Submission to the Legal and Constitutional Affairs Legislation Committee

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INTRODUCTION[1]

This submission relates mainly to Schedule 1, the Parenting Framework. I have tried to minimise legal technicalities, citations and jargon.

The Appendix deals with a specific and surprisingly difficult question, namely the impact of the bill on parents' obligation to consult about long-term issues relating to their children, in the absence of a court order.

SCHEDULE 1: THE PARENTING FRAMEWORK

Why the law needs changing

The present law was much influenced by the admirable work of the Hull Committee in 2003 ('Every Picture Tells a Story'). The Committee managed to focus on the children's best interests despite the somewhat polarised public debate at that time (some groups arguing for a legal presumption that children should spend equal time with each parent, and others stressing the need to protect children from violence and abuse, and arguing that emphasising equal time and parental entitlements put children at risk). The Committee did not actually draft legislation, but urged that the law should encourage the involvement of both parents after separation, while protecting children from violence and abuse.[2]

Although this general idea was widely accepted, the bill emerged in 2006 in a form that had not been recommended by the Family Law Council or any other expert body on family law and has been shown to have serious technical flaws, as explained by the ALRC. The key flaws in the resulting legislation are well documented and may be summarised as follows.

There is a presumption that (except in some circumstances such as violence) the court must assume that it will be in children's best interests if their parents have equal shared parental responsibility.

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1 AM; Honorary Professor, ANU College of Law. I should mention that I have been much involved as an academic specialising in children's law both before and after my time as a judge of the Family Court of Australia.

2 The Committee also stressed the importance of protecting children from being subjected to intractable disputes between parents, but unfortunately this important theme was not reflected in the 2006 amendments.

The problem is that the presumption is linked to specific parenting arrangements in a somewhat strange way: if a court makes an order for equal shared parental responsibility, it must then normally 'consider' making orders giving parents equal time with the children (or if not, 'substantial and significant' time with them): s 65DAA. The actual provisions are technical and complex, and have led many parents to believe mistakenly that there is a legal presumption of equal time (which the Hull Committee had rejected), and have encouraged some parents to think of equal time as a parental entitlement (which it is not, being contrary to the basic principle that the child's best interests must be paramount).

That is perhaps the main problem. But there are others. Section 60B contains a complex set of 'objects' and 'principles' that largely overlap with the list of matters the court must consider when assessing what is in the child's best interests. And that list of relevant matters - s 60CC - is divided into two categories, 'primary' and 'additional' considerations. These provisions contribute to the complexity and muddle, making it difficult for parents and those advising them to focus on the child's needs in a straightforward way.

These problems have been well documented over many years. They are well explained in the 2019 Report of the Australian Law Reform Commission, and are mentioned in the Explanatory Memorandum.

How the bill addresses these flaws

The bill would correct these flaws essentially in the way proposed by the ALRC. In short, the bill:

- Removes the confusing and overlapping provisions of s 60B, leaving s 60CC as the source of guidance on determining what is in the child's best interest.

- Removes the confusing link between parental decision-making ('parental responsibility') and the making of post-separation arrangements for children (what used to be called custody and access).

- Removes the categories ‘primary’ and ‘additional’, so that s 60CC now contains a simple list of matters to be considered when determining what is likely to be in the child’s best interests.

The repeal of the presumption of equal shared parental responsibility

In itself, the idea of presuming that children will ordinarily benefit if the parents have equal shared parental responsibility should not be controversial. It is not very different from the ordinary practice of the courts since the Act commenced in 1976: they would leave each parent with parental responsibility (originally called ‘guardianship’) (s 61C) unless there were circumstances indicating that this would not be in the child’s best interests. Those circumstances included cases where a parent was unable or unsuitable to make sensible decisions (eg in some cases or mental ill-health, or violence or substance abuse), or where the parents’ relationship was so fraught that they could not work together to make decisions about the child.

