

Is it safe enough?

Making sense of the Family Law Amendments – Part 2.

Amy Power
Senior Solicitor, Women's Legal Service NSW

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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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- 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:

- Part 2 of presentation on the changes to the *Family Law Act 1975* (“the Act”)
- We will take a detailed look at the removal of the presumption of equal shared parental responsibility and the removal of mandatory considerations of specific time orders (equal time or substantial and significant time);



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What we will discuss today

We will also look at some of the other changes in relation to:

- Codification of the rule in *Rice v Asplund (1970)*
- Re-draft of Division 13A of the Act in relation to consequences of non-compliance with parenting orders (contravention)
- Changes to the definitions of ‘member of the family’ and ‘relative’
- Requirements for Independent Children’s Lawyers to meet with a child
- Changes in relation to Hague Convention Child Abduction matters
- Harmful proceedings orders
- Overarching purpose
- Provisions for regulations in relation to Family Report Writers



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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.

You 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

Domestic and family violence is a prevalent issue in matters coming before the Court.

Given the prevalence, practitioners working in family law matters are likely to encounter allegations in relation to domestic and family violence in the work they do.

2021 data obtained through the Lighthouse Pilot Project showed that approximately 80% of family law cases filed involve family violence.



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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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6 May 2024 – the changes are upon us!

As of **6 May 2024**, Monday this week, most changes took effect.

These changes apply to all new and existing proceedings, except where the final hearing has begun.

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Repeal of Presumption of Equal Shared Parental Responsibility

The presumption of equal shared parental responsibility has been removed.

The Court is no longer required to presume it is in a child's best interest for the child's parents to have to make joint decisions in relation to major long-term issues of a child (ie. education, major health issues, religion, cultural upbringing, name or substantial changes to a child's living arrangements)



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Removal of mandatory consideration of certain time arrangements

The Court is no longer required to consider making an order that a child spend equal time, or substantial and significant time (being time on both weekends and week days) with each parent in circumstances where an order for equal shared parental responsibility was made.



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Parental Responsibility

Unless varied by a Court order, both parents have parental responsibility for a child, where decisions can be made individually by each parent, or jointly. The recent changes to the Act have affected this.

Definition of parental responsibility has also not changed:

Parental responsibility in relation to a child means all the duties, powers and responsibilities and authority which by law, parents have in relation to children (s61B of the Act)

Major long-term issues

The definition of major-long term issues has not changed.

Major long-term issues in relation to a child means issues about the care, welfare and development of a child of a long-term nature and includes (but is not limited to) issue about:

- a. *Education (current and future)*
- b. *Religious and cultural upbringing;*
- c. *Health*
- d. *The child's name; and*
- e. *Changes to a child's living arrangements that makes it significantly more difficult for the child to spend time with a parent.*

New guidance on joint-decision making

New s61CA - Consultation between parents on major long-term decisions

- Provides that unless a Court orders otherwise **and it is safe to do so** parents are encouraged to consult each other on major long-term decisions for a child.
- Important to note that this provision is **not enforceable** but aimed to provide assistance on what to do about major decisions if there are no court orders.



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New guidance on decision making orders

- New s61D(3) makes clear that the Court can still make orders in relation to the allocation of parental responsibility
- The Court can still make an order for joint or sole decision making
- The Court can still allocate all or certain aspects of decision making on major long term issues
- There is a slight change in language: now uses 'sole decision making on long term issues' or 'joint decision making on long term issues'



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New guidance on the effects of an order on joint decision making

- New s61DAA sets out the effect of an order that requires joint decision making on major long-term decisions
- Requires those who are to have joint decision making to consult with each other in relation to the decision and make a genuine effort to make a joint decision.
- s65DAA(2) makes it clear that this section does not require any other person to establish before acting on a decision about the child communicated by one of the people allocated joint decision making, that the decision has been made jointly.



No requirement to consult where no major-long term issues

New s61DAB makes clear that there is no requirement for a person spending time with a child to consult a person who has parental responsibility on issues that are not major long-term issues.



How will the Court decide time orders or parental responsibility?

Now that the provisions have been removed that required the court to consider making an order for equal shared parental responsibility and the subsequent equal or substantial and significant time, how will the Court make these decisions?



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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 person who has or is proposed to have parental responsibility of a child 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.



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How will allocation of decision making on major issues be decided?

- Depends on the individual circumstances of the case
- Will depend on how the best interest considerations can be applied in each particular case



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Remember 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?



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Presumption of ESPR did not apply where there was family violence

The old presumption of making an order for equal shared parental responsibility did not apply in circumstances where there was reasonable grounds to believe that a parent had engaged in:

- a. Abuse of a child or another child that was a member of the child's family; or
- b. Family violence.

With the removal of the provisions in relation to equal shared parental responsibility, the provisions that made it clear in the legislation that there was not a presumption in favour of an equal shared parental responsibility order have also been removed

It will be more important than ever to put on evidence about family violence and the inability and safety risks of a victim-survivor in being able to jointly make decisions with a perpetrator of violence, for a child.



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Case Study

You are acting for a client in parenting proceedings. The client instructs the following:

- She has two children aged 5 and 7 years old
- She separated from the father of the children 2 years ago
- Since separation, the children have lived with your client and spent time with the father every second weekend and half the school holidays. However, the father will often show up at your client's house uninvited and demand to see the children. He threatens your client that he will take her to court to get 'full custody' of the children if she doesn't do what he says.
- Your client is terrified she might lose her children and the father will get 'full custody' so she agrees to the father taking the children for additional time.
- Your client has been concerned when the children return to her after spending time with the father. They have said things like "I'm starving mummy, daddy didn't feed us any dinner last night".
- About a month ago, the 7 year old returned from time with the father with bruises down the sides of her arms that looked like marks from fingers. When your client asked what happened, the 7 year old burst into tears but did not say anything to your client about how she got the bruises.



