Australian Government

Attorney-General's Department

FAMILY VIOLENCE ACT – FREQUENTLY ASKED QUESTIONS

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Family Violence Act – Frequently Asked Questions

General Questions

What is the Family Violence Act?

The *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* ('Family Violence Act') amends the *Family Law Act 1975* (Cth) ('Family Law Act') to provide better protection for children and families at risk of violence and abuse.

The amendments will help people within the family law system to better understand violence and abuse and ensure it is reported and responded to more effectively.

Why was the Family Violence Act developed?

The Family Violence Act was developed in response to three key reports received by the Government into the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) ('2006 Family Law Reforms') and how the family law system deals with family violence. These reports are the:

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

These reports and other research on the issues of family violence, shared care and infant development, provide a strong evidence base for reform. The reports indicate that the Family Law Act fails to adequately protect children and other family members from family violence and child abuse.

The research reports also provide solid evidence that shared parenting can assist the developmental outcomes of children in cases where the parents can cooperate, there is low conflict and the parents live close to each other. However, equal time arrangements that are inflexible and made in the context of conflict between the parents will generally result in poorer developmental outcomes for children.

The Family Violence Act, in responding to these research reports, places a focus on the protection and safety of children, but retains the substance of the 2006 Family Law Reforms which promoted children having a meaningful relationship with both parents.

How was the Family Violence Act developed?

The Family Law Amendment (Family Violence) Bill 2010 Exposure Draft was released for public consultation in November 2010. The Bill was accompanied by a consultation paper which sought comments on the proposed changes. The public consultation received over 400 written submissions from key stakeholders in the family law system, organisations, judicial officials, academics and individuals. 73 per cent of all submissions supported the Bill, with a further 10 per cent offering information about their very difficult personal experiences.

The Family Violence Act was introduced into Parliament in March 2011. The legislation was referred to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report ('the Senate Committee inquiry').

In addition to the Senate Committee inquiry the House of Representatives Selection Committee referred the legislation to the House of Representatives Social Policy and Legal Affairs Committee for inquiry. However that Committee, noting the work already being undertaken by the Senate Committee, agreed not to further inquire into the legislation.

The Senate Committee inquiry received 275 individual written submissions and held a public hearing in Canberra on 8 July 2011. The Senate Committee reported to Parliament on 22 August 2011.

Government amendments were made to the Family Violence Act in the Senate, responding to the Senate Committee report.

The Family Violence Act was passed by the Parliament on 24 November 2011.

What are the key features of the changes made by the Family Violence Act?

The key changes to the Family Law Act 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 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.

When do the changes apply?

The family violence measures in the Family Violence Act (Schedule 1) commence on 7 June 2012 and will apply to cases filed with the courts on or after that date.

Will the changes apply in Western Australia?

The Family Violence Act will apply in Western Australia in relation to children of a marriage and the parents of children who are or were parties to that marriage.

As the Western Australian Parliament has not referred constitutional power to the Commonwealth with respect to ex-nuptial children, it is up to that Parliament as to whether it will adopt these amendments in that State.

The Government has no reason to believe that the Western Australian Parliament will not adopt the measures.

Are the changes gender biased?

The amendments are gender neutral—just like the Family Law Act.

The Government is committed to strengthening protections available under the Family Law Act to any person affected by violence and abuse.

All family members have the right to be free from harm and to live without fear of violence or abuse.

Do the changes 'roll back' shared care?

The amendments do not 'roll back' the 2006 family law reforms.

The measures take positive action to ensure the safety of children caught up in disputes.

The amendments will improve the Family Law Act's protections for children without compromising support for the concept of shared parental responsibility where this is safe for children.

The amendments will provide the courts with better information on which to assess risk to families and the best interests of children, which will improve the appropriateness of parenting orders made by the family courts.

The best interests of the child must always take priority.

Will the changes affect child support or social security and family tax benefit payments?

The Family Violence Act does not amend child support or family assistance legislation or the social security law.

The purpose of the Family Violence Act is to ensure that parenting arrangements reflect the best interests of the child, including by protecting the child from harm and ensures that violence is reported and addressed.

To the extent that the courts or parents make new or modify existing parenting arrangements to meet that objective, this could result in changes to child support, social security and family assistance payments.

Those payments are, to the extent they depend on whether a person has the care of a child, generally determined on the basis of actual care arrangements established by family court orders as well as other evidence provided by parties involved.

