

Is it safe enough? Changes to the Family Law Act

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SNAPSHOT

- Significant changes to the *Family Law Act 1975* will soon come into effect.
- The changes will help simplify a convoluted and complex family law system.
- As the provisions are new and untested, until case law is developed their effectiveness at safeguarding children and victim-survivors of family violence is yet to be determined.
- It is essential that these changes are underpinned by an evidence-based community education campaign, as well as targeted domestic and family violence training for all professionals working within the family law system.

The *Family Law Amendment Act 2023* ('Act') received Royal Assent on 6 November 2023. Most of the changes will apply from 6 May 2024. The Act introduces some of the most significant changes to the *Family Law Act 1975* ('*Family Law Act*') since the 2006 reforms.

Context

Changes to the *Family Law Act* were introduced primarily in response to recommendations made in the Australian Law Reform Commission's *Family Law for the Future: An Inquiry into the Family Law System* (ALRC Report 135, 2019) ('**ALRC Report**'). The ALRC Report highlighted several problems with the family law system including: insufficient protection for people experiencing or at risk of family violence, significant court delays, and the legislation in this area was complicated and confusing.

This article will consider these changes from the perspective of victim-survivors of family violence and the impact these changes are likely to have on them and their family law proceedings.

It has been claimed that the 'legislation will see more family law matters resolved quickly, safely and inexpensively without compromising the safety of family members' ([Explanatory Memorandum Family Law Amendment Bill 2023](#) at [1]). Although there have been some positive steps forward, when analysing these changes through the lens of a specialist sexual, domestic and family violence legal service, we are concerned the changes will not be as effective as anticipated and, in some circumstances, may actually compromise safety. Close scrutiny of the amended 'best interests' test in particular, will be required to ensure the Act achieves its intended purpose.

Summary of key changes

Key reforms include:

- change to the 'best interests' test including:
 - reduction of the best interests list to six 'non-hierarchical' factors;
 - introduction of a standalone provision for Aboriginal or Torres Strait Islander children; and
 - safety is no longer prioritised in the best interests factors.
- removal of the presumption of equal shared parental responsibility;
- variation of Objects and Principles;
- changes to definitions and wording in the Bill to better reflect First Nations understandings of family;
- introduction of harmful proceedings orders;
- slight expansion of the non-publication rules ([s 121](#) of the *Family Law Act*);

- increased regulation of Family Report Writers;
- slight expansion of allocation of Independent Children’s Lawyers in Hague matters;
- changes to contravention matters including costs orders; and
- codification of *Rice & Asplund* with respect to applications to vary existing orders.

Simplification of the ‘best interests’ considerations

The best interests of the child is the paramount consideration when making any decision about a child. This has not changed.

What has changed, however, is that the best interests considerations have been simplified and consolidated into a single non-hierarchical list, with the removal of ‘primary’ and ‘additional’ considerations. The new list also includes a stand-alone provision with respect to the best interests of Aboriginal and Torres Strait Islander children.

The amended best interests considerations include:

- what arrangements would promote the safety of the child and any person caring for the child? This must include consideration of the history of family violence involving the child or a person caring for a child, and any family violence order that applies or has applied to the child or member of the child’s family;
- 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 for the 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
- anything else that is relevant to the particular circumstances of the child.

Importantly, the expanded safety considerations encompass the child as well as each person who has care of the child.

It is of concern, however, that because safety is no longer overtly prioritised, the improvements to the Act and potential benefits of these changes, may be compromised. While safety is listed first in the considerations list, the Explanatory Memorandum makes it clear the order of the list does not matter and the list is ‘non-hierarchical’ (Explanatory Memorandum at [27]). It is the intention of the Act that safety is not to be considered as more important than any other best interests consideration.

This move to a ‘non-hierarchical’ list winds back the current requirement for the need to protect a child from harm to be considered above all other considerations, which clearly and unequivocally prioritises the safety of children in parenting matters.

Close scrutiny of the new [s 60CC\(2\)\(e\)](#) provisions is required. Under [s 60CC\(2\)\(3\)](#), the Court must consider ‘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’. This provision is new and untested. It is unclear how effective this provision will be at safeguarding children and victim-survivors of family violence. While there is scope for this provision to be interpreted protectively and for the benefit of children and victim-survivors of family violence, it is also potentially lower than the current threshold. There is a real risk that this provision may not result in safer parenting orders as was intended.

