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

The Attorney-General's Department have introduced a new bill to Federal Parliament which seeks to amend the *Family Law Act 1975* to better address issues surrounding family violence in family law. The draft bill was released for public consultation in November 2010, and the official *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011* was introduced to Parliament on 24 March 2011.

In 2006, dramatic amendments were made to the Family Law Act 1975 to introduce the concept of 'equal shared parental responsibility'. The 2006 amendments provided that the two primary considerations when determining a child's best interests should be:

1. The benefit of the child having a meaningful relationship with both parents, and
2. The need to protect the child from physical or psychological harm from being exposed to abuse, neglect or family violence.

Unfortunately, with these amendments came a wave of misconception that the new law gave fathers the 'right' to equal time with their children, or otherwise provided children's meaningful time with both parents should take priority over protecting them from harm or violence. This latter misconception also arose from the 2006 legislation's 'additional consideration' regarding "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". This provision has made some parties and practitioners hesitant to voice allegations regarding violence and abuse in fear that this may be 'used against them' as evidence that they are unwilling to facilitate the child's relationship with the other parent.

Reports prepared by Australian Institute of Family Studies (AIFS), the Honourable Professor Richard Chisholm AM, and the Family Law Council have shown that in this

form, the *Family Law Act* was failing to adequately protect children and other family members from child abuse and family violence. As such the Family Violence bill has been drafted to address this and better facilitate 2006 legislation's key aims to protect children from physical or psychological harm.

Key elements of the Family Violence Bill

The Family Violence Bill will not repeal any of the shared care provisions introduced by the 2006 legislation; however it will underline that these should only apply where this is safe for the child. To do so, the bill will remove disincentives to the disclosure of family violence and child abuse, and more clearly set out what type of behaviour is constitutes family violence and abuse. The bill also aims to strengthen the obligations of lawyers, family dispute resolution practitioners, family consultants and family counsellors, ensure courts have better access to evidence of family violence and abuse and make it easier for state and territory child protection authorities to participate in family law proceedings where appropriate.

The key changes that will be introduced by the Bill are as follows:

1. Change to the definition of *abuse*

- The Bill will change the definition of "abuse" to include psychological harm caused by being subject to or exposed to family violence, as well as serious neglect.
- The Bill will also remove the previous requirement for an "assault" to be an offence under an enforceable law in a State or Territory

2. Change in definition of *family violence*

- The Bill introduces a much expanded definition of the term 'family violence'. This is defined as "violent, threatening or any other type of behaviour that coerces or controls a family member or which causes the family member to be fearful."
- The Bill includes a long (non-exhaustive) list of examples of family violence, including assault, sexual assault or sexually abusive behaviour, stalking,

derogatory taunts, intentionally damaging property or injuring an animal, unreasonably denying financial autonomy or withholding necessary financial support, preventing the victim from making or keeping connections with their family, friends or culture, or otherwise unlawfully depriving liberty.

- The Bill also addresses exposure of children to family violence. It provides that exposure will occur where children witness or hear threats of family violence, see or hear assault between family members, comfort victims or clean up after incidents of family violence, or are present when police or ambulance attend an incident involving assault of a family member.

3. The UN Convention on the Rights of the Child

- Part VII of the Family Law Act deals with all matters relating to children.
- The Bill provides that an additional 'objective' of Part VII is to give effect to the UN Convention on the Rights of the Child.
- This does not provide that the Convention is to be incorporated into Australia's domestic law; however it does mean that the Convention is to be considered as an interpretive aid to Part VII of the Act.

4. Primary consideration when determining children's best interests - s60CC(2)

- One of the most significant changes proposed by the Bill is to section 60CC(2) of the Family Law Act, which provide the two 'primary considerations' of protecting children's meaningful relationship with both parents and protecting children from harm.
- As outlined above, there has been some misconception or uncertainty as to which consideration should prevail in circumstances of conflict between them. For example, where there was a serious risk of a parent inflicting abuse, should the child continue to spend time with the parent to try to protect their meaningful relationship; or should the parent be prevented from spending time with the child to protect the child from the risk of abuse?

- The additional section 60CC(2A) clearly provides that if there is any inconsistency between the two 'primary considerations', the court is to give greater weight to the need to protect the child from physical or psychological harm from being subjected or exposed to abuse, neglect or family violence.
- Importantly, this does not mean that parents will automatically be denied time or communication with children where there is a risk of family violence. Rather, the Court should not make Orders which would expose the child to such a risk on the basis that they wanted to protect the child's meaningful relationship with the parent.
- It is important to note that there are many strategies to ensure protection of both the child's safety and their relationship with a parent posing a risk of violence, such as supervised contact. The Court will prefer to allow such supervised contact where this will remove the risk of family violence, in order to ensure that the children continue to have a relationship with their parent.

