FAMILY LAW SECTION
LAW COUNCIL OF AUSTRALIA

Representing Family Lawyers Throughout Australia

19 July 2005

Ms Joanne Towner
Secretary
House of Representatives
Standing Committee on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

Dear Ms Towner

Review of exposure draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005

I refer to Ian Kennedy's letter to you, sent under cover of my email of 18 July 2005.

Attached please find a copy of the submission prepared by the Family Law Section of the Law Council of Australia (FLS) in response to the above enquiry. A copy of the submission has also been sent to you by email.

Yours sincerely

Maureen Schull

Maureen Schull
Executive Officer

Address Section correspondence to
The Chairman, Family Law Section
Law Council of Australia
GPO Box 1989 Canberra ACT 2601

Telephone **+61 2 6246 3788**
Facsimile +61 2 6248 0639
mail@familylawsection.org.au
www.familylawsection.org.au

Law Council of Australia Limited
ABN 85 005 260 622
19 Torrens St Braddon ACT 2612
DX 5719 Canberra

Law Council
OF AUSTRALIA

FAMILY LAW SECTION
LAW COUNCIL OF AUSTRALIA

Representing Family Lawyers Throughout Australia

18 July 2005

Ms Joanne Towner
Secretary
House of Representatives
Standing Committee on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

By email: laca.reps@aph.gov.au

Dear Ms Towner

Review of exposure draft of the *Family Law Amendment (Shared Parental Responsibility) Bill 2005*

I refer to your letter of 27 June 2005 and your invitation to the Family Law Section of the Law Council of Australia (FLS) to provide comments on the draft Bill.

FLS is concerned at the limited time available to consider and digest the extensive range of amendments contained in the Bill. This has meant that we have not been able to fully consider the amendments in as much detail as we would have liked and it is possible that some issues, particularly relating to the technical aspects, may have been overlooked.

We would appreciate the opportunity of making a supplementary submission to the Committee, if necessary, on any issues that may arise in the course of the Inquiry. Once the Inquiry has reported, we are also happy to work with the Attorney-General's Department to address any outstanding drafting or other issues.

Yours sincerely

Ian Kennedy

Ian Kennedy AM
Chair

Address Section correspondence to
The Chairman, Family Law Section
Law Council of Australia
GPO Box 1989 Canberra ACT 2601

Telephone **+61 2 6246 3788**
Facsimile +61 2 6248 0639
mail@familylawsection.org.au
www.familylawsection.org.au

Law Council of Australia Limited
ABN 85 005 260 622
19 Torrens St Braddon ACT 2612
DX 5719 Canberra

Law Council
OF AUSTRALIA

Law Council
OF AUSTRALIA

Review of exposure draft of the *Family Law Amendment (Shared Parental Responsibility) Bill 2005*

House of Representatives
Standing Committee on Legal &
Constitutional Affairs

18 July 2005

GPO Box 1989, Canberra, ACT 2601, DX 5719 Canberra
Telephone +61 2 6246 3788
Facsimile +61 2 6248 0639
19 Torrens St Braddon ACT 2612
www.lawcouncil.asn.au

Family Law Section

Law Council of Australia

Submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs

Family Law Amendment (Shared Parental Responsibility) Bill 2005

Executive Summary

General

1. It is regrettable that the community has had just a little over three weeks to consider the 316 amendments contained in 114 pages of complex changes and amendments in the exposure draft of the Bill which underpin the significant package of reforms to the family law system proposed by the Government.

2. The Family Law Section of the Law Council of Australia (FLS) accepts the policy decisions and initiatives underlying the legislative proposals. This submission is directed solely at the technical aspects of the draft Bill.

3. The principal concern of FLS is to see the policies driving the legislation effected in a way which:
   - 3.1 Is workable;
   - 3.2 Is effective;
   - 3.3 Is intelligible and accessible to the public;
   - 3.4 Preserves and protects the welfare of children;
   - 3.5 Does not inadvertently encourage inappropriate disputation between parents in relation to their children;
   - 3.6 Does not create confusion or undermine well-established protections;
   - 3.7 Reduces rather than increases complexity and attendant costs;
   - 3.8 Creates as much certainty as possible for those families confronting the unfortunate consequences of the breakdown of relationships between parents.

