The Family Law Amendment Bill 2023

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The Family Law Amendment Bill 2023 makes important changes to several parts of the Act, many of them sensible and welcome; but the amendments which have attracted the greatest controversy and concern are directed to the core elements of the law on parenting after separation, including substantial changes to the notion of parental responsibility. This paper reviews these changes, which at first sight look like a complete u-turn from policies which were unanimously agreed by a parliamentary inquiry 20 years ago and passed through Parliament with bipartisan support. Yet both the Australian Law Reform Commission, which recommended many of these changes, and the Attorney-General, in his Second Reading Speech, deny that any major change of policy is intended. The main purpose of the reforms, they say, is to make the law less confusing and to eradicate the erroneous impression that parents are entitled to an equal time order after separation.

The continuity in the overall philosophy of Part VII and the importance of both parents in children's lives is further emphasised in the Explanatory Memorandum. This indicates that the Government believes it is important to most children to have 'substantial and significant time' with both parents after separation, despite the Government's decision to eliminate this language from the Act. The Government also thinks, according to the Explanatory Memorandum, that most children need a loving and nurturing relationship with both of their parents, at the same time as it repeals the notion that children need a 'meaningful' relationship with both parents. It also removes from the Act specific references to children's right to know, be cared for and have regular contact with both their parents. There are really no indications from these explanatory materials what outcomes from judicially determined cases the Government thinks should be different as a result of its substantial amendments, or what lines of case law authority should be radically reconsidered.

All then, is not as it appears. The messages of the Bill and its explanatory materials may well create an interpretative challenge for the courts. It will be very important for the Full Court of the Federal Circuit and Family Court of Australia to issue a judgment at the earliest opportunity, as it has done in previous legislative reforms, to clarify the extent to which there has been a policy change. In particular, it needs to explain what aspects of the existing case law cease to be applicable in the new legislative environment beyond changes to the terminology. Without this, the family law system could experience years of confusion and an increased burden of litigation.

The Family Law Amendment Bill: Radical Change or Minor Revision?

Experienced practitioners are used to constant change in the text of the Family Law Act. Barely a year goes by when there are not some amendments, and the vast majority of them are to Part VII on children.

Fiddling with or fine-tuning the text of the Act is a much easier task than grappling with the difficult issues on the ground. Sometimes the importance of the text of the law is exaggerated, especially when it comes to judicial decisions on the parenting arrangements. If the Act required judges only to do the best they could in the circumstances and to make the least detrimental decision possible about the children, the results of most cases would probably not be all that different from now.

Part VII of the FLA seems to get longer each year. It looks like a building which has been extensively renovated and extended over many years, but each time with different architects who have different styles and conflicting objectives in terms of how they want the building to look.

So 2023 brings further change; and it would be understandable if practitioners did not pay close attention to the changes in the Bill on the basis that like so many other amendments to the FLA, it will not alter practice very much on the ground beyond requiring changes of language or "tick-a-box' compliance with new statutory requirements.

That could be a mistake. This legislation, for better or for worse (and no doubt for both) could have very significant implications for legal practice and for the work of the courts, depending on how it is interpreted. It may also have broader societal consequences, reigniting grievances among separated fathers about being marginalised in relation to their children's lives. The Bill, which was first issued as an exposure draft, makes radical changes to the law on parenting after separation, ostensibly in the name of simplification. While some simplification of the law was desirable, the changes go far beyond that, going so far as to repeal aspects of the law that have existed without difficulty or controversy ever since 1995. The major question is what the Government, and through it the Parliament, actually intends by engaging in such wholesale repeal of provisions that have been in the law for decades. The answer to that question is far from clear.

A complete reversal of the 2006 reforms?

What seems apparent enough from the text is that it reverses, in a wholesale way, almost all the changes that were made to the Act following the unanimous report of a parliamentary committee in 2003. This led in due course to the 2006 changes. Those amendments were made after one of the biggest public inquiries in recent history. They passed the Parliament with almost unanimous support, and were amended in only relatively minor ways by a Labor government in 2011 to enhance the focus on the issue of family violence. Curiously though, there are numerous indications in the explanatory materials to the effect that the Government

does not disagree at all with the intentions of the earlier Parliaments and does not really want the law, which it has chosen to repeal, to change at the level of fundamental values or understanding of what is in the best interests of children.

The Full Court of the Family Court, in a landmark judgment delivered within a few months of the commencement of the 2006 reforms, summarised the general intent of the law as follows:[1]

> In our view, it can be fairly said there is a legislative intent evinced in favour of substantial involvement of both parents in their children's lives, both as to parental responsibility and as to time spent with the children, subject to the need to protect children from harm, from abuse and family violence and provided it is in their best interests and reasonably practicable.

Does this remain true of the law as it will be following the enactment of the *Family Law Amendment Bill* 2023?

Are two parents important to children after parental separation?

The case for saying that the Bill involves radical change arises from the fact that the Bill essentially removes from the Act almost every single reference to the importance of both parents being involved in children's lives after separation. Instead, courts will be required to consider the benefit to children of a relationship with their other parent "only where it is safe to do so". There is no longer a requirement that whatever relationship the court chooses to preserve need be 'meaningful'. Gone also will be the legislative provision that says that children have a right to know and be cared for by both their parents and to spend time on a regular basis with both parents and others significant to them, except when it would be contrary to their best interests. Gone also will be any presumption that both parents should have equal parental responsibility, even in cases where there is no violence or abuse, or that parents need to consult with one another about major long-term issues unless a court makes a specific order to that effect.

The Bill erases from the text of the law almost every indication that non-resident parents and grandparents are important to children's lives and therefore that the preservation of a close relationship with them, so far as is possible in the circumstances and subject to concerns about violence or abuse, is presumptively in children's best interests. This represents a reversal of almost everything agreed in family policy over the last thirty years. It also flies in the face of overwhelming research evidence[2] and an international consensus, at least in Western countries, about the importance to children of maintaining the involvement of both parents in their lives

[1] *Goode & Goode* (2006) FLC 93-286 at [72].