As indicated above, the main problem with the current law is that it links the question of decision-making (parental responsibility) with the very different question, how much time the child should spend with each parent. The ALRC, the Exposure Draft and the Bill would all solve this problem by removing the link, enabling the court to decide separately what orders would be best for the child in relation to parental responsibility, and in relation to the child’s care. In my opinion this is clearly desirable. The law should not indicate that any particular outcome is likely to be best for the child (as the law now does when it says that the courts must consider equal time). The court should focus on what is best for each child in the particular circumstances. I believe these points are generally accepted by relevant bodies and individuals with expertise in family law.

Although this is clear, there is a difference between the ALRC, the Exposure Draft, and the present bill about how to deal with the presumption:

- the ALRC recommended replacing it with a different version (a presumption of ‘joint decision making about major long term matters’).

- The Exposure Draft would have simply repealed the presumption.

- The present Bill would repeal the presumption and add provisions clarifying orders about parental responsibility and encouraging those who have parental responsibility to try to agree in the interests of the child.

On this topic I support the Bill. I think it is an improvement on the ALRC recommendation, and an improvement on the Exposure Draft.

I agree with removing the old presumption of equal shared parental responsibility. Even without the s 65DAA link with parenting arrangements, the old presumption, especially with the words 'equal' and 'sharing', might well continue the misunderstanding that parents have some kind of a right to equal time with the children. The law should instead consistently reinforce the message that the child's best interests are to be paramount (s 60CA) - as the bill does in the new s 60B(1). The Family Law Council's submission on the Exposure Draft contains a detailed analysis of this issue.

Conclusion on the repeal of the presumption of equal shared parental responsibility

Overall, in my view the bill makes a clear and desirable change in the way the Act deals with parental responsibility. Each parent retains parental responsibility (under existing s 61C) unless the court makes a contrary order. This enables each parent to make decisions about the child, eg arrange medical treatment. The parents are encouraged to agree about long-term issues (existing s 63B and new s 61CA). If a court makes an order for joint responsibility, the bill spells out the consequences (s 61DAA, s 61DAB: the persons must consult and make a genuine effort to come to a joint decision).

Possible qualification: the wording of new s61CA and parental consultation

Despite the above, I see a possible problem with the wording of the proposed s 61CA. It relates to the question what if any are parents' obligations to consult each other about long-term issues relating to their children, in circumstances where the court has not made an order. (Where the court has made an order, the answer of course depends on the terms of the order, and the relevant provisions of the bill

are entirely satisfactory.) Because is a rather difficult issue and requires careful analysis I have dealt with it separately in the Appendix.

If the reasoning in the Appendix is correct, the Committee might like to consider omitting the words “if it is safe to do so” from s 61CA. At first sight this might seem to minimise the importance of children’s safety, which is of vital importance, and can be seriously at risk in some circumstances following parents’ separation.[3] However in the Appendix I set out reasons for believing that such an amendment would not place children at risk, and would be desirable to avoid misunderstanding about the law.

Matters to be considered in the child’s best interests: s 60CC

The Bill’s s 60CC list is admirably clear: a simple list of matters that must be considered. Like the existing law, it is not restrictive: the last item, para (f) is ‘anything else that is relevant to the particular circumstances of the child’. The list is very similar to the list proposed by the Australian Law Reform Commission.

Of course no such list can include everything that might be relevant, and should not attempt to do so: the longer the list is, the more people might think that anything not on the list could not be important.

There will always be differences about what should be on such a list. It is essentially a list of matters that are commonly important for children, and particularly children whose cases are likely to come before the court in fully contested hearings. The situations of those children are very different from those of most other children: fully contested children’s cases typically involve serious issues of violence, substance dependence, and abuse, and a significant number of relocation cases (where one parent proposes to take the children to live in another country, or a distant part of Australia). These are the cases most difficult for parents to settle. Indeed, I believe the mediation and conciliations services we have generally work very well, and the vast majority of cases are resolved by

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[3] I hope my concern for children’s safety is evident from some of my academic and judicial work, from the 1980s (membership of the *NSW Child Protection Council*, and the *Task Force on Child Sexual Assault*); the decision in *Marriage of JG and BG* (1994) 18 Fam LR 255; the *Family Courts Violence Review 2019; and such articles as* 'Child abuse allegations in family law cases: A review of the law' (2011) 25 *Australian Journal of Family Law* 1-32.

parental agreement. Experienced family lawyers very often contribute to helping parents settle these cases.

