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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**FAMILY LAW LEGISLATION AMENDMENT
(FAMILY VIOLENCE AND OTHER MEASURES) BILL 2011**

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Attorney-General,
the Hon Robert McClelland MP)

FAMILY LAW LEGISLATION AMENDMENT (FAMILY VIOLENCE AND OTHER MEASURES) BILL 2011

Outline

The Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 (the 'Family Violence Bill') will amend the *Family Law Act 1975* (Cth) to provide better protection for children and families at risk of violence and abuse. The Bill also makes several technical amendments which correct drafting and minor policy oversights and provide other efficiencies for the courts and litigants.

The Family Violence Bill responds to reports received by the Government into the 2006 family law reforms and how the family law system deals with family violence. The reports indicate that the Act fails to adequately protect children and other family members from family violence and child abuse. These reports are the *Evaluation of the 2006 family law reforms* by the Australian Institute of Family Studies (AIFS); *Family Courts Violence Review* by the Honourable Professor Richard Chisholm AM; and *Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues* by the Family Law Council.

Other research reports on family violence, shared care and infant development further provide a strong evidence base for reform. These reports are: *Family Violence and Family Law in Australia: the Experiences and Views of Children and Adults from Families who Separated Post-1995 and Post-2006* collaboratively produced by Monash University, the University of South Australia and James Cook University; *Shared Care Parenting Arrangements since the 2006 Family Law Reforms* by the Social Policy Research Centre of the University of New South Wales; and *Post-separation parenting arrangements and developmental outcomes for infants and children* by Jennifer McIntosh, Bruce Smyth, Margaret Kelaher, Yvonne Wills and Caroline Long.

The safety of children is of critical importance and the Government takes the issue of addressing and responding to family violence and child abuse very seriously. The family law system must prioritise the safety of children to ensure the best interests of children are met. The Family Violence Bill sends a clear message that family violence and child abuse are unacceptable.

These amendments address issues of significant community concern by strengthening the role of family courts, advisers and parents in preventing harm to children while continuing to support the concepts of shared parental responsibility and shared care, where this is safe for children.

The key amendments made by the Family Violence Bill will:

- 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 Family Violence Bill retains the substance of the shared parenting laws introduced in the *Family Law Amendment (Shared Responsibility) Act 2006* (Cth) and continues to promote a child's right to a meaningful relationship with both parents where this is safe for the child.

Schedule 2 of the Family Violence Bill contains several other amendments to the Act. These will clarify the Family Court's power to dismiss appeals and to delegate procedural applications in appeals to Registrars; align the Family Court's and the Federal Magistrate Court's provisions on administering oaths and affirmations and swearing affidavits; clarify that parentage testing orders and parentage declarations are not parenting orders; provide the Family Court Judges with a rule-making power relating to bankruptcy proceedings transferred to the Family Court under section 35A of the *Bankruptcy Act 1966* (Cth), and correct drafting and minor policy oversights and provide other efficiencies for the courts and litigants.

Schedule 2 to the Family Violence Bill also makes consequential amendments to the Bankruptcy Act to reflect the proposed power to be given to Family Court Judges to make rules relating to bankruptcy proceedings transferred to the Family Court under section 35A of that Act.

Financial Impact

The amendments in this Bill have negligible financial implications.

NOTES ON CLAUSES

Clause 1: Short title

1. This clause provides that the Bill, once enacted, will be cited as the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011*.

Clause 2: Commencement

2. This clause provides for the commencement of the Act. Sections 1 to 3 of the Act will commence on the day the Act receives the Royal Assent. Schedule 1 of the Act will commence on a single day to be fixed by Proclamation, but not more than 6 months after receiving the Royal Assent. Items 1, 2 and 30 of Schedule 2 will commence on the 28th day after the Act receives the Royal Assent. Items 3 to 29 of Schedule 2 will commence on the day the Act receives the Royal Assent. Part 2 of Schedule 2 will commence on the day the Act receives the Royal Assent.

Clause 3: Schedules

3. This clause provides that each Act specified in a Schedule to the Bill will be amended or repealed as set out in the Schedules.

SCHEDULE 1 – AMENDMENTS RELATING TO FAMILY VIOLENCE

Part 1 – Amendments

Family Law Act 1975

Item 1: Subsection 4(1) (definition of *abuse*)

4. Item 1 repeals the definition of ‘abuse’ in relation to a child in subsection 4(1) of the Act and replaces it with a new definition of ‘abuse’. The definition will include assault; sexual abuse and exploitation; causing a child to suffer serious psychological harm including where the child is exposed to family violence; and serious neglect of the child.

5. As with the existing definition of ‘abuse’, proposed paragraph (a) provides that an assault, including a sexual assault, amounts to abuse. However, the new definition will remove the requirement for the assault to be an offence under an enforceable law in a State or Territory. This means that those working with the Act, including courts, legal practitioners and family members will not be required to have regard to the terms of State and Territory laws when considering whether abuse has occurred. The new definition will remove uncertainty about knowing the elements of an offence and whether an offence has been committed.

6. Paragraph (b) of the definition, which deals with sexual exploitation, is based on the existing definition but contains minor drafting changes that reflect current drafting practice.

7. New paragraph (c) of the definition provides that abuse involves causing the child to suffer serious psychological harm including by the child being exposed to family violence. This reflects current social science and approaches to child protection, which indicate that exposure to violence threatens a child’s physical, emotional, psychological, social, education and behavioural wellbeing.

8. New paragraph (d) of the definition extends the definition to serious neglect of the child. The meaning of neglect is not defined and therefore takes its ordinary meaning. Neglect encompasses a range of acts of omission including failure to provide adequate food, shelter, clothing, supervision, hygiene or medical attention.

Item 2: Subsection 4(1)

9. Item 2 amends subsection 4(1) to include a reference to the definition of ‘exposed’ in new section 4AB (definition of *family violence* etc) proposed by item 8. This amendment follows existing drafting of the Act which places more extensive definitions at the end of the interpretation section.

Item 3: Subsection 4(1) (definition of *family violence*)

10. Item 3 amends subsection 4(1) to include a signpost to the new definition of ‘family violence’ in new section 4AB (definition of *family violence* etc) proposed by item 8. This amendment follows existing drafting of the Act which places more extensive definitions at the end of the interpretation section.

Item 4: Subsection 4(1) (definition of *member of the family*)

11. Item 4 repeals the existing definition of ‘member of the family’ in subsection 4(1) and inserts a new definition which refers the reader to revised subsection 4(1AB). This amendment moves the description of the purposes for which the definition applies to the substantive definition. This follows existing drafting of the Act which places more extensive definitions at the end of the interpretation section.

Item 5: Subsection 4(1) (paragraph (a) of the definition of *Registry Manager*)

12. Item 5 amends the general definition of ‘Registry Manager’ to carve out proposed section 67ZBA from its meaning. In addition to amendments made by item 34, this change helps to ensure that the specialised definition of ‘Registry Manager’ in subsection 67Z(4) of the Act continues to apply to section 67Z (dealing with allegations of child abuse) and is extended to proposed section 67ZBA (dealing with allegations of family violence). The same meaning is applied to both provisions to ensure consistent reporting obligations in relation to child abuse and family violence and to avoid duplication.

Item 6: Paragraph 4(1AB)(a)

13. Item 6 amends paragraph 4(1AB)(a) to ensure that the definition of ‘member of the family’ is incorporated into the new definition of ‘family violence’ in proposed section 4AB. This amendment is consequential to items 3 and 8, which moves the definition of ‘family violence’ from subsection 4(1) to proposed subsection 4AB.

