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SUBMISSION TO THE HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Family Law Amendment (Shared Parental Responsibility) Bill (2005)

This submission seeks to cover the broad range of issues raised by the House of Representatives Standing Committee on Legal and Constitutional Affairs in questions provided to this Department on 4 July 2005 and 6 July 2005 in relation to the Family Law Amendment (Shared Parental Responsibility) Bill 2005 (the Bill).

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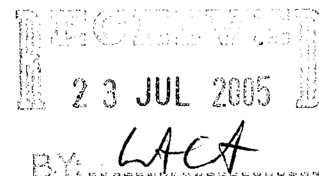

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A. OVERVIEW OF THE FAMILY LAW AMENDMENT (SHARED PARENTAL RESPONSIBILITY) BILL 2005

1. The Family Law Amendment (Shared Parental Responsibility) Bill 2005 (the Bill) is a key component of the package of family law reforms that was announced by the Prime Minister on 29 July 2004. The legislation will underpin the package of measures announced in the 2005-06 Budget, estimated at $397 million over four years. These initiatives represent a major change in family law and aim to bring about a cultural shift in how family separation is managed: away from litigation and towards cooperative parenting.

Changes to the Act

2. The Bill amends the *Family Law Act 1975* (the Act) to implement a number of the recommendations in the report of the House of Representatives Standing Committee on Family and Community Affairs (the Committee) inquiry into child custody arrangements in the event of family separation. The report, titled *Every picture tells a story,* was released on 29 December 2003 (the Report). The amendments to the Act form part of the government's significant new reform agenda in family law. A summary of the recommendations and how they have been implemented in the Bill is at attachment A.

Schedule 1 – Shared parental responsibility

3. Amendments contained in the Bill support and promote shared parenting and encourage people to reach agreement about the parenting of children after separation. The amendments advance the Government's long standing policy of encouraging people to take responsibility for resolving disputes themselves, in a non adversarial manner.

4. The changes to the Act will recognise the importance of children having a meaningful involvement with both parents and will include a new presumption of joint parental responsibility, except in cases involving child abuse or family violence. Other changes will:

    - require parents to attend family dispute resolution, such as mediation, before taking a parenting matter to court (with exceptions including child abuse or family violence);
    - require the courts to consider substantial sharing of parenting time in appropriate cases;
    - encourage parents to consider substantially sharing parenting time when developing parenting plans outside the courts; and
    - better recognise the interests of the child in spending time with grandparents and other relatives.

5. The changes to the law will emphasise the best interests of the child.

6. When deciding the best interests of a child, the primary factors that the court must consider will be the benefit to the child of having a meaningful relationship with both parents and the need to protect the child from physical or

psychological harm. Among other factors to be considered will be the capacity of each parent to provide for the needs of the child and the willingness and ability of each parent to facilitate a continuing relationship between the child and the other parent.

Schedule 2 – Compliance regime

7. Breaches of court orders are a major source of conflict and distress to all parties involved. The Family Relationship Centres will have an important role to play in helping parents to resolve such issues outside the courts. The expansion of the Contact Orders Program will also help where conflict has led to a breakdown in contact between a parent and child.

8. However, the government recognises that in some cases the court needs to take firm action to deal with breaches. The amendments ensure that enforcement applications can be dealt with appropriately by the court, particularly given the object that children have a meaningful relationship with both parents. The government proposes to strengthen the enforcement provisions in the Act. New provisions will include:

- a requirement that the court consider 'make up' contact if contact has been missed through a breach of an order. This provision is intended to apply even where a party is able to show that there was a reasonable excuse for breaching the order. The court will now have power to order make up contact if that is in the best interests of the child;
- a power to award compensation for reasonable expenses incurred by a person but which were wasted due to a breach of an order. This might include airfares or other tickets purchased but not used or travel expenses incurred by the person to collect a child, but the child was not made available;
- in cases where there is not a serious breach of an order, the court will need to consider making an order for costs;
- in cases involving a series of breaches or a serious disregard of court orders, a presumption that legal costs will be awarded against the party who has breached the order, unless it is not in the best interests of the child; and
- a new discretion to impose a bond without criminal penalties for cases where there is not a serious breach of a court order (the option of a bond with criminal penalties already exists for a serious breach of a court order).

Schedule 3 – Amendments relating to the conduct of child-related proceedings

9. Adversarial processes tend to escalate and prolong conflict. As part of this response, the Bill implements a range of amendments to provide legislative support for a less adversarial approach to be adopted in all child-related proceedings under the Act. This approach relies on active management of proceedings by judicial officers in a way that considers the impact of the proceedings on the child and not just the outcome of the proceedings. The intention is to ensure that the case management practices adopted by courts will promote the best interests of the child by encouraging parents to focus on their children and on their parenting responsibilities. This approach largely reflects

that taken by the Family Court of Australia in its pilot of the Children's Cases Program.

Schedule 4 – Changes to dispute resolution

10. The Bill amends the counselling and dispute resolution provisions in the Act to implement the government's policy of encouraging separating and divorcing parents to utilise counselling and dispute resolution services without the need to go to court. The Bill also streamlines the obligations that will be placed on the court, lawyers and others, to provide information to those affected by separation and divorce about family law proceedings and available counselling and dispute resolution services.

Schedule 5 – Removal of references to residence and contact

11. Changes to the Act in 1995 adopted the terms 'residence' and 'contact' instead of 'custody' and 'access' in order to eliminate any sense of ownership of children. However, the intended change of culture has not been achieved. Consistent with recommendation 4 of the Committee's Report, the terms 'residence' and 'contact' are removed from the Act with the emphasis now on the more family-focussed term of 'parenting orders'. In the majority of cases, references to 'residence' will be replaced with 'lives with'. References to 'contact' will be replaced with 'spends time with' and 'communicates with' in the majority of cases.

B. POSSIBLE CONCERNS WITH THE BILL

12. The government anticipates that the major criticisms of the Family Law Amendment (Shared Parental Responsibility) Bill 2005 (the Bill) will be:

- Increased risk of family violence and child abuse to women and children

13. A number of women's groups (such as the National Council of Single Mothers and their Children) have raised concerns that the proposed reforms will place women and children at greater risk of violence. In particular, the groups are concerned that it will be much easier for abusive parents to have contact with their children, that there are risks in the requirement for compulsory dispute resolution prior to application to court and that the requirement to agree on long-term issues will lead to the escalation of conflicts. They are also concerned about the effect of the strengthening of the enforcement provisions on the risks to women and children.

14. The government does not consider that this is a likely outcome for the proposed amendments. The government considers that family violence and child abuse cannot be tolerated. There are a number of provisions in the exposure draft which focus on ensuring that a child is protected from family violence and child abuse. The new principles in item 2 of Schedule 1 specifically refer to the need for a child to be protected from the risk of physical or psychological harm caused by family violence or child abuse.

15. Both the presumption of joint parental responsibility (item 11, Schedule 1) and the requirement to attend family dispute resolution prior to going to court (item 9, Schedule 1), will not apply in cases involving family violence and child abuse. In those cases, the court will not be obliged to consider the child spending time with both parents.

16. The best interests of the child will remain the paramount consideration. In determining what is in the best interests of the child, one of the primary factors that the court will need to consider is the need to protect the child from violence or harm (item 26, Schedule 1). The new format of section 68F elevates the importance of the safety of the child in the court's considerations.

17. Where a case is exempt from the requirement for family dispute resolution because it involves family violence or child abuse, there will still be a requirement for the person wanting to take the matter to court to obtain information from a family counsellor or family dispute resolution practitioner about what services and options available to them, so that they are aware of any alternatives to court action and services that may assist them in their particular circumstances. Where there is a risk of child abuse or family violence if there is a delay in the court hearing the matter, the requirement to obtain a certificate does not apply. This is to minimise the risk of violence to the parties or the child in those matters.

18. Schedule 3 of the exposure draft contains amendments to implement new procedures for the conduct of those family law matters that do go to court. The

more active case management approach will ensure that allegations of family violence and child abuse are dealt with at an earlier stage in the court process. Judicial officers will be better able to ensure that appropriate evidence is before them, to assist the court to better address these issues in the proceedings.

19. Screening for family violence and child abuse will also be a very important role of the Family Relationship Centres (announced in the 2005-06 Budget) and the centres will also be able to provide information and advice to victims of family violence about their options and about support services available. There is funding of $7 million to increase specialist family violence services and 30 new children's contact services to help ensure children and parents are protected from violence and abuse during contact.

- That the Bill will lead to increased litigation

20. Concern has been expressed by a number of groups (including the legal profession and the courts) that the Bill may lead to increased disputes and therefore litigation.

21. It is important that the changes to the Act be considered as part of the overall package of reforms announced in the 2005-06 Budget. As discussed previously, the government's reforms include increased services to help people to resolve disputes outside of the court system. The changes in the Bill are necessary to achieve the government's objectives to encourage families to resolve disputes outside of the court system and to encourage cooperative parenting after separation.

22. The government considers that although there may be an increase in litigation in the short term, the introduction of compulsory dispute resolution and the new expanded family dispute resolution services will result in a decrease in litigation in the medium to long term.

Presumption of joint parental responsibility

23. A number of groups have been lobbying for changes to the Act to provide for the 50/50 sharing of time with a child. In rejecting this approach, the Committee and the government decided that in order to ensure that children receive the benefit of a meaningful relationship with both parents, it is necessary to provide a starting point of joint parental responsibility unless there are issues of safety. There is concern that litigation may increase as a result of the introduction of the presumption. These concerns are that parents will litigate to determine whether the presumption will apply to their case and that parents with existing orders will re-litigate to achieve a better outcome.

24. The government has avoided the potentially confusing option of two presumptions, opting for the simpler structure of one presumption and a limitation that the presumption will not apply in cases of family violence or child abuse.

25. The presumption of joint parental responsibility will not apply where there are reasonable grounds to believe that a parent of the child (or person who lives with a parent of the child) has engaged in child abuse or family violence. This is an objective test which is applied by the court. There must be evidence of family violence or child abuse for the presumption not to apply. This evidence will include the evidence of the alleged victim of the family violence or child abuse. It will not be enough to suggest that there is only a minor risk of family violence or child abuse. This approach is appropriate given the serious implications of not having joint parental responsibility. The reasonable grounds test will also assist in addressing concerns about false allegations being made to avoid the application of the presumption.

26. Due to the limited evidence available at interim hearings, item 11, Schedule 1 makes clear that the court has a discretion to apply the presumption at an interim hearing. However, any decision relating to the allocation of parental responsibility at the interim hearing is to be disregarded at a final hearing. This will address concerns that a status quo is established at an interim hearing, which is very difficult to alter at a final hearing.

27. To some extent, it is inevitable that some parents will attempt to re-litigate their case to obtain more favourable orders in view of the legislative change. The case of *Rice and Asplund*[1] will restrict these applications unless a there has been a 'significant change' in circumstances. In addition, prior to filing a new application with the court, parents will need to attend family dispute resolution and are likely to resolve the dispute at this stage.

Major long-term issues

28. The concern expressed is that there will be an increase in litigation as non resident parents seek to enforce the duty to consult, which is required by joint parental responsibility.

29. Section 61C of the Act currently provides for each parent to have parental responsibility and very few existing orders alter that position. However, the Act does not specify what it means for each parent to have parental responsibility and many fathers in particular are concerned that a non residential parent has little influence on their children's lives.

30. In accordance with recommendation 3 of the Report, joint parental responsibility is defined in the Bill in order to give guidance to the meaning of the term. Proposed section 65DAC (item 23, Schedule 1) provides that the effect of joint parental responsibility is that persons should consult and make a genuine effort to come to a decision about major long-term issues in relation to the child. Despite this clarification, there is concern in relation to the effect of the requirement that parents make joint decisions about major long-term issues.

31. Item 6 of Schedule 1 defines major long-term issues to mean issues about the care, welfare and development of the child of a long-term nature. This includes

[1] (1979) FLC 90-725

a child's education, religion and cultural upbringing, health, name and significant changes to the child's living arrangements. An issue that may cause disagreement between parties is the issue of significant changes to the child's living arrangements. This will include any substantial changes to the type and location of the residence in which the child usually lives. This factor is not intended to cover situations where the child relocates to another residence within the same locality, unless this produces a significant change. 'Major long-term issues' is not intended to cover trivial matters.

Compulsory dispute resolution provisions

32. There is some risk that parties may litigate about whether a person meets one of the exceptions to the requirement to attend family dispute resolution. These exceptions are necessary to ensure that people are not forced to attend family dispute resolution in circumstances where it is inappropriate. During the consultation about the reforms there was general acceptance of the provision of compulsory attendance at a dispute resolution service prior to application to the courts and we do not expect wholesale attempts to avoid these provisions.

33. The exception to attendance that is most likely to be controversial is where family violence or child abuse is alleged. To address concerns that there may be false allegations to avoid attendance, the threshold to establish this exception is that the court must be satisfied that the person making the allegation has reasonable grounds to allege that child abuse or family violence has occurred or that there is a risk of child abuse or family violence.

34. This is an objective test which should allay concerns about a more subjective test. At the time the government released its discussion paper, it was proposed that there should be explicit provision for costs if a person sought to avoid these provisions. The government decided not to proceed with that measure because there was concern that this would discourage people from relying on the exceptions where there were genuine violence and abuse issues.

35. Another consideration was that the measure did not satisfy other groups who did not consider this provision would be an effective deterrent. The court still retains a general capacity to order costs in these circumstances, although the usual costs outcome is that each party pays their own costs. The decision to set an objective test was made in the context of not proceeding with the explicit cost provisions.

36. The Bill also provides a mechanism at subsection 60I(9) (item 9, Schedule 1) that the court must consider whether a person who has not attended family dispute resolution should be referred to a service. This provision is intended to be a further disincentive to parties who contrive to avoid compliance with the family dispute resolution requirement.

37. As discussed in paragraph 17 of this submission, section 60J at item 9 of Schedule 1 provides that a person relying on the family violence or child abuse exception will still need to file a certificate evidencing that they have obtained information from a family counsellor or family dispute resolution practitioner

about services and options available to them, so that they are aware of any alternatives to court action and services that may assist them in their particular circumstances. This section was inserted to address concerns that cases involving family violence and child abuse may miss out on some of the information and referral services offered by the new Family Relationship Centres.

38. When an application that relies on one of the exceptions to attendance at family dispute resolution is made to the court, a judicial officer will make an initial assessment as to whether the exception relied on is appropriate, prior to hearing the matter. In the common registry process, this assessment may be made by a registrar exercising delegated judicial power. It would not be appropriate for filing staff to determine whether an exception has been met. The applicant will need to provide some evidence to ensure that the court is reasonably satisfied of the family violence or child abuse or risk of family violence or child abuse.

- Enforcement provisions

39. A number of groups (such as the Lone Fathers and the Shared Parenting Council) have indicated that they do not consider the enforcement provisions go far enough. They consider that there should be mandatory penalties if a party does not comply with court orders. The government considers the changes to the enforcement provisions provide the court with significantly more options to enforce orders, while allowing the court sufficient discretion to ensure that the most appropriate orders are made in the best interests of the children.

40. The amendments contained in the Bill to strengthen the existing enforcement regime are about providing the court with a greater range of options to appropriately deal with contraventions. The court will retain a discretion to determine the most appropriate orders and will consider the circumstances in each case in light of the best interests of the child. However, the provisions do place greater obligations on the court to make orders compensating the party who has not had contact as a result of the breach.

- That the amendments do not do enough to ensure shared parenting after separation

41. A number of groups have criticised the Bill as not doing enough to achieve equal shared parenting outcomes.

42. The government considers that the legislation clearly contains a number of provisions that will help to ensure that both parents have a greater share in the parenting responsibilities for their child after separation. The provisions in the Bill will promote the importance of children having a meaningful involvement with both of their parents. The provisions are deliberately child focussed. The key provisions are:

    - Item 2 of Schedule 1 adds as an objective, ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives to the maximum extent possible consistent with their best interests.

- Item 26 of Schedule 1 provides that a primary consideration in determining the best interests of the child will be the benefit to the child of having a meaningful relationship with both parents.

- Item 11 of Schedule 1 provides a starting point or presumption of shared parental responsibility. Item 23 of Schedule 1 includes the new section 65DAC which clarifies that the effect of an order providing for joint parental responsibility is that decisions about major long-term issues affecting the child have to be made jointly.

- Item 23 Schedule 1 requires the court to consider a child spending substantial time with both their parents where there is joint parental responsibility, both parents want this and it is reasonably practicable.

- The amendments to the enforcement provisions in Schedule 2 will significantly strengthen the parenting compliance regime and improve compliance with court orders providing for shared parenting.

C. DEFINING THE CONCEPT OF JOINT PARENTAL RESPONSIBILITY

The Requirement to Consult

43. Parents already can and do litigate about the issues that are defined as 'major long-term issues in item 6 of Schedule 1. The Bill now makes clear the obligation to seek to agree about major long-term issues in proposed section 65DAC (item 23, Schedule 1). The clarification of what issues are major long-term issues is intended to reduce disputes about what falls into this category and to make it clear that day to day decisions can be made by the parent who has care of the child, thus reducing litigation about those issues.

New Partners – A Major Long-Term Issue?

44. Living with a new partner is not defined as a major long-term issue in the Bill and parties are therefore not required to consult about a new partner.

45. However, if having a new partner results in significant changes to a child's living arrangements, a person will be required to consult. This is appropriate given that significant changes to living arrangements may have a significant impact on the child and on the capacity of a parent to exercise parental responsibility in relation to that child. It will also give parents an opportunity to discuss the best way to handle a particular change for their child.

46. Under existing law, an application to the court in relation to the arrangements for a child may be made if there is a significant change in the circumstances of the child or either parent (*Rice and Asplund*[2]). The possibility of litigating this issue therefore already exists.

[2] (1979) FLC 90-725

Resolving Disputes about the Requirement to Consult

47. Joint parental responsibility requires parents to consult and make a genuine effort to come to a joint decision under proposed section 65DAC.

48. Where a parent does not fulfil these requirements, the other partner can file an application seeking a resolution of the issue. Where a case is exempt from the requirement for family dispute resolution because it involves family violence or child abuse, there will still be a requirement for the person wanting to take the matter to court to obtain information from a family counsellor or family dispute resolution practitioner about options and support services available.

49. When determining such an application, the court will have the power to vary the order that requires joint parental responsibility. Depending on what is in the best interests of the child, the court may either make a decision about the issue in contention or change the order so that parental responsibility in relation to a particular component is no longer joint.

Section 65DAE – 'No Need to Consult'

50. The 'no need to consult' provision located in proposed section 65DAE (item 23, Schedule 1) will be contestable in court. A person may disagree with a decision that has been made by the person that the child is spending time with. For example, a parent who is spending time with the child feeds the child in a manner that is inconsistent with the child's religious upbringing. Although what a child eats is not usually a major long-term issue, a child's religious or cultural upbringing is defined as a major long-term issue in item 6 of the Bill.

51. In the event that the parties are unable to resolve this issue themselves, the parties will be required to attend family dispute resolution to discuss this issue before the court will hear this matter. The government anticipates that the majority of these types of issues will be resolved though these services.

Exception to Compulsory Family Dispute Resolution – Family Violence and Child Abuse

52. Item 9 of Schedule 1 ensures that people who apply to the court for a parenting order will be required to first attempt to resolve their dispute using family dispute resolution services, such as mediation. This change will assist people to resolve family relationship issues outside the court system, which will have the benefits of providing flexible solutions, minimising conflict and avoiding costly court procedures.

53. There are a number of exceptions in the Bill to this requirement, including where there is or has been family violence or child abuse. This exception recognises the impact that these issues can have on the capacity of parties to participate effectively in a dispute resolution process. The party seeking to rely on this exception must satisfy the court that they had reasonable grounds to believe that the abuse or violence has occurred or may occur.

54. Proposed section 60J will apply to a person who wishes to file an application for a parenting order in court and is not required to attend family dispute resolution because the case involves family violence or child abuse. This provision is discussed at paragraphs 17 and 37 of this submission.

D. THE PRESUMPTION OF JOINT PARENTAL RESPONSIBILITY

55. Item 11 of Schedule 1 provides for a new presumption (or starting point) of joint parental responsibility. The presumption will not apply in cases where there is family violence or child abuse. It can be rebutted if it is not in the child's best interests.

The Complexity of Two Presumptions

56. The government considers that the intention of recommendations 1 and 2 of the Committee can be achieved by having only one presumption and providing for an exception to the application of that presumption in cases of family violence and child abuse.

57. On reviewing earlier drafts of the Bill, the Family Court of Australia and the Federal Magistrates Court (the Courts) raised concerns about the complexity of the drafting of the two presumptions about the sharing of parental responsibility, as suggested in recommendations 1 and 2 of the Report. The Courts were also concerned about how these presumptions would operate in practice.

58. A further consideration was that retaining the two presumptions would have the effect that where the exceptions relating to family violence and child abuse apply, there is no starting point of joint parental responsibility and the court must consider the best interests of the child. In such cases, the negative presumption would also apply with the same result (that the court must consider the best interests of the child without any particular starting point).

59. As a result of these concerns, the government decided to have only one presumption which is intended to apply in all cases except where there is family violence and child abuse.

Note Concerning No Presumption of Equal Time

60. The note in proposed section 61DA explains that this provision does not provide for a presumption about the amount of time a child spends with each of the parents. The note directs the reader to section 65DAA which deals with this issue.

61. Notes to legislation generally do not have legal effect[3]. The intention of a note is to provide assistance to readers and, in particular, self-represented litigants. Notes are not intended to change the law and cannot contradict the outcome of

[3] Section 13(3) of the *Acts Interpretation Act 1901* provides that marginal notes, footnotes and endnotes are not to be taken as part of an Act.

other provisions in the Bill. The notes are used throughout this Bill to provide such assistance and to provide cross references between related provisions.

E. PARENTING PLANS

62. Division 4 of Part VII of the Act provides that generally parenting plans are written agreements made between the parents of a child. A parenting plan can be varied or revoked by further written agreement. These provisions are broadly drafted to ensure that there is sufficient flexibility to encourage people to enter into parenting plans. Item 13 of Schedule 1 is a non exclusive list of the matters that a parenting plan may deal with.

63. The intention of parenting plans is to reach an agreement outside of the court system. Item 14 of Schedule 1 sets out a series of obligations for advisers. The aim of this provision is to assist people making parenting plans to understand what the plan may include, the effect of the plan and the availability of programs to assist people who experience difficulties in complying with a plan.

64. The system of registration of parenting plans provided for in the Act was repealed by amendments to the Family Law Act in 2003. This was because of concerns that registration resulted in the plans losing the advantage of flexibility and consequently were not often used.

The Effect of Proposed Section 64D

65. Parenting plans are not enforceable as court orders but allow parents (and other parties) to reach parenting arrangements outside of the court system. The focus on parenting plans in this Bill is part of the cultural shift to have cooperative child-focussed parenting take place outside of the adversarial court system.

66. Section 64D, at item 19 of Schedule 1, inserts a default provision into parenting orders that are made after the commencement of these provisions. The default provision has the effect that those parenting orders will be subject to any subsequent parenting plan. There is a discretion for the court not to include the default provision in the parenting order in cases where this is not appropriate. The use of a default provision in parenting orders to achieve the policy intention ensures that there is an appropriate exercise of judicial power by the court because the court retains a discretion not to include this provision if it is inappropriate.

67. The intention of section 64D is that, to the extent of any inconsistency, a parenting order should cease to have effect in circumstances where parents subsequently make a parenting plan that deals with a matter in a court order. This does not mean that the parenting plan itself is enforceable (parenting plans have no legal enforceability), but does mean that after the commencement of these provisions, where this default provision is included in the parenting order, there will no longer be a right to enforce the previous court order (to the extent of inconsistency with the new parenting plan).

68. Therefore, people can only lose the capacity to enforce their existing parenting order within the court system if they agree to this in writing in a parenting plan. The unenforceability will be limited to the extent to which the later plan is inconsistent with the earlier orders. Item 14 of Schedule 1 ensures that they will be advised about the effect of entering into a parenting plan.

69. The government will fund the Family Relationship Centres to provide appropriate support for people to agree on parenting plans. The Centres will also find support services to assist people implement the plan, without the need to use the court system.

70. For example – A and B have parenting orders which provide that their child live with A and spend weekends with B. The section 64D default provision is included in their parenting order. Several years later, circumstances have changed for both A and B and the child indicates that he/she would like to live with B and spend weekends with A. After attending a family dispute resolution service, A and B both agree that this is appropriate. Rather than incur the costs (both financial and personal) of going through another court process, A and B agree in writing to the new arrangement.

71. If the arrangement breaks down and A wants the child to live with him/her, then A will not be able to bring an enforcement application against B seeking to enforce the parenting order and to penalise B for contravention of the original order. A will have to either renegotiate the agreement or, if this is unsuccessful, go back to court and seek new parenting orders. The court will make parenting orders that are in the best interests of the child. Item 23 of Schedule 1 requires the court to consider the parenting plan that was made by the couple when making these further parenting orders.

72. If A and B had obtained consent orders (through a court process for the agreement they reached subsequent to the original orders), A would not be able to bring an application for contravention of the original orders. However, if A were concerned about the new arrangement and later wanted to revert to the original orders then A would still need to either seek to negotiate an agreement or go to court to seek to vary the consent orders.