[2] For useful summaries, see J Kelly and R Emery, "Children's Adjustment Following Divorce: Risk and Resilience Perspectives" (2003) 52 Family Relations 352; J Kelly, "Developing Beneficial Parenting Plan Models for Children Following Separation and Divorce" (2005) 19 *Journal of the American Academy of Matrimonial Lawyers* 237. On parental conflict and children's wellbeing after separation, see N Mahrer et al, "Does Shared Parenting Help or Hurt Children in High-Conflict Divorced Families?" (2018) 59 *Journal of Divorce and Remarriage* 324

after separation in the absence of serious and ongoing issues concerning family violence, child abuse or parental incapacity.[3]

The question, which I will address towards the end of this paper, is whether in fact the Government intends such a radical reversal of social policy. The preponderance of the evidence is that it does not, raising significant problems in terms of the "intentions of Parliament". The difficult task of the courts will be to discern those intentions from the text of the Act and explanatory materials (which can be referred to, given all the ambiguities and uncertainties about what the text intends to bring about). Arguably, in the absence of a clearly stated intent to change the law, the courts are entitled to conclude that the Parliament has simply provided a different legislative formulation of the same basic philosophy and understanding of what is in the best interests of most children.

It is first necessary to summarise the changes.

Summary of the changes

The major effects of this part of the Bill are:

- To replace the objects and to remove the principles underlying the application of Part VII;
- To abolish the presumption of equal shared parental responsibility
- to make changes to the requirements for parents, who both have parental responsibility, to consult with one another about major long-term issues;
- to reduce substantially the number of factors the court should consider in determining the best interests of the child;
- to abolish any need to consider a shared parenting arrangement.

Objects and principles

The objects and principles in Part VII of the Act will be deleted, and replaced with two rather banal statements concerning the purposes of this Part of the Act:

> The objects of this Part are:
>
> (a) to ensure that the best interests of children are met, including by ensuring their safety; and
>
> (b) to give effect to the Convention on the Rights of the Child done at New York on 20 November 1989.

It is important to observe what the legislation repeals. The following objects and principles will be deleted:

[3] For a review of that international consensus, see Parkinson, P., *Family Law and the Indissolubility of Parenthood* (Cambridge UP, New York, 2011).

- To ensure that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the child's best interests
- That children have the right to know and be cared for by both their parents;
- That children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives); and
- That parents jointly share duties and responsibilities concerning the care, welfare and development of their children
- That parents should agree about the future parenting of their children.

These are all statements currently contained in s.60B of the Act which sets out the objects and principles for parenting after separation, subject to the overriding principle that the best interests of the child are the paramount consideration. The deletions remove statements concerning the rights of children which have stood in the law, without controversy, for over 27 years. These are replaced by a generic reference to the Convention on the Rights of the Child which offers nothing by way of specific guidance on how those rights apply in the context of parenting after separation.

No coherent case has been made for the abolition of the objects and principles, as the ALRC proposed, or the runt that is left of them in the Bill. In the discussion paper, the ALRC proposed to rewrite them but not to remove them. In its final report it recommended removing them, but not because the members of the Commission didn't believe the objects and principles properly expressed what should be the underlying values and principles of Part VII of the Act. No, they gave a technocratic reason. Noting, at 5.35, "the similarity between the principles and the best interests factors, and the limited legal effect of the principles, the ALRC considers that removal of the objects and principles would reduce confusion and enhance the clarity of Pt VII."

Under the new Bill, there is actually little or no overlap between the objects and principles, as currently contained in s.60B and the best interests factors in the revised s.60CC, other than to emphasise the importance of protection from violence and abuse.

The lack of guidance on principles for settling cases

The justifications offered for the replacement of the objects and principles fail to take into account the role of such objects and principles for giving a sense of purpose to the family law system, insofar as it deals with parenting after separation, rather than just what the judges do. Legally, objects and principles play quite a residual role; but this is to forget their wider purpose in setting out norms and values for lawyers, mediators, family consultants and others in the community who seek to resolve disputes without the need for a trial. Objects and principles also offer the primary guide to the intentions of Parliament for this Part of the Act. They therefore have a residual, but not insignificant, interpretative role.

Law is not written only for judges to decide cases. Legislation must speak beyond the judges to the community at large, providing norms to help parents and their advisers settle disputes,

rather than just listing factors for judges to consider in the small number of cases which require a judicial resolution. Appropriately framed guidance in legislation may help parents to resolve post-separation parenting arrangements more easily by establishing principles and norms which can help shape the way people view what it means for parents to live apart.

The ALRC prefaced its proposals for reform by acknowledging that legislation in such a sensitive and difficult area needed to speak to a diverse range of audiences. Specifically, the Commission wrote:

> [T]he legislative framework needs to support agreement making and decision making in a variety of contexts and for families with diverse needs. Court-based decision making applies to the smallest volume of families in each annual cohort, but these families also have the highest concentrations of complex psycho-social needs. Such families are also present in all the other formal and informal pathways identified by AIFS in lesser concentrations.
>
> The legislation needs to provide a decision making framework for judicial decision making, and a guide for parenting decisions made outside the court. In doing so, the aim should always be that any decisions should safeguard the best interests of the child.

In similar vein, the Attorney-General in his Second Reading Speech said:

> [M]ost separated Australian couples are able to settle their own arrangements outside of the family law system, and co-parent successfully. Research by the Australian Institute of Family Studies has found that only three per cent of separating families have their parenting arrangements determined by a court. The parenting provisions in the Family Law Act must therefore serve as a guide to those negotiating their own arrangements, as well as judicial decision-makers.

The difficulty is that the Government proposes to remove almost all normative guidance which is currently in the Act, and which has informed negotiations for so many parents who, to a greater or lesser extent, have 'bargained in the shadow of the law' without needing to go to trial.

Parental responsibility

Legal practitioners, mediators, and family consultants will all need to be aware of significant changes being made by this Bill to the law concerning parental responsibility.

Parental responsibility is defined in the current law as "all the duties, powers, responsibilities and authority which, by law, parents have in relation to children": s.61B. Both parents retain that responsibility in the absence of a court order: s.61C. That position will remain under the law as it is to be amended. It has been the position ever since 1975, when the law said:

> 61. (1) Subject to any order of a court for the time being in force, each of the parties to a marriage is a guardian of any child of the marriage who has not attained the age of 18 years and those parties have the joint custody of the child.

The reference here is to what Americans call 'joint legal custody', not 'joint physical custody'.