Item 7: Paragraph 4(1AB)(c)

14. Item 7 amends paragraph 4(1AB)(c) to ensure that the definition of ‘member of the family’ is applied to obligations in new section 60CH (to inform the court of care arrangements under child welfare laws) and new section 60CI (to inform the court of notifications to, and investigations by, prescribed State or Territory agencies). This amendment is consequential to item 21, which creates proposed sections 60CH and 60CI.

Item 8: After section 4AA

15. Item 8 inserts new section 4AB which will define ‘family violence’ and when a child is ‘exposed’ to family violence.

16. New subsection 4AB(1) defines ‘family violence’ as violent, threatening or any other type of behaviour that coerces or controls a family member or which causes the family member to be fearful. Behaviour that fits within the general characterisation set out in the definition will be captured. The definition is intended to cover a wide range of behaviour including assault, sexual assault or other sexually abusive behaviour, stalking, emotional and psychological abuse, and economic abuse. The definition encompasses patterns of family violence and single violent events.

17. New subsection 4AB(2) provides a non-exhaustive list of examples that fit within the definition of ‘family violence’. The examples recognise the wider range of behaviour experienced by victims of family violence. The inclusion of examples will not exclude any behaviour that is within the general characterisation set out in subsection 4AB(1). For example, threats of suicide and self-harm are not mentioned in the definition or examples of ‘family violence’, but will be captured by the definition where the threat is intended to coerce, control or cause a family member to be fearful.

18. New subsection 4AB(3) defines the term ‘exposed’. This new term provides that a child is ‘exposed’ to family violence if the child sees or hears or otherwise experiences the effects of family violence. Proposed subsection 4AB(4) will provide a non-exhaustive list of example situations where a child may be exposed to family violence. The examples clarify that there does not have to be intent for a child to hear, witness or otherwise be exposed to family violence.

Item 9: Subsection 12E(3) (note)

19. Item 9 repeals the note under existing subsection 12E(3), which deals with the obligations on legal practitioners to give their clients documents containing information prescribed under section 12D of the Act. The substitute note refers the reader to new general obligations for advisers introduced by new section 60D proposed by item 22 and to information giving obligations under section 63DA of the Act.

Item 10: Subsection 12G(1)(note)

20. Item 10 repeals the note under subsection 12G(1), which deals with obligations on family counsellors, family dispute resolution practitioners to give a married person who is considering instituting certain proceedings (and, in appropriate cases, that person’s spouse) documents containing information prescribed under section 12C of the Act. The substitute note includes a reference to new general obligations for advisers to be introduced by new section 60D proposed by item 22 as well as referring the reader to additional information-giving obligations for these professionals under section 63DA of the Act.

Item 11: Paragraph 43(1)(ca)

21. Item 11 amends paragraph 43(1)(ca), which provides the principles to be applied by courts, by replacing the word ‘safety’ with ‘protection’. This promotes consistency of terminology in the Act.

Item 12: After paragraph 60A(a)

22. Item 12 amends section 60A, which outlines what is done in Division 1 of Part VII of the Act. The revised outline will include references to Subdivisions BA and BB of Division 1 (covering introductory issues relating to children’s matters). The descriptions are drawn from the titles of the Subdivisions in Division 1. Under this amendment, section 60A refers to retitled Subdivision BA and new Subdivision BB introduced into the Act by items 16 and 22 respectively.

Item 13: At the end of section 60B

23. Item 13 inserts a new subsection into section 60B of the Act to provide that a further object of Part VII of the Act is to give effect to the United Nations *Convention on the Rights of the Child* (the Convention). The purpose of this object is to confirm, in cases of ambiguity, the obligation on decision makers to interpret Part VII of the Act, to the extent its language permits, consistently with Australia’s obligations under the Convention. The Convention may be considered as an interpretive aid to Part VII of the Act. To the extent that the Act departs from the Convention, the Act would prevail. This provision is not equivalent to incorporating the Convention into domestic law.

24. Australia ratified the Convention in 1990 and, in doing so, committed to protecting and ensuring children's rights. The Convention contains the full range of human rights – civil, cultural, economic, political and social rights. These rights can be broadly grouped as protection rights, participation rights and survival and development rights. One of the main principles on which the Convention is based is the obligation to have regard to the best interests of the child as a primary consideration in decision-making. Part VII of the Act is based on this same principle; although the best interests of the child are elevated to ‘paramount’ status in several provisions. The reference to the Convention in section 60B does not adversely affect these provisions in Part VII or dilute the meaning of ‘paramount consideration’. Nothing in the Convention prevents Australia enacting stronger protections for the rights of the child than the Convention itself prescribes.

25. The note provides the reader with a reference for accessing the Convention in accordance with current drafting practice.

Item 14: Section 60C (cell at table item 1, column headed “Divisions and coverage”)

26. Item 14 updates the table in section 60C of the Act which provides an outline of issues dealt with by Part VII of the Act (dealing with children’s matters). New issues are included for Division 1 as a result of items 16 and 22.

Item 15: Section 60C (cell at table item 8, column headed “Divisions and coverage”)

27. Item 15 updates the table in section 60C of the Act which provides an outline of issues dealt with by Part VII of the Act (dealing with children’s matters). New issues are included for Division 8 as a result of item 29.

Item 16: Subdivision BA of Division 1 of Part VII (heading)

28. Item 16 changes the heading of Subdivision BA of Division 1 of Part VII of the Act to indicate that the issues dealt with in that subdivision relate to court proceedings. This is necessary to distinguish between existing Subdivision BA, which deals with matters a court must consider when dealing with a children’s matter, and new Subdivision BB which deals with adviser’s obligations in relation to children’s matters. Subdivision BB is introduced by item 22.

Item 17: After subsection 60CC(2)

29. Item 17 inserts new subsection 60CC(2A) which requires the court, when determining what is in a child’s best interests, to give greater weight to the primary consideration that protects the child from harm in cases if there is inconsistency in applying the considerations. Section 60CC(2) of the Act provides that the two primary considerations are: (a) the benefit to the child of having a meaningful relationship with both of the child’s parents; and (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence. Where child safety is a concern, this new provision will provide the courts with clear legislative guidance that protecting the child from harm is the priority consideration.

Item 18: Paragraph 60CC(3)(c)

30. Item 18 repeals paragraph 60CC(3)(c) of the Act and replaces it with new paragraphs 60CC(3)(c) and (ca).

31. Current paragraph 60CC(3)(c) is commonly referred to as the ‘friendly parent provision’. This provision required the family courts to consider the willingness of one parent towards the other in facilitating a child’s relationship with other parent. The AIFS *Evaluation of the 2006 Family Law Reforms* and the Family Law Council report to the Attorney-General, *Improving responses to family violence in the family law system*, noted the impact this provision had in discouraging disclosures of family violence and child abuse. These reports indicate that parties were not disclosing concerns of family violence and child abuse for fear of being found to be an ‘unfriendly parent’.

32. The repeal of paragraph 60CC(3)(c) is intended to remove this disincentive and enable all relevant information to be put before the courts for consideration in making parenting orders. Removal of the ‘friendly parent’ provision will not prevent the court from considering a range of matters relevant to the care, welfare and development of the child such as a parent’s attitude to the responsibilities of parenthood.

