

# Family Violence Reforms: A review of trends since the 2012 changes



This fact sheet summarises the Ask LOIS webinar on this topic, presented by Mari Vagg on 24 March 2015. This webinar can be viewed for free at [www.asklois.org.au/webinars/past-webinars](http://www.asklois.org.au/webinars/past-webinars).

## This fact sheet covers:

- The Family Violence Amendments
- Steps taken by the Courts
- Analysis and evaluation of the reforms

## Legislative Reform

- In 1995 substantial amendments to the Family Law Act brought in a right for the child to have contact with both parents
- In 2006 the Family Law Act was amended leading to the introduction of:
  - Shared care, requirements that parents actively facilitate a relationship with the other parent (the “friendly parent” provisions); and
  - A provision for costs to be awarded against people who make false allegations of child abuse or family violence
- In 2011 changes were passed aiming to better recognise of the scope of family violence and abuse. They are often referred to as either the 2011 or 2012 changes
  - The *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011*
  - Changes started on **7 June 2012** and only apply to applications started from that date

## Problems caused by the 2006 Amendments

- Confusion about the interpretation of Equal Shared Parental Responsibility and the requirements that judges consider making orders for “shared care”
- Placing children with abusive parents
- Undue focus on parents’ rights rather than children’s rights
- Family violence victims not raising family violence for fear of cost orders or being deemed an ‘unfriendly parent’
- Family violence not dealt with at earliest stage resulting in inappropriate orders, putting children at risk
- As a result of the increasing concerns raised by the courts, lawyers, parents and child advocates, there was a flurry of reports and reviews about the 2006 amendments, including:
  - Family Courts Family Violence Review by Professor Richard Chisholm AM (2009);
  - Family Law Council Report (2009);
  - AIFS Evaluation of the 2006 family law reforms (2009).
  - ALRC and NSWLRC reports (both 2010);
  - Several social science research reports on the impacts and views of children and their parents since the 2006 changes

## 2012 changes

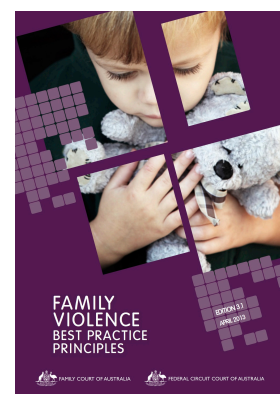
- New, broader definitions of ‘child abuse’ and ‘family violence’
- More weight given to safety of children over meaningful relationship with both parents, see s 60CC(2A)
- Removal of ‘friendly parent’ provision
- Removal of costs order for ‘false allegations’
- Includes reference to international obligations under the *Convention on the Rights of the Child*



- New provisions relating to state protection authorities (such as FACS) if participating in family law proceeding, in the hope that this would encourage their participation in family law proceedings and create a greater collaboration between child welfare authorities and the Family Law Courts
- New obligations on lawyers requiring that they provide advice to parents on the need to ensure a child's best interests are met through parenting arrangements that prioritise the safety of children
- New requirements that notices about family violence and child abuse must be filed ('Form 4')
- Broader definition of 'family violence':
  - Section 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.
  - Now includes non-exhaustive list of examples of behaviour that may constitute family violence. It is important to note that these examples of behaviour on their own do **not** constitute family violence. For example:
    - Socially and financially controlling behaviour
    - Exposing a child to family violence
    - Property damage
    - Causing injury or death to an animal
- Broader definition of 'child abuse' (section 4(1)) that now includes:
  - Serious psychological harm, which can arise from exposure to family violence; and
  - Serious neglect

### The Family Violence Best Practice Principles

- The *Best Practice Principles* (Ed 3.1, 2013) are 'a practical and useful guide' for judicial officers, family law practitioners and litigants in cases involving issues of family violence and/or child abuse.'
- They Principles incorporate the 2012 changes, and have had some impact on Family Law decisions since the amendments.
- For example, the Principles refer to some US 'typology literature' (Rathus, 2013) and then define or explain each of these four categories:
  - Coercive controlling violence
  - Violent resistance
  - Situational couple violence
  - Separation instigated
- The principles provide background and context as well as a guide as to the statutory framework, a checklist of legislative requirements and guidelines for the conduct of hearings at each stage in cases where issues of family violence and/or child abuse are raised



### Notice of Risk

- Since 12 January 2015, it is now mandatory that everyone involved in children's cases before the **Federal Circuit Court must** file a **Notice of Risk** form – whether or not family violence is involved
- Since the 2012 reforms, the **Family Court** has required a **Form 4** to be filed in matters where family violence or child abuse has occurred or is a risk.
  - Ie, the Form 4 for the Family Court isn't required in every case, only those where there is a history or a risk of family violence or child abuse. A notice of risk form is now required in every children's matter in the Federal Circuit Court
- You should note though, that the *Notice of Risk* form seeks to identify a wider range of risks, including mental illness of a parent, drug and alcohol abuse and serious parental incapacity

## Analysis and evaluation



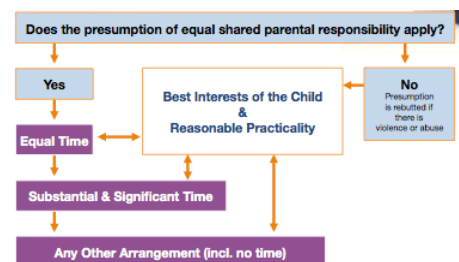
Justice Strickland and Kristen Murray, 'A judicial perspective on the Australian family violence reforms 12 months on' (2014) 28 *AJFL* 47

