

AFCC 49th annual conference, Chicago, 6-9 June 2012

Attachment Theory and Family Violence: a judicial perspective

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TABLE OF CONTENTS

Introduction.....	2
An overview of attachment theory and family violence	3
An overview of the most recent major reforms to family law in Australia	6
<i>FAMILY LAW AMENDMENT (SHARED PARENTAL RESPONSIBILITY) ACT 2006</i>	<i>6</i>
<i>FAMILY LAW LEGISLATION AMENDMENT (FAMILY VIOLENCE AND OTHER MEASURES) ACT 2011</i>	<i>11</i>
Viewing the 2006 reforms from an attachment perspective	12
Viewing the 2011 reforms from an attachment perspective	25
How will we know if the 2011 family violence reforms are achieving their stated objectives and what factors might militate against the achievement of those objectives?.....	29
What further refinements to Australian family law are necessary, given the corrosive effects of family violence on well being, functioning and attachment?	36
Conclusion	40
Appendix 1	41
Appendix 2	62
Appendix 3	70
Appendix 4	72

* I would like to acknowledge the assistance of Kristen Murray, Senior Legal Research Adviser to the Chief Justice, Family Court of Australia, for her assistance in preparing my presentation and this paper. I would also like to thank Pam Hemphill, Principal, Child Dispute Services and Jacqueline Beall, Senior Family Consultant, Family Court of Australia, for their contribution to my presentation.

† The views expressed in this paper are my own and are personal to me. They do not represent those of the Family Court of Australia.

Introduction

The focus of this paper is on recent reforms to private family law in Australia, which are designed to protect children from harm, particularly harm occasioned by family violence,¹ abuse and high-level parental conflict.

There are two tranches of legislative changes that I intend to discuss: what are colloquially known as the ‘shared parenting reforms’ of 2006² and the ‘family violence reforms’ of 2011, which came into effect in June 2012.³ Both sets of laws are considered from the perspective of attachment theory; positively and negatively. Neither the 2006 nor the 2011 amendments were specifically formulated within an attachment theory paradigm. Nevertheless, the influence of attachment theory on both sets of laws is able to be discerned.

I will then discuss possible ways in which we might know whether the 2011 reforms have succeeded in their objective of protecting children from harm, and what could militate against their success, insofar as that is possible to measure.

Finally, I wish to share my thoughts as to what further refinements to the Australian family law system and particularly to the legislative framework under which the Family Court of Australia operates would be desirable,⁴ to ensure that children’s developmental opportunities are maximised.

¹ I am using the term “family violence” in preference to “domestic violence” as that is the expression used in the Australian *Family Law Act 1975* (Cth). I recognise however that both terms are used in the relevant literature.

² *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth).

³ *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth). Schedule 1 of the Act, which contains the substantive amendments to the *Family Law Act 1975* (Cth), came into effect on 7 June 2012.

⁴ The Family Court of Australia is established by and principally exercises jurisdiction under the *Family Law Act 1975* (Cth). In this paper, references to “the Act” are to be taken to be to the *Family Law Act 1975* (Cth).

I should mention that although my paper doesn't strictly follow the format of my presentation at the conference, which was 'question and answer' style, all of the material I presented (and indeed more) has been included.

I don't intend to discuss the 2011 reforms in exhaustive detail and for that reason I have included an overview at appendix 1. The same applies to statistical data about shared parenting arrangements following the 2006 reforms and about the nature and quality of child/parent relationships following the 2006 reforms. This data can be found at appendix 2.

I must also emphasise that the views expressed in this paper are my own and are based on my observations as a judge sitting at first instance and on appeal. They do not represent those of the Chief Justice or of the Family Court of Australia as a whole.

An overview of attachment theory and family violence

As the theme for the 49th AFCC annual conference was structured around the special edition of the *Family Court Review* and the work of Richard Bowlby, the following overview of attachment theory and its relationship with family violence and high level conflict is drawn from commentaries on Bowlby's work. In doing so however, I recognise that Bowlby's conceptualisation of attachment theory is not uncontroversial and that the significance accorded by Bowlby and others to formative infant-mother interactions in particular has been the subject of critical analysis.⁵

In their brief summary of attachment theory, Mikulincer and Shaver say the following:

According to Bowlby, human beings are born with an innate psychobiological system (the attachment behavioural system) that motivates them to seek proximity

to supportive others (attachment figures) in times of need. This system accomplishes basic regulatory functions (protection from threats and alleviation of distress) in humans of all ages, but is most directly observable during infancy and childhood.

...

Interactions with attachment figures who are available and responsive in times of need facilitate optimal attachment-system functioning and promote a sense of attachment security, a sense that the world is safe, that attachment figures are helpful when called on, and that it is possible to explore the environment curiously and engage effectively and enjoyably with other people. ... When attachment figures are not readily available and supportive, however, a sense of security is not attained, negative internal working models are formed, and strategies of affect regulation other than appropriate proximity seeking (secondary attachment strategies, conceptualised in terms of two major dimensions, avoidance and anxiety) are adopted.⁶

West and George write that “attachment theorists emphasize that what is important to development is the *quality* of this bond.”⁷ McIntosh has described the “cornerstone” of a secure attachment as “the capacity of a parent to take on an infant’s perspective.”⁸

In discussing anger and the conceptualisation of anxious attachment, West and George record that Bowlby emphasised that anger is a natural response to threats to attachment.

⁵ See for example Pamela S. Ludolph and Milfred D. Dale, ‘Attachment in Child Custody: An Additive Factor, Not a Determinative One’ (2012) 46 *Family Law Quarterly* 1; Michael E. Lamb, ‘Attachments, Social Networks, and Developmental Contexts’, (2005) 48 *Human Development* 108.

⁶ Mario Mikulincer and Phillip R Shaver, ‘Attachment, Anger and Aggression’ in Shaver, Phillip R. (Ed); Mikulincer, Mario (Ed), *Human Aggression and Violence: Causes, Manifestations, and Consequences*, Herzilya series on personality and social psychology, Washington, DC, USA, 2011, p. 242.

⁷ Malcolm West and Carol George, ‘Abuse and Violence in Intimate Adult Relationships: new perspectives from attachment theory’, (1999) 1 *Attachment and Human Development* 137, p. 138.

However, as they observe, Bowlby viewed anger which becomes so intense or persistent that it threatens to weaken or disrupt the attachment bond as dysfunctional. Bowlby considered dysfunctional anger to be the foundation of anxious attachment.⁹

A chapter of the special edition of the *Family Court Review* is devoted specifically to attachment theory, family violence and family law.¹⁰ The researchers Alicia Liberman and Charles Zeanah, in conversation with Jennifer McIntosh, state that there is “no question” that when a child witnesses family violence, the protective shield that the parent represents for the child is severely damaged, “if not shattered”. They assert that the child not only loses trust in the father (where the father is the perpetrator) but also in the mother, who is more often than not the victim. Zeanah maintains that the direct and indirect effects of violence on very young children is the biggest challenge to be faced by infant mental health. Zeanah says:

*There are issues about being around parents who are violent and scary and unpredictable from the child’s point of view, and likely to fly off the handle. And there are also problems of being cared for by a parent who in themselves is very frightened and traumatized. That creates its own set of problems. Of great concern, it makes it very hard for the child to develop a secure attachment to someone who is embroiled in something like that. It is too hard to separate that kind of intense level of violence and threat of violence from the relationship with the child. It’s almost impossible to do that.*¹¹

In summary, Zeanah states that “[i]t is very clear that this kind of conflict between parents affects children in a bad way.”¹² The researchers emphasise that the effects on children of witnessing or otherwise being exposed to family violence and high level

⁸ Jennifer McIntosh, ‘Assessing attachment needs and potential in high risk infants’ (2006) 12 *Journal of Family Studies* 57, p. 59.

⁹ West and George, above n. 7, pp. 138-9.

¹⁰ Alicia Liberman, Charles Zeanah and Jennifer McIntosh, ‘Attachment Perspectives on Domestic Violence and Family Law’ (2011) 49 *Family Court Review* 529.

¹¹ *Ibid* p. 530.

¹² *Ibid*.

conflict are not just “in the moment.” Zeanah asserts that not only does it create long term problem trajectories for children but, where the father is the perpetrator and the father has left, children often identify with the aggressor, which in turn becomes the template for the way in which the child relates to women in intimate relationships in later life. Thus it can be contended that the effect of violence on attachment relationships has both intra and inter-generational dimensions.

An overview of the most recent major reforms to family law in Australia

I now wish to provide an overview of the shared parenting and family violence reforms, which I will then analyse from an attachment theory perspective.

Family Law Amendment (Shared Parental Responsibility) Act 2006

The Australian Institute of Family Studies (the AIFS), a statutory research institute, was commissioned by the Australian Government to undertake an evaluation of the shared parenting reforms. A brief summary of their findings is contained at appendix 2. I have taken the following précis of the shared parenting reforms from the AIFS’ evaluation report, with due acknowledgement to the researchers who prepared that report.¹³ The précis concludes at the commencement of the discussion of Division 12A of the Act, at page 9.

In 2006, a series of changes to the family law system were introduced. There were changes to the Family Law Act and increased funding for new and expanded family relationships services, including the establishment of 65 Family Relationship Centres and a national advice line. The aim of the reforms was to bring about “generational change in

¹³ Rae Kaspiew, Matthew Gray, Ruth Weston, Lawrie Moloney, Kelly Hand, Lixia Qu, *Evaluation of the 2006 Family Law Reforms*, Australian Institute of Family Studies, December 2009, pp. 1-4, www.aifs.gov.au/institute/pubs/fle/evaluationreport.pdf (viewed 9 August 2012).

family law” and a “cultural shift” in the management of separation, “away from litigation and towards cooperative parenting”.

The changes to the family law system followed an inquiry by the House of Representatives Standing Committee on Family and Community Affairs in 2003, which recommended changes to the family relationship services system and the legislation. The committee’s report, *Every Picture Tells a Story*, made recommendations that aimed to make the family law system “fairer and better for children”. The 2006 changes reflected some, but not all, of the recommended changes.

The policy objectives of the 2006 changes to the family law system were to:

- help to build strong healthy relationships and prevent separation;
- encourage greater involvement by both parents in their children's lives after separation, and also protect children from violence and abuse;
- help separated parents agree on what is best for their children (rather than litigating), through the provision of useful information and advice, and effective dispute resolution services; and
- establish a highly visible entry point that operates as a doorway to other services and helps families to access these other services.

The 2006 amendments to the Act focused on changing the legislative provisions governing parental responsibility and time arrangements, while retaining the child’s best

interests as the paramount consideration in parenting matters.¹⁴ Further changes were introduced to ensure that greater emphasis was placed on protecting children from harm.

The Objects provisions were expanded, with the addition of an Object providing for children to have the benefit of the “meaningful involvement” of both parents in their lives¹⁵ and a provision enunciating children’s right to be protected from harm through exposure to abuse, violence or neglect.¹⁶ These two aims were restated as the two “primary considerations”¹⁷ in the reformulated list of factual matters relevant to best interests determinations, which now has a partially hierarchical structure that includes a series of “additional considerations”,¹⁸ expanding the welfare checklist in the previous framework.

In terms of parental responsibility, the new framework introduced a presumption in favour of “equal shared parental responsibility”,¹⁹ with a nexus between the application of the presumption and considerations in relation to time arrangements.²⁰ Where the presumption is applied and orders for shared parental responsibility are made, the courts are obliged to consider making orders for children to spend equal or substantial and significant time with each parent. They are required to consider whether such arrangements are “reasonably practicable” and in the child’s best interests.²¹

The insertion of these provisions reflected the Government’s intention to emphasise the importance of a child having a meaningful relationship with both parents and having both parents exercising decision-making responsibility for children.

¹⁴ *Family Law Act 1975* (Cth) s 60CA.

¹⁵ *Ibid* s 60B(1)(a).

¹⁶ *Ibid* s 60B(1)(b).

¹⁷ *Ibid* s 60CC(2).

¹⁸ *Ibid* s 60CC(3).

¹⁹ *Ibid* s 61DA.

²⁰ *Ibid* s 65DAA.

²¹ *Ibid* s 65DAA(1)(a), (b).