33. New paragraphs 60CC(3)(c) and (ca) will substantially re-enact the content of current paragraphs 60CC(4)(1)(a) and (c) which are to be repealed by item 20. The purpose of these provisions was to ensure that, when determining the best interests of the child, the court takes into account whether a person has failed to fulfil their parental responsibility obligations in the past.

34. Proposed paragraph 60CC(3)(c) will require the court to consider the extent to which each of the child’s parents has fulfilled, or failed to fulfil, his or her responsibilities as a parent. This will include the extent to which each parent has taken, or failed to take, the opportunity to spend time with the child, communicate with the child, and participate in decision-making about major long-term issues in relation to the child.

35. Proposed paragraph 60CC(3)(ca) will require the court to consider the extent to which each parent has facilitated, or failed to facilitate, the other parent doing these things and the extent to which each parent has fulfilled, or failed to fulfil, his or her obligation to maintain the child.

Item 19: Paragraph 60CC(3)(k)

36. Item 19 deletes paragraph 60CC(3)(k) and replaces it with a similar provision which removes the requirement that a family violence orders must be final or contested. The effect of this new paragraph is the courts must have regard to any family violence order made—including interim, non-contested and police issued order—and give appropriate weight to these orders. The definition of ‘family violence order’ in subsection 4(1) of the Act remains unchanged. This is definition draws on orders made under prescribed State and Territory legislation.

Item 20: Subsections 60CC(4) and (4A)

37. Item 20 will repeal subsections 60CC(4) and (4A) of the Act. As explained in item 18, paragraphs 60CC(4)(1)(a) and (c) will be substantially re-enacted in paragraph 60CC(3)(c). Subsection 60CC(4A) is to be repealed on the basis that it currently qualifies subsection 60CC(4) and will therefore become redundant with the repeal of that subsection. The repeal of subsections 60CC(4) and (4A) will not inhibit the courts’ ability to consider events and circumstances since parental separation which may be considered under paragraph 60CC(3)(m).

Item 21: At the end of Subdivision BA of Division 1 of Part VII

38. Item 21 inserts new obligations on parties to provide the court with information regarding risks to the child, or another child who is a member of the child's family. Information about whether a child is or has been the subject of a care order, notification or investigation under a child welfare law is crucial in assisting the family courts to make decisions about children. This information is an indicator of the risks of harm to the child and may alert the court to other evidence relevant to the child's welfare and best interests. In addition, the information will assist the court in determining whether jurisdictional matters under section 69ZK arise and whether to request the involvement of relevant child welfare authorities. For example, the court may order the authorities to provide information relating to the notifications and investigations.

Section 60CH – Informing court of care arrangements under child welfare laws

39. Proposed section 60CH requires parties to parenting proceedings to notify the court if the child or another child who is a member of the child's family is under the care of a person under a child welfare laws. This proposed section further provides that a person who is not party to proceedings may advise the court if the child or another child who is a member of the child's family is under the care of a person under a child welfare law. Under proposed subsection 60CH(3), the validity of any orders made by the court will not be affected by a failure to inform the court about such care arrangements. Despite this, the limitation in section 69ZK of the Act, which restricts the circumstances in which the courts can make orders in relation to a child who is under the care of a person under a child welfare order, will prevail over section 60CH.

Section 60CI – Informing court of notification to, and investigations by, prescribed State or Territory agencies

40. Proposed section 60CI requires parties to parenting proceedings to disclose to the court whether the child has been the subject of a notification or report to, or investigation, inquiry or assessment by, a prescribed child welfare authority. This proposed section will further provide that a person who is not a party to the proceedings may advise the court about whether the child has been the subject of a notification or report to, or investigation, inquiry or assessment by, a prescribed child welfare authority. A failure to inform the court will not affect the validity of any orders made by the court.

Item 22: After Subdivision BA of Division 1 of Part VII

41. Item 22 inserts new Subdivision BB in Division 1 of Part VII which outlines the obligations on advisers when working with parents to reach parenting arrangements for their children. As with current section 63DA of the Act, an adviser is defined as a legal practitioner, family counsellor, family dispute resolution practitioner or a family consultant.

42. New subdivision BB directs advisers to focus on the best interests of a child when providing advice about parenting arrangements and other matters relating to that child under Part VII of the Act.

43. Where there is inconsistency in applying the primary considerations of a child's right to a meaningful relationship with each parent and the child's right to be protected from harm, advisers are required to encourage parents to prioritise a child's safety. This approach is consistent with the amendments made by item 17 which concerns the best interests of a child in court proceedings. The new adviser obligations help parents to consider the protection of their children from harm as a priority at an early stage of discussions with the assistance of their advisers.

Item 23: Section 60K

44. Item 23 repeals section 60K, which requires the court to take prompt action in relation to allegations of child abuse or family violence. Section 60K will be substantially re-enacted in proposed section 67ZBB (Court to take prompt action in relation to allegations of child abuse or family violence) to be inserted by item 34. Proposed section 67ZBB is located more appropriately near sections 67Z and 67ZBA which, respectively, impose obligations to report child abuse and family violence to the courts.

Item 24: Before subsection 63DA(1)

45. Item 24 provides that new adviser obligations set out in new Subdivision BB are in addition to obligations on advisers under section 63DA of the Act to give certain advice in connection with the making of parenting plans in relation to a child. This item should be read in conjunction with item 22 of this Schedule, which requires advisers to encourage parents to take account of the child's best interests and prioritising the child's safety.

Item 25: Paragraph 63DA(2)(c)

46. Item 25 repeals paragraph 63DA(2)(c), which requires advisers to inform their clients that decisions made in developing parenting plans should be made in the best interests of the child. This obligation is expanded upon in new Subdivision BB to be inserted by item 22, which applies to all advice by advisers about matters under Part VII of the Act (dealing with children's matters), not just advice given in connection with the making of a parenting plan. The new obligations in Subdivision BB are additional to those set out in section 63DA, which concerns the obligations of advisers in relation to parenting plans.

Item 26: Subsection 65DAA(5) (note 1)

47. Item 26 repeals 'Note 1' under existing subsection 65DAA(5) of the Act. This note outlines the relevant behaviour the court should take into account with respect to paragraph 65DAA(5)(c) in determining what parenting order the court should make in the best interests of the child. The note identifies the additional considerations in subsection 60CC(3), particularly paragraphs 60CC(3)(c) and (i), as relevant behaviour the court should take into account. This note is no longer necessary due to the repeal of paragraph 60CC(3)(c) by item 18.

Item 27: Subsection 65DAA(5) (note 2)

48. Item 27 relabels 'Note 2' as 'Note' as a consequence of 'Note 1' being repealed by item 26.

Item 28: Paragraph 67A(c)

49. Item 28 amends paragraph 67A(c) of the Act which provides an outline of the matters addressed in Division 8 of Part VII of the Act. The amendment will be updated to inform the reader

that Subdivision D of Division 8 of Part VII contains provisions relating to allegations of family violence as well as child abuse. This is consequential to amendments made by item 34.

Item 29: Subdivision D of Division 8 of Part VII (heading)

50. Item 29 updates the heading of Subdivision D of Division 8 of Part VII to inform the reader that Subdivision D contains provisions relating to allegations of family violence as well as child abuse. The heading is amended as a consequence of item 34 which inserts new sections 67ZBA and 67ZBB into the Act. Respectively, these provisions concern allegations of family violence and obligations on the courts to act promptly in relation to allegations of child abuse or family violence.