However, the Bill abolishes the presumption of equal shared parental responsibility and replaces it with a provision to the effect that if the Court chooses to make an order concerning the allocation of responsibility for making decisions about major long term issues in relation to the child, it may provide for joint or sole decision making. It can do so in relation to all or specified major long term issues.

What are the implications of these changes?

If there is a court order about decision-making

If there is a court order for joint decision making in relation to all or specified major long term issues, then the law is substantively unchanged. Secs. 61DAA and 61DAB explain the effect of this, which is similar to the current position in relation to equal shared parental responsibility:

> 61DAA Effect of parenting order that provides for joint decision making about major long term issues
>
> (1) If a parenting order provides for joint decision making by persons in relation to all or specified major long term issues in relation to a child, the order is taken to require each of the persons:
>
> (a) to consult each other person in relation to each such decision; and
>
> (b) to make a genuine effort to come to a joint decision.
>
> (2) To avoid doubt, this section does not require any other person to establish, before acting on a decision about the child communicated by one of those persons, that the decision has been made jointly.
>
> 61DAB No need to consult on issues that are not major long term issues
>
> (1) If a child is spending time with a person at a particular time under a parenting order, the order is taken not to require the person to consult a person who:
>
> (a) has parental responsibility for the child; or
>
> (b) shares parental responsibility for the child with another person;
>
> about decisions that are made in relation to the child during that time on issues that are not major long term issues.
>
> Note: This will mean that the person with whom the child is spending time will usually not need to consult on decisions about such things as what the child eats or wears because these are usually not major long term issues.
>
> (2) Subsection (1) applies subject to any provision to the contrary made by a parenting order.

When there is no court order about decision-making

However, what if there is no order for joint decision-making, or for sole decision-making, for that matter? What if there are no orders at all? This will be very common for parents who have lived apart from before the child's birth, those who have separated but come to parenting arrangements amicably, those who have parenting plans drawn up with assistance from a mediator, and those who do not have established and regular parenting arrangements. Since 1975, the law has been that both parents retain equal parental responsibility for the child, or 'joint custody', as the original drafters of the Act in the Whitlam government put it.

For all these people, the Family Law Amendment Bill changes the law quite significantly and with retrospective effect to alter the position of parents who separated many years ago. If there are no orders made about parental responsibility at all, then the default position is that both parents in principle retain the parental responsibility that they have held ever since the child was born: s.61C. Either of them can give consents that parents are required to give, for example to allow the child to go on a school excursion or to consent to most kinds of medical treatment.[4]

Under the current law, in addition to the right of either parent to exercise parental responsibility separately, the parents have a legal duty to consult on major long-term issues. This is not written into the legislation specifically in application to those who do not have an order for equal shared parental responsibility, but it arises from the case law on the 1995 reforms to the Act. It is also a commonsense interpretation of what it means for two parents to have "joint custody" (as in 1975) or joint parental responsibility. If, as the Whitlam era drafters put it, the parents have joint custody, then it is not open to the mother to act as if she has sole custody without any consultation with the father even on the most important long-term issues.

The leading case on the 1995 reforms was *B and B: Family Law Reform Act 1995*,[5] a decision of the Full Court led by the then Chief Justice Nicholson. It was a very important case in which the Attorney-General of the day, Daryl Williams QC, chose to appear personally as intervenor to argue for the Government's understanding of the law.

On the issue of parental responsibility, the Court said the following (at 9.27-9.30):

> An important issue is whether parents may exercise this responsibility independently or whether they must do so jointly… Section 60B(2)(c) and (d) respectively refer to parents sharing duties and responsibilities and agreeing about the future parenting of their children. Section 61C bestows parental responsibility on each parent, in the absence of a court order to the contrary. Section 64B(6) enables the Court to make a joint specific issues order.
>
> In the absence of a specific issues order, we think it unlikely that the Parliament intended that separated parents could only exercise all or any of their powers or discharge all or any

[4] Some medical treatment requires both parents' consent: *Re Kelvin* [2017] FLC ¶93-809; *Re Imogen (no 6)* [2020] FamCA 761). Some requires court approval: *Secretary, Department of Health and Community Services v JWB* (1992) 175 CLR 218.

[5] [1997] FamCA 33.

> of their parenting responsibilities jointly in relation to all matters. This is never the case when parents are living together in relation to day to day matters, and the impracticability of such a requirement when they are living separately only has to be stated to be appreciated.
>
> As a matter of practical necessity either the resident parent or the contact parent will have to make individual decisions about such matters when they have the sole physical care of the children. On the other hand, consultation should obviously occur between the parents in relation to major issues affecting the children such as major surgery, place of education, religion and the like. We believe that this accords with the intention of the legislation.

This is the origin, in the case law, of the idea that parents who both have parental responsibility need to consult on major issues. To describe it as a legal duty is not to say that it is an enforceable obligation in the same way as say, an order that a child spend time with a parent every other weekend. It is an obligation without a remedy for breach. However, bad behaviour in relation to parental responsibility could be adduced as evidence and used against that parent if there were subsequent litigation about parenting arrangements, although if there were issues about safety or practicability (for example, the other parent is incapacitated by addiction or mental illness), no criticism would be made by the court of a parent who flew solo when making major decisions. So the duty to consult is a 'soft' obligation, but one with normative effect.

The duty to consult was enshrined in legislation in 2006 to define what "equal shared parental responsibility" means in practice. That meaning is retained in the new Bill if a court makes an order that parents have joint decision-making responsibility. However, the Bill abolishes this duty to consult on major issues if there are no court orders about decision-making in place. If all the parents have is an informal agreement, or a mediator-assisted parenting plan, the non-resident parent has no right to be consulted on even major issues affecting his or her children's lives.

This is for two reasons. First, the Bill repeals the two principles on which this interpretation of the meaning of joint parental responsibility rests in the current law. These are s. 60B(2)(c) and (d), as quoted in the passage from *B v B* above, which refer to parents sharing duties and responsibilities and agreeing about the future parenting of their children. Secondly, the Bill introduces a new s.61CA to the Act which is specific in saying there is no legal duty on one parent to consult the other parent even on the most important long-term issues in a child's life:

61CA Consultation between parents on major long-term issues

> If it is safe to do so, and subject to any court orders, the parents of a child who is not yet 18 are encouraged:
>
> (a) to consult each other about major long-term issues in relation to the child; and
>
> (b) in doing so, to have regard to the best interests of the child as the paramount consideration.