The need to protect children from family violence and child abuse was given increased emphasis in the new scheme through recognition in the Objects²² (s60B(1)(b)) and in the primary considerations of the Act.²³

Provisions further underpinning the increased emphasis on protection from exposure to family violence and child abuse included:

- an obligation on the court to take prompt action where documents are filed alleging child abuse or family violence in connection with an application under Part VII of the Act;²⁴ and
- power for the court to make orders for state and territory agencies (i.e., child protection agencies) to provide information about notifications, assessments and reports relevant to child abuse or exposure to family violence in relation to a child to whom proceedings under the Act relate.²⁵

Other provisions relevant to the issue of family violence and child abuse included s 117AB, which obligated a court to make a costs order where a party is found to have “knowingly made false allegations or statements” in proceedings under the Act. While this provision does not specifically refer to family violence and abuse, its enactment was intended to address concerns that allegations of family violence may be “easily made” in family law proceedings.²⁶

²² Ibid s 60B(1)(b).

²³ Ibid s 60CC(2)(b).

²⁴ Ibid s 60K.

²⁵ Ibid s 69ZW.

²⁶ Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility) Bill 2005, para 215.

The 2006 reforms also introduced Division 12A of Part VII, “to provide legislative support for a less adversarial approach to be adopted in all child-related proceedings under the Act”.²⁷ Key provisions provide that:

- the court must consider the needs of the child and impact of proceedings upon them in determining the conduct of the proceedings;
- the court is to actively direct, control and manage the proceedings;
- the proceedings should be conducted in a way that safeguards the child against family violence, child abuse and neglect, and the parties to the proceedings against family violence;
- the proceedings are to be conducted in a way that promotes cooperative and child-focused parenting by the parties;
- judges have the power to decide which issues may be disposed of summarily and which require full investigation;
- judges have the power to give directions and make orders regarding procedural steps, subject to deciding whether a step is justified on the basis of likely benefits, considered against the cost of taking it.

Under Division 12A of Part VII, certain provisions of the *Evidence Act 1995* (Cth) do not apply in child-related proceedings.²⁸

The principles contained in and features of Division 12A had their genesis in the Family Court of Australia’s children’s cases pilot program, which later became the less

²⁷ Ibid para 339.

²⁸ *Family Law Act 1975* (Cth) s 69ZT.

adversarial trial. The less adversarial trial is the 'default position' for the way in which parenting disputes are heard in the Family Court of Australia.

As described in *Finding a Better Way*, a publication that describes the history and experience of the Family Court's move to a less adversarial trial, the model is designed to focus on:

- producing the best possible and sustainable outcomes for children
- identifying the real issues which require resolution
- looking to the future needs of the child
- hearing cases in a timely and cost effective manner
- providing a fair process which observes the rules of natural justice
- dealing with self-represented litigants effectively, and
- attempting to achieve resolution wherever possible.²⁹

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

I have set out in some detail the key provisions of this amending legislation in appendix 1 to this paper. In summary though the important changes include:

- giving greater weight to the protection from harm when determining what is in a child's best interests
- changing the definition of 'family violence' and 'abuse' to reflect a contemporary understanding of what family violence and abuse is by clearly setting out what

²⁹ Margaret Harrison, *Finding a Better Way: a bold departure from the traditional common law approach to the conduct of child related proceedings*, Family Court of Australia, April 2007 http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/about/publications/Papers/Papers+and+Reports/FCOA_pr_Finding_Better_Way (viewed 9 August 2012).

behaviour is unacceptable, including physical and emotional abuse and the exposure of children to family violence

- better targeting what a court can consider in relation to family violence orders as part of considering a child's best interests
- requiring family consultants, family counsellors, family dispute resolution practitioners and legal practitioners, when advising clients, to encourage them to prioritise the safety of children
- improving reporting requirements for family violence and abuse, ensuring the courts have better access to evidence, and
- making it easier for state and territory child protection authorities to participate in family law proceedings.

Viewing the 2006 reforms from an attachment perspective

I now want to consider both sets of laws from the perspective of attachment theory, commencing with the shared parenting reforms of 2006. My starting point is to ask the question “What features of the shared parenting reforms might be considered to be consistent with the principles that underlie attachment theory?”

First, it could be said that section 60CC(2)(a), which is couched in terms of the benefit to the child of having a meaningful relationship with both parents, is consonant with attachment theory in the sense that the inquiry is qualitative, nuanced and child-focused. On the face of the language used in the statute at least, the section is directed not towards parental rights or the amount of time a child should spend with both parents but to the nature and quality of the relationship the child has with both parents and what

arrangements should be put in place to ensure the child continues to benefit from that relationship.

I set out earlier what West and George said about the importance of the quality of the parent-child relationship to attachment theorists. In a similar vein, Dr Liz Trinder, in discussing the concept of ‘meaningful relationships’, said:

It is difficult to overstate the importance of relationships for children’s ongoing developmental outcomes. In particular, we now have a clear understanding of the critical importance of parent–child relationships in shaping children’s psycho-social development, including social, cognitive, emotional, learning and long-term mental health outcomes (McIntosh 2003; Sroufe et al. 2005). In this context the importance placed on meaningful parent–child relationships in the Family Law Amendment (Shared Parental Responsibility) Act 2006 is broadly to be welcomed.³⁰

I think too that Division 12A, which as I have said contains principles for the conduct of child related proceedings, captures many of the themes that permeate attachment theory.

In an evaluation of what is known as the child responsive program, which operates within the less adversarial trial, researchers McIntosh and Long said:

The LAT is a supportive Court process for separating parents, aiming to maximise early and effective dispute resolution, without full adversarial armoury. It focuses on the interests of the child and the parents’ proposals for the future of each child, rather than the past history of the parties’ relationships. Each case is closely managed by one Judge, who actively determines the issues to be decided and the way in which evidence will be heard. Crucially, the less formal, supportive and available manner of the LAT Judge appeared to create better

*outcomes for parents and their children than were achieved through the mainstream court process.*³¹

I consider this to be a significant finding in light of Lieberman's comment that she wishes there was much less emphasis on adversarial processes in divorce and that any changes to the law needs to be child-centric. Division 12A clearly achieved this.³² Similarly, McIntosh suggests that adversarial processes are an impediment to a parent acting protectively in relation to their child, insofar as she says that "in an adversarial system, a mother might be blamed for coaching the child, or for being the architect of the child's terror."³³

Reflecting on the converse, in my view there are many features of the 2006 shared parenting reforms that are inconsistent with, or antithetical to, attachment theory.

I say this first because the inquiry *Every Picture Tells a Story*, which was the genesis of the shared parenting reforms, had a strong 'parental rights focus'. The fulcrum of the inquiry was the amount of time children should spend with each parent and not the quality of that time, or a consideration of ways of supporting a child's attachment with their primary caregiver. The parliamentary committee charged with responsibility for undertaking the inquiry, which as I said earlier was the House of Representatives Standing Committee on Family and Community Affairs, was specifically directed to consider whether there should be a presumption that a child spend equal time with both parents and the circumstances in which the presumption should not apply. Their focus was on the amount, and not the quality, of time spent with both parents and again I refer to what West and George have said about the importance of qualitative assessments in attachment theory.

³⁰ Dr Liz Trinder, 'What Might Children Mean by a Meaningful Relationship' (2009) 15 *Journal of Family Studies* 20.

³¹ Jennifer McIntosh and Caroline Long, *The Child Responsive Program, operating within the Less Adversarial Trial: A Follow Up Study of Parent and Child outcomes*, report to the Family Court of Australia, July 2007, p. 4.

³² Above n. 10, p. 533.

³³ *Ibid.*

In my view the Committee's discussion, findings and recommendations were suffused with considerations of time. One example of this is the persistent reference to an alleged "strong community feeling" that there was an '80-20' rule in the courts. By this the Committee seemed to be referring to an unspoken rule that children live with their mothers and spend every second weekend with their fathers. Despite this being strenuously denied by the Family Court and legal service providers in evidence, the Committee nevertheless went on to say that this perception was reinforced by individuals, audience reactions and the nebulous sounding "community statements." The Committee also went on to say that families should start with an expectation of equal care for their children, with no recognition that this should only occur where it is in the best interests of the child to have such an arrangement in place.

Secondly, and I think critically, although the legislature stopped short of introducing a presumption of equal time, the government of the day was not entirely clear about this in the materials it produced to accompany the shared parenting reforms or more broadly in the messages it was sending. And as for the legislation itself, as I have mentioned, one of its major features was a statutory link between considerations of parental responsibility and time. As evidence from the various evaluations of the 2006 reforms shows, and I will discuss them in more detail shortly, there was an expectation in the community that equal time was the starting point, even for very young children. Certainly data from the AIFS evaluation suggests that there has been an increase in the number of orders for equal time since 2006, particularly where those orders have been made by consent. Family Court judges though have been clear that it is the quality and not the quantity of time that counts. Nevertheless, in my experience at least, after 2006, there was an observable tendency in the matters that came before the Court to be characterised by disputation over amounts or blocks of time, rather than the quality of that time. Of course, arguments over time have always been a feature of litigation in the Family Court but I believe the lack of clarity around what the reforms were, and that 'parental responsibility' and time were coupled together, fuelled that.

In an attachment context, Bowlby notes that securely attached parents and children take time for granted. Those parents who are insecurely attached though need proof that the child loves them and look for that in the amount of time the child spends with them.³⁴ I posit therefore that the legislative nexus between parental responsibility and time and the consequent focus on time in contested litigation, involving an already vulnerable client group, is reinforcing and indeed could be seen as entrenching already insecure attachments.

To the extent that the association between parental responsibility and time has contributed to an increase in the number of orders for equal or substantially shared time, I record what Dr Jennifer McIntosh and colleagues said about the effect on young children in particular of living in a shared care arrangement, namely:

Consistent with the findings of Solomon and George (1999), young infants under two years of age living with a non-resident parent for only one or more nights a week were more irritable, and were more watchful and wary of separation from their primary caregiver than young children primarily in the care of one parent. Children aged 2–3 years in shared care (at the policy definition of 5 nights or more per fortnight) showed significantly lower levels of persistence with routine tasks, learning and play than children in the other two groups.

Of concern but as predicted by attachment theory, they also showed severely distressed behaviours in their relationship with the primary parent (often very upset, crying or hanging on to the parent, and hitting, biting, or kicking), feeding related problems (gagging on food or refusing to eat) and not reacting

³⁴ Richard Bowlby and Jennifer McIntosh, 'John Bowlby's Legacy and Meanings for the Family Law Field: in conversation with Sir Richard Bowlby' (2011) 49 *Family Court Review* 549 at 555.

*when hurt. Such behaviours are consistent with high levels of attachment distress.*³⁵

McIntosh et al found that there were developmental arguments against shared parenting surrounding the *disruptive* nature of the lifestyle for children, and the *disorganising* potential of the lifestyle for infant attachment.³⁶

It is also arguable that the introduction of a presumption of equal shared parental responsibility acted to obscure a ‘best interests’ inquiry, with the best interests of the child of course being the paramount consideration in parenting proceedings. I suggest this because the presumption, upon application, imposes obligations on the court to then consider equal time and substantial and significant time. That, I believe, encourages parents to focus on evidence that is supportive of the application of presumption or of its non-application or rebuttal, rather than on the child’s needs. Thus, this aspect of the shared parenting reforms, I contend, is not necessarily child focused.

I also see the ‘twin pillars’ of ‘the benefit to the child of having a meaningful relationship with both parents’ and ‘protection from harm’ as problematic. This is because, again, although the legislation and jurisprudence is clear that neither primary consideration has any particular weighting, the perception is that ‘meaningful relationships’ trumps ‘protection from harm’ when the two are in conflict. Parents may therefore be entering into arrangements that are developmentally inappropriate for children and that place them at risk of harm from being exposed to violence or conflict, in the belief that a court would make that order anyway at the conclusion of a trial. I have earlier spelled out what attachment theory says about exposure to conflict and violence with respect to the near-*impossibility* of secure attachments being sustained in that environment.

³⁵ Jennifer McIntosh, Bruce Smyth, Margaret Kelaher, Yvonne Wells and Caroline Long, *Post-separation parenting arrangements and developmental outcomes for infants and children*, report prepared for the Attorney-General’s Department, Canberra, May 2010, p. 9.

³⁶ *Ibid* pp. 9-10.