Item 30: Subsection 67Z(1)

51. Item 30 amends section 67Z of the Act to apply it to an ‘interested person’ in proceedings under the Act, which is broader than its current application, namely, to a party to proceedings under the Act. Item 32 will insert a new definition of ‘interested person’ to ensure that section 67Z applies to parties to proceedings under the Act, an independent children’s lawyer who represents the interests of a child in the case and other persons prescribed by the regulations. The heading of section 67Z is altered to reflect the broadening of the persons covered by that provision.

Item 31: Subsection 67Z(2)

52. Item 31 amends subsection 67Z(2) to refer to ‘interested person’ instead of ‘party’. This reflects the amendments to items 30 and 32, which extend section 67Z to interested persons and define these in broad terms. Under this item, an ‘interested person’ will be required to file a notice in the court and serve a true copy of the notice upon the person who is alleged to have abused the child or from whom the child is alleged to be at risk of abuse.

53. The Family Court currently prescribes a Notice of Child Abuse or Family Violence (Form 4) for the purposes of existing subsection 67Z(2) under the current Family Law Rules 2004.

Item 32: Subsection 67Z(4)

54. Item 32 amends subsection 67Z(4) to include a definition of ‘interested person’. The purpose of this change is to ensure certain people, such as the parties to proceedings and any independent children’s lawyer representing a child in the case, are required to file a notice (currently a Notice of Child Abuse or Family Violence (Form 4)) in the court. Respectively, paragraphs (a) and (b) of the definition of ‘interested person’ mean a party to the proceedings or an independent children’s lawyer who represents the interests of a child in the proceedings. Paragraph (c) of the definition enables regulations to prescribe persons in addition to those persons set out in paragraphs (a) and (b). This item is to be read in conjunction with items 30 and 31.

Item 33: At the end of subsection 67ZA(3)

55. Item 33 inserts a note at the end of existing subsection 67ZA(3), which authorises certain persons (such as lawyers, family dispute resolution practitioners, family consultants, family counsellors and certain Registrars) to notify a prescribed child welfare authority of reasonable suspicions that a child has been ill treated, is at risk of being ill-treated, or is at risk of, or has been exposed or subjected to, behaviour which psychologically harms the child. The note clarifies that a person who is authorised to report their suspicions under subsection 67ZA(3) not excused from mandatory reporting obligations arising under subsection 67ZA(2) where that person has reasonable grounds for suspecting that a child has been abused or is at risk of abuse.

Item 34: At the end of Subdivision D of Division 8 of Part VII

Section 67ZBA – Where interested person makes allegation of family violence

56. Item 34 inserts new section 67ZBA, which creates obligations upon an ‘interested person’ in proceedings for an order under Part VII of the Act who makes an allegation of family violence. This provision is based on section 67Z of the Act which creates similar obligations in relation to allegations of child abuse. It is intended to ensure that family courts receive the best possible evidence of family violence.

57. Subsection 67ZBA(1) applies if family violence has been alleged by an interested party, as a consideration that is relevant to whether the court should make or refuse to make an order sought under Part VII of the Act.

58. Subsection 67ZBA(2) provides that where an interested person makes an allegation of family violence, that person must file a notice in the prescribed form in the court, and serve a true copy of the notice on the party to proceedings to whom the allegation referred to in paragraph 67ZBA(1)(a) or (b) relates. It would be open to the courts to prescribe the same notice for the purposes of subsection 67ZBA(2) as is prescribed for the purposes of subsection 67Z(2). Currently, the notice prescribed by the Family Court is a Notice of Child Abuse or Family Violence (Form 4).

59. Subsection 67ZBA(3) sets out the obligations where the alleged family violence (or risk of family violence) is also abuse of a child (or risk of abuse of a child). This subsection clarifies that, in such cases, only one notice is required to be filed and served, either under subsection 67Z(2) or subsection 67ZBA(2). If the notice is filed under subsection 67ZBA(2) the Registry Manager must deal with the notice as if it has been filed under subsection 67Z(2).

60. Subsection 67ZBA(3) contains a note to clarify that the notice must be filed and served under the requirements in subsection 67Z(2) if the allegation of abuse of a child (or a risk of abuse of a child) relates to a person who is not a party to the proceedings.

61. Subsection 67ZBA(4) defines the terms ‘interested person’, ‘prescribed form’ and ‘Registry Manager’ for the purposes of section 67ZBA.

Section 67ZBB – Court to take prompt action in relation to allegations of child abuse or family violence

62. Item 34 inserts new section 67ZBB. Section 67ZBB substantially re-enacts existing section 60K. The proposed provision will be located in Subdivision D of Division 8 of Part VII of the Act, which is a more appropriate position as that subdivision deals with allegations of child abuse and family violence.

63. As with section 60K, proposed section 67ZBB will place an obligation on the court to take prompt action in relation to allegations of child abuse or family violence. The new provision operates in broadly in the same way as section 60K, although the allegation need not be confined to an allegation in a document.

64. New subsection 67ZBB(1) sets out the application of section 67ZBB. It applies where a notice is filed under subsection 67Z(2) or 67ZBA(2) in proceedings for an order under Part VII in relation to a child and the notice alleges, as a consideration relevant to whether the court should make or refuse to make the order, that: there has been abuse of the child or would be a risk of such abuse if the proceedings were delayed; or there has been family violence by one of the parties to proceedings or is a risk of such family violence.

65. Importantly, new paragraph 67ZBB(2)(c) requires the court to deal with the issues raised by the allegation of child abuse or family violence (or risk thereof) as expeditiously as possible.

66. In addition, the combined effect of new subsections 67ZBB(2) and (3) is that the court must, as soon as practicable and if appropriate within eight weeks after the notice is filed, consider what interim or procedural orders (if any) should be made to enable appropriate evidence about the allegations to be obtained expeditiously as possible and to protect the child or any of the parties to proceedings. The kinds of orders encompassed by paragraphs 67ZBB(2)(a) and (b) include orders for the preparation of a family report, orders requiring the appointment of an independent children's lawyer; and orders to obtain documents or information from a prescribed State or Territory agency under section 69ZW. Paragraph 67ZBB(2)(b) states that the court must make such orders where appropriate.

67. New subsection 67ZBB(4) requires the court, which has to consider what orders (if any) it should make under sub-paragraph 67ZBB(2)(a)(i) to enable appropriate evidence about the allegation to be obtained as expeditiously as possible, to specifically consider whether it should make orders under section 69ZW to obtain documents or information relating to the allegation from a prescribed State or Territory agency. This new subsection will not limit the powers of the court under sub-paragraph 67ZBB(2)(a)(i).

68. New subsection 67ZBB(5) requires the court, which has to consider what orders (if any) it should make under sub-paragraph 67ZBB(2)(a)(ii) to protect the child or any of the parties to proceedings, to specifically consider whether it should make orders or grant an injunction under section 68B. This new subsection will not limit the powers of the court under sub-paragraph 67ZBB(2)(a)(ii).

69. New subsection 67ZBB(6) provides that the validity of an order will not be affected by a failure to comply with proposed section 67BB.

Item 35: Section 68N (note)

70. Item 35 repeals the note at the end of section 68N, which references other provisions dealing with family violence. This note is unnecessary and risks becoming unwieldy with the addition of new family violence provisions. The outline of Part VII at section 60C already provides guidance to the reader about provisions relating to family violence.