How the Court will take Parenting Plans into Consideration

73. It is intended that a court will consider the most recent parenting plan when it makes a parenting order. The court must also have regard to parenting plans when considering varying a parenting order as part of a contravention application. The intention is to encourage people, wherever possible, to try to reach agreement outside of the court process.

74. Section 65DAB at item 23 of Schedule 1 provides for a court to have regard to a parenting plan. The intention is that this provision will mostly be used in situations where, prior to entering the legal system, parents have agreed on a parenting plan that breaks down and parenting orders are required (because the plan itself is unenforceable). It may also be relevant, where due to the effect of

section 64D, a previous parenting order has become unenforceable and the parents now come before the court to seek new parenting orders.

75. This provision simply ensures that the court is made aware of arrangements agreed to by the parents and which have broken down. The court is still required to make a decision in the best interests of the child but information about the agreement may assist the court in considering the appropriate parenting orders to make.

76. The provisions in Schedule 2 relating to parenting plans are intended to cover situations where parenting orders have been made prior to the commencement of these provisions or where parenting orders are made which do not have the default section 64D provision about being subject to subsequent parenting plans. For other parenting orders where there is a section 64D default provision, any subsequent parenting plan will have rendered the orders unenforceable to the extent of inconsistency, so the contravention provisions will no longer be relevant.

77. New sections 70NEC (item 4, Schedule 2), 70NGB (item 8, Schedule 2) and 70NJA (item 12, Schedule 2) provide that where parenting plans are made after parenting orders, and they are not subject to the parenting order (as they were made prior to the commencement or the default provision of section 64D hasn't been applied) the court will need to have regard to the terms of the parenting plan. The court must specifically consider whether it would be appropriate to exercise the powers that the court already has under the contravention provisions to vary the existing parenting orders if those orders are inappropriate. The court is required only to have regard to and not to rely on a parenting plan because a parenting plan is not enforceable and any decision made by the court must be made in the best interests of the child.

78. A party is entitled to 'rely' on a parenting plan as a defence to an application that they be dealt with for breach of the original order. So the later parenting plan will protect the parent who has behaved in a way which breaches the order but complies with the parenting plan. This provision will not allow a parent to resile from an agreement unless the court makes a further order. A parenting plan is a shield, not a sword.

Obligations on Advisers

79. It is envisaged that the information relating to parenting plans that advisers (ie. legal practitioners, family counsellors, family dispute resolution practitioners and family and child specialists) are required to provide under proposed section 63DA, in item 14 of Schedule 1, will generally be provided in a written form (eg brochures).

80. There are two main reasons for this approach. Firstly, it is important that the information people receive about parenting plans is accurate, consistent and comprehensive (to place appropriate emphasis on key issues such as the interaction of parenting plans and parenting orders). Secondly, as many advisers will not be legal practitioners, it would be inappropriate to expect them

to provide advice about the legal implications of parenting plans. Carefully prepared written material will enable the information required under section 63DA to be provided by all advisers in a manner that addresses these two issues.

81. If the person receiving those documents requires further information or advice on the legal implications of parenting plans, the adviser should refer them to a provider of legal advice.

Understanding Parenting Plans - Third Parties

82. As discussed at paragraph 66 of this submission, section 64D has the effect of making a parenting order subject to any subsequent parenting plan that is in writing and is clearly made between the parents. The provision does so by inserting a default provision into parenting orders that are made after the commencement of these provisions. Therefore, a third party will be required to take notice of a subsequent parenting plan.

83. In relation to the Airport Watch List, the Australian Federal Police (the AFP) can only act if a parent has obtained a court order prohibiting the removal of the child from the country and requiring the child's name to be placed on the Airport Watch List. Orders restraining travel are in most instances made under Part XIV of the Act. Therefore, the AFP would not be able to rely on a parenting order obtained under Part VII or a subsequent parenting plan (section 64D will only apply to orders made under Part VII).

84. Parents also seek assistance from the AFP to enforce their parenting orders. For example, where a child has not returned from a period of contact a parent may request that the AFP return the child to them. However, the AFP cannot act until the parent has obtained a location order (if necessary) and recovery order from the court. The AFP will not otherwise enforce a parenting order or subsequent parenting plan.

85. In relation to child support matters, the Child Support Agency (the CSA) normally relies on written documentation from parents about what the actual living arrangements of the child are, rather than parenting orders. However, in situations where reference to a parenting plan is required, the CSA must also take notice of a subsequent parenting plan.

F. THE BEST INTERESTS TEST

The Current Test

86. Currently, in deciding whether to make a parenting order, a court must regard the best interests of the child as the paramount consideration (section 65E). Subsection 60D(1) of the Act defines 'interests' in relation to a child to include 'matters related to the care, welfare or development of the child.' The factors that the court must consider in determining the best interests of the child are set out in subsection 68F(2), as follows:

(a) any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's wishes;

(b) the nature of the relationship of the child with each of the child's parents and with other persons;

(c) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:
   i. either of his or her parents; or
   ii. any other child, or other person, with whom he or she has been living;

(d) the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;

(e) the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;

(f) the child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders) and any other characteristics of the child that the court thinks are relevant;

(g) the need to protect the child from physical or psychological harm caused, or that may be caused, by:
   i. being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or
   ii. being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person;

(h) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;

(i) any family violence involving the child or a member of the child's family;

(j) any family violence order that applies to the child or a member of the child's family;

(k) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;

(l) any other fact or circumstance that the court thinks is relevant.

87. The weight to be given to each factor is a matter for the court.

88. Section 60B(2) of the Act states the four principles that underlie the objects of Part VII. These principles are, however, always subject to the rider that any decision must be based on what is in the child's best interests.

89. Case law provides that the court should consider the longer term best interests of the child to the extent that this is both possible and reasonable in the circumstances.

The New Provisions

90. The best interests of the child under section 65E will continue to be the paramount consideration for the court in making parenting orders.

91. The major amendment contained in the Bill is the creation of two tiers of factors that the court must consider in determining what is in the best interests of the

child. The primary factors that the court must consider are: the benefit to the child of having a meaningful relationship with both parents and the protection of the child from physical or psychological harm.

92. The intention of separating these factors into two tiers is to elevate the importance of the primary factors and to better direct the court's attention to the revised objects of Part VII of the Act. The government considers it important to link the objectives of Part VII into operative provisions. This will lead to a more consistent focus on the court achieving the key elements of the objects of Part VII.

93. The elevation of these considerations, particularly that relating to ensuring a meaningful ongoing relationship between parents and children, is consistent with the proposal to introduce a presumption in favour of joint parental responsibility.

94. The second tier of factors will be the existing factors in subsection 68F(2) of the Act (as set out above). In addition, these amendments introduce a new factor that the court must consider which is the willingness and ability of each of the child's parents to facilitate and encourage a close and continuing relationship between the child and the other parent.

95. There is also an amendment to the current paragraph 68F(2)(j) (item 35, Schedule 1) which directs the court to consider a final or contested family violence order. The intention of this subsection is to ensure that uncontested or interim family violence orders are not an independent factor in determining the best interests of the child. The court will still consider, as a primary factor, the need to protect children from harm and will have regard to any actual violence under paragraph 68F(2)(i).

Consistency with the United Nations Convention on the Rights of the Child

96. The proposed subsection 68F(1A) reads as follows:

> The primary considerations are:
> (a) the benefit to the child of having a meaningful relationship with both of the child's parents; and
> (b) the need to protect the child from physical or psychological harm caused, or that may be caused, by:
> i. being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or
> ii. being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person.

97. Article 3 of the United Nations Convention on the Rights of the Child (the Convention) states that:

> (1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or

> legislative bodies, the best interests of the child shall be a primary consideration.

98. The Convention does not contain a definition of best interests of the child. The considerations listed as primary considerations in the proposed subsection 68F(1A) are consistent with other articles of the Convention, particularly Article 9(3), Article 19(1) and Article 18(1), although the wording is different. The text of these articles is as follows:

> Article 9
> (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
> (1) States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. 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.
>
> Article 19
> (1) States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

99. It is also relevant to mention Article 12 of the Convention. The text of Article 12(1) is as follows:

> States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

100. This is addressed in the current paragraph 68F(2)(a) which states that the court must consider 'any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the wishes of the child. This will become an additional consideration in paragraph 68F(2)(a). The wording will also more closely reflect that of the Convention as 'wishes' is to be amended to 'views'.

101. In summary, the factors that will become primary factors under the proposed subsection 68F(1A) are consistent with Australia's obligations under the Convention. Given this consistency and the fact that there is no definition of the best interests of the child in the Convention, the introduction of a hierarchy in this provision is not inconsistent with Australia's obligations under the Convention.

G. ALLEGATIONS OF VIOLENCE

102. The government is concerned that interim uncontested family violence orders from State and Territory Magistrates Courts can influence the outcome of family law proceedings. These orders can, in some cases, be obtained without evidence having been properly tested.

Paragraph 68F(2)(j) – Consideration of Family Violence Orders

103. In light of these concerns, the government proposes to amend current paragraph 68F(2)(j) in item 35 of Schedule 1 of the Bill (as discussed in paragraph 95 of this submission). This item provides that a court can consider a final or contested family violence order, rather than any family violence order. The intention of this subsection is to ensure that uncontested interim family violence orders are not an independent factor in determining the best interests of the child. This should address a concern that allegations of violence can be taken into account that were later found to be without substance.

104. The government does not consider that this amendment has the potential to place children at risk. In determining the best interests of the child, the court will consider, as a primary factor, the need to protect children from physical or psychological harm under subsection 68F(1A) in item 26 of Schedule 1. The court may also have regard to:

- any family violence involving the child or a member of the child's family under paragraph 68F(2)(i) of the Act; and
- final or contested family violence orders under paragraph 68F(2)(j).

105. If there are pending family violence orders, it will be a matter for the court in each particular case whether it chooses to wait for the determination of the issues of family violence by the State or Territory court. Alternatively, the court hearing the parenting application may draw its own conclusion about the violence as it impacts on the best interests of the child under paragraphs 68F(1A) and 68F(2)(i).

106. Schedule 3 of the Bill also contains amendments to implement new procedures for the conduct of those family law matters that do go to court. The more active case management approach will ensure that allegations of violence and abuse are dealt with at an earlier stage in the court process and that judicial officers are better able to ensure that appropriate evidence is before them to assist the court to better address these issues in the proceedings.

107. The investigation of allegations of child abuse and family violence is primarily a matter for the States and Territories. The government has concerns that these matters are often not given sufficient priority for investigation by relevant State and Territory authorities.

108. In relation to child abuse, the government is pleased with the national rollout of the Family Court's Magellan project and the recent extension of the Magellan project to NSW. The Magellan project involves the Family Court more actively managing parenting disputes involving allegations of serious physical and/or

sexual abuse against children. It is built on inter-organisational agreements that create a series of strong collaborative arrangements between the Court and relevant State and Territory agencies, including child protection authorities and legal aid. The Family Court of Western Australia has also implemented the Colombus project, which involves active case management by that Court of those cases that involve both allegations of child abuse and of domestic violence.

109. In addition, the Standing Committee of Attorneys-General has established a working group to consider ways of better coordinating the Commonwealth's family law system with child protection systems at State and Territory levels. One of the issues being examined is the development of model protocols between the family courts and state agencies to ensure appropriate information is available to the family courts in cases where there are allegations of child abuse.

Interim Family Violence Orders

110. Under paragraph 68F(2)(j), the court will be able to consider an interim order that was contested by the respondent.

111. In the event of an uncontested interim order, the court will be able to take the factors discussed in paragraph 104 of this submission into account. In considering the existence or threat of violence under paragraph 68F(2)(i), the respondent will be able to provide any evidence they have to contradict allegations of violence made under that provision.

H. THE COMPLIANCE REGIME

112. The government recognises that there is considerable dissatisfaction with how contraventions of parenting orders are dealt with. The government has considered the Committee's recommendations in relation to enforcement at Recommendation 21. The Bill proposes the adoption of a series of measures that clarify what the court is required to consider and adds to the options available to the court, while still protecting the best interests of the child. During consultations on the Committee's recommendations, there was considerable concern raised with the government about the potential problems that might arise from the proposals to reverse the residence of children and impose minimum financial penalties. In essence, these concerns were that parties would be reluctant to raise genuine concerns about risks to children if the result could be such penalties.

113. Enforcement cases are often cases that involve the most entrenched and bitter conflict between couples. A court is not necessarily the best venue to address such conflict. The Committee has noted (at paragraph 4.141) that a key reason for the lack of success of the current system is the limited availability of appropriate post-separation parenting programs. The substantial increase in such services that will result from the government's Budget announcements should alleviate much of this problem. Further, the changes in Schedule 1 at items 13 and 16 that increase the detail of what parenting plans and parenting

orders contain and the introduction of greater support services for parents in these circumstances should all help to significantly reduce the level of enforcement applications.

114. Many breaches of parenting orders result from the inappropriateness of existing orders, many of which are made by consent. The new regime of assistance that will be available to separating families and the greater flexibility given to the courts should reduce the numbers of such unworkable orders being made in the first place.

Clarification of the Standard of Proof

115. One concern about the current provisions is that courts require a very high standard of proof of a breach because of the possibility of criminal sanctions. The standard of proof required is clarified in the Bill.

116. Item 2 of Schedule 2 makes clear the standard of proof that will apply and ensures that expectations about the standard of proof are clear and realistic. This provision is intended to assist practitioners and in particular self-represented litigants as it clarifies the evidentiary standard that must be met. This will assist in case preparation. The lower standard of 'balance of probabilities' will apply for cases where non criminal sanctions are sought. This will make it easier to demonstrate contraventions than under the current system where a higher standard, which is something between the balance of probabilities and beyond reasonable doubt[4], may be applied to all contravention applications. For those matters where the court proposes to make orders that involve a criminal sanction, the court will need evidence that satisfies the court beyond reasonable doubt.

Costs in Enforcement Proceedings

117. The Bill introduces new powers to award costs against a party in items 6, 9 and 11 of Schedule 2. These powers will only apply to enforcement applications.

118. Under stage 2 of the parenting compliance regime, proposed paragraph 70NG(1)(f) allows the court to make an order for some or all of the costs against the contravening party.

119. In relation to matters under stage 3 of the parenting compliance regime (Subdivision C, Division 13A, Part VII), proposed paragraphs 70NJ(3)(g) and (h) (item 11, Schedule 2) list the power to order some or all of the costs against the contravening party in the available court options. Proposed section 70NJ(2A) (item 9, Schedule 2) inserts a presumption into stage 3 that the court will order costs for legal expenses against a party who has breached the order, unless it is not in the best interests of the child. Where it is not in the best interests of the child to make such an order, the court must make one of the other orders available to it in subsection 70NJ(3).

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[4] *Briginshaw v Briginshaw* (1938) CLR 336

120. These provisions in specifically state that they will only apply to proceedings under that Subdivision.

121. Otherwise, the general rule that each party bear their own costs will apply.

Other Options for the Court to Encourage Compliance

122. The range of orders from which the court can consider the most appropriate option is significantly expanded which will address concerns expressed by the court about the current limited options that they have.

123. There will be a discretionary power to award compensation for reasonable expenses incurred by a party (such as airfares wasted or other tickets purchased but not used). There is also a discretion to impose a civil bond for such breaches where the consequences of failure to comply with the bond would be limited to civil penalties. This would distinguish it from the current bond provisions at the final stage of the parenting compliance regime where there are clear criminal consequences.

124. At the third stage of the parenting compliance regime, there will also be a rebuttable presumption requiring the court to make an order for costs for legal expenses against a party who has breached the order and to consider making other appropriate orders. This is discussed at paragraph 119 of the submission.

Orders Providing for Compensatory Time

125. Under the proposed section 70NEAB (item 3, Schedule 2), a court must consider an order for make up contact even where there is a reasonable excuse for contravening the parenting order. This provision recognises the importance of, and benefit to, the child having contact with their non resident parent.

126. The idea of compensatory orders was suggested as an alternative to requiring the court to consider a reversal of a residence order if contact did not occur. Reversing a residence order was thought to be too drastic a change and would not achieve the required outcome, that is, to ensure that contact occurs.

127. A preference for compensatory contact over the reversal of residency was expressed in the written submissions of the ACT Women's Legal Service and the National Network of Women's Legal Services. The idea was also discussed during consultation meetings with the Legal Aid Commission of Western Australia, the Family Law Section and ACT Legal Aid.

Compensation Orders

128. Compensation orders under proposed paragraphs 70NG(1)(e) (item 6, Schedule 2) and 70NJ(3)(f) (item 11, Schedule 2) allow the court to make an order awarding compensation for reasonable expenses incurred by a party if there has been a breach of a parenting order.

129. For example, under the terms of an order contact is to occur with a non resident parent in another State. The non resident parent purchases a plane ticket for the child to travel but the other parent refuses or fails to send the child and the contact does not take place. In considering an enforcement application, the court can order that the non resident parent be reimbursed by the resident parent for the reasonable expenses that were incurred. It is anticipated that such an order would only be made if the other parent is at fault in some way.

Bonds

130. The bond provision in proposed section 70NGA (item 8, Schedule 2) is based upon section 70NM in the current Act and provides that a court may require a person to enter into a bond for a specified period of to 2 years. The key difference is that such a bond does not carry criminal sanctions as are available under section 70NM of the Act.

131. A bond with 'surety' is given where a person promises to take responsibility for a party's performance of an undertaking. For example, that person promises the court that it will pay the bond if the party breaches a condition of the bond. This is similar to a guarantor for a loan.

132. A bond with 'security' requires a party to provide the court with some form of wealth in advance. For example, a court may require the payment of a sum of money into court that is returned if the obligation is met. If the party does not meet the condition, that money will be forfeited. A further example is where the party is required to transfer ownership of an asset which the court can realise if the condition is not met.

133. Section 70NGA does not specify the maximum amount of money a person can be ordered to pay as a bond. The current provision in the Act is also silent on this issue.

134. The government considers that the court requires maximum flexibility in determining the amount required for a bond. The court must be able to make an order for a sufficient amount that will act as a meaningful deterrent for breaching a bond. For example, while a person with a very low income would only require a small amount, a person with a high income and assets would require a large amount as an incentive to meet the conditions of the bond. This is a similar situation that a court faces when determining bail for a criminal act.

135. It is important to note that a person will only be required to forfeit the amount ordered by the court if they breach a condition of the bond.

136. Money forfeited as a result of non compliance with a bond will go to Commonwealth Consolidated Revenue.

Impact of Subsequent Parenting Plans

137. Proposed section 70NJA (item 12, Schedule 2) allows the court to take into account any subsequent parenting plan when it is considering whether to vary parenting orders as part of stage 3 of the parenting compliance regime (proposed section 70NEC in item 4 of Schedule 2, gives the court the same power in relation to stage 2 of the parenting compliance regime). This provision ensures that the court is informed about the type of agreements that the parents themselves were considering when deciding what is in the best interests of the child. The court is not however bound by the terms of the parenting plan.

138. Sections 70NEC and 70NJA will only be relevant for the enforcement of parenting orders that do not have a section 64D default clause (parenting orders made prior to the commencement of that provision or where the court has exercised its discretion not to include the provision).

139. Where a section 64D clause is included in a parenting order, the parenting compliance regime will not be relevant if a subsequent parenting plan has been made. The effect of this provision is that the parenting order will be unenforceable to the extent it is inconsistent with any subsequent parenting plan.

I. AMENDMENTS RELATING TO THE CONDUCT OF CHILD-RELATED PROCEEDINGS

140. Schedule 3 of the exposure draft is specifically designed to ensure that the court process is less adversarial. This approach relies on active management by judicial officers and ensures that proceedings are managed in a way that considers the impact of the proceedings (not just the outcome of the proceedings) on the child. The intention is to ensure that the case management practices adopted by courts will promote the best interests of the child by encouraging parents to focus on their parenting responsibilities.

141. This approach largely reflects the approach taken by the Family Court in its pilot Children's Cases Program (CCP), although it is not intended to restrict courts exercising family law jurisdiction to the implementation of the CCP program.

142. Initial data from this project is very encouraging. There have now been some 126 cases finalised out of the 220 that have been accepted into the project. There have not yet been any appeals from the decisions that have been made. The full evaluation is expected in early 2006.

143. The evaluation methodology relies on the comprehensive data collected by the Family Court for analysis by the researcher, extensive interviews with all the participants in the process (judges, staff, lawyers and stakeholder groups) and client surveys, distributed at the completion of the case to each party. The CCP approach will be compared against a matching control group of cases which were completed in the same period.

144. A second sub study of the impact on children is being conducted. In addition, the Family Court has been undertaking a thorough examination of the resource impacts of the model including the judicial, mediator and client services staff resources in order to be able to plan for future expansion of the program.

145. The government's view is that Schedule 3 of the Bill is drafted sufficiently broadly to allow for flexibility in adopting any appropriate findings or recommendations that result from the evaluation of the Children's Cases Program.

146. In drafting these provisions, the government was also mindful that the different courts exercising family law jurisdiction may require flexibility in the operation or development of less adversarial programs within the individual court structure.

Making the Court Process Less Traumatic and Easier to Navigate

147. The less adversarial approach set out in Schedule 3 is generally intended to make the court process less traumatic by promoting a cooperative approach between parents, with a focus on children.

148. In particular, the provisions set out in proposed sections 60KE, 60KF, 60KG and 60KI (item 4, Schedule 3) will ensure a significantly less adversarial approach to decision making. Section 60KE sets out the obligations imposed on a judicial officer dealing with children's matters to be more involved in the way that a case is dealt with at the trial phase. Section 60KG provides that many of the rules of evidence that would normally apply in such matters will not apply unless the court decides otherwise. Section 60KI gives the court greater power to direct how evidence will be produced and how the examination of witnesses will take place at trial.

149. In addition to the legislative changes, the implementation of a combined registry for family law matters is a key component of the package of reforms announced by the government. The aim is to channel cases to the appropriate court and address concerns that the family court system can be confusing for many people. For example, the registry will provide one comprehensive set of information to parents. The Courts have held a series of consultative workshops in early February 2005 in Melbourne, Sydney and Brisbane. The courts have also released an information kit as the basis for further consultation with stakeholders about the proposed combined registry.

Opportunities for the Appropriate Inclusion of Children

150. The first principle of the less adversarial approach at subsection 60KB(3) at item 4 of Schedule 3 is that the court considers the needs and concerns of the child or children in determining the conduct of the proceedings. The third principle of this approach is that proceedings should be conducted to promote cooperative and child focussed parenting by the parties. Implementation of this principle potentially provides an opportunity for much closer participation of

children in appropriate cases and a much greater focus on their children's interests by disputing parents. This is in part because the greater judicial management of the hearing process is intended to make it much more flexible and able to respond to the dynamics of the case as it progresses. For example, a judicial officer may in an appropriate case more directly involve children in the court process itself, so that the children could feel that their views were in fact before the court.

151. Under the current system, children's views are generally put before the court by a child representative who is a lawyer with specific training in the requirements of the role. It is expected that this will continue to be the primary manner in which the views of children are put to the court. In addition, the Family Court is currently working on implementing a child inclusive model for non-judicial dispute resolution through court mediators. This dispute resolution process occurs as part of the overall court process. This model provides for the direct involvement of children at an earlier stage of that process.

The Relationship between Sections 60KE and 60KI

152. In developing Schedule 3, the government considered the current examples of the *Federal Magistrates Act 1999*, the *NSW Children and Young Persons (Care and Protection) Act 1998* and the United Kingdom Civil Procedure Rules (the UK Rules). In particular, the UK Rules provided a basis for the development of the duties and powers of the court that are set out in proposed sections 60KE and 60KF.

153. The government has consulted closely with the Family Court of Australia and the Federal Magistrates Court in the development of the Bill, particularly Schedule 3. These provisions reflect the views of these courts.

154. The government considers that the mandatory factors listed in section 60KE will focus the courts on the principles for conducting child-related proceedings in section 60KB. In particular, the amendments in section 60KE will ensure the active management of proceedings by judicial officers in such a way that considers the impact of the proceedings on the child and not just the outcome of the proceedings.

155. The discretionary factors in section 60KF will allow the court the flexibility to return to a mediation model once some of the issues have been resolved and the parties are able to focus on the interests of their children in the light of the court's findings.

Responsibility for Case Management

156. The government anticipates that children's cases will be managed by either judges or magistrates.

157. Currently, decisions on cases in the Children's Cases Program in the Sydney and Parramatta registries of the Family Court are made by judges. In the

Federal Magistrates Court, decisions are made by magistrates. The government does not anticipate that this will change.

J. THE DISPUTE RESOLUTION PROVISIONS

158. Schedule 4 of the exposure draft amends the counselling and dispute resolution provisions in the Act to implement the government's policy of encouraging separating and divorcing parents to utilise counselling and dispute resolution services without the need to go to court.

159. The amendments distinguish services available in the community from those provided by the courts, to assist in clarifying the different roles played by each sector in assisting people affected by separation and divorce. The Schedule also amends the prerequisites for approval as a family counselling or family dispute resolution organisation.

Encouraging Out of Court Settlements

160. The amendments introduced by the exposure draft will encourage more out of court settlement than the existing Act primarily through the provisions in Schedule 1 of the Bill, in particular proposed sections 60I and 63DA. Proposed section 60I provides (subject to some exceptions) that the court may not hear an application under Part VII of the Act unless the applicants have attended family dispute resolution. Proposed section 63DA requires professionals giving advice or assistance to people in relation to parental responsibility for a child to inform the people about parenting plans (which should encourage more people to enter into such arrangements, rather than seeking orders from the court).