Parents are just 'encouraged' to consult with each other about major long-term issues, and even this is qualified by saying "if it is safe to do so" – a matter of perception for the parent deciding

whether to consult. The popular notion now of 'psychological safety' gives an expanded scope for when a parent might justify not doing one thing or another because it is not 'safe'.

This legislative 'encouragement' to consult is redundant and without legal effect. It is an oddity of drafting (also evident, for example in s.63B) based upon a view that legislation can be a means of moral exhortation.

Under the new Bill, the involvement of the non-resident parent in making decisions about major long-term issues will be almost entirely at the discretion of the parent with primary care. She can choose whether she should respond to the Parliament's encouragement to consult with the other parent. She is entirely within her rights to keep him completely in the dark and to consult him on nothing at all. That is, although he has the same level of parental responsibility as her, she can in practice operate as a single parent without reference to him, except for the purposes of facilitating the children spending time with him in accordance with whatever parenting arrangements they have agreed. In practical terms, if not in theory, she can operate as if she has sole custody.

Section 61CA, which has the effect of abolishing the duty to consult, will apply from the day this item commences, that is on proclamation or in any event within six months of the Royal Assent. Since it defines the law in the absence of court orders, it will have retrospective effect in defining the rights and obligations of parents whenever they separated, even if it was many years ago, if they do not have orders for equal shared parental responsibility. Parliament ought to be made aware specifically of proposed amendments that alter people's rights with retrospective effect.

It would appear that this huge change to the law is intended. The Second Reading Speech again:

> Many stakeholders consulted on the bill have also expressed concern that continuing requirements for parents to share decision-making for their children have provided avenues for high levels of conflict and coercive control.
>
> Where parents can safely consult on major long-term issues for their children, the legislation will encourage parents to do so and to focus on outcomes that will be in the best interests of the children. The legislation will make clear the orders that can be formulated in relation to parental decision-making on major long-term issues.

It is apparent then that the Government intends to alter the law concerning joint parental responsibility for the vast majority of separating families who do not need to have their parenting arrangements determined by a court and who otherwise can manage without court orders.

The difference between basic and enhanced parental responsibility

So if the Bill passes in its current form, there will be two levels of joint parental responsibility – basic and enhanced. Basic parental responsibility is what separated parents will have if there are no court orders made at all, or at least none in relation to decision-making. In a situation, still by far the most common, where there is one primary caregiver and the other spends time

with the children mainly on alternate weekends (if living close enough) and during school holidays, the non-resident parent will in practice have very few parental rights. The primary caregiver can make all the major decisions about the children's lives without informing the non-resident parent or consulting him.

Parents will be under no duty to consult with one another even where there is an equal time arrangement. This is unworkable in practice.

If, however, there is an Order for joint decision-making, then the primary caregiver will have a duty to consult the non-resident parent on major long-term issues, and the duty to consult necessarily implies a duty to inform him about issues that may require decision, such as elective surgery.

Consequences for lawyers, mediators and the courts

This has some significant consequences for legal practice and for the work of mediators and family consultants. It may also have some substantial workload implications for the courts.

The first consequence is that there could well be arguments about parental responsibility and decision-making that do not arise under the existing law and which could well greatly increase conflict. The problem with this part of the Bill can be seen through the lens of, respectively, a primary caregiver who is emotionally bruised by the breakdown of the relationship and wants to secure a substantial degree of autonomy for herself as primary parent; and conversely, the non-resident parent who wants to retain an active involvement in his children's lives, and certainly to be involved in major decisions that affect them.

Legally advised, the primary caregiver will want to advocate for one of two options in a mediation or other negotiation. The first is that the parenting arrangements be agreed informally or documented in a parenting plan, with the consequence that she is, in practice, in the box seat when it comes to making all decisions about the children's lives. The father need not be consulted or informed. This option gives the father only basic parental responsibility.

The second option is that she seeks a court order that gives her sole decision-making authority on all issues, or all issues except certain named matters where decision-making should be joint. An order for sole decision-making still leaves the father with rights to make decisions about the children when they are spending time with him – for example giving consent to stitches being inserted in the event the child needs them following an injury (s.61DAB, inserted by the Bill). However, beyond this she is in the box seat, just like in option 1.

For the father, the position is clear. He *must* seek court orders for joint decision-making. No responsible legal adviser could recommend that the father accepts a handshake agreement, however amicable matters may currently be. Circumstances change. The primary caregiver may want to move away a long-distance or come to resent the father's new partner. Amicable arrangements can turn sour long after the separation. Disputes can arise about all sorts of matters.

Under the present law, parental responsibility is, in most cases, not in issue. If the parents enshrine their agreement in court orders, they will readily be able to agree on equal shared parental responsibility unless there are issues that go to rebut the presumption contained currently in s.61DA of the Act.

However, given a father will need now to get court orders once the Bill is passed, the issue arises what those orders will be. There is no default option. There will be no presumption in favour of shared parental responsibility. The law presents the court, and therefore the parents and their advisers, with a variety of possibilities on decision-making responsibility – all joint, all single, or a mixture of some matters being for sole decision-making while others are joint. That is a whole new set of issues to argue about, and they may well have to be argued about because the issue of decision-making authority must be resolved by some kind of court order.

The second implication is that there will be far more demand upon the court to make orders about parental responsibility in circumstances where otherwise the parties are not in dispute. If a parent is going to need at least one court order, then he or she might as well seek a whole suite of orders concerning the parenting arrangements. Some of these applications for consent orders will be filed by unrepresented litigants. The burden on the courts to process consent orders could well be substantially increased as a result. This is not a trivial impost. The AIFS research on the 2006 amendments, involving interviews with 10,000 participants who had recently separated, showed that most parents resolve their parenting arrangements without lawyers or family dispute resolution practitioners. If the Bill in its current form goes through, the culture is likely to change because fathers will learn, from friends or relatives, from the media or elsewhere, that they will need to have enhanced joint parental responsibility to retain their position as an equally responsible parent after separation.

Requiring parents to approach the court when there is no substantive conflict to resolve is a very retrograde step. This reverses thirty years of public policy in which the focus has been on trying to get parents to resolve issues without the need for lawyers and court orders unless the level of disputation and distrust makes orders necessary.