One of the difficulties of drawing up a list such as s 60CC is that the circumstances most likely to be important in litigated cases will be rather different from those that are most important in the more ordinary cases, the ones that are usually settled. Since at least 1996, the Act has tried to provide guidance both to the court in deciding cases and to the parties in settling cases, and to some extent it reflects a compromise between the two.

Although the proposed s 60CC in the list is not exactly what I recommended, it emerges from the expertise and consultation that the ALRC contributed, and the further consultation conducted by the Attorney-General's Department in relation to the Exposure Draft. In my view it is a very good list, and a great improvement on the present law.

I will not examine it line-by-line, but would like to comment on two aspects: the omission of material that was in the previous version of s 60CC, and paragraph (e).

The significance of omitted material

Some of the material in the old list has been omitted even though it was useful. For example, the old requirements to consider the history or parenting, and to consider the children's maturity in connection with giving weight to their views, were perfectly sensible and could have been included. However, the more you include, the longer the list gets, and you can never include everything. These two matters will of course remain relevant under the bill. Each parent's history of parenting will always be important evidence when the court considers the parents' respective capacity to provide for the child's needs (para (d)). And evidence of the child's maturity will continue to be considered, along with other matters, in assessing what weight should be given to their views. Another example is that the child's material needs are not specifically mentioned; but it is obvious that this will be relevant - for example, the court would consider whether the parents complied with their child support obligations.

In my view the omissions help to keep the list short and clear, and the EM explains, as it should, the reasons for the omissions: so nobody should assume that because something has been omitted from the list it is no longer to be considered.

Paragraph (e)

The benefits of parental involvement continue to be recognised in the bill, but are treated somewhat differently The main differences seem to be as follows.

The benefit of parental involvement now appears as the fifth matter listed, whereas it had previously been one of the two 'primary' considerations' and, with protection from violence, also featured in the old s 60B. However since 2012 the Act has required that protection from violence should be given "greater weight" - s60CC(2A) - so the relegation of parental involvement would not be entirely inconsistent with the current law.

In my view the bill places it appropriately. While obviously parental involvement is enormously valuable to most children, it is what one might call a second-order matter, something that is important because parental involvement is usually a way of providing for children's needs. Sadly in some cases it is not. Those cases include cases where parents for one reason or another are unable to attend to the child's needs. By contrast, children *always* benefit by being safe from violence, neglect and abuse (now paragraph (a).

The Bill's provision in para (e) speaks of *'the benefit to the child of <u>being able to have</u> a relationship*' with the parents. This was suggested in some submissions on the Exposure Draft, including the Family Law Council, and includes, more clearly perhaps than the existing law, situations where for some reason the child does not yet have a relationship with the parent, but would be advantaged by having such a relationship in the future.

I am a little concerned about the words "*The benefit*". Although any such benefit would ultimately be a matter for evidence, the words could be taken as indicating that parental involvement is necessarily beneficial to the child. This is of course not so: unfortunately, as mentioned elsewhere in this submission, even apart from risks of violence or abuse, there are situations where the involvement of both parents is not conducive to the child's best interests. One of those situations, as

the Hull Committee recognised, is where children are subjected to intractable conflict between the parents. In earlier work and in my submission on the Exposure Draft I had suggested (unsuccessfully) the inclusion of a general statement to the effect that normally children benefit from the involvement of both parents.[4] In the absence of such a provision - which I do not urge at this late stage of the bill's progress - I suggest that the problem might be solved, or at least reduced, if the opening words were "*Any benefit*" rather than "*The benefit*".

