*, p. 13; Family Law Council, *Submission 113*, p. 15; Ms Carmel O'Brien, *Submission 129*; The Benevolent Society, *Submission 131*, p. 9; Australian Association of Social Workers, *Submission 173*, p. 8; Justice for Children, *Submission 189*, p. 1; BoysTown, *Submission 196*, p. 12.

> would be at least some uniformity in how family law violence is interpreted and applied in the family law system.[108]

3.112 Justice for Children considered that one way to improve standards would be to require those working within the family law system to possess specific qualifications in child development, and the impacts of trauma and abuse. In addition:

> [W]e could ensure that [judges] adhered to particular principles around their decision making with regard to children's safety such that, for example, they would not place children with parents who would not themselves pass a 'working with children' check.[109]

3.113 Justice for Children favoured a mandatory set of principles focussed on the safety and well-being of a child once abuse or family violence has been established on a balance of probabilities. Representatives at the hearing referred to, but specifically rejected, the Family Violence Best Practice Principles currently used by judges of the Family Court of Australia:

> Whilst those guidelines exist, nevertheless, we can identify judgment after judgment where child sex abuse has been established beyond reasonable doubt and children are placed in the care of the people or households that have perpetrated that. Those guidelines clearly do not prohibit those outcomes (a) as a conclusion and (b) those guidelines are not being adhered to. They are certainly not sufficient.[110]

3.114 Representatives of the Family Court of Australia questioned what common training for persons involved in the family law system would entail, as appeared to have been suggested by Women's Legal Services Australia. The Deputy Chief Justice remarked:

> I am not quite sure how you would do it, who would do it, what would be the curriculum, how it would be carried out and what particular emphases would occur during the course of training. I am not opposed to it.[111]

3.115 More specifically, the Deputy Chief Justice responded to concerns that judges in the Family Court of Australia have insufficient training in the field of domestic violence:

> [T]he court has a program of judicial education. It has an active and continuing committee that provides that. There have been a number of

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108 Ms Adut Ngor, Women's Legal Services Australia, *Committee Hansard*, 8 July 2011, p. 25. Also see Ms Robyn Cotterell-Jones, Victims of Crime Assistance League, *Committee Hansard*, 8 July 2011, p. 25.

109 Dr Elspeth McInnes, Justice for Children, *Committee Hansard*, 8 July 2011, p. 43.

110 Dr Elspeth McInnes, Justice for Children, *Committee Hansard*, 8 July 2011, p. 46. Also see Justice for Children, answers to question on notice, 11 July 2011 and 18 July 2011; Ms Lydia Lorenz, Justice for Children, *Committee Hansard*, 8 July 2011, p. 46.

111 *Committee Hansard*, 8 July 2011, p. 36.

> events in which judges have received training in and around the subject of domestic violence and the things that go with it.[112]

3.116 His Honour also commented on the extent to which domestic violence training can be applied in a courtroom:

> I do not understand that by having some form of training I could recognise instantly when someone walks into my courtroom that they either have been the victim of violence or are a violent person. I do not think that is appropriate. Courts must operate on the evidence before them, and that evidence must be on the basis of witnesses put to the court and not some form of intuitive determination by a judge.
>
> ...
>
> Any training that provides an understanding for judges and others involved in the system about how to interpret the responses and reactions from people who are engaged in proceedings before the court is obviously useful. What I do not think it represents is a substitute for a proper consideration of the relevant evidence in the relevant matter at that particular time.[113]

Repeal of the mandatory costs orders provision

3.117 The Bill repeals current section 117AB which requires the court to make a costs order against a party if satisfied that the party knowingly made a false allegation or statement in the proceedings.

Support for repeal of the provision

3.118 Many submitters supported section 117AB's removal either for the reason identified by the Australian Institute of Family Studies (that is, it discourages the disclosure of abuse and family violence) or due to the perceived adequacy of the Family Court of Australia's general costs discretion in subsection 117(2) of the Act.[114]

3.119 A few submissions also referred to the common misinterpretation of section 117AB and the need to eliminate that confusion.

3.120 The Family Law Practitioners' Association of Queensland (FLPA), for example, submitted:

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112 *Committee Hansard*, 8 July 2011, p. 36.

113 *Committee Hansard*, 8 July 2011, pp 36-37. Also see Justice the Hon. Steven Strickland, Family Court of Australia, *Committee Hansard*, 8 July 2011, p. 37.

114 For example, Professor Patrick Parkinson, *Submission 14*, p. 1; Ms Christine Cherry, *Submission 27*, p. 1; Associate Professor Juliet Behrens and Professor Belinda Fehlberg, *Submission 32*, p. 1; Council of Single Mothers and their Children, *Submission 74*, p. 4; Name Withheld, *Submission 94*, p. 4; Family Law Council, *Submission 113*, p. 7; Ms Bronwynne Luff, *Submission 164*, p. 4; Armadale Domestic Violence Intervention Project, *Submission 179*, p. 2; Dr Lesley Laing, *Submission 197*, p. 4; Professor Richard Chisholm, *Submission 203*, p. 12; Mr Geoff Sinclair, Law Council of Australia, *Committee Hansard*, 8 July 2011, p. 54.

> [Section] 117AB has only ever applied in circumstances where a person knowingly makes a false allegation or statement. It has never applied where one person makes an allegation and the Court is unable to find that the act complained of actually occurred. [Section] 117AB has only applied where a person makes a malicious allegation that is found to be untrue.
>
> FLPA understands that [section] 117AB has been misunderstood in that if allegations are made against a person which are not proven in Court an order for costs will be made against the person making the allegation. This is contrary to case law in relation to the section. If this is the view of litigants and/or practitioners, and [section] 117AB is seen as a major impediment to raising violence in family law proceedings then it should be repealed.[115]

Opposition to repeal of the provision

3.121 On the other hand, some submitters supported current section 117AB and were strongly opposed to its repeal.[116] The reasons for this support varied from the need to retain the provision as a deterrent, to belief in the ability of the court to distinguish between unsubstantiated allegations and false allegations.

3.122 Men's Health Australia, for example, submitted that a common legal strategy in family law proceedings is spurious allegations of family violence or abuse:

> The proposed changes mean that there will be no penalties available for the court to discourage fabricated allegations of violence or abuse. It is absurd that this will be the only Australian Court unable to penalise those who deliberately lie in proceedings. The proposed changes encourage the use of hearsay and uncorroborated allegations by both parents and officers of government departments.[117]

3.123 Dads in Distress Support Services emphasised the importance of current section 117AB as a deterrent. Its submission argued that the repeal of this section will lead to an explosion of false allegations and an escalation of mental anguish for those falsely accused of family violence:

> The negative psychological impact of false allegations cannot be over-estimated. A large percentage of people coming to us for support have been subjected to false allegations and suffer considerable anguish as a result. It is highly offensive to those who are victims of false allegations to suggest that there be no sanctions against those proven to have made false claims. The current sanctions would not appear to be strong enough in our

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115 *Submission 132*, p. 5.

116 For example, Mr David Hardidge, *Submission 55*, p. 1; Joint Parenting Association, *Submission 146*, p. 6; Mr Alexander Stewart, *Submission 152*, p. 1; Salt Shakers, *Submission 157*, p. 4.

117 *Submission 60*, p. 2. Also see Name Withheld, *Submission 134*, p. 2; Mr Howard Beale, *Submission 155*, p. 5; FamilyVoice Australia, *Submission 184*, p. 8.

> view, but to repeal them would only add to the psychological pressures on many non-custodial parents.[118]

3.124 The Joint Parenting Association was not persuaded by the rationale offered in support of the repeal of current section 117AB. The Joint Parenting Association submitted that the Family Court of Australia correctly interprets the section and, if parties to proceedings believe otherwise, they are mistaken:

> Not being able to substantiate an allegation is not the equivalent of a knowingly made false accusation. Further, an allegation based on a mistaken view of another party's words or behaviour does not amount to a false assertion and the court is able to discern the difference between good faith and malicious assertions designed to gain advantage in proceedings. Lawyers know this to be the case and if some are advising clients otherwise as critics assert they are in breach of their ethical cannons.[119]

Prevalence of mandatory costs orders

3.125 The Deputy Chief Justice advised the committee that adverse costs orders have been made under section 117AB in only a very small number of cases. However, His Honour spoke at length regarding the difficulty of quantifying the number of cases in which the court has found a party to have knowingly made false allegations:

> People who come to the Family Court, in my experience, at least – and it may not be shared by others – generally try to tell the truth. They tell it as well as they can reasonably remember it, bearing in mind that the Family Court deals not with a specific instance on one particular day but with the period of the relationship, which may span many years.

3.126 His Honour continued:

> It is not uncommon for people to report things with a particular focus. If it is in a highly emotional moment, then it is not uncommon for that to be quite different, depending on which side of the divide you on. Accordingly, there are not very many cases in my experience in the Family Court in which people are found to have deliberately perjured themselves in saying that either they did do something or did not do something or that someone had done something or someone had not done something. Hence, from our point of view it would be extraordinarily difficult to keep statistics about what were thought to be false allegations.[120]

3.127 His Honour also alluded to the difficulty in obtaining an accurate sampling for all family law matters:

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118 *Submission 44*, p. 4. Similar comments were made by the Dads4Kids Fatherhood Foundation: see *Submission 95*, pp 12-13.