161. Schedule 4 will encourage more out of court settlements primarily through supporting the provisions in the other Schedules of the Bill. For example, proposed section 60I could not work as intended unless a clear distinction was made between services that are concerned with relationship or personal issues and those that are genuinely concerned with resolving disputes. The introduction of clearly delineated categories of family counselling and family dispute resolution achieves the necessary distinction between the two processes.

162. Schedule 4 also encourages more out of court settlement in the following ways:

- Part IIIA of Schedule 4 consolidates and expands the requirements relating to the provision of information on family services, to ensure that people receive useful information on family counselling and family dispute resolution services early in the process of separation or divorce. The provision of such information at an early stage may help the people involved to address problematic issues before they become entrenched.
  This will assist many couples to avoid escalating levels of conflict, putting people in a better position to negotiate their own agreements rather than requiring intervention by the courts.
- Part IIIB of Schedule 4 expands the power of courts exercising jurisdiction under the Act to order, or advise, people to attend family services that are appropriate to their needs. The courts' increased power in this area will

assist people affected by separation or divorce to receive appropriate assistance at the appropriate time, including, importantly, assistance to resolve their disputes outside the judicial process.

- Changes to the provisions relating to approval of organisations may also encourage more out of court settlements, through wider availability of dispute resolution and counselling services that will allow more people to access services to professionally assist them to make arrangements without court intervention. The amendments remove the requirement for approved organisations to be 'voluntary' or non-profit. This widens the pool of organisations eligible for approval to include organisations that operate on a for-profit basis. This should assist in ensuring that a range of organisations can apply to provide the increased services announced in the 2005 Budget.

Confidentiality and Inadmissibility

Family counsellors and family dispute resolution practitioners

(i) Confidentiality

163. Currently family and child counsellors and family and child mediators must take an oath of confidentiality, as set out in regulations 58 and 66 of the *Family Law Regulations 1984* (the Regulations). Proposed sections 10C and 10K move the terms of the oaths into the Act, to emphasise the importance of confidentiality.

164. The differences between proposed sections 10C and 10K and the oaths at regulations 58 and 66 are set out in detail in attached Table 3. The main areas of difference between the proposed and existing provisions are:

    - In response to concerns that have been raised by many counselling and dispute resolution practitioners, the proposed provisions will allow a family counsellor or family dispute resolution practitioner to disclose information when making a referral, provided the party who made the disclosure consents to that disclosure. If the disclosure was made by a child who is under 18, both parents must consent to the disclosure. If agreement cannot be reached the matter may be referred to the court. This is similar to the situation in relation to parentage testing, under section 69W of the Act.
    - The proposed provisions will allow family counsellors and family dispute resolution practitioners to make disclosures for research purposes, provided the disclosures do not identify individuals.

(ii) Admissibility

165. Currently the admissibility of communications with family and child counsellors, family and child mediators and other professionals to whom they refer, is dealt with at section 19N of the Act. The admissibility of communications with family counsellors, family dispute resolution practitioners and the professionals to whom they refer will be dealt with at proposed sections 10D and 10L.

166. The differences between proposed sections 10D and 10L and current section 19N are set out in detail in attached Table 3. The main areas of difference between the proposed and existing provisions are:

- Currently the evidence of any person who is attending counselling with a family and child counsellor or mediation with a family and child mediator is inadmissible, but evidence arising from a professional consultation pursuant to a referral from a counsellor or mediator is only inadmissible where the person attending the consultation is a party to a marriage (see 19N(1)(e)). Under the amendments, the admissibility of evidence will be related to the professional to whom a family counsellor or family dispute resolution practitioner refers, rather than the status of the person who is referred (see paragraphs 10D(1)(b) and 10L(1)(b)).
- In order to ensure that professionals to whom family counsellors and family dispute resolution practitioners make referrals are aware of the inadmissible status of communications made to them, subsections 10D(4) and 10L(4) require the family counsellor or family dispute resolution practitioner to inform the professional of this fact when making a referral.

Family and child specialists

167. The role of family and child specialists consolidates the existing functions of court counsellors, court mediators and welfare officers under the current Act. Under the current Act communications with court mediators are always inadmissible. The admissibility of communications with court counsellors and welfare officers is affected by the section under which the counsellor or welfare officer is providing a service. For example, under section 62G the court can direct a family and child counsellor or welfare officer to provide a report to the court. The court can also receive a report from a family and child counsellor or welfare officer under section 65G.

168. Under the proposed amendments, if a court wishes to provide services that are confidential and inadmissible, it can do so by authorising or engaging staff to provide family counselling and/or family dispute resolution. Such services will be covered by proposed sections 10C, 10D, 10K and 10L. However, it is expected that most family counselling and family dispute resolution services will be provided outside the court.

169. The services that are provided by family and child specialists will not be confidential and communications with family and child specialists will be admissible in court provided the person concerned has been informed that disclosures made to family and child specialists are admissible. (Even if a person has not been informed that their statements or disclosures will be admissible, special considerations will apply in cases that involve child abuse.)

170. Thus the court retains the power to provide both inadmissible and admissible services, but the status of any process will be made clearer, as the title of the person who provides court services will differ depending upon whether communications made in the provision of the service are intended to be admissible or not, unlike the present situation where court counsellors and

welfare officers can provide services in which the admissibility of communications may differ.

Approved Organisations

Eligibility for approval – current requirements

171. Under the current legislation voluntary (non-profit) organisations may apply to the Attorney-General for approval as a counselling organisation (section 13A) or a mediation organisation (section 13B). The Attorney-General may approve an organisation as a counselling or mediation organisation only if he or she is satisfied that:

    - the organisation is willing and able to engage in family and child counselling (or family mediation, as relevant) and
    - the whole, or a substantial part, of the organisation's activities consist, or will consist, of family and child counselling (or family mediation if applying for approval as a mediation organisation).

172. An organisation may be approved as a counselling and/or a mediation organisation (section 13).

173. If the Attorney-General decides to refuse an organisation's application for approval, he or she must give written notice of that decision to the organisation (subsections 13A(3) and 13B(3)).

Eligibility for approval – proposed requirements

174. Under the Bill, the Attorney-General may approve an organisation as a family counselling or a family dispute resolution organisation only if he or she is satisfied that:

    - the organisation is currently receiving, or has been selected to receive, funding under a program or part of a program that has been designated by the Attorney-General, and
    - the organisation is receiving, or has been selected to receive, that funding in order to provide services that include family counselling or family dispute resolution, as relevant.

175. An organisation may be approved as a family counselling and/or a family dispute resolution organisation.

Removal of requirement for organisations to be 'voluntary'

176. Under the current legislation only non-profit organisations (referred to in the legislation as 'voluntary organisations') may apply to the Attorney-General for approval as counselling organisations (section 13A) or mediation organisations (section 13B). Under the amendments, organisations will no longer need to be operated on a non-profit basis in order to be approved. As set out above, the Attorney-General may approve organisations that are receiving, or have been

selected to receive, funding under a designated program, to provide services that include family counselling or family dispute resolution (as relevant). The profit status of an organisation will not be relevant to the approval decision. This will broaden the range of organisations able to receive funding and approval under the Act, which should assist in ensuring that a range of organisations can apply to provide the increased services announced in the 2005 Budget.

Funding requirement

177. As set out above, the proposed provisions allow the Attorney-General to approve an organisation as a family counselling or a family dispute resolution organisation only if that organisation is currently receiving, or has been selected to receive, funding to provide services that include family counselling or family dispute resolution (as relevant) under a program or part of a program that has been designated by the Attorney-General. The approval of an organisation will relate to the type of funding it receives. For example, only organisations that receive funding to provide services that include family dispute resolution will be eligible for approval as a family dispute resolution organisation.

178. The decision as to whether an organisation will be funded under a designated program will be made according to the guidelines of that program (such as the Approval Requirements for the Family Relationships Services Program (FRSP)). Such funding decisions are independent of the process for approval of organisations under the Act. In practice an organisation would be selected to receive funding (usually through a competitive process) and would then be able to be approved under the Act. The proposed provisions relating to approval of organisations do not in any way restrict the range of organisations that can apply for funding.

179. The proposed amendment of the Act to require approved organisations to be selected to receive funding reflects current practice, as all approved organisations are currently funded under the FRSP. Accountability requirements under the FRSP assist in ensuring a level of quality in the services that are provided by approved organisations.

Effect of amendments on existing services

180. Existing services will not be affected by the changes to the process for approval of organisations. Item 120 of the Bill provides that if, immediately before Schedule 4 commences, an organisation is approved as a counselling organisation it is taken to be approved as a family counselling organisation under proposed section 10E. Similarly, Item 121 provides that if, immediately before Schedule 4 commences, an organisation is approved as a mediation organisation it is taken to be approved as a family dispute resolution organisation under proposed section 10N.

Assuring the Quality of Services

181. Currently the primary mechanism for ensuring the quality of approved organisations is not the Act, but rather funding agreements and regular audits.

To our knowledge, this approach (i.e. ensuring the quality of the services through program management rather than through legislation) is the norm in situations where the Australian government is in some way responsible for services. An example is the contracts to deliver Job Network services.

182. The insufficiency of the Act to provide a framework in which to guarantee quality of services is reflected in the practice of approving only organisations currently funded under the FRSP. FRSP funding agreements set out rigorous reporting requirements (including independent auditing) and are transparently enforceable.

183. However, although the quality of services is ensured mainly through the stringent requirements imposed under the FRSP funding agreements, Part 5 of the Regulations, which sets out requirements that must be complied with by family and child counsellors, family and child mediators and arbitrators, includes a number of quality control measures. The Regulations will require amendment to reflect the changes introduced by the Bill, but the substance of the requirements set out in Part 5 of the Regulations will be maintained.

184. The requirement for family and child counsellors and family and child mediators to maintain confidentiality, as set out in regulations 58 and 66 will be moved into the Act by proposed sections 10C and 10K (see Table 3).

185. The other requirements in the Regulations relate to family and child mediators and arbitrators. Current section 19P provides that the regulations may prescribe requirements to be complied with by family and child mediators in relation to the family and child mediation services they provide. This provision is reproduced at proposed sections 10R of the Bill.

186. Division 2 of Part 5 of the Regulations provides for minimum levels of qualifications, training, and experience for family and child mediators. The regulations also contain a set of consumer protection provisions. All potential parties to a mediation are required to be assessed by a mediator to ensure that the parties are in a position to negotiate freely. Issues such as family violence, safety of the parties and equality of bargaining power are addressed to ensure that the matter in dispute is appropriate for mediation.

187. The regulations also provide that information on factors such as the process of mediation, child's interests issues, the right to terminate a mediation session, the right to obtain legal advice, the immunity of mediators from any civil liability, the inadmissibility, confidentiality and disclosure obligations, qualifications of the mediators and other factors has to be given to the parties in a written statement prior to the mediation.

188. These safeguards will be maintained in the amended regulations, until the introduction of accreditation standards, discussed below, to help ensure the quality of family counselling and family dispute resolution services. No changes are planned to the requirements imposed on arbitrators.

Introduction of accreditation standards

189. The Department has funded the Community Services and Health Industry Skills Council (CSHISC) to develop competency-based accreditation standards and a suite of qualifications for family counsellors, dispute resolution practitioners and workers in Children's Contact Centres. When these standards are introduced they will provide a further mechanism for ensuring quality additional to those in the funding agreements.

190. As part of the development of accreditation standards:
   - CSHISC will develop core competency standards in consultation with stakeholders
   - Registered Training Organisations (RTOs) will assess and certify practitioners' competencies, and
   - RTOs will also offer training courses or direct people to appropriate courses for them to gain competencies.

191. This approach will examine expanding the range of acceptable qualifications in a way which both recognises existing competencies and provides opportunities for workers to gain the required competencies at minimal cost. A competency-based approval system would also provide opportunities for existing practitioners to gain competencies in specific areas such as screening for domestic violence or ensuring that their practice is child-focussed.

192. We expect the accreditation requirements to be introduced into the legislation in about 18 to 24 months.

Availability of Dispute Resolution Services

193. The introduction of a requirement to attend dispute resolution before an application for a Part VII order may be heard by the court will undoubtedly result in an increased demand for family dispute resolution services. The government has allocated significant resources in the 2005-06 Budget to ensure that such services will be readily available. In particular, substantial funds have been allocated to the establishment of Family Relationship Centres. It is the responsibility of the Attorney-General's Department and the Department of Family and Community Services to ensure that the roll out of the Family Relationship Centres occurs in accordance with the government's statements, and the Department fully expects that this will occur.

194. However, the provision of family dispute resolution services will not be the sole domain of Family Relationship Centres – the services will also be provided by individuals who meet the requirements for family dispute resolution practitioners under the Regulations and by other approved organisations. Recognising the role of these organisations in meeting the increased demand for dispute resolution services resulting from the Bill, the government recently announced that it will expand community-based dispute resolution services by 25 per cent, at an additional cost of $13.4 million over four years.

195. In addition, the national telephone advice line that will support the Family Relationship Centres, which will be providing services by mid-2006, will be able to arrange for dispute resolution to be conducted by telephone or video conferencing by Family Relationship Centres in other locations, if there is not a dispute resolution service available in the location of a person wishing to file a parenting matter.

196. Due to the increased funding of dispute resolution services, such services will be accessible in all but the most exceptional cases. In such cases, the exception to the requirement to attend dispute resolution set out at paragraph 60I(8)(e) may apply, as it covers situations where one or more of the parties is unable to participate effectively in family dispute resolution, due to circumstances such as physical remoteness or intellectual impairment.

197. Significant delays in accessing family dispute resolution services are not expected, and waiting times are likely to be much less than those involved in obtaining a hearing for non-urgent matters in court.

Urgent applications

198. A delay in accessing dispute resolution services is not a specific exception to the requirement to attend dispute resolution before the court can hear an application for a Part VII order.

199. If an application for an order under Part VII of the Act is made in circumstances of urgency, the requirement to attend dispute resolution does not apply and the court may hear the application. If a matter is not urgent, it is expected that the court would refuse to hear an application until the parties had attended dispute resolution, given the variety of ways in which the requirement to attend dispute resolution is able to be satisfied (i.e. through Family Relationship Centres, private practitioners, approved organisations, telephone or video facilities etc).

K. CONSULTATION WITH ABORIGINAL AND TORRES STRAIT ISLANDER GROUPS

200. There are a number of amendments contained in the Bill which implement the Family Law Council's December 2004 Report, *Recognition of Traditional Aboriginal and Torres Strait Islander Child Rearing Practices*. For example, the principles in item 2 of Schedule 1 contain reference to the need to specifically consider the right of a child to enjoy their culture and contain particular reference to the rights of Aboriginal and Torres Strait Islander children to develop a positive appreciation of their culture.

201. The government considered it appropriate for these recommendations to be implemented, as they are broadly consistent with the recommendations of the Report about ensuring the recognition of the role of extended families.

202. In the preparation of their report, the Family Law Council (the Council) sought submissions from a range of Aboriginal and Torres Strait Islander organisations and received submissions from:

- the Aboriginal and Torres Strait Islander Commission (ATSIC)
- the National Aboriginal and Torres Strait Islanders Legal Services Secretariat (NAILSS)
- the Aboriginal and Torres Strait Islander Women's Legal and Advocacy Service (ATSIWLAS)
- the Women's Legal Resources Centre, and
- the Officer of Multicultural and Torres Strait Islander Affairs (in the Department of Immigration and Multicultural and Indigenous Affairs).
- Council provided an early draft of the document to the Aboriginal Legal Service of Western Australia which provided a detailed response.

203. The Council report was based on recommendation 22 of the *Out of the Maze* report by the Family Law Pathways Advisory Group (the Pathways Group). In developing that recommendation, the Pathways Group received 284 submissions as well as 307 individually signed identical form letters. They consulted consumers, service providers, indigenous leaders and legal professionals between 27 September 2000 and 18 October 2000, in all States and Territories. An Indigenous Pathways Forum was held in Canberra on 23 October 2000.

204. The Pathways Group recommendation originally stemmed from recommendation 54 of the *Bringing them Home* report of Human Rights Equal Opportunity Committee (HREOC).

L. IMPACT ON CHILD SUPPORT

205. The Bill is generally consistent with the recommendations of the Child Support Taskforce in its report, *In the Best Interests of Children – Reforming the Child Support Scheme* (the Taskforce Report). In particular, the recommendations that relate to better recognising joint parental responsibility and that encourage agreements rather than litigated outcomes reflect similar recommendations in that Taskforce Report.

M. ATTACHMENTS TO SUBMISSION

206. The following attachments are provided:

- Attachment 1 – Comparison of Committee recommendations, government response and provisions of the Bill

- Attachment 2 – Schedule 4 provisions

- Attachment 3 - Précis of the Australian Government Solicitor advice – less adversarial approach

FAMILY LAW AMENDMENT (SHARED PARENTAL RESPONSIBILITY) BILL 2005

Schedule 4 Provisions

Abbreviations use in table

the Act	*Family Law Act 1975*
the Bill	Family Law Amendment (Shared Parental Responsibility) Bill 2005
CEO	Chief Executive Officer
FCoA	Family Court of Australia
FCWA	Family Court of Western Australia
the FMA	*Federal Magistrates Act 1999*
FMC	Federal Magistrates Court
FRSP	Family Relationships Services Program
ITAA	*Income Tax Assessment Act 1997*
NADRAC	National Alternative Dispute Resolution Advisory Council
the Regulations	*Family Law Regulations 1984*
the Rules	Family Law Rules 2004

Proposed provision	Corresponding current provision(s)	Change to current provision
Schedule 4		
Part 1 - Amendments		
Family Law Act 1975		
Item 1 – subsection 4(1) Insert definition of 'abuse, in relation to a child'	Subsections 19N(4), 60D(1), 62F(10), 70NI(3)	No change to current definition.
Item 2 – subsection 4(1)		An element of the changes to counselling and dispute resolution terminology

Proposed provision	Corresponding current provision(s)	Change to current provision
Insert definition of 'advisory dispute resolution'		introduced by the Bill. The terms 'family and child counselling' and 'family and child mediation' are removed by the Bill and the new terms 'family counselling' (defined at s10A) and 'family dispute resolution' (defined at s10H) are introduced. The new definition of 'family dispute resolution' encompasses both 'advisory dispute resolution' (where advice is provided as part of the process) and 'facilitative dispute resolution' (where no advice is provided, but information can be provided).
Item 3 – subsection 4(1) Repeal the definition of 'approved counselling organisation'		An element of the changes to counselling and dispute resolution terminology introduced by the Bill. Organisations that are approved by the Attorney-General to offer family counselling services will be known as 'approved family counselling organisations' (see Item 4).
Item 4 – subsection 4(1) Insert definition of 'approved family counselling organisation'.	Based on current definition of 'approved counselling organisation' at subsections 4(1) and 12(1).	An element of the changes to counselling and dispute resolution terminology introduced by the Bill. Organisations that are approved by the Attorney-General to offer family counselling services will be known as 'approved family counselling organisations'. See section 10E for information on how the process for approval of organisations has changed.
Item 5 – subsection 4(1) Insert definition of 'approved family dispute resolution organisation'.	Based on current definition of 'approved mediation organisation' at subsections 4(1) and 12(2).	An element of the changes to counselling and dispute resolution terminology introduced by the Bill. Organisations that are approved by the Attorney-General to offer family dispute resolution services will be known as 'approved family dispute resolution organisations'.
Item 6 – subsection 4(1) Repeal the definition of 'approved mediation organisation'		An element of the changes to counselling and dispute resolution terminology introduced by the Bill. Organisations that are approved by the Attorney-General to offer family dispute resolution services will be known as 'approved family dispute resolution organisations' (see Item 5).
Item 7 – subsection 4(1) Insert definition of 'arbitration'.		Currently the Act does not contain a definition of 'arbitration', which poses problems for users of the Act who are unfamiliar with the term. The definition of arbitration inserted by the Bill is taken from the National Alternative Dispute Resolution Advisory Council's (NADRAC's) 'Glossary of Common Terms'.
Item 8 – subsection 4(1) Amends the definition of 'arbitrator'	Subsection 4(1)	The definition of 'arbitrator' is unchanged from the current definition, except that it specifically refers to the fact that the 'prescribed requirements' for arbitrators will be set out in the *Family Law Regulations 1984*, which should assist readers.

Proposed provision	Corresponding current provision(s)	Change to current provision
Item 9 – subsection 4(1) Repeal the definition of 'child counselling'		The current definition of 'child counselling' contains elements of both processes concerned with psychological health and relationships issues and those that aim to resolve disputes. This definition is incompatible with the clear delineation of these two types of processes in the Bill. The two elements contained in the current definition of 'child counselling' are incorporated into the new terms introduced by the Bill - 'family counselling' (defined at section 10A) and 'family dispute resolution' (defined at section 10H).
Item 10 – subsection 4(1) Repeal the definition of 'community mediator'		Unlike the current Act, the Bill does not distinguish between family counsellors and family dispute resolution practitioners who are employed by the courts, employed by approved family dispute resolution organisations, or who meet the requirements specified in the *Family Law Regulations 1984*. Under the Act, all family counsellors and family dispute resolution practitioners receive the same benefits, and are subject to the same requirements, when conducting family counselling or family dispute resolution. As a result, the references in the current Act to 'community mediators', 'court counsellors', 'court mediators' and 'private mediators' are no longer needed. This Item repeals the definition of 'community mediator'. The definitions of 'court counsellor', 'court mediator' and 'private mediator' are repealed by Items 11, 12 and 26.
Item 11 – subsection 4(1) Repeal the definition of 'court counsellor'		See Item 10.
Item 12 – subsection 4(1) Repeal the definition of 'court mediator'		See Item 10.
Item 13 – subsection 4(1) Insert definition of 'facilitative dispute resolution'		An element of the changes to counselling and dispute resolution terminology introduced by the Bill. The terms 'family and child counselling' and 'family and child mediation' are removed by the Bill and the new terms 'family counselling' (defined at s10A) and 'family dispute resolution' (defined at s10H) are introduced. The new definition of 'family dispute resolution' encompasses both 'advisory dispute resolution' (where advice is provided as part of the process) and 'facilitative dispute resolution' (where no advice is provided, but information can

Proposed provision	Corresponding current provision(s)	Change to current provision
		be provided).
Item 14 – subsection 4(1) Repeal the definition of 'family and child counselling'		An element of the changes to counselling and dispute resolution terminology introduced by the Bill. The terms 'family and child counselling' and 'family and child mediation' are removed by the Bill and the new terms 'family counselling' (defined at s10A) and 'family dispute resolution' (defined at s10H) are introduced.
Item 15 – subsection 4(1) Repeal the definition of 'family and child counsellor'		An element of the changes to counselling and dispute resolution terminology introduced by the Bill. As part of this change, the terms 'family and child counselling', 'family and child counsellor', 'family and child mediation' and 'family and child mediator' will be removed from the Act and new terms 'family counselling' (defined at section 10A) and 'family dispute resolution' (defined at section 10H) will be introduced. The professionals who provide these services are termed 'family counsellors' (defined at section 10B) and 'family dispute resolution practitioners' (defined at section 10J).
Item 16 – subsection 4(1) Repeal the definition of 'family and child mediation'		An element of the changes to counselling and dispute resolution terminology introduced by the Bill. The terms 'family and child counselling' and 'family and child mediation' are removed by the Bill and the new terms 'family counselling' (defined at s10A) and 'family dispute resolution' (defined at s10H) are introduced.
Item 17 – subsection 4(1) Repeal the definition of 'family and child mediator'		An element of the changes to counselling and dispute resolution terminology introduced by the Bill. As part of this change, the terms 'family and child counselling', 'family and child counsellor', 'family and child mediation' and 'family and child mediator' will be removed from the Act and new terms 'family counselling' (defined at section 10A) and 'family dispute resolution' (defined at section 10H) will be introduced. The professionals who provide these services are termed 'family counsellors' (defined at section 10B) and 'family dispute resolution practitioners' (defined at section 10J).
Item 18 – subsection 4(1) Insert definition of 'family and child specialist'		'Family and child specialists' will be appointed by the Family Court of Australia, the Family Court of Western Australia or the Federal Magistrates Court. A family and child specialist will be assigned to each case in the court involving children, and will manage the case, providing a continuing service, as it moves through the court process. Proposed Part III of the Act deals with the functions of 'family and child specialists'.
Item 19 – subsection 4(1) Insert definition of 'family		An element of the changes to counselling and dispute resolution terminology introduced by the Bill. The terms 'family and child counselling' and 'family and

Proposed provision	Corresponding current provision(s)	Change to current provision
counselling’		child mediation’ are removed by the Bill and the new terms ‘family counselling’ (defined at s10A) and ‘family dispute resolution’ (defined at s10H) are introduced. Currently ‘family and child counselling’ contains elements of both processes concerned with psychological health and relationships issues and those that aim to resolve disputes (including conciliation – see section 10H for further information). The two types of processes needed to be clearly delineated in order to allow the successful introduction of compulsory dispute resolution. The definition of ‘family counselling’ is based on NADRAC’s ‘Glossary of Terms’.
Item 20 – subsection 4(1) Insert definition of ‘family counsellor’		An element of the changes to counselling and dispute resolution terminology introduced by the Bill. As part of this change, the terms ‘family and child counselling’, ‘family and child counsellor’, ‘family and child mediation’ and ‘family and child mediator’ will be removed from the Act and new terms ‘family counselling’ (defined at section 10A) and ‘family dispute resolution’ (defined at section 10H) will be introduced. The professionals who provide these services are termed ‘family counsellors’ (defined at section 10B) and ‘family dispute resolution practitioners’ (defined at section 10J). See section 10B for further information.
Item 21 – subsection 4(1) Insert definition of ‘family dispute resolution’		An element of the changes to counselling and dispute resolution terminology introduced by the Bill. The terms ‘family and child counselling’ and ‘family and child mediation’ are removed by the Bill and the new terms ‘family counselling’ (defined at s10A) and ‘family dispute resolution’ (defined at s10H) are introduced. ‘Family and child mediation’ is currently defined in such a way (in the Act and the Regulations) that precludes processes which involve the provision of advice (see section 10H for further information). This has resulted in some forms of dispute resolution being regarded as ‘family and child counselling’. The two types of processes needed to be clearly delineated in order to allow the successful introduction of compulsory dispute resolution. The definition of ‘family dispute resolution’ is based on NADRAC’s ‘Glossary of Terms’
Item 22 – subsection 4(1) Insert definition of ‘family		An element of the changes to counselling and dispute resolution terminology introduced by the Bill. As part of this change, the terms ‘family and child

Proposed provision	Corresponding current provision(s)	Change to current provision
dispute resolution practitioner’		counselling’, ‘family and child counsellor’, ‘family and child mediation’ and ‘family and child mediator’ will be removed from the Act and new terms ‘family counselling’ and ‘family dispute resolution’ will be introduced. The professionals who provide these services are termed ‘family counsellors’ (defined at section 10B) and ‘family dispute resolution practitioners’ (defined at section 10J).
Item 23 – subsection 4(1) Repeal the definition of ‘marriage counselling’		As part of the change to terminology, the terms ‘child counselling’, ‘marriage counselling’, ‘family and child counselling’ and ‘family and child mediation’ will be removed from the Act and new terms ‘family counselling’ (defined at section 10A) and ‘family dispute resolution’ (defined at section 10H) will be introduced. The services that are currently termed ‘marriage counselling’ have been incorporated into the definition of ‘family counselling’.
Item 24 – subsection 4(1) Insert definition of ‘organisation’	Based on current definition of ‘voluntary organisation’ at subsection 4(1).	This definition is relevant in relation to the approval of family counselling and family dispute resolution organisations, which is dealt with at sections 10E to10G and 10N to 10Q. The definition of ‘organisation’ is the same as the definition of ‘voluntary organisation’ currently in the Act, except that ‘voluntary’ has been removed, to allow organisations that operate on a for-profit basis to be approved. (See further explanation at sections 10E and 10N).
Item 25 – subsection 4(1) Repeal the definition of ‘private arbitration’		Currently the Act refers to arbitration as ‘private arbitration’ and ‘section 19D arbitration’. The term ‘private arbitration’ is not sufficiently explanatory, and may mislead, to the extent that it implies that the court has no involvement. In order to address these issues this Item repeals the definition of ‘private arbitration’. It is replaced by the term ‘relevant property and financial arbitration’, which is defined at paragraph 10S(2)(b) (See Item 27).
Item 26 – subsection 4(1) Repeal the definition of ‘private mediator’		See Item 10.
Item 27 – subsection 4(1) Insert definition of	Replaces the term ‘private arbitration’ as defined at	Currently the Act refers to arbitration as ‘private arbitration’ and ‘section 19D arbitration’.