Structure and definitions

4. FLS recommends that all relevant definitions contained in section 4 [Interpretation] and Part VII [Children] of the *Family Law Act 1975* (FLA) be collated and grouped together in a single Dictionary.

5. FLS strongly recommends that the opportunity be taken to restructure Part VII [Children] so that its contents are arranged in a more logical and helpful sequence, with the relevant provisions grouped together.

6. The currently narrow definition of *abuse* in relation to a child[1] may have the unintended consequence of excluding certain behaviour, which does not fall within the existing definition of *abuse*, but that should be considered under the proposed amendments to the FLA.

Schedule 1 – Shared parental responsibility

Objects and principles

7. FLS recommends that a 'note' be added to the end of the proposed section 60B[2] of the FLA to make it clear that the objects provisions, and the principles underlying those objects, do not displace the court's obligations, under section 65E, to regard the best interests of the child as the paramount consideration.

8. FLS is concerned that the proposed amendments to sections 60B and 68F of the FLA will establish a hierarchy, within a hierarchy, of considerations for determining the best outcomes for children, each with a seemingly different impact. If the amendments proceed, Part VII [Children] will contain *Objects*, *Principles underlying the objects*, *Primary considerations* and *Additional considerations*.

---

1 See subsection 4(1) FLA. The definition of *abuse* was previously found in section 60D(1) FLA.

2 Section 60B of the FLA sets out the objects of Part VII [Children] and principles underlying it.

Contravention

9. FLS queries the 6 month time limit imposed in the proposed subparagraph 60I(8)(c)[3] of the FLA. If a contravention application is filed and the respondent has behaved in a way that showed a serious disregard for his or her obligations under the order there seems little point in forcing them to attend family dispute resolution. In these circumstances there is little prospect of the respondent co-operating, and this provision may simply act as a means by which they can further delay proceedings.

Effect of interim orders on presumption

10. FLS is opposed to the proposed section 61DB of the FLA[4]. It is highly inappropriate for the court to disregard the factual circumstances that may evolve following interim orders and the resulting status quo.

Parenting plan over-riding court orders

11. The proposed section 64B of the FLA provides that parenting orders are subject to later parenting plans. FLS has no objection to this provision, which elevates the legal significance of parenting plans, on the basis that parenting plans are in writing and are signed and dated by both parties and have a cooling off period. This will also require an amendment to subsection 63C of the FLA.

Schedule 2 – Compliance regime

12. FLS is concerned that the amendments proposed in Schedule 2 will produce a legislative scheme which is too complex. FLS is also concerned that the complexity and some specific provisions of the scheme will tend to undermine the two key messages if compliance is to be successfully promoted, that is:

    12.1 That orders must be strictly complied with; and
    12.2 That if the orders are no longer suitable or workable then an application to vary should be made without delay.

---

3 The proposed subparagraph 60I(8)(c) of the FLA provides that a party is not required to file a certificate regarding attendance at family dispute resolution if the application relates to a contravention within 6 months of the date the parenting order was made and a person has showed a serious disregard for his or her obligations under the order.

4 The proposed section 61DB of the FLA provides that a court must disregard the allocation of parental responsibility made in an interim order, when the court is making a final parenting order.

13. FLS recommends that the contravention process be simplified. These provisions will often be used by self-represented litigants as well as qualified lawyers and they need to be clear and simple. Apart from making the legislation accessible, simplification is likely to reduce cost and delay and promote the message that parenting orders must be obeyed and, if they are seen to be impractical or unsuitable, then an application must immediately be made to vary them.

14. To achieve the objective of simplification, FLS suggests that the existing Subdivisions B and C and the amendments proposed in the Bill be redrafted with the following objectives in mind:

    14.1 That when any contravention application is before it, a court may vary the relevant parenting orders.
    14.2 That a party may make a simple application for compensatory contact and costs along the lines suggested by FLS (refer FLS position paper at Attachment A to this submission).
    14.3 That there be a single contravention process in which the court has the power to impose higher penalties for serious or repeat contraventions.