119 *Submission 146*, p. 6.

120 *Committee Hansard*, 8 July 2011, p. 35.

> Let me suggest this to you: approximately 50 per cent of all the matters that are listed for hearing in the Family Court actually get a judgment. That means that about one half of all the cases that come on for hearing are settled. Of the cases that are filed in the Family Court, something less than 12 per cent actually get a hearing date. So something like six per cent of all the cases before the Family Court are actually the subject of a judicial determination. In that context, to talk about whether or not someone has made a false allegation or not is very difficult because there are clearly no determinations about something like 94 per cent of the cases that are there. Those figures are rough; they vary from month to month and year to year, but they are approximately right.

3.128 The Deputy Chief Justice then described what occurs when a presiding judge believes that a party has, or may have committed perjury:

> We of course have no power to deal with perjury, although, commonly, people in the community suggest that we should be putting people in jail for perjury. It is a criminal offence. If that situation occurs, the matters are referred to the Attorney-General for prosecution under the Crimes Act. I cannot recall the last time any reference to the Attorney-General was the subject of prosecution, successful or otherwise. It is a commonly argued matter about the court that we do not deal with people who commit perjury. The short answer is that we cannot. It is not within our jurisdiction to do so. Ultimately, it is a matter for the Attorney-General to prosecute – not personally, but for the officers of the Commonwealth – as a criminal offence.[121]

Retrospective effect of the application provision in item 45 of Schedule 1

3.129 Item 45 of Schedule 1 reads:

> **Amendments that apply to proceedings instituted on or after commencement**
>
> Subject to item 47, the amendments made by items 1 to 8, 11, 13, 17 to 21, 30 to 34, 37, 38 and 40 to 43 of this Schedule apply in relation to proceedings whether instituted before, on or after commencement.[122]

3.130 The Chief Justice noted that the substantive provisions of Schedule 1 of the Bill will apply to proceedings instituted before or on commencement of the Bill, including part-heard proceedings and those where judgement is pending. The Chief Justice submitted that the Bill will impose additional costs and delays for litigants in such proceedings:

> I say this because it seems to me that the requirements of procedural fairness dictate that [persons involved in the proceedings] would need to be

121 *Committee Hansard*, 8 July 2011, p. 36.

122 Item 47 of Schedule 1 provides that the amendments made by Schedule 1 do not affect existing orders or constitute 'changed circumstances'.

> given the opportunity to consider and make submissions as to the effect of the amendments on the proceedings and the implications for determining what arrangements are in the best interests of the child.[123]

3.131 The Chief Justice further cautioned:

> Cases involving actual violence or abuse or the risk of harm to children are precisely those cases that need to be brought on quickly, heard in a timely manner and finalised so that appropriate protective arrangements can be put in place.[124]

3.132 In June 2011, the Attorney-General responded to concerns similar to those of the Chief Justice raised by the Senate Standing Committee for the Scrutiny of Bills:

> To ensure the best result for children, the [Bill] was cast to apply to as many family law cases as possible. I note that the *Family Law Amendment (Shared Parental Responsibility) Act 2006*, which introduced the 2006 family law reforms, contains a range of application provisions. Some apply to 'orders' made on or after the commencement date and similarly reach back to proceedings instituted before the commencement of that Act. The regulation making power in item 48 was drafted to ensure that certain proceedings, such as part-heard, reserved judgment and appeal matters, could be carved out from application.[125]

3.133 His Honour, Justice Steven Strickland, conceded that regulations might be one way of eliminating the retrospective application of item 45 of Schedule 1. However, Justice Strickland noted that no such regulations were made in respect of the 2006 family law reforms and further:

> We do not know the detail of [the current proposal]. We have not seen any draft regulations. We initially had a concern about that. By that I mean: the Chief Justice wondered how regulations could override legislation. But, again, the Chief Justice understands that the Attorney-General has advice about this and that it can be done and it has been done before. If that is right – and, as I said, the Chief Justice has not seen any draft regulations yet – that certainly would be a way of dealing with this issue.[126]

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123 *Submission 39*, p. 1. Also see Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 4 of 2011*, 11 May 2011, p. 32; Deputy Chief Justice the Hon. John Faulks, Family Court of Australia, *Committee Hansard*, 8 July 2011, p. 31.

124 *Submission 39*, p. 2. Her Honour particularly noted the difficulties the amendment would cause for and within the Family Court of Australia (Appeal Division). Also, see Law Council of Australia, *Submission 200*, p. 5 for similar commentary.

125 Senate Standing Committee for the Scrutiny of Bills, Sixth Report of 2011, 22 June 2011, pp 296-297.

126 *Committee Hansard*, 8 July 2011, p. 32 and p. 34. His Honour noted that the Family Court of Australia instigated a number of practical arrangements to bring the 2006 family law reforms to the attention of practitioners and self-represented litigants: see p. 34.

3.134 However, it was the Chief Justice's suggestion that the Bill be amended to commence on Royal Assent or by proclamation and to apply only to those applications filed after the commencement date.[127]

Departmental response

3.135 According to departmental officers:

> The way that the bill is currently drafted involves the bill commencing upon proclamation rather than upon assent. If the proclamation is not made within six months, then it would commence at the end of a six-month period. The thinking behind that was that there would be that time period to allow the court to get through as many matters as possible before the commencement of the legislation in order to have a fairly clear approach to the commencement of the provisions. Because we were not sure how the court might be going with that, we thought there would be an ability for the government to make an assessment about whether part-heard or fully-heard proceedings should be carved out [under item 48 of Schedule 1], or if there were not terribly many of them then it would not be an issue.[128]

3.136 The Department also confirmed that it had received advice from the Office of Parliamentary Counsel that regulation-making powers for matters of a transitional, savings and application nature are relatively common in Commonwealth legislation:

> These powers are conferred in complex legislation and often in circumstances in which the Government is still to finalise transitional, savings or application arrangements or where there is a strong possibility that unexpected issues may arise after enactment of the legislation.[129]

3.137 In answer to a question on notice, the Department stated that its approach to commencement of the Bill and the approach proposed by the Family Court of Australia were not substantially different. However:

> The approach taken by the Government does allow the new family violence measures to be applied to more matters and potentially protect more children and their families. The approach taken in the Bill also allows the Government to deal expeditiously with matters that may arise during the implementation of the new law.[130]

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127 *Submission 39*, p. 2.

128 Mrs Toni Pirani, Attorney-General's Department, *Committee Hansard*, 8 July 2011, pp 56-57.

129 Answer to question on notice, received 22 July 2011, p. 14.

130 Answer to question on notice, received 22 July 2011, p. 15.

Resourcing implications for the Family Court of Australia

3.138 The Explanatory Memorandum states that the amendments proposed by the Bill will have negligible financial implications.[131] However, inquiry participants who addressed this issue expressed a contrary view.

3.139 The Chief Justice submitted that the confluence of amendments will have resource implications for the Family Court of Australia and expressed concern about the court's ability to fulfil its obligations under proposed new section 67ZBB (the requirement to take prompt action). The Chief Justice stated:

> In the current financial climate, the Court is not in a position to accommodate an expansion of its workload unless more funding is forthcoming to assist the Court in managing that increase.[132]

3.140 The Law Council of Australia endorsed the comments of the Chief Justice:

> The courts already struggle to meet the requirements of [section] 60K and this situation will only get worse with the introduction of [section] 67ZBB. It is the view of the Family Law Section that the courts will not be able to meet the requirements of [section] 67ZBB unless the Government commits significant further resources.[133]

3.141 More generically, some submitters stated:

> The issue of family violence cannot be adequately addressed without looking at the issue of lack of resources – for court processes, support services and legal assistance – as all of these things are a major contributor to the failure of the court system to adequately protect victims of violence.[134]

3.142 When the issue of additional funding was raised with the Department, it responded:

> The family courts will need to adapt their practices to deal with the reform as no additional funding is to be allocated in respect of the Bill.[135]

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131 Explanatory Memorandum, p. 2.

132 *Submission 39*, p. 6. The Chief Justice noted that this is in addition to the increased workload to be effected by item 45 of Schedule 1 (the application provision).

133 *Submission 200*, p. 4.

134 Women's Legal Services Australia, *Submission 62*, p. 18. Also see Wirringa Baiya Aboriginal Women's Legal Service, *Submission 65*, p. 6; NSW Women's Refuge Movement, *Submission 207*, p. 19 for identical comments.

135 Attorney-General's Department, answer to question on notice, received 22 July 2011, p. 5.

Equal shared parental responsibility

3.143 The Bill will affect two key features of the 2006 family law reforms: the presumption of equal shared parental responsibility (ESPR), as set out in current section 61DA; and the requirement to attend pre-filing family dispute resolution in parenting cases, as set out in current section 60I. Whereas only a few submitters commented on the latter issue,[136] the majority of inquiry participants commented on the ESPR provisions in the Act.