Proposed provision	Corresponding current provision(s)	Change to current provision
'relevant property or financial arbitration'	subsection 4(1).	The term 'private arbitration' is not sufficiently explanatory, and may mislead, to the extent that it implies that the court has no involvement. In order to address these issues Item 25 repeals the definition of 'private arbitration'. It is replaced by the term 'relevant property and financial arbitration', which is defined at paragraph 10S(2)(b). This new term assists understanding by clearly stating the types of issues that may be dealt with in arbitration.
Item 28 – subsection 4(1) Insert definition of 'section 13E arbitration'	Replaces reference to section 19D, which will no longer exist, with a reference to 13E, which substantially reproduces the terms of current s19D.	Currently the Act refers to arbitration as 'private arbitration' and 'section 19D arbitration'. As, due to the restructure of the Act, there will no longer be a s19D, this type of arbitration will now be referred to as 'section 13E arbitration'. No substantive changes have been made to the arbitration provisions.
Item 29 – subsection 4(1) Repeal the definition of 'voluntary organisation'		The references, in the provisions relating to approval of organisations, have been changed from 'voluntary organisation' to 'organisation'. The definition of organisation is the same as the definition of 'voluntary organisation', except that 'voluntary' has been removed, to allow organisations that operate on a for-profit basis to be approved. (See further explanation at sections 10E and 10N).
Item 30 – subsection 4(1) Repeal the definition of 'welfare officer'		The functions currently performed by welfare officers (eg providing family reports) will be performed by the new family and child specialists. As a result, the definition of welfare officer is no longer needed. There will still be a role for 'child welfare officers' (as defined at s60D of the Act) who provide child protection services for the States and Territories.
Item 31 – subsection 4(1) Reference to 'person or people involved in proceedings'		The term 'a person or people involved in proceedings' is used in the following provisions: o section 11A –the functions of family and child specialists include 'assisting and advising' people involved in proceedings, and helping them to resolve their disputes. o section 12F – requires the principal executive officer of a court with jurisdiction under the Act to provide information documents on family counselling and family dispute resolution to a person

Proposed provision	Corresponding current provision(s)	Change to current provision
		involved in proceedings, if requested. (Under s12F(1) the court has an obligation to give information documents to anyone considering instituting proceedings, without being asked to do so). o subparagraph 123(1)(s)(iii) – allows rules of court to be made in relation to the giving of advice and assistance by family and child specialists (as per s11A). o subparagraph 123(1)(sd)(iii) – allows rules of court to be made in relation to the procedures to be followed by people involved in proceedings when receiving services from a family and child specialist (as per s11A). o FMA paragraph 87(2)(c) - allows rules of court to be made for the FMC in relation to the giving of advice and assistance by family and child specialists (as per FLA s11A) The Bill does not impose any obligations on 'people involved in proceedings'. The use of the term allows assistance to be given to people, including children, who may be affected by the proceedings, but are not actually parties to the proceedings.
Item 32 – Parts II and III Repeal the parts and substitute with provisions set out below.		In order to simplify the Act, Parts II and III of the Act are deleted and replaced by a new structure that groups provisions relating to non-judicial interventions logically, by topic. This will assist users of the Act by consolidating all provisions dealing with a particular area (for example, the obligations imposed on various groups to inform people about non-judicial interventions to assist those in the family law system) in one place within the Act.
Section 10A Definition of 'family counselling'		An element of the changes to counselling and dispute resolution terminology introduced by the Bill. The terms 'family and child counselling' and 'family and child mediation' are removed by the Bill and the new terms 'family counselling' (as defined here) and 'family dispute resolution' (defined at s10H) are introduced. Currently 'family and child counselling' contains elements of both processes concerned with psychological health and relationships issues and those that aim to resolve disputes (including conciliation – see section 10H for further information). The two types of processes needed to be clearly delineated in order to allow the successful introduction of compulsory dispute resolution.

Proposed provision	Corresponding current provision(s)	Change to current provision
		The definition of 'family counselling' is based on NADRAC's 'Glossary of Terms'.
Section 10B Definition of 'family counsellor'	Based on current definition of 'family and child counsellor' at subsection 4(1)	Currently the Act provides for three types of 'family and child counsellors': 1. court counsellors 2. people authorised by an approved counselling organisation to offer family and child counselling on behalf of the organisation, or 3. people authorised under the regulations to offer family and child counselling. The definition of 'family counsellor' introduced by this section covers those who will provide family counselling for the FCoA, the FCWA and the FMC, in paragraphs 10B(b), (c), (d) and (e). It covers people authorised to offer family counselling by approved family counselling organisations in paragraph 10B(a). The third group currently referred to in the definition of 'family and child counsellors', that is, people authorised under the regulations to offer family and child counselling, is not addressed in the definition of 'family counsellor' as no family and child counsellors have been authorised under the regulations, and no regulations exist on which to base such authorisations. The Attorney-General's Department is currently working to establish accreditation requirements for family counsellors and family dispute resolution practitioners. This process will involve extensive consultation with relevant groups and is expected to result in the introduction of accreditation standards in around 18 months time. Until the accreditation standards are formulated and adopted, the status quo, in relation to the people who are regarded as family counsellors under the Act, will be maintained.
Section 10C Communications in family counselling etc are confidential	Based on regulation 58 of the Regulations	This section moves the oath that was previously in regulation 58 of the Family Law Regulations 1984, into the Act, to emphasise the importance of confidentiality. Proposed section 10C differs from the oath at regulation 58 as follows: o The family counsellor is able to disclose information when making a referral, provided the party who made the disclosure consents to that disclosure. If the disclosure was made by a child who is under 18,

Proposed provision	Corresponding current provision(s)	Change to current provision
		both parents must consent to the disclosure. If agreement cannot be reached the matter may be referred to the court. This is similar to the situation in relation to parentage testing, under section 69W of the Act. o The need to be able to disclose information on referral was raised by many practitioners in the consultations that took place on the Government's discussion paper. Such disclosure will assist clients as they will not need to relate the details of their story each time they see a different professional. o The oath referred to 'protecting a child'. This was not sufficiently descriptive for primary legislation, so it has been refined to refer to protecting a child from harm (whether physical, sexual, emotional or financial). This is wider than the concept of 'abuse' (defined in subsection 4(1) – see Item 1) that is used in the sections relating to admissibility. o The reference to disclosures being permitted when required to comply with a law of the Commonwealth, a State or a Territory has been added. This will allow, for example, disclosures to child welfare authorities under mandatory child abuse reporting requirements. o Disclosures that do not identify a person will be able to be made for research purposes. o Subsection 10C(5) clarifies that even if a counsellor is permitted to make a disclosure under subsections 10C(3) or (4), that does not mean that the information disclosed will be admissible as evidence. The admissibility of evidence arising in family counselling is governed by section 10D. o The section also makes clear that the provision of a certificate by a family counsellor under subsection 60J(1) is not prevented by the confidentiality requirement. Section 60J(1) (see Schedule 1)

Proposed provision	Corresponding current provision(s)	Change to current provision
		provides that where a person is not required to attend dispute resolution due to child abuse or family violence, the court must not hear an application for a parenting order unless a certificate from a family counsellor or family dispute resolution practitioner is filed stating that the counsellor or practitioner has given the applicant information about the issues that the order would deal with. o Section 16 of the *Marriage Act 1961* deals with the ability of judges to consent to the marriage of a minor in circumstances where consent has been refused by the minor's parents. Paragraph 16(2A)(a) provides that the judge must not consider the minor's request for consent unless there is a signed certificate from a family counsellor stating that the minor has received counselling in relation to the proposed marriage. Subsection 10C(6) ensures that the family counsellor will not be considered to have breached confidentiality requirements if they provide such a certificate.
Section 10D Communications in family counselling etc are inadmissible	Based on section 19N	Proposed section 10D differs from section 19N as follows: o (1)(b) – currently section 19N contains an anomaly in that inadmissibility applies to the professional providing the service in the case of counsellors and mediators, but applies (in a restricted way) to the person receiving a service when that service is being provided on the referral of a counsellor or mediator. This results in a situation where the evidence of any person who is attending counselling with a family and child counsellor or mediation with a family and child mediator is inadmissible, but evidence arising from a professional consultation pursuant to a referral from a counsellor or mediator is only inadmissible where the person attending the consultation is a party to a marriage (see 19N(1)(e)). o The fact that any disclosure, on referral for professional consultation, by people other than parties to a marriage is admissible may hamper the ability of counsellors and mediators to confidently refer people to the services they need, and make people reluctant to utilise such services.

Proposed provision	Corresponding current provision(s)	Change to current provision
		- To address these problems the admissibility of evidence will now be related to the professional to whom a family counsellor or family dispute resolution practitioner refers, rather than the status of the person who is referred. - In order to ensure that professionals to whom family counsellors make referrals are aware of the inadmissible status of communications made to them, subsection 10D(4) requires the family counsellor to inform them of this fact when making a referral.
Section 10E Approval of family counselling organisations	Based on section 13A.	The prerequisites for organisations seeking approval have been amended as follows: - The requirement that the organisations be 'voluntary' or non-profit has been removed. - In order to be eligible for approval, organisations are only required to be selected to receive funding to provide services which include family counselling or family dispute resolution, as appropriate, under an Australian Government program designated by the Minister. This new requirement reflects current practice, as all approved organisations are currently funded under the Australian Government Family Relationships Services Program (FRSP). Accountability requirements under that Program assist in ensuring a level of quality in the services that are provided by approved organisations. (See response to Question 7 for more information). - The capacity to approve organisations subject to conditions (as per section 13C of the Act) has been removed. It is intended that quality issues should be addressed through the FRSP funding contracts, as this provides a stringent and enforceable means of ensuring and addressing service standards.
Section 10F Automatic termination of and revocation of approvals	Based on section 13D	An organisation's approval will automatically be revoked if the organisation ceases to be selected to receive funding to provide family counselling. Current section 13D does not allow an organisation to request a revocation of its approval. The Minister will now be required to revoke an organisation's approval

Proposed provision	Corresponding current provision(s)	Change to current provision
		if this is requested by the organisation.
Section 10G Minister to publish lists of approved family counselling organisations	Section 13E	No substantive change from current provision.
Section 10H Definition of 'family dispute resolution'		An element of the changes to counselling and dispute resolution terminology introduced by the Bill. The terms 'family and child counselling' and 'family and child mediation' are removed by the Bill and the new terms 'family counselling' (defined at s10A) and 'family dispute resolution' (as defined here) are introduced. The definition of 'family dispute resolution' encompasses both 'advisory dispute resolution' (where advice is provided as part of the process) and 'facilitative dispute resolution' (where no advice is provided, but information can be provided). Currently, Part V of the Regulations provides that the family and child mediator's role does not include the provision of advice (see paragraph 63(1)(c)). As a result, dispute resolution processes that include the provision of advice (such as conciliation) are currently regarded as a form of 'family and child counselling'. This is problematic, as counselling and dispute resolution need to be clearly delineated in order to allow the successful introduction of compulsory dispute resolution. The proposed definitions of 'family counselling' and 'family dispute resolution' achieve a clear differentiation of the two processes. Under the proposed definitions processes such as conciliation will be 'advisory dispute resolution'. The definitions of 'family dispute resolution', 'advisory dispute resolution' and 'facilitative dispute resolution' are based on NADRAC's 'Glossary of Terms'.
Section 10J Definition of 'family dispute resolution practitioner'	Based on current definition of 'family and child mediator' at subsection 4(1)	Currently the Act provides for three types of 'family and child mediators': 1. people employed or engaged by the Family Court or a Family Court of a State to provide family and child mediation services 2. people authorised by an approved counselling organisation to offer family and child counselling on behalf of the organisation, or 3. people, other than those mentioned in (1) or (2), who offers family and child

Proposed provision	Corresponding current provision(s)	Change to current provision
		mediation (in compliance with the requirements in the Regulations). The definition of 'family dispute resolution practitioner' introduced by this section covers those who will provide family dispute resolution for the FCoA, the FCWA and the FMC, in paragraphs 10J(b), (c), (d) and (e). It covers people authorised to offer family dispute resolution by approved family dispute resolution organisations in paragraph 10J(a). Other people who provide family dispute resolution in compliance with the Regulations are covered by paragraph 10J(f).
Section 10K Communications in family dispute resolution etc are confidential	Based on regulation 66 of the Regulations	This section moves the oath that was previously in regulation 66 of the Regulations, into the Act, to emphasise the importance of confidentiality. See the information provided in relation to section 10C, above, for an explanation of how this section differs from the oath. (Regulations 58 and 66 are the same, except to the extent that they relate to different professionals. The same is true of proposed sections 10C and 10K. The fact that they relate to different professionals means that the provisions referred to in subsections 10C(6) and 10K(6) also differ. The provisions referred to in subsection 10K(6) are set out below). Section 10K states that the provision of a certificate by a family dispute resolution practitioner under subsections 60I(7) or 60J(1) is not prevented by the confidentiality requirement. . Subsection 60I(7) (see Schedule 1) provides that a court must not hear an application for a parenting order unless (subject to some exceptions) the applicant files a certificate from a family dispute resolution practitioner that states that the applicant has attended family dispute resolution, or that the applicant did not attend, but this failure was due to the failure of the other party to attend. Section 60J(1) (see Schedule 1) provides that where a person is not required to attend dispute resolution due to child abuse or family violence, the court must not hear an application for a parenting order unless a certificate from a family counsellor or family dispute resolution practitioner is filed stating that the counsellor or practitioner has given the applicant information about the issues that the order would deal with.
Section 10L Communications in family dispute resolution etc are inadmissible	Based on section 19N	See information provided in relation to section 10D, above, for an explanation of how this section differs from section 19N. (Proposed sections 10D and 10L are identical, except to the extent that they deal with different professionals.)

Proposed provision	Corresponding current provision(s)	Change to current provision
Section 10M Family dispute resolution practitioners have immunity sometimes	Section 19M	The new definition of 'family dispute resolution' in section 10H encompasses both 'advisory dispute resolution' and 'facilitative dispute resolution'. As set out in relation to proposed section 10H, currently a family and child mediator's role expressly excludes the provision of advice. Accordingly, processes that were previously referred to as 'family and child mediation' will in future fall within the new definition of 'facilitative dispute resolution' (paragraph 10H(2)(b)). Practitioners conducting facilitative dispute resolution will retain the immunity that currently applies to mediators under section 19M of the Act. Currently, dispute resolution processes that include the provision of advice are regarded as a form of 'family and child counselling'. Practitioners conducting family and child counselling do not currently have immunity under the Act. Under the amendments, dispute resolution processes that include the provision of advice will fall within the definition of 'advisory dispute resolution' (paragraph 10H(2)(a)). Practitioners conducting advisory dispute resolution do not have immunity under the amendments, a position which is unchanged from the arrangements currently in the Act.
Section 10N Approval of family dispute resolution organisations	Based on section 13B.	See information provided in relation to section 10E, above, for an explanation of how this section differs from section 13B. (Proposed sections 10E and 10N are identical, except to the extent that they deal with different professionals.)
Section 10P Automatic termination of and revocation of approvals	Based on section 13D	See information provided in relation to section 10F, above, for an explanation of how this section differs from section 13D. (Proposed sections 10F and 10P are identical, except to the extent that they deal with different professionals.)
Section 10Q Minister to publish lists of approved family dispute resolution organisations	Section 13E	No substantive change from current provision.
Section 10R Family dispute resolution practitioners must comply with regulations	Section 19P	No substantive change from current provision.
Section 10S		Currently the Act does not contain a definition of 'arbitration'.

Proposed provision	Corresponding current provision(s)	Change to current provision
Definition of 'arbitration'		This definition of arbitration is taken from the National Alternative Dispute Resolution Advisory Council's (NADRAC's) 'Glossary of Common Terms'. See Items 27 and 28 for information on 'relevant property or financial arbitration' and 'section 13E arbitration'. No substantive changes have been made to the arbitration provisions.
Section 10T Definition of 'arbitrator'	Subsection 4(1)	The definition of 'arbitrator' is unchanged from the current definition, except that it specifically refers to the fact that the 'prescribed requirements' for arbitrators will be set out in the Regulations, which should assist users of the Act.
Section 10U Arbitrators may charge fees for their services	Section 19H	Reproduces current provision.
Section 10V Arbitrators have immunity	Section 19M	Reproduces current provision.
Section 11A Functions of family and child specialists		The role of the family and child specialists consolidates the existing functions of court counsellors, court mediators and welfare officers under the current Act. The title 'family and child specialist' will differentiate services offered within the courts from counselling and dispute resolution services provided in the community. This will assist in addressing the confusion that exists among the public as to the roles performed by the two sectors and the appropriate place to seek different forms of assistance.
Section 11B Definition of 'family and child specialist'		Provides that family and child specialists provide services in the FCoA, the FCWA and the FMC.
Section 11C Communications with family and child specialists are admissible		The primary distinction between 'family counsellors' and 'family dispute resolution practitioners'(who mainly provide services in the community) on the one hand, and court-based 'family and child specialists' on the other, is that the former will provide confidential services and evidence of anything said or any admissions made during those processes will be inadmissible. The services provided by 'family and child specialists' will not be protected by confidentiality and evidence of things that are said to a family and child specialist will be admissible in court provided the person concerned has been informed that

Proposed provision	Corresponding current provision(s)	Change to current provision
		disclosures made to family and child specialists are admissible. Family and child specialists will play an important role in the less adversarial proceedings for children's matters, introduced by Schedule 3.
Section 11D Family and child specialists have immunity	Based on section 19M	Family and child specialists require immunity as their work, as set out at 11A, will directly feed into the court's decision-making process. If the family and child specialists did not have immunity, people who were unhappy with the court's decision could endeavour to attack the foundations of that decision by challenging the family and child specialists. Any problems with the court's decisions should be dealt with directly through the appeals process.
Section 11E Courts to consider seeking advice from family and child specialists		Part IIIB of Schedule 4 sets out the power of courts exercising jurisdiction under the Act to order, or advise, people to attend family services, either court-based or non-court, that are appropriate to their needs. Section 11E aims to ensure that the court makes orders that are appropriate to the circumstances and needs of the parties, and which take into account the family services available in different areas. This section provides that where a court has the power to order a person to attend family counselling, family dispute resolution, a course, program or service, or an appointment with a family and child specialist, it may seek the advice of either a family and child specialist (if it is a Court that has family and child specialists) or an appropriately qualified professional, either within the court or outside it (such as a professional employed by a Family Relationship Centre). To emphasise the importance of making orders that are tailored to the individual's requirements, the court must consider seeking such professional advice before making a relevant order.
Section 11F Court may order parties to attend appointment with a family and child specialist	Based on sections 62F and 65F	As explained in relation to proposed section 11A, above, the role of the family and child specialists consolidates the existing functions of court counsellors, court mediators and welfare officers under the current Act. Currently the court may order the parties to proceedings to attend a conference with a family and child counsellor or welfare officer at any stage of proceedings in which the care, welfare and development of a child is relevant (subsection 62F(2)), or in proceedings for a parenting order (subsection 65F(1)). This section basically reproduces the power

Proposed provision	Corresponding current provision(s)	Change to current provision
		the court has under current 62F and 65G, as, in practice, parties will only be required to attend an appointment with a family and child specialist if the case involves children. Proposed subsection 11F(3) reproduces current subsection 62F(3).
Section 11G Consequences of failure to comply with order under section 11F	Subsections 62F(5)-(7)	Proposed section 11G reproduces subsections 62F(5) - (7).
Section 12A Objects of Part		To implement the Government's policy of encouraging separating and divorcing parents to utilise non-court counselling and dispute resolution services, Part IIIA of Schedule 4 ensures people receive useful information on these services early in the process of separation or divorce. The provision of such information at an early stage may assist the people involved to address problematic issues before they become entrenched.
Section 12B Prescribed information about non-court based family services and court's processes and services	Based on sections 14G, 17, 19J and 62H	Proposed subsection 12(1) allows the obligation to provide information to be met by the provision of documents, to ensure that the burden placed on practitioners is not too onerous. The information that is required to be provided under paragraph 12B(2)(a) is currently referred to in sections 17 and 62H of the Act and paragraph 6(1)(h) of Schedule 1 of the Family Law Rules (the Pre-Action Procedures). Current sections 14F and 14G require courts and legal practitioners to consider whether to advise the parties about the primary dispute resolution methods that could be used to resolve any matter in dispute. Current section 19J refers to the provision of information on mediation services and facilities. Proposed paragraph 12B(2)(b) reflects these provisions. Section 19J also refers to the provision of information on arbitration facilities. This is reproduced in proposed subsection 12B(2)(e). The requirement in proposed paragraph 12(d) is new in that it relates to a new class of service providers, but does reflect current sections 17 and 19J, to the extent that those sections requires provision of advice on the court's counselling and mediation

Proposed provision	Corresponding current provision(s)	Change to current provision
		facilities. The information required under subsection 12B(2)(c) is not currently required to be provided under the Act
Section 12C Prescribed information about reconciliation	Based on sections 14C and 14D	Current sections 14C and 14D require judges and legal practitioners, respectively, to consider, from time to time, the possibility of reconciliation between the parties. If reconciliation is considered to be a possibility, section 14C provides that the judge may adjourn the proceedings and interview the parties in chambers or advise them to make use of the services of a family and child counsellor. The current legislation provides no guidance or direction to legal practitioners who consider that a reconciliation may be possible. Proposed section 12C allows regulations to be made to set out specific information that must be included in documents provided to clients where there is a reasonable possibility of reconciliation between the parties.
Section 12D Prescribed information about Part VII proceedings	Based on sections 62B, 62H	Current section 62B provides that the court and legal practitioners must consider whether to advise parties to Part VII proceedings (i.e. proceedings about children) about counselling for Part VII orders. Current section 62H sets out the information that the court must provide to people proposing to institute proceedings under Part VII. It requires the provision of information on the legal and possible social effects of the proposed proceedings (at 62H(a) - addressed by proposed section 12B, above) and the counselling and welfare facilities available (at 62H(b)). Proposed section 12D expands on the requirement currently at paragraph 62H(b) to ensure that families receive adequate information on the services available to assist them.
Section 12E Obligations on legal practitioners	Based on sections 14D, 14G, subsection 62B(3) and paragraph 6(1)(h) of Schedule 1 of the Family Law Rules	Currently legal practitioners are required, under section 14G and subsection 62B(3), to consider whether to advise their clients, or persons by whom they are consulted in relation to a family law matter, about the primary dispute resolution methods that may assist in resolving matters in dispute, and the counselling for Part VII orders (i.e. orders concerning children) available from courts or approved organisations. Paragraph 6(1)(h) of Schedule 1 of the Family Law Rules (the Pre-Action Procedures) provides that lawyers must give their clients documents (which may be prepared by the court) about the primary dispute resolution services available to them and the legal and social effects and the possible consequences for children of