Item 36: Subsection 69ZH(2)

71. Item 36 amends subsection 69ZH(2) to include a reference to proposed Subdivision BB. The effect of this amendment is that new Subdivision BB, inserted by item 22 of Schedule 1, will be read down to only apply to a child of a marriage, or the child's parents as parties to the marriage, in those States that have not referred constitutional power with respect to ex-nuptial children. Subdivision BB will also be read down according to subsection 69ZH(3) of the Act relating to parental responsibility.

Item 37: Paragraph 69ZN(5)(a)

72. Item 37 amends paragraph 69ZN, which outlines the principles for conducting child-related proceedings. Paragraph 69ZN(5)(a) will be repealed and replaced with a new sub-principle based on terminology consistent with other provisions in Part VII of the Act. The proposed sub-principle is to safeguard ‘the child concerned from being subjected to, or exposed to, abuse, neglect or family violence’. This amendment does not change the substance of paragraph 69ZN(5)(a).

Item 38: Before paragraph 69ZQ(1)(a)

73. Item 38 imposes a new duty on the court to actively ask each party to child-related proceedings about the existence, or risk, of child abuse or family violence. The imposition of this duty implements the family courts’ obligation under subsection 68ZN(5) to conduct proceedings in a way that will safeguard the child and the parties to the proceedings from harm. The duty does not currently extend to requiring the court to proactively inquire about other information which might be useful evidence from people or agencies other than parties to the proceedings.

Item 39: At the end subsection 91B(2)

74. Item 39 inserts a new note at the end of existing section 91B, which allows a court to request a child welfare officer to intervene in proceedings that affect or may affect the welfare of a child. The purpose of this note is to alert the reader to the immunity for costs provision in proposed subsection 117(4A) to be inserted by item 42. Under proposed subsection 117(4A), the court must not make a order for costs or security for costs against an officer of a child welfare authority or a Commonwealth, State or Territory entity which has engaged or employed such an officer where the officer has intervened in proceedings at the request of the court and acted in good faith in relation to the proceedings.

Item 40: Subsection 117(1)

75. Item 40 removes the reference to section 117AB in subsection 117(1), as a consequence of the repeal of section 117AB by item 43.

Item 41: Subsection 117(2)

76. Item 41 is a consequential amendment to insert a reference to new subsection 117(4A), introduced by item 42, which introduces a new immunity for certain officers from orders involving costs or security for costs.

Item 42: After subsection 117(4)

77. Item 42 introduces an immunity from orders for costs or security for costs for officers of a State or Territory or of the Commonwealth who: are responsible for child welfare laws of the State or Territory; intervene in family law proceedings following a request by the court; and act in good faith in relation to the proceedings. Intervention by child welfare authorities can help the family courts to obtain information about suspected family violence and abuse affecting the child. It can also provide the family courts additional options to protect the child from harm when determining parenting orders.

Item 43: Section 117AB

78. Item 43 repeals existing section 117AB of the Act. Section 117AB requires the court to make a mandatory cost order against a party to the proceedings, for some or all of the costs of another party, where the court is satisfied that the first party knowingly made a false allegation or statement in the proceedings.

79. The AIFS *Evaluation of the 2006 Family Law Reforms* and the Family Law Council report to the Attorney-General, *Improving responses to family violence in the family law system*, indicate that section 117AB has operated as a disincentive to disclosing family violence. Vulnerable parents may choose to not raise legitimate safety concerns for themselves and their children due to fear they will be subject to a costs order if they cannot substantiate the claims. Section 117 of the Act will allow family courts to make cost orders in response to false statements in appropriate cases.

Part 2 – Application and transitional provisions

Item 44: Definitions

80. Item 44 provides definitions that are to be applied in the interpretation of the application and transitional provisions related to Schedule 1. Definitions are provided for the terms ‘commencement’ and ‘old Act’. These terms are defined to improve the readability of provisions in this Part and to help the reader to determine whether particular provisions commence before or after Schedule 1 commences.

Item 45: Application of certain amendments

81. Item 45 provides that certain new provisions in Schedule 1 apply to all proceedings that are instituted before, on or after commencement. This application rule prioritises the safety of children in Part VII proceedings including those that are before the courts at commencement. It is subject to sub-item 47(1), which provides the amendments made by Schedule 1 do not affect an order made under, or a certificate given under subsection 60I(8) of, the Act as in force immediately before commencement.

82. Proposed provisions that will be subject to this application rule are: definitions related to ‘abuse’, ‘family violence’, ‘exposed’ and ‘family member’ (items 1 to 3); principles to be applied by courts exercising jurisdiction under the Act (item 11); the introduction of a new object underlying Part VII of the Act (item 13); the prioritisation of safety within primary considerations, and changes to additional considerations, in section 60CC of the Act (items 17 to 20); requirements to inform the courts of certain matters relating to child welfare (item 21); requirements to file notices relating to allegations of child abuse or family violence or risk of child abuse or family violence and for the court to take prompt action in relation to allegations of child abuse or family violence (items 30 to 34); principles for, and general duties on the court when, conducting child-related court proceedings (items 37 and 38); and the removal of the mandatory cost order provision (item 40 to 43).

83. This application rule prioritises the safety of children over the cost and convenience to the courts, witnesses and the parties who may have matters part or fully heard. To assist the transition process, clause 3 of the Family Violence Bill provides that the measures in Schedule 1 will commence upon a single date to be fixed by Proclamation but no later than 6 months after the day the Act receives the Royal Assent. This would allow for a delayed commencement and, in turn, help the courts to anticipate new requirements in proceedings during the lead up to commencement.

Item 46: Documents filed under section 60K

84. Item 46 ensures that the courts will continue to be obligated to act promptly in relation to certain allegations of child abuse or family violence or a risk of child abuse or family violence notwithstanding the repeal of section 60K of the Act. The obligations upon the court under section 60K to act promptly will continue to apply in relation to any document filed in the court in accordance with section 60K prior to the commencement of Schedule 1.

Item 47: Amendments do not affect existing orders etc. or constitute changed circumstances

85. Item 47 will ensure that existing orders and certain certificates relating to the requirement to participate in family dispute resolution are preserved following commencement of Schedule 1.

86. Sub-item 47(1) ensures that any orders made before commencement are not affected by the amendments in Schedule 1. This sub-item would preserve prior orders made under the Act, including cost orders made pursuant to section 117AB (which is to be repealed under item 43 of Part 1 of Schedule 1).

87. Sub-item 47(1) also ensures that any certificate issued by a Family Dispute Resolution Practitioner (FDRP) for the purposes of subsection 60I(8) of the Act is not affected by the amendments in Schedule 1. Any certificate issued under subsection 60I(8), and filed in a court under subsection 60I(7), of the Act must be considered by that court when it determines whether it may hear an application for a Part VII order in relation to a child.

88. This amendment does not prevent a person who was unable to obtain a certificate under subsection 60I(8) prior to commencement of Schedule 1 from seeking a certificate, after commencement, taking account of the new definitions of ‘family violence’ and ‘abuse’, etc.

89. Sub-item 47(2) puts beyond doubt that changes to the Act made by Schedule 1 do not constitute such a significant change in circumstances or new factor so as to meet the test of *Rice and Asplund* (1979) FLC 90-725. That case limits the court’s capacity to rehear matters to two kinds of cases: those where there is a change in the circumstances of the parties where some new factor has arisen which would justify a serious step; and those where there is some factor which was not disclosed at a previous hearing that would have been material.

90. It is not generally in the best interests of the child to have repeated applications concerning them before the courts. Sub-item 47(2) would not, however, prevent a person from seeking a rehearing of a children’s matter where he or she failed to disclose child abuse or family violence that is a material concern relevant to the best interests of the child. The courts will reconsider parenting arrangements when material circumstances were not disclosed when the original orders were made.

