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## KEY LEGISLATIVE CHANGES ARISING FROM THE *FAMILY LAW LEGISLATION AMEND- MENT (FAMILY VIOLENCE AND OTHER MEASURES) ACT 2011*

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Bronia Tulloch

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Bronia Tulloch  
Barrister at Law  
C/- Foley's List  
205 William Street  
Melbourne VIC 3000  
Phone: 9225 7777  
broniattulloch@vicbar.com.au

## KEY LEGISLATIVE CHANGES ARISING FROM THE FAMILY LAW LEGISLATION AMENDMENT (FAMILY VIOLENCE AND OTHER MEASURES) ACT 2011

18 April 2012

### 1. Introduction

The *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* ("the Amending Act"). Will *inter alia* amend key provisions of the parenting provisions of the *Family Law Act 1975* ("the FL Act"). The Amending Act was given Royal Assent on 7 December 2011.

Amendments to the FL Act relating to family violence will commence on 7 June 2012. Other provisions of the Amending Act commenced on 7 December 2011 and 4 January 2012.

This paper considers the amendments relating to family violence (Schedule 1 of the Amending Act).

### 2. Key Changes

This paper does not attempt to mention every change arising from Schedule 1 of the Amending Act. I have selected the following changes as being most relevant to family lawyers:

- a. Expanding the definition of abuse and family violence – Section 4 of the FL Act and the new Section 4AB
- b. Changes to Section 60CC – How a court determines what is in a child's best interests
- c. New sections 60CH and 60CI – Obligations to inform the court about child welfare orders and investigations
- d. New Subdivision BB of Division 1 of Part VII of the FL Act – Adviser's obligations in relation to the best interests of the child
- e. New sections 67ZBA and 67ZBB – Procedure for making allegations of child abuse or family violence and court's obligation to take prompt action.
- f. Removing section 117AB – provision for mandatory costs order against a party who knowingly made a false statement

3. History of the Amending Act

The Replacement Explanatory Memorandum states that the relevant bill:

*“responds to reports received by the Government into the 2006 family law reforms and how the family law system deals with family violence. The reports indicate that the Act fails to adequately protect children and other family members from family violence and child abuse.”*

There are three key reports listed:

- A. Evaluation of the 2006 Family Law Reforms by the Australian Institute of Family Studies – December 2009 (“AIFS Report”);
- B. Family Courts Violence Review – A Report by Professor Richard Chisholm – 27 November 2009 (“Chisholm Report”); and
- C. Improving Responses to Family Violence in the Family Law System: An advice on the intersection of family violence and family law issues by the Family Law Council – December 2009 (“FLC Report”).

The AIFS Report exceeds 400 pages. It consolidates very significant surveys of parents, lawyers, relationship service providers, judicial officers as well as court judgments, files and other data. Matters raised in that report which seem to have been adopted by the Amending Act include criticisms of Section 117AB and “the friendly parent criterion” a description of the current Subsection 60CC(3)(c) of the FL Act which provides under additional considerations:

*“(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.”*

The Chisholm Report also recommends the removal of Section 117AB and the “friendly parent criterion” as well as provisions in the act directing family advisers on what information to provide.

Similarly the FLC Report recommended the removal of Section 117AB and the “friendly parent criterion” as well as a broader definition of family violence in the same terms as provided by the Victorian state family violence protection legislation. Being a more expansive definition than currently provided in Section 4 of the FL Act.

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4. A Broader Definition of Child Abuse and Family Violence – Amendment to Section 4 and the new Section 4AB

The current provision in Section 4 of the FL Act gives the following definition:

*"abuse" , in relation to a child, means:*

*(a) an assault, including a sexual assault, of the child which is an offence under a law, written or unwritten, in force in the State or Territory in which the act constituting the assault occurs; or*

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

The Amending Act provides as follows:

**"abuse" , in relation to a child, means:**

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

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

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

**(d) serious neglect of the child.**

(emphasis added)



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The current provisions in Section 4 of the FL Act give the following definition:

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

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

The new definition of family violence in Section 4 incorporates reference to the following new provision in the Amending Act:

## **4AB Definition of *family violence* etc.**

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

**(2) Examples of behaviour that may constitute family violence include (but are not limited to):**

**(a) an assault; or**

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

**(c) stalking; or**

**(d) repeated derogatory taunts; or**

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

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

(4) Examples of situations that may constitute a child being exposed to family violence include (but are not limited to) the child:

- (a) overhearing threats of death or personal injury by a member of the child's family towards another member of the child's family; or
- (b) seeing or hearing an assault of a member of the child's family by another member of the child's family; or

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(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.