3.144 Current subsections 61DA(1) and (2) of the Act state:

> (1) When making a parenting order in relation to a child, the court must apply a presumption that it is in the best interests of the child for the child's parents to have equal shared parental responsibility for the child.
>
> Note: The presumption provided for in this subsection is a presumption that relates solely to the allocation of parental responsibility for a child as defined in section 61B. It does not provide for a presumption about the amount of time the child spends with each of the parents (this issue is dealt with in section 65DAA).
>
> (2) The presumption does not apply if there are reasonable grounds to believe that a parent of the child (or a person who lives with a parent of the child) has engaged in:
>
> > (a) abuse of the child or another child who, at the time, was a member of the parent's family (or that other person's family); or
> >
> > (b) family violence.

3.145 Some submitters and witnesses argued that the proposed new definitions of 'abuse' and 'family violence' constitute an attempt to 'roll back' the ESPR provisions of the Act.[137]

3.146 Dads4Kids Fatherhood Foundation, for example, submitted:

> [T]he 2006 reforms were initiated due to too many children being denied the opportunity to develop a meaningful relationship with both of their parents. We are very disheartened to see the shared parenting legislation be reversed under the guise of reducing family violence.[138]

3.147 The Joint Parenting Association similarly submitted:

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136 For example, the Law Council of Australia who supported the principles underpinning the two key features of the 2006 family law reforms mentioned in paragraph 3.143: see Mr Geoff Sinclair, Law Council of Australia, *Committee Hansard*, 8 July 2011, p. 53.

137 For example, Non-Custodial Parents Party (Equal Parenting), *Submission 1*, p. 2; Mr Roger Smith, *Submission 45*, p. 3; Professor Stephen Brown, *Submission 68*; Dads4Kids Fatherhood Foundation, *Submission 95*, p. 2; Name Withheld, *Submission 101*, p. 1; Name Withheld, *Submission 134*, p. 1; Mr Howard Beale, *Submission 155*, p. 1; Men's Rights Agency, *Submission 170*, p. 5; Lone Fathers Association, *Submission 190*, p. 2; Shared Parenting Council of Australia, *Submission 204*, p. 5.

138 *Submission 95*, p. 2.

> [We are strongly opposed to] the Federal Government's removal of the many common-sense provisions of the Family Law Act that were enacted in 2006 to bring a much needed balance between protecting families from violence and protecting children's human right to the love of their parents in equal measure following divorce.[139]

3.148 Men's Health Australia voiced its concerns as follows:

> We are strongly opposed to the Federal Government's proposal to remove many of the sensible provisions of the Family Law Act that were instituted in 2006 to bring a much needed balance between protecting families from violence and protecting parents from false allegations of violence.
>
> ...
>
> We have no doubt that the proposed changes will lead to increased rates of suicide, depression and self-medication in many separated fathers (and some mothers), and the potential damage to the lives of children denied access to one of their parents is unthinkable.
>
> ...
>
> The Family Court must be allowed to act in the best interests of children, which means where possible encouraging substantial contact with both parents. The proposed changes do not do this, and in fact seem designed to abet malicious litigants.[140]

3.149 However, there were also diametrically opposed submitters and witnesses who argued that the Bill does not, but should, eliminate the ESPR provisions altogether. The reasons for this view included: each case must be determined on its

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139 *Submission 146*, p. 1. Also see Mr Barry Williams, Lone Fathers Association, *Committee Hansard*, 8 July 2011, p. 17.

140 *Submission 60*, pp 1 and 3. Also see Mr Barry Williams, Lone Fathers Association, *Committee Hansard*, 8 July 2011, p. 17.

own merits (rather than according to a statutory formula);[141] and the ESPR provisions continue to place children and families at risk of abuse and violence.[142]

3.150 The Explanatory Memorandum states:

> The Family Violence Bill retains the substance of the shared parenting laws introduced in the *Family Law Amendment (Shared Responsibility) Act 2006* (Cth) and continues to promote a child's right to a meaningful relationship with both parents where this is safe for the child.[143]

3.151 The Attorney-General has publicly reiterated that position as follows:

> Despite the claims of some interest groups, the reforms do not repeal the shared care laws introduced in 2006.
>
> The Family Violence Bill retains the substance of the shared parenting laws and continues to promote a child's right to a meaningful relationship with both parents–but the best interests of the child must always come first, particularly in situations of conflict.
>
> The Australian Institute of Family Studies has found that shared care generally works well where the parents have little conflict, can cooperate and live close together.
>
> A child's right to a meaningful relationship with both parents – where this is safe – should always be supported.[144]

Need for a public education campaign about the Bill's proposed measures

3.152 Associate Professor Rhoades and Professor Dewar stated that a key theme of the Australian Institute of Family Studies report was that many people who sought assistance from family law services possessed an inaccurate understanding of the law:

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141 For example, Associate Professor Helen Rhoades and Professor John Dewar, *Submission 9*, pp 5-6; Northern Rivers Community Legal Centre, *Submission 23*, p. 4; Women's Legal Centre (ACT and Region), *Submission 26*, p. 5; National Peak Body for Safety and Protection of Parents and Children, *Submission 33*, Attachment 3, p. 4; Peninsula Community Legal Centre, *Submission 40*, pp 3 and 5; Women's Legal Services Australia, *Submission 62*, p. 13; Council of Single Mothers and their Children, *Submission 74*, p. 7; Name Withheld, *Submission 92*, p. 1; Name Withheld, *Submission 99*, p. 4; Family Law Council, *Submission 113*, p. 14; Women Everywhere Advocating Violence Elimination, *Submission 114*, p. 17; The Benevolent Society, *Submission 131*, p. 5; Immigrant Women's Support Service, *Submission 181*, p. 2. Also see Ms Bronwynne Luff, *Submission 164*, p. 6; Name Withheld, *Submission 124*, p. 1; Justice for Children, *Submission 189*, p. 6; Anglicare Victoria, *Submission 253*, p. 5. Also see Professor Richard Chisholm, *Committee Hansard*, 8 July 2011, p. 6.

142 For example, the Women's Legal Centre (ACT and Region), *Submission 26*, pp 5-6; Wirringa Baiya Aboriginal Women's Legal Service, *Submission 65*, pp 4-5; Hawkesbury Nepean Community Centre, *Submission 107*, pp 10-11; Shoalcoast Community Legal Centre, *Submission 177*, p. 4. Also see Australian Institute of Family Studies, *Submission 173*, pp 5-6.

143 Explanatory Memorandum, p. 2.

144 The Drum Opinion, 24 March 2011, available at: http://www.abc.net.au/unleashed/45516.html (accessed 14 June 2011).

> Surveys of service sector personnel revealed that on first seeking assistance, clients of both legal and family dispute resolution services 'failed to understand the distinction between the concepts of equal shared parental responsibility and time', and that many parents, particularly fathers, 'had an expectation of equal care-time arrangements' (Kaspiew et al, 2009: 207, 210). The research found that these misunderstandings of the law had led to unrealistic instructions from clients, impeding the ability of service sector professionals, especially lawyers, to achieve developmentally appropriate care arrangements for children (Kaspiew et al, 2009: 215)...[O]ur view is that the Government's proposed approach to prioritising safety from harm (by enacting a new section 60CC(2A) and new advisers' obligations regarding the best interests of the child in section 60D) may further complicate the legislation, creating added confusion for clients. **We believe a public education campaign to accompany the introduction of the [Bill] is warranted to educate the wider community about the new provisions and to correct the present misunderstandings of the [Act].**[145]

3.153 Psychologists and social workers within the family law system, community legal centres and other submitters agreed with this recommendation.[146]

Committee view

3.154 The committee commends the Australian Government for responding to reviews of the operation of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* and introducing the Bill to address ongoing concerns about the protection of children and families at risk of abuse and violence.

3.155 The committee notes that its inquiry into the provisions of the Bill generated considerable interest from both individuals and organisations. Irrespective of participants' views on specific issues, a common theme to emerge in much of the evidence was that the *Family Law Act 1975* (Act) is too complex. In particular, submitters and witnesses described difficulties in interpreting and applying certain provisions in Part VII of the Act.

3.156 The Family Court of Australia requires clear legislative guidance from the Parliament. Australian families, and family law and child welfare professionals, equally require legislation which they can understand and readily apply. In the context of protecting a child from harm, this cannot be overemphasised.

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145 *Submission 9*, pp 6-7 with emphasis in the original document. Also see Mr Geoff Sinclair, Law Council of Australia, *Committee Hansard*, 8 July 2011, p. 51 for similar comments regarding community misconceptions of the shared parental responsibility provisions.

146 For example, see the Peninsula Community Legal Centre, *Submission 40*, p. 5; Caxton Legal Centre, *Submission 72*, p. 7; Ms Linda Tan, Ms Jennifer Walker, Ms Natalie Haddad, Ms Danielle Moglia and Ms Jessica Frearson, *Submission 106*, p. 4; Family Law Council, *Submission 113*, pp 15-16.

3.157 For these reasons, the committee suggests that, at the first opportunity, the Australian Government renumber provisions in the Act to ease comprehension and make the legislation more 'user friendly'. The committee also believes that there is considerable merit in Associate Professor Rhoades and Professor Dewar's suggestion for an education campaign to accompany the introduction of the Bill. The campaign should specifically cover the critical amendments made by the Bill and the Bill's commencement date, and should clarify the distinction between the concepts of equal shared parental responsibility and time.