15. FLS is opposed to the introduction of the phrase '*minor or technical nature*' in relation to contravention applications – see proposed subparagraphs 70NG(1)(d), 70NG(1)(e)(iv) and 70NG(1)(f). FLS believes that the addition of the phrase '*minor or technical nature*' will lead to unnecessary applications and arguments about the interpretation of that phrase The use of this phrase adds an unnecessary layer of complexity in situations where the court already has the discretion to take such matters into account.

16. FLS strongly opposes the proposed subsection 70NJ(2A) of the FLA regarding automatic costs sanctions in contravention applications. It is highly inappropriate to impose automatic costs sanctions in children's cases, even on a *prime facie* basis. The court already has sufficient discretion to order costs in appropriate circumstances

Schedule 3 – Conduct of child-related proceedings

17. FLS is opposed to the proposed new subsections 60KA(2) and (3). These provisions extend the principles for conducting child related proceedings to other proceedings, if the parties consent. By way of example, this means that, if parties consent, the rules of evidence will not apply (unless the court directs – see proposed Subdivision D of Division 1A of Part VII) in proceedings relating to, *inter alia*, property matters; spousal maintenance; and orders and injunctions, including proceedings where orders binding third parties are sought.

18. FLS is very concerned at the introduction of the expressions *legal technicality and form* in the proposed subsection 60KB(6) of the FLA. These expressions have no clear definition or meaning and are likely to encourage argument about the meaning of 'technicality' and 'form' that might not otherwise have occurred.

19. FLS is strongly opposed to the proposed section 60KG of the FLA which provides that the rules of evidence do not apply unless court decides otherwise. Subsection 60KG(1) effectively abolishes the current structure provided by the Evidence Act (Cth) and replaces this with nothing more than a power for the Judge to make orders about evidence. Judges and Federal Magistrates will have to develop a whole new unnecessary and secondary body of common law because the structure of the Evidence Act (Cth) has been taken away. It must be remembered that the provisions of Section 190 of the Evidence Act were utilised by the Family Court in order to have consenting couples enter the Children's Cases Program.

20. As a general principle, FLS is in favour of the provisions in the proposed section 60KI (which sets out the court's general duties and powers relating to evidence) which permit the operation of the Children Cases Program on a non-consensual basis. FLS submits that if this section is enacted, there is no valid reason to enact the proposed section 60KG and thereby do away with the benefits and advantages of the Evidence Act (Cth).

Schedule 4 – Changes to dispute resolution

Confidentiality

21. As a matter of principle FLS believes that maintaining confidentiality in family counselling and family dispute resolution is fundamental to successful outcomes in these processes. The greater the assurance of confidentiality that can be given to a party participating in a counselling or dispute resolution process, the more likely it is that a party will participate without reservation, thus significantly enhancing the prospects of a successful outcome. However, FLS is recommending that the disclosure categories listed in the proposed paragraphs 10C(3)(a)-(c) and (f) and paragraphs 10K(3)(a)-(c) and (f)[5] be amended to limit disclosure to circumstances relating to a serious threat to the welfare of the child.

---

5 The proposed paragraphs 10C(3)(a)-(c) and (f) and paragraphs 10K(3)(a)-(c) and (f) of the FLA enable a family counsellor or family dispute resolution practitioner to disclose a communication for the for the purposes of enabling them *to properly discharge his or her functions* or for the purpose of *assisting the person representing the child to do so properly.*

Regulations

22. A number of the proposed amendments rely on regulations (see proposed sections 10J, 10R, and 10T of the FLA). FLS is unable to provide comment on these provisions until we have the opportunity to consider the proposed regulations.

Family Dispute Practitioners

23. The proposed subsection 10K(1) of the FLA provides that a family dispute resolution practitioner must not disclose a communication made to the practitioner while the practitioner is conducting family dispute resolution. There are several exceptions referred to in the proposed subsection 10K(3). However, FLS notes that there is no exception for disclosure based on the consent of the participants in the process. For example, a family dispute resolution practitioner might be conducting a mediation and using the typical joint sessions/private caucus model. The family dispute resolution practitioner would, under a strict reading of the proposed subsection 10K(1), not be able to disclose to the father a communication made to him by the mother, even though such communication was authorized and was, indeed, part of the process of facilitating resolution.