The best interests of the child does not always, and indeed may never, equate to the best financial outcome for one or both of the child's parents.

The amendments are about the rights of children and the responsibilities of parents, and this includes a right to be safe from parents who engage in violent behaviour.

Advisers must encourage families to focus on the best interests of the child and, in doing so, put the wellbeing of their children front and centre when reaching agreement on parenting arrangements.

Improving understanding of family violence and abuse

What is different about the new definition of family violence?

The new definition of 'family violence' is closely aligned with the definition recommended by the Australian and New South Wales Law Reform Commissions in their report *Family Violence—A National Legal Response*.

The definition sets out a general characterisation test for family violence, which is the substantive definition. To be 'family violence' the behaviour must coerce, control or cause fear in a family member.

A non-exhaustive list of examples of harmful behaviour likely to be captured by the definition is included in the Family Law Act. This list recognises that family violence can take many forms including physical, psychological and emotional.

If a behaviour is not included in the list of examples, it does not necessarily mean that the behaviour will or won't be captured by the definition.

The definition will give the family courts clear legislative guidance about 'family violence' and help judicial officers to better consider behaviour, including patterns of behaviour, within their factual context.

The family courts must consider behaviour in the context in which it occurs, and interpret the definition of 'family violence' in a way that advances the purpose of the law and is consistent with the principles to be applied by the courts (see sections 43 and 69ZN).

What is different about the new definition of abuse?

The definition of 'abuse' has been broadened to ensure that a greater range of abuse cases are reported to family courts and, in turn, to child welfare authorities.

As with the existing definition, abuse includes assault and sexual abuse and exploitation. Added to these are causing a child to suffer serious psychological harm, including where the child is exposed to family violence, and serious neglect of the child.

Will victims of family violence be guilty of abuse if their child has been 'exposed' to the violence?

The amendments are not intended to further punish victims of family violence; they are intended to ensure that the courts get the information that they need to make safe parenting arrangements.

Many victims before the family courts currently face the dilemma of reporting family violence to the court with the risk of losing their children, or staying silent.

The amendments will help to encourage disclosure of family violence. They will improve the understanding of what family violence is by clearly setting out the types of behaviour that are unacceptable; and they will ensure that appropriate action is taken to prioritise the safety of children.

Removing barriers to disclosure

How will the family courts' response to allegations of family violence be improved?

The courts can only make parenting orders on the evidence before it.

The amendments will encourage information to be presented to the court so the court can make appropriate and safe parenting arrangements.

The courts will also have an obligation to ask the parties whether there are any concerns about family violence and child abuse to enable better management of these cases.

The courts' ability to identify and respond to cases of violence will also be increased through non-legislative measures such as the AVERT multidisciplinary training package and the risk assessment framework.

The AVERT family violence training package is a multi-disciplinary training package for professionals in the family law system to help them better understand family violence and its impacts and looking for ways to improve information sharing to better protect families in the system.

To obtain copies of the AVERT package please email FLSIsection@ag.gov.au. The package can also be accessed via the AVERT Family Violence website www.avertfamilyviolence.com.au.

The Attorney-General's Department is also developing a common risk identification framework for family violence across the broader family law system. The main purpose of screening is to identify clients who are at risk of harm, including the currency and extent of the risk. The framework will be available around mid 2012.

Will the changes mean it will take longer to get to court?

These amendments place children and their safety front and centre in family law matters.

The changes will bring out relevant evidence earlier, which would be expected to enable the courts to deal with matters more efficiently.

Under the Family Law Act the courts are required to act promptly where there are allegations of violence or abuse to ensure the safety of children.

The Family Court aims to deal with those cases involving the most vulnerable children as quickly as possible.

The Government acknowledges it will take some time for those within the family law system to become familiar with the changes.

Are there measures in place to stop people making false allegations of violence and abuse?

Repealing section 117AB will not prevent courts from imposing costs orders for knowingly false allegations or denials.

The courts will retain the power under section 117 to make costs orders if the court is of the opinion that there are circumstances to justify doing so.

Section 117 is broad enough to deal with all false statements, including false allegations and false denials.

Improving reporting requirements

Are family violence orders important for the family courts to know about?

Family violence orders are an important part of the legal response available to victims of family violence.

It is important that where family violence orders exist, family courts and others helping parents to work out parenting arrangements are told of this.

This is essential for the safety of all involved.

Like other courts, the family courts have the powers necessary to assess the relevance and the probative value of the existence of family violence orders in making orders, including assessing the best interests of the child.