I have made several references to various evaluations of the 2006 shared parenting reforms and it is appropriate at this point for me to identify the reports and describe the key findings.

There were three major reports, namely:

- the *Family Courts Violence Review*, undertaken by Professor Richard Chisholm and released in November 2009
- the *Evaluation of the 2006 family law reforms*, undertaken by the Australian Institute of Family Studies and released in December 2009
- a review by the Family Law Council, culminating in the report *Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues*, released in December 2009.

Consistent with what I said earlier, it is fair to say that there is a thematic commonality emerging from the three reports as to widespread misunderstandings arising from the way in which the legislation is expressed, which necessarily has implications for children's safety, security and wellbeing.

I will briefly discuss each report in turn and especially what they have to say about messages "radiating" from the shared parenting reforms.

I will first address the Chisholm Family Courts Family Violence Review. The following quote neatly summarises the findings made by Professor Chisholm, who incidentally is a former judge of the Family Court of Australia. He states:

The conclusions emerging from the Family Violence Review suggest that with hindsight it can be seen that some of the techniques used in those amendments have proved confusing and troublesome. In particular, many people seem to have

wrongly assumed that the amendments created a presumption that children should spend equal time with each parent (except in cases of violence or abuse). This misunderstanding seems to have arisen in part because of the complexity of the 2006 amendments. For example, the presumption of equal parental responsibility has been wrongly taken to mean that there was also a presumption favouring children spending equal time with each parent. Again, the weight to be attached to particular circumstances is not now determined simply by their importance for the child in the circumstances of each case, but by whether each circumstance falls within the class of 'primary' consideration, or is merely an 'additional' consideration, a question which will often require the parties to work out whether particular events fall within the legislative definition of 'family violence'.

Working out what is best for children is hard enough without having to get involved in such technical distinctions. The tangle of legal technicality that resulted from the 2006 amendments may well have distracted parties and those advising them from focusing on what arrangements are likely to be best for the children in the circumstances of each case. It may also have led to the very opposite of what the Hull Committee intended, namely the parties thinking about their own entitlements, rather than what is best for their children.³⁷

The second report is the AIFS evaluation of the 2006 family law reforms.

In discussing how the 2006 reforms have been working in practice, AIFS found that many parents and some professionals do not understand the distinction between shared parental responsibility and shared time, or the presumption of equal shared parental responsibility. AIFS found that a common misunderstanding was that shared parental responsibility allows for equal physical time to be spent with both parents. According to AIFS, this confusion has resulted in disillusionment in some fathers, who find that the

law does not automatically provide for 50-50 'custody', which in turn can make it challenging to achieve child focused arrangements in cases where equal or shared care arrangements are not practical or appropriate.

Legal sector professionals indicated that in their view the legislative changes had promoted a focus on parents' rights rather than children's needs, obscuring to some extent the primacy of the "best interests" principle. Further, they indicated that in their view the legislative framework did not adequately facilitate making arrangements that were developmentally appropriate for children.

The last report is the Family Law Council's. In its report *Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues*, the Council made recommendations similar to those advanced by Professor Chisholm. As to the issue of what people think the shared parenting reforms do, as opposed to what they actually say, the Council said:

There is also a perception that equal shared parental responsibility equates to equal time or "50/50" and that the burden rests on the parent seeking different orders to carry the burden of convincing the court that something other than 50/50 time is appropriate. This understanding of what the legislation means appears to have been informed by some broad public perceptions. Those matters that the federal family courts take into consideration in making the determinations of whether equal time is appropriate do not appear to have filtered through to community views.³⁸

As I will soon discuss, these three reports were formative in the development of the recent family violence reforms. The Explanatory Memorandum to the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 (Cth) clearly

³⁷ Professor Richard Chisholm, Family Courts Violence Review, 27 November 2009, pp. 7-8. www.ag.gov.au/Documents/Chisholm_report.pdf (viewed 15 August 2012).

states that the reports informed the development of the reforms and that they, and other research reports on family violence, shared care and infant development, provided a strong evidence base for change.

As far as statistical data is concerned, that can be found at appendix 2. That appendix contains data from the 2010-11 Annual Report of the Family Court of Australia, an article by McIntosh and Chisholm entitled 'Cautionary notes on the shared care of children in conflicted parental separation',³⁹ a study of parents who separated after the 2006 Family Law Reforms by Lixia Qu and Ruth Weston, and from the evaluation of the 2006 Family Law Reforms undertaken by the Australian Institute of Family Studies in December 2009.

It is my understanding that this data was also persuasive in the development of the 2011 family violence reforms. In his second reading speech on the family violence bill, under the heading 'the evidence base for the reforms', the Attorney-General said the following:

The damaging effects of family violence and child abuse have been recorded in a range of reports commissioned by the government in recent years.

In an evaluation of the 2006 family law reforms released by the government last year, the Australian Institute of Families Studies (AIFS) found that two-thirds of separated mothers and over half of separated fathers reported experiencing abuse, either emotional or physical, by the other parent. The Australian Institute of Family Studies also found that one in five separated parents surveyed reported safety concerns associated with ongoing contact with their child's other parent.

³⁸ 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*, Canberra, December 2009, p. 83.

³⁹ (2008) 14 *Journal of Family Studies* 37.

A report by the Family Law Council highlights data that victims of family violence receive more psychiatric treatment and have an increased incidence of attempted suicide and alcohol abuse than the general population. Violence is also a significant cause of homelessness.

*These are disturbing findings.*⁴⁰

For my own part, the major concerns arising from the 2006 amendments, particularly from the perspective of children's wellbeing and development, were:

- children and the victim parent were being re-traumatised when they were forced to see or spend time with a parent who perpetrated violence
- children were being subjected to ongoing violence, or used as weapons against victim parent, or witnessing the ongoing denigration of parent (or all three)
- children were being subjected to ongoing high inter-parental conflict
- children's relationships with both parents was negatively affected by exposure to violence and/or conflict and the attachment relationship between the 'victim parent' and child was being disrupted in times of high distress.

From my perusal of the Explanatory Memorandum, the second reading speech and the transcript of the parliamentary debates occurring during the passage of the bill, my concerns were shared by the Australian parliament.

The following statement by the former Attorney-General, which is contained in the second reading speech for the Family Law Legislation Amendment (Family Violence and

⁴⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 24 March 2011, 3140 (Robert McClelland, Attorney-General).

Other Measures) Bill 2011, is redolent of some of the major themes arising from a consideration of attachment theory, family violence and shared parenting laws.

Children are the most vulnerable members of our community. Most children thrive in happy and cohesive families who put the best interests of their children first. Unfortunately, some children are not so lucky and experience significant conflict, fear, isolation and harm.

Their experiences often occur within the confines of the family home and involve trusted family members. Conflict often escalates during family breakdown increasing the risk to these children.

Often there are strong intergenerational effects.⁴¹

In debate, Ms Ley, the Member for Farrer, said:

Family violence is unacceptable and there is never an excuse for it. No-one in today's society should have to spell out why. Apart from the threat to safety, the mental and physical pain and anguish, and the sheer psychological damage violence does to the people who are on the receiving end—and in part to those who perpetrate it—front and centre of its negative effect is the message it gives to children, who, while they may not actually have their physical safety threatened, are too often severely affected.

Witnessing violence in an ongoing parental relationship teaches children that it is a valid transaction—one they may need at some stage to employ. It is no secret that violent patterns of behaviour are passed down through generations. Women and men fleeing violent relationships often say to me that the final reason they left

⁴¹ Ibid.

*a violent partner was the lesson they were unwittingly teaching their children that it is okay to do this and okay to have it done to you.*⁴²

Ms O'Neill, the Member for Robertson, said:

*As a former high school teacher, I understand that a stable childhood, free of abuse and family violence, is essential in ensuring children reach their potential. As many of my colleagues in the teaching profession across this nation would acknowledge, schools are the sites at which a lot of the trauma of family violence is discovered. The reporting conditions that demand teachers to link people into the kind of care that they need is a big advance from the time I started in that profession. While I am aware that there are inspiring exceptions of remarkably resilient young children who do survive this, and I do not want to increase the sense of victimhood that can sometimes gather around this issue, we do know that there are long-lasting impacts on children who are affected by abuse and family violence, and the outcomes can indeed be tragic.*⁴³

At the conclusion of the debate, the (then) Attorney-General, Mr McClelland, said:

*It (the Bill) is not about impeding safe parenting relationships in any way, shape or form. They are not at risk. We recognise they are the majority of relationships, but there are nonetheless a substantial minority where children are at risk, and we are neglectful in our responsibility to those children if we do not act...*⁴⁴

Similar to what I have said about the shared parenting reforms themselves not being directly formulated by reference to attachment theory, the various inquiries into and evaluations of the 2006 shared parenting laws, which led to the 2011 family violence

⁴² Commonwealth, *Parliamentary Debates*, House of Representatives, 30 May 2011, 4981 (Sussan Ley).

⁴³ Commonwealth, *Parliamentary Debates*, House of Representatives, 26 May 2011, 4817 (Deborah O'Neill).

⁴⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 30 May 2011, 4999 (Robert McClelland, Attorney-General).

reforms, were not strictly conducted within an attachment theory paradigm. In my view however they capture the essence of what attachment theory tells us about the way that exposure to violence and parental conflict, and an emphasis on the amount of time spent with a parent rather than the quality of parent-child relationships, can affect childhood development.

Viewing the 2011 reforms from an attachment perspective

Earlier in this paper I outlined the major features of the family violence reforms. As I did with the shared parenting reforms, I now want to examine them from the perspective of attachment theory.

Although Professor Chisholm was not analysing the 2011 family violence amendments through an attachment 'lens', as I have already said, I agree with him that the removal of the "friendly parent" provision and mandatory costs orders will be potentially very significant. To quote from his report:

The first conclusion is that three particular provisions need to be amended in a way that respects their original purposes but avoids the risk that they might deter victims of violence from making appropriate disclosures. They are the 'friendly parent' provision, the provision directing family advisers on what information to provide, and a provision for the making of costs orders where there are knowingly false allegations or statements.

This point is generally accepted...in the literature designed to help separating parents. Similarly, the point is frequently made by judicial officers in their judgments and in discussions with the parties and their representatives.

It is therefore entirely understandable that the legislature might have thought it desirable to make this familiar and important point by specifically including it among the matters to be taken into account when deciding what is likely to be best for children.

Unfortunately, what is obviously desirable in most families can sometimes be problematical in families that are dysfunctional or have particular problems, including problems associated with violence and abuse. Sometimes, children can be attracted to parents who have abused them or who have been violent. In some circumstances, those parents might constitute a continuing risk for the children. Sometimes the violent parent will continue to provide the child with a role model for dealing with life's problems by using violence.⁴⁵

In my view some of the features of the amending Act which are consistent with promoting organised and secure attachment relationships include the following:

First, the significantly expanded definition of 'family violence' (which can be found in appendix 1) to me embodies the understanding that children's development can and is affected by forms of behaviour that includes but is not limited to physical violence and/or abuse. It encompasses both behaviour directed towards them and that which is directed towards a parent, which may have deleterious effects on their ability to parent and thus on the attachment relationship with the child. Examples include denial of financial autonomy, repeated derogatory taunts, and isolation from family, friends and culture. It also captures, in a causal sense, typologies of violence insofar as the definition makes reference to 'coercion' and 'control'. The definition then goes on to link those to a family member being fearful. It therefore appears to me to be consistent with the literature I have already referred to, which discusses the damaging effects of coercive controlling violence within the spectrum of family violence and the difficulties children

⁴⁵ Chisholm, above n 37, p. 7.

experience in developing secure attachments to frightened, traumatised and damaged parents.

Secondly, there is an expanded definition of a child being exposed to family violence, which is not limited to a temporal relationship between the child and acts of violence. It includes (for example) a child comforting a member of their family who has been the victim of an assault, and cleaning up a site after there has been damage to property. To my mind this constitutes a recognition of the multi-faceted and pervasive effects of family violence. From a childhood development perspective I believe this can create a dependent loyalty between a parent and child, whereby the child assumes a supportive and protective role for the parent in a maladaptive sense.