24. The proposed section 10M provides that family dispute resolution practitioners have immunity only when conducting *facilitative* dispute resolution (i.e. not *advisory* dispute resolution). FLS notes that this means that a member of the court staff who is conducting family dispute resolution of an advisory nature (e.g. conciliation as traditionally understood) would not have immunity.

Arbitration

25. FLS is concerned that the proposed section 10S definition of *arbitration* is too restrictive and does not recognise the diversity of contexts in which arbitration takes place.

Family and child specialist

26. FLS submits that the description *family and child specialist* does not accurately reflect the functions of this position, in which all communication is now reportable to the court. FLS believes that the office is more appropriately described as *Family Assessor* and recommends that the description be changed throughout the proposed Part III.

27. The proposed paragraph 11G(1)(b) provides that if a party fails to comply with an instruction given by the *family and child specialist* the specialist must report the failure to the court. FLS is concerned that a failure to comply with the instructions that the specialist gives to a parent could arise from a reluctance to disclose what would otherwise be privileged (for example, if the specialist instructs a parent to reveal the nature of advice given by a lawyer, or to make a disclosure that would otherwise be self-incriminating).

Mandatory referral

28. The proposed section 13C creates a regime for mandatory referrals to family counselling and family dispute resolution but there appear to be no safeguards to ensure that the processes used *are appropriate in the circumstances and proper procedures are followed* (picking up the words in the proposed *Objects* paragraph 13A(1)(b) of the FLA).

Schedule 5 – Removal of references to residence and contact

29. The Bill proposes that the current references to *residence* and *contact* be removed from the Family Law Act (and other legislation[6]). References to *residence* will be replaced with *lives with* and references to *contact* will be replaced by *spends time with* and *communicates with*. FLS submits that the changing the labels, yet again, will not bring about any substantial change to the way parents (or the general public, the court, mediators, counsellors or lawyers) consider parenting issues. Many litigants, and the media, to this day still refer to the pre-1995 terms of *custody* and *access* and further change will be likely to cause additional unnecessary confusion without commensurate gains.

---

6 The Bill amends the following Acts - *Australian Citizenship Act 1948*, *Australian Passports Act 2005*, *Child Support (Assessment) Act 1989*, *Evidence Act 1995*, *Family Law Act 1975*, *Federal Magistrates Act 1999*, *Income Tax Assessment Act 1997*, *Marriage Act 1961* and *Migration Act 1958*.

List of Recommendations

General

1.1 FLS strongly recommends that the opportunity be taken to restructure Part VII [Children] so that its contents are arranged in a more logical and helpful sequence, with the relevant provisions grouped together.

1.2 FLS recommends that all relevant definitions contained in section 4 [Interpretation] and Part VII [Children] of the Family Law Act be collated and grouped together in a single Dictionary. Ideally, this recommendation should be extended so that all definitions (including interpretations in section 4(1) of the FLA) are collated together in a single Dictionary.

1.3 FLS recommends that the definition of *abuse* in the Family Law Act be broadened.

Schedule 1 – Shared parental responsibility

1.4. FLS recommends that the introductory words '*except when it is or would be contrary to a child's best interests*' (see paragraph 60B(2)(a)) also be used as introductory words in subsection 60B(1).

1.5 FLS recommends that a 'note' be added to the end of the proposed section 60B to make it clear that the objects provisions, and the principles underlying those objects, do not displace the court's obligations, under section 65E of the Family Law Act, to regard the best interests of the child as the paramount consideration.

1.6 FLS recommends that further consideration be given to the proposed changes to sections 60B and 68F.

1.7 FLS recommends that the definition of *Aboriginal child* be amended to read: *Aboriginal child* means a child who is a descendant of the indigenous inhabitants of Australia.

1.8 FLS recommends that further consideration be given to the definition of *component* in the Family Law Act.

1.9 FLS recommends that further consideration be given to the definition *major long-term issues* in the Family Law Act.

1.10 FLS recommends that the subsection 60D(1) definition of *step-father* and *step-mother* be replaced with *step-parent*.

1.11 FLS recommends that further consideration is required in relation to decisions made under subparagraphs 60I(8)(b) and (c).