How do I inform the court about family violence and child abuse?

The amendments make a number of changes to the law which make it easier for people to inform the court about family violence and child abuse during a case.

There is now a positive obligation on people to inform the court where they are aware a child who is the subject of the proceedings, or a child who is a member of the child's family, has had involvement with child welfare authorities or child protection agencies (see new sections 60CH and 60CI). However, where a person fails to inform the court about those matters any order made by the court remains valid.

The requirement to file a *Notice of child abuse and family violence, or risk of family violence* (Form 4) with the court has been broadened. A *Notice of child abuse and family violence, or risk of family violence* must be filed with the court if a party to the case, or an independent children's lawyer representing a child in the case, makes an allegation of child abuse or family violence. A true copy of the *Notice of child abuse and family violence, or risk of family violence* must also be served on the person who is the subject of the allegation.

This will ensure that the family courts are made aware of relevant issues so that appropriate action is taken to prioritise the safety of children.

The *Notice of child abuse and family violence, or risk of family violence* can be found in the forms section of the www.familylawcourts.gov.au website or in Schedule 2 of the *Family Law Rules 2004*.

What are mandatory reporting requirements?

Mandatory reporting requirements ensure that the authorities best placed to help children who have been abused or are at risk of being abused can act promptly to ensure the child's safety.

The broadened definition of abuse will ensure that a greater range of abuse cases are reported to child welfare authorities.

Under the Family Law Act there are a number of positive obligations on people to report an allegation of child abuse to a child welfare authority.

Where a *Notice of child abuse and family violence, or risk of family violence* is filed with the court alleging that a child to whom the proceedings relate has been abused or is at risk of being abused the Registry Manager must, as soon as practicable, notify a child welfare authority.

In performing duties, functions or exercising powers, family consultants, family counsellors, family dispute resolution practitioners, arbitrators, independent children's lawyers, the Registrar or a Deputy Registrar of a Registry of the Family Court of Australia, the Registrar or a Deputy Registrar of the Family Court of Western Australia, and a Registrar of the Federal Magistrates Court:

- must, as soon as practicable, notify a child welfare authority where that person reasonably suspects that a child has been abused, or is at risk of being abused.
- may notify a child welfare authority where that person reasonably suspects that a child has been ill treated, or is at risk of being ill treated, or has been exposed or subjected, or is at risk of being exposed or subjected, to behaviour which psychologically harms the child
- may notify a child welfare authority if that person knows that the relevant child welfare authority has previously been notified about the abuse or risk of abuse
- may disclose other information to a child welfare authority where that person reasonably believes the information is necessary to enable the authority to properly manage the matter the subject of the notification.

Mandatory reporting requirements under the Family Law Act are set out in sections 67Z, 67ZA and 67ZB.

Do the new definitions of family violence and abuse mean that I am automatically exempt from family dispute resolution and can go straight to court?

People who have experienced or are at risk of family violence or abuse continue to be able to seek an exception to the family dispute resolution (FDR) requirements under the Family Law Act and apply directly to court, and do not need to attempt FDR and have a section 60I certificate issued in their case.

After commencement of the amendments (from 7 June 2012), the court will need to consider claims for the exception against the new definitions for family violence and abuse.

If a person thinks the exemption applies the process for applying to the court remains the same. FDR Practitioners should advise people to tell court staff if they are relying on an exception. The court staff will advise what form is required. Registrars will be available to determine requests for exceptions as they currently do for the Family Court of Australia on the first court date.

As is currently the case, where an exemption does not apply, people will still be required to attempt FDR before making an application for a parenting order to the court and it will be up to the FDR practitioner to determine suitability of FDR in light of the new definitions.

How do the new definitions impact on FDR Practitioners assessing suitability for FDR?

Currently, as a requirement under the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (the Regulations), FDR practitioners conduct a comprehensive screening and assessment process to determine suitability of parties for FDR, and the factors they consider include whether there has been a history of family violence among the parties, the likely safety of the parties and a risk that a child may suffer child abuse. Screening and assessment is continuous throughout the FDR process.

The new definitions will be significant when FDR practitioners are screening and assessing whether it is appropriate for a client to participate in or continue participating in FDR. There may be cases where individuals who had previously been assessed as suitable, may now be assessed as unsuitable for FDR. This will depend on the individual circumstances of each case.