Proposed provision	Corresponding current provision(s)	Change to current provision
		proposed litigation. Legal practitioners are also currently required, under section 14D, to consider the possibility of a reconciliation of the parties but no guidance or direction is provided as to the appropriate course to be taken if reconciliation of the parties is regarded as possible. Proposed section 12E builds on sections 14D and 14G, subsection 62B(3) and paragraph 6(1)(h) of Schedule 1 of the Rules. All the information that legal practitioners are required to provide under section 12E will be provided in the form of documents, which should ensure that the task of providing information is not too onerous. Information on reconciliation is not required to be provided if the legal practitioner has reasonable grounds to believe that the information has already been provided, or if he or she believes that there is no reasonable possibility of a reconciliation between the parties to a marriage. The additional information requirements that are placed on lawyers by this section recognise the important role lawyers play as gatekeepers for information on the family law system.
Section 12F Obligations on principal executive officers of court	Sections 17, 19J, and 62H, subsection 62B(2)	Currently court staff have information provision obligations under sections 17, 19J and 62H and subsection 62B(2). This section builds upon the obligations that exist under these sections. Currently court staff are not required to provide information on services to assist with the reconciliation of couples, as they would not be in a position to assess the likelihood of reconciliation. As information will be provided in documents, there is no need for court staff to make such assessments, as the same documents can be provided to everyone who is considering instituting family law proceedings. The obligation under section 12F is imposed on the principal executive officers of all courts with jurisdiction under the Act. The principal executive officer may then delegate the actual provision of documents to staff as accords with the administrative arrangements operating in the different courts.
Section 12G Obligations on family counsellors, family dispute		The current provisions relating to reconciliation (sections 14B – 14D) only require judges and legal practitioners to consider the possibility of a reconciliation of the parties. To emphasise the importance of helping people to reconcile, where this is

Proposed provision	Corresponding current provision(s)	Change to current provision
resolution practitioners and arbitrators		appropriate, proposed section 12G requires other professionals who come into contact with people considering family law proceedings, that is family counsellors, family dispute resolution practitioners and arbitrators, to provide information on the services that are available to assist with a reconciliation. As is the case with legal practitioners (see 12E) information on reconciliation is not required to be provided if the family counsellor, family dispute resolution practitioner or arbitrator has reasonable grounds to believe that the information has already been provided, or if he or she believes that there is no reasonable possibility of a reconciliation between the parties to a marriage.
Section 13A Objects of this Part		Sets out objects of proposed Part IIIB of the Act – Court's powers in relation to court and non-court based family services
Section 13B Court to accommodate possible reconciliations	Based on sections 14B and 14C	Proposed section 13B differs from current sections 14B and 14C as follows: o currently a judge may, under paragraph 14C(2)(b), interview the parties in chambers to assist in a possible reconciliation. This ability has been removed, with the approval of judges, as it is felt that this role is better performed by a person specifically trained as a counsellor. o under subsection 14C(3) if a judge adjourns proceedings to give the parties an opportunity to consider reconciling, he or she may, but is not obliged to, advise the parties to use the services of a family and child counsellor (or other suitable professional). The Government believes that reconciliation of parties to a marriage should be encouraged wherever appropriate and that it is important that people considering a reconciliation are given the most appropriate expert assistance. To ensure that people receive such assistance, subsection 14C(3) provides that if proceedings are adjourned to give the parties an opportunity to consider a reconciliation the court must advise the parties to attend a family counselling organisation, or other appropriate person or organisation. The parties are not obliged to act on the court's recommendation, but it is appropriate that they are made aware of, and advised to use, relevant available services.
Section 13C Court may refer parties to	Sections 16A, 16B, 19B,	Courts exercising jurisdiction under the Act can currently order people to attend, or

Proposed provision	Corresponding current provision(s)	Change to current provision
family counselling, family dispute resolution and other family services	19BAA, 19BA, 62F, 65F, 65LA and 70NG.	refer them to, counselling, mediation or a post- separation parenting program under sections 16A, 16B, 19B, 19BAA, 19BA, 62F, 65F, 65LA and 70NG. Proposed section 13C consolidates and strengthens the power of the court under those sections in order to make the Act simpler to access and understand. Empowering the court to order people to attend relevant services at any time in any proceedings under the Act maximises the opportunities for people to address issues and resolve disputes outside the court. The attitudes of parties may change throughout proceedings and proposed section 13C will allow the court to direct people to appropriate services at the appropriate time. To ensure that the court makes orders that are suitable to the circumstances and needs of the parties, and which take into account the family services available in different areas, the court is required to consider seeking advice from a family and child specialist (if it is a Court that has family and child specialists) or an appropriately qualified professional, either within the court or outside it (such as a professional employed by a Family Relationship Centre) when making an order under this section. This recognises that judges may not be aware of all the relevant services operating in an area, or their areas of expertise, and therefore may benefit from seeking specialist advice.
Section 13D Consequences of failure to comply with order under section 13C	Subsections 62F(5)-(7)	Proposed section 11G reproduces subsections 62F(5) - (7).
Section 13E Court may refer Part VIII proceedings to arbitration	Section 19D	Proposed section 13E reproduces section 19D. Note that the court can only make an order referring the proceedings to arbitration with the consent of all the parties to the proceedings. No substantive changes have been made to the arbitration provisions.
Section 13F Court may make orders to facilitate arbitration of certain disputes	Subsection 19E(1)	Proposed section 13F reproduces subsection 19E(1), except to the extent that the term ‘private arbitration’ has been replaced by ‘relevant property or financial arbitration’ (see Items 25 and 27). No substantive changes have been made to the arbitration provisions.

Proposed provision	Corresponding current provision(s)	Change to current provision
Section 13G Family Court and Federal Magistrates Court may determine questions of law referred by arbitrator	Sections 19EA and 19EB	Proposed section 13G consolidates sections 19EA and 19EB (with relevant changes to terminology). No substantive changes have been made to the arbitration provisions.
Section 13H Awards made in arbitration may be registered in court	Subsections 19D(5) and 19E(2)	Proposed section 13H reproduces subsections 19D(5) and 19E(2) (with relevant changes to terminology). No substantive changes have been made to the arbitration provisions.
Section 13J Family Court and Federal Magistrates Court can review registered awards	Sections 19F and 19FA	Proposed section 13J consolidates sections 19F and 19FA (with relevant changes to terminology). No substantive changes have been made to the arbitration provisions.
Section 13K Family Court and Federal Magistrates Court may set aside registered awards	Sections 19G and 19GA	Proposed section 13K consolidates sections 19G and 19GA (with relevant changes to terminology). No substantive changes have been made to the arbitration provisions.
Items 33 -34 Consequential amendments		These amendments are consequential to the amendments to the structure of, and the terminology employed in, the Act.
Items 35 Insert subsection 37(3)		The Chief Executive Officer of the FCoA has the power to give directions that relate to the functions of family and child specialists in the FCoA, and the functions of court officers or staff members acting as family counsellors or family dispute resolution practitioners under proposed section 38BB. Proposed subsection 37(3) provides that the Principal Registrar must not give directions that relate to the functions of these people. This clarifies that the responsibility for family and child specialists, family counsellors and family dispute resolution practitioners in the FCoA rests with the CEO of that court, rather than with its Principal Registrar.
Items 36 -37 Consequential amendments		These amendments are consequential to the amendments to the structure of, and the terminology employed in, the Act.
Item 38 Insert Division 1A after		Inserts a new Division into the Act, which deals with administration of the FCoA's family services.

Proposed provision	Corresponding current provision(s)	Change to current provision
Division 1 of Part IVA of Act		
Section 38BA Chief Executive Officer has functions of family and child specialists		Proposed section 38BC allows the CEO of the FCoA to delegate powers, functions and duties in relation to the functions of family and child specialists mentioned in proposed section 11A. This will allow the CEO to control the work flow to individual family and child specialists, to ensure that they are able to provide services to the court and people involved in proceedings in the most efficient and effective way. The CEO cannot delegate functions that he or she does not have, so, in order for 38BC to work as intended, functions to be performed by family and child specialists under proposed section 11A must be conferred on the CEO. Proposed section 38BA does this. The manner in which the CEO chooses to delegate such functions will be a decision for him or her, for example, the CEO may choose to delegate the functions of family and child specialists to a 'Principal family and child specialist'. The Bill has been designed to allow maximum flexibility for the CEO in this regard.
Section 38BB Chief Executive Officer may give directions that relate to family services functions		The CEO has power, under subsection 38D(1) to do all things necessary or convenient to be done for the purpose of assisting the Chief Judge manage the administrative affairs of the FCoA. This situation will not be changed by the proposed amendments. To put the matter beyond doubt, proposed section 38BB clarifies that the CEO may give directions to family and child specialists, and court officers or staff members performing the functions of a family counsellor or family dispute resolution practitioner.
Section 38BC Chief Executive Officer may delegate functions and powers that relate to family and child specialists		Proposed section 38BA confers the functions to be performed by family and child specialists under proposed section 11A on the CEO. Proposed section 38BC permits the CEO to delegate these functions, to allow the CEO to control the work flow to individual family and child specialists, to ensure that they are able to provide services to the court and people involved in proceedings in the most efficient and effective way.
Section 38BD Chief Executive Officer may authorise officer or		Proposed sections 10B and 10J explain who is a 'family counsellor' or a 'family dispute resolution practitioner'. Paragraph 10B(c) provides that an officer or staff member of the FCoA authorised by the CEO to provide family counselling under

Proposed provision	Corresponding current provision(s)	Change to current provision
staff member to act as family counsellor or family dispute resolution practitioner		the Act is a family counsellor. Paragraph 10J(c) is an equivalent provision dealing with family dispute resolution practitioners. Proposed subsections 38BD(1) and (2) specifically enable the CEO of the FCoA to authorise officers or staff members of the FCoA to provide family counselling or family dispute resolution as per paragraphs 10B(c) and 10J(c). Subsection 38BD(3) ensures that family and child specialists who are authorised by the CEO to provide family counselling or family dispute resolution for the FCoA do not combine the two roles, by, for example, attempting to provide services as both a family and child specialist and a family dispute resolution practitioner in the one case. It is imperative that the work of family and child specialists is kept separate from the work of family counsellors and family dispute resolution practitioners as the confidentiality and admissibility applying to the processes are completely different and it would be impossible for a practitioner to offer both types of services without compromising each one.
Item 39 Repeal paragraphs 38N(1)(d), (da) and (daa)		Section 38N of the Act sets out the officers of the FCoA. Item 39 removes references to positions that have been changed due to changes in terminology: o Paragraph 38N(1)(d) – court counsellors. Under the Bill no distinction is made between counsellors who offer services for approved organisations and those who offer services for courts. See Item 10 for more information. o Paragraph 38N(1)(da) – a Principal Mediator. The term 'mediator' is not used in the Bill. In order to give the FCoA maximum flexibility to organise its administrative arrangements (especially in view of the creation of a combined registry for the FCoA and the FMC), the Bill does not refer to any hierarchy of family and child specialists – this will be a matter for the courts to determine. o Paragraph 38N(1)(daa) – Managers Mediation. The terms 'mediator' and 'mediation' are not used in the Bill. As above, the Bill does not impose any predetermined hierarchy on family and child specialists – this is a matter for the courts to determine.
Item 40		Section 38N of the Act sets out the officers of the FCoA. Item 40 replaces the

Proposed provision	Corresponding current provision(s)	Change to current provision
Paragraph 38N(1)(db)		reference to 'mediators' in paragraph 38N(1)(db) with a reference to 'family and child specialists'.
Item 41 Insert subsection 38R(1A)		Section 38R of the Act allows the CEO of the FCoA to engage consultants. Item 41 explicitly provides that the CEO may engage people to perform family counselling and family dispute resolution.
Item 42 Amend subsection 38R(2)		This amendment is consequential to Item 41.
Item 43 Paragraph 41(4)(c)		Section 41 of the Act sets out the requirements for the establishment of State Family Courts. This item amends paragraph 41(4)(c), to provide that the Governor-General will not proclaim a court to be a State Family Court unless (inter alia) the Governor-General is satisfied that appropriate family counselling, family dispute resolution services and family and child specialists will be available to that court. Currently paragraph 41(4)(c) only refers to 'counselling facilities' being available. The FCWA has been provided with the draft Bill, and made no comments on this Item.
Item 44 Paragraph 44(1B)(a)		Subsection 44(1B) provides that an application for divorce shall not be heard (without the leave of the court) unless a certificate is filed stating that the parties have considered reconciliation with the assistance of a family and child counsellor etc. Item 44 updates the titles of the professionals from whom a certificate may be obtained in line with the changes to terminology employed in the Act.
Item 45 Subsection 55A(2)		Changes a reference to 'a family and child counsellor or welfare officer' to 'a family and child specialist', in line with the amendments to the terminology employed in the Act.
Item 46 Table item 3		This amendment is consequential to the amendments to the structure of, and the terminology employed in, the Act.
Item 47 Subsection 60D(1) definition of 'abuse'		See Item 1.
Item 48 Subsection 60D(1) amend definition of 'member of the Court personnel'		This Item removes references to positions that no longer exist, that is, court counsellor, court mediator and welfare officer, and inserts a reference to a family and child specialist.
Item 49		As a result of amendments to the structure of, and the terminology employed in, the

Proposed provision	Corresponding current provision(s)	Change to current provision
Change heading of Division 3 of Part VII		Act, Division 3 of Part VII now deals only with reports relating to children under 18.
Item 50 Amend section 62A		This item repeals section 62A, which sets out what Division 3 of Part VII does, to reflects its new, more limited focus.
Item 51 Repeal sections 62B, 62C, 62CA, 62D, 62E and 62F and substitute new section 62B		The requirements of current subsection 62B have been strengthen and incorporated into proposed sections 12D, 12E and 12F. Current sections 62C, 62CA, 62D and 62E relate to provision of family and child counselling by courts exercising jurisdiction under the Act. As the majority of family counselling and family dispute resolution will be provided through the community, rather than the court, these provisions have been removed. As set out in relation to proposed sections 10B and 10J, the FCoA, FCWA and FMC will still be able to provide these services where necessary, but it is intended that most counselling and dispute resolution services will be provided outside the court. Current section 62F allows the court to direct parties to proceedings to attend a conference with a family and child counsellor or welfare officer. This has been replaced by proposed section 13C. Proposed section 62B provides that if an order is made under Part VII, the court must inform the parties to the proceedings about the family services available to assist them to adjust to that order. As with proposed sections 12E, 12F and 12G, proposed section 62B ensures that people are made aware of appropriate services at the appropriate time.
Item 52 Amend subsection 62G(2)		Changes a reference to 'a family and child counsellor or welfare officer' to 'a family and child specialist', in line with the amendments to the terminology employed in the Act.
Item 53 Amend subsections 62G(4) and (5)		Changes references to 'a counsellor or welfare officer' to 'a family and child specialist', in line with the amendments to the terminology employed in the Act.
Item 54 Amend subsection 62G(6)		Changes a reference to 'a counsellor or welfare officer' to 'a family and child specialist', in line with the amendments to the terminology employed in the Act.
Item 55 Repeal section 62H		Current section 62H has been incorporated into proposed sections 12B, 12D and 12F.

Proposed provision	Corresponding current provision(s)	Change to current provision
Item 56 Repeal subsection 65F(1)		Current subsection 65F(1) is replaced by proposed section 13C.
Item 57 Amend paragraph 65F(2)(a)		Changes a reference to 'a conference with a family and child counsellor or a welfare officer' to 'family counselling', in line with the amendments to the terminology employed in the Act.
Item 58 Amend paragraph 65L(1)(a)		Changes a reference to 'a family and child counsellor or welfare officer' to 'a family and child specialist', in line with the amendments to the terminology employed in the Act.
Item 59 Amend paragraph 65L(1)(b)		Changes a reference to 'a family and child counsellor or welfare officer' to 'a family and child specialist', in line with the amendments to the terminology employed in the Act.
Item 60 Amend subsection 65LA(1)		Current subsection 65LA(1) details the procedure to be followed by the provider of a post-separation parenting program when a person is ordered by the court to attend such a program. Such levels of detail are unnecessary and are properly decisions for the providers of programs rather than the legislation. As a result, subsection 65LA(1) is amended to enable the court to order a party to attend a post-separation parenting program, without going into unnecessary detail as to the administration of that program.
Item 61 Amend definition of 'post-separation parenting program' in subsection 65LA(3)		Currently the Act requires the Attorney-General's Department to compile a list of 'post-separation parenting program providers'. As the list has no relation to the quality of services provided, it has little value and is being removed from the Act by Items 62 and 66. (As with approved organisations, the quality of services provided by post-separation parenting programs is best addressed through detailed funding agreements, which are responsive enough to cope with developments in service delivery). The definition of 'post-separation parenting program' has been amended to remove the reference to 'a provider'.
Item 62 Repeal definition of 'post-separation parenting program provider' in subsection 65LA(3)		See Item 61.
Item 63 Amend subsection		This amendment is consequential to the amendments to the terminology employed in the Act.

Proposed provision	Corresponding current provision(s)	Change to current provision
67ZA(1)		
Item 64 Repeal definition of 'post-separation parenting program' in section 70NB		See Item 61.
Item 65 Insert new definition of 'post-separation parenting program' in section 70NB		See Item 61.
Item 66 Repeal definition of 'post-separation parenting program provider' in section 70NB		See Item 61.
Item 67 Amend paragraph 70NG(1)(a)		As with current subsection 65LA(1) (see Item 60) subsection 70NG(1) details the procedure to be followed by the provider of a post-separation parenting program when a person is ordered by the court to attend such a program. Such levels of detail are unnecessary and are properly decisions for the providers of programs rather than the legislation. As a result, subsection 70NG(1) is amended to enable the court to order a party to attend a post-separation parenting program, without going into unnecessary detail as to the administration of that program.
Item 68 Amend subsection 70NG(3)		Current subsection 70NG(3) requires the court to notify the provider of a post-separation parenting program when an order is made directing a party to attend the program. This item amends subsection 70NG(3) to require the principal executive officer of a court to notify the program provider, to clarify that this is an administrative, rather than judicial, task.
Item 69 Amend section 70NH		This item simplifies section 70NH, in line with the amendments to subsections 65LA(1) and 70NG(1).
Item 70 Amend subsection 70NI(1)		This amendment is consequential to the amendments to subsections 65LA(1), 65LA(3) and 70NG(1).
Item 71 Amend paragraphs 70NI(2)(a) and (b)		Currently, subsection 70NI(3) provides that a 'child' is under 18 years old. Subsection 70NI(3) will be repealed by item 72, as the definition of abuse has been placed in subsection 4(1) by Item 1. As a result, subsection 70NI(2) is amended to

Proposed provision	Corresponding current provision(s)	Change to current provision
		clarify that the exception to inadmissibility that it creates only applies in relation to children who are under 18 years old. This is in accordance with proposed sections 10D and 10L.
Item 72 Repeal subsection 70NI(3)		See item 1.
Item 73 Repeal paragraphs 70NIA(a) and (b)		Consequential to removal of 'provider' by Items 62 and 66.
Item 74 Repeal section 70NIB		See Item 61.
Item 75 Repeal paragraph 70NJ(5)(ab)		Consequential to removal of 'provider' by Items 62 and 66.
Item 76 Amend subsection 70NM(4)		This amendment is consequential to the amendments to the terminology employed in the Act.
Item 77 Amend subsection 102A(5) – paragraph (b) of the definition of 'examined'		Changes a reference to 'family and child counsellor or welfare officer' to 'family counsellor or family and child specialist', in line with the amendments to the terminology employed in the Act.
Item 78 Insert subsection (1A) before subsection 111CV(1)		This amendment is consequential to the amendments to the terminology employed in the Act. The section has also been amended to clarify the institutions and individuals it covers. No substantive changes have been made to the section.
Item 79 Amend subsection 111CV(1)		As above, the section has also been amended to clarify the institutions and individuals it covers. No substantive changes have been made to the section.
Item 80 Repeal subsection 111CV(5)		
Item 81 Amend subsection 115(2)		The section has also been amended to clarify the institutions and individuals it covers. No substantive changes have been made to the section.

Proposed provision	Corresponding current provision(s)	Change to current provision
Item 82 Amend paragraph 123(1)(j)		This amendment is consequential to the amendments to the terminology employed in the Act.
Item 83 Amend paragraph 123(1)(s)		This amendment is consequential to the amendments to the terminology employed in the Act.
Item 84 Amend paragraph 123(1)(sa)		This amendment is consequential to the amendments to the terminology employed in the Act.
Item 85 Amend paragraph 123(1)(sb)		This amendment is consequential to the amendments to the terminology employed in the Act.
Item 86 Amend paragraph 123(1)(sb)		This amendment is consequential to the changes to the structure of the Act.
Item 87 Amend paragraph 123(1)(sc)		This amendment is consequential to the amendments to the terminology employed in the Act.
Item 88 Insert paragraph 123(1)(sca) after paragraph 123(1)(sc)		This amendment is consequential to the amendments to the terminology employed in the Act and the introduction of family and child specialists.
Item 89 Amend paragraph 123(1)(sd)		This amendment is consequential to the amendments to the terminology employed in the Act and the introduction of family and child specialists.
Item 90 Amend paragraph 123(1)(se)		This amendment is consequential to the amendments to the terminology employed in the Act and the introduction of family and child specialists.
Item 91 Amend subparagraph 123(1)(sf)(i)		This amendment is consequential to the changes to the structure of the Act.
Item 92 Amend subparagraph		This amendment is consequential to the changes to the structure of the Act.

Proposed provision	Corresponding current provision(s)	Change to current provision
123(1)(sf)(ii)		
Item 93 Amend subparagraph 123(1)(sf)(ii)		This amendment is consequential to the changes to the structure of the Act.
Item 94 Amend paragraph 123(1)(ba)		This amendment is consequential to the amendments to the terminology employed in the Act.
Item 95 Insert paragraph 125(1)(bba) after 125(1)(bb)		Allows regulations to be made in relation to the registration of arbitration awards, to address a current deficiency in the regulation-making power.
Item 96 Amend paragraph 125(1)(bc)		Consequential on amendments at Items 88 – 93.
Item 97 Amend paragraph 125(1)(ca)		Proposed paragraph 125(1)(ca) is consequential to the amendments to the terminology employed in the Act. Proposed paragraph 125(1)(cb) allows regulations to be made in relation to the provision of advisory dispute resolution and facilitative dispute resolution, as introduced by proposed section 10H.
Federal Magistrates Act 1999		
Item 98– section 5 Repeal the definition of 'family and child counsellor'		See Item 15.
Item 99– section 5 Insert definition of 'family and child specialist'		See proposed section 11B of the Act.
Item 100– section 5 Repeal the definition of 'welfare officer'		See Item 30.

Proposed provision	Corresponding current provision(s)	Change to current provision
Item 101– Part 4 Amend heading to Part 4.		Family law proceedings in the FMC will be covered by the Act, rather than provisions in the FMA.
Item 102– section 20A Insert section 20A before section 21.		Item 102 provides that family law proceedings in the FMC will be covered by the Act, rather than provisions in the FMA.
Item 103– Division 1A of Part 7 Insert Division 1A after Division 1 of Part 7. Division 1A contains the provisions set out below.		Inserts a new Division into the FMA, which deals with Administration of the FMC's family services (see proposed Division 1A of Part IVA of the Act, at Item 38).
Section 93A Chief Executive Officer has functions of family and child specialists		See proposed section 38BA.
Section 93B Chief Executive Officer may give direction that relate to family services functions		See proposed section 38BB.
Section 93C Chief Executive Officer may delegate functions and powers that relate to family and child specialists		See proposed section 38BC.
Section 93D Chief Executive Officer may authorise officer or staff member to act as family counsellor or family dispute resolution practitioner		See proposed section 38BD.
Item 104– paragraph		This amendment is consequential to the amendments to the terminology employed

Proposed provision	Corresponding current provision(s)	Change to current provision
87(1)(f) Amend paragraph 87(1)(f) and insert 87(1)(fa).		in the Act and the FMA.
Item 105– subsection 87(2) Amend subsection 87(2)		This amendment is consequential to the amendments to the terminology employed in the Act and the FMA.
Item 106– paragraph 99(1)(f) Insert paragraph (f) at the end of subsection 99(1)		Section 99 of the FMA sets out the officers of the FMC. Item 106 adds 'family and child specialists' to the list of court officers.
Item 107– paragraph 102(2)(k) Amend paragraph 102(2)(k) and insert paragraph 102(2)(ka)		These amendments are consequential to the amendments to the structure of, and the terminology employed in, the Act.
Item 108– section 111A Insert section 111A – Family and child specialists		Family and child specialists may be officers of the FMC (as per Item 106). This item provides that if a family and child specialist is an officer of the FMC, he or she is to be engaged under the *Public Service Act 1999*. This is the position in relation to staff of the FMC, under subsection 112(2) of the FMA.
Item 109– subsection 115(1A) Insert subsection 115 (1A)		This item mirrors item 41, which relates to section 38R of the Act. Section 115 of the FMA allows the CEO of the FMC to engage consultants. Item 109 explicitly provides that the CEO may engage people to perform family counselling and family dispute resolution.
Item 110– subsection 115(2) Amend subsection 115 (2)		Consequential to amendment at Item 109.
Income Tax Assessment Act 1997		
Item 111– subsection 30-70(1) Amend subsection 30-70(1) (table item 8.1.1.)		This amendment is consequential to the amendments to the terminology employed in the Act.