5. Removal of 'Friendly Parent Provision'- s60CC(3)(c)

- Another significant change proposed by the bill is the repeal of the 'additional consideration' regarding parents' willingness to facilitate and encourage the child's relationship to the other parent.
- As discussed above, this has inadvertently acted as a disincentive for parents to disclose fears or circumstances of family violence.
- Under the proposed Bill, the Court is to consider:
 - the extent to which each parent has taken or failed to take the opportunity to spend time and communicate with the child, and make decisions about major long-term issues relation to the child; and
 - the extent to which each parent has fulfilled or failed to fulfil their obligation to maintain the child.

6. Parties to parenting proceedings must notify court where there is involvement of child welfare agencies or law

- Additional sections proposed by the Bill will impose an obligation on all parties to Court proceedings to inform the Court if a child of the parties' family/ies is:
 - under the care of a person under a child welfare law;
 - is or has been subject to a notification, report, inquiry or assessment by a prescribed State or Territory authority relating to abuse or an allegation or suspicion thereof.
- The section also provides that persons who are not party to the proceedings may also inform the Court of such circumstances.
- Importantly, the Bill provides that failure to inform the Court of such matters does not affect the validity of any Orders made. This ensures certainty as to whether or not Orders are valid and enforceable.

7. Advisors obligations to advise parents regarding children's best interests

- The Bill also seeks to introduce obligations on 'advisers' in all children's matters. Advisers are defined as legal practitioners, family counsellors, family dispute resolution practitioners and family consultants.
- The new sections provide that any adviser giving advice or assistance on a children's matter must:
 - inform the person that the child's best interests should be their paramount consideration, and
 - encourage the person to act on the basis that the child's best interest will be met by following the 'primary considerations' as set out in section 60CC(2) and discussed above.
- Under the Bill, 'advisers' would also be authorised to notify a prescribed child welfare authority of reasonable suspicions of abuse or risk of abuse.

8. Repeal of s117B regarding mandatory cost order

- The Bill finally seeks to repeal the current requirement for court to make mandatory cost order where satisfied a party made a false allegation/statement.
- This is because the Australian Institute of Family Studies' report has indicated that this section had acted as a disincentive to disclosing family violence where cases could not be substantiated.
- S117 still allows courts to make a cost order regarding false statements, however under the Bill would have discretion not to do so where appropriate.

9. Prescribed form for allegations of family violence

- The Bill will also provide that where a party to proceedings, Independent Children's Lawyer or other interested person makes an allegation of family violence, they must do so by filing and serving a copy of a prescribed 'notice' form.
- This will ensure that allegations regarding family violence are made clearly, succinctly and with proper notice to all relevant parties.
- The Bill further provides that where a prescribed notice of allegations for family violence has been filed, the Court must deal with the issues raised by the notice expeditiously, and consider what interim Orders should be made to obtain relevant evidence and otherwise protect the child. The general timeline for the Court's response should be within 8 weeks where this is appropriate.

While the above amendments proposed by the Bill will make significant changes to the drafting of relevant provisions of the Family Law Act, it is important to note that this is aimed at ensuring the Act achieves its original aims and objectives. The key objectives of the Family Law Act, as introduced by the 2006, do not appear to have been changed by the Family Violence Bill but rather clarified and confirmed.

Commencement and transitional provisions

As the Family Violence Bill has not yet been passed by Parliament, there is no certainty regarding its commencement date. It is important to note that the Bill may be

amended by Parliament or the Senate prior to commencement; although no amendments have been proposed to date. The Bill was referred to the Senate Legal and Constitutional Affairs Legislation Committee on 25 March 2011, and their report is due on 23 June 2011.

Once enacted, the various parts of the Act will commence either on the day of Royal Assent, or 28 days thereafter.

Upon commencement, the majority of the provisions of the Bill relating to family violence will apply to all proceedings before the Court, whether or not these were issued before, on or after commencement.

This means that it is imperative that all relevant practitioners, consultants and counsellors become familiar with the new laws prior to its commencement; as upon commencement they will need to apply these to all of their files involving any allegation, risk or circumstance of family violence.

Again, as the Bill largely clarifies, rather than changes, the intentions of the Family Law Act 1975, this may not have dramatic change upon commencement. However, from this time practitioners will need to apply and advise all clients, including existing clients, of the expanded definition of family violence, the clarification of the primary considerations, the need to make children's best interests paramount and the need to disclose circumstances involving child welfare laws and agencies. A further practical amendment will be the need to use the prescribed form for allegations of family violence.

Sally Nicholes & Monica Blizzard

Nicholes Family Lawyers
Level 3, 224 Queen Street
Melbourne VIC 3000

Telephone: + 613 9670 4122
Facsimile: + 613 9670 5122
Web: www.nicholeslaw.com.au
DX: 294 Melbourne