

Is it safe enough?

Making sense of the Family Law Amendments – Part 1.

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Disclaimer

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A note on language

This presentation uses gendered language to discuss domestic and family violence and sexual assault.

This reflects the reality that most victims/survivors of domestic and family violence and sexual assault are women, and most perpetrators are men.

That said, we acknowledge domestic and family violence and sexual assault can happen to anyone, including men, and in different kinds of relationship, including LGBTIQ+ relationships.

A great source of information on all this and more can be found at ourwatch.org.au.



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A note – content warning and practice self-care

This presentation will discuss domestic and family violence and sexual assault.

Please be mindful of this and remember to look after yourself when discussing these topics.

It's ok to take a break, step away from your computer or mute your sound if you need to at any point during the presentation. Please make sure you look after yourself.



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Women's Legal Service NSW

- Statewide specialist Community Legal Centre for women
- Non-profit, non-government
- Free legal advice and representation
- Law reform and community education
- Prioritise women disadvantaged by cultural, social and economic circumstance
- Specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims support, care and protection, human rights and access to justice.
- More detail and our publications: wlsnsw.org.au



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What we will discuss today

The focus of the session today will be:

- To provide an overview of the up-coming changes to the *Family Law Act 1975* (“the Act”)
- Take a detailed look at the changes to the ‘Best Interest Considerations’ – section 60CC of the Act
- Compare the new ‘Best Interest Considerations’ to the old
- Discuss the advantages and disadvantages of the changes to the ‘Best Interest Considerations’
- Apply the new ‘Best Interest Considerations’ to some case studies



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Questions and Comments

There is a chat and Q & A function in the presentation. Please feel free to use these throughout the presentation to ask questions or make comments.

There will be time to answer questions at the end of the presentation.

Your participation and comments, particularly when workshopping the case studies, are strongly encouraged!



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Why look at the Family Law changes with a safety lens? Domestic & family violence in the family courts

2015 Australian Institute of Family Studies (AIFS) research into family law cases found that family violence or child abuse was present in:

- 70% of matters resolved by judicial determination;
- 60% of matters resolved by consent after proceedings were initiated but prior to trial; and
- 38% of cases had 4 or more risk factors.

NSW Law & Justice Foundation research found that victims of domestic & family violence are **16 times** more likely (than those who are not victims of DFV) to turn to the family courts to protect their children and themselves

NSW Law & Justice Foundation:

"Quantifying the legal and broader life impacts of domestic and family violence victims (2019)"

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What does recent court data tell us?

2021 data obtained through the Lighthouse Pilot Project showed:

- Approximately 80% of family law cases filed involve family violence; and
- Around 50% of high risk matters screened as part of the Lighthouse Project, contain four or more major risk factors:
 - 54% of parties allege a child has been abused or is at risk of abuse
 - 64% of parties allege they have experienced family violence
 - 57% of parties allege a child has experienced family violence
 - 39% of parties allege that drug, alcohol or substance misuse has caused harm or poses a risk of harm to a child
 - 40% of parties allege that the mental ill-health of a party has caused harm or poses a risk of harm to a child

These family violence figures are significantly higher than previously reported, but are likely to still be under-reported figures

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Why is this discussion so important?

The numbers of matters in the family courts which raise issues of violence and risk are huge; and

The safety of children and victim-survivors requires that:

- the law appropriately promotes and prioritises safety;
- the law is clear in words and intent to the broader community;
- the processes both in court and outside of court are safe;
- advocates – legal and non-legal - know the law and promote safety and know how to work together; and
- judicial officers promote safety, ensure safe processes from when a matter is filed right through until final determination and that they make safe decisions

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2024 – a huge change is upon us!

2024 will see big changes in family law matters for:

- Parenting proceedings; and
- Likely property proceedings.