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- The children have started to get really upset and agitated before changeovers and they cry when the father takes them into his care.
- The school contacted your client needing forms signed so the 7 year old could go on an excursion. The father has repeatedly refused to sign the form and so the 7 year old missed out on the excursion.
- Your client has taken the 5 year old to a number of doctors appointments and she has recently been diagnosed with autism.
- The father has never gone to any of these appointments and he denies the 5 years has autism. Your client has offered to call the father when she is with the doctor, so the doctor can explain the diagnosis to him, however he has refused to take the call.
- The father has not given consent to apply to the NDIS to get the 5 year old funding for support for her autism.
- The father messages your client frequently, at all hours of the day and night. He will refer to your client as things such as a 'bitch', a 'useless mother who has no idea' or the 'worst mother ever'. There are times when your client may have more than 20 messages from the father in a day. Some of the messages ask about things like who is she sleeping with at the moment, where is she going on the weekends when she doesn't have the kids in her care.
- Your client has made reports about the messages to police, however they have told her that 'it is a family law matter and there is nothing they can do'.



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Case Study

Consider:

- What advice would you give this client about what orders should be made in relation to decision making on major issues?
- What s60CC factors do you think are most relevant?
- 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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Codification of *Rice and Asplund* – New s65DAAA

When there is a final parenting order already in place, the Court cannot reconsider the final parenting order unless:

- a. There has been a significant change in circumstances since the final parenting order was made; and
- b. The court is satisfied it is in the child's best interest for the Court to reconsider the final parenting orders.

This rule was previously known under the common law rule set out in the case *Rice v Asplund*. The codification of this rule means that it is now set out in the legislation.



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Enforcement of child-related orders - contravention

While Division 13A has been redrafted, there aren't substantial changes to the current law in relation to contraventions. The changes were aimed at making the provisions easier to understand and for the courts to apply.

The key changes relate to:

- a. Removal of specific cost order provisions from Division 13A and that these can now be made pursuant to s117;
- b. Removal of the Court's power to make Community Service Orders in cases of non-compliance;
- c. Clarification that the Court at any stage of proceedings and **without necessarily making a finding on a contravention** make an order for 'make-up' time, vary a parenting order, or order parties to attend parenting programs.



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Enforcement of child-related orders - contravention

The provisions around where there is a 'reasonable excuse' for contravening an order, including in circumstances where there are safety concerns, have been retained.

However if the Court can at any stage of proceedings and **without necessarily making a finding on a contravention** make an order for 'make-up' time, vary a parenting order, or order parties to attend parenting programs, what will this mean if someone is contravening an order for safety reasons? How can they raise reasonable excuse?



Expanded Definitions

There is now an expanded definition of 'relative' and 'member of a child's family'.

For an Aboriginal or Torres Strait Islander child, a person is a relative of that child if, in accordance with that child's Aboriginal or Torres Strait Islander culture (including but not limited to any kinship systems of that culture), they are related to the child.



Independent Children Lawyers (ICL)

ICLs are now required to meet with a child and provide a child with an opportunity to express their views.

However there are exceptions that apply, including:

- If the child is under 5 years old;
- The child does not want to meet with the ICL; or
- There are exceptional circumstances justifying not performing the duty (including if it would expose a child to a risk of psychical or psychological harm that cannot be safely managed or it would have a significantly adverse impact on the child).



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Hague Convention – Child Abduction (international family law)

There have been changes to remove the requirement that the appointment of an ICL in cases brought under the 1980 Hague Convention can only be made in 'exceptional circumstances'.

ICLs can now be appointed in the same circumstances in Hague Convention matters as other family law matters.

There has also been changes to remove the higher threshold to not allow an objection by a child to return under the Hague Convention to be taken into account unless the objection was of a strength of feeling beyond mere expression of a preference or of ordinary wishes.



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Harmful Proceedings Orders

- Introduces new provision under the Act aimed to combat 'systems abuse'
- These are called 'harmful proceedings order'
- The Court will have the power to make a harmful proceedings order of its own initiative or on application from a party at any time while proceedings are on foot
- The harmful proceedings order will prevent a vexatious litigant from filing and serving new applications without first obtaining leave of the court
- To make this order, the Court needs to be satisfied that there are reasonable grounds to believe that the commencement of further proceedings would cause harm to the person responding to the proceedings
- Harm may include psychological harm or oppression, major mental distress, causes a detrimental effect on a person's capacity to care for a child or financial harm



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Overarching purpose

Introduction of an overarching purpose into the Act

The overarching purpose of family law practice and procedure is to facilitate the just resolution of disputes:

- a. In a way that ensures the safety of families and children; and
- b. In a way that promotes the best interest of the child; and
 - i. according to law; and
 - ii. as quickly, inexpensively and efficiently as possible.



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Family Report Writers

- The changes have provided a new power for Government to make regulations in relation to family report writers
- The regulations are to be in relation to standards and requirements to be met by family report writers who prepare family reports
- Important to note: the regulations have not yet been developed so their usefulness and effectiveness are yet to be determined
- So for now, there continues to be no regulatory scheme for the standards and requirements to be met by family report writers



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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 and with the removal of the rebuttable presumption of ESPR where there was family violence.

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.



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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.

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Where to from here?

We need good experts who will outline the history of violence and its relationship to risk.

After considering the evidence and history of violence, and 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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