91. The note following sub-item 47(2) directs the reader to the principle in *Rice and Asplund*. This note is to assist readers, particularly self-represented litigants, to understand how sub-item 47(2) links to the common law.

Item 48: Transitional, application and savings – regulations

92. Item 48 enables regulations to be made about matters of a transitional, application or saving nature relating to amendments made by the Schedule 1. If such regulations were made, those regulations would prevail over any transitional, application or savings provisions set out in Part 2 of Schedule 1, to the extent of any inconsistency. The purpose of this amendment is to allow the rules in items 44 to 47 to be adjusted to take account of any unexpected transitional, application and savings matters or to take other action such as to carve out proceedings that are part heard or where judgment is reserved if that is considered appropriate.

SCHEDULE 2 – OTHER AMENDMENTS

Part 1 – Amendments

Bankruptcy Act 1966

Item 1: Paragraph 35A(3)(f)

93. Item 1 amends section 35A of the *Bankruptcy Act 1966* (Cth) which enables the Federal Court of Australia to transfer proceedings under that Act to the Family Court of Australia. Presently, paragraph 35A(3)(f) provides that, subject to earlier paragraphs of subsection 35A(3), Rules of Court made under the *Federal Court of Australia Act 1976* apply, with specific modifications, in and in relation to the proceedings transferred to the Family Court.

94. This item, which omits the words ‘the Rules of Court made under that Act’ from paragraph 35A(3)(f) of the Bankruptcy Act, is to be read in conjunction with item 30 of Schedule 2. That amendment will empower the Family Court to make its own rules relating to bankruptcy proceedings transferred to it under section 35A of the Bankruptcy Act.

95. This item is also to be read in conjunction with item 2 of Schedule 2.

Item 2: At the end of subsection 35A(3)

96. Item 2 inserts a note at the end of subsection 35A(3) of the Bankruptcy Act to signal to the reader that any proceedings transferred from the Federal Court of Australia to the Family Court of Australia under section 35A will be dealt with by Rules of Court made by the Family Court for such purposes. This amendment is consequential to the amendment made by items 1 and 30 of Schedule 2.

Family Law Act 1975

Item 3: Subsection 11F(1)

97. Item 3 amends subsection 11F(1) of the Act to expressly empower courts exercising jurisdiction under the Act to order the parties to proceedings to arrange for children who are the subject of proceedings to attend an appointment or a series of appointments with a family consultant. This amendment will remove doubt about the courts’ ability to order these appointments which is currently taking place and being enforced in accordance with paragraph 11G(1)(b) and subsection 11G(2) of the Act.

98. This amendment is to be read in conjunction with items 4, 15 and 16 of Schedule 2.

Item 4: Subsection 11G(2)

99. Item 4 substitutes subsection 11G(2) with two new subsections: subsections 11G(1A) and 11G(2).

100. Subsection 11G(1A) requires family consultants to report to the court where a person has failed to comply with an order under subsection 11F(1) to arrange for a child to attend an appointment with a family consultant, or where the child fails to attend an appointment arranged in compliance with such an order.

101. Subsection 11G(2) extends the power of the court to make further orders where the family consultant reports failures to comply with orders to attend family consultant appointments to reports received under subsections 11F(1) and (1A).

102. This amendment is to be read in conjunction with items 3, 15 and 16 of Schedule 2.

Item 5: Subsection 13C(1) (note 2)

103. Item 5 amends Note 2 following subsection 13C(1) of the Act to reflect amendments made by item 3 of Schedule 2. This consequential change to the Note provides a signpost to the reader indicating that the court can also order parties to arrange for a child to attend appointments with a family consultant.

Item 6: Subsection 24(1)

104. Item 6 amends subsection 24(1) of the Act relating to the performance of certain duties and exercise of certain powers when the Chief Judge of the Family Court is ill or absent from Australia. Subsection 24(1) currently provides that whenever this situation occurs, the Deputy Chief Judge or, if the Deputy Chief Judge is unavailable, the senior Judge Administrator who is in Australia and is available and willing to do so will fulfil such obligations. There are presently no Judge Administrators in the Family Court, and no further appointments are envisaged.

105. Accordingly, item 6 omits the words ‘the senior Judge Administrator’ and substitutes these with the words ‘the next senior Judge’. The seniority of Judges assigned to the Appeal Division of the Family Court is determined under subsection 23(4) of the Act. Under that provision, each Appeal Division Judge has seniority according to the day on which her or his assignment to the Appeal Division took effect.

Item 7: At the end of subsection 37A(1)

106. Item 7 inserts a new note after subsection 37A(1), which allows the Judges of the Family Court or a majority of them to make Rules of Court delegating powers to Registrars. The proposed note will provide a signpost to the reader to consider new section 37AA in relation to how subsection 37A(1) will apply to powers under existing subsections 94(2D) and 94AAA(10) of the Act to hear and determine applications of a procedural nature in appeals to the Family Court.

Item 8: After section 37A

107. Item 8 inserts section 37AA to expressly provide that the Family Court may make Rules of Court delegating powers to hear and determine applications of a procedural nature in appeals to Registrars of the Family Court.

108. When making Rules of Court under subsection 37A(1) delegating these powers to Registrars, the Judges of the Family Court may, under subsection 37AA(2), specify modifications of section 37A that are to have effect in relation to the exercise by Registrars of the powers. Several provisions in section 37A require modification to apply to powers that might be delegated to Registrars to hear and determine applications of a procedural nature in Family Court appeals.

109. For example, subsection 37A(3) provides that exercise by a Registrar of powers delegated by Rules of Court made under subsection 37A(1) ‘shall, for all purposes, be deemed to have been exercised by the Court or a Judge, as the case requires’. Applications of a procedural nature in appeals from a single Judge decision of the Family Court of Australia or the Family Court of Western Australia are usually heard and determined, under subsection 94(2D) of the Act, by either a Judge of the Appeal Division of the Family Court or a Full Court of the Family Court.

Item 9: Subsection 55(5) (definition of *appeal*)

110. Item 9 repeals the definition of ‘appeal’ in subsection 55(5) of the Act, and replaces it with a new definition. Section 55 sets out when a divorce order takes effect generally and where an appeal is instituted.

111. The term ‘appeal’ is currently defined in subsection 55(5) in a limited way as it does not extend to applications to review a divorce order made by a Judicial Registrar or a Registrar of the Family Court of Australia, a Registrar of the Federal Magistrates Court or the Principal Registrar or a Registrar or Deputy Registrar of the Family Court of Western Australia.

112. The term ‘appeal’, as currently defined, also does not extend to applications to review a declaration under section 55A of the Act made by one of these court officers in divorce proceedings about the arrangements that the spouses have made for their children, or to rescind a divorce order under section 57 or 58 of the Act.

113. The new definition of ‘appeal’ expressly covers applications for review of divorce orders, declarations under section 55A of the Act and orders determining applications under sections 57 or 58 of the Act for the rescission of a divorce order.

Item 10: At the end of section 60A

114. Item 10 updates section 60A of the Act which provides an outline of what is contained in Part VII of the Act. An additional paragraph is included to identify provisions inserted into the Act in 2006 about the use of family dispute resolution before applying for an order under Part VII relating to children.