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Family Law Amendment Act 2023

Family Law Amendment Bill 2023 (No. 1) – parenting provisions:

- FLAB passed with amendments, on 19 October 2023. The House of Representatives agreed to the Senate amendments on 19 October 2023.
- Received Royal Assent on 6 November 2023.
- Most changes take effect as of **6 May 2024**.
- **From this date, these changes will apply to all new and existing proceedings, except where the final hearing has begun.**

“This legislation will see more family law matters resolved quickly, safely and inexpensively without compromising the safety of family members.”

But, is there is a risk that some of the changes will actually compromise safety?

Key Amendments

**** Change to the best interest considerations;**

Removal of presumption of equal shared parental responsibility;

Removal of mandatory consideration of specific time orders (equal time or substantial and significant time);

New definitions for ‘member of family’ and ‘relative’

Codification of the law regarding changes to court orders (Rice & Asplund);

Introduction of harmful proceedings orders.

Other Amendments

Revamp of non-publication rules (current s121);

New requirements for ICLs, including mandatory meeting with a child 5 years old and over (with some exceptions);

Provision for regulation of Family Report Writers (although the actual regulations not provided);

Slight change for Hague abduction matters in relation to a child objecting to their return and removal of requirement for 'exceptional circumstances' for an ICL to be appointed.

Some changes to contravention applications.



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Best interest considerations

Change to the best interest considerations:

- List has been reduced from 2 primary and 14 secondary considerations to 6 considerations;
- Each Best Interest Consideration will be weighed depending on the facts of the individual case;
- The need to protect a child from harm is no longer prioritised or given greatest weight in the best interest factors;
- Wording changed from "*protection from harm*" to "*safety*"; and
- Separate standalone consideration for First Nation's children and families.

Is it now too simple?



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Best interest considerations – s60CC (*General Considerations*)

- What arrangements will promote the safety (inc. safety from being subjected to or exposed to family violence, abuse, neglect or other harm) of the child and any person caring for the child;
- Any views expressed by the child;
- The developmental, psychological, emotional and cultural needs of the child;
- The capacity of each parent to provide for the child’s developmental, psychological, emotional and cultural needs;
- The benefit to the child having a relationship with the child’s parents and other people who are significant to the child, where it is safe to do so; and
- Any other relevant circumstance.



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Best interest considerations – s60CC (3) (*Right to enjoy Aboriginal or Torres Strait Islander Culture*)

If a child is an Aboriginal or Torres Strait Islander Child, the Court must also consider:

- a. The child’s right to enjoy the child’s Aboriginal Torres Strait Islander culture by having the support, opportunity and encouragement necessary:
 - i. To connect with and maintain that culture with members of their family, community, culture, country and language;
 - ii. To explore the full extent of that culture consistent with the child’s age and developmental level and child’s views; and
 - iii. To develop a positive appreciation of that culture.
- b. The likely impact any proposed parenting order will have on that right.



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Best interest considerations – s60CC (2A)

When considering BIC 'General Considerations', the Court must consider:


- a. Any history of family violence, abuse or neglect involving the child or a person caring for the child; and
- b. Any family violence order that applies or has applied to the child or a member of the child's family.




Compare the pair – what are the advantages and disadvantages?

- Let's take a closer look...



		
New 'Best Interest Consideration' as of 6 May 2024 (Section 60CC(2)(a))	Current 'Best Interest Consideration' (Section 60CC(2)(b) and	
a) What arrangements would promote the safety (including safety from being subjected to, or exposed to, family violence, abuse, neglect, or other harm) of: <ul style="list-style-type: none"> i. the child; and ii. each person who has care of the child (whether or not a person has parental responsibility for the child); 	(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. (2A) In applying the primary considerations, the court is to <i>give greater weight</i> to the consideration set out in paragraph (2)(b).	
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New 'Best Interest Consideration' as of 6 May 2024 (Section 60CC(2)(b))	Current 'Best Interest Consideration' (Section 60CC(3)(a) and	
b) any views expressed by the child;	(3) (a) any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views;	
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New 'Best Interest Consideration' as of 6 May 2024 (Section 60CC(2)(c))	Current 'Best Interest Consideration' (Section 60CC(3)(g) and
c) the developmental, psychological, emotional and cultural needs of the child;	(3) (g) the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child's parents, and any other characteristics of the child that the court thinks are relevant;

