The Family Law Act – Holy Grail or Patchwork Quilt

We find ourselves again facing a major change to the Act in June 2012, where the Legislature has made another attempt to deal with families after separation. What has changed in the Family Law landscape to warrant recent amendments given the last major "Bipartisan Senate" reforms passed in 2006, arising from the Parliamentary enquiry and report, "Every Picture Tells a Story"?

It seems nothing much has changed with separating families, but reports commissioned by the Federal Government and interest groups have imparted a view that more needs to be done to protect children and other family members from family violence and child abuse within the family law system. The Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 (the amending Act) makes significant changes to the Family Law Act 1975 (the Act).

The Family Violence Act

The new Family Violence Act, which amended the Family Law Act (now a burgeoning 731 pages) is, of course, supported by volumes of research and responds to several research reports received by the Federal Government into the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth) and how the family law system deals with family violence.

It responds to calls from a range of groups for a review of the "Shared Parental Responsibility" Amendments in 2006, and is primarily a response to criticisms, particularly by some interest groups, that the emphasis on maintaining parental relationships after separation and the "friendly parent" provisions in s60CC, have led to matters of family violence and as well, child abuse being given inadequate importance or consideration by the courts and authorities.

The Reports that led to the changes

The Federal Government response originated from, in my view, four key reports. The Australian Institute of Family Studies (AIFS), Evaluation of the 2006 family law reforms in December 2009, which indicated that the previous Act was widely supported by parents and professionals and was working well for children, including youngsters under three. Litigation rates had fallen and there is a matching increase in the use of family dispute resolution services. This was one of the largest reports ever done on family separation with 28,000 respondents. The second report "Family Courts Violence Review" by Professor Richard Chisholm AM, November 2009. The third report was the Family Law Council, "*Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues*, December 2009". Lastly the report from Professor Rosalind Croucher's, April 2010 NSW and Australian Law Reform Commission reports, which dealt with questions relating to family violence.

These, on the surface at least, seem reasonable enough and good reports to consider. After all, anything that can be done in the child's best interests in protection from violent mothers and fathers is paramount and must come first. No one can reasonably argue against such a proposition.

However, there are shades of grey and complexities that each and every case delivers to the judiciary.

What is worrying is that some commentaries and outcomes from "experts" in the field and academic ideologues are concerning, do not fit with current and contemporary public attitudes, and give fair minded citizens cause to question the rationale behind some judicial decisions and accuracy of Ministerial statements.

Three examples are a recent case delivered by a highly experienced Federal Magistrate wherein he was placed in the difficult position of excluding a father from any contact with his children. He took the unusual step of writing a letter to the children to be opened when they turned 14 and told the children he did not accept their mothers' claims that their father sexually abused them, but still thought it would be best if they lived with her. This case confused the "common" person and resulted in a large amount of public commentary on online media sites that questioned the "allowed" contact.[1]

The Federal Attorney General Nicola Roxon, in a Sydney Morning Herald opinion piece, stated *"… it will remain a criminal offence to make false allegations of violence during court proceedings*. " [2] There does not appear to be any criminal offence available to support such commentary.

During the Senate enquiry Professor Patrick Parkinson, University of Sydney wrote "There *are many features of this Bill which I consider will lead to an improvement of the law as it affects victims of violence. In particular, I support the removal of the friendly parent provision in s.60CC(3) and the costs provision in s.117AB, not because I think the courts have improperly applied these provisions over the past four years but because advocacy groups have been worried by them and these groups have offered anecdotal evidence to the effect that lawyers have advised clients not to raise domestic violence issues because of these provisions."* [3]

An interested observer would have to ask how anecdotal evidence could be used to make such major changes to the Act.

The Family Law Act in June 2012

The Family Law Act today is a cumbersome beast and not unlike the mystery of the Holy Grail is complex, has had a lengthy history of intrigue, is under continual change and tweaking, and is fought over by well-intentioned lobbyist groups. It lies strictly in the domain of the Family Court which has developed a vast array of parallel rules and as well interpretation through much case law. The Act is the work of aged master craftsmen in Canberra, who contemplate each and every word to ensure its appropriate level of complexity is maintained and enshrined in legalise to confound and perplex and sometimes shame (at the bench) those mere mortals who decide to take up practice in the jurisdiction.