Thirdly, I observe that the definition of ‘abuse’ was previously limited to physical acts in the form of a sexual assault, but it now includes causing a child to suffer severe psychological harm. According to the explanatory memorandum, “This reflects current social science and approaches to child protection, which indicate that exposure to violence threatens a child’s physical, emotional, psychological, social, education and behavioural wellbeing.”

Fourthly, and importantly, amendments have been made to section 60CC(2) of the Family Law Act (which as I have said contain the two ‘primary considerations’ in considering what arrangements would be in the best interests of a child), so that protecting a child from harm associated with family violence or abuse takes priority over the benefit of maintaining meaningful relationships with both parents. Insofar as attachment theory is concerned, Zeanah says that in circumstances in which mothers in court ordered co-parenting arrangements have elevated anxiety and fear about their child’s well-being arising from past violence, which the AIFS data at appendix 2 shows they do, the best way forward from the perspective of attachment is to ‘pick a parent’ and make that attachment relationship a major concern for the child, with everything else

being secondary to that.⁴⁶ It appears to me that the legislative elevation of primacy of safety over relationships with both parents – which, as Zeanah has said, in circumstances of conflict, violence and unresolved trauma, it is developmentally disastrous for a child to be in the middle of that by spending substantial time with both parents – is consonant with Zeanah’s observations.

Fifthly, as Richard Chisholm has highlighted, the removal of disincentives for primary attachment figures to raise protective concerns because of a perception that they will be punished (in the form of an order for costs, or with respect to the allocation of parental responsibility and particularly time) if they cannot ‘prove’ an allegation of violence to the requisite legal standard, is also significant.

However, there are also features of the amending legislation which I think, at least potentially, contra-indicate the development of organised and secure attachments.

Most significantly in my view, the legislative pathway that was the subject of adverse comment in the three reports relied upon by the Government as providing the impetus for reform, has been retained. Thus, the statutory linkage between consideration of equal shared parental responsibility and time remains intact. I am concerned that maintaining the association between the two concepts, which in my view should not be linked, creates the potential for the normative messages arising from the family violence reforms – namely, the primacy of children’s safety and best interests – to be confused. This is particularly so for parents who are attempting to bargain ‘in the shadow of the law’, as government encourages them to do.

In saying this however I acknowledge political realities. The current government, when in opposition, supported the shared parenting amendments during their passage through Parliament and it would be naïve to expect the government to repeal the shared parenting reforms in their entirety.

⁴⁶ Zeanah, above n. 10, p. 531.

Further, as Professor Chisholm has pointed out, distinguishing between primary and additional considerations, where one of the primary considerations is protecting children from harm associated with violence and abuse, suggests that there are two types of relationships: those in which violence or abuse (or risk of violence or abuse) features and all 'other' relationships. This ignores the fact that children's development can be impaired and secure attachment compromised by other environmental factors (a parent's mental illness, substance abuse issues or entrenched conflict, for example).

Unfortunately in my view the amendments go no further than prioritising protection from harm associated with violence and abuse. They do not, as Professor Chisholm recommended, abolish the distinction between primary and additional considerations altogether. I see this as an opportunity wasted.

How will we know if the 2011 family violence reforms are achieving their stated objectives and what factors might militate against the achievement of those objectives?

I want to now discuss the important question of how will we know if the legislation is achieving its stated policy objectives. Although I do not believe a formal evaluation has been commissioned, I nevertheless consider that there are a few 'markers' that might give us a sense of that.

First may I say though that in my opinion, the extent to which attachment theory can or should be given legislative expression or relied upon as the basis for crafting parenting orders is necessarily limited. I agree with Lieberman's observation that "...theory cannot make law. Theory can guide legal thinking, but no theory accounts for the multiplicity of influences that are enacted in each particular situation."⁴⁷ Thus, in the context of a 'best interests' inquiry, which is particular to each family, it is difficult to generalise about what a 'good' outcome is and what trends we would expect to see in the types of orders being made.

⁴⁷ Ibid.

Despite this caveat, attachment theory potentially has an important part to play in sculpting law, and in this regard I note that Jennifer McIntosh “quietly applauds” legislation that upholds the right of the child to early psychological security with an available and continuous attachment relationship.⁴⁸

As to what we might expect to see, insofar as Australian research shows that a significant proportion of parents whose children were living in a shared care arrangement had safety concerns associated with ongoing contact with the other parent, and given what attachment theory says about the effect of this on the parent-child relationship,⁴⁹ it would not be unreasonable to expect to see a reduction in the number of orders where a child is required to spend equal or significant time with a parent who has been found to have behaved violently or who presents an unacceptable risk of doing so. Allied with this, perhaps one would also expect to see an increase in the number of orders whereby any time spent with a violent parent, or a parent who presents a risk of being violent, is subject to supervision. In this context, I refer again to Zeanah’s statement in response to the question of what preventative steps the family law system could take where there has been a history of violence and where a parent has heightened anxiety and fear about the well being of their child, that you “pick a parent and make the attachment relationship the major concern for the child”. I also note that in the guest editor’s introduction to the special issue of the *Family Court Review*, it is said that there was widespread agreement by the contributors to that special edition that domestic violence trauma and extreme parental conflict are pathogenic and, in that context, it is often better to prioritize one solid attachment than to have two troubled attachments.⁵⁰

As a quantitative measure, I would certainly expect to see an increase in the number of Notices of Family Violence or Child Abuse filed. Since 2006, such Notices have only

⁴⁸ Jennifer McIntosh, ‘Assessing Attachment Needs and Potential in High Risk Infants’ (2006) 12 *Journal of Family Studies* 57, p. 68.

⁴⁹ Kaspiew et. al, above n. 13; Dale Bagshaw, Thea Brown, Sarah Wendt, Alan Campbell, Elspeth McInnes, Beth Tinning, Becky Batagol, Adiva Sifris, Danielle Tyson, Joanne Backer and Paula Fernandez Arias, ‘The Effect of Family Violence on Post-Separation Parenting Arrangements’ (2011) 86 *Family Matters* 49.

⁵⁰ Jennifer E. McIntosh, ‘Guest Editor’s Introduction’, (2011) 49 *Family Court Review* 418, p. 424.

been filed in approximately 10% of all applications for final parenting orders. In my experience, that figure does not correspond with the frequency with which allegations of family violence are made in parenting proceedings. An increase in the number of Notices filed would, I believe, be indicative of the fact that disclosures are being made more frequently. That may appear self evident, but what I mean by this is that if Notices are being filed more often, then that might suggest that the removal of the purported legislative disincentives to making allegations by way of the 'friendly parent' provision and the mandatory costs order for knowingly making a false allegation of violence have been effective.

Further, it might also indicate that conduct which, prior to the commencement of the reforms, was not understood to constitute 'violence' or was thought not to be encompassed within the previous definition of family violence can now be taken into account. Isolation from family and friends and economic abuse, for example, fall explicitly within the revised definition and that may serve to encourage allegations to be made and particularised in the Notice.

Given that attachment theorists assert that family violence can be influential in the development of disorganised attachment relationships between parents and children, I suggest one would also want to see sections 67ZBA and 67ZBB operating so that risk to a child is identified at an early stage and protective orders are made on an interim basis to help preserve the relationship between the child and attachment figure or at least to prevent any further damage to that relationship. Such orders could include for example limiting the time spent with the parent who has allegedly behaved violently, restraining the allegedly violent parent through an injunction for personal protection, and excluding the allegedly violent parent from the home in which the primary parent and child reside, where the allegations are sufficiently serious to warrant that course of action. I recognise though that there are inherent limitations associated with interim hearings in the sense of the limited material before the court and the lack of opportunity to test what evidence there is. Even so, I would hope that sections 67ZBA and 67ZBB could nevertheless be

utilised to support attachment relationships where it is in the best interests of the child to do so.

Although it is of course a matter for individual judicial officers, to the extent that the family violence reforms embody an understanding of attachment theory, perhaps in judgments we might begin to see discussion of concepts such as safety and protection from harm in a manner more fully informed by an appreciation of the importance of having a secure attachment figure and how attachment is affected by violence and parental conflict.

Further, as far as judgments are concerned, in light of the primacy that is now being accorded to the safety of children over the benefit of having a meaningful relationship with both parents, I would expect to see consideration of how the elevation of safety affects the relationship between the ‘primary’ and the ‘additional’ considerations, especially in light of the ‘friendly parent’ provision being excised from the additional considerations. Currently the primary considerations don’t ‘trump’ the additional considerations but it will remain to be seen whether the balance between the two sets of considerations will be affected, and what that will mean as far as the types of orders being made.

I would also expect to see a greater and more nuanced focus on family violence in issues assessments and family reports, informed by an understanding of the aetiology and effect of violence on both children and parents, as captured in the expanded definitions of ‘family violence’, ‘exposure to family violence’ and ‘abuse’. The revised family violence screening and assessment process that has been developed in response to the family violence amendments and the associated training program for family consultants should be of critical importance in achieving this objective. A copy of the family violence screening questions, as revised and refocused in light of the 2011 reforms, can be found at appendix 3. The updated Family Violence Policy applicable to family consultants can be found at appendix 4.

I congratulate the former government for investing in an evaluation of the 2006 reforms, in the same way that the current government is similarly to be applauded for commissioning the reviews that culminated in the 2011 family violence reforms. Given the laudatory policy objectives underpinning the family violence reforms, it is to be hoped that the government will continue to invest in research and evaluation as to the extent to which the new laws are achieving their stated aims.

In terms of what might militate against the achievement of the policy objectives underlying the reforms, a major issue is resourcing, or the lack thereof. This is an issue that the Chief Justice of the Family Court of Australia, in consultation with the Family Court's Law Reform Committee (of which I am Chair), has vigorously pursued.

In her Honour's submission to the Senate Legal and Constitutional Affairs Legislation Committee, the Chief Justice said:

The final issue I want to touch on is the resourcing implications arising from the Bill. Although the explanatory memorandum states that the amendments in the Bill will have negligible financial implications, I am not convinced that is the case.

The Bill considerably expands the definition of 'family violence' and 'abuse of a child'. For example, the proposed definition of 'abuse' now encompasses serious psychological harm and neglect. A new definition of 'exposure to family violence' has also been inserted.

As I have already discussed, the category of people who can file a prescribed notice and activate the 'prompt requirement' processes contained in section 67ZBA is being expanded to include prescribed "interested people". The identity of the individuals who and organisations which may be so prescribed is at present unknown. However, on my reading of the explanatory memorandum the Government appears to be anticipating that a higher number of prescribed

notices will be filed than is presently the case with Form 4s. That would in turn mean that the 'prompt action' requirements imposed on the Court by section 67ZBB would be engaged with greater regularity.

I am concerned that the confluence of amendments, by way of expanded definitions and categories of persons who can engage special court processes, will have resource implications for the Court. Section 67ZBB requires the Court to consider what interim or procedural orders should be made to enable appropriate evidence to be gathered expeditiously and to protect the child or parties. The Court must take such action as soon as practicable and, if appropriate, within eight weeks. If these 'special processes' are being used more often, the Court's ability to take action within an eight week time frame will become increasingly compromised.⁵¹

A second factor to my mind are the inherent limitations of the legal process and of legislation as an agent for social and behavioural change. It has aptly been described elsewhere as a "blunt tool."⁵² There are obviously limits to what the law can achieve by way of repairing damaged relationships. As McIntosh has said, correctly in my view, "...a judge can't order a relationship to recover or trauma to heal on its own."⁵³ In a similar vein, Lieberman has observed that "a judge cannot rescue a child from the parents the child has."⁵⁴ I therefore think we need to be realistic about what statutory amendment can do in and of itself, and particularly as I have already said where it is not accompanied by additional resourcing.

⁵¹ Submission to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, 28 April 2011, submission no. 39, p. 5, (the Hon. Diana Bryant AO, Chief Justice, Family Court of Australia)
http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/family_law_familyviolence/submissions.htm (viewed 14 August 2012).

⁵² McIntosh et. al., above n. 35, p. 10.

⁵³ McIntosh, above n. 10, p. 533.

⁵⁴ Ibid.