Item 11: Section 60C (cell at table item 1, column headed “Divisions and coverage”)

115. Item 11 updates section 60C of the Act which sets out, in tabular form, an outline of Part VII of the Act and the coverage if Divisions within the Part. Table item 1 is amended to include a reference to ‘family dispute resolution’ overlooked in a previous amendment.

Item 12: Section 60C (cell at table item 7, column headed “Divisions and coverage”)

116. Item 12 updates section 60C which sets out, in tabular form, an outline of Part VII of the Act and the coverage if Divisions within the Part. Table item 7 is amended to include a reference to ‘varying the maintenance of certain children’ overlooked in a previous amendment.

Item 13: Section 60C (cell at table item 7, column headed “Divisions and coverage”)

117. Item 13 updates section 60C which sets out, in tabular form, an outline of Part VII of the Act and the coverage if Divisions within the Part. Table Item 7 is amended to include a reference to ‘recovery of amounts paid under maintenance orders’ overlooked in a previous amendment.

Item 14: Section 60C (cell at table item 12A, column headed “Divisions and coverage”)

118. Item 14 updates section 60C which sets out, in tabular form, an outline of Part VII of the Act and the coverage of Divisions within the Part. Table Item 12A is amended to include a reference to ‘matters relating to evidence’ overlooked in a previous amendment.

Items 15 and 16: Subsection 62G(5), subsection 62G(6)

119. Items 15 and 16, for consistency with the amendments made by items 3 and 4 of Schedule 2, make consequential amendments to section 62G of the Act, which enables a court, in proceedings where the care, welfare and development of a child who is under 18 is relevant, to direct a family consultant to give the court a report on relevant matters.

120. Item 15 amends subsection 62G(5), which enables the court to make appropriate orders and directions for the purpose of the preparation of a report it has asked a family consultant to give. One example of such an order or direction currently set out in subsection 62G(5) is an order or direction that ‘a party to proceedings, or the child, attend an appointment or a series of appointments with a family consultant’. Item 15 expands the example to refer to an order or direction that ‘one or more parties to the proceedings attend, or arrange for the child to attend, an appointment or a series of appointments with a family consultant’.

121. Reflecting the recasting of the example in subsection 62G(5), item 16 amends subsection 62G(6) to include new paragraph 62G(6)(b) which provides that the family consultant must report any failure of a child to attend an appointment arranged in compliance with an order or direction under subsection 62G(5).

Item 17: At the end of subsection 64B(1)

122. Item 17 amends subsection 64B(1) to clarify that a declaration or order under Subdivision E, Division 1 of Part VII is not a ‘parenting order’. This amendment relates to parentage testing orders under section 69W, parentage declarations under section 69VA and other orders in Subdivision E associated with parentage testing orders, for example, orders to make the parentage testing procedure more effective and reliable, and orders requiring people who have prepared reports about information obtained from parentage testing to give evidence in relation to those reports.

Item 18: At the end of section 66A

123. Item 18 updates section 66A which provides an outline of what Division 7 of Part VII deals with and contains. An additional paragraph is included to indicate that Division 7 ‘deals with the recovery of amounts paid under maintenance orders (Subdivision G)’ which was overlooked in a previous amendment.

Item 19: At the end of paragraph 68LA(6)(a)

124. Item 19 involves the correction of a drafting error. It inserts the word ‘and’ at the end of a paragraph to clarify that the provision, which concerns the non-disclosure obligations of independent children’s lawyers, should be read cumulatively.

Item 20: Subsection 69N(4)

125. Item 20 involves the correction of a drafting oversight in subsection 69N(4), which deals with the powers of the court when transfer of proceedings from courts of summary jurisdiction in certain cases. That provision empowers the court to make such orders as it considers necessary pending the disposal of proceedings by the court to which they are transferred. Subsection 69N(4) contains an outdated reference to making orders under subsection 62F(2) repealed in 2006. The reference to repealed subsection 62F(2) is substituted with a reference to existing section 13C(1) which, since 2006, has established an equivalent power to order parties to do certain things at any stage in proceedings.

Item 21: Section 69ZS (note 2)

126. Item 21 amends Note 2 following existing section 69ZS to provide a signpost to the reader indicating that the court may order parties to proceedings to attend appointments with a family consultant.

Item 22: Section 69ZU

127. Item 22 repeals section 69ZU of the Act. Section 69ZU currently restricts the use of an opinion given by a family consultant unless it is given as sworn evidence. Section 69ZU reflects past Family Court practice under which family consultants were sworn in on the first day of a less adversarial trial ensuring that any future testimony given in the matter had the character of sworn evidence. This practice is no longer followed. This means that family consultant reports ordered under section 62G of the Act and other documents prepared by family consultants must be verified by affidavit if they contain statements of opinion. Section 69ZU treats statements of opinion by family consultants less favourably than statements made by other persons that are routinely admitted into evidence in parenting proceedings through documents produced on subpoena.

128. For the above reasons, section 69ZU is repealed to enable a court to be able to take into account any opinion expressed by a family consultant in child related proceedings under the Act without the family consultant having given the opinion as sworn evidence.

Items 23 to 25: Before paragraph 70NAF(3)(a); After paragraph 70NEB(1)(d); After section 70NEC

129. Items 23 to 25 amend provisions in Division 13A of Part VII of the Act, which provide for the consequences of failure to comply with orders under the Act affecting children. The amendments take account of observations made by the Full Family Court in *Elsbeth & Peter; Mark & Peter and John & Peter (Penalty and Costs)* [2007] FamCA 1072 about provisions that enable the courts to require persons in breach of orders to enter into a bond.

130. In *Elsbeth & Peter* the Full Family Court drew attention to two oversights in the amendments made by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* relating to less serious contraventions of an order affecting a child. A contravention of such an order is ‘less serious’ where the person has not behaved in a way that showed a serious disregard for his or her obligations under the order, and has not earlier had a sanction imposed for contravening the order.

131. The first oversight concerns the obligation on the court, before requiring the person to enter into the bond, to explain to the person, in language likely to be readily understood, the consequences of failing to enter into the bond. The Full Family Court observed that, unlike the case for serious contraventions, there were no provisions that set out or explained what the consequences might be. To address this, item 24 amends subsection 70NEB(1) of the Act to insert new paragraph 70NEB(1)(da). This proposed paragraph would enable a court, if a person fails without reasonable excuse to enter into a bond as required by a court for a less serious contravention of an order affecting a child, to impose on the person a fine not exceeding 10 penalty units.

132. The second oversight is that there is no mirror provision to section 70NFF of the Act, which sets out the consequences of failing to comply with a bond entered into in relation to a more serious contravention. To address this oversight, item 25 inserts new section 70NECA which sets out, in similar terms to section 70NFF, the consequences of failing to comply with a bond entered into for a less serious contravention of an order affecting a child. The consequences enable a court, where satisfied that the person has failed, without reasonable excuse, to comply with the bond, to impose a fine not exceeding 10 penalty units or to revoke the bond and deal with the person for his or her original contravention in any manner in which he or she could have been dealt with for that contravention if the bond had not been entered into.

133. Section 4AA of the *Crimes Act 1914* (Cth) currently provides that a penalty unit is an amount of \$110.00.

134. Recognising the power to impose fine under paragraphs 70NEB(1)(da) and 70NECA(3)(a) is punitive, item 23 amends subsection 70NAF(3) to require the standard of proof to be reached before a court may make an order under paragraph 70NEB(1)(da) or paragraph 70NECA(3)(a) is for the court to be satisfied beyond reasonable doubt that the grounds for making the order exist.