3.158 In respect of the substantive provisions proposed in the Bill, the committee comments as follows.

Prioritising the best interests of children in parenting matters

3.159 The committee strongly endorses prioritising the protection of children from all forms of harm. Accordingly, committee members have reservations concerning the need to determine an inconsistency between the two primary considerations prior to the Family Court of Australia being required to give greater weight to the need to protect a child from physical or psychological harm. There should be no such pre-requisite. The committee considers that the objective of proposed new subsection 60CC(2A) could be better met by redrafting the proposed provision as suggested by numerous submitters:

> 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).

3.160 The committee accepts the general principles that it is important for a child to have a relationship with his or her parents, and for each parent to facilitate a relationship with the other parent. However, the committee does not believe a relationship should be facilitated where there is a real risk of harm to a child. Nor should a parent feel compelled to conceal, or fail to disclose, that risk due to a fear of having a child removed from his or her care. The committee therefore supports proposed new paragraph 60CC(3)(c) but recommends that it be modified to require the Family Court of Australia to take into consideration the reasons why a relationship might not have been facilitated, including a risk of harm to a child.

3.161 The committee notes that existing section 60CF of the Act requires parties to inform the Family Court of Australia of any relevant family violence orders. If the Family Court of Australia becomes aware of such an order, the committee agrees that it is not the order itself but its evidentiary basis which is of interest to the Family Court of Australia. Accordingly, the committee, like the Australian Law Reform Commission and the Family Court of Australia, considers that the Bill should implement the provision proposed by Professor Chisholm as paragraph 60CC(3)(k):

> (k) any relevant inferences that can be drawn from any family violence order that applies, or has applied, to the child or a member of the child's family, taking into account the nature of the order, the circumstances in

> which it was made, any evidence admitted and any findings made by the court that made the order, and any other relevant matter.[147]

3.162 One final point in relation to the additional considerations: the committee considers that it would be helpful for the Department to reissue the Explanatory Memorandum highlighting that the proposed amendments to subsection 60CC(3) are not intended to restrict the matters to which the court may have regard under current paragraph 60CC(3)(m).

Recommendation 1

3.163 The committee recommends that proposed new subsection 60CC(2A) in item 17 of Schedule 1 of the Bill be amended to read '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)'.

Recommendation 2

3.164 The committee recommends that proposed new paragraph 60CC(3)(c) in item 18 of Schedule 1 of the Bill be amended to require the Family Court of Australia to give consideration to the reason(s) why one parent might not have facilitated a relationship with the other parent in accordance with that provision, including due to risk of harm to a child.

Recommendation 3

3.165 The committee recommends that proposed new paragraph 60CC(3)(k) in item 19 of Schedule 1 of the Bill be amended to read:

> **(k) any relevant inferences that can be drawn from any family violence order that applies, or has applied, to the child or a member of the child's family, taking into account the nature of the order, the circumstances in which it was made, any evidence admitted and any findings made by the court that made the order, and any other relevant matter.**

New definitions of 'abuse' and 'family violence'

3.166 In the proposed new definition of 'abuse', the requirement for a child to suffer *serious* psychological harm or *serious* neglect concerned the committee. The committee agrees with the Family Law Council, and other inquiry participants, that by its very nature any form of child abuse is serious. The committee would much prefer that child abuse is caught in its earliest stages, rather than subject a child to more prolonged abuse in order to meet a statutory threshold. This is not the message that this committee, or the Australian Government, wishes to send to the Australian community.

147 *Supplementary Submission 203*, p. 1.

3.167 The Attorney-General's Department explained the use of the qualifier 'serious' in paragraph (c) of the proposed new definition of 'abuse' as an attempt to avoid over-reporting. The committee is not persuaded by this argument. Child welfare authorities are properly responsible for investigating all allegations of child abuse and should be given the opportunity to do so. If there is a concern that a broader definition of 'abuse' will impede investigations, the committee would strongly urge all child welfare authorities to review and, if necessary, implement appropriate processes for granting priority to the most urgent cases and dealing with all other cases within a reasonable time frame. In this context, the committee notes that the Family Court of Australia is required to act promptly and, in any event, within eight weeks.

3.168 The committee commends the Australian Government for giving greater recognition to the breadth of behaviours which constitute family violence. As noted by the Attorney-General's Department, the proposed new definition of 'family violence' provides a more descriptive and subjective, but not exclusive, test, which requires decision makers to consider the personal experiences of family members.[148]

3.169 Some inquiry participants told the committee that the proposed new definition of 'family violence', and the repeal of the mandatory costs order provision in existing section 117AB, would result in an 'explosion' of malicious and vexatious claims. The committee does not agree with these assertions. According to the Family Court of Australia, existing section 117AB is seldom used. Further, the committee accepts the research findings of Dr Michael Flood and, in particular, the finding that false allegations are rarely made. This finding was supported by inquiry participants, and in this regard, the committee notes that allegations made by a party will be required to meet the thresholds set out in proposed new subsection 4AB(1), as well as the usual evidentiary standards.

Recommendation 4

3.170 The committee recommends that:

- **proposed paragraph (c) in the new definition of 'abuse' in subsection 4(1) in item 1 of Schedule 1 of the Bill be amended by removing the reference to the word 'serious'; and**
- **the Attorney-General's Department review the provisions in the *Family Law Act 1975* containing the words 'abuse' and 'neglect' to determine whether there are any legislative inconsistencies which need to be addressed.**

Ensuring better access to evidence of abuse and family violence

3.171 One objective of the Bill is to ensure that the Family Court of Australia has better access to evidence of abuse and family violence. Submitters and witnesses presented a considerable amount of information to the committee suggesting that more

148 Answer to question on notice, received 22 July 2011, p. 7.

could be done to achieve this objective. The committee agrees that there is room for improvement.

3.172 In July, the Standing Committee of Attorneys-General (SCAG) undertook to provide a national response to the Australian Law Reform Commission and New South Wales Law Reform Commission report, *Family Violence – A national legal response*.[149] That report made a number of findings regarding improvements to information sharing between the federal family law system and state and territory child protection systems. The committee supports improved interactions between these systems but considers it appropriate to wait for the SCAG response and the outcome of the current initiatives briefly mentioned in the evidence of the Attorney-General's Department.

3.173 The committee accepts the Department's explanation regarding what course of action the Family Court of Australia is to take should it receive an affirmative response to its inquiry into whether a party alleges abuse, neglect or family violence. However, the committee considers that this explanation should appear in the relevant provisions and accordingly suggests the inclusion of an appropriate note where necessary.

Training and education in the family law system

3.174 Throughout the inquiry, participants questioned the specialist knowledge of professional persons involved in the family law system. In particular, the committee heard concerns that judicial officers possess and apply various understandings of what constitutes family violence and its dynamics. The Family Court of Australia was not convinced that 'common training' would resolve any perceived deficiencies in judicial training. In its view, the Family Court of Australia judicial education program, supplemented by the recently updated Family Violence Best Practice Principles, provides judicial officers with adequate knowledge to fulfil their function. The committee accepts that the on-going education and internal procedures adopted by the Family Court of Australia and its officers sufficiently prepares the court to appropriately manage matters involving allegations of abuse and family violence.

3.175 The committee is aware of some concern that the Family Violence Best Practice Principles are not always implemented and, as a consequence, it is alleged that the Family Court of Australia is, in some instances, making unsafe parenting arrangements. Without overwhelming evidence to support these allegations, the committee accepts the evidence of the Law Council of Australia that such instances would be rare.[150]

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149 Standing Committee of Attorneys-General, Communiqué, 21-22 July 2011.

150 Mr Geoff Sinclair, Law Council of Australia, *Committee Hansard*, 8 July 2011, p. 52.

Commencement provisions

3.176 The committee notes the Attorney-General's Department's advice regarding the commencement date of the Bill, and understands that it is the intention that Schedule 1 of the Bill commence six months after the Bill receives Royal Assent, if proclamation has not occurred within that six-month period (subclause 2(1) of the Bill). This time frame was chosen to allow the Family Court of Australia some lead time to put in place relevant processes and systems for the new measures.[151]

3.177 The committee also notes that the key objective of the Bill is to provide better protection for children and families at risk of violence and abuse. For this reason, item 45 of Schedule 1 has been drafted to apply the substantive provisions of the Bill to as many family law cases as possible, including proceedings instituted in the Family Court of Australia prior to commencement of the Bill.[152]

3.178 The committee strongly endorses the key objective of the Bill and therefore believes that the substantive provisions of the Bill should commence earlier than the maximum lead time of six months provided for in subclause 2(1) of the Bill. The committee considers that three months is sufficient time for the Family Court of Australia, and other stakeholders, to prepare for the changes to be introduced upon enactment of the Bill.

3.179 In addition, the committee is concerned with the proposal to allow the substantive provisions of the Bill to be proclaimed after Royal Assent but before expiration of the lead time. The committee believes that such a proposal introduces an element of uncertainty which is best avoided in order to establish a clear and specific commencement date for Schedule 1 of the Bill.