To my mind there has been a discernible trend in the executive branch of government to use reform of the statute book as a panacea for perceived ills, which has the effect of imposing a weighty obligation on courts to meet the legislature's expectations in circumstances in which that may be both unattainable and inappropriate. That trend is also evident in these reforms, and the obligation imposed on judicial officers to "enquire" as to family violence is one such example. In the submission by the Chief Justice to the Senate Committee the Chief Justice said this:

Again, I am not sure what end this provision is trying to achieve and the explanatory memorandum provides little assistance. It makes reference to proactive enquiries about other information which might be useful evidence from people or agencies other than the parties but self-evidently an enquiry by the Court under section 69ZQ(1)(aa) would not elicit this information.

The new sub-section seems to contemplate a yes or no answer. The Court's obligation is discharged when a response is received. In the event of an affirmative response to a question such as "is the child at risk of family violence or abuse?", what use is the Court to make of this? The response is not evidence as such. If it is anticipated that the Court will then go on to direct the filing of a Form 4 or make directions as to the filing of affidavits or preparation of other evidence, or the appointment of an ICL, the Bill should be clear about this. As presently expressed, the Bill and the explanatory memorandum provide no assistance with these issues.

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.*⁵⁵

I recollect that when the Court enquired of the Attorney-General's Department as to the purpose of this provision, they confirmed that no consequences flowed from receiving an affirmative answer and that this provision had been included to "start a conversation" about violence. Courts are emphatically not the fora in which "conversations" about violence should occur.

I am also concerned that the reforms could be seen as sending mixed messages. Government has consistently said that it values and prioritises safety, yet supports shared parenting. This is evidenced by the fact that the relationship between responsibility and time has been retained, including the various obligations to consider equal time and substantial and significant time. As discussed earlier, the various evaluations have found this linkage to be problematic in terms of parental expectation and has the potential to obscure a best interests inquiry. To the extent that legislation sends, in Smyth's words, "radiating messages",⁵⁶ the message these amendments send are to some extent confused. Insofar as protecting children from harm associated with violence and parental conflict is the overriding intention of the reforms, their achievement may be compromised as a result.

What further refinements to Australian family law are necessary, given the corrosive effects of family violence on well being, functioning and attachment?

I am in broad agreement with Professor Chisholm's recommendations about legislation contained in his *Family Courts Violence Review* report. These, in summary, include:

⁵⁵ Bryant, above n. 51.

⁵⁶ Bruce Smyth, 'A five year retrospective of post-separation shared care research in Australia' (2009) 15 *Journal of Family Studies* 36.

- that the Government give consideration to retaining the present provisions relating to parental responsibility (ss 61B, 61C, and 61DA), but amending the Act so that the guidelines for determining arrangements for the care of children (s 60CC) are independent of the provisions dealing with parental responsibility;
- amending s 61DA so that it creates a presumption in favour of each parent having “parental responsibility”;
- in considering what parenting orders to make, the court must not assume that any particular parenting arrangement is more likely than others to be in the child’s best interests, but should seek to identify the arrangements that are most likely to advance the child’s best interests in the circumstances of each case; and
- re-writing Part VII in the interests of clarity and simplicity.⁵⁷

It is perhaps implicit in what Professor Chisholm is saying that the Act should not in any way couple considerations of parental responsibility with considerations of how much time a child spends with each parent. I consider that the presumption should be repealed and that reference to an obligation to consider “equal time” and “substantial and significant time” should similarly be excised.

The formulation in s 60CC(2)(a) as to “the benefit to the child of a meaningful relationship” is, I believe, often misunderstood. The emphasis on the “benefit to the child” can be overlooked. I have the impression that it is a commonly held view that ‘meaningfulness’ of a relationship should be assessed by reference to the amount of time spent with a parent, rather than the quality of the relationship. This is despite what the case law says. For example, in *Mazorski v Albright* Justice Brown said:

⁵⁷ Chisholm, above n. 37, pp. 12-15.

*What these definitions convey is that ‘meaningful’, when used in the context of ‘meaningful relationship’, is synonymous with ‘significant’ which, in turn, is generally used as a synonym for ‘important’ or ‘of consequence’. I proceed on the basis that when considering the primary considerations and the application of the object and principles, a meaningful relationship or a meaningful involvement is one which is important, significant and valuable to the child. It is a qualitative adjective, not a strictly quantitative one.*⁵⁸

I have no argument with the intent of the provision and indeed I consider it to be very important, but perhaps it would benefit from being expressed with more clarity.⁵⁹

Finally, while a key component of the family law reforms is the revised and expanded definition of family violence, the Act does not provide any further assistance as to how the court is to proceed after making a finding that violence has occurred, or that a child has been exposed to family violence. This is a concern that has also been expressed by the Chief Justice. For example, there is nothing in the Act that states that, if an allegation of violence is found to be proven, the court must not order that a child spend unsupervised time with the person who has used violence, unless the court is satisfied that such an arrangement would be safe and in the child’s best interests. This is in contradistinction to our regional neighbours New Zealand, whose legislation does contain such a provision.⁶⁰

With the emphasis that has been placed on the expanded definition of family violence, and the way in which it relates to the presumption of equal shared parental responsibility and then to consideration of equal time and substantial and significant time, parents may think that a finding of family violence will automatically mean that there will be no order for equal time or substantial and significant time. However, this may not be the outcome.

⁵⁸ (2007) 37 Fam LR 518 at 526.

⁵⁹ For further discussion of the concept of a “meaningful relationship” see Richard Chisholm, ‘The Meaning of Meaningful: Exploring a Key Term in the Family Law Act Amendments of 2006’ (2008) 22 *Australian Journal of Family Law* 175.

⁶⁰ *Care of Children Act 2004* (NZ) s 60.

Even if the court decides that it is not in the interests of the child to make an order for equal time or for significant or substantial time, there is no guidance as to what order might then be made in circumstances where an allegation of family violence has been found to be proven to the requisite legal standard.

Having said that, this was the case before the amendments and the Court was still able to fashion orders in these circumstances, taking into account all of the relevant factors such as the kind of violence, the impact of that violence, the extent of the violence, the parenting arrangements that had been in place, including by consent, and the age and views of the children.

Further, as many of my judicial brethren have often pointed out, one very relevant factor in how the violence is addressed is the orders sought by each party. For example, if the dispute is about whether the child should spend two days rather than three days with the violent parent, it is unlikely that the violence will have much, if any, bearing on the result.

I agree with the Chief Justice's view expressed to me on a number of occasions that it should be possible to insert in the Act, perhaps in s 60CC(2), some of the considerations that the court would take into account in making an order for time spent notwithstanding that violence had been established. This would make it clear to the parties litigating these matters that not only might the court be considering making such an order, but the criteria upon which that order might be based.

The point is that given the continuing absence of any guidance in the legislation as to how the court is to proceed, the expectation of parents created by the focus on the expanded definitions may well be defeated.

Conclusion

In conclusion, all that I can really say is “watch this space.” We will certainly know much more in twelve months’ time, if our experience of the 2006 shared parenting reforms is any guide.⁶¹ I would expect to see some jurisprudential development during this period, although not necessarily at an appellate level. Our data collection system already captures information about the number of Notices of Family Violence and Child Abuse filed, the types of orders made and, where parents agree or a judge orders that a parent spend less than 30% of time with their child or children, the main reason why that order was made. We have been capturing this information since 2006 and it will be instructive for comparative purposes, as to whether the category of violence/abuse features more prevalently. The Australian Institute of Family Studies is also undertaking a study into the use of independent children’s lawyers in family law proceedings and I understand that the effect of the family violence reforms is an issue that is being built into the research design. Of course, thanks to the evaluation of the 2006 reforms there is baseline data available should government wish to commission a formal evaluation, and I hope they do so.

Nevertheless, despite what judgments, orders and data will tell us, I believe the inescapable reality is that maintaining a statutory framework in which legislative presumptions then trigger mandatory consideration of time means that the family violence reforms are compromised in their ability to protect children from harm associated with family violence. Viewed from an attachment perspective and indeed from that of anyone concerned about the safety and wellbeing of children and young people, the family violence reforms can be seen as an opportunity lost.

⁶¹ For example, the Full Court of the Family Court handed down a decision as to the legislative pathway to be followed in light of the 2006 shared parenting amendments within six months of those amendments coming into effect – see *Goode & Goode* (2006) FLC 93-286.

Appendix 1



**THE FAMILY LAW LEGISLATION AMENDMENT (FAMILY VIOLENCE AND
OTHER MEASURES) ACT 2011
BACKGROUND AND KEY PROVISIONS***

* Information contained in this handout is extracted from the Bills Digest no. 126, 2010-11, prepared by the Parliamentary Library, Parliament of Australia.

INTRODUCTION

The *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth) (“the Family Violence Act”) received Royal Assent on 7 December 2011.

The purpose of the Act is to amend Part VII of the *Family Law Act 1975* (Cth), which deals with children, to enable the courts and the family law system to respond more effectively to parenting cases involving violence or allegations of violence.

Its substantive provisions commence on 7 June 2012.

The Family Court of Australia was established as a stand-alone, specialised superior court in 1975 and commenced operation in 1976. The Court exercises jurisdiction in private family law disputes and jurisdiction is principally (but not exclusively) conferred by the Family Law Act. Australia operates under a system of cooperative federalism and as such private family law disputes are the constitutional responsibility of the Commonwealth whereas public law disputes are the responsibility of the States and Territories. The States and Territories also have responsibility for hearing and determining applications for protective orders against family violence, although the Family Court does have jurisdiction to make injunctions for personal protection in both children’s cases and property proceedings.

As one of two federal courts exercising jurisdiction under the Family Law Act, the Family Court of Australia will be significantly affected by the family violence amendments, both in terms of changes to the law to be applied and in practice and procedure.

BACKGROUND

*The Family Law Act 1975 and children*⁶²

The provisions of the Family Law Act relating to parenting cases are contained mainly in Part VII, which is titled 'Children'. Part VII was significantly changed by amendments in 1995⁶³ and again by amendments in 2006.⁶⁴ A brief overview of these amendments follows.

It should be noted that, in Australia, the law relating to parenting cases has long been governed by the principle that the child's best interest must be treated as the paramount (but not sole) consideration. This principle was originally developed by courts' decisions in the nineteenth and early twentieth centuries, and then incorporated into legislation. It remains in the Family Law Act and section 60CA now provides: "*In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.*"

The 1995 reforms

1995 saw significant amendments to the Family Law Act under the initiative of the then Labor Government. The objectives of the legislation were said to be:

- to remove the proprietorial and 'winner takes all' connotations of the old law of custody and access by emphasising the continued sharing of parental responsibility;
- to promote and encourage continued contact between both parents and their children post-separation;
- to promote private agreement of arrangements; and
- to shift attention to the rights of children and away from those of parents.

The child's best interests remained the paramount consideration in decision-making, although there was a general statement in the opening part of the legislation that, subject

⁶² This section relies heavily on two articles: J Dewar, 'Can the centre hold?: reflections on two decades of family law reform in Australia', *Australian Journal of Family Law*, vol. 24, 2010, pp. 140—142, http://parlinfo.aph.gov.au/parlInfo/download/library/jrnart/213975/upload_binary/213975.pdf;fileType=application/pdf#search=%22dewar%20family%20law%20reform%22 and P Parkinson, 'Editorial: the family law reform pendulum', *Australian Journal of Family Law*, vol. 23, 2009, p. 155, http://parlinfo.aph.gov.au/parlInfo/download/library/jrnart/WHFV6/upload_binary/WHFV6.pdf;fileType=application/pdf#search=%22family%20law%20reform%20pendulum%22

⁶³ *Family Law Reform Act 1995*.

⁶⁴ *Family Law Amendment (Shared Responsibility) Act 2006*.

to the best interests test, children had a right of contact on a regular basis with both parents and with significant others.

