

OVERVIEW OF CHANGES IN THE LAW

Introduction to CCH Family Law Act Book 2012

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Introduction

During the past 12 months there have been two major changes to the *Family Law Act 1975* ("the Act"), two sets of changes to the *Family Law Rules 2004* and to the *Family Law Regulations 1984* and one set of changes to the *Federal Magistrates Court Rules 2001*. Other legislation has made relatively minor changes to the legislation in this Book. The changes to the Act, being the family violence amendments and the retrospective validation of orders with respect to de facto financial matters, are the most significant and also led to consequential changes to subordinate legislation.

Family violence amendments

The *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* ("the Family Violence Act") responded to reports received by the Government into the 2006 family law reforms and how the family law system deals with family violence. The Family Violence Act amendments commenced on 7 June 2012 and largely apply to proceedings commenced on or after that date. The key amendments made by the Family Violence Act aimed to, as set out in the Replacement Explanatory Memorandum to the Bill:

- prioritise the safety of children in parenting matters
- change the definitions of 'abuse' and 'family violence' to better capture harmful behaviour
- strengthen advisers' obligations by requiring family consultants, family counsellors, family dispute resolution practitioners and legal practitioners to prioritise the safety of children
- ensure the courts have better access to evidence of abuse and family violence by improving reporting requirements; and
- make it easier for state and territory child protection authorities to participate in family law proceedings where appropriate

The definition of "abuse" was amended to:

- Remove the requirement for "an assault including a sexual assault" of a child to be an offence under the law of the State or Territory in which the assault occurs
- Include "causing the child to suffer serious psychological harm"
- Include "serious neglect of the child"

The definition of "family violence" was also broadened. It was previously defined in s 4(1) as "conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person's family that causes that or any other member of the person's family reasonably to fear for, or reasonably be apprehensive about, his or her personal wellbeing or safety."

The new definition in s 4AB(1) is "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." Examples 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" (s 4AB(2)).

A child is exposed to family violence "if the child sees or hears family violence or otherwise experiences the effects of family violence" (s 4AB(3)). Examples are listed in s 4AB(4) and include seeing or hearing an assault by a member of the child's family towards another member of the child's family and being present when police or ambulance officers attend an incident involving such an assault.

The primary considerations for determining what is in a child's best interests were amended so that:

1. The Court must give greater weight to s 60CC(2)(b) ("the need to protect a child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence") than to s 60CC(2)(a) ("the benefit to the child of having a meaningful relationship with both of the child's parents").
2. The so-called "friendly parent" provision (s 60CC(3)(c)) was removed. This stated that one of the additional considerations was "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." It was removed because of concern that parties were reluctant to allege child abuse or family violence in case they were seen as unwilling to facilitate the child's relationship with the other party. The replacement provisions, s 60CC(3)(c) and (ca), look at 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 and the extent to which each of the child's parents has fulfilled, or failed to fulfil, the parent's obligations to maintain the child.
3. The requirement that a family violence order was only relevant if it was a final order or the making of it was contested was removed. Relevant inferences can now be drawn under s 60CC(3)(k) from the nature of the order, the circumstances in which the order was made, any evidence admitted, any findings made by the court and any other relevant matter.

Section 60D sets out the obligations of an adviser in relation to the best interests of a child. "Adviser" is defined to include a legal practitioner, a family counsellor, a family dispute

resolution practitioner or a family consultant. An adviser giving advice or assistance to a person about matters concerning a child or Pt VII 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)".

These obligations arise even for proceedings commenced but not finalised prior to 7 June 2012 (item 45 of the Family Violence Act) although most other amendments do not apply to those proceedings.

Section 67ZBB sets out the Court's obligations if a Form 4 Notice of Child Abuse or Family Violence is filed. The Court must consider if any interim or procedural orders should be made to enable appropriate evidence to be obtained as expeditiously as possible, to protect the child or any of the parties and to deal with the issues raised by the allegation as expeditiously as possible.

In conducting child-related proceedings, the court must ask each party whether the child has been, or is at risk of being, subjected to, or exposed to, abuse, neglect or family violence and whether a party has been, or is at risk of being, subjected to family violence (s 69ZQ(1)(aa)). The court must deal with the matter appropriately and decisions which the court must make are listed in the same sub-section.

Section 117AB was removed from the Act due to concern that it acted as a disincentive to reporting family violence or child abuse because of the prospect of a mandatory costs order if a false allegation was made.