5. Changes to Section 60CC – How a Court Determines what is in a Child's Best Interests

a. Greater weight to abuse, neglect or family violence

The current provisions of Section 60CC of the FL Act are as follows:

*How a court determines what is in a child's best interests*

*Determining child's best interests*

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

*Primary considerations*

- (2) *The primary considerations are:*
- (a) the benefit to the child of having a meaningful relationship with both of the child's parents; and*
  - (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.*

*Note: Making these considerations the primary ones is consistent with the objects of this Part set out in paragraphs 60B(1)(a) and (b).*

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The Amending Act inserts the following additional subsection:

**(2A) In applying the considerations set out in subsection (2), the court is to give greater weight to the consideration set out in paragraph (2)(b).**

The effect of the new subsection 60CC(2A) is to elevate the consideration of protecting a child from abuse, neglect or family violence above the child's need to have a relationship with both parents.

b. The "friendly parent criterion" – removing Subsection 60CC(3)(c)

A concern reflected in the three major reports relied upon by the government is that the "friendly parent criterion" has served to discourage parents from making or pursuing allegations of family violence against the other parent in case such allegations are viewed as evidence of the reporting parent being unwilling to facilitate and encourage a relationship with the other parent. The relevant provision in the current FL Act is as follows:

*Subsection 60CC(3)(c)*

*(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;*

The new subsections 60CC(3)(c) and (ca) are as follows:

**(3) Additional considerations are:**

.....

**(c) the extent to which each of the child's parents has taken, or failed to take, the opportunity:**

**(i) to participate in making decisions about major long-term issues in relation to the child; and**

**(ii) to spend time with the child; and**

**(iii) to communicate with the child;**



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**(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;**

Assuming that the reports are correct in identifying this as a significant problem in relation to dealing with family violence, there is now no requirement that each parent facilitate a relationship with the other parent. Family violence is not a feature in all family law disputes, but all families are affected by this amendment.

The new Subsections 60CC(3)(c) and (ca) effectively adopt the old provisions of Subsections 60CC(4) and (4A) which will also be repealed, these currently provide:

*(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.*

### c. Broader recognition of Family Violence Orders and proceedings – Expanding Subsection 60CC(3)(k)

Currently under the additional considerations in Subsection 60CC(3)(k) the court is obliged to take into account family violence orders. That subsection reads as follows:

*(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;*

The Amending Act significantly broadens the matters that may be taken into account in relation to family violence orders. The new provision is as follows:

**(k) if a family violence order applies, or has applied, to the child or a member of the child's family--any relevant inferences that can be drawn from the order, taking into account the following:**

- (i) the nature of the order;**
- (ii) the circumstances in which the order was made;**
- (iii) any evidence admitted in proceedings for the order;**
- (iv) any findings made by the court in, or in proceedings for, the order;**
- (v) any other relevant matter;**

6. New sections 60CH and 60CI – Obligations to inform the court about child welfare orders and investigations

The Amending Act creates a positive obligation to inform the court about child welfare proceedings in the state courts. It seems unlikely that even without such an amendment contested proceedings would be run before the Family Court or the Federal Magistrates' Court without child welfare matters being put into evidence. Where child welfare proceedings or investigations have occurred in relation to a child, the issues leading to such proceedings or investigations are certainly already among the matters to be considered under Section 60CC of the FL Act.

The new provisions are as follows:

**60CH Informing court of care arrangements under child welfare laws**

- (1) If a party to the proceedings is aware that the child, or another child who is a member of the child's family, is under the care (however described) of a person under a child welfare law, that party must inform the court of the matter.**
- (2) If a person who is not a party to the proceedings is aware that the child, or another child who is a member of the child's family, is under the care (however described) of a person under a child welfare law, that person may inform the court of the matter.**
- (3) Failure to inform the court of the matter does not affect the validity of any order made by the court. However, this subsection does not limit the operation of section 69ZK (child welfare laws not affected).**

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

- (1) If:**
  - (a) a party to the proceedings is aware that the child, or another child who is a member of the child's family, is or has been the subject of:**
    - (i) a notification or report (however described) to a prescribed State or Territory agency; or**
    - (ii) an investigation, inquiry or assessment (however described) by a prescribed State or Territory agency; and**
  - (b) the notification, report, investigation, inquiry or assessment relates to abuse, or an allegation, suspicion or risk of abuse;****that party must inform the court of the matter.**
- (2) If:**
  - (a) a person who is not a party to the proceedings is aware that the child, or another child who is a member of the child's family, is or has been the subject of:**
    - (i) a notification or report (however described) to a prescribed State or Territory agency; or**
    - (ii) an investigation, inquiry or assessment (however described) by a prescribed State or Territory**



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

that person may inform the court of the matter.

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

(4) In this section:

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

7. New Subdivision BB of Division 1 of Part VII of the FL Act – Adviser's obligations in relation to the best interests of the child

An advisor is defined to include a legal practitioner (as you would expect). It seems that this new subdivision requires advisors to, in effect, tell a client or a party about the law. While it seems possible that other categories of "advisors" such as a family consultant may not currently have an obligation to advise a client about the law, it does seem excessive to enact legislation to require a lawyer to do the very thing that he or she is engaged by the client to do. The new subdivision reads:

**Subdivision BB -- Best interests of the child: adviser's obligations**

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

(1) If an adviser gives advice or assistance to a person about matters concerning a child and this Part, the adviser must:

(a) inform the person that the person should regard the best interests of the child as the paramount consideration; and

(b) encourage the person to act on the basis that the child's best interests are best met:

(i) by the child having a meaningful relationship with both of the child's parents; and

(ii) by the child being protected from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and



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(iii) in applying the considerations set out in subparagraphs (i) and (ii)--by giving greater weight to the consideration set out in subparagraph (ii).