Removal of the presumption of equal shared parental responsibility

The most significant change introduced under the Act is the removal of the presumption of equal shared parental responsibility.

The presumption of equal shared parental responsibility, and the flow on provisions which require consideration of certain time arrangements, are confusing and not well understood. The most common misapprehension is the requirement for children to spend equal time with each parent. This led to many victims-survivors of family violence feeling compelled to agree to equal time arrangements, even where this would be unsafe for them and their children.

Under the new Act, decisions about parental responsibility will be based on the individual circumstances of each case and what is in the best interests of the child.

There has been no change to the Court's power to make an order for equal shared parental responsibility (now called 'joint decision making') or for sole parental responsibility.

There is no doubt that the removal of the presumption of equal shared parental responsibility is a positive step forward for victim-survivors of family violence. However, the effectiveness of this important change is compromised by the fact that safety is no longer prioritised in the best interests considerations because decisions about parental responsibility are determined by the best interests test.

Further, there is nothing in the Act that indicates an order for joint decision making should not be made where there has been a history of family violence. This is likely to mean that the burden of convincing the Court that an order for joint decision making is not in the best interests of the child will fall on victim-survivors. It will be more important than ever for victim-survivors to put on evidence including:

- who has historically made decisions for the child;
- any difficulties the parties have had making decisions together, with a focus on circumstances where this has exposed a child or adult victim-survivor to risk; and
- whether coercion and control had been exerted in parental decision making.

Harmful proceeding orders

A new addition to the *Family Law Act* is the inclusion of the harmful proceedings order.

Legal systems are often used by perpetrators of family violence as a mechanism to further harass, threaten, and exert power and control over victim-survivors. This provision will give the Court power to deal with proceedings that are unmeritorious, harmful or vexatious. A 'harmful proceedings order' will prevent a person from filing and serving any further family law applications without the leave of the Court.

The introduction of harmful proceedings orders is positive and it is hoped that it will be useful in preventing continuing systems abuse. Examination of its use in practice will be required to determine whether it is effective at achieving this purpose.

Family report writers

New provisions in the Act provide for the development of Regulations which will prescribe minimum standards and requirements for Family Report Writers and reports including:

- the duties of Family Report Writers;
- the process to monitor and enforce compliance with the prescribed standards;
- a complaints process for making complaints against Family Report Writers;
- training for Family Report Writers;
- publication of the names of Family Report Writers including their qualifications, training and experience, availability, fees, compliance with standards and requirements, membership of professional associations, registration or employment and any other matter relevant to preparing reports; and
- standards and requirements in relation to the content of reports.

A family report and the recommendations contained in the report are an essential and persuasive piece of evidence in determining arrangements for children. We hope these new provisions will result in an improvement in the standard and consistency of reports.

That said, the legislation uses discretionary language and outlines what 'may' be included in the Regulations rather than what 'must' be included. Without the Regulations, drafted alongside the changes to the *Family Law Act*, it is difficult to ascertain their effectiveness. Overall, the contemplation of standard setting and regulation of Family Report Writers is positive given the current Act is silent on this issue.

Review provisions

The Act provides for a review of the 2023 amendments after three years. Review provisions (if done right) can be one of the most effective mechanisms to ensure new legislation works as intended, and further amendments can be made to address gaps or unintended consequences if required.

It is imperative that if the amended Act is not achieving its intended purpose of making family law simpler and safer, these concerns are monitored and raised as part of the review.

Cultural reform

In order for these reforms to be truly effective, we must have a widespread plain language community education campaign highlighting the changes, especially the removal of equal shared parental responsibility.

There must also be specific, in-depth and on-going training for all professionals working within the family law system. This training must be developed and delivered by family violence specialists such as Women's Legal Services. This training not only addresses the amendments to the *Family Law Act*, but also increases knowledge and awareness of the nature and dynamic of family violence including: sexual violence and the impacts that violence has on children and victim-survivors; lethality risk factors; how to ensure safety is built into any proposed arrangements regarding children; and how to ensure evidence of family violence is best put before the Court.

Further reform

While many of these reforms are positive steps forward, there is a need for further reform including:

- prioritisation of safety in the best interests factors;
- improved funding of specialised family violence providing informed and culturally safe legal services;
- regulation of Family Report Writers;
- regulation of children's contact services; and
- improving Aboriginal and Torres Strait Islander cultural safety including by ensuring wider and ongoing consultation with communities.

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