Schedule 2 of the Family Violence Act contains other amendments to the Act including:

- Clarification of the Family Court's power to dismiss appeals and to delegate procedural applications in appeals to Registrars
- Including an extensive list of witnesses for affidavits in s 98AB
- Clarifying that parentage testing orders and parentage declarations are not parenting orders
- Providing Family Court Judges with a rule-making power relating to bankruptcy proceedings transferred to the Family Court under s 35A *Bankruptcy Act 1966* (Cth).

Retrospective Validation of Orders

The *Family Law Amendment (Validation of Certain Orders and Other Measures) Act 2012* "Validation Act" retrospectively validated "affected orders" being orders made by the Family Law Courts with respect to de-facto financial causes before the relevant proclamation was made on 11 February 2012 for all States and Territories except Western Australia.

On 5 February 2009 the *Family Law Amendment (De Facto Financial Matters & Other Measures) Act 2008* was proclaimed by the Governor-General with a commencement date of

1 March 2009 with respect to certain items. The commencement date of the balance of the Amendment Act was triggered by the commencement of these items. This was intended to give exclusive jurisdiction to the Family Law Courts in all State and Territories which had referred their powers with respect to de facto financial causes.

However, s 40(1) of the Act requires that the jurisdiction of the Family Court not be exercised except in accordance with a Proclamation under that section. Section 40(2) provides that the Governor-General may, by proclamation, fix the date from which the relevant jurisdiction can be exercised by the Family Court. Section 31(1)(aa) confers jurisdiction on the Family Court with respect to "matters arising under this Act in respect of which de facto financial causes are instituted under this Act".

Specific reference ought to have been made in a proclamation but this did not occur prior to the commencement of the de facto provisions. The appropriate proclamation was made on 11 February 2012 but it was not retrospective.

The Federal Magistrates Court was also affected by the oversight. Under s 40A of the Act, the Federal Magistrates Court cannot exercise jurisdiction in, say, New South Wales, if the jurisdiction it seeks to exercise is not capable of being exercised by the Registries of the Family Court in New South Wales.

The problem did not apply to Western Australia as the Family Court of Western Australia continues to exercise State power over de facto relationships. However, the Validation Act retrospectively validated certain orders of the Family Court made on appeal from Family Law Magistrates in Western Australia between 1 July 2006 and 21 October 2011. A Proclamation ought to have been made in 2006.

The Validation Act:

- (a) declared that the rights and liabilities of all persons affected by orders made during the period before 11 February 2012 were the same as if the Proclamation had been made when it should have been made;
- (b) excluded liabilities arising from convictions for offences relating to de facto financial causes from the retrospectivity;
- (c) ensured that if new orders were made on the basis that the affected order was or might have been invalid, the retrospectivity did not revive the affected order.
- (d) ensured that if an order was declared or held to be invalid or to have been made without power before the commencement of the Validation Act, the order was not revived;
- (e) respectively validated orders made on appeal from Family Law Magistrates in Western Australia;
- (f) removed s 40(1) and 40(2) from the Act and replaced them with a new s 40(1). Regulations are now used to specify a date from which the jurisdiction of the Family Court must not be exercised in specified States or Territories. This helps ensure that similar oversights do not occur in the future.

From 21 April 2012 the *Family Law Amendment Regulation 2012* (No 2) commenced. This Regulation was introduced under s 40(1) of the Act to restrict the exercise of the Family Court's jurisdiction.

The Family Court cannot exercise jurisdiction under s 31(1)(c) concerning matters arising under the law of a territory (other than Northern Territory) including adoption of children. The Family Court has never been able to exercise this jurisdiction and the Regulation maintains this limitation. The Regulation also restricts the Family Court from exercising a large proportion of the jurisdiction conferred on it under the Act in Western Australia, the Cocos (Keeling) Islands and Christmas Island. Due to s 40A of the Act, the restrictions in the Regulation limit the exercise of jurisdiction by the Federal Magistrates Court.

Amendments to the *Family Law Rules*

The *Family Law Amendment Rules 2012* (No.1) included the following amendments to the Rules:

1. Further defined the nature of court events, the recording of which is prohibited.
2. Introduced a Statement of Truth for an application for consent orders.
3. Made rules necessary or convenient to implement the amendments made by the Family Violence Act.
4. Implemented a streamlined approach to the filing and storing of electronically filed large documents attached to affidavits.

Rule 5.19 *Family Law Amendment Rules 2011* (No 2) sets out matters to be included in an affidavit in support of an application and to suppress publication of a judgment. The Court anonymises all judgments in accordance with s 121 of the Act, but most judgments are published on the Family Court website and on www.austlii.edu.au as well as by CCH and other legal publishers.

Before making an order, the Court will consider such matters as whether there is a public interest in suppressing or not suppressing publication, why further anonymisation is not sufficient and whether a summary of the judgment should be publicly available if publication is suppressed.