Proposed provision	Corresponding current provision(s)	Change to current provision
Item 112– subsection 30-75(1) Amend subsection 30-75(1)		Subsection 30-75(1) of the ITAA refers to organisations that are approved 'by the Attorney-General' under the Act or the *Marriage Act 1961*. As the Minister responsible for legislation differs according to administrative arrangements, it is preferable that the actual Minister responsible for individual pieces of legislation is not referred to in the ITAA, as otherwise any changes to administrative arrangements will mandate a legislative amendment. To avoid this result, Item 112 removes the reference to the Attorney-General from subsection 30-75(1) of the ITAA.
Item 113– subsection 30-75(1) Amend subsection 30-75(1)		This amendment is consequential to the amendments to the structure of the Act.
Marriage Act 1961		
Item 114– subsection 9D(1) Amend subsection 9D(1)		This amendment is consequential to the amendments to the structure of, and the terminology employed in, the Act.
Item 115– subsection 9D(2) Amend subsection 9D(2)		This amendment is consequential to the amendments to the process for approval of organisations (see proposed section10E).
Item 116– paragraph 16(2A)(a) Amend paragraph 16(2A)(a)		This amendment is consequential to the amendments to the terminology employed in, the Act.
Item 117– paragraph 16(2A)(b) Amend paragraph 16(2A)(b)		This amendment is consequential to the amendments to the terminology employed in, the Act.
Item 118– subsection 16(7) Amend subsection 16(7)		This amendment is consequential to the amendments to the terminology employed in, the Act.
Part 2 – Transitional and		

Proposed provision	Corresponding current provision(s)	Change to current provision
application provisions		
Item 119 definition of 'commencement'		
Item 120 Approved counselling organisations become approved family counselling organisations	Section 13A	Transitional provision.
Item 121 Approved mediation organisations become approved family dispute resolution organisations	Section 13B	Transitional provision.
Item 122 Notices filed under section 15	Section 15	Transitional provision.
Item 123 Arbitration awards registered under section 19D are taken to be registered under section 13H	Section 19D and 19E	Transitional provision.
Item 124 Powers under Division 4 of Part IIIB of the Family Law Act 1975 may be exercised in relation to section 19D arbitration and private arbitration	Section 19D and 19E	Transitional provision.
Item 125 Subsection 44(1B) certificates	Subsection 44(1B)	Transitional provision.

Proposed provision	**Corresponding current provision(s)**	**Change to current provision**
Item 126 Request for counselling under section 62C or 62CA	Sections 62C and 62CA	Transitional provision.
Item 127 Order under subsection 62F(2)	Subsection 62F(2)	Transitional provision.
Item 128 Reports under section 62G	Section 62G	Transitional provision.
Item 129 Pre-parenting order counselling for the purposes of section 65F	Section 65F	Transitional provision.
Item 130 Supervision etc of parenting orders	Section 65L	Transitional provision.
Item 131 Application of amendments to the Income Tax Assessment Act 1997		Transitional provision.
Item 132 Regulations may prescribe transitional matters		Transitional provision.

Attachment 3

Précis of Advice Received from the Australian Government Solicitor

Less Adversarial Approach

The government received legal advice on the less adversarial approach to child-related matters contained in Schedule 3. That advice concluded that the provisions in that Schedule were likely to be within Commonwealth constitutional power.

The More Active Role of the Judge

1. The provisions allowing for active case management, making findings before the conclusion of proceedings and asking questions of witnesses are consistent with Chapter III of the Constitution and with the requirements of natural justice.

2. In relation to the provision allowing for the court to deal with matters without the physical attendance of the parties, ordinarily, the physical attendance of the parties at court is necessary to safeguard a party's right to be heard and hence ensure natural justice. However, the retention of the power to require the physical attendance of the parties where their non-attendance is inappropriate is probably sufficient to ensure the validity of the provision.

3. In relation to the provision allowing the making of orders on the court's own initiative, the advice stated that the ability of a court to act on its own motion is not necessarily inconsistent with the exercise of judicial power (eg. the court's powers in relation to contempt can be exercised on its own motion).

4. In the special context of Part VII proceedings[1], the ability of a court to make orders on its own initiative is likely to be consistent with Chapter III of the Constitution. .

The Modified Set of Evidential Rules

5. It is within constitutional power to modify the rules of evidence. The court retains a discretion to apply the rules of evidence where it considers that they are necessary in the best interest of the child or otherwise.

6. Where the court does not exercise its discretion to apply the rules of evidence, it is left to the court to give such directions and make such orders as it considers appropriate regarding the admissibility of evidence in the proceedings. The exercise of discretion may mean that evidence the parties wish to present may be excluded. However, this in itself does not mean that the court will be acting in an unconstitutional manner.

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[1] In *Re P (A Child); Separate Representative* (1993) FLC 92-376 at 79-896, the Family Court said that 'proceedings in relation to the welfare of children are not strictly adversarial having regard to the court's obligations to treat the welfare of the child as the paramount consideration.'

7. The exclusion of evidence is left to the discretion of the court which, in exercising that discretion will be limited by reference to the proposed principles of Schedule 3 and, by implication at least, the requirement to act judicially. The court maintains its role in determining the relevance and reliability of evidence and this, is sufficient to ensure that this aspect of the less adversarial approach is likely to be valid.

Application to Non-Part VII Proceedings

8. The special character of Part VII proceedings (see paragraph 4) reinforces the validity of the less adversarial provisions, at least in so far as those provisions provide for a more inquisitorial approach.

9. That special nature is not shared by other proceedings under the *Family Law Act 1975* (the Act). The extension of the less adversarial provisions to other proceedings under the Act, such as property proceedings which involve the more usual judicial role of adjudicating on existing rights and altering those rights, is more open to doubt and this is why the less adversarial approach will only apply to such proceedings by consent.

ATTORNEY-GENERAL'S DEPARTMENT

SUBMISSION TO THE HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Family Law Amendment (Shared Parental Responsibility) Bill (2005)

This submission seeks to cover the broad range of issues raised by the House of Representatives Standing Committee on Legal and Constitutional Affairs in questions provided to this Department on 4 July 2005 and 6 July 2005 in relation to the Family Law Amendment (Shared Parental Responsibility) Bill 2005 (the Bill).

<u>Outline of Submission</u>

A. Overview of the Bill

B. Possible Concerns with the Bill

- Increased risk of family violence and child abuse
- Risk of increased litigation
  - Presumption of joint parental responsibility
  - Major long-term issues
  - Compulsory dispute resolution provisions
- Enforcement provisions
- The Bill does not do enough to ensure shared parenting after separation

C. Defining the Concept of Joint Parental Responsibility

- The requirement to consult
- New partners – A major long-term issue?
- Resolving disputes about the requirement to consult
  - Section 65DAE – 'No need to consult'
- Exception to compulsory dispute resolution – family violence and child abuse

D. The Presumption of Joint Parental Responsibility

- The complexity of the two presumptions
- Note concerning no presumption of equal time

E. Parenting Plans

- The effect of proposed section 64D
- How the courts will take parenting plans into consideration
- Obligations of advisors
- Understanding parenting plans – third parties

F. The Best Interests Test

- The current test
- The new provisions
- Consistency with the United Nations Convention on the Rights of the Child

G. Allegations of Violence

- Paragraph 68F(2)(j) – Consideration of family violence orders
    - Interim family violence orders

H. The Compliance Regime

- Clarification of the standard of proof
- Costs in enforcement proceedings
- Other options for the court to encourage compliance
    - Orders providing for compensatory time
    - Compensation orders
    - Bonds
- Impact of subsequent parenting plans

I. Amendments Relating to the Conduct of Child-Related Proceedings

- Making the court process less traumatic and easier to navigate
- Opportunities for the appropriate inclusion of children
- The relationship between sections 60KE and 60KI
- Responsibility for case management

J. The Dispute Resolution Provisions

- Encouraging out of court settlements
- Confidentiality and inadmissibility
    - Family counsellors and family dispute resolution practitioners
    - Family and child specialists
- Approved organisations
    - Eligibility for approval – current requirements
    - Eligibility for approval – proposed requirements
    - Removal of requirement for organisations to be 'voluntary'
    - Funding requirement
    - Effect of amendments on existing services
- Assuring the quality of services
    - Introduction of accreditation services
- Availability of dispute resolution services
    - Urgent applications

K. Consultation with Aboriginal and Torres Strait Islander Groups

L. Impact on Child Support

M. Attachments to Submission

- Attachment 1 – Comparison of Committee recommendations, government response and provisions of Bill
- Attachment 2 – Schedule 4 provisions
- Attachment 3 - Précis of the Australian Government Solicitor advice – less adversarial approach

A. OVERVIEW OF THE FAMILY LAW AMENDMENT (SHARED PARENTAL RESPONSIBILITY) BILL 2005

1. The Family Law Amendment (Shared Parental Responsibility) Bill 2005 (the Bill) is a key component of the package of family law reforms that was announced by the Prime Minister on 29 July 2004. The legislation will underpin the package of measures announced in the 2005-06 Budget, estimated at $397 million over four years. These initiatives represent a major change in family law and aim to bring about a cultural shift in how family separation is managed: away from litigation and towards cooperative parenting.

Changes to the Act

2. The Bill amends the *Family Law Act 1975* (the Act) to implement a number of the recommendations in the report of the House of Representatives Standing Committee on Family and Community Affairs (the Committee) inquiry into child custody arrangements in the event of family separation. The report, titled *Every picture tells a story,* was released on 29 December 2003 (the Report). The amendments to the Act form part of the government's significant new reform agenda in family law. A summary of the recommendations and how they have been implemented in the Bill is at attachment A.

Schedule 1 – Shared parental responsibility

3. Amendments contained in the Bill support and promote shared parenting and encourage people to reach agreement about the parenting of children after separation. The amendments advance the Government's long standing policy of encouraging people to take responsibility for resolving disputes themselves, in a non adversarial manner.

4. The changes to the Act will recognise the importance of children having a meaningful involvement with both parents and will include a new presumption of joint parental responsibility, except in cases involving child abuse or family violence. Other changes will:
   - require parents to attend family dispute resolution, such as mediation, before taking a parenting matter to court (with exceptions including child abuse or family violence);
   - require the courts to consider substantial sharing of parenting time in appropriate cases;
   - encourage parents to consider substantially sharing parenting time when developing parenting plans outside the courts; and
   - better recognise the interests of the child in spending time with grandparents and other relatives.

5. The changes to the law will emphasise the best interests of the child.

6. When deciding the best interests of a child, the primary factors that the court must consider will be the benefit to the child of having a meaningful relationship with both parents and the need to protect the child from physical or

psychological harm. Among other factors to be considered will be the capacity of each parent to provide for the needs of the child and the willingness and ability of each parent to facilitate a continuing relationship between the child and the other parent.

Schedule 2 – Compliance regime

7. Breaches of court orders are a major source of conflict and distress to all parties involved. The Family Relationship Centres will have an important role to play in helping parents to resolve such issues outside the courts. The expansion of the Contact Orders Program will also help where conflict has led to a breakdown in contact between a parent and child.

8. However, the government recognises that in some cases the court needs to take firm action to deal with breaches. The amendments ensure that enforcement applications can be dealt with appropriately by the court, particularly given the object that children have a meaningful relationship with both parents. The government proposes to strengthen the enforcement provisions in the Act. New provisions will include:

   - a requirement that the court consider 'make up' contact if contact has been missed through a breach of an order. This provision is intended to apply even where a party is able to show that there was a reasonable excuse for breaching the order. The court will now have power to order make up contact if that is in the best interests of the child;
   - a power to award compensation for reasonable expenses incurred by a person but which were wasted due to a breach of an order. This might include airfares or other tickets purchased but not used or travel expenses incurred by the person to collect a child, but the child was not made available;
   - in cases where there is not a serious breach of an order, the court will need to consider making an order for costs;
   - in cases involving a series of breaches or a serious disregard of court orders, a presumption that legal costs will be awarded against the party who has breached the order, unless it is not in the best interests of the child; and
   - a new discretion to impose a bond without criminal penalties for cases where there is not a serious breach of a court order (the option of a bond with criminal penalties already exists for a serious breach of a court order).

Schedule 3 – Amendments relating to the conduct of child-related proceedings

9. Adversarial processes tend to escalate and prolong conflict. As part of this response, the Bill implements a range of amendments to provide legislative support for a less adversarial approach to be adopted in all child-related proceedings under the Act. This approach relies on active management of proceedings by judicial officers in a way that considers the impact of the proceedings on the child and not just the outcome of the proceedings. The intention is to ensure that the case management practices adopted by courts will promote the best interests of the child by encouraging parents to focus on their children and on their parenting responsibilities. This approach largely reflects

that taken by the Family Court of Australia in its pilot of the Children's Cases Program.

Schedule 4 – Changes to dispute resolution

10. The Bill amends the counselling and dispute resolution provisions in the Act to implement the government's policy of encouraging separating and divorcing parents to utilise counselling and dispute resolution services without the need to go to court. The Bill also streamlines the obligations that will be placed on the court, lawyers and others, to provide information to those affected by separation and divorce about family law proceedings and available counselling and dispute resolution services.

Schedule 5 – Removal of references to residence and contact

11. Changes to the Act in 1995 adopted the terms 'residence' and 'contact' instead of 'custody' and 'access' in order to eliminate any sense of ownership of children. However, the intended change of culture has not been achieved. Consistent with recommendation 4 of the Committee's Report, the terms 'residence' and 'contact' are removed from the Act with the emphasis now on the more family-focussed term of 'parenting orders'. In the majority of cases, references to 'residence' will be replaced with 'lives with'. References to 'contact' will be replaced with 'spends time with' and 'communicates with' in the majority of cases.

B. POSSIBLE CONCERNS WITH THE BILL

12. The government anticipates that the major criticisms of the Family Law Amendment (Shared Parental Responsibility) Bill 2005 (the Bill) will be:

- Increased risk of family violence and child abuse to women and children

13. A number of women's groups (such as the National Council of Single Mothers and their Children) have raised concerns that the proposed reforms will place women and children at greater risk of violence. In particular, the groups are concerned that it will be much easier for abusive parents to have contact with their children, that there are risks in the requirement for compulsory dispute resolution prior to application to court and that the requirement to agree on long-term issues will lead to the escalation of conflicts. They are also concerned about the effect of the strengthening of the enforcement provisions on the risks to women and children.

14. The government does not consider that this is a likely outcome for the proposed amendments. The government considers that family violence and child abuse cannot be tolerated. There are a number of provisions in the exposure draft which focus on ensuring that a child is protected from family violence and child abuse. The new principles in item 2 of Schedule 1 specifically refer to the need for a child to be protected from the risk of physical or psychological harm caused by family violence or child abuse.

15. Both the presumption of joint parental responsibility (item 11, Schedule 1) and the requirement to attend family dispute resolution prior to going to court (item 9, Schedule 1), will not apply in cases involving family violence and child abuse. In those cases, the court will not be obliged to consider the child spending time with both parents.

16. The best interests of the child will remain the paramount consideration. In determining what is in the best interests of the child, one of the primary factors that the court will need to consider is the need to protect the child from violence or harm (item 26, Schedule 1). The new format of section 68F elevates the importance of the safety of the child in the court's considerations.

17. Where a case is exempt from the requirement for family dispute resolution because it involves family violence or child abuse, there will still be a requirement for the person wanting to take the matter to court to obtain information from a family counsellor or family dispute resolution practitioner about what services and options available to them, so that they are aware of any alternatives to court action and services that may assist them in their particular circumstances. Where there is a risk of child abuse or family violence if there is a delay in the court hearing the matter, the requirement to obtain a certificate does not apply. This is to minimise the risk of violence to the parties or the child in those matters.

18. Schedule 3 of the exposure draft contains amendments to implement new procedures for the conduct of those family law matters that do go to court. The

more active case management approach will ensure that allegations of family violence and child abuse are dealt with at an earlier stage in the court process. Judicial officers will be better able to ensure that appropriate evidence is before them, to assist the court to better address these issues in the proceedings.

19. Screening for family violence and child abuse will also be a very important role of the Family Relationship Centres (announced in the 2005-06 Budget) and the centres will also be able to provide information and advice to victims of family violence about their options and about support services available. There is funding of $7 million to increase specialist family violence services and 30 new children's contact services to help ensure children and parents are protected from violence and abuse during contact.

- <u>That the Bill will lead to increased litigation</u>

20. Concern has been expressed by a number of groups (including the legal profession and the courts) that the Bill may lead to increased disputes and therefore litigation.

21. It is important that the changes to the Act be considered as part of the overall package of reforms announced in the 2005-06 Budget. As discussed previously, the government's reforms include increased services to help people to resolve disputes outside of the court system. The changes in the Bill are necessary to achieve the government's objectives to encourage families to resolve disputes outside of the court system and to encourage cooperative parenting after separation.

22. The government considers that although there may be an increase in litigation in the short term, the introduction of compulsory dispute resolution and the new expanded family dispute resolution services will result in a decrease in litigation in the medium to long term.

Presumption of joint parental responsibility

23. A number of groups have been lobbying for changes to the Act to provide for the 50/50 sharing of time with a child. In rejecting this approach, the Committee and the government decided that in order to ensure that children receive the benefit of a meaningful relationship with both parents, it is necessary to provide a starting point of joint parental responsibility unless there are issues of safety. There is concern that litigation may increase as a result of the introduction of the presumption. These concerns are that parents will litigate to determine whether the presumption will apply to their case and that parents with existing orders will re-litigate to achieve a better outcome.

24. The government has avoided the potentially confusing option of two presumptions, opting for the simpler structure of one presumption and a limitation that the presumption will not apply in cases of family violence or child abuse.

25. The presumption of joint parental responsibility will not apply where there are reasonable grounds to believe that a parent of the child (or person who lives with a parent of the child) has engaged in child abuse or family violence. This is an objective test which is applied by the court. There must be evidence of family violence or child abuse for the presumption not to apply. This evidence will include the evidence of the alleged victim of the family violence or child abuse. It will not be enough to suggest that there is only a minor risk of family violence or child abuse. This approach is appropriate given the serious implications of not having joint parental responsibility. The reasonable grounds test will also assist in addressing concerns about false allegations being made to avoid the application of the presumption.

26. Due to the limited evidence available at interim hearings, item 11, Schedule 1 makes clear that the court has a discretion to apply the presumption at an interim hearing. However, any decision relating to the allocation of parental responsibility at the interim hearing is to be disregarded at a final hearing. This will address concerns that a status quo is established at an interim hearing, which is very difficult to alter at a final hearing.

27. To some extent, it is inevitable that some parents will attempt to re-litigate their case to obtain more favourable orders in view of the legislative change. The case of *Rice and Asplund*[1] will restrict these applications unless a there has been a 'significant change' in circumstances. In addition, prior to filing a new application with the court, parents will need to attend family dispute resolution and are likely to resolve the dispute at this stage.

Major long-term issues

28. The concern expressed is that there will be an increase in litigation as non resident parents seek to enforce the duty to consult, which is required by joint parental responsibility.

29. Section 61C of the Act currently provides for each parent to have parental responsibility and very few existing orders alter that position. However, the Act does not specify what it means for each parent to have parental responsibility and many fathers in particular are concerned that a non residential parent has little influence on their children's lives.

30. In accordance with recommendation 3 of the Report, joint parental responsibility is defined in the Bill in order to give guidance to the meaning of the term. Proposed section 65DAC (item 23, Schedule 1) provides that the effect of joint parental responsibility is that persons should consult and make a genuine effort to come to a decision about major long-term issues in relation to the child. Despite this clarification, there is concern in relation to the effect of the requirement that parents make joint decisions about major long-term issues.

31. Item 6 of Schedule 1 defines major long-term issues to mean issues about the care, welfare and development of the child of a long-term nature. This includes

[1] (1979) FLC 90-725

a child's education, religion and cultural upbringing, health, name and significant changes to the child's living arrangements. An issue that may cause disagreement between parties is the issue of significant changes to the child's living arrangements. This will include any substantial changes to the type and location of the residence in which the child usually lives. This factor is not intended to cover situations where the child relocates to another residence within the same locality, unless this produces a significant change. 'Major long-term issues' is not intended to cover trivial matters.

Compulsory dispute resolution provisions

32. There is some risk that parties may litigate about whether a person meets one of the exceptions to the requirement to attend family dispute resolution. These exceptions are necessary to ensure that people are not forced to attend family dispute resolution in circumstances where it is inappropriate. During the consultation about the reforms there was general acceptance of the provision of compulsory attendance at a dispute resolution service prior to application to the courts and we do not expect wholesale attempts to avoid these provisions.

33. The exception to attendance that is most likely to be controversial is where family violence or child abuse is alleged. To address concerns that there may be false allegations to avoid attendance, the threshold to establish this exception is that the court must be satisfied that the person making the allegation has reasonable grounds to allege that child abuse or family violence has occurred or that there is a risk of child abuse or family violence.

34. This is an objective test which should allay concerns about a more subjective test. At the time the government released its discussion paper, it was proposed that there should be explicit provision for costs if a person sought to avoid these provisions. The government decided not to proceed with that measure because there was concern that this would discourage people from relying on the exceptions where there were genuine violence and abuse issues.

35. Another consideration was that the measure did not satisfy other groups who did not consider this provision would be an effective deterrent. The court still retains a general capacity to order costs in these circumstances, although the usual costs outcome is that each party pays their own costs. The decision to set an objective test was made in the context of not proceeding with the explicit cost provisions.

36. The Bill also provides a mechanism at subsection 60I(9) (item 9, Schedule 1) that the court must consider whether a person who has not attended family dispute resolution should be referred to a service. This provision is intended to be a further disincentive to parties who contrive to avoid compliance with the family dispute resolution requirement.

37. As discussed in paragraph 17 of this submission, section 60J at item 9 of Schedule 1 provides that a person relying on the family violence or child abuse exception will still need to file a certificate evidencing that they have obtained information from a family counsellor or family dispute resolution practitioner

about services and options available to them, so that they are aware of any alternatives to court action and services that may assist them in their particular circumstances. This section was inserted to address concerns that cases involving family violence and child abuse may miss out on some of the information and referral services offered by the new Family Relationship Centres.

38. When an application that relies on one of the exceptions to attendance at family dispute resolution is made to the court, a judicial officer will make an initial assessment as to whether the exception relied on is appropriate, prior to hearing the matter. In the common registry process, this assessment may be made by a registrar exercising delegated judicial power. It would not be appropriate for filing staff to determine whether an exception has been met. The applicant will need to provide some evidence to ensure that the court is reasonably satisfied of the family violence or child abuse or risk of family violence or child abuse.

- Enforcement provisions

39. A number of groups (such as the Lone Fathers and the Shared Parenting Council) have indicated that they do not consider the enforcement provisions go far enough. They consider that there should be mandatory penalties if a party does not comply with court orders. The government considers the changes to the enforcement provisions provide the court with significantly more options to enforce orders, while allowing the court sufficient discretion to ensure that the most appropriate orders are made in the best interests of the children.

40. The amendments contained in the Bill to strengthen the existing enforcement regime are about providing the court with a greater range of options to appropriately deal with contraventions. The court will retain a discretion to determine the most appropriate orders and will consider the circumstances in each case in light of the best interests of the child. However, the provisions do place greater obligations on the court to make orders compensating the party who has not had contact as a result of the breach.

- That the amendments do not do enough to ensure shared parenting after separation

41. A number of groups have criticised the Bill as not doing enough to achieve equal shared parenting outcomes.

42. The government considers that the legislation clearly contains a number of provisions that will help to ensure that both parents have a greater share in the parenting responsibilities for their child after separation. The provisions in the Bill will promote the importance of children having a meaningful involvement with both of their parents. The provisions are deliberately child focussed. The key provisions are:

    - Item 2 of Schedule 1 adds as an objective, ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives to the maximum extent possible consistent with their best interests.

- Item 26 of Schedule 1 provides that a primary consideration in determining the best interests of the child will be the benefit to the child of having a meaningful relationship with both parents.

- Item 11 of Schedule 1 provides a starting point or presumption of shared parental responsibility. Item 23 of Schedule 1 includes the new section 65DAC which clarifies that the effect of an order providing for joint parental responsibility is that decisions about major long-term issues affecting the child have to be made jointly.

- Item 23 Schedule 1 requires the court to consider a child spending substantial time with both their parents where there is joint parental responsibility, both parents want this and it is reasonably practicable.

- The amendments to the enforcement provisions in Schedule 2 will significantly strengthen the parenting compliance regime and improve compliance with court orders providing for shared parenting.