For the first time, reference was made to family violence as a factor in decision-making on the best interests of the child⁶⁵, and detailed provisions were introduced concerning the inter-relationship between family violence orders and orders for contact. Courts were instructed to endeavour not to make parenting orders that exposed a person to an unacceptable risk of family violence.⁶⁶

The 2006 reforms

Just over a decade later, after a change of Government, the Howard (Liberal) Government, in response to the House of Representatives Committee report, *Every picture tells a story*⁶⁷, introduced the 2006 reforms. These went further than the 1995 reforms in a number of important respects and were the subject of considerable debate. Most notably, the legislation promotes equal sharing of time post-separation much more actively than its predecessor, in a number of ways:

- there is a presumption of “equal shared parental responsibility” (section 61DA). This presumption is not applicable in cases where there are reasonable grounds to believe one of the parties has engaged in family violence or child abuse (subsection 61DA(2)) and it is rebuttable on the basis of evidence that would satisfy a court that its application is not in the child’s best interests (subsection 61DA(4));
- where an order for equal shared parental responsibility is made, a court must consider whether making an order for the child to spend equal time with both parents is in the best interests of the child and reasonably practicable (subsection 65DAA(1)). If so, then it must consider making such an order (paragraph 65DAA(I)(c)). If an order for equal time is not made, then a court must consider making an order for ‘substantial and significant time’ with both parents (subsection 65DAA(2)). ‘Substantial and significant time’ must include weekdays as well as weekends, and must be such as to allow both parents to be involved in the child's daily routine;
- the traditional checklist for determining the best interests of the child is now divided into two tiers: primary considerations and additional considerations. The ‘primary’ considerations are:
 - (a) the benefit to the child of having a meaningful relationship with both of its parents, and

⁶⁵ Section 68F (as it was after 1995), *Family Law Act 1975*.

⁶⁶ P Parkinson, Editorial: the family law reform pendulum, op. cit., p. 155.

⁶⁷ House of Representatives Standing Committee on Family and Community Affairs, *Every picture tells a story: report on the inquiry into child custody arrangements in the event of family separation*, Parliament of the Commonwealth of Australia, 2003

- (b) the need to protect the child from harm or from being exposed to abuse, neglect or violence (subsection 60CC(2))
- these primary considerations have been described as “the twin pillars” of the parenting provisions in Part VII;
 - the ‘additional’ considerations (subsection 60CC(3)), are those from the traditional checklist, with the notable addition of the so-called ‘friendly parent’ provision (paragraph 60CC(3)(c)), which requires a court to take account of the willingness of each parent to facilitate a close relationship between the child and the other parent;
 - parents are required to attend family dispute resolution (FDR) and obtain a certificate from an FDR practitioner before they can apply to court for parenting orders, unless there are concerns about family violence and abuse or other exceptions, including urgency (section 60I).

The legislation was accompanied by a significant investment in new community- based FDR services, including Family Relationship Centres, and in other specific forms of service provisions such as contact centres.

Review of the 2006 reforms

Since the introduction of the 2006 reforms, there have been a number of reviews and inquiries into family law matters including the issue of family violence and child abuse. In the context of the Family Violence Act, the more significant of these reports⁶⁸ are:

- the *Evaluation of the 2006 family law reforms*, by the Australian Institute of Family Studies (the AIFS Evaluation)⁶⁹
- the *Family Courts Violence Review*, by the Honourable Professor Richard Chisholm (the Chisholm Review)⁷⁰
- *Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues*, a report by the Family Law Council (the Family Law Council Report).⁷¹

⁶⁸ Another relevant report, conducted by the Australian and New South Wales Law Reform Commissions addressed the issue of inconsistencies in the interaction and application of the Commonwealth and States regarding domestic violence, child protection, sexual assault and family law. Australian Law Reform Commission, ‘Family violence: a national legal response’, *Report*, no. 114, 2010,

<http://www.alrc.gov.au/publications/family-violence-national-legal-response-alrc-report-114>

⁶⁹ R Kaspiew et al, *Evaluation of the 2006 family law reforms*, 2009, Australian Institute of Family Studies, <http://www.aifs.gov.au/institute/pubs/fle/index.html>

⁷⁰ R Chisholm, *Family Courts Violence Review*, 2009,

http://www.ag.gov.au/www/agd/agd.nsf/Page/Families_FamilyCourtsViolenceReview

⁷¹ Family Law Council, *Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues*, 2009, [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3273BD3F76A7A5DEDAE36942A54D7D90\)-Family_Violence_Report.pdf/\\$file/Family_Violence_Report.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3273BD3F76A7A5DEDAE36942A54D7D90)-Family_Violence_Report.pdf/$file/Family_Violence_Report.pdf)

On 28 January 2010, the then Attorney-General, the Hon Robert McClelland, released all three reports. He described them as providing “a comprehensive and objective analysis of the family law system against the aim of providing fair and sustainable solutions for families, while ensuring the safety and wellbeing of children.”⁷²

The first and most comprehensive of these reports was the AIFS Evaluation commissioned by the Howard Government, its purpose being to conduct a major evaluation of the 2006 changes to the Family Law Act. The AIFS evaluation was based on an extensive amount of empirical research, comprising 17 separate studies involving 28 000 people, 1724 court files, administrative data and legal analysis.⁷³

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

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

In relation to the positive findings, it found for example, that the principle of shared parental responsibility is widely supported, although it is often misconstrued as requiring equal shared care time and, according to the AIFS, has led to unrealistic expectations among some parents.⁷⁴

There was also evidence that the majority of separated parents with a shared care arrangement enjoy cooperative relationships with one another, and there were also indications of improved screening and identification of violence cases within the family relationships sector.⁷⁵

However, at the same time the AIFS evaluation findings underline the existence of complex issues, including family violence, safety concerns, mental health problems and substance misuse issues. For example, 26 per cent of mothers and 18 per cent of fathers reported experiencing physical hurt prior to separation, and 29 per cent of mothers and 4 per cent of fathers reported experiencing emotional abuse before, during and after

⁷² R McClelland, (Attorney-General), *Release of family law reviews*, media release, 28 January 2010, http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/AKWV6/upload_binary/akwv60.pdf;fileType=application/pdf#search=%22chisholm%20FAMILIES%22

⁷³ For a summary of the AIFS Evaluation see: R Kaspiew et al, ‘The Australian Institute of Family Studies evaluation of the 2006 family law reforms: key findings’, *Australian Journal of Family Law*, vol. 24, 2010, pp. 5-33, http://parlinfo.aph.gov.au/parlInfo/download/library/jrnart/SD6X6/upload_binary/SD6X6.pdf;fileType=application/pdf#search=%22Evaluation%20of%20the%202006%20family%20law%20reforms%22 .

⁷⁴ *Ibid.*, p. 6.

⁷⁵ *Ibid.*, p. 25.

separation. Families with complex needs are the predominant clients both of post-separation services and the legal sector.⁷⁶

Importantly the AIFS evaluation found that there was clear evidence that the family law system as a whole had a way to go in achieving an effective response to families presenting with family violence and child abuse. For example, it noted that while children in shared care represent a minority overall, and while the majority of families with shared care appear to be doing well, there is evidence that these arrangements are sometimes being made even in circumstances where parents have safety concerns, with adverse consequences for the well-being of children.⁷⁷

The evaluation found that in families where violence had occurred, they were no less likely to have shared care-time arrangements than in those families where violence had not occurred. Similarly, families who reported safety concerns were no less likely to have shared care-time arrangements than families without safety concerns.⁷⁸

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

- the need for inter-professional communication and collaboration about cases where family violence and child abuse are involved. For example the finding that families who had ongoing safety concerns were no less likely than other families to have shared care, despite interaction with all parts of the system indicates a need for all professionals across the system to develop a common understanding about circumstances where shared care arrangements should not be encouraged or endorsed;⁷⁹
- evidence of all three reports indicated some aspects of the 2006 reforms have created impediments to effective handling of matters where family violence and child abuse are alleged. The misunderstanding of the law, in combination with a lack of awareness among some professionals of the implications of family violence and child abuse (and the effect this may have for post-separation

⁷⁶ R Kaspiew et al, 'The AIFS evaluation of the 2006 family law reforms: a summary', *Family Matters*, no. 86, 2011, p. 9,

http://parlinfo.aph.gov.au/parlInfo/download/library/jrnart/544756/upload_binary/544756.pdf;fileType=application/pdf#search=%22AIFS%20family%20law%22

⁷⁷ R Kaspiew et al, 'The Australian Institute of Family Studies evaluation of the 2006 family law reforms: key findings', op. cit., p. 5.

⁷⁸ R Kaspiew et al, 'The AIFS evaluation of the 2006 family law reforms: a summary', op. cit., p. 12.

⁷⁹ R Kaspiew et al, 'The Australian Institute of Family Studies evaluation of the 2006 family law reforms: key findings', op. cit., p. 26.

parenting arrangements) raise concerns. All reports recommended that training and professional development be improved;⁸⁰

- two aspects of the legislative framework in particular may inhibit concerns about family violence and child abuse being raised at all or in a way that links them to the future involvement of a parent in a child's life. These are the cost orders for false allegations (section 117AB) and the 'friendly parent' provisions criterion (paragraph 60CC(3)(c) and also paragraph 60CC(4)(b)).⁸¹

The Government's response

In November 2010, the then Attorney-General, the Hon R McClelland, released the Exposure Draft Family Law Amendment (Family Violence) Bill 2010 and a related consultation paper. The exposure draft bill was described as responding to "the recent reports commissioned into the 2006 family law reforms and how the family law system deals with family violence."⁸²

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

The exposure draft bill, with some amendments, formed the basis for the Bill introduced into Parliament on 24 March 2011 and which subsequently passed into law on 7 December 2011.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Ibid.

KEY PROVISIONS

Definition of “family violence”

Central to the amendments in Schedule 1 of the Family Violence Act is the new definition of “family violence”.

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

The new definition, which comes into effect on 7 June 2012, is:

4AB Definition of *family violence* etc.

- (1) For the purposes of this Act, *family violence* means violent, threatening or other behaviour by a person that coerces or controls a member of the person’s family (the *family member*), or causes the family member to be fearful.
- (2) Examples of behaviour that may constitute family violence include (but are not limited to):
 - (a) an assault; or
 - (b) a sexual assault or other sexually abusive behaviour; or
 - (c) stalking; or
 - (d) repeated derogatory taunts; or
 - (e) intentionally damaging or destroying property; or
 - (f) intentionally causing death or injury to an animal; or
 - (g) unreasonably denying the family member the financial autonomy that he or she would otherwise have had; or
 - (h) unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support; or
 - (i) preventing the family member from making or keeping connections with his or her family, friends or culture; or

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

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

Definition of “abuse”

The Family Violence Act repeals the existing definition of abuse and replaces it with the following:

Subsection 4(1) (definition of *abuse*)

abuse, in relation to a child, means:

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

- (b) a person (the *first person*) involving the child in a sexual activity with the first person or another person in which the child is used, directly or indirectly, as a sexual object by the first person or the other person, and where there is unequal power in the relationship between the child and the first person; or
- (c) causing the child to suffer serious psychological harm, including (but not limited to) when that harm is caused by the child being subjected to, or exposed to, family violence; or
- (d) serious neglect of the child.

In substance, paragraphs (c) and (d) are new. The change is the addition of causing children to suffer serious psychological harm by exposure to family violence, and ‘serious neglect’.

United Nations Convention on the Rights of the Child

The Family Violence Act inserts a new sub-section, section 60B(4), into the Family Law Act to provide that an additional object of Part VII is to give effect to the Convention on the Rights of the Child done at New York on 20 November 1989.

The Explanatory Memorandum states that the effect of this provision is to allow the Convention to be used as an interpretive aid to Part VII of the Family Law Act but that it is not equivalent to incorporating the Convention into domestic law.

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

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

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

Subsection 60CC(2) provides that the primary considerations are:

- (a) the benefit to the child of having a meaningful relationship with both parents, and
- (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

The Family Violence Act inserts a new sub-section, section 60CC(2A), which states:

After subsection 60CC(2)

(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 Explanatory Memorandum states: “Where child safety is a concern, this new provision will provide the courts with clear legislative guidance that protecting the child from harm is the priority consideration.”

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

The “additional considerations” (subsection 60CC(3)), for determining the best interests of the child include amongst other things, the so-called ‘friendly parent’ provision (paragraph 60CC(3)(c) and also paragraph 60CC(4)(b)). These provisions mean that the willingness and extent to which one parent has facilitated the child having a relationship with the other parent is taken into account in determining the best interests of the child and, ultimately, orders dealing with parenting arrangements and parental responsibility.

The Family Violence Act repeals the ‘friendly parent’ provisions (paragraph 60CC(3)(c) and subsections 60CC(4) and (4A)).

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

- (c) the extent to which each of the child’s parents has taken, or failed to take, the opportunity to participate in making decisions about major long-term issues in relation to the child; to spend time with the child; and to communicate with the child
- (ca) the extent to which each of the child’s parents has fulfilled, or failed to fulfil, the parent’s obligations to maintain the child.