Parties to an Application for Consent Orders no longer need to swear or affirm an affidavit. Instead, they only need to sign a Statement of Truth which does not require the signature of the party to be witnessed (r 10.18(a)).

New definitions were inserted into the Dictionary to the *Family Law Rules*. The definition of "court event" was expanded to include "an attendance with a single expert witness performing the functions of a single expert witness". The definitions of "expert", "expert witness" and "single expert witness" were moved from r 15.43 to the Dictionary but were not changed.

Rule 1.19 prohibits the photographing or recording by electronic means of hearings, trials, conferences, attendances on a family consultant, single expert or person who is in the court premises.

Rule 2.04D was amended to prescribe a Notice of Child Abuse or Family Violence (Form 4) for the purposes of s 67Z(2) and s 67ZBA(2). The person filing the Form 4 must file an affidavit or affidavit setting out the evidence on which the allegations in the Form 4 are based, by no later than the time the Form 4 is filed.

Filing a Notice of Child Abuse or Family Violence in appropriate cases is also required for cases commenced before 7 June 2012 if a party alleges that there has been family violence by one of the parties or there is a risk of family violence by one of the parties. If no Notice was filed before 7 June 2012, one must be filed and the Court must treat the allegation as if s 67ZBB applied.

Procedures were introduced to alert the Court to allegations of family violence and to how the allegations have been dealt with in the orders, when a Court is making consent orders. If the orders are presented during a hearing or trial, each party or lawyer:

- "(a) must advise the court 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;
- (b) must advise the court 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
- (c) if allegations of abuse or family violence have been made must explain to the court how the order attempts to deal with the allegations." (r 10.15A(3)).

For any other application, each party or a lawyer:

- "(a) must certify in an annexure to the draft consent order 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;
- (b) must certify in the annexure 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
- (c) if allegations of abuse or family violence have been made- must explain in the annexure how the order attempts to deal with the allegations". (r 10.15A(3)).

Rule 15.12(7) addresses lengthy affidavits filed electronically by requiring that if an affidavit and associated documents total more than 50 pages:

- each document must be filed as an exhibit to the affidavit
- each document must be served with the hard copy of the affidavit
- a hard copy of each exhibit must be filed with the court at least 48 hours before the court event in which the affidavit is to be relied on.

Federal Magistrates Court Rules Amendments

The *Federal Magistrates Court Amendment Rules 2012 (No 1)* primarily:

- facilitate the Family Violence Act
- enable ordinary service by email
- amend the costs schedule
- amend the enforcement provisions in r 25B, particularly with respect to child support.

Commencing 1 June 2012, r 13.04 was amended. Prior to that date, in an application for a parenting order by consent, the parties were required to advise the Court whether any of the following allegations were made in the proceedings:

- (a) allegations of child abuse or neglect, or a risk of child abuse or neglect;
- (b) allegations of family violence or a risk of family violence;
- (c) allegations of mental ill-health that is alleged to adversely impact on parenting capacity;
- (d) allegations of serious parental incapacity;
- (e) any other allegation involving a risk to the child (r 13.04A(2)).

The new r 13.04A(2A) requires each party to advise the court (similarly to s 692Q(1)(aa)):

- "(a) whether the party considers that the child concerned has been, or is at risk of being, subjected or exposed to abuse, neglect or family violence; and
- (b) 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."

If an allegation has been made under r 13.045A(2) or a party advises the court of any concerns mentioned in subrule (2A), "the parties must explain to the court how the parenting order attempts to deal with the allegation" (r 13.04A(3)).

Proceeds of Crime

State and Territory proceeds of crime orders were given the same recognition under the Act as orders under the *Proceeds of Crime Act 2002*. These amendments apply to proceeds of crime orders or applications for forfeiture orders made at or after commencement, but apply to proceedings under the Act regardless of whether the proceedings under that Act commenced before or after the order or application was made. The Proceeds of Crime Authority replaced the Director of Public Prosecutions as the relevant authority.

Conclusion

At the time of publishing this Book, the Family Violence Act amendments had only just commenced. It is not yet known whether they will have the effects sought by the legislators.

The general expectation is that there will be considerable litigation about the interpretation and application of the amendments.

After a year in which there were major changes to the *Family Law Act*, in the coming year there is an expectation of further significant legislative change. Whilst a merger of the Family Court and the Federal Magistrates Court is no longer proposed, the Attorney General, Nicola Roxon, has announced that the name of the Federal Magistrates Court will change. There is also likely to be changes in the types of matters dealt with by each court which will presumably result in significant changes to the Rules of both Courts.