Recommendation 5

3.180 The committee recommends, in relation to the commencement date of Schedule 1 of the Bill, that column 2 of subclause 2(1) of the Bill be amended to delete reference to 'A single day to be fixed by Proclamation' and to provide that Schedule 1 will commence on the day after the end of the period of three months beginning on the day of Royal Assent.

3.181 The committee further notes that the regulation-making power in item 48 of Schedule 1 of the Bill could be invoked to make regulations of a transitional, application or savings nature relating to the substantive provisions of the Bill. It is

151 Mrs Toni Pirani, Attorney-General's Department, *Committee Hansard*, 8 July 2011, p. 57.

152 Answer to question on notice, received 22 July 2011, p. 14.

arguable whether such a provision amounts to an inappropriate delegation of legislative power.[153]

3.182 As a general principle, the committee does not consider that the use of 'Henry VIII' clauses is a preferred course of action, particularly when the precise content or nature of potential regulations is not known or unclear. The committee understands that no regulations have been drafted in relation to the Bill.[154] In this circumstance, it is difficult for the committee to reach firm conclusions regarding the appropriateness of item 48 of Schedule 1.

3.183 However, the committee is persuaded that the regulation-making power in this instance would serve a useful and practical function. As noted by the Attorney-General's Department, the provision enables the Australian Government, in consultation with the Family Court of Australia, to assess categories of proceedings to which the substantive provisions of the Bill should not apply. Such categories could include part-heard, reserved judgement, appeal or filed matters which have not been disposed of by the court prior to the commencement date.[155] For this reason, the committee concludes that the regulation-making power in item 48 of Schedule 1 should remain in the Bill.

Equal shared parental responsibility provisions

3.184 The committee is not persuaded by arguments that the Bill 'winds back' the shared parenting reforms introduced by the *Family Law Amendment (Shared Parental Responsibility) Act 2006*. Upon examination, the Bill appears to strike a balance between a child's right to a meaningful relationship with both parents and a child's right to protection from harm. The committee chooses these words with care as Part VII of the Act promotes the rights and interests of children only.

Minor drafting issues

3.185 Finally, the committee notes two small drafting issues: first, the use of the word 'done' in proposed new subsection 60B(4); and second, the heading 'Amendments that apply to proceedings instituted on or after commencement' in item 45 of Schedule 1. In relation to the first point, the committee agrees with the Australian Law Reform Commission that the word 'done' is 'ugly' and 'inelegant',[156]

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153 For example, see the Attorney-General's Department, answer to question on notice, received 22 July 2011, p. 14 where the Attorney-General expressed the view that item 48 of Schedule 1 did not comprise an inappropriate delegation of legislative power as the provision did not affect the substantive operation of the measures proposed in the Bill.

154 Mrs Toni Pirani, Attorney-General's Department, *Committee Hansard*, 8 July 2011, p. 57.

155 Mrs Toni Pirani, Attorney-General's Department, *Committee Hansard*, 8 July 2011, p. 56; Answer to question on notice, received 22 July 2011, p. 15.

156 Professor Rosalind Croucher, Australian Law Reform Commission, *Committee Hansard*, 8 July 2011, pp 6-7.

but notes that the wording reflects the current drafting practice of the Office of Parliamentary Counsel. In relation to the second point, it is clear that the heading is meant to read 'Amendments that apply to proceedings instituted on or before commencement' and should be amended accordingly.

Recommendation 6

3.186 The committee recommends that the Attorney-General's Department, in conjunction with the family law courts and relevant professional organisations, institute an education campaign, to commence no less than two months prior to the expiration of any lead time, and to cover the critical amendments made by the Bill, including the Schedule 1 commencement date.

Recommendation 7

3.187 The committee recommends that the heading in item 45 of Schedule 1 of the Bill be amended to read 'Amendments that apply to proceedings instituted on or before commencement'.

Recommendation 8

3.188 Subject to the above recommendations, the committee recommends that the Senate pass the Bill.

Senator Trish Crossin
Chair

RECOMMENDATIONS

Recommendation 1

3.163 The committee recommends that proposed new subsection 60CC(2A) in item 17 of Schedule 1 of the Bill be amended to read '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)'.

Recommendation 2

3.164 The committee recommends that proposed new paragraph 60CC(3)(c) in item 18 of Schedule 1 of the Bill be amended to require the Family Court of Australia to give consideration to the reason(s) why one parent might not have facilitated a relationship with the other parent in accordance with that provision, including due to risk of harm to a child.

Recommendation 3

3.165 The committee recommends that proposed new paragraph 60CC(3)(k) in item 19 of Schedule 1 of the Bill be amended to read:

> **(k) any relevant inferences that can be drawn from any family violence order that applies, or has applied, to the child or a member of the child's family, taking into account the nature of the order, the circumstances in which it was made, any evidence admitted and any findings made by the court that made the order, and any other relevant matter.**

Recommendation 4

3.170 The committee recommends that:

- **proposed paragraph (c) in the new definition of 'abuse' in subsection 4(1) in item 1 of Schedule 1 of the Bill be amended by removing the reference to the word 'serious'; and**
- **the Attorney-General's Department review the provisions in the *Family Law Act 1975* containing the words 'abuse' and 'neglect' to determine whether there are any legislative inconsistencies which need to be addressed.**

Recommendation 5

3.180 The committee recommends, in relation to the commencement date of Schedule 1 of the Bill, that column 2 of subclause 2(1) of the Bill be amended to delete reference to 'A single day to be fixed by Proclamation' and to provide that Schedule 1 will commence on the day after the end of the period of three months beginning on the day of Royal Assent.

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Recommendation 7

3.187 The committee recommends that the heading in item 45 of Schedule 1 of the Bill be amended to read 'Amendments that apply to proceedings instituted on or before commencement'.

Recommendation 8

3.188 Subject to the above recommendations, the committee recommends that the Senate pass the Bill.

ADDITIONAL COMMENTS BY COALITION SENATORS

1.1 Coalition senators agree with the majority report, except for the findings and recommendations made in relation to the repeal of the facilitation aspect of the 'friendly parent' provision, the new definition of 'abuse', the new definition of 'family violence', the repeal of the mandatory costs order provision (section 117AB), and the application provision in item 45 of Schedule 1 of the Bill.

Repeal of the facilitation aspect of the 'friendly parent' provision

1.2 Coalition senators agree with the general principles accepted by the committee in the majority report, that is, it is important for a child to have a relationship with his or her parents, and for each parent to facilitate a relationship with the other parent.

1.3 However, Coalition senators note that the Bill will undermine those principles by repealing those provisions in the existing paragraphs 60CC(3)(c) and 60CC(4)(b) which take account of a party's willingness to facilitate another party's involvement in a child's welfare. Such repeal attacks a key element of the shared parenting principles.

1.4 Coalition senators are unpersuaded that parties to proceedings are not disclosing concerns of family violence and child abuse for fear of being found to be an 'unfriendly parent'.

1.5 For this reason, Coalition senators consider that the existing obligation for a parent to facilitate a child's relationship with the other parent is appropriate, and consider that the existing provisions to this effect should remain in the legislation.

Recommendation 1

1.6 Coalition senators recommend that items 18 and 20 of Schedule 1 of the Bill not be supported.

New definition of 'abuse'

1.7 Coalition senators agree that any form of child abuse is serious and, in an ideal world, all allegations of child abuse would be investigated immediately they were raised. However, this is not an ideal world, and state and territory child protection authorities must work with the resources available to them at any particular time.

1.8 The Attorney-General's Department recognised that a definition of 'abuse' which encompasses each and every allegation of abuse could severely impact the state and territory child protection systems. This could well be to the detriment of those children suffering the types of abuse which the Bill aims to prevent.

1.9 Coalition senators also question whether state and territory child protection authorities could implement appropriate processes to distinguish the most substantive allegations of child abuse. Assuming that this were feasible, it is not a system change that could be implemented overnight.

1.10 Coalition senators consider that the word 'serious' in proposed paragraph (c) of the new definition of abuse in subsection 4(1) of the Bill appropriately seeks to avoid over-reporting and to focus limited child protection resources on substantive allegations.

1.11 For the reasons referred to above, Coalition senators do not support the majority report's Recommendation 4.

New definition of 'family violence'

1.12 Coalition senators endorse the objective of giving greater recognition to the breadth of behaviours comprising family violence. However, Coalition senators do not consider that the net should be cast so wide as to capture all human behaviours.

1.13 In evidence, Professor Richard Chisholm gave compelling evidence that proposed new subsection 4AB(1) is over-inclusive, capturing 'any behaviour that causes a family member to be fearful'.[1] Coalition senators believe such a provision undermines the objective of the Bill as it makes no allowance for the intent of the party giving rise to a 'fear'.

1.14 Professor Chisholm proposed an alternate provision – referred to in paragraph 3.74 of the majority report – which Coalition senators consider would better target family violence, by introducing a requirement for the behaviour to be intended to cause a family member to be fearful. Coalition senators recommend that proposed new subsection 4AB(1) be amended accordingly.