C. DEFINING THE CONCEPT OF JOINT PARENTAL RESPONSIBILITY

The Requirement to Consult

43. Parents already can and do litigate about the issues that are defined as 'major long-term issues in item 6 of Schedule 1. The Bill now makes clear the obligation to seek to agree about major long-term issues in proposed section 65DAC (item 23, Schedule 1). The clarification of what issues are major long-term issues is intended to reduce disputes about what falls into this category and to make it clear that day to day decisions can be made by the parent who has care of the child, thus reducing litigation about those issues.

New Partners – A Major Long-Term Issue?

44. Living with a new partner is not defined as a major long-term issue in the Bill and parties are therefore not required to consult about a new partner.

45. However, if having a new partner results in significant changes to a child's living arrangements, a person will be required to consult. This is appropriate given that significant changes to living arrangements may have a significant impact on the child and on the capacity of a parent to exercise parental responsibility in relation to that child. It will also give parents an opportunity to discuss the best way to handle a particular change for their child.

46. Under existing law, an application to the court in relation to the arrangements for a child may be made if there is a significant change in the circumstances of the child or either parent (*Rice and Asplund*[2]). The possibility of litigating this issue therefore already exists.

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[2] (1979) FLC 90-725

Resolving Disputes about the Requirement to Consult

47. Joint parental responsibility requires parents to consult and make a genuine effort to come to a joint decision under proposed section 65DAC.

48. Where a parent does not fulfil these requirements, the other partner can file an application seeking a resolution of the issue. Where a case is exempt from the requirement for family dispute resolution because it involves family violence or child abuse, there will still be a requirement for the person wanting to take the matter to court to obtain information from a family counsellor or family dispute resolution practitioner about options and support services available.

49. When determining such an application, the court will have the power to vary the order that requires joint parental responsibility. Depending on what is in the best interests of the child, the court may either make a decision about the issue in contention or change the order so that parental responsibility in relation to a particular component is no longer joint.

Section 65DAE – 'No Need to Consult'

50. The 'no need to consult' provision located in proposed section 65DAE (item 23, Schedule 1) will be contestable in court. A person may disagree with a decision that has been made by the person that the child is spending time with. For example, a parent who is spending time with the child feeds the child in a manner that is inconsistent with the child's religious upbringing. Although what a child eats is not usually a major long-term issue, a child's religious or cultural upbringing is defined as a major long-term issue in item 6 of the Bill.

51. In the event that the parties are unable to resolve this issue themselves, the parties will be required to attend family dispute resolution to discuss this issue before the court will hear this matter. The government anticipates that the majority of these types of issues will be resolved though these services.

Exception to Compulsory Family Dispute Resolution – Family Violence and Child Abuse

52. Item 9 of Schedule 1 ensures that people who apply to the court for a parenting order will be required to first attempt to resolve their dispute using family dispute resolution services, such as mediation. This change will assist people to resolve family relationship issues outside the court system, which will have the benefits of providing flexible solutions, minimising conflict and avoiding costly court procedures.

53. There are a number of exceptions in the Bill to this requirement, including where there is or has been family violence or child abuse. This exception recognises the impact that these issues can have on the capacity of parties to participate effectively in a dispute resolution process. The party seeking to rely on this exception must satisfy the court that they had reasonable grounds to believe that the abuse or violence has occurred or may occur.

54. Proposed section 60J will apply to a person who wishes to file an application for a parenting order in court and is not required to attend family dispute resolution because the case involves family violence or child abuse. This provision is discussed at paragraphs 17 and 37 of this submission.

D. THE PRESUMPTION OF JOINT PARENTAL RESPONSIBILITY

55. Item 11 of Schedule 1 provides for a new presumption (or starting point) of joint parental responsibility. The presumption will not apply in cases where there is family violence or child abuse. It can be rebutted if it is not in the child's best interests.

The Complexity of Two Presumptions

56. The government considers that the intention of recommendations 1 and 2 of the Committee can be achieved by having only one presumption and providing for an exception to the application of that presumption in cases of family violence and child abuse.

57. On reviewing earlier drafts of the Bill, the Family Court of Australia and the Federal Magistrates Court (the Courts) raised concerns about the complexity of the drafting of the two presumptions about the sharing of parental responsibility, as suggested in recommendations 1 and 2 of the Report. The Courts were also concerned about how these presumptions would operate in practice.

58. A further consideration was that retaining the two presumptions would have the effect that where the exceptions relating to family violence and child abuse apply, there is no starting point of joint parental responsibility and the court must consider the best interests of the child. In such cases, the negative presumption would also apply with the same result (that the court must consider the best interests of the child without any particular starting point).

59. As a result of these concerns, the government decided to have only one presumption which is intended to apply in all cases except where there is family violence and child abuse.

Note Concerning No Presumption of Equal Time

60. The note in proposed section 61DA explains that this provision does not provide for a presumption about the amount of time a child spends with each of the parents. The note directs the reader to section 65DAA which deals with this issue.

61. Notes to legislation generally do not have legal effect[3]. The intention of a note is to provide assistance to readers and, in particular, self-represented litigants. Notes are not intended to change the law and cannot contradict the outcome of

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[3] Section 13(3) of the *Acts Interpretation Act 1901* provides that marginal notes, footnotes and endnotes are not to be taken as part of an Act.

other provisions in the Bill. The notes are used throughout this Bill to provide such assistance and to provide cross references between related provisions.

E. PARENTING PLANS

62. Division 4 of Part VII of the Act provides that generally parenting plans are written agreements made between the parents of a child. A parenting plan can be varied or revoked by further written agreement. These provisions are broadly drafted to ensure that there is sufficient flexibility to encourage people to enter into parenting plans. Item 13 of Schedule 1 is a non exclusive list of the matters that a parenting plan may deal with.

63. The intention of parenting plans is to reach an agreement outside of the court system. Item 14 of Schedule 1 sets out a series of obligations for advisers. The aim of this provision is to assist people making parenting plans to understand what the plan may include, the effect of the plan and the availability of programs to assist people who experience difficulties in complying with a plan.

64. The system of registration of parenting plans provided for in the Act was repealed by amendments to the Family Law Act in 2003. This was because of concerns that registration resulted in the plans losing the advantage of flexibility and consequently were not often used.

The Effect of Proposed Section 64D

65. Parenting plans are not enforceable as court orders but allow parents (and other parties) to reach parenting arrangements outside of the court system. The focus on parenting plans in this Bill is part of the cultural shift to have cooperative child-focussed parenting take place outside of the adversarial court system.

66. Section 64D, at item 19 of Schedule 1, inserts a default provision into parenting orders that are made after the commencement of these provisions. The default provision has the effect that those parenting orders will be subject to any subsequent parenting plan. There is a discretion for the court not to include the default provision in the parenting order in cases where this is not appropriate. The use of a default provision in parenting orders to achieve the policy intention ensures that there is an appropriate exercise of judicial power by the court because the court retains a discretion not to include this provision if it is inappropriate.

67. The intention of section 64D is that, to the extent of any inconsistency, a parenting order should cease to have effect in circumstances where parents subsequently make a parenting plan that deals with a matter in a court order. This does not mean that the parenting plan itself is enforceable (parenting plans have no legal enforceability), but does mean that after the commencement of these provisions, where this default provision is included in the parenting order, there will no longer be a right to enforce the previous court order (to the extent of inconsistency with the new parenting plan).

68. Therefore, people can only lose the capacity to enforce their existing parenting order within the court system if they agree to this in writing in a parenting plan. The unenforceability will be limited to the extent to which the later plan is inconsistent with the earlier orders. Item 14 of Schedule 1 ensures that they will be advised about the effect of entering into a parenting plan.

69. The government will fund the Family Relationship Centres to provide appropriate support for people to agree on parenting plans. The Centres will also find support services to assist people implement the plan, without the need to use the court system.

70. For example – A and B have parenting orders which provide that their child live with A and spend weekends with B. The section 64D default provision is included in their parenting order. Several years later, circumstances have changed for both A and B and the child indicates that he/she would like to live with B and spend weekends with A. After attending a family dispute resolution service, A and B both agree that this is appropriate. Rather than incur the costs (both financial and personal) of going through another court process, A and B agree in writing to the new arrangement.

71. If the arrangement breaks down and A wants the child to live with him/her, then A will not be able to bring an enforcement application against B seeking to enforce the parenting order and to penalise B for contravention of the original order. A will have to either renegotiate the agreement or, if this is unsuccessful, go back to court and seek new parenting orders. The court will make parenting orders that are in the best interests of the child. Item 23 of Schedule 1 requires the court to consider the parenting plan that was made by the couple when making these further parenting orders.

72. If A and B had obtained consent orders (through a court process for the agreement they reached subsequent to the original orders), A would not be able to bring an application for contravention of the original orders. However, if A were concerned about the new arrangement and later wanted to revert to the original orders then A would still need to either seek to negotiate an agreement or go to court to seek to vary the consent orders.

How the Court will take Parenting Plans into Consideration

73. It is intended that a court will consider the most recent parenting plan when it makes a parenting order. The court must also have regard to parenting plans when considering varying a parenting order as part of a contravention application. The intention is to encourage people, wherever possible, to try to reach agreement outside of the court process.

74. Section 65DAB at item 23 of Schedule 1 provides for a court to have regard to a parenting plan. The intention is that this provision will mostly be used in situations where, prior to entering the legal system, parents have agreed on a parenting plan that breaks down and parenting orders are required (because the plan itself is unenforceable). It may also be relevant, where due to the effect of

section 64D, a previous parenting order has become unenforceable and the parents now come before the court to seek new parenting orders.

75. This provision simply ensures that the court is made aware of arrangements agreed to by the parents and which have broken down. The court is still required to make a decision in the best interests of the child but information about the agreement may assist the court in considering the appropriate parenting orders to make.

76. The provisions in Schedule 2 relating to parenting plans are intended to cover situations where parenting orders have been made prior to the commencement of these provisions or where parenting orders are made which do not have the default section 64D provision about being subject to subsequent parenting plans. For other parenting orders where there is a section 64D default provision, any subsequent parenting plan will have rendered the orders unenforceable to the extent of inconsistency, so the contravention provisions will no longer be relevant.

77. New sections 70NEC (item 4, Schedule 2), 70NGB (item 8, Schedule 2) and 70NJA (item 12, Schedule 2) provide that where parenting plans are made after parenting orders, and they are not subject to the parenting order (as they were made prior to the commencement or the default provision of section 64D hasn't been applied) the court will need to have regard to the terms of the parenting plan. The court must specifically consider whether it would be appropriate to exercise the powers that the court already has under the contravention provisions to vary the existing parenting orders if those orders are inappropriate. The court is required only to have regard to and not to rely on a parenting plan because a parenting plan is not enforceable and any decision made by the court must be made in the best interests of the child.

78. A party is entitled to 'rely' on a parenting plan as a defence to an application that they be dealt with for breach of the original order. So the later parenting plan will protect the parent who has behaved in a way which breaches the order but complies with the parenting plan. This provision will not allow a parent to resile from an agreement unless the court makes a further order. A parenting plan is a shield, not a sword.

Obligations on Advisers

79. It is envisaged that the information relating to parenting plans that advisers (ie. legal practitioners, family counsellors, family dispute resolution practitioners and family and child specialists) are required to provide under proposed section 63DA, in item 14 of Schedule 1, will generally be provided in a written form (eg brochures).

80. There are two main reasons for this approach. Firstly, it is important that the information people receive about parenting plans is accurate, consistent and comprehensive (to place appropriate emphasis on key issues such as the interaction of parenting plans and parenting orders). Secondly, as many advisers will not be legal practitioners, it would be inappropriate to expect them

to provide advice about the legal implications of parenting plans. Carefully prepared written material will enable the information required under section 63DA to be provided by all advisers in a manner that addresses these two issues.

81. If the person receiving those documents requires further information or advice on the legal implications of parenting plans, the adviser should refer them to a provider of legal advice.

Understanding Parenting Plans - Third Parties

82. As discussed at paragraph 66 of this submission, section 64D has the effect of making a parenting order subject to any subsequent parenting plan that is in writing and is clearly made between the parents. The provision does so by inserting a default provision into parenting orders that are made after the commencement of these provisions. Therefore, a third party will be required to take notice of a subsequent parenting plan.

83. In relation to the Airport Watch List, the Australian Federal Police (the AFP) can only act if a parent has obtained a court order prohibiting the removal of the child from the country and requiring the child's name to be placed on the Airport Watch List. Orders restraining travel are in most instances made under Part XIV of the Act. Therefore, the AFP would not be able to rely on a parenting order obtained under Part VII or a subsequent parenting plan (section 64D will only apply to orders made under Part VII).

84. Parents also seek assistance from the AFP to enforce their parenting orders. For example, where a child has not returned from a period of contact a parent may request that the AFP return the child to them. However, the AFP cannot act until the parent has obtained a location order (if necessary) and recovery order from the court. The AFP will not otherwise enforce a parenting order or subsequent parenting plan.

85. In relation to child support matters, the Child Support Agency (the CSA) normally relies on written documentation from parents about what the actual living arrangements of the child are, rather than parenting orders. However, in situations where reference to a parenting plan is required, the CSA must also take notice of a subsequent parenting plan.

F. THE BEST INTERESTS TEST

The Current Test

86. Currently, in deciding whether to make a parenting order, a court must regard the best interests of the child as the paramount consideration (section 65E). Subsection 60D(1) of the Act defines 'interests' in relation to a child to include 'matters related to the care, welfare or development of the child.' The factors that the court must consider in determining the best interests of the child are set out in subsection 68F(2), as follows:

(a) any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's wishes;
(b) the nature of the relationship of the child with each of the child's parents and with other persons;
(c) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:
  i. either of his or her parents; or
  ii. any other child, or other person, with whom he or she has been living;
(d) the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;
(e) the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;
(f) the child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders) and any other characteristics of the child that the court thinks are relevant;
(g) the need to protect the child from physical or psychological harm caused, or that may be caused, by:
  i. being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or
  ii. being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person;
(h) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;
(i) any family violence involving the child or a member of the child's family;
(j) any family violence order that applies to the child or a member of the child's family;
(k) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;
(l) any other fact or circumstance that the court thinks is relevant.

87. The weight to be given to each factor is a matter for the court.

88. Section 60B(2) of the Act states the four principles that underlie the objects of Part VII. These principles are, however, always subject to the rider that any decision must be based on what is in the child's best interests.

89. Case law provides that the court should consider the longer term best interests of the child to the extent that this is both possible and reasonable in the circumstances.

The New Provisions

90. The best interests of the child under section 65E will continue to be the paramount consideration for the court in making parenting orders.

91. The major amendment contained in the Bill is the creation of two tiers of factors that the court must consider in determining what is in the best interests of the

child. The primary factors that the court must consider are: the benefit to the child of having a meaningful relationship with both parents and the protection of the child from physical or psychological harm.

92. The intention of separating these factors into two tiers is to elevate the importance of the primary factors and to better direct the court's attention to the revised objects of Part VII of the Act. The government considers it important to link the objectives of Part VII into operative provisions. This will lead to a more consistent focus on the court achieving the key elements of the objects of Part VII.

93. The elevation of these considerations, particularly that relating to ensuring a meaningful ongoing relationship between parents and children, is consistent with the proposal to introduce a presumption in favour of joint parental responsibility.

94. The second tier of factors will be the existing factors in subsection 68F(2) of the Act (as set out above). In addition, these amendments introduce a new factor that the court must consider which is the willingness and ability of each of the child's parents to facilitate and encourage a close and continuing relationship between the child and the other parent.

95. There is also an amendment to the current paragraph 68F(2)(j) (item 35, Schedule 1) which directs the court to consider a final or contested family violence order. The intention of this subsection is to ensure that uncontested or interim family violence orders are not an independent factor in determining the best interests of the child. The court will still consider, as a primary factor, the need to protect children from harm and will have regard to any actual violence under paragraph 68F(2)(i).

Consistency with the United Nations Convention on the Rights of the Child

96. The proposed subsection 68F(1A) reads as follows:

> The primary considerations are:
>
> (a) the benefit to the child of having a meaningful relationship with both of the child's parents; and
>
> (b) the need to protect the child from physical or psychological harm caused, or that may be caused, by:
>
> i. being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or
>
> ii. being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person.

97. Article 3 of the United Nations Convention on the Rights of the Child (the Convention) states that:

> (1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or

> legislative bodies, the best interests of the child shall be a primary consideration.

98. The Convention does not contain a definition of best interests of the child. The considerations listed as primary considerations in the proposed subsection 68F(1A) are consistent with other articles of the Convention, particularly Article 9(3), Article 19(1) and Article 18(1), although the wording is different. The text of these articles is as follows:

> Article 9
> (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
> (1) States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. 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.
>
> Article 19
> (1) States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

99. It is also relevant to mention Article 12 of the Convention. The text of Article 12(1) is as follows:

> States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

100. This is addressed in the current paragraph 68F(2)(a) which states that the court must consider 'any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the wishes of the child. This will become an additional consideration in paragraph 68F(2)(a). The wording will also more closely reflect that of the Convention as 'wishes' is to be amended to 'views'.

101. In summary, the factors that will become primary factors under the proposed subsection 68F(1A) are consistent with Australia's obligations under the Convention. Given this consistency and the fact that there is no definition of the best interests of the child in the Convention, the introduction of a hierarchy in this provision is not inconsistent with Australia's obligations under the Convention.

G. ALLEGATIONS OF VIOLENCE

102. The government is concerned that interim uncontested family violence orders from State and Territory Magistrates Courts can influence the outcome of family law proceedings. These orders can, in some cases, be obtained without evidence having been properly tested.

Paragraph 68F(2)(j) – Consideration of Family Violence Orders

103. In light of these concerns, the government proposes to amend current paragraph 68F(2)(j) in item 35 of Schedule 1 of the Bill (as discussed in paragraph 95 of this submission). This item provides that a court can consider a final or contested family violence order, rather than any family violence order. The intention of this subsection is to ensure that uncontested interim family violence orders are not an independent factor in determining the best interests of the child. This should address a concern that allegations of violence can be taken into account that were later found to be without substance.

104. The government does not consider that this amendment has the potential to place children at risk. In determining the best interests of the child, the court will consider, as a primary factor, the need to protect children from physical or psychological harm under subsection 68F(1A) in item 26 of Schedule 1. The court may also have regard to:
    - any family violence involving the child or a member of the child's family under paragraph 68F(2)(i) of the Act; and
    - final or contested family violence orders under paragraph 68F(2)(j).

105. If there are pending family violence orders, it will be a matter for the court in each particular case whether it chooses to wait for the determination of the issues of family violence by the State or Territory court. Alternatively, the court hearing the parenting application may draw its own conclusion about the violence as it impacts on the best interests of the child under paragraphs 68F(1A) and 68F(2)(i).

106. Schedule 3 of the Bill also contains amendments to implement new procedures for the conduct of those family law matters that do go to court. The more active case management approach will ensure that allegations of violence and abuse are dealt with at an earlier stage in the court process and that judicial officers are better able to ensure that appropriate evidence is before them to assist the court to better address these issues in the proceedings.

107. The investigation of allegations of child abuse and family violence is primarily a matter for the States and Territories. The government has concerns that these matters are often not given sufficient priority for investigation by relevant State and Territory authorities.

108. In relation to child abuse, the government is pleased with the national rollout of the Family Court's Magellan project and the recent extension of the Magellan project to NSW. The Magellan project involves the Family Court more actively managing parenting disputes involving allegations of serious physical and/or

sexual abuse against children. It is built on inter-organisational agreements that create a series of strong collaborative arrangements between the Court and relevant State and Territory agencies, including child protection authorities and legal aid. The Family Court of Western Australia has also implemented the Colombus project, which involves active case management by that Court of those cases that involve both allegations of child abuse and of domestic violence.

109. In addition, the Standing Committee of Attorneys-General has established a working group to consider ways of better coordinating the Commonwealth's family law system with child protection systems at State and Territory levels. One of the issues being examined is the development of model protocols between the family courts and state agencies to ensure appropriate information is available to the family courts in cases where there are allegations of child abuse.

Interim Family Violence Orders

110. Under paragraph 68F(2)(j), the court will be able to consider an interim order that was contested by the respondent.

111. In the event of an uncontested interim order, the court will be able to take the factors discussed in paragraph 104 of this submission into account. In considering the existence or threat of violence under paragraph 68F(2)(i), the respondent will be able to provide any evidence they have to contradict allegations of violence made under that provision.

H. THE COMPLIANCE REGIME

112. The government recognises that there is considerable dissatisfaction with how contraventions of parenting orders are dealt with. The government has considered the Committee's recommendations in relation to enforcement at Recommendation 21. The Bill proposes the adoption of a series of measures that clarify what the court is required to consider and adds to the options available to the court, while still protecting the best interests of the child. During consultations on the Committee's recommendations, there was considerable concern raised with the government about the potential problems that might arise from the proposals to reverse the residence of children and impose minimum financial penalties. In essence, these concerns were that parties would be reluctant to raise genuine concerns about risks to children if the result could be such penalties.

113. Enforcement cases are often cases that involve the most entrenched and bitter conflict between couples. A court is not necessarily the best venue to address such conflict. The Committee has noted (at paragraph 4.141) that a key reason for the lack of success of the current system is the limited availability of appropriate post-separation parenting programs. The substantial increase in such services that will result from the government's Budget announcements should alleviate much of this problem. Further, the changes in Schedule 1 at items 13 and 16 that increase the detail of what parenting plans and parenting

orders contain and the introduction of greater support services for parents in these circumstances should all help to significantly reduce the level of enforcement applications.

114. Many breaches of parenting orders result from the inappropriateness of existing orders, many of which are made by consent. The new regime of assistance that will be available to separating families and the greater flexibility given to the courts should reduce the numbers of such unworkable orders being made in the first place.

Clarification of the Standard of Proof

115. One concern about the current provisions is that courts require a very high standard of proof of a breach because of the possibility of criminal sanctions. The standard of proof required is clarified in the Bill.

116. Item 2 of Schedule 2 makes clear the standard of proof that will apply and ensures that expectations about the standard of proof are clear and realistic. This provision is intended to assist practitioners and in particular self-represented litigants as it clarifies the evidentiary standard that must be met. This will assist in case preparation. The lower standard of 'balance of probabilities' will apply for cases where non criminal sanctions are sought. This will make it easier to demonstrate contraventions than under the current system where a higher standard, which is something between the balance of probabilities and beyond reasonable doubt[4], may be applied to all contravention applications. For those matters where the court proposes to make orders that involve a criminal sanction, the court will need evidence that satisfies the court beyond reasonable doubt.

Costs in Enforcement Proceedings

117. The Bill introduces new powers to award costs against a party in items 6, 9 and 11 of Schedule 2. These powers will only apply to enforcement applications.

118. Under stage 2 of the parenting compliance regime, proposed paragraph 70NG(1)(f) allows the court to make an order for some or all of the costs against the contravening party.

119. In relation to matters under stage 3 of the parenting compliance regime (Subdivision C, Division 13A, Part VII), proposed paragraphs 70NJ(3)(g) and (h) (item 11, Schedule 2) list the power to order some or all of the costs against the contravening party in the available court options. Proposed section 70NJ(2A) (item 9, Schedule 2) inserts a presumption into stage 3 that the court will order costs for legal expenses against a party who has breached the order, unless it is not in the best interests of the child. Where it is not in the best interests of the child to make such an order, the court must make one of the other orders available to it in subsection 70NJ(3).

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[4] *Briginshaw v Briginshaw* (1938) CLR 336

120. These provisions in specifically state that they will only apply to proceedings under that Subdivision.

121. Otherwise, the general rule that each party bear their own costs will apply.

Other Options for the Court to Encourage Compliance

122. The range of orders from which the court can consider the most appropriate option is significantly expanded which will address concerns expressed by the court about the current limited options that they have.

123. There will be a discretionary power to award compensation for reasonable expenses incurred by a party (such as airfares wasted or other tickets purchased but not used). There is also a discretion to impose a civil bond for such breaches where the consequences of failure to comply with the bond would be limited to civil penalties. This would distinguish it from the current bond provisions at the final stage of the parenting compliance regime where there are clear criminal consequences.

124. At the third stage of the parenting compliance regime, there will also be a rebuttable presumption requiring the court to make an order for costs for legal expenses against a party who has breached the order and to consider making other appropriate orders. This is discussed at paragraph 119 of the submission.

Orders Providing for Compensatory Time

125. Under the proposed section 70NEAB (item 3, Schedule 2), a court must consider an order for make up contact even where there is a reasonable excuse for contravening the parenting order. This provision recognises the importance of, and benefit to, the child having contact with their non resident parent.

126. The idea of compensatory orders was suggested as an alternative to requiring the court to consider a reversal of a residence order if contact did not occur. Reversing a residence order was thought to be too drastic a change and would not achieve the required outcome, that is, to ensure that contact occurs.

127. A preference for compensatory contact over the reversal of residency was expressed in the written submissions of the ACT Women's Legal Service and the National Network of Women's Legal Services. The idea was also discussed during consultation meetings with the Legal Aid Commission of Western Australia, the Family Law Section and ACT Legal Aid.

Compensation Orders

128. Compensation orders under proposed paragraphs 70NG(1)(e) (item 6, Schedule 2) and 70NJ(3)(f) (item 11, Schedule 2) allow the court to make an order awarding compensation for reasonable expenses incurred by a party if there has been a breach of a parenting order.

129. For example, under the terms of an order contact is to occur with a non resident parent in another State. The non resident parent purchases a plane ticket for the child to travel but the other parent refuses or fails to send the child and the contact does not take place. In considering an enforcement application, the court can order that the non resident parent be reimbursed by the resident parent for the reasonable expenses that were incurred. It is anticipated that such an order would only be made if the other parent is at fault in some way.