[1] http://www.familylawwebguide.com.au/forum/pg/topicview/misc/7930/index.php&start=0#post_49726
[2] http://www.smh.com.au/opinion/politics/protecting-our-children-will-always-be-at-the-heart-of-family-law-20120602-1zoxa.html#ixzz1wjy1xU9o
[3] Family Law Legislation Amendment (Family Violence) Bill 2011 Submission to Senate Committee on Legal and Constitutional Affairs Prof. Patrick Parkinson, University of Sydney.

It is impossible, given the word limit constraints, to inform in this article of the complete and in depth changes but I will outline the key points that this author suggests should be reviewed by law students and practitioners in this area of law.

The big ticket items

Family Violence

The definitions of "family violence" 4AB and "abuse"4AB (1) and (3) in relation to a child in the Commonwealth Act, but not State Criminal codes, are very significantly changed; 4AB "(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.

Standard of evidence

In particular any standard of evidence is removed and removal of the following text is significant.

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

The Removal of any judicial or qualifying test will mean all allegations will have to be accepted on "face value". In his recent writing, "The Family Violence Amendments to the Family Law Act 1975", Federal Magistrate David Halligan asks an important question about the removal of any judicial test, "*Does this mean that irrational fearfulness will satisfy the new definition?"* If nothing more, it is clear that the bar for allegations of family violence and abuse is now low and the standard to refute such allegations is high. The equitable balance between fact and fiction from aggrieved litigants seems to have been weighted to one side.

Family Violence additional behaviour considered

The detailed list of additional behaviour that may constitute family violence is included (but is **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."*

Abuse

The definition of abuse is changed; 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.*

What does serious mean?

> The definition does not define or say what "serious" means nor what "neglect" means and we should expect matters that involve allegations of abuse to cost significantly more as expert opinion will be required to determine abuse matters. The question remains as to how serious the serious abuse has to be to get over the bar.

Its not child abuse to withhold a child from the other parent

Withholding a child from the other parent was not considered child abuse, nor was there consideration given to Paediatric Condition Falsification, where parents go to great lengths to deliberately fabricate or lie about physical injury or illness to children. Research suggests it is widely agreed that the disorder centres on the perpetrator's need for positive attention from physicians.[4]

The Federal Government explanatory guidance says:

…the definition of family violence and abuse is to reflect a contemporary understanding of what family violence and abuse is, by clearly setting out what behaviour is unacceptable, including physical and emotional abuse and the exposure of children to family violence.[5] As well better target what a court can consider in relation to family violence orders as part of considering a child's best interests.

Convention on the Rights of the Child

In s60B the Act implements and gives effect to the **Convention on the Rights of the Child** (New York 1989). Guidance notes in the Attorney Generals explanatory memorandum do not give any comfort that this will have an impact, except as to an interpretive aid to any ambiguity.

My view is that the provisions may not have any impact on day to day practical matters, although it has been placed there to uphold the right of the child to be heard. Too often the voices of the children are "interpreted" through the lenses of social workers and other children's advocates, which can affect the fidelity of the message that judges hear. Parental alienation of impressionable children remains a problem for the court where child-parent bonds are damaged by the aberrant behaviour of one parent's active loathing of the other parent.

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[4] Shaw RJ, Dayal S, Hartman JK, DeMaso DR. Factitious disorder by proxy: pediatric condition falsification. Harv Rev Psychiatry. 2008;16(4):215-24. Review

[5] Attorney General , Changes to Family Law from 7 June 2012

Child protection comes first

The Court is now required when applying the two primary considerations under s.60CC(2) to give a **greater weight to child protection** by directing the court to give greater weight to the consideration set out in paragraph (2)(b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and therefore a lesser weight to (2)(a) the benefit to the child of having a meaningful relationship with both of the child's parents;

What happened to friendly parents?

The so called "friendly parent" provisions that consider the "Best Interests of the child" have been altered, where previously 60CC (3)(c) the willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent has **now been repealed** and replaced.