In the assessment of suitability of FDR, an FDR practitioner also considers other relevant factors under the Regulations, including equality of bargaining power among the parties, the emotional, psychological and physical health of the parties and any other matter that the FDR practitioner considers relevant to the proposed FDR.

The new definition of abuse has been expanded to include serious neglect and causing a child to suffer psychological harm as a result of the child being exposed or subjected to family violence. FDR practitioners need to be aware of this particular amendment for mandatory reporting purposes of child abuse.

The transitional arrangements for the amendments to the Family Law Act ensure that all section 60I certificates issued prior to commencement of the amendments (ie prior to 7 June 2012) remain current and do not need to be re-issued.

Parenting orders

I have an existing parenting order, how will the changes affect me?

The changes will not affect parenting orders that were made prior to the amendments commencing on 7 June 2012.

The amendments only apply to cases filed with the family courts on or after 7 June 2012.

I am currently in court seeking a parenting order, how will the changes affect me?

Under the Family Violence Act amendments, the family courts will make parenting orders in accordance with the law applying when the matter was filed with the court. This will ensure that cases are dealt with efficiently and without added costs to applicants.

When making parenting orders, the paramount consideration for the family courts is the best interests of the child.

The best interests of the child will vary depending on the facts of each case. There is no particular outcome guaranteed when the court is asked to make a parenting order.

I will seek a parenting order after the changes commence, how will the changes affect me?

The paramount consideration for the family courts when making parenting orders is the best interests of the child.

The best interests of the child will vary depending on the facts of each case. There is no particular outcome guaranteed when the court is asked to make a parenting order.

The amendments do not change the importance of considering the benefit to a child in having a meaningful relationship with both of the child's parents, nor the weight that should be given to that consideration in cases where there are no concerns for the child's safety.

For those cases where there are no family violence or child abuse concerns and it is in the best interests of the child equal shared parental responsibility will apply and the court is compelled to consider making an order for the child to spend equal time or substantial and significant time with each of the parents.

However, in those circumstances where the presumption of equal shared parental responsibility does not apply the court is required to have regard to the best interests of the child as set out in the Family Law Act. In this situation, even though the court is not compelled to do so, both equal time or substantial and significant time may be considered.

Do I have a right to revisit my case?

Family law cases are complex and in each individual case the facts need to be considered by the court and a decision made on those facts.

Parents are able to revisit parenting orders in certain circumstances.

Before the court will consider varying orders concerning parenting arrangements, an applicant must satisfy the court that there has been a material change in circumstance since the original orders were made.

The amendments made by the Family Violence Act cannot be relied upon as 'a change of circumstance' to re-open litigation about children.

Strengthening adviser obligations

What is different about the new adviser obligations?

Advisers are currently subject to obligations to give advice in relation to parenting plans, including in relation to the best interests of the child.

The amendments are aimed at ensuring that advisers provide advice that better helps parents understand how to meet a child's best interests through parenting arrangements that prioritise the safety of children.

The amendments extend the obligation on advisers to matters relating to Part VII of the Family Law Act, dealing with children's matters more generally, to ensure that parties are asked to consider the safety of their children as a priority at an early stage of discussions.

Advisers are family consultants, family counsellors, family dispute resolution practitioners and legal practitioners.

How do the changes encourage child welfare authorities to participate in cases?

The amendments encourage participation in cases by child welfare authorities by ensuring they are immune from having a costs order made against them when they intervene on request of the court.

The purpose of this immunity is to encourage greater collaboration between the child welfare authorities and the family court to enable better outcomes for children.

The costs immunity is limited to where a court requests a child welfare authority to intervene. These cases are where the risk of family violence and child abuse is most extreme.

Where the court makes an assessment that further evidence is needed any constraint to the participation of child welfare authorities should be removed. However, child welfare authorities must assess the appropriateness of intervention on a case by case basis.

Review and more information

How will the changes be reviewed?

Research focussing on understanding the prevalence and impact of family violence for separated families is ongoing and will be used to inform future reforms and improvements to the family law system.

As such, the Government has proposed a review of the changes starting with a baseline study, to be conducted by the Australian Institute of Family Studies, to assess the impact of the amendments. This research is expected to be completed in late 2013.

Where do I go for more information?

For further information about the changes you can:

- Visit the Attorney-General's Department website at www.ag.gov.au
- Call the Family Relationships Advice Line on 1800 050 321
- Visit the Family Law Courts website at www.familylawcourts.gov.au, or

Visit your local Family Relationship Centre or online at www.familyrelationships.gov.au