These are not new considerations as they substantially re-enact the content of paragraphs 60CC(4)(a) and (c). However the ‘friendly parent’ provision is gone entirely.

The Explanatory Memorandum states:

Current paragraph 60CC(3)(c) is commonly referred to as the ‘friendly parent provision’. This provision required the family courts to consider the willingness of one parent towards the other in facilitating a child’s relationship with other

parent. The AIFS *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’.

The repeal of paragraph 60CC(3)(c) is intended to remove this disincentive and enable all relevant information to be put before the courts for consideration in making parenting orders. Removal of the ‘friendly parent’ provision will not prevent the court from considering a range of matters relevant to the care, welfare and development of the child such as a parent’s attitude to the responsibilities of parenthood.

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

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

The Act repeals the current section 60CC(3)(k) and substitutes it with the following:

Paragraph 60CC(3)(k)

(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;

The supplementary Explanatory Memorandum states:

The amendment omits proposed new paragraph 60CC(3)(k) which allowed the court to consider any family violence orders which apply to a child or a member of the child’s family. The amendment inserts a replacement paragraph which

allows the court to consider evidence of any family violence order which has or does apply to the child or a member of the child's family. Further, it provides for the court to consider any relevant inferences that can be drawn from those family violence orders, taking into account the nature of the order, the circumstances in which it was made, and evidence admitted and any findings made by the court that made the order, and any other relevant matter.

The amendment reflects the position that the relevant circumstances surrounding the making of family violence orders should be considered in determining the best interests of the child and are likely to be of greater probative value than the mere existence of the orders.

This amendment will provide greater guidance to litigants (particularly those who are self-represented) about the type of evidence they might like to submit to a court in parenting matters. This aligns with one of the stated objectives of the Family Violence Act, being to encourage better evidence of family violence and child abuse to be provided to the family courts.

Reporting information regarding risks to the child

The Family Violence Act inserts sections 60CH and 60CI that impose new obligations on parties to provide the court with information regarding risks to the child.

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

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

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

The Act sets out a new set of obligations for advisers concerning the best interest of the child, as follows:

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

- (1) If an adviser gives advice or assistance to a person about matters concerning a child and this Part, the adviser must:
 - (a) inform the person that the person should regard the best interests of the child as the paramount consideration; and
 - (b) encourage the person to act on the basis that the child's best interests are best met:
 - (i) by the child having a meaningful relationship with both of the child's parents; and
 - (ii) by the child being protected from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and
 - (iii) in applying the considerations set out in subparagraphs (i) and (ii)—by giving greater weight to the consideration set out in subparagraph (ii).

- (2) In this section:

adviser means a person who is:

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

Requiring interested persons to disclose family violence

The Act inserts a new section, 67ZBA. It states:

67ZBA Where interested person makes allegation of family violence

- (1) This section applies if an interested person in proceedings for an order under this Part in relation to a child alleges, as a consideration that is relevant to whether the court should make or refuse to make the order, that:
 - (a) there has been family violence by one of the parties to the proceedings; or
 - (b) there is a risk of family violence by one of the parties to the proceedings.
- (2) The interested person must file a notice in the prescribed form in the court hearing the proceedings, and serve a true copy of the notice upon the party referred to in paragraph (1)(a) or (b).
- (3) If the alleged family violence (or risk of family violence) is abuse of a child (or a risk of abuse of a child):
 - (a) the interested person making the allegation must either file and serve a notice under subsection (2) of this section or under subsection 67Z(2) (but does not have to file and serve a notice under both those subsections); and
 - (b) if the notice is filed under subsection (2) of this section, the Registry Manager must deal with the notice as if it had been filed under subsection 67Z(2).

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

- (4) In this section:
interested person in proceedings for an order under this Part in relation to a child, means:
 - (a) a party to the proceedings; or
 - (b) an independent children's lawyer who represents the interests of the child in the proceedings; or

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

In effect, section 67ZBA requires interested persons in proceedings who allege family violence to file a Notice of Child Abuse or Family Violence with the court. The obligation to file the notice arises if the family violence is alleged “as a consideration that is relevant to whether the court should make or refuse to make the order”.

The Explanatory Memorandum states:

The intent of section 67ZBA is to provide for the filing of a written notice when an interested person wishes to make an allegation of child abuse or family violence in proceedings under Part VII of the Family Law Act. This is essential to allow the court to deal efficiently and effectively with the allegation.

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

Section 67ZBB requires courts to take prompt action in relation to allegations of child abuse or family violence. It states:

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

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

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

Section 67ZBB substantially re-enacts existing section 60K, although its purview is broader as a result of substituting “interested person” for “party”.

Courts must ask about child abuse or family violence

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

It states:

Before paragraph 69ZQ(1)(a)

Insert:

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

The Explanatory Memorandum states: “The imposition of this duty supports the family courts’ obligation under subsection 68ZN(5) to conduct proceedings in a way that will safeguard the child and the parties to the proceedings from harm.”

Cost orders and false allegations

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

The Explanatory Memorandum states:

The AIFS Evaluation of the 2006 Family Law Reforms, the Family Courts Violence Review by the Hon Professor Chisholm AM and the Family Law Council report to the Attorney-General, *Improving responses to family violence in the family law system*, indicate that section 117AB has operated as a disincentive to disclosing family violence. Vulnerable parents may choose to not raise legitimate safety concerns for themselves and their children due to fear they will be subject to a costs order if they cannot substantiate the claims. Section 117 of the Act allows family courts to make cost orders in response to false statements in appropriate cases.

CONCLUDING OBSERVATIONS

The Bills Digest prepared by the Parliamentary Library, Parliament of Australia, concludes with the following observations about the Family Violence Act (then Bill):

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

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

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

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

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

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

Appendix 2

A selection of data about shared parenting arrangements following the enactment of the Family Law Amendment (Shared Parental Responsibility) Act 2006

June 2012

Family Court of Australia, 2010-11 Annual Report

http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/about/publications/annual/FCOA_ar_10-11 (accessed 30 May 2012)

Percentage of cases where majority time children spend with parents for finalised litigated cases, 2007-08 to 2010-11				
	2007-08	2008-09	2009-10	2010-11
With mother	60%	59%	66%	62%
With father	17%	18%	14%	18%
(shared 50/50)	14%	15%	12%	10%

Percentage of cases where majority time children spend with parents for finalised litigated cases, 2007-08 to 2010-11				
	2007-08	2008-09	2009-10	2010-11
With mother	60%	59%	66%	62%
With father	17%	18%	14%	18%
(shared 50/50)	14%	15%	12%	10%

Most common reason why mothers had less than 30% of time spent with children for finalised litigated cases, 2007-08 to 2010-11				
	2007-08	2008-09	2009-10	2010-11
Abuse and/or family violence	16%	17%	12%	14%
Entrenched conflict	2%	11%	24%	14%
Distance/transport/ Financial matters	16%	11%	12%	10%
Mental health	31%	19%	24%	33%

Most common reason why fathers had less than 30% of time spent with children for finalised litigated cases, 2007-08 to 2010-11				
	2007-08	2008-09	2009-10	2010-11
Abuse and/or family violence	29%	27%	36%	36%
Entrenched conflict	15%	16%	23%	26%
Distance/transport/ Financial matters	6%	10%	7%	11%
Mental health	3%	3%	4%	6%

Dr Jennifer McIntosh & Professor Richard Chisholm, ‘Cautionary notes on the shared care of children in conflicted parental separation’ *Journal of Family Studies*, vol. 14, issue 1, April 2008, pp. 37-52

The article discussed data obtained from two studies. The two studies explored outcomes from dispute resolution interventions in Family Court and community settings for parents experiencing significant conflict over post-separation parenting agreements.

Study 1: Disputing parents and their children: A mediation sample

The ‘Children Beyond Dispute’ research program is a longitudinal study, funded by the Australian Government Attorney General’s Department, and directed by McIntosh. The study is now in its fourth year. The findings reported here are from the first three phases of this project, where outcomes were compared for two groups of separated parents, who experienced one of two different forms of brief therapeutic mediation for entrenched parenting disputes. Among other things, the study explored impacts of the interventions on parental conflict, acrimony (psychologically held hostility), and parental alliance (parental cooperation and regard), and the emotional wellbeing of children. Data were collected from parents and children prior to their mediation, three months after, and again one year after. One hundred and eighty-three families were involved in this phase of the study, with parent report data collected on over 300 children.

Sixteen percent of parents arrived at mediation already in established shared care arrangements.

Each of those families maintained that shared arrangement over the course of the year. Twenty seven percent of this sample completed mediation with a new agreement for shared care of their children; however, three-quarters of those arrangements had reverted to less than 35:65% division by the end of the year. The most stable arrangements occurred in families who had never entered a shared arrangement, and maintained less than 35% shared care throughout the year.

Data on 181 school-aged children from the above study were explored 12 months following mediation, including mother, father and child measures across the year. Children's mental health was measured with the Strengths and Difficulties Questionnaire (SDQ), parent report using the full scale score from the identified resident parent (Goodman 1997). This 20-item scale distinguishes children with normal, commonly occurring levels of anxiety from those who are in what is called the 'clinical range'. The clinical range can be thought of as a concerning level of emotional distress, shown in anxiety, sadness, clinginess, psycho-somatic and anti-social symptoms, at a level that warrants professional intervention (ie counselling or child psychiatry services).

In keeping with large scale studies (Sawyer et al 2000), 21% of children in this mediation sample had a higher than average rate of clinical anxiety compared to 14% of non-divorced children in the Australian population. Multiple variables were systematically examined through regression modelling to see what core factors or combination of factors were most highly associated with children's poor mental health outcomes one year after mediation (McIntosh & Long 2006; McIntosh, Wells et al 2008). These analyses identified six core variables:

1. Fathers had low levels of formal education.
2. There was high, ongoing inter-parental conflict.
3. Children's overnight care was substantially shared.
4. Mother-child relationship was poor, as reported by mother and child.

5. There was high acrimony (psychological hostility) between parents.
6. The child in question was under ten years old.

The first two variables independently predicted poor outcomes. Variables 3 to 6 added significantly to the likelihood of poor outcomes when they co-occurred with any of the other variables.

Study 2: High conflict parents and their children: A Family Court sample

This second study examined outcomes for 77 parents and 111 children who had attended the Child Responsive Program (CRP) Pilot in the Family Court of Australia (McIntosh & Long 2007; McIntosh, Bryant & Murray 2008). This study involved comprehensive interviews with parents, prior to and four months after litigated settlement of their dispute over the care of their children. The interviews explored conflict, cooperation, relationships and child wellbeing, again using the Strengths and Difficulties Questionnaire (Goodman 1997), parent report, emotional symptoms sub-scale. Data for all children aged four years and over were obtained through this measure for domains of anxiety, tearfulness, fearfulness, psychosomatic symptoms and separation anxiety.

Four months after settlement, 28% of these 111 children had mental health scores in the clinical range, indicating a high degree of emotional distress. Multiple regression modelling was used, exploring all variables to see which combination of factors best accounted for children's poor emotional outcomes. The following five variables were most highly associated with children's poor mental health outcomes in the Family Court sample:

1. The child was unhappy with their living and care arrangements.
2. The resident parent's relationship with the child had deteriorated over the past four months.
3. The child lived in substantially shared care.
4. One parent held concerns about the child's safety with the other parent.
5. The parents remained in high conflict.

The first three variables independently predicted poor outcomes. Variables 4 and 5 added significantly to the likelihood of poor outcomes when they co-occurred with any of the other factors.

Other findings include:

- 28% percent of the children studied here entered Court, and 46% left Court, in a shared care arrangement.
- In 73% of the shared care cases, at least one parent reported 'almost never' co-operating with each other, four months post Court.
- In 39% of shared care cases, a parent reported 'never' being able to protect their children from their conflict.
- In four of the shared care cases in this study, parents reported 'never' having contact of any kind with each other.

Seventy percent of these orders were made by consent, either in the CRP or out of Court settlement. Thirty percent were judicially determined.

The authors conclude (at p. 42):

The data from this second study are concerning because they suggest that a significant proportion of these children emerged from Family Court proceedings with substantially shared care arrangements that imposed a psychological strain for the child.