Thirdly, and following from the second implication, parenting plans are likely not to be a viable option for fomalising parenting arrangements any more, despite the fact that this is a very common practice for mediators currently. A lawyer who fails to advise the non-resident parent about the difference in practice between basic and enhanced parental responsibility, and the inadequacy of formalising the agreement by way of a parenting plan, could be exposed to a claim of negligence. It will become standard practice for all lawyers to advise their clients to seek court orders about this aspect of the parental arrangements even if there are no parenting issues otherwise in dispute.

Mediators and family consultants will probably not be in a different position. No family dispute resolution professional could responsibly fail to inform the parents of the reasons why for at least one of them, it is highly desirable to get court orders about decision-making.

The fourth implication is for the workload of family consultants and publicly funded mediators in the Family Relationship Centres. There will be a substantial impact upon the conciliation work of the mediators and family consultants if issues that currently are not disputed become matters on which agreements, involving a smorgasbord of possibilities, have to be forged.

These are substantial consequences. The proposed s.61CA was not included in the Exposure Draft and has therefore not been a matter for consultation with the legal profession or academic experts.

The duty to consider some form of shared parenting

The Bill abolishes any duty on the court to consider shared parenting, either in the form of an equal time arrangement or one for substantial and significant time (s.65DAA). Also abolished is the duty on mediators and other advisers to raise this option.

The background to s.65DAA (and other provisions of Part VII which will now be repealed) is that the parliamentary inquiry in 2003 rejected any presumption that children should spend equal time with each parent. However, the Committee considered that "the goal for the majority of families should be one of equality of care and responsibility along with substantially shared parenting time".[6]

The Bill, if enacted, will remove all traces of this as a policy objective.

The s.60CC factors

The Bill adopts a greatly reduced list of factors in the name of simplification. The revised factors are:

> The court must consider the following matters:
>
> (a) what arrangements would promote the safety (including safety from family violence, abuse, neglect, or other harm) of:
>
> (i) the child; and
>
> (ii) each person who has care of the child (whether or not a person has parental responsibility for the child);
>
> (b) any views expressed by the child;
>
> (c) the developmental, psychological, emotional and cultural needs of the child;
>
> (d) the capacity of each person who has or is proposed to have parental responsibility for the child to provide for the child's developmental, psychological, emotional and cultural needs;
>
> (e) the benefit to the child of being able to have a relationship with the child's parents, and other people who are significant to the child, where it is safe to do so;

[6] Ibid, p.30.

(f) anything else that is relevant to the particular circumstances of the child.

Gone is the requirement for the court to consider the benefit to the child of having a meaningful relationship with both of the child's parents. Instead, the last of the specific factors (consideration (e)) is 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". There is no hierarchy of factors in the new s.60CC and so the order in which the factors are listed is of no legal significance; but the messaging of taking a factor that was first and stated to be as primary consideration in the current law, and then placing it both last and in a much reduced and contingent version, will to some seem unmistakeable.

No longer a 'meaningful' relationship

Section 60CC(2)(a) currently provides:

the benefit to the child of having a meaningful relationship with both of the child's parents;

Under the terms of the Bill, no longer does the Court have to consider a 'meaningful' relationship with the non-resident parent.

Does this mean that Parliament is deemed to hold the view that a child from 2023 onwards, does not need a meaningful relationship with the non-resident parent? Is any sort of relationship the most that the law should aspire to? This can be a significant issue in relocation cases.

A court interpreting the new provisions might well reach the conclusion that the Parliament did not intend for the non-resident parents' relationship with their children to be downgraded in importance to such an extent. This is because the origins of the amendment lie in the ALRC's recommendation to drop the word, and it did not express the view that relationships with fathers are relatively unimportant. Surprisingly, its recommendation was based upon a rather basic error of law. The ALRC justified the deletion of 'meaningful' with the claim that in the current law there is a "presumption that a relationship with a parent is necessarily in the child's interest" (5.61). This is plainly wrong. The term has been interpreted by the Full Court in numerous cases. The leading case is *McCall & Clark*.[7] The Full Court said:

> It appears to us that there are three possible interpretations of s 60CC(2)(a):
>
> (a) one interpretation is that the legislation requires a court to consider the benefit to the child of having a meaningful relationship with both of the child's parents by examination of evidence of the nature of the child's relationship at the date of the hearing, to make findings based on that evidence, which findings will be reflected in the orders ultimately made ("the present relationship approach");

[7] (2009) FLC 93-405.

> (b) a second interpretation is that the legislature intended that a court should assume that there is a benefit to all children in having a meaningful relationship with both of their parents ("the presumption approach"); and
>
> (c) the third interpretation is that the court should consider and weigh the evidence at the date of the hearing and determine how, if it is in a child's best interests, orders can be framed to ensure the particular child has a meaningful relationship with both parents ("the prospective approach").
>
> We conclude that the preferred interpretation of benefit to a child of a meaningful relationship in s 60CC(2)(a) is "the prospective approach" although, depending upon factual circumstances, the present relationship approach may also be relevant. We note however that s 60CC(3)(b) requires a court to explore existing relationships between a child and his or her parents and other persons, including grandparents. If the interpretation we have set out in (a) above were exclusively applied, that interpretation would limit a court making appropriate orders in circumstances where a significant relationship had not been established between a child and a parent at the date of trial.
>
> We reject the interpretation in sub-paragraph (b). In our view if the legislature intended to elevate the benefit to a child of a meaningful relationship to a presumption it would have said so in clear and unambiguous language. (emphasis added).

So, contrary to the ALRC's report, there is no "presumption that a relationship with a parent is necessarily in the child's interest even when the child has had no relationship with the parent to that point."[8] This was no doubt an error overlooked by the Commissioners in their rush to finish a massive report in very difficult circumstances.

Since the rationale for the change was just a misunderstanding of the law, the Full Court of the FCFCOA is entitled to draw the conclusion that Parliament does not intend to give any significance to the deletion of the word 'meaningful' if the Bill is passed in its current form. It does not intend to change the law on the importance that the Court should place on the meaningful involvement of non-resident parents in their children's lives in the absence of violence, abuse or other disqualifying factors.