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New 'Best Interest Consideration' as of 6 May 2024 (Section 60CC(2)(d))	Current 'Best Interest Consideration' (Section 60CC(3)(f) and
d) the capacity of each person who has or is proposed to have parental responsibility for the child to provide for the child's developmental, psychological, emotional and cultural needs;	(3) (f) the capacity of: <ul style="list-style-type: none"> i. each of the child's parents; and ii. any other person (including any grandparent or other relative of the child); to provide for the needs of the child, including emotional and intellectual needs;

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New 'Best Interest Consideration' as of 6 May 2024 (Section 60CC(2)(e))	Current 'Best Interest Consideration' (Section 60CC(2)(a) and
e) the benefit to the child of being able to have a relationship with the child's parents, and other people who are significant to the child, where it is safe to do so	(2) (a) the benefit to the child of having a meaningful relationship with both of the child's parents

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New 'Best Interest Consideration' as of 6 May 2024 (Section 60CC(2)(f))	Current 'Best Interest Consideration' (Section 60CC(3)(m) and
f) anything else that is relevant to the particular circumstances of the child.	(3) (m) any other fact or circumstance that the court thinks is relevant.

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New 'Best Interest Consideration' as of 6 May 2024 (Section 60CC(2)(A))	Current 'Best Interest Consideration' (Section 60CC(3)(j) and (k))
<p>(2) (A) In considering the general considerations, the court must include consideration of:</p> <ul style="list-style-type: none"> a) any history of family violence, abuse or neglect involving the child or a person caring for the child (whether or not the person had parental responsibility for the child); and b) any family violence order that applies or has applied to the child or a member of the child's family. 	<p>(3) (j) any family violence involving the child or a member of the child's family;</p> <p>(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:</p> <ul style="list-style-type: none"> 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;

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New 'Best Interest Consideration' as of 6 May 2024 (Section 60CC(3)) – right to ATSI Culture	Current 'Best Interest Consideration' (Section 60CC(3)(h) and (6))
<p>(3) (a) the child's right to enjoy the child's Aboriginal or Torres Strait Islander culture, by having the support, opportunity and encouragement necessary:</p> <ul style="list-style-type: none"> i. to connect with, and maintain their connection with, members of their family and with their community, culture, country and language; and ii. to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and iii. to develop a positive appreciation of that culture; and <p>(b) the likely impact any proposed parenting order under this Part will have on that right.</p>	<p>(3) (h) if the child is an Aboriginal child or a Torres Strait Islander child:</p> <ul style="list-style-type: none"> i. the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture); and ii. the likely impact any proposed parenting order under this Part will have on that right; <p>(6) an Aboriginal <u>child's</u> or a Torres Strait Islander <u>child's</u> right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right:</p> <ul style="list-style-type: none"> (a) to maintain a connection with that culture; and (b) to have the support, opportunity and encouragement necessary: <ul style="list-style-type: none"> i. to explore the full extent of that culture, consistent with the <u>child's</u> age and developmental level and the <u>child's</u> views; and ii. to develop a positive appreciation of that culture.

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What 'Best Interest Considerations' have been left out?

Provisions about:

- The nature of child's relationship with their parents and other persons
- Extent to which each of the child's parents has taken or failed to take opportunity to participate in long term decision making, spend time with a child and communicate with a child
- Extent to which parents have maintained a child
- Attitude to the child and to the responsibilities of parenthood demonstrated by each parent
- the practical difficulty and expense of a child spending time with and communicating with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;

Will these provisions being omitted make a difference?



Advantages & Disadvantages

- The list has been simplified – this is likely to be a positive, especially for self-represented litigants
- Consideration of safety of carers is now recognised (but does not extend to other children in household)

HOWEVER:

- All considerations will be weighed based on the individual circumstances of the case
- Safety is no longer prioritised over all other considerations
- Benefit to the child of having a relationship with each parent – how will this be interpreted? Will it be interpreted as being a lower or a higher bar than “meaningful relationship”?