Recommendation 2

1.15 Coalition senators recommend that proposed new subsection 4AB(1) in item 8 of Schedule 1 of the Bill be amended to read:

> **For the purposes of this Act, family violence means behaviour by a person towards a member of the person's family that is violent, threatening, coercive or controlling, or is intended to cause the family member to be fearful.**

Repeal of the mandatory costs orders provision

1.16 Coalition senators oppose the repeal of the mandatory costs order provision (section 117AB). While some submitters and witnesses argued that the provision is

1 *Committee Hansard*, 8 July 2011, p. 3.

redundant, rarely used and discourages the disclosure of allegations of abuse and family violence, Coalition senators are cognisant of contrary arguments.

1.17 Coalition senators consider that, irrespective of its invocation, the mandatory costs order provision sends a strong message to family law litigants that the making of knowingly false allegations will not be tolerated. This is particularly important in circumstances where a prosecution for perjury will not necessarily follow.

1.18 Further, Coalition senators cannot justify the repeal of section 117AB on the grounds that it might be misunderstood by family law litigants – including on account of poor legal advice – as submitted by the Joint Parenting Association, among others. Coalition senators suggest that this is an area in which a public education campaign could prove useful.

Recommendation 3

1.19 Coalition senators recommend that item 43 of Schedule 1 of the Bill be removed from the Bill.

Application provision

1.20 In evidence, the Family Court of Australia expressed a preference for the substantive provisions of the Bill to apply only to those applications filed after the commencement date.[2]

1.21 Coalition senators believe this is a highly pragmatic approach as it will make a clear distinction between those matters to which the new measures apply, and those matters to which the current arrangements will have continued application. Such an approach is more equitable to parties with matters already before the court since it will eliminate the imposition of additional costs and possible delays associated with compliance by affected parties with the new arrangements.

Recommendation 4

1.22 Coalition senators recommend that item 45 of Schedule 1 of the Bill be amended to apply only to proceedings instituted in the Family Court of Australia on or after commencement.

1.23 Coalition senators agree with and support all other recommendations in the majority report.

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2 *Committee Hansard*, 8 July 2011, p. 31.

Senator Gary Humphries
Deputy Chair

Senator Sue Boyce

Senator Helen Kroger

Senator John Williams

ADDITIONAL COMMENTS BY THE AUSTRALIAN GREENS

Introduction

1.1 The Australian Greens believe it is essential that the Family Law Act is amended as it fails to fully protect children and family members from abuse and violence. The best interests of children should be prioritised in the family law system.

1.2 We support the recommendations in the majority report but believe more amendments are required. As such, these additional comments provide several recommendations to strengthen the Bill, including: the removal of equal shared parental responsibility provisions; strengthening of the best interests clause; expanding the reference to exposure in both the definition of family violence and abuse; and the consideration of a risk assessment framework for the family law system.

Removal of equal shared parental responsibility (ESPR)

1.3 The Australian Greens have consistently opposed the ESPR requirement since its introduction in 2006. As we argued at that time, ESPR creates a de facto presumption of equal time:

> While 'equal shared parental responsibility' and 'equal time' are not one and the same, they are inter-related in a way that creates an unacceptable formula in the bill…We share the concerns of Relationships Australia, who stated:
>
> "[We] acknowledge that the concept has moved from a 'presumption of equal time' to a presumption of 'equal shared parental responsibility'. However, we are concerned that with a starting point of a child spending 'equal time' or 'substantial and significant time' with each parent this will be a de facto presumption of equal time".[1]
>
> The operation of a presumption such as this, de facto or otherwise, is likely to lead to an inappropriate and harmful focus in determining what is best for children.[2]

1.4 Subsections 61DA(1) and (2) of the Act require the court to presume that it is in the best interests of the child for the child's parents to have equal shared parental

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1 Senate Legal and Constitutional Legislation Committee, Inquiry into Provisions of the Family Law Amendment (Shared Parental Responsibility) Bill 2005, March 2006, *Submission 14*, p. 1.

2 Senate Legal and Constitutional Legislation Committee, Inquiry into Provisions of the Family Law Amendment (Shared Parental Responsibility) Bill 2005, March 2006, Dissenting Report by the Australian Democrats and the Australian Greens.

responsibility for the child unless there are reasonable grounds to believe that a parent has engaged in abuse or family violence. Submissions to the inquiry highlighted the following concerns with ESPR.

Lack of clarity

1.5 As outlined by Professor Richard Chisholm, aspects of the legislation including ESPR are 'unnecessarily complex and confusing, making it hard for people to focus on what is best for children'.[3] While the Act doesn't create a presumption favouring equal time, it can easily be interpreted that way, as it is the only outcome the Act specifically mentions.[4] Professor Chisholm noted:

> [O]n this, as on other matters, I believe that the Act is subtly incoherent, sending out inconsistent messages. Not surprisingly, the [Australian Institute of Family Studies] Evaluation and other reports reveal that it has caused considerable misunderstanding.[5]

Family violence not given proper consideration

1.6 Evidence was submitted as part of the inquiry which expressed concern that family violence is not given adequate consideration in decisions on equal shared parenting. For example, Women's Legal Services Australia (WLSA) stated:

> There should be no presumption of equal shared parental responsibility. The presumption is meant to be rebutted by family violence. However, the issue is that family violence may not be given its due weight to be able to negate the presumption, especially at an interim stage, where the family violence allegations are unlikely to be considered or tested...There should therefore be no presumption about shared responsibility for decision-making and reference should only be made to the best interests of child and the circumstances of each case.[6]

1.7 Concerns about family violence are supported by the Australian Institute of Family Studies Evaluation which found, out of parents who had setup arrangements after the 2006 reforms, those with safety concerns were no less likely than other parents to have shared care-time arrangements.[7]

Detrimental outcomes for children and families

1.8 It is self-evident that failure to adequately consider family violence can lead to negative outcomes.

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3 *Submission 203*, p. 23.

4 *Submission 203*, p. 24.

5 *Submission 203*, pp 4-5.

6 *Submission 62*, p. 12.

7 Family Law Council, *Submission 113*, p. 10.

1.9 During the hearing, WLSA argued:

> The presumption and emphasis on shared parenting over and above other parenting outcomes places children and other family members who have experienced domestic violence in danger. This is because such arrangements provide multiple opportunities for abuse to occur, such as changeover, and because of the high levels of communication and contact that is required in shared parenting arrangements.[8]

1.10 Further:

> Data suggests the reforms have been successful in producing an increase in 'substantially shared care arrangements' since the legislation came into force. At the same time, however, the research indicated that a significant number of these arrangements are characterized by intense parental conflict, and that shared care of children is a key variable affecting poor emotional outcomes for children.[9]

1.11 Professors Helen Rhoades and John Dewar, recommending that the presumption of ESPR be repealed, cited research showing ESPR creates "expectations and demands for shared time by fathers which have placed pressure on mothers to agree to 'unsafe arrangements'".[10] The Family Law Council (FLC) pointed to recent research indicating that shared care of children is contra-indicated where there are risks to children's well-being, such as where parental mental health or drug misuse concerns, or high ongoing parental conflict, are present.[11]

1.12 Furthermore, when giving evidence, the FLC stated that there is no clear benefit to shared parenting arrangements:

> The recent research that has been released, including reports by the Australian Institute of Family Studies, Cashmore and others and McIntosh and others, indicates that shared parenting arrangements of themselves offer no independent benefit to children compared with other types of arrangements where children see their non-resident parent regularly and there are no concerns about safety, violence and conflict.[12]

Approach based on individual needs

1.13 It became increasingly evident throughout the hearing process that a flexible approach is needed, tailored to the circumstances of each family, not a 'one size fits' all requirement of shared responsibility. Parenting arrangements should always be governed by the best interests of the child, and should be determined on a

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8 Ms Angela Lynch, Women's Legal Services Australia, *Committee Hansard*, 8 July 2011, p. 22.

9 Women's Legal Services Australia, *Submission 62*, p. 12.

10 *Submission 9*, p. 3.

11 *Submission 113*, p. 9.

12 Mrs Nicola Davies, Family Law Council, *Committee Hansard*, 8 July 2011, p. 9.

case-by-case basis. As WSLA clearly summed up, 'The safety and wellbeing of families is too important not to take the time to judge each case on its own merits when issues of domestic violence and abuse are involved'.[13]

1.14 Evidence given to the inquiry indicates that the presumption of ESPR is often not in the best interests of the child. The Australian Greens believe this provision should be repealed.

Considerations in determining a child's best interests

1.15 The Australian Greens do not believe the recommendation on subsection 60CC(2A) goes far enough to protect the best interests of the child, nor does it 'challenge the present misperceptions of the law (especially the impression that there are 'two basic types of case')'.[14] It may in fact increase the complexity of the judicial decision making process.

1.16 A large number of submissions,[15] including that of Professors Rhoades and Dewar and WLSA, recommend removing the two tiers of factors present in section 60CC and creating a single list of which child safety is the first consideration and is given priority.[16] Women's Legal Services Australia supports this, further clarifying that a meaningful relationship should be listed as one of the many factors, and that the provision should direct the courts to weigh up all factors relative to the circumstances of each case:

> There should be no primary considerations at all but one list of factors for consideration:
>
> - where the safety and protection of children is listed as the first consideration and given priority;
> - that having a meaningful relationship be listed as one of the many factors;
> - that the courts should weigh up all of the factors on the list depending on the circumstances of each individual case.[17]

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13 Ms Angela Lynch, Women's Legal Services Australia, *Committee Hansard*, 8 July 2011, p. 22.