(2) In this section:

"*adviser*" means a person who is:

- (a) a legal practitioner; or
- (b) a family counsellor; or
- (c) a family dispute resolution practitioner; or
- (d) a family consultant.

8. New sections 67ZBA and 67ZBB – Procedure for making allegations of child abuse or family violence and court's obligation to take prompt action.

A new definition of an "interested person" is included in the existing definitions provisions of Subsection 67Z which relate to allegations of child abuse. This definition is the same as provided in Subsection 67BA(4) which relates to allegations of family violence.

A new Section 67ZBA provides the procedure for reporting family violence (which of course includes provision for a new form). That Section is:

## **67ZBA Where interested person makes allegation of family violence**

**(1) This section applies if an interested person in proceedings for an order under this Part in relation to a child alleges, as a consideration that is relevant to whether the court should make or refuse to make the order, that:**

**(a) there has been family violence by one of the parties to the proceedings; or**

**(b) there is a risk of family violence by one of the parties to the proceedings.**

**(2) The interested person must file a notice in the prescribed form in the court hearing the proceedings, and serve a true**

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copy of the notice upon the party referred to in paragraph (1)(a) or (b).

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

(a) the interested person making the allegation must either file and serve a notice under subsection (2) of this section or under subsection 67Z(2) (but does not have to file and serve a notice under both those subsections); and

(b) if the notice is filed under subsection (2) of this section, the Registry Manager must deal with the notice as if it had been filed under subsection 67Z(2).

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

(4) In this section:

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

(a) a party to the proceedings; or

(b) an independent children's lawyer who represents the interests of the child in the proceedings; or

(c) any other person prescribed by the regulations for the purposes of this paragraph.

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

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

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The new Section 67ZBB requires the court to “take prompt action”, which if appropriate is said to be within 8 weeks after the filing of a notice. That new section is:

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

#### **(1) This section applies if:**

**(a) a notice is filed under subsection 67Z(2) or 67ZBA(2) in proceedings for an order under this Part in relation to a child; and**

**(b) the notice alleges, as a consideration that is relevant to whether the court should make or refuse to make the order, that:**

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

**(ii) there would be a risk of abuse of the child if there were to be a delay in the proceedings; or**

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

**(iv) there is a risk of family violence by one of the parties to the proceedings.**

#### **(2) The court must:**

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

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

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

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

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

(3) The court must take the action required by paragraphs (2)(a) and (b):

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

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

(4) Without limiting subparagraph (2)(a)(i), the court must consider whether orders should be made under section 69ZW to obtain documents or information from State and Territory agencies in relation to the allegation.

(5) Without limiting subparagraph (2)(a)(ii), the court must consider whether orders should be made, or an injunction granted, under section 68B.

(6) A failure to comply with a provision of this section does not affect the validity of any order made in the proceedings for the order.

Reading these provisions it is hard to see how they provide for any significant change to the current process of dealing with child related matter, save for the reference to such matters being dealt with (presumably on an interim basis) within 8 weeks.

9. Removing section 117AB – provision for mandatory costs order against a party who knowingly made a false statement

The current FL Act includes Section 117AB which states as follows:



*Costs where false allegation or statement made*

- (1) *This section applies if:*
  - (a) *proceedings under this Act are brought before a court;*  
*and*
  - (b) *the court is satisfied that a party to the proceedings knowingly made a false allegation or statement in the proceedings.*
- (2) *The court must order that party to pay some or all of the costs of another party, or other parties, to the proceedings.*

There have been some reported decisions where costs have been made against a party under this mandatory provision, but these types of orders are rare. Although all of the three key reports claim that this provision operates as a disincentive to parties in the reporting of family violence, perhaps the real problem with the provision is that it was expressed in mandatory terms. Giving the court a discretion to make costs orders in such circumstances might have been appropriate to encourage parties to give proper consideration to the allegations that they choose to make. False allegations being so potentially damaging to families and children.

10. Conclusion

The 2006 reforms to the Family Law Act provided a significant change to outcomes for separated families. The criticism of some of those reforms is well known, particularly the provisions in relation to shared parenting. The Amending Act does not really tackle the more problematic aspects of the 2006 reforms. Although it purports to address issues of family violence it is hard to see how the above amendments will translate in to significant changes in the judicial determinations that we see coming from the Family Court and the Federal Magistrates Court. Family Court Judges and Federal Magistrates, on the most part, take allegations of family violence seriously. The existing legislation gives them significant power to address these issues where the evidence warrants such action. The Amending Act appears to “tip toe” around the big issues, such as shared parenting, which might otherwise lead to a substantial departure from the 2006 reforms.