> The vastly more complex definition that focuses on the extent to which each of the child's parents has taken, or failed to take, the opportunity (i) to participate in making decisions about major long-term issues in relation to the child; and (ii) to spend time with the child; and (iii) to communicate with the child;
>
> It is highly probable that where a parent has tried to take an opportunity to participate in (i) – (iii) and that opportunity has been thwarted by the other parent, then there is an expectation courts will look closely at that parent's behaviour which has led to the parent being unable to participate.

How will the additions to 60k impact?

Of interest is 60CC (3)(k) which is replaced with an extended text and in particular where a family violence order applies, or HAS applied, to the child or a member of the child's family and this includes interim orders or old orders no longer applicable, then the court will take into account a list of specific issues under part (i) – (v)

> *(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 concerning effect is how far courts will get "bogged down" in dealing with investigating these matters which will certainly mean higher costs for litigants. This will involve obtaining transcripts of any local court matters, police statements and the like.

Changes to 60k may also result in a lot more applications to get ADVO or other sorts of state intervention orders under way at local courts as a means to showing the other parent as unfit to parent, but raises valid concerns that Magistrates courts will receive more applications that relate to allegations and spurious or unsupportable complaints.

Obligations on Advisors

There are now new obligations for "advisors" (including legal practitioners) about the advice they MUST give. The person should (a) 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).

Duties on the court

Duties of the court in giving effect to the Division 12A principles apply with new obligations giving effect to conducting child related proceedings, as set out in s.69ZQ(1). In addition to the existing requirements, the court must also "(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;"

Mandatory penalties for false allegations is gone

S.117AB, The section which mandated a costs order against a party found to have knowingly made a false allegation or statement in proceedings, is repealed for new cases. The aim of this is to ensure that all allegations are raised and explored. [6]

The Court still has ability under sections 117 (1), (2) and (2A) a range of options to make costs orders and under s118 in relation to frivolous or vexatious matters. It is feared by some lobby groups that the removal of mandatory penalty for false allegations will result in more allegations that require the court to proactively enquire and make determinations. It is also argued that taking away any mandatory penalties for proved and false allegations is at odds with common law (perjury) practices in other jurisdictions.

Conclusion

It is important that the Explanatory Memorandum is read to understand the intention and meanings associated with the amendments. What is clear is that the Act remains as complex as ever and requires a great deal of in depth consideration of many sections before appearing at the bench. The Act supports the rights of the child to have a meaningful relationship with both their mother and father, in an environment of safety and security.

What remains to be seen is the flow on effect of s60k in the Magistrates court, who deal with intervention and Domestic Violence orders and how the Family Courts deal with these.

What is certain is that few, if any parents involved in matters of separation that involve violence, family violence and abuse will sit down and read the Act before conducting such activities. If the Federal Government intended, as a result of the introduction of the measures included in the Act, to see a marked reduction in violence in the community then few if any of the measures introduced will have such an effect.

[6] Sharma & Sharma (NO 2.) [2007] FamCA 425

[iii] Useful citation references

1. Secretary SPCA, Fathers contact letters and birthday cards only, on FLWG, Judgements of Interest !, Fathers contact letters and birthday cards only (10 June 2012) <http://www.familylawwebguide.com.au/forum/pg/topicview/misc/7930/index.php&start=0#post_49726>.
2. Nicola Roxon, Protecting our children will always be at the heart of family law (June 3, 2012) Opinion SMH.com.au <http://www.smh.com.au/opinion/politics/protecting-our-children-will-always-be-at-the-heart-of-family-law-20120602-1zoxa.html#ixzz1zGw7XSEY>.
3. Professor Patrick Parkinson, Submission No 14 to 23 to Senate Legal and Constitutional Committees Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011, 30 April 2011 < http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/family_law_familyviolence/submissions.htm>.
4. Shaw RJ, Dayal S, Hartman JK, DeMaso DR. Factitious disorder by proxy: pediatric condition falsification. Harv Rev Psychiatry. 2008;16(4):215-24. Review.
5. The Honourable Nicola Roxan MP Attorney General, New family violence changes take effect (Media Release, 7 June 2012) <http://www.attorneygeneral.gov.au/Media-releases/Pages/2012/Second%20Quarter/7-June-2012---New-family-violence-changes-take-effect.aspx>.
6. Sharma & Sharma (NO 2.) [2007] FamCA 425