14 *Submission 9*, p. 3.

15 For example, see Northern Rivers Community Legal Centre, *Submission 23*, p. 3; Women's Legal Centre (ACT and Region), *Submission 26*, p. 3; Peninsula Community Legal Centre, *Submission 40*, p. 4; Wirringa Baiya Aboriginal Women's Legal Service, *Submission 65*, pp 2-3; Women's Legal Service Tasmania, *Submission 70*, p. 4; Caxton Legal Centre, *Submission 72*, p. 4; Australian Association of Social Workers, *Submission 69*, pp 3-4; Women Everywhere Advocating Violence Elimination, *Submission 114*, p. 5; Top End Women's Legal Service, *Submission 176*, p. 3; Shoalcoast Community Legal Centre, *Submission 177*, p. 3.

16 *Submission 9*, p. 3.

17 *Submission 62*, p. 9.

1.17 The Australian Greens support this suggestion as it simplifies the two tiered approach, provides flexibility and places the safety of children as the top priority in all cases.

Exposure to family violence in the definition of 'family violence'

1.18 Recognising that exposure to family violence is a form of abuse is an important step in improving the protection of children and prioritising their safety. However, the Australian Greens believe that exposure should be included in the definition of family violence and that in both the definition of abuse and family violence the legislation should be clarified to ensure that the parent victim is not held responsible for the exposure.

1.19 Both the Australian Law Reform Commission (ALRC), citing recommendations from its recent report into family violence,[18] and WLSA, among many others, recommended that exposure to the effects of family violence be included in the definition of family violence. The ALRC noted the 'considerable amount of research documenting the fact that exposure of children to family violence causes long-term emotional, psychological, physical and behavioural issues,' and urged the committee to include exposure in the definition of family violence and abuse as certain behaviour can constitute both.[19]

1.20 Submissions also stressed that it must be clear that the parent victim of violence is not responsible for the child/children's exposure. WLSA wrote:

> The proposed definition of exposure should make it clear that it applies to exposure by the person who perpetrates family violence (to avoid unintended consequences that a victim of violence has exposed the child to violence). It must be clear in the Family Law Act that victims of violence must not be held responsible for not being able to remove children from the violence.[20]

1.21 This recommendation is supported by the ALRC[21] and other organisations, and is included in the joint ALRC/NSWLRC report, *Family Violence – A national legal response* which suggests that the more appropriate wording would be 'behaviour by the person using the violence that causes the child to be exposed to family violence'.[22]

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18 Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Legal Response*, October 2010, para 5.200.

19 *Submission 69*, p. 5.

20 *Submission 62*, p. 7.

21 *Submission 69*, p. 5.

22 Quoted in Women's Legal Services Australia, *Submission 62*, p. 7.

Risk assessment framework

1.22 Finally, the Australian Greens would like to draw attention to a recommendation made by WLSA. As their submission pointed out, over 50% of parenting matters in the family law courts involve allegations of child abuse and/or family violence.[23] As such, WLSA recommended implementing a risk assessment framework to identify and explore issues of family violence and child abuse at the initial stages of an application. Such early risk assessment would 'contribute to ensuring that the matter proceeds through the most appropriate court division and ensuring less adversarial and earlier resolution of issues',[24] as well as assisting 'agencies to ensure that appropriate referrals can be made and safety planning undertaken for women and their children when necessary'.[25]

1.23 The Australian Greens recognise that implementing a risk assessment framework would represent a significant and broad reform of the family law system and all related government policy. However, we strongly support the suggestion and recommend it is explored further.

Conclusion

1.24 As the Explanatory Memorandum declares, 'the safety of children is of critical importance...The family law system must prioritise the safety of children to ensure the best interests of children are met'.[26] The Australian Greens wholeheartedly support this statement. The Bill as it stands and the committee's recommendations are a considerable next step in improving the family law system, after years of pleas for reform. However, we concur with numerous submissions calling for greater protection for children and other family members who may be the victims of family violence.

Recommendations

1.25 The Australian Greens recommend that:

- **Equal shared parental responsibility provisions (subsections 61DA(1) and (2)) are removed from the Family Law Act;**
- **The demarcation between the two tiers of factors in section 60CC is removed to create one list of factors for consideration, where:**
  - **the safety and protection of children is listed as the first consideration and given priority;**
  - **having a meaningful relationship is listed as one of the many factors;**

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23 *Submission 62*, p. 15.

24 *Submission 62*, p. 15.

25 *Submission 62*, p. 16.

26 Explanatory Memorandum, p. 1.

- **the courts should weigh up all of the factors on the list depending on the circumstances of each individual case;**
- **Exposure to the effects of family violence be included in the definition of 'family violence';**
- **The definition of exposure to abuse and family violence makes it clear that only the perpetrator is at fault for the child's exposure; and**
- **The creation of a comprehensive risk assessment framework for the family law system is explored.**

Senator Rachel Siewert

APPENDIX 1

SUBMISSIONS RECEIVED

Submission Number	Submitter
1	Non-Custodial Parents Party (Equal Parenting)
2	Ms Ruth Evans
3	Dads on the Air, Australia
4	Mrs Barbara Holborow
5	Confidential
6	Name Withheld
7	Name Withheld
8	Name Withheld
9	Associate Professor Helen Rhoades and Professor John Dewar
10	Name Withheld
11	Name Withheld
12	Confidential
13	Confidential
14	Professor Patrick Parkinson, University of Sydney
15	Fairness In Child Support
16	Confidential
17	Confidential
18	Confidential
19	Confidential
20	Name Withheld
21	Name Withheld
22	Confidential
23	Northern Rivers Community Legal Centre
24	Name Withheld
25	Name Withheld
26	Women's Legal Centre (ACT and Region)
27	Ms Christine Cherry
28	Name Withheld
29	Confidential
30	Name Withheld
31	Australian Family Association, Vic Branch
32	Associate Professor Juliet Behrens and Professor Belinda Fehlberg
33	National Peak Body for Safety and Protection of Parents and Children
34	Senator Louise Pratt, Senator for Western Australia
35	South West Refuge
36	Confidential

37	Confidential
38	Ms Thelma Edelsten
39	The Hon. Diana Bryant, Chief Justice, Family Court of Australia
40	Peninsula Community Legal Centre
41	Confidential
42	Confidential
43	Confidential
44	Dads in Distress Support Services
45	Mr Roger Smith
46	Name Withheld
47	Ms Jo-Anne Reeves
48	Redfern Legal Centre and Sydney Women's Domestic Violence Court Advocacy Service
49	Ms Helen Cummings
50	Ms Judith Lello
51	Mr Allan Lello
52	Ms Ruth Frances
53	Ms Zara Lewis
54	Ms Toni Ortolan
55	Mr David Hardidge
56	Lija Polikevics, Erika Aleidzans and Ralfs Aleidzans
57	Name Withheld
58	Name Withheld
59	Australian Domestic and Family Violence Clearinghouse
60	Men's Health Australia
61	One in Three Campaign
62	Women's Legal Services Australia
63	Ms Suzana Zuzek
64	Ms Linda Bennett
65	Wirringa Baiya Aboriginal Women's Legal Service
66	Women's Domestic Violence Court Advocacy Service Network
67	Ms Bridie Schmidt
68	Professor Stephen Brown
69	Australian Law Reform Commission
70	Women's Legal Service Tasmania
71	Relationships Australia
72	Caxton Legal Centre
73	Ms Karen Gardener, Dolores Single Women's Refuge
74	Council of Single Mothers and their Children
75	Women's Legal Services NSW
76	Mr Eric Sanders
77	Confidential
78	Ms Elisabeth Peters
79	Inner City Legal Centre
80	Women's Legal Service (Qld)

81	Confidential
82	Confidential
83	Confidential
84	Name Withheld
85	Confidential
86	Name Withheld
87	Name Withheld
88	Ms Vita Kristovskis
89	Tripoli and Mena Association
90	Ms Xiaoli Ma
91	The Family Law Practitioners Association of WA
92	Name Withheld
93	ACON
94	Name Withheld
95	Dads4Kids Fatherhood Foundation
96	Domestic Violence Legal Workers Network
97	Name Withheld
98	Tasmania Police
99	Name Withheld
100	Community Legal Centres NSW
101	Name Withheld
102	Name Withheld
103	Name Withheld
104	Name Withheld
105	Dr Stacey Gibson
106	Ms Linda Tan, Ms Jennifer Walker, Ms Natalie Haddad, Ms Danielle Moglia, Ms Jessica Frearson
107	Hawkesbury Nepean Community Legal Centre
108	Mr Simon Hunt, Family Law Action Group
109	Mr Gordon Cramer
110	Gosnells Community Legal Centre
111	Confidential
112	Women's Information and Referral Exchange
113	Family Law Council
114	Women Everywhere Advocating Violence Elimination
115	Name Withheld
116	Confidential
117	Name Withheld
118	Name Withheld
119	Name Withheld
120	Name Withheld
121	Name Withheld
122	Name Withheld
123	Name Withheld
124	Name Withheld