The bill also refers to '*other people who are significant to the child*', and this could include, obviously, people such as grandparents, step-parents and other family members; their significance to the child would depend on the circumstances. These words convey a valuable child focus, referring to people's significance *to the child* in each actual case, something about which evidence can be given.

Finally, there is a special emphasis on safety in the concluding words, '*where it is safe to do so*'. The insistence on safety is understandable in view of the nature of the cases that mostly come before the courts for determination: they very frequently include serious issues about the children's safety. However I have reservations about the inclusion of these words.

Firstly, they appear to be unnecessary, in view of the other sections of the Act about protecting children, in particular s 60CC para (a): "*what arrangements would promote the safety …of the child; and each person who has care of the child."* Even without the words '*where it is safe to do so*' added to para (e), it seems obvious that a court would not disregard a child's safety in order to ensure parental involvement.

Secondly, the point could have been expressed differently. Another way of putting it might have been '*unless it is unsafe to do so'*, or '*unless it appears unsafe to do so*', which is the approach of the UK legislation. The difference may be important, especially in interim cases, where the court will often have only limited evidence

[4] The words I had proposed were "*Children will ordinarily benefit by maintaining relationships with parents and other family members who are important to them. In particular, children who have formed a close relationship with both parents before their parents' separation will ordinarily benefit from having the substantial involvement of both parents in their lives, where such involvement does not expose them to inadequate parenting, abuse, violence or continuing conflict".*

and may not be able to determine the truth of allegations of violence or abuse. Some might argue that in such cases, the bill would mean that a child should not spend unsupervised time with a parent because the court cannot be positively satisfied that the child would be safe.

This is a difficult issue, but on balance I would suggest omitting the words 'where it is safe to do so'. Alternatively, I would substitute words such as '*unless it is unsafe to do so'*, or '*unless it appears unsafe to do so*'. (A similar issue arises with these words in s 61CA, discussed in the Appendix).

Conclusion on the s 60CC list of factors

There is no obvious 'right answer' to the way the act should list the matters relevant to the child's best interests. In my view the bill's version of s 60CC is a great improvement on the present law and a very good list, although I have suggested two modifications relating to para (e):

First, the words were "*Any benefit*" seem preferable to the existing "*The benefit*".

Secondly the words 'where it is safe to do so' should be deleted, or if that is not accepted, should be replaced by '*unless it is unsafe to do so'*, or '*unless it appears unsafe to do so*'.

Table: Exposure Draft and amending bill (at 1 May 2023)

There have been some changes since the Exposure Draft, and I briefly note some of them, and my comments, in the table below

Exposure draft	Amending bill	Chisholm comment
S 60B Objects: (a) to ensure that the best interests of children are met; […]	**S 60B Objects: […]** (a) to ensure that the best interests of children are met**, including by ensuring their safety**; and […]	**No objection** to the change, though safety is obviously part of best interests, and is much emphasised in other provisions.

	S 60CC (b) if the child is an Aboriginal or Torres Strait Islander child—**also** consider the matters set out in subsection (3).	**Agree**: adding "also" is useful to clarify intent.
(a) what arrangements would best promote the safety [of the child and]	(a) what arrangements would **[~~best~~]** promote the safety […]	**Strongly agree** - removal of 'best' avoids possible confusion, as pointed out by Professor Parkinson.
(ii) each person who has parental responsibility for the child (the ***carer***);	**(ii) each person who has care of the child (whether or not a person has parental responsibility for the child);**	**Agree** with change: it matters who has the child's actual care.
(c) the developmental, psychological, emotional needs of the child; […]	(c) the developmental, psychological, emotional **and cultural** needs of the child; […]	**Agree**: Happy to include cultural needs in (c) and (d).
	(e) the benefit to the child of being able to **have** [~~maintain~~] a relationship with both of the the child's parents […]	I am **content** with the change, although there was merit in emphasising the benefit of continuity, as the word 'maintain' did.
	Insertion of new ss 61CA, 61DAA, and DAB.	**Agree**: these are useful provisions, especially in view of the removal of the presumption of equal shared parental responsibility. My reservation about the wording of s 61CA is mentioned above.