"Where it is safe to do so"

Former Family Court judge the Hon. Richard Chisholm has pointed out another issue with the text as it stands. If the Court is only required to consider the benefit to the child of a relationship with the other parent or grandparents "where it is safe to do so", then where is the onus of proof? If there is no evidence at all about safety matters, or if the evidence is evenly balanced,

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[8] The ALRC's other explanation (at 5.61) was that: "As compared with the existing s 60CC(2A), the recommended wording reflects that there are other meaningful relationships that may be relevant considerations. For example, relationships with grandparents or siblings may be particularly relevant in some cases." It is certainly sensible to retain in the Act some acknowledgement of children's right to maintain relationships with people significant to them, not just their parents. Grandparents are a prime example, and this can be an issue in relocation cases, for example. However, the word 'meaningful' could have been kept while also making reference to relationships with significant others.

what is the court to do? On one reading, if the court cannot be affirmatively satisfied that it is safe for the other parent to be involved in the child's life, the court does not need to consider the benefits from that parental relationship.

The point Dr Chisholm makes is particularly important in interim proceedings, when evidence about risks to safety may be contested, or as is so often the case, both parents make allegations against each other. Courts cannot resolve such disputed issues of fact in a brief interim hearing.

As Dr Chisholm points out, the current wording of the Bill on this aspect may be contrasted with a formulation such as "unless it is unsafe to do so", which would be much clearer.

Interpreting the purpose of reform

Whenever one is interpreting an amended law, one of the first questions to ask is why was the law changed? Or in the old language, what was the 'mischief' that the amendment sought to address? When Parliament makes an amendment, the lawyer's assumption has to be that it had a reason to do so, and to try to identify that reason.

With this Bill, that could be rather difficult, beyond generally having a purpose of simplification, which the Government may not end up achieving in the short to medium term.

Simplification or renewed complexity?

A major objective of this Bill, according to the Second Reading Speech, the Explanatory Memorandum (EM), and the most important of the travaux preparatoires (the ALRC report) is to reduce complexity and to simplify the law. The EM (p.3) provides this overview:

> Schedule 1 of the Bill contains significant amendments to streamline the legislative framework for making parenting orders, including changes to the section which covers the factors to be considered when making parenting arrangements in the best interests of the child.

So the purpose is mainly to 'streamline' the law. Such sentiments are scattered throughout the EM. For example, on p.6 it says:

> The Bill will reduce complexity and increase focus on the best interests of children by removing the existing two-tier structure of 'primary' and 'additional' considerations and focusing on a core list of considerations that are likely to be relevant in a majority of matters.

In similar vein, the Second Reading Speech says:

> The bill makes a number of amendments to make it easier to understand the issues to be considered when determining parenting arrangements in the best interests of the child.

Of course, textual changes may make some difference to the work of the courts. If the Act is a little more readable, even a little shorter, all to the good.

That said, there is a cost to textual amendments. The cost, when changes are made to sections that the courts use every day, such as s.60CC, is that the law becomes unsettled. Ten years or

more of precedents may no longer be applicable. Whether or not they are applicable may itself be an issue on which lawyers and judges cannot agree, necessitating appeals on the applicable law. The Full Court of the Family Court has a long-standing problem of inconsistency between differently constituted three member benches on the interpretation of the law, so an authoritative five member court may need to be empanelled early on to try to provide clarity. It is not unlikely that the High Court will need to settle the law afresh on a range of different matters. However, it takes time and money to litigate these issues up to the Full Court or the High Court. The costs are borne by litigants who can ill-afford it at a time of financial distress for so many. It is also borne by judges who must take more time to get their judgments legally 'right' than when the law was settled.

In the meantime, lawyers are less able to advise on what the law means and how it will be applied in practice, and the mother's lawyer may well have a different 'take' on the law from the father's lawyer. Litigation increases, not decreases. Disputes become harder to resolve, not easier. Eventually, the appellate courts provide authoritative interpretations of the new sections (or at least they might do – sometimes they refuse to provide any guidance about how trial judges should exercise their broad discretion).

It is far from clear at this point, that the Bill will make the law less confusing and more simple. It could take several years before we will all understand what impact this Bill is meant to have on the pre-existing law.

Clarification or major change in philosophy?

It is far from clear whether the Government just intends a little clarification or simplification, or a revolution in the law on parenting arrangements. There can be little doubt that a major impetus for these changes has been the advocacy of women's groups who have long been critical of any emphasis, however mild, on the involvement of both parents in children's lives after separation, unless this is something the mother agrees to. This goes back to the 1995 amendments, which in the view of some, were highly undesirable changes to the law,[9] although they were very similar in most respects to the highly regarded Children Act 1989 in England and Wales.[10] More detached and experienced observers thought the changes in 1995 were largely symbolic and exhortatory.[11] The criticisms of the law only increased in volume after 2006 and were little assuaged by the Labor Government's amendments in 2011. The arguments

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[9] Helen Rhoades, Regina Graycar & Margaret Harrison, *The Family Law Reform Act: The First Three Years, Final Report*. Sydney: University of Sydney and the Family Court of Australia; Regina Graycar, 'Law reform by frozen chook: Family law reform for the new millennium?' (2000) 24 *Melbourne University Law Review* 737; Helen Rhoades, 'The rise and rise of shared parenting laws' (2002) 19 *Canadian Journal of Family Law* 75; Susan Armstrong, 'We told you so …' Women's legal groups and the Family Law Reform Act 1995, (2001) 15 *Australian J. Fam. L.* 129.

[10] John Dewar, 'The Family Law Reform Act 1995 (Cth) and the Children Act 1989 (UK) Compared – Twins or Distant Cousins?', (1996) 10 *Australian J. Fam. L.* 18.

[11] Richard Chisholm, 'Assessing the impact of the Family Law Reform Act 1995', (1996) 10 Australian J. Fam. L. 177.

that were presented after 2006[12] are echoed in the Second Reading Speech, notwithstanding all the changes to the law since then.

However, there are numerous factors that would allow a court to conclude that the Parliament does not intend radical change to the post-2006 law despite the fact that it is throwing out almost every change enacted then. Clearly it is replacing the 2006 reforms with a 'safety first' emphasis; but that could also be said of the amendments made in 2011, which introduced a more comprehensive definition of family violence and made it plain that safety was the priority amongst the primary considerations in determining the best interests of the child.