A question of safety

- Safety is not defined – physical, emotional, psychological, cultural? Plain language meaning?
- Is the concept of “safety” easier to understand for the lay person?
- “Promote the safety of” rather than “protect” - is it a higher bar or a lower bar or the same?
- “If it is safe to do so” – benefit to the child of having a relationship with a parent and other significant people:
 - child no longer has a right to the relationship; and
 - reference to “meaningful relationship” has been removed.



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Case Study – how can we apply the best interest factors?

A client comes to you, on 7 May 2024 seeking family law advice.

The client instructs:

- She has three children aged 6, 8 and 15 years old.
- She was in a relationship with the children’s father for 10 years. She separated from him 18 months ago when she fled the family home after he held a knife to her throat, causing a superficial cut. He said leave to her “leave now or next time you won’t be so lucky”.
- The mother did not report this incident to police, but she did tell her best friend.
- Throughout the relationship, the father was physically and sexually violent to her. There were times the children were exposed to the father’s violence against your client. Your client previously had an ADVO protecting her from the father but it expired 4 years ago. The children were named on the order. The mother over the years disclosed some of the violence by the father to her General Practitioner.



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Case Study – how can we apply the best interest factors?

A client comes to you, on 7 May 2024 seeking family law advice.

The client instructs:

- After fleeing the relationship, your client suffered serious mental health problems, including being diagnosed with PTSD and depression. The mother attempted suicide a year ago and spent 2 weeks in a mental health ward at hospital.
- Your client instructs the father would use cocaine when they were together. Your client has heard through family that he has recently been charged with driving under the influence of illicit substances.
- Your client has not had face-to-face contact with her children as the father has refused, telling everyone she is “crazy” and a bad mum who abandoned her children.
- The children did occasionally call your client, but over time this eventually stopped. There has now been no contact at all for 6 months. The last text your client got from the 15 year old said “I hate you, I never want to see you again. You are crazy and a bad mum who abandoned us”.



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Case Study

Consider:

- What advice would you give this client based on the new s60CC factors?
- What factors do you think are most relevant?
- Would you advise to commence proceedings?
- If so, what orders would you seek and how are they in the best interest of the children?
- What evidence would you want before the Court to support those orders and how could you obtain this?



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Where to from here?

Will victim-survivors will need to put a lot more energy into arguments around safety, where court no longer required to give this the greatest weight.

DFSV, risk and need for safety **MUST** be very much front and centre of each case. Make sure you address this with evidence!

Lawyers must be skilled at understanding the dynamics of violence, taking a history, understanding risk and translating that risk into safety planning and orders.

Where to from here?

Review of Act in 3 years (May 2027) & government must table its report within 12 months of review and provided to both Houses of Parliament.

If the changes are/ are not fit for purpose and achieving the governments objective that *“this legislation will see more family law matters resolved quickly, safely and inexpensively without compromising the safety of family members.”* then this needs to be communicated back to Government in the Review. Monitor your cases and outcomes – how are they tracking compared to before the changes?

Because there is no prioritisation of safety the facts of the case and evidence raised (including expert evidence) is going to be more important than ever.

Where to from here?

We need good experts who will outline the history of violence and its relationship to risk, what the social science evidence says, what the risk assessment tools say and how that informs their recommendations and why the Court should make particular orders.

*See recent case where safety screening tool relied upon by Court Child Expert: [Harendra & Veda \(No 3\) \[2024\] FedFamC2F 27](#)
NB: case determined prior to the changes to the law and 'Best Interest Considerations'*

After considering the evidence and history of violence, and the good expert report, we need the court to determine what this evidence and history means in relation to risk and the need for risk and safety to be factored into the orders the court makes.

Be across new case law as it emerges following the changes – how will the court determine matters?



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Questions



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