References relating to the parenting framework

Subject to some minor matters of drafting, the Family Law Council and the Australian Institute of Family Studies supported the Exposure Draft, and their submissions contain a wealth of supporting discussion and findings from research.

The flaws in the current law have also been analysed by a number of experienced academic and practising family lawyers.[5]

The courts, too, have referred to the unsatisfactory complexity of the present law - see citations in the Family Law Council's submission, including *Banks & Banks* (2015) FLC 93-637 (in discussing the current multiplicity of section 60CC factors, the judicial officer "may lose sight of the forest for the trees'); *Marvel & Marvel* [2010] FamCAFC 101 ('The legislative pathway to be considered since the amendments in 2006 is convoluted. It has been aptly described as "a dilemma of labyrinthine complexity"). Even in recent times, the complexity of the legislation has tripped up judges, eg *Bielen & Kozma* [2022] FedCFamC1A 221. And as the Family Law Council pointed out, "*Many litigants also "lose sight of the forest for the trees", filing lengthy affidavits, addressing each additional factor under separate headings even when they are not relevant."*[6]

My own efforts to improve the law are contained in a number of publications over the years, of which the most relevant are the submission on the Exposure Draft, and the two papers, 'Rewriting Part VII of the Family Law Act: A Modest Proposal' (2015) 24 (3) Austr*alian Family Lawyer*, 1-22 and 'Compliance with Parenting Orders: A Modest Proposal to Re-draft Division 13A of Part VII' (2018) 27(2*) Australian Family Lawyer*, 19-34. The history of the 2006 amendments is reviewed in 'Making it work: The Family Law Amendment (Shared Parental Responsibility) Act 2006' (2007) 21 (2) *Australian Journal of Family Law* 143-172.

THE OTHER SCHEDULES: BRIEF COMMENTS

Schedule 2—Enforcement of child-related orders

The ALRC correctly pointed out the need to simplify the unnecessarily tangled provisions of Division 13A. The bill's provisions are still complex, but unavoidably so, and are much easier to understand than the present law. This change will not address the very great problems relating to post-order arrangements - only

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5 For example Rick O'Brien, 'Simplifying the System: Family Law Challenges – Can the System Ever be Simple?' (2010) 16(3) *Journal of Family Studies* 264; Helen Rhoades, 'Rewriting Part VII of the Family Law Act' (Paper presented at the 16th National Family Law Conference, Sydney, October 2014.)

6 Family Law Council submission on the Exposure Draft, para 26.

additional services seem likely to do that - but in my view they will help to remove confusion and difficulty.

Schedule 3—Definition of member of the family

The changes appear to be more inclusive of Aboriginal and Torres Strait Islander families, and follow the Australian Law Reform Commission recomendations. I notice that the ALRC consulted substantially with Aboriginal and Torres Strait Islander bodies. While I have no expertise in this area, I see no reason not to accept these sensible changes.

Schedule 4—Independent children's lawyers

These provisions appear desirable, encouraging ICLs to speak with the children and hear their views, and remove the present restriction on ICLs in Hague child abduction cases. Both of these changes will need adequate funding if they are to be fully effective.

Schedule 5—Case management and procedure

Having been away from practice for some years now I do not feel it would be appropriate for me to do more than say that these provisions seem desirable.

Schedule 6—Communications of details of family law proceedings

I hope these provisions resolve some uncertainties that have emerged in relation to s 121, but have no particular comment on the drafting.

Schedule 7—Family report writers, Schedule 8—Review of operation of the Federal Circuit and Family Court of Australia Act 2021, and Schedule 9—Dual appointments

I have no comment on these schedules.