The continuing relevance of the Convention

The first factor pointing to a parliamentary intent for continuity in the application of the law is that it continues to be an object of Part VII for the Court to implement the UN Convention on the Rights of the Child. While the EM emphasises that a major application of this is to "ensure the views of children are appropriately heard and considered in family law proceedings",[13] the longer treatment of the human rights implications of the Bill in the EM does reference other provisions of the Convention as well.

Article 9.3 of the Convention states:

> States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

This is reflected in the language of the principles that, curiously, the Government now wishes to repeal in s.60B(2)(a) and (b):

> (a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and
>
> (b) children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives).

There doesn't seem to be anything of significance in the Second Reading Speech or the EM that suggests the Government does not wish the law to reflect these principles. On the contrary, the Attorney-General said in his Second Reading Speech:

> The government recognises that, for most children, it is strongly in their best interests to have a loving and nurturing relationship with both parents after separation.

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[12] See e.g. Zoe Rathus, 'Shifting the Gaze: Will Past Violence Be Silenced by a Further Shift of the Gaze to the Future Under the New Family Law System?', (2007) 21 *Australian J. Fam. L.* 87; Tracey de Simone, 'The Friendly Parent Provisions in Australian Family Law – How Friendly Will You Need to Be?", (2008) 22 *Australian J. Fam. L.* 56.

[13] Explanatory Memorandum, p.2.

It is a basic principle of statutory interpretation that the Parliament should not be taken to intend to deprive people of their human rights without clear legislative words. So it is reasonable to assume that the Government does not intend, in this Bill, to deprive children of their "right to spend time on a regular basis with, and communicate on a regular basis with, both their parents" subject to their best interests, notwithstanding the deletion of this right from the Act.

A close and nurturing relationship

It also seems that the Government wants the law to stay the same on the importance of both parents where there are no significant safety issues. This is far from clear in the Bill; but the EM states (p.22):

> Where appropriate and safe, parenting orders that ensure children benefit from a close and nurturing relationship with their parents should be made.

So 'close and nurturing', or 'loving and nurturing', replace 'meaningful' – just not in the Act.

Substantial and significant time with each parent

The Government seeks to abolish the part of the Act which requires courts to consider parenting arrangements that will give non-resident parents substantial and significant time with their children, and it will no longer be a duty on advisers to explore this either. Notwithstanding this, the EM states (p.22):

> No one particular arrangement will work for all children or all families, whose needs are diverse and will change over time. However, where safe and appropriate, most children benefit from spending time with their parents not only at the weekends and in school holidays, but also during the school week, and will also benefit from allowing each parent to be involved in the child's daily routine and occasions and events that are of particular significance to the child.

In other words, the Government does not intend for Parliament to take a different view of what is in the best interests of most children from the view it took in 2006 and 2011. It is just a little surprising that it has chosen not to say so in the text of the Act, and instead to repeal provisions that provided a soft impetus for courts and advisers to turn their minds to the possible benefits of these arrangements.

Equal time arrangements

In similar vein, the EM states (p.28):

> The court can continue to make orders for equal time or substantial and significant time in the event that it determines that arrangement is in the best interests of the child, however there is no requirement to consider these arrangements if they would not be suitable.

The importance of grandparents

There is no indication from the travaux preparatoires or any of the other authoritative sources of interpretation, that the Parliament intends to downgrade the significance of grandparents. This is an effect of abolishing the principles in s.60B, since the generic reference to the Convention does not provide nearly as much support for their important role as the s.60B focus

on the child's right to enjoy relationships with "other people significant to their care, welfare and development (such as grandparents and other relatives)". Grandparents still factor into s.60CC at least "where it is safe to do so".

It doesn't seem that the Government turned its mind to the impact of repealing the current s.60B principles on grandparents.

The best interests of the child really are paramount

According to the Second Reading Speech and the EM, one of the major purposes of the Bill is to resolve a problem that no-one in the country has ever previously identified as a problem. The Attorney-General said in his Second Reading Speech:

> The existing objects and principles of part VII, in section 60B, are often misunderstood to be legally binding, and contain significant overlap with the best-interests factors. The bill replaces these with a much shorter objects clause to make clear that children's best interests are the most important consideration in making decisions about parenting arrangements, including their safety.

It is a little surprising that the Government should claim that the objects and principles, as enacted currently, cause any confusion about whether children's best interests are the most important consideration in making decisions about parenting arrangements. It is difficult to imagine where it got such a strange idea. Section 60B, in the current Act, begins as follows:

> The objects of this Part are to ensure that the best interests of children are met by:…

Section 60CA is also abundantly clear:

> In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.

There is not a family lawyer in the country who does not know that the best interests of the child are the paramount consideration in parenting cases. That has been the law for almost a century.[14] Family lawyers convey this routinely to clients, as do mediators, family consultants and other such professionals involved with families. There has never been a scintilla of doubt or confusion on this.

What the Bill does want to do is extend the *application* of the best interests principle a little. Here is a passage from p.8 of the EM:

> The Bill also expressly recognises and strengthens the paramountcy of the best interests of children in family law parenting proceedings by:

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[14] It became the law first in England in 1925, and Australian state jurisdictions followed. See also *Matrimonial Causes Act 1959* (Cth) s.85(1): In proceedings with respect to the custody, guardianship, welfare, advancement or education of children of children of a marriage: (a) the court shall regard the interests of the children as the paramount consideration."

• specifying that, in proceedings where the best interests of children are paramount, the court, parties to proceedings, and lawyers must act in a way that promotes the best interests of a child (new Division 1A of Part XI)

• codifying the common law rule established by *Rice and Asplund*, that specifies that for a court to reconsider a final parenting order it must be in the child's best interests to do so (new section 65DAAA), and

• including an express statement in new subsection 68L(1) that Hague Convention matters are to be included in the list of matters involving a child's welfare as a paramount or a relevant consideration for the purposes of section 68L.

So there is some minor tweaking to the current law, including in the new Division 1A of Part XI. This introduces the overarching purpose concept contained in the Federal Circuit and Family Court of Australia Act 2021 to the Family Law Act. As originally enacted, this is all about requiring parties and their lawyers to try to resolve disputes without unreasonable cost and delay. The new Division 1A of Part XI makes it another purpose of the Act in relation to proceedings in which the best interests of a child are the paramount consideration that the just resolution of disputes be facilitated by being conducted, inter alia, "in a way that promotes the best interests of the child". It is a little unclear what this means in practice since what is in the best interests of the child is the very question in dispute in the litigation. The sentiments of Division 1A of Part XI are not at all unwelcome, but the EM (pp.69ff) does not shed much light on what the practical outworkings of the new duties might be.