125	Name Withheld
126	Confidential
127	Name Withheld
128	Name Withheld
129	Ms Carmel O'Brien and others
130	Domestic Violence Victoria, Domestic Violence Resource Centre Victoria, Federation of Community Legal Centres Victoria, Women with Disabilities Victoria, Victorian Women's Trust
131	The Benevolent Society
132	Family Law Practitioners' Association of Queensland
133	Name Withheld
134	Name Withheld
135	Name Withheld
136	Name Withheld
137	Name Withheld
138	Name Withheld
139	Name Withheld
140	Name Withheld
141	Name Withheld
142	Name Withheld
143	Name Withheld
144	Name Withheld
145	Mr Dale Williams
146	Joint Parenting Association
147	Name Withheld
148	Mr Craig Cannock
149	Mrs Christine Reynolds
150	Mr Matthew Hopkins
151	Mr Alberto Carvalho
152	Mr Alexander Stewart
153	Mr Joseph Rossi
154	Ms Catherine Steele
155	Mr Howard Beale
156	Mr Cameron Smyth
157	Salt Shakers
158	Penrith Domestic Violence Services
159	Mrs Vonda Cannock
160	Name Withheld
161	Mr George Potkonyak
162	Confidential
163	Family Relationship Services Australia
164	Ms Bronwynne Luff
165	Confidential
166	Victims of Crime Assistance League Inc NSW
167	Richard Hillman Foundation

168	Ms Patricia Merkin
169	Mr Scott Smith
170	Men's Rights Agency
171	Mr John Stapleton
172	National Council for Children Post-Separation
173	Australian Association of Social Workers
174	Australian Institute of Family Studies
175	Port Stephens Domestic Violence Committee
176	Top End Women's Legal Service
177	Shoalcoast Community Legal Centre
178	Victoria Police
179	Armadale Domestic Violence Intervention Project
180	North and Northwest Community Legal Service
181	Immigrant Women's Support Service
182	Delvena Women's Refuge
183	Sole Parents' Union
184	FamilyVoice Australia
185	Name Withheld
186	Confidential
187	Confidential
188	Queensland Government
189	Justice for Children
190	Lone Fathers Association (Australia)
191	Name Withheld
192	Confidential
193	Confidential
194	Confidential
195	Confidential
196	BoysTown
197	Dr Lesley Laing
198	The Law Society of NSW
199	Confidential
200	Law Council of Australia
201	Ms Zoe Rathus AM
202	National Legal Aid
203	Professor Richard Chisholm
204	Shared Parenting Council of Australia
205	Confidential
206	Young Lawyers, Law Society of NSW
207	NSW Women's Refuge Movement
208	Support Help and Empowerment
209	Name Withheld
210	Confidential
211	Confidential
212	Confidential

213	Confidential
214	Confidential
215	Mr Michael Fox
216	Confidential
217	Confidential
218	Ms Michelle O'Hair
219	Oppressed People of Australia
220	Ms Jolanta Beitnaraite
221	Mr Cameron Battersby
222	Ms Paula Rowlands
223	Ms Theresa Singhdeo
224	YWCA of Canberra
225	Name Withheld
226	Confidential
227	Canberra Rape Crisis Centre
228	Tamworth Family Support Service
229	Name Withheld
230	Violence Against Women Advisory Group (VAWAG)
231	Mr Graham Douglas
232	Name Withheld
233	Name Withheld
234	Ms Michelle Bamford
235	Murray Mallee Community Legal Service
236	Ms Deborah Deagan
237	Ms Beryl Spencer
238	Name Withheld
239	Confidential
240	Name Withheld
241	Name Withheld
242	Name Withheld
243	Mr Richard Quist
244	Dr Darryl Menaglio
245	Confidential
246	Confidential
247	Confidential
248	Confidential
249	Name Withheld
250	Name Withheld
251	Name Withheld
252	Name Withheld
253	Anglicare Victoria
254	Australian Human Rights Commission
255	Confidential
256	Ms Leah Billeam
257	Confidential

258	Confidential
259	Name Withheld
260	Ms Jan Pickard
261	Confidential
262	Ms Mykayla Tanner
263	Mr Daniel Hume
264	Confidential
265	Name Withheld
266	Ms Pettina Stanghon
267	Ms Amanda Brewer
268	Confidential
269	Confidential
270	Confidential
271	Confidential
272	Ms Simone Karp
273	Name Withheld
274	Name Withheld
275	Confidential

Form Letters Received

Form letter 1 received by 7 individuals
Form letter 2 received by 11 individuals
Form letter 3 received by 25 individuals
Form letter 4 received by 5 individuals
Form letter 5 received by 3 individuals

ADDITIONAL INFORMATION RECEIVED

1. Article provided by Dr Gordon Finley on 9 May 2011: Gordon E Finley and Seth J Schwartz, 'The Divided World of the Child: Divorce and Long-Term Psychosocial Adjustment'

2. Response provided by Non-Custodial Parents Party (Equal Parenting) to Professor Richard Chisholm's submission on 14 June 2011

3. Article provided by the Australian Institute of Criminology on 1 July 2011: 'Trends & issues in crime and criminal justice no. 419: Children's exposure to domestic violence in Australia'

4. Tabled document provided by the Attorney-General's Department at public hearing in Canberra on 8 July 2011: 'Avert Family Violence: Collaborative Responses in the Family Law System', a DVD training package in family violence

5. Tabled document provided by Justice For Children at public hearing in Canberra on 8 July 2011: 'Joint Statement-Alliance for Children's Safety'

6. Tabled document provided by Justice For Children at public hearing in Canberra on 8 July 2011: 'Rally for Children's Safety-Key messages and call for endorsement'

7. Tabled document provided by Justice For Children at public hearing in Canberra on 8 July 2011: 'Rally for Children's Safety Alliance-Endorsing organisations'

8. Tabled document provided by Justice For Children at public hearing in Canberra on 8 July 2011: article from Australian Women's Weekly, June 2011

9. Tabled document provided by Emeritus Professor Freda Briggs AO at public hearing in Canberra on 8 July 2011: Opening statement

Answers to Questions on Notice

1. Answers to Questions on Notice from Justice for Children for public hearing on 8 July 2011

2. Additional response to answers to Questions on Notice from Justice for Children for public hearing on 8 July 2011

3. Material relating to Answers to Questions on Notice from Justice for Children for public hearing on 8 July 2011

4. Answers to Questions on Notice from Family Relationship Services Australia for public hearing on 8 July 2011

5. Answers to Questions on Notice from Council of Single Mothers and their Children for public hearing on 8 July 2011

6. Additional answers to Questions on Notice from Council of Single Mothers and their Children for public hearing on 8 July 2011

7. Answers to Questions on Notice from Attorney-General's Department for public hearing on 8 July 2011

8. Answers to Questions on Notice from Women's Legal Service Australia for public hearing on 8 July 2011

9. Answers to Questions on Notice from Family Law Council for public hearing on 8 July 2011

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Canberra, 8 July 2011

ANDERSON, Mr Peter, Victorian Regional Coordinator and Project Manager, Dads in Distress Support Services

BRIGGS, Professor Freda, AO, Adviser, Justice for Children

CARTER, Mr James, Policy Adviser, Lone Fathers Association

CHISHOLM, Professor Richard, Private capacity

COTTERELL-JONES, Ms Robyn, Executive Director, Victims of Crime Assistance League New South Wales

CROUCHER, Professor Rosalind, President, Australian Law Reform Commission

DAVIES, Mrs Nicola, Member, Family Law Council

DAVIES, Ms Kerry, Project Worker, Council of Single Mothers and their Children

FAULKS, Justice John, Deputy Chief Justice, Family Court of Australia

HENDERSON-KELLY, Ms Sandra, Principal Legal Officer, Family Law Branch, Attorney-General's Department

KASPIEW, Dr Rae, Senior Research Fellow, Australian Institute of Family Studies

LORENZ, Ms Lydia, Member, Justice for Children

LYNCH, Ms Angela, Community Legal Education Lawyer, Women's Legal Services Australia

MASON, Mr Dean, National Chairman, Dads in Distress Support Services

McINNES, Dr Elspeth, Child Development and Abuse Expert, Justice for Children

NGOR, Ms Adut Zita, National Law Reform Coordinator, Women's Legal Services Australia

NORRIS, Ms Niki, Independent Advocate for Child Protection, Justice for Children

PAGE, Ms Samantha, Executive Director, Family Relationship Services Australia

PEEL, Ms Sara, Legal Officer, Australian Law Reform Commission

PIRANI, Mrs Toni, Assistant Secretary, Family Law Branch, Attorney-General's Department

PRICE, Mr Clive, Member, Family Law Council

PRICE, Ms Sue, Director, Men's Rights Agency

SINCLAIR, Mr Geoff, Chair, Family Law Section, Law Council of Australia

STANBROOK, Ms Jennifer, Member, Justice for Children

STRICKLAND, Justice Steven, Chair, Law Reform Committee, Family Court of Australia

WESTON, Ms Ruth, Assistant Director (Research), Australian Institute of Family Studies

WILLIAMS, Mr Barry, National President and Spokesperson, Lone Fathers Association Australia; and Spokesperson, Parents Without Partners Australia