Bonds

130. The bond provision in proposed section 70NGA (item 8, Schedule 2) is based upon section 70NM in the current Act and provides that a court may require a person to enter into a bond for a specified period of to 2 years. The key difference is that such a bond does not carry criminal sanctions as are available under section 70NM of the Act.

131. A bond with 'surety' is given where a person promises to take responsibility for a party's performance of an undertaking. For example, that person promises the court that it will pay the bond if the party breaches a condition of the bond. This is similar to a guarantor for a loan.

132. A bond with 'security' requires a party to provide the court with some form of wealth in advance. For example, a court may require the payment of a sum of money into court that is returned if the obligation is met. If the party does not meet the condition, that money will be forfeited. A further example is where the party is required to transfer ownership of an asset which the court can realise if the condition is not met.

133. Section 70NGA does not specify the maximum amount of money a person can be ordered to pay as a bond. The current provision in the Act is also silent on this issue.

134. The government considers that the court requires maximum flexibility in determining the amount required for a bond. The court must be able to make an order for a sufficient amount that will act as a meaningful deterrent for breaching a bond. For example, while a person with a very low income would only require a small amount, a person with a high income and assets would require a large amount as an incentive to meet the conditions of the bond. This is a similar situation that a court faces when determining bail for a criminal act.

135. It is important to note that a person will only be required to forfeit the amount ordered by the court if they breach a condition of the bond.

136. Money forfeited as a result of non compliance with a bond will go to Commonwealth Consolidated Revenue.

Impact of Subsequent Parenting Plans

137. Proposed section 70NJA (item 12, Schedule 2) allows the court to take into account any subsequent parenting plan when it is considering whether to vary parenting orders as part of stage 3 of the parenting compliance regime (proposed section 70NEC in item 4 of Schedule 2, gives the court the same power in relation to stage 2 of the parenting compliance regime). This provision ensures that the court is informed about the type of agreements that the parents themselves were considering when deciding what is in the best interests of the child. The court is not however bound by the terms of the parenting plan.

138. Sections 70NEC and 70NJA will only be relevant for the enforcement of parenting orders that do not have a section 64D default clause (parenting orders made prior to the commencement of that provision or where the court has exercised its discretion not to include the provision).

139. Where a section 64D clause is included in a parenting order, the parenting compliance regime will not be relevant if a subsequent parenting plan has been made. The effect of this provision is that the parenting order will be unenforceable to the extent it is inconsistent with any subsequent parenting plan.

I. AMENDMENTS RELATING TO THE CONDUCT OF CHILD-RELATED PROCEEDINGS

140. Schedule 3 of the exposure draft is specifically designed to ensure that the court process is less adversarial. This approach relies on active management by judicial officers and ensures that proceedings are managed in a way that considers the impact of the proceedings (not just the outcome of the proceedings) on the child. The intention is to ensure that the case management practices adopted by courts will promote the best interests of the child by encouraging parents to focus on their parenting responsibilities.

141. This approach largely reflects the approach taken by the Family Court in its pilot Children's Cases Program (CCP), although it is not intended to restrict courts exercising family law jurisdiction to the implementation of the CCP program.

142. Initial data from this project is very encouraging. There have now been some 126 cases finalised out of the 220 that have been accepted into the project. There have not yet been any appeals from the decisions that have been made. The full evaluation is expected in early 2006.

143. The evaluation methodology relies on the comprehensive data collected by the Family Court for analysis by the researcher, extensive interviews with all the participants in the process (judges, staff, lawyers and stakeholder groups) and client surveys, distributed at the completion of the case to each party. The CCP approach will be compared against a matching control group of cases which were completed in the same period.

144. A second sub study of the impact on children is being conducted. In addition, the Family Court has been undertaking a thorough examination of the resource impacts of the model including the judicial, mediator and client services staff resources in order to be able to plan for future expansion of the program.

145. The government's view is that Schedule 3 of the Bill is drafted sufficiently broadly to allow for flexibility in adopting any appropriate findings or recommendations that result from the evaluation of the Children's Cases Program.

146. In drafting these provisions, the government was also mindful that the different courts exercising family law jurisdiction may require flexibility in the operation or development of less adversarial programs within the individual court structure.

Making the Court Process Less Traumatic and Easier to Navigate

147. The less adversarial approach set out in Schedule 3 is generally intended to make the court process less traumatic by promoting a cooperative approach between parents, with a focus on children.

148. In particular, the provisions set out in proposed sections 60KE, 60KF, 60KG and 60KI (item 4, Schedule 3) will ensure a significantly less adversarial approach to decision making. Section 60KE sets out the obligations imposed on a judicial officer dealing with children's matters to be more involved in the way that a case is dealt with at the trial phase. Section 60KG provides that many of the rules of evidence that would normally apply in such matters will not apply unless the court decides otherwise. Section 60KI gives the court greater power to direct how evidence will be produced and how the examination of witnesses will take place at trial.

149. In addition to the legislative changes, the implementation of a combined registry for family law matters is a key component of the package of reforms announced by the government. The aim is to channel cases to the appropriate court and address concerns that the family court system can be confusing for many people. For example, the registry will provide one comprehensive set of information to parents. The Courts have held a series of consultative workshops in early February 2005 in Melbourne, Sydney and Brisbane. The courts have also released an information kit as the basis for further consultation with stakeholders about the proposed combined registry.

Opportunities for the Appropriate Inclusion of Children

150. The first principle of the less adversarial approach at subsection 60KB(3) at item 4 of Schedule 3 is that the court considers the needs and concerns of the child or children in determining the conduct of the proceedings. The third principle of this approach is that proceedings should be conducted to promote cooperative and child focussed parenting by the parties. Implementation of this principle potentially provides an opportunity for much closer participation of

children in appropriate cases and a much greater focus on their children's interests by disputing parents. This is in part because the greater judicial management of the hearing process is intended to make it much more flexible and able to respond to the dynamics of the case as it progresses. For example, a judicial officer may in an appropriate case more directly involve children in the court process itself, so that the children could feel that their views were in fact before the court.

151. Under the current system, children's views are generally put before the court by a child representative who is a lawyer with specific training in the requirements of the role. It is expected that this will continue to be the primary manner in which the views of children are put to the court. In addition, the Family Court is currently working on implementing a child inclusive model for non-judicial dispute resolution through court mediators. This dispute resolution process occurs as part of the overall court process. This model provides for the direct involvement of children at an earlier stage of that process.

The Relationship between Sections 60KE and 60KI

152. In developing Schedule 3, the government considered the current examples of the *Federal Magistrates Act 1999*, the *NSW Children and Young Persons (Care and Protection) Act 1998* and the United Kingdom Civil Procedure Rules (the UK Rules). In particular, the UK Rules provided a basis for the development of the duties and powers of the court that are set out in proposed sections 60KE and 60KF.

153. The government has consulted closely with the Family Court of Australia and the Federal Magistrates Court in the development of the Bill, particularly Schedule 3. These provisions reflect the views of these courts.

154. The government considers that the mandatory factors listed in section 60KE will focus the courts on the principles for conducting child-related proceedings in section 60KB. In particular, the amendments in section 60KE will ensure the active management of proceedings by judicial officers in such a way that considers the impact of the proceedings on the child and not just the outcome of the proceedings.

155. The discretionary factors in section 60KF will allow the court the flexibility to return to a mediation model once some of the issues have been resolved and the parties are able to focus on the interests of their children in the light of the court's findings.

Responsibility for Case Management

156. The government anticipates that children's cases will be managed by either judges or magistrates.

157. Currently, decisions on cases in the Children's Cases Program in the Sydney and Parramatta registries of the Family Court are made by judges. In the

Federal Magistrates Court, decisions are made by magistrates. The government does not anticipate that this will change.

J. THE DISPUTE RESOLUTION PROVISIONS

158. Schedule 4 of the exposure draft amends the counselling and dispute resolution provisions in the Act to implement the government's policy of encouraging separating and divorcing parents to utilise counselling and dispute resolution services without the need to go to court.

159. The amendments distinguish services available in the community from those provided by the courts, to assist in clarifying the different roles played by each sector in assisting people affected by separation and divorce. The Schedule also amends the prerequisites for approval as a family counselling or family dispute resolution organisation.

Encouraging Out of Court Settlements

160. The amendments introduced by the exposure draft will encourage more out of court settlement than the existing Act primarily through the provisions in Schedule 1 of the Bill, in particular proposed sections 60I and 63DA. Proposed section 60I provides (subject to some exceptions) that the court may not hear an application under Part VII of the Act unless the applicants have attended family dispute resolution. Proposed section 63DA requires professionals giving advice or assistance to people in relation to parental responsibility for a child to inform the people about parenting plans (which should encourage more people to enter into such arrangements, rather than seeking orders from the court).

161. Schedule 4 will encourage more out of court settlements primarily through supporting the provisions in the other Schedules of the Bill. For example, proposed section 60I could not work as intended unless a clear distinction was made between services that are concerned with relationship or personal issues and those that are genuinely concerned with resolving disputes. The introduction of clearly delineated categories of family counselling and family dispute resolution achieves the necessary distinction between the two processes.

162. Schedule 4 also encourages more out of court settlement in the following ways:

    - Part IIIA of Schedule 4 consolidates and expands the requirements relating to the provision of information on family services, to ensure that people receive useful information on family counselling and family dispute resolution services early in the process of separation or divorce. The provision of such information at an early stage may help the people involved to address problematic issues before they become entrenched. This will assist many couples to avoid escalating levels of conflict, putting people in a better position to negotiate their own agreements rather than requiring intervention by the courts.
    - Part IIIB of Schedule 4 expands the power of courts exercising jurisdiction under the Act to order, or advise, people to attend family services that are appropriate to their needs. The courts' increased power in this area will

assist people affected by separation or divorce to receive appropriate assistance at the appropriate time, including, importantly, assistance to resolve their disputes outside the judicial process.

- Changes to the provisions relating to approval of organisations may also encourage more out of court settlements, through wider availability of dispute resolution and counselling services that will allow more people to access services to professionally assist them to make arrangements without court intervention. The amendments remove the requirement for approved organisations to be 'voluntary' or non-profit. This widens the pool of organisations eligible for approval to include organisations that operate on a for-profit basis. This should assist in ensuring that a range of organisations can apply to provide the increased services announced in the 2005 Budget.

Confidentiality and Inadmissibility

Family counsellors and family dispute resolution practitioners

(i) Confidentiality

163. Currently family and child counsellors and family and child mediators must take an oath of confidentiality, as set out in regulations 58 and 66 of the *Family Law Regulations 1984* (the Regulations). Proposed sections 10C and 10K move the terms of the oaths into the Act, to emphasise the importance of confidentiality.

164. The differences between proposed sections 10C and 10K and the oaths at regulations 58 and 66 are set out in detail in attached Table 3. The main areas of difference between the proposed and existing provisions are:

    - In response to concerns that have been raised by many counselling and dispute resolution practitioners, the proposed provisions will allow a family counsellor or family dispute resolution practitioner to disclose information when making a referral, provided the party who made the disclosure consents to that disclosure. If the disclosure was made by a child who is under 18, both parents must consent to the disclosure. If agreement cannot be reached the matter may be referred to the court. This is similar to the situation in relation to parentage testing, under section 69W of the Act.
    - The proposed provisions will allow family counsellors and family dispute resolution practitioners to make disclosures for research purposes, provided the disclosures do not identify individuals.

(ii) Admissibility

165. Currently the admissibility of communications with family and child counsellors, family and child mediators and other professionals to whom they refer, is dealt with at section 19N of the Act. The admissibility of communications with family counsellors, family dispute resolution practitioners and the professionals to whom they refer will be dealt with at proposed sections 10D and 10L.

166. The differences between proposed sections 10D and 10L and current section 19N are set out in detail in attached Table 3. The main areas of difference between the proposed and existing provisions are:

- Currently the evidence of any person who is attending counselling with a family and child counsellor or mediation with a family and child mediator is inadmissible, but evidence arising from a professional consultation pursuant to a referral from a counsellor or mediator is only inadmissible where the person attending the consultation is a party to a marriage (see 19N(1)(e)). Under the amendments, the admissibility of evidence will be related to the professional to whom a family counsellor or family dispute resolution practitioner refers, rather than the status of the person who is referred (see paragraphs 10D(1)(b) and 10L(1)(b)).
- In order to ensure that professionals to whom family counsellors and family dispute resolution practitioners make referrals are aware of the inadmissible status of communications made to them, subsections 10D(4) and 10L(4) require the family counsellor or family dispute resolution practitioner to inform the professional of this fact when making a referral.

Family and child specialists

167. The role of family and child specialists consolidates the existing functions of court counsellors, court mediators and welfare officers under the current Act. Under the current Act communications with court mediators are always inadmissible. The admissibility of communications with court counsellors and welfare officers is affected by the section under which the counsellor or welfare officer is providing a service. For example, under section 62G the court can direct a family and child counsellor or welfare officer to provide a report to the court. The court can also receive a report from a family and child counsellor or welfare officer under section 65G.

168. Under the proposed amendments, if a court wishes to provide services that are confidential and inadmissible, it can do so by authorising or engaging staff to provide family counselling and/or family dispute resolution. Such services will be covered by proposed sections 10C, 10D, 10K and 10L. However, it is expected that most family counselling and family dispute resolution services will be provided outside the court.

169. The services that are provided by family and child specialists will not be confidential and communications with family and child specialists will be admissible in court provided the person concerned has been informed that disclosures made to family and child specialists are admissible. (Even if a person has not been informed that their statements or disclosures will be admissible, special considerations will apply in cases that involve child abuse.)

170. Thus the court retains the power to provide both inadmissible and admissible services, but the status of any process will be made clearer, as the title of the person who provides court services will differ depending upon whether communications made in the provision of the service are intended to be admissible or not, unlike the present situation where court counsellors and

welfare officers can provide services in which the admissibility of communications may differ.

Approved Organisations

Eligibility for approval – current requirements

171. Under the current legislation voluntary (non-profit) organisations may apply to the Attorney-General for approval as a counselling organisation (section 13A) or a mediation organisation (section 13B). The Attorney-General may approve an organisation as a counselling or mediation organisation only if he or she is satisfied that:
    - the organisation is willing and able to engage in family and child counselling (or family mediation, as relevant) and
    - the whole, or a substantial part, of the organisation's activities consist, or will consist, of family and child counselling (or family mediation if applying for approval as a mediation organisation).

172. An organisation may be approved as a counselling and/or a mediation organisation (section 13).

173. If the Attorney-General decides to refuse an organisation's application for approval, he or she must give written notice of that decision to the organisation (subsections 13A(3) and 13B(3)).

Eligibility for approval – proposed requirements

174. Under the Bill, the Attorney-General may approve an organisation as a family counselling or a family dispute resolution organisation only if he or she is satisfied that:
    - the organisation is currently receiving, or has been selected to receive, funding under a program or part of a program that has been designated by the Attorney-General, and
    - the organisation is receiving, or has been selected to receive, that funding in order to provide services that include family counselling or family dispute resolution, as relevant.

175. An organisation may be approved as a family counselling and/or a family dispute resolution organisation.

Removal of requirement for organisations to be 'voluntary'

176. Under the current legislation only non-profit organisations (referred to in the legislation as 'voluntary organisations') may apply to the Attorney-General for approval as counselling organisations (section 13A) or mediation organisations (section 13B). Under the amendments, organisations will no longer need to be operated on a non-profit basis in order to be approved. As set out above, the Attorney-General may approve organisations that are receiving, or have been

selected to receive, funding under a designated program, to provide services that include family counselling or family dispute resolution (as relevant). The profit status of an organisation will not be relevant to the approval decision. This will broaden the range of organisations able to receive funding and approval under the Act, which should assist in ensuring that a range of organisations can apply to provide the increased services announced in the 2005 Budget.

Funding requirement

177. As set out above, the proposed provisions allow the Attorney-General to approve an organisation as a family counselling or a family dispute resolution organisation only if that organisation is currently receiving, or has been selected to receive, funding to provide services that include family counselling or family dispute resolution (as relevant) under a program or part of a program that has been designated by the Attorney-General. The approval of an organisation will relate to the type of funding it receives. For example, only organisations that receive funding to provide services that include family dispute resolution will be eligible for approval as a family dispute resolution organisation.

178. The decision as to whether an organisation will be funded under a designated program will be made according to the guidelines of that program (such as the Approval Requirements for the Family Relationships Services Program (FRSP)). Such funding decisions are independent of the process for approval of organisations under the Act. In practice an organisation would be selected to receive funding (usually through a competitive process) and would then be able to be approved under the Act. The proposed provisions relating to approval of organisations do not in any way restrict the range of organisations that can apply for funding.

179. The proposed amendment of the Act to require approved organisations to be selected to receive funding reflects current practice, as all approved organisations are currently funded under the FRSP. Accountability requirements under the FRSP assist in ensuring a level of quality in the services that are provided by approved organisations.

Effect of amendments on existing services

180. Existing services will not be affected by the changes to the process for approval of organisations. Item 120 of the Bill provides that if, immediately before Schedule 4 commences, an organisation is approved as a counselling organisation it is taken to be approved as a family counselling organisation under proposed section 10E. Similarly, Item 121 provides that if, immediately before Schedule 4 commences, an organisation is approved as a mediation organisation it is taken to be approved as a family dispute resolution organisation under proposed section 10N.

Assuring the Quality of Services

181. Currently the primary mechanism for ensuring the quality of approved organisations is not the Act, but rather funding agreements and regular audits.

To our knowledge, this approach (i.e. ensuring the quality of the services through program management rather than through legislation) is the norm in situations where the Australian government is in some way responsible for services. An example is the contracts to deliver Job Network services.

182. The insufficiency of the Act to provide a framework in which to guarantee quality of services is reflected in the practice of approving only organisations currently funded under the FRSP. FRSP funding agreements set out rigorous reporting requirements (including independent auditing) and are transparently enforceable.

183. However, although the quality of services is ensured mainly through the stringent requirements imposed under the FRSP funding agreements, Part 5 of the Regulations, which sets out requirements that must be complied with by family and child counsellors, family and child mediators and arbitrators, includes a number of quality control measures. The Regulations will require amendment to reflect the changes introduced by the Bill, but the substance of the requirements set out in Part 5 of the Regulations will be maintained.

184. The requirement for family and child counsellors and family and child mediators to maintain confidentiality, as set out in regulations 58 and 66 will be moved into the Act by proposed sections 10C and 10K (see Table 3).

185. The other requirements in the Regulations relate to family and child mediators and arbitrators. Current section 19P provides that the regulations may prescribe requirements to be complied with by family and child mediators in relation to the family and child mediation services they provide. This provision is reproduced at proposed sections 10R of the Bill.

186. Division 2 of Part 5 of the Regulations provides for minimum levels of qualifications, training, and experience for family and child mediators. The regulations also contain a set of consumer protection provisions. All potential parties to a mediation are required to be assessed by a mediator to ensure that the parties are in a position to negotiate freely. Issues such as family violence, safety of the parties and equality of bargaining power are addressed to ensure that the matter in dispute is appropriate for mediation.

187. The regulations also provide that information on factors such as the process of mediation, child's interests issues, the right to terminate a mediation session, the right to obtain legal advice, the immunity of mediators from any civil liability, the inadmissibility, confidentiality and disclosure obligations, qualifications of the mediators and other factors has to be given to the parties in a written statement prior to the mediation.

188. These safeguards will be maintained in the amended regulations, until the introduction of accreditation standards, discussed below, to help ensure the quality of family counselling and family dispute resolution services. No changes are planned to the requirements imposed on arbitrators.

Introduction of accreditation standards

189. The Department has funded the Community Services and Health Industry Skills Council (CSHISC) to develop competency-based accreditation standards and a suite of qualifications for family counsellors, dispute resolution practitioners and workers in Children's Contact Centres. When these standards are introduced they will provide a further mechanism for ensuring quality additional to those in the funding agreements.

190. As part of the development of accreditation standards:

- CSHISC will develop core competency standards in consultation with stakeholders
- Registered Training Organisations (RTOs) will assess and certify practitioners' competencies, and
- RTOs will also offer training courses or direct people to appropriate courses for them to gain competencies.

191. This approach will examine expanding the range of acceptable qualifications in a way which both recognises existing competencies and provides opportunities for workers to gain the required competencies at minimal cost. A competency-based approval system would also provide opportunities for existing practitioners to gain competencies in specific areas such as screening for domestic violence or ensuring that their practice is child-focussed.

192. We expect the accreditation requirements to be introduced into the legislation in about 18 to 24 months.

Availability of Dispute Resolution Services

193. The introduction of a requirement to attend dispute resolution before an application for a Part VII order may be heard by the court will undoubtedly result in an increased demand for family dispute resolution services. The government has allocated significant resources in the 2005-06 Budget to ensure that such services will be readily available. In particular, substantial funds have been allocated to the establishment of Family Relationship Centres. It is the responsibility of the Attorney-General's Department and the Department of Family and Community Services to ensure that the roll out of the Family Relationship Centres occurs in accordance with the government's statements, and the Department fully expects that this will occur.

194. However, the provision of family dispute resolution services will not be the sole domain of Family Relationship Centres – the services will also be provided by individuals who meet the requirements for family dispute resolution practitioners under the Regulations and by other approved organisations. Recognising the role of these organisations in meeting the increased demand for dispute resolution services resulting from the Bill, the government recently announced that it will expand community-based dispute resolution services by 25 per cent, at an additional cost of $13.4 million over four years.

195. In addition, the national telephone advice line that will support the Family Relationship Centres, which will be providing services by mid-2006, will be able to arrange for dispute resolution to be conducted by telephone or video conferencing by Family Relationship Centres in other locations, if there is not a dispute resolution service available in the location of a person wishing to file a parenting matter.

196. Due to the increased funding of dispute resolution services, such services will be accessible in all but the most exceptional cases. In such cases, the exception to the requirement to attend dispute resolution set out at paragraph 60I(8)(e) may apply, as it covers situations where one or more of the parties is unable to participate effectively in family dispute resolution, due to circumstances such as physical remoteness or intellectual impairment.

197. Significant delays in accessing family dispute resolution services are not expected, and waiting times are likely to be much less than those involved in obtaining a hearing for non-urgent matters in court.

Urgent applications

198. A delay in accessing dispute resolution services is not a specific exception to the requirement to attend dispute resolution before the court can hear an application for a Part VII order.

199. If an application for an order under Part VII of the Act is made in circumstances of urgency, the requirement to attend dispute resolution does not apply and the court may hear the application. If a matter is not urgent, it is expected that the court would refuse to hear an application until the parties had attended dispute resolution, given the variety of ways in which the requirement to attend dispute resolution is able to be satisfied (i.e. through Family Relationship Centres, private practitioners, approved organisations, telephone or video facilities etc).

K. CONSULTATION WITH ABORIGINAL AND TORRES STRAIT ISLANDER GROUPS

200. There are a number of amendments contained in the Bill which implement the Family Law Council's December 2004 Report, *Recognition of Traditional Aboriginal and Torres Strait Islander Child Rearing Practices*. For example, the principles in item 2 of Schedule 1 contain reference to the need to specifically consider the right of a child to enjoy their culture and contain particular reference to the rights of Aboriginal and Torres Strait Islander children to develop a positive appreciation of their culture.

201. The government considered it appropriate for these recommendations to be implemented, as they are broadly consistent with the recommendations of the Report about ensuring the recognition of the role of extended families.

202. In the preparation of their report, the Family Law Council (the Council) sought submissions from a range of Aboriginal and Torres Strait Islander organisations and received submissions from:

- the Aboriginal and Torres Strait Islander Commission (ATSIC)
- the National Aboriginal and Torres Strait Islanders Legal Services Secretariat (NAILSS)
- the Aboriginal and Torres Strait Islander Women's Legal and Advocacy Service (ATSIWLAS)
- the Women's Legal Resources Centre, and
- the Officer of Multicultural and Torres Strait Islander Affairs (in the Department of Immigration and Multicultural and Indigenous Affairs).
- Council provided an early draft of the document to the Aboriginal Legal Service of Western Australia which provided a detailed response.

203. The Council report was based on recommendation 22 of the *Out of the Maze* report by the Family Law Pathways Advisory Group (the Pathways Group). In developing that recommendation, the Pathways Group received 284 submissions as well as 307 individually signed identical form letters. They consulted consumers, service providers, indigenous leaders and legal professionals between 27 September 2000 and 18 October 2000, in all States and Territories. An Indigenous Pathways Forum was held in Canberra on 23 October 2000.

204. The Pathways Group recommendation originally stemmed from recommendation 54 of the *Bringing them Home* report of Human Rights Equal Opportunity Committee (HREOC).

L. IMPACT ON CHILD SUPPORT

205. The Bill is generally consistent with the recommendations of the Child Support Taskforce in its report, *In the Best Interests of Children – Reforming the Child Support Scheme* (the Taskforce Report). In particular, the recommendations that relate to better recognising joint parental responsibility and that encourage agreements rather than litigated outcomes reflect similar recommendations in that Taskforce Report.

M. ATTACHMENTS TO SUBMISSION

206. The following attachments are provided:

- Attachment 1 – Comparison of Committee recommendations, government response and provisions of the Bill

- Attachment 2 – Schedule 4 provisions

- Attachment 3 - Précis of the Australian Government Solicitor advice – less adversarial approach