Lixia Qu & Ruth Weston, *Parenting dynamics after separation: A follow-up study of parents who separated after the 2006 family law reforms*, Australian Institute of Family Studies, December 2010 & Jodie Lodge and Michael Alexander, *Views of adolescents in separated families: a study of adolescents' experiences after the 2006 reforms to the family law system* Australian Institute of Family Studies, December 2010

<http://www.aifs.gov.au/institute/research/projects/flre.html> (accessed 30 May 2012)

These two reports examined the behaviour and experiences of parents and adolescents from families that have separated since 2006.

Of more than 7,000 separated parents who participated in the Longitudinal Study of Separated Families (LSSF):

- Around 60 per cent of parents reported a friendly or cooperative inter-parental relationship, while around one in five described it as highly conflictual or fearful;
- Experiences of abuse were more likely to take the form of emotional abuse rather than physical hurt;
- One in five parents reported that they had safety concerns for themselves or their child as a result of ongoing contact with the other parent;
- Despite the intent of the 2006 reforms to protect children from exposure to violence or abuse, most parents who reported recent experiences of being harmed physically indicated that their children had witnessed violence or abuse.
- Almost one in four parents experienced family violence before their separation and in many cases children had witnessed some of the abuse or violence.

Rae Kapiew, Matthew Gray, Ruth Weston, Lawrie Moloney, Kelly Hand, Lixia Qu and the Family Law Evaluation Team, Evaluation of the 2006 family law reforms, Australian Institute of Family Studies, December 2009

<http://www.aifs.gov.au/institute/pubs/fle/index.html> (accessed 30 May 2012)

Court data pre-and post reform shows that a higher proportion of children's cases resulted in shared care time (defined as 35% to 65% of time with each parent, including equal time arrangements) post-reform as compared to pre-reform. Shared care time arrangements, whether made by consent or by judicial determination, increased from 9% to 14%. The proportion of judicially determined cases resulting in orders for shared care time increased from 2% pre-reform to 13% post reform. For orders made by consent, shared care time orders were made in 15% of cases post reform, as compared with 10% of cases pre-reform.

The various sets of data used in AIFS's analysis suggest that traditional care-time arrangements, involving more nights with the mother than father, remain the most common, but shared care time is increasing both among separated families in general and among those whose dispute is litigated, especially families whose dispute is finalised through judicial determination. Where there is a change from a shared care-time arrangement, there tends to be a move towards the traditional arrangement.

39% of mothers reported experiencing emotional abuse prior to separation and 26% reported experiencing physical abuse. 36.4% of fathers reporting experiencing emotional abuse prior to separation and 16.8% reported experiencing physical abuse. 72% of mothers who reported experiencing physical abuse and 63% of fathers who did the same also reported that their children had witnessed violence or abuse.

Up to one-fifth of separating parents (17% of fathers and 21% of mothers) had safety concerns associated with ongoing contact with their child's other parent. In total, 15% of fathers and 18% of mothers expressed concerns about the safety of their child. Only 50% of mothers and 24% of fathers who held safety concerns indicated that they had attempted (or managed) to limit contact for safety reasons. Among fathers and mothers who cared for their child for 66–100% of nights and who held safety concerns about ongoing contact with the child's other parent, 17% of fathers and 56% of mothers indicated that they had attempted to limit contact with the other parent.

46% of mothers whose children lived in an equal time arrangement reported experiencing emotional abuse prior to separation and 23.5% reported experiencing physical abuse. For fathers, the relevant figures were 40.9% and 15.5%.

At least 24% of both mothers and fathers whose child spent most or all nights with the father (i.e., 66–100% of nights) indicated that they had been physically hurt prior to separation. This was mentioned by 24% of fathers and 37% of mothers whose child spent most nights with the father, by 33% of fathers and 28% of mothers whose child saw the mother during the daytime only, and by 25% of fathers whose child never saw the

mother. In addition, where the child never saw the father, 27% of fathers and 40% of mothers indicated that they had been physically hurt.

Parents with safety concerns were no less likely than other parents to indicate that they had shared care time arrangements (fathers: 22–23%; mothers 11–12%). In other words, around one in four fathers and one in ten mothers with shared care-time arrangements indicated that they held safety concerns as a result of ongoing contact. Parents with safety concerns were also more likely than those without such concerns to report that the father never saw the child: 18% of fathers with safety concerns resulting from ongoing contact with the child's mother never saw their child, compared with 6% of other fathers. The difference for mothers was smaller (18% cf. 12%). The vast majority of parents who reported having safety concerns had experienced violence.

19.4% of mothers in arrangements where the child lived with them for between 53% and 65% of the time and with the father for between 35% and 47% of the time held safety concerns. 16% of mothers who had children living in equal time arrangements held safety concerns.

Data on child wellbeing from the longitudinal study of separated families showed a clear and strong link between parental experience of family violence before or during separation and child low wellbeing. The data also showed that shared care time in cases where there were safety concerns held by mothers following separation correlated with poorer outcomes for children.

Appendix 3

Family Court of Australia, Child Dispute Services Family Violence Screening Questions Version 1.1, 20 March 2012

Question 1 (identification question)

Is there, or has there ever been a family violence protection order sought or granted in relation to you or any members of your family?

Follow up

If yes, invite the client to: describe the critical incident: give an indication of the number of orders and breaches; ask about police call outs and any criminal charges.

Question 2 (identification question)

Have you ever had any fears or concerns for your safety, your child's safety or the safety of any other family member as a result of your ex partner's behaviours?

Follow up

If yes, invite the client to briefly describe the ex- partner's behaviours and in general terms, indicate that you will now ask some questions that will help you understand their fears/concerns in more detail and then proceed to ask the remaining questions.

Question 3 (threats)

Has your ex partner ever threatened to harm you or somebody close to you, or behaved in a manner that was threatening towards you or somebody close to you (e.g. threatening gestures, stalking)?

Follow up

If yes, invite the client to describe the threat/s, taking particular notice of whether they are increasing in frequency and intensity, involve or potentially involve weapons, entail detailed plans and/or homicidal/suicidal ideation.

Question 4 (spousal violence history)

Have your ex partner's behaviours included pushing, slapping, hitting or the use of any other type of physical force?

Follow up

If yes, invite the client to describe these behaviours, paying particular attention to temporal factors such as frequency and chronicity, as well as to contextual factors such as substance misuse, mental illness, emotional instability, and stressful events.

Question 5 (injuries)

Have you or anyone else ever been injured/harmed or sought medical attention as a result of your ex partner's behaviours?

Follow up

If yes, invite the client to describe the injuries, their frequency and any enduring effects.

Question 6 (escalation)

Have any of your ex-partner's behaviours (i.e. the ones that you have mentioned above) become more frightening / concerning in the past six months?

Follow up

If yes, invite the client to tell you which types of behaviours are being referred to (threats, actual harm, contextual behaviours such as mood changes or substance misuses, and other behaviours) and how these behaviours have been increasing in frequency and intensity.

Question 7 (child abuse)

Do you have any fears or concerns about your child's physical safety and/or emotional security (including witnessing family violence) as a result of your ex partner's behaviours.

Follow up

If yes, invite the client to describe the relevant incident/s and their impact on the child. (If the response indicates that the child's physical safety or emotional security may be an issue, also refer to the 'Child Risk Assessment Decision Making Pathway' for a more comprehensive exploration of the risk to the children).

Question 8 (psychological abuse)

Has your ex partner ever; called you names, yelled at you, stopped you seeing friends and family or leaving the house, restricted your access to money or done anything else that made you feel humiliated, intimidated or controlled?

Follow up

If yes invite the client to detail the relevant behaviours/incidents and to describe their impact on them.

Appendix 4

Child Dispute Services, Family Violence Policy Last updated 15 May 2012

 FAMILY COURT OF AUSTRALIA	 FEDERAL MAGISTRATES COURT OF AUSTRALIA	CHILD DISPUTE SERVICES FAMILY VIOLENCE POLICY
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Scope

This policy applies to all family consultant interventions within the Family Court of Australia and the Federal Magistrates Court of Australia.

Key principles

- 1) The safety and on-going protection of parties and children is of paramount importance. Parties and children should be safe while on Court premises or in the consulting rooms of Regulation 7 family consultants.
- 2) There is considerable research evidence that children who have been subjected to violence, and / or who have witnessed family violence, are significantly adversely affected by such an experience.
- 3) Parties who have been subjected to family violence and who have been unable to exercise control over their lives often lack confidence to represent their own interests.
- 4) Prime consideration is the alleged victim's safety. Those who have been subjected to family violence have the right to make their own choices about what is tolerable for them (including not being in the presence of the alleged perpetrator), and their choices should be respected.
- 5) Where any client expresses concerns for their safety, or about potential family violence, a safety plan will be devised and implemented without the need to determine or assess the accuracy or validity of the client's expressed concerns.
- 6) Particular cultural groups may have special needs. While family consultants must be sensitive to these special needs, safety concerns must not be overridden.

Definition

- 7) Family consultants operate within the Family Law Act, which, at s4AB(1), defines

family violence as

“... 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”.

8) The legislative definition is primarily directed at coercive controlling family violence. In this regard the use of the verbs “coerces” and “controls” is central to the definition.

9) It is important to note that the above definition at section 4AB(1) is the effective definition of family violence. What follows at section 4AB(2) is a non-exhaustive list of behaviours which may constitute family violence. These include

- 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”.

Role of the family consultant

10) Family consultants are bound to place the best interests of the child as the paramount consideration. The family consultant’s role is to identify and address with the parties all issues which impact on the well being of the children, including those issues relating to family violence.

11) It is the responsibility of family consultants to encourage parties to address issues relating to violence if concerns are raised or allegations are made, and to inform them of the research information on the adverse effects on children of exposure to family violence.

12) It is appropriate for family consultants to engage perpetrators or alleged perpetrators in an exploration of their behaviour and its impact on themselves and their relationships with others, and to provide appropriate referral information.

13) It is appropriate for family consultants to assist those who have experienced family violence to explore the impact of family violence on them and their children, and provide appropriate referral information.

14) Following a Child Dispute Services intervention, it is the responsibility of the family consultant to advise the Court, via written and/or oral advice, about any family violence which has been noted or alleged, potential implications for orders, and the ongoing consequences this might have for the children.

Family violence and child abuse

15) Family consultants have a mandatory role in reporting child abuse to the appropriate authorities.

16) S4(1) FLA, includes a child being “subjected to, or exposed to, family violence” as a form of psychological harm. Many researchers similarly regard exposure to family violence as a form of psychological harm. Other researchers regard witnessing violence as a specific form of abuse in its own right. Exposure to family violence can include hearing or seeing a parent or sibling being subjected to a range of forms of abuse, as well as exposure to the effects of a family member’s violent behaviour.

17) Exposure of a child to family violence can therefore constitute grounds for a notification of risk of abuse.

Screening and risk assessment

18) All staff must be alert to safety issues when setting up or conducting all family consultant interventions. Where safety issues have been identified appropriate arrangements must be made to minimise risk of physical or psychological danger to all participants and others on the premises.

19) Every effort will be made, through routine screening and risk assessment, to ensure that a party’s (or child’s) right to, and need for, protection is not compromised by the child dispute intervention process.

20) Family consultants will routinely inform the court as to whether or not family violence risk issues have been identified.

Joint interviews

21) Family consultant interventions commence with separate interviews. From time to time a joint interview may be proposed if it appears that it may help to progress the matter without posing a risk to any participant.

22) Parties have the right to decline to be interviewed jointly. Any subsequent joint interview agreed to by parties will be terminated by the family consultant if concerns arise regarding safety or intimidation.

23) In matters in which there is a family violence order, sessions can be held with both parties jointly (in person or by phone) only if there is an exclusionary clause in the family violence order in relation to dispute resolution or orders of the Family Law Courts. If

there is no such clause then no joint interviews can be undertaken without the family violence order being amended.

Training and development

24) To provide quality services aimed at ensuring that the child's interests remain paramount, it is essential that family consultants have a sound understanding of the issues for families in which family violence is a feature.

25) It is the responsibility of Child Dispute Services management to ensure that adequate and regular training of family consultants occurs in relation to family violence, and that newly appointed staff are familiarised with all relevant policy, any practice guidelines and the current literature .