Item 26: Subsection 70NFF(2)

135. Item 26 corrects a drafting oversight in subsection 70NFF(2), which sets the consequences that arise when the court is satisfied that the person has, without reasonable excuse, failed to comply with a community service order or a bond. Subsection 70NFF(2) operates on the condition ‘if the court (whether or not constituted by the judge or magistrate...) is satisfied’. Given the Federal Magistrates Court’s central role in enforcing parenting orders, it is useful to include a reference to ‘Federal Magistrate’ in subsection 70NFF(2).

Item 27: Section 96AA

136. Item 27 enhances the Family Court’s power to dismiss appeals. The item repeals existing section 96AA and replaces it with a new provision that gives the Family Court power to dismiss an appeal (generally or in relation to a particular ground) where, having regard to the grounds of appeal disclosed in the relevant notice of appeal, the appeal has no reasonable prospect of success (either generally or in relation to a particular ground). The proposed amendment is more in line, but not identical to, similar provisions in other Commonwealth Acts dealing with other federal courts.

137. The amendment will mean that the Court's power to dismiss appeal proceedings is available at times other than, as well as during, the hearing of the appeal. The item also changes the basis on which the Family Court may dismiss an appeal. Currently, the Family Court may only dismiss an appeal where there are no proper grounds of appeal. Under this item, the Family Court will be able to dismiss an appeal if it appears to the court, having regard to the grounds of appeal as disclosed in the notice of appeal, that the notice of appeal has no reasonable prospect of success. That is, the focus of item 27 on the 'prospects of success' would allow the Family Court to dismiss an appeal that is founded on a proper ground of appeal, but which has no reasonable prospect of success.

138. Item 27 will not limit any other powers of the Family Court. For example, the Court's power to order a stay of appeal proceedings would remain even though the express reference to this power will be removed.

Item 28: After section 98

139. Item 28 inserts sections 98AA and 98AB into the Act. Respectively, these new provisions will authorise the categories of people before whom an oath or affirmation may be administered, and an affidavit may be sworn or affirmed, for Family Court purposes. The proposed provisions would be closely aligned to similar provisions in the *Federal Magistrates Act 1999* (see sections 58 and 59 of that Act). However, references to Commissioners of the High Court and the State and Territory Supreme Courts will not be included in proposed section 98AB on the basis that these either have no practical effect or have limited operation. An authorisation given under subsection 98AA(2) or (3) would not be of a legislative character and, as such, would not be a legislative instrument for the purposes of the *Legislative Instruments Act 2003* (Cth).

Item 29: Subsection 112AH(2)

140. Item 29 corrects a drafting oversight in subsection 112AH(2), which sets the consequences that arise when the court is satisfied that a person has, without reasonable excuse, failed to comply with a sentence or community service order. Subsection 112AH (2) operates on the condition 'if the court (whether or not constituted by the judge or magistrate...) is satisfied'. Given the Federal Magistrates Court's central role in enforcing parenting orders, it is useful to include in subsection 112AH(2) a reference to 'Federal Magistrate'.

Item 30: After paragraph 123(1)(ba)

141. Item 30 inserts a new rule making power in to subsection 123(1) of the Act. This item will allow the Family Court to make Rules of Court providing for and in relation to proceedings transferred to the Family Court under section 35A of the Bankruptcy Act.

142. This item is to be read in conjunction with items 1 and 2 of Schedule 2.

Part 2 – Application and transitional provisions

Item 31: Application of amendments made by items 1, 2 and 30

143. Item 31 sets out the application of items 1, 2 and 30 of Schedule 2 which, collectively, will amend the Family Law Act and the *Bankruptcy Act 1966* to allow the Family Court to make Rules of Court providing for and in relation to proceedings transferred under section 35A of the Bankruptcy Act from the Federal Court of Australia to the Family Court of Australia. Item 31 provides that these amendments will apply to all proceedings transferred to the Family Court whether before, on or after the commencement of items 1, 2 and 30 of Schedule 2.

144. After commencement, all new matters and active matters being heard on the basis that the *Federal Court (Bankruptcy) Rules 2005* apply will be dealt with according to new Family Court Rules of Court to be made under revised subsection 123(1) of the Act.

Item 32: Saving of orders and directions under subsections 11F(1) and 62G(5)

145. Item 32 saves any order or direction made under subsections 11F(1) or 62G(5) relating to appointments with family consultants (including any application for such an order or direction), in force immediately before the commencement of items 2 and 15 of Schedule 2, as if it were an order or direction (or an application for an order or application) under subsection 11F(1) or 62G(5) after that commencement.

Item 33: Application of amendment made by item 9

146. Item 33 ensures that the amendments made by item 9 of Schedule 2 apply to all appeals, applications, interventions or reviews referred to in that item whether instituted before, or after the commencement of item 9. This means that a divorce will generally take effect at the expiration of 1 month after any appeal, application, intervention or review is determined or discontinued.

147. Sub-item 33(2) provides that amendments made item 9 of Schedule 2 do not affect any divorce orders that have taken effect before the commencement of that item.

Item 34: Application of amendment made by item 17

148. Item 34 provides that the amendments made by item 17 of Schedule 2, which provide that certain declarations or orders made under Subdivision E of Division 12 of Part VII of the Act (such as parentage testing orders, parentage declarations) are not ‘parenting orders’, will apply in relation to declarations and orders whether made before, on or after the commencement of item 17. This means that any proceedings involving such orders cannot be reversed solely on any earlier characterisation of these orders in accordance with section 64B of the Act in its terms before the commencement of item 17.

Item 35: Application of amendment made by item 22

149. Item 35 provides that the amendment made by item 22 of Schedule 2, which concerns the court’s ability to consider opinions expressed by a family consultant, apply regardless of whether that opinion was expressed before, on or after the commencement of item 22. This means that, after the commencement of item 22, a court may take into account any opinion expressed by a family consultant in child-related proceedings under the Act without the family consultant having given the opinion as sworn evidence.

Item 36: Application of amendments made by items 24, 25 and 26

150. Item 36 sets out the application of items 24, 25 and 26, which relate to new measures relating to the enforcement of bonds.

151. Sub-item 36(1) provides that item 24, which enables the court to impose a fine on a person who has not complied with a requirement to enter a bond in relation to a less serious contraventions, will apply to all orders requiring persons to enter bonds regardless of whether those orders were made before, on or after the commencement of item 24.

152. Sub-item 36(2) provides that item 25, which sets out a procedure for the court to enforce a bond imposed in relation to a less serious contraventions, will apply to all bonds entered into regardless of whether those bonds were entered into before, on or after the commencement of item 25.

153. Sub-item 36(3) provides that item 26, which inserts the words ‘Federal Magistrate’ into subsection 112AH(2), will apply in relation to community service orders or orders requiring persons to enter bonds made before, on or after the commencement of that amendment.

Item 37: Application of amendment made by item 27

154. Sub-item 37(1) provides that the amendment made by item 27 of Schedule 2, relating to the Family Court’s power under section 96AA of the Act to dismiss appeal proceedings, will apply in relation to appeals instituted before, on or after the commencement of that item. Sub-item 37(2) provides that any dismissal or stay of proceedings on an appeal prior to the commencement of item 27 is not affected by the proposed repeal and replacement of section 96AA of the Act.

Item 38: Application of amendment made by item 29

155. Item 38 provides that the amendment made by item 29, which inserts the words ‘Federal Magistrate’ into subsection 112AH(2), will apply in relation to sentences imposed, or orders made before, on or after the commencement of that amendment.