- Allegations are being made more frequently in affidavits, including non-physical types of violence
- The expanded definitions are having an effect on the way judges are treating allegations
- Use of "well known" typologies of violence can overly focus attention on classification
- Confusion about s 60CC(2A) remains and *'there has not necessarily been a reduction in orders requiring a child to spend equal time or substantial and significant time with a parent who is alleged to have behaved violently'*
- Importance placed on protective action by the person alleging FV
- Part VII remains cumbersome and convoluted and may be antithetical to the major purpose of the 2011 reforms
- Justice Strickland's own conclusions were that: *Although the conclusions are necessarily preliminary, and the sample size was small, the authors formed the view that the family violence reforms are reflective of community standards, have assisted in raising awareness about the nature and effects of family violence, and are arguably contributing to an increase in the use of protective measures such as injunctions and supervision of 'time spent' with a parent. However, several factors, including a lack of resources, the absence of legislative guidance as to how to proceed when an allegation is found to be substantiated, and the complexity of Pt VII, are potentially impeding the achievement of the reform objective*

### Part VII Family Law Act

The reference to the "cumbersome" decision-making pathway in Part VII refers to the decision-making process that the court has to go through when deciding any parenting case.

The 2006 reforms introduced this pathway and the presumption of equal shared parental responsibility. This presumption can be rebutted if *'there are reasonable grounds' to believe that there is child abuse or family violence.'*



Dr Renata Alexander, 'Moving Forwards or Back to the Future? An Analysis of Case Law on Family Violence Under the Family Law Act 1975 (Cth)' (2010) *UNSW Law Journal* 33(3), 907.

- In Dr Alexander's study of over 100 cases in the Family Court and the then Federal Magistrates Court between 2006 and 2011, she only found a handful where the presumption of equal shared parental responsibility was rebutted and only if there was **serious** family violence or child abuse

Dr Renata Alexander, Monash University and Victorian Bar, 'Family Violence: Working With Families In Crisis - Has the Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 made any difference?' (2014)

- In this study, Dr Alexander reviewed about 90 cases decided at first instance in both family law courts in the past two years.
- She found some trends are discernible:
  - Strict application of the new definition: that is, there must be coercion, control or fear
  - Inconsistent approaches by judges:
    - Some cases suggest that judges are employing a subjective test from the standpoint of the victim/survivor. While in other cases, judges have adopted a more objective approach and applied the categorisations of family violence set out in the *Best Practice*



*Principles* and determined the abusive behaviour to be ‘couple violence’ or ‘situational and not coercive violence’ and therefore not ‘family violence’.

- In cases of child abuse, some cases refer to the effects of children being exposed to family violence and make protective orders accordingly. But in other cases, even where the behaviour was found to constitute family violence or child abuse, it seemed to have featured little in the final decisions and parenting orders made
- Dr Alexander concluded:
  - Problems with the definition of ‘family violence’
  - The legislative pathway in Part VII is unchanged
  - Over-reliance on typologies of violence

#### Submission by Women’s Legal Services Australia on 2012 amendments

- The amendments are a good first step but they do not go far enough
- Legislation plays a vital role in shifting the culture
- Safety is key and should take priority and protection should be ensured at the earliest stage in a matter
- Parenting arrangements should be in the best interests of the child on a case by case basis, no parenting arrangement should be privileged over another
- Shared decision-making and how much time a child spends with each parent should not be linked

#### Dr Adiva Sifris and Anna Parker, ‘Family violence and family law: Where to now?’ (2014) 4 *Fam L Rev* 3

“In particular, it is argued that if the family law system is to respond adequately to the high incidence of violence and abuse within separated families, provisions in the *Family Law Act* which treat family violence as an exception to the norm must be amended. The present treatment of cases involving violence as an exception to the mainstream family law pathway fails to recognise the prevalence and seriousness of violence permeating the family law system, resulting in unsuitable and unsafe parenting outcomes.”

#### Women’s Legal Services NSW

WLS NSW are monitoring the impact of the 2012 changes, including:

- References to **typologies of violence**
- References to **social science research**
- **Characterisation of protective mums** as fixated, obsessive, anxious, over-protective, delusional, hyper-vigilant, having a persecutory disorder or smothering etc.
- **Characterisation of family violence as high conflict**, minimising the violence etc.

#### References

- **Alexander**, ‘Family Violence: Working With Families In Crisis - Has the Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 made any difference?’ (2014)
- **Alexander**, ‘Moving Forwards or Back to the Future? An Analysis of Case Law on Family Violence Under the Family Law Act 1975 (Cth)’ (2010) *UNSW Law Journal* 33(3), 907
- **Rathus**, ‘Shifting Language and Meanings between Social Science and the Law: Defining Family Violence’ (2013) 36(2) *UNSW Law Journal* 359
- **Sifris and Parker**, ‘Family violence and family law: Where to now?’ (2014) 4 *Fam L Rev* 3
- **Strickland and Murray**, ‘A judicial perspective on the Australian family violence reforms 12 months on’ (2014) 28 *AJFL* 47