APPENDIX: PARENTS' POSSIBLE OBLIGATIONS TO CONSULT EACH OTHER

Do parents have legal obligations to consult each other, in the absence of a court order? What would be the impact of the proposed bill?

A useful starting point is *B and B: Family Law Reform Act 1995* [1997] FamCA 33. In that case, the Full Court said that it could not have been intended that separated parents could only exercise all or any of their powers jointly in relation to day to day matters, but continued:

> *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.*

Does the word "should" in this passage mean that parents have a legal duty to consult on major long-term issues'? If so, why didn't the Court say so, instead saying that 'this' (ie that "*consultation should obviously occur*"), "*accords with the intention of the legislation*"?

If the passage is taken to mean that there is such a duty, two questions arise.

First, the *nature of the duty*. There is no provision for its enforcement, in contrast to the duty arising under a court order requiring consultation, breach of which could lead to contravention proceedings. Does the duty have any legal effect?

I think the answer is that it states a behavioural norm, indicating what the courts regard as proper parental behaviour. This could have relevance in parenting proceedings: a parent who failed in the duty to consult might be seen as failing in that aspect of their parenting role. Such a finding might be a factor influencing the court's assessment of what orders would be in the child's best interests.

Second, the *content of the duty*: what is required? Suppose parent A has a mental illness that makes it impossible for him or her to focus on what is best for the child. Or suppose Parent A has threatened to kill himself or herself, or someone else, or

abduct the child overseas, if Parent B makes any request about the child. The court could not have intended that in such extreme circumstances Parent B would have a duty to consult with Parent A.

The duty must not be absolute, therefore. It must be something like *"Each parent has a duty to consult the other about long term matters relating to the child,* ***unless****… [eg the parent has reason to believe that attempting such consultation would be contrary to the child's best interests/dangerous for the parent or the child/manifestly fruitless…]*

Although there must be *some* such qualification, we don't know precisely what it is, and the Full Court didn't say - very sensibly, because it would be absurd to try to list all the possibilities.

Article 3 of the Convention on the Rights of the Child is a useful guide to drafting on this point (emphasis added):

> *3. 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****.*

Article 18 is also useful:

> *18 …Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.*

Given this, any duty to consult has to do with the task of parenting - protecting and nurturing the children - as distinct from any entitlement of the other parent to be consulted. The courts would hardly expect a parent to consult the other where it would be unlikely to contribute to 'adequate and proper parenting' for the children. Nor would it be required, obviously, if it put the child or someone else in peril, or if it was obviously futile.

Without attempting precision where none is possible, we could roughly indicate the nature of the possible *B and B* duty as follows: *"Each parent has a duty to*

consult the other about long term matters relating to the child, unless it is unreasonable in the circumstances to do so."

Now we can compare the situation at present with the situation if the bill were passed.

Under the present legislation

Under the present legislation, the position appears to be as follows:

> Each parent has parental responsibility under s 61C, and thus each parent can, for example, authorise medical treatment for the child.
>
> If there is no court order, the parents may have the qualified duty to consult just described - as a result of s 60B principles and the *B and B* decision.
>
> In addition, by s 63B they are "encouraged":[7]
>
> > (a) to agree about matters concerning the child; and
> >
> > (b) to take responsibility for their parenting arrangements and for resolving parental conflict; and
> >
> > (c) to use the legal system as a last resort rather than a first resort; and
> >
> > (d) to minimise the possibility of present and future conflict by using or reaching an agreement; and
> >
> > (e) in reaching their agreement, to regard the best interests of the child as the paramount consideration.

I don't know of any authority on this, but while the language of encouragement is perhaps a bit weaker than the "should" in *B and B*, we might expect a court in parenting proceedings to question a parent who had not done what the legislation encouraged. Thus in practice the s 63B encouragement would have a similar effect to the *B and B* "should", although perhaps somewhat weaker.