I would not, myself, know what interpretation of the new law to suggest to practitioners, given what is in the best interests of a child is a matter of opinion and values, not facts, and reasonable judges can disagree about what is in the best interests of a child, just as parents can.

Will the legislation change decisions by the courts?

It is quite possible that mostly, the outcomes of cases determined by a judge will not change much. Only a small fraction of cases that are filed in parenting matters end up going to trial for final orders. Even fewer need the judge to make a decision, since some settle at the door of the court or part way through the trial. The litigated matters tend to be difficult cases where there are allegations of serious violence or abuse (sometimes made by both parents against one another), and significant issues of parental capacity by reason of mental illness, drug and alcohol addiction or otherwise. Judges will continue to do their best in the circumstances, informed by whatever evidence is adduced to them. The text of the Act will not be of huge assistance, but conversely it will not impose much of an impediment on them making the best decision they can in the circumstances.

However, there are implications for relocation cases, for example. Furthermore, there could be a shift in the law to deprive children of contact with their fathers or mothers in situations where now courts would make a greater effort to try to keep some relationship between the non-resident parent and children alive, while taking appropriate measures to ensure the children's safety and that of their primary carer. Much depends on whether the changes to the Act are

meant to curtail the discretion of judges on such matters to decide cases based upon the best evidence available and the recommendations of such experts as are involved in the case. Arguably, if the Government really does mean that the best interests of the child are paramount, and if anything this already strong directive is being 'strengthened', then the discretion of the Court is not being fettered at all.

That said, the amended Act could have all sorts of impacts upon how parents negotiate the arrangements 'in the shadow of the law'. The Bill strips out almost all guidance from the Act, notwithstanding that the ALRC, the Second Reading Speech and the EM all recognise the importance of the legislation providing such guidance.

Conclusion

Reading the amendments to Part VII contained in the Bill led me to think wistfully of the days in which parliamentary counsel, instructed by the Attorney-General's Department, could express what Parliament needs to say by way of guidance and authorisation to the courts in a way which is both economical and precise, as well as clear. The original version of the *Family Law Act* in 1975 was very economical with words. Section 64 said this:

> Powers of court in custodial proceedings
>
> 64. (1) In proceedings with respect to the custody or guardianship of, or access to, a child of a marriage-
>
> (a) the court shall regard the welfare of the child as the paramount consideration;
>
> (b) where the child has attained the age of 14 years, the court shall not make an order under this Part contrary to the wishes of the child unless the court is satisfied that, by reason of special circumstances, it is necessary to do so; and
>
> (c) subject to paragraphs (a) and (b), the court may make such order in respect of those matters as it thinks proper, including an order until further order.

In legislation, often 'less is more'. This Bill, despite claiming to simplify it, makes the law even more prolix and padded with verbiage of uncertain meaning or significance.

If Parliament is going to amend Part VII of the Act yet again, the Government which introduces the Bill has an obligation to make its intent clear. Given the scope for uncertainty about what Parliament does intend by these amendments, and therefore the potential for increased litigation, it would be highly desirable for the Attorney-General to issue clarifying statements in a revised Second Reading Speech and in the Explanatory Memorandum.

The need for clarification

The Government, in introducing this Bill, has given insufficient thought to what the changes concerning parenting disputes are supposed to mean and what changes to the pre-existing law it is intended to bring about. The most that can be said is it wants to achieve some simplification and to abolish any requirement to consider a shared parenting arrangement. There is scant reference in the EM to any case law. Most likely the Government was unaware of how its

proposed reforms affect parents' existing rights and obligations in the exercise of joint parental responsibility, in circumstances where there are no court orders.

Two alternate readings of the "intentions of Parliament"

When law reform bodies or government departments engage in reform of existing legislation, they never have the luxury of starting with a blank sheet of paper. The additions they propose to an existing law build upon what is already there; and the deletion of material from that law necessarily mean removing parts of the Act which were put there for a reason, and which previous generations of law reformers and MPs thought to be important.

On one reading, the Government's implicit message in the changes it proposes concerning parenting disputes is that it rejects completely what its Labor Party predecessors voted for in 2006, and declined to modify substantially in 2011. That is the most obvious message of so many of the deletions and changes. On this reading, the intent of the Family Law Amendment Bill could be expressed as follows:

> In our view, it can be fairly said there is a legislative intent evinced in favour of primary care of a child with one parent, and the maintenance of a relationship with the other parent in the child's life only where it is safe to do so.

However, a close reading of the Second Reading Speech and the EM indicates that perhaps the Government does not intend this at all. Surprisingly, these two important interpretative documents reassert the Government's belief in much of what it has decided to delete from the Act. In particular, the EM says (p.22) that "where safe and appropriate, most children benefit from spending time with their parents not only at the weekends and in school holidays, but also during the school week, and will also benefit from allowing each parent to be involved in the child's daily routine and occasions and events that are of particular significance to the child." That is precisely what Parliament intended the law to be in 2006 and which it reasserted in 2011.

So there is much to be said for the view that the Government intends no change to the interpretation of the Act as summarised so well by the Full Court in *Goode and Goode*:[15]

> In our view, it can be fairly said there is a legislative intent evinced in favour of substantial involvement of both parents in their children's lives, both as to parental responsibility and as to time spent with the children, subject to the need to protect children from harm, from abuse and family violence and provided it is in their best interests and reasonably practicable.

That is very close to what the Government has said in its own Explanatory Memorandum. "Plus les choses changent plus elles restent les mêmes" as the French say.

[15] *Goode & Goode* (2006) FLC 93-286 at [72].

The deletions do, however, put the Full Court of the FCFCOA and the High Court into an interpretative quandary. Has the Parliament, if it enacts this Bill, passed a text which is consistent with the Government's stated objectives?

Until these matters are authoritatively clarified, the Government's desire to reduce complexity cannot be achieved. The lack of clarity about the philosophy underlying Part VII of the Act as it will be amended, and what exactly the legislative intent is, could lead to years of uncertainty and increased conflict in the family law system.