The Act's provisions relating to safety

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[7] This "encouragement" obviously does not create a legal duty, and thus there is no need for s 63B to fuss about circumstances in which consultation is unreasonable. Although this section is located in a part of the Act dealing with parenting plans, its operation is not restricted.

It is relevant to note a number of provisions that are now in the Act, and will remain if the bill is passed, that in various ways seek to protect the safety of children and others.

By s 43, in exercising jurisdiction under the Act, the court must have regard to […]

> *(c) the need to protect the rights of children and to promote their welfare; and …*
>
> *(ca) the need to ensure protection from family violence; […]*

The current s 60CC list of relevant consideration now includes the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; this is to be given "greater weight" than "the benefit to the child of having a meaningful relationship with both of the child's parents".

The proposed s 60CC also gives safety particular emphasis, making it number one on the list:

> *(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);*

By 60CG, which will be retained, in considering what order to make, the court must, to the extent that it is possible to do so consistently with the child's best interests being the paramount consideration, ensure that the order: […] (b) *does not expose a person to an unacceptable risk of family violence*.

Section 68N, setting out the purposes of Division 11, includes ensuring that orders, injunctions and arrangements "do not expose people to family violence". See also s 68R(5)(c).

Under the Bill

Since s 61C and 63B would remain in force, under the bill each parent has parental responsibility and they are 'encouraged' to agree and avoid litigation etc. Sections 43 and 68N will also remain in force.

But there will also be this new provision:

> ***S 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.*

Like s 63B, this provision uses the word "encourage". Unlike the passage in *B and B*, and old s 60B, it also says *"If it is safe to do so*".

If the above analysis is correct, and the 'encouragement', like the 'duty' under the old s 60B, is necessarily qualified by the implied addition of words such as "unless it is unreasonable (etc) to do so", the opening words unnecessary. Children's safety is already emphasised in the various other provisions mentioned. Even without those words, in my view, it is obvious that a court would not consider unfavourably a decision by a parent to avoid consultation where doing so threatened the child's safety, or someone else's safety.

While mere repetition might be regarded as a trivial defect, the opening words could perhaps have an unfortunate and unintended consequence (somewhat similar to that of the old "twin pillars" emphasis)[8] namely to indicate the mistaken view that endangering the child is the *only* legitimate reason a parent could have for not consulting the other. In fact, as mentioned above, there could be many other reasons for not doing so, for example:

- The other parent may be incapable of participating in decisions about the child, for reasons of mental ill health, substance abuse, or other factors.
- The other parent may be unable to be contacted;
- The other parent may have indicated unwillingness to participate in any consultation about the child;

[8] I have suggested in previous publications that the emphasis on the 'twin pillars' could lead to the wrong conclusion that in the absence of violence or abuse unsupervised contact with the other parent is necessarily in the child's best interests. Of course the truth is that mostly it is, but sometimes it is not.

- The other parent may have indicated such a fixed position on the relevant issue that further attempts at consultation would be futile and counterproductive.

Incidentally, it seems inconsistent that the words “if it is safe to do so” are used in s 61CA but not in s 63B.

Conclusion

Where there has been no order, the current law expresses the desirability of parents consulting about the child’s long term issues, without spelling out what each parent must do, or in what circumstances it will be acceptable not to consult the other. Under the bill this will remain the case except for the additional words “*if it is safe to do so*” in s 61CA, one of the two sections that encourage parental consultation.

In my view the child’s safety is sufficiently emphasised elsewhere in the Act and the words “*if it is safe to do so*” could send the unintended message that risks to the child’s safety are the only matters that could justify a parent in not consulting the other about long-term issues relating to the child. I therefore recommend that they be omitted from s 61CA.

If contrary to my view it is thought necessary to have some such qualification written into s 61CA, then as in the case of s 60CC(2)(e) (discussed above), preferable wording would be ‘*unless it is unsafe to do so’*, or ‘*unless it appears unsafe to do’.*

(30 May 2023)