1.12 FLS recommends that subsection 60I(8) be amended so that sub-paragraph (d) regarding urgency is given greater prominence and appears at the beginning of subsection 60I(8).

1.13 FLS recommends that the 6 month time limit be removed from subparagraph 60I(8)(c) so that all contravention applications, where the respondent has shown a serious disregard for his or her obligations under the order, can be brought straight to the court for determination.

1.14 FLS recommends that subsections 61DA(3) be deleted.

1.15 FLS recommends that section 61DB be deleted

1.16 FLS recommends that the words *child support* be used in place of *maintenance* in paragraph 63C(2)(f).

1.17 FLS recommends that the words *child support* be used in place of *maintenance* in paragraph 64B(2)(f).

1.18 FLS recommends that subsection 63C of the Family Law Act (regarding parenting plans) be amended.

1.19 FLS recommends that the current format of 68F be maintained with all considerations (both *primary* and additional) listed under the one section and for the court to exercise discretion as it considers appropriate.

1.20 FLS recommends that further consideration be given to the references to family violence in paragraph 68F(2)(j).

Schedule 2 – Compliance regime

2.1 FLS recommends that the contravention process be simplified by redrafting the current Subdivisions B and C and the proposals in the Bill. See also FLS position paper on Contravention Process.

2.2 FLS recommends that Subdivision AAA be re-numbered.

2.3 FLS recommends that Subdivision AA be renamed "*Subdivision AA-Court's powers where contravention or contravention without reasonable excuse not established*".

2.4 FLS recommends that further consideration be given to the desirability of the proposed introduction of the phrase *minor or technical nature*.

2.5 FLS recommends that subsection 70NG(1A) should be amended to include a provision that, in deciding whether or not to adjourn the proceedings, the court must have regard to compliance with the primary parenting order.

2.6 FLS recommends that the conditions that may be imposed on a person by a bond in subsection 70NGA(4) be extended to include a condition that a party comply with a court order.

2.7 FLS recommends that section 70NM (Bonds under stage 3 of the parenting compliance regime) be amended in a similar fashion to include a condition that a party comply with a court order.

2.8 FLS recommends that further consideration be given to the presumption of automatic costs sanctions as proposed in subsection 70NJ(2A).

2.9 FLS recommends that subsection 63C of the Family Law Act (regarding parenting plans) be amended. See also recommendation 1.18.

2.10 FLS recommends that Subdivision A and AAA also include a provision about the effect of parenting plans.

Schedule 3 – Conduct of child-related proceedings.

3.1 FLS recommends further discussion about the impact of proposed subsections 60KA(2) and (3) of the Family Law Act.

3.2 FLS recommends that further consideration be given to the desirability of the proposed expressions *legal technicality* and *form* in subsection 60KB(6).

3.3 FLS recommends that further consideration be given to the use of the words *if the court considers it appropriate* in the proposed subsection 60KE(f) of the Family Law Act.

3.4 FLS recommends further discussion regarding the impact of the proposed section 60KG of the Family Law Act.

Schedule 4 – Changes to dispute resolution

4.1 FLS recommends that paragraphs 10C(3)(d) and (e) and 10K(3)(d) and (e) be amended so as to limit disclosure to circumstances relating to a serious threat to the welfare of a child.

4.2 FLS recommends that the proposed regulations under section 10J(f) regarding the definition of family dispute resolution practitioner be made available for comment as soon as possible.

4.3 FLS recommends that further consideration be given to the impact of not allowing a family dispute resolution practitioner to disclose a communication if the parties consent.

4.4 FLS recommends that further consideration be given to the limitation of immunity provided under proposed section 10M of the Family Law Act.

4.5 FLS recommends that the proposed regulations under section 10R which prescribe the requirements to be complied with by family dispute resolution practitioners be made available for comment as soon as possible.

4.6 FLS recommends that consideration be given to broadening the definition of *arbitration* in the proposed section 10S of the Family Law Act.

4.7 FLS recommends that any proposed regulations under section 10T which prescribe the requirements for an arbitrator be made available for comment as soon as possible.

4.8 FLS recommends that the description *family and child specialist* be replaced with *Family Assessor* throughout the proposed Part III.

4.9 FLS recommends that further consideration be given to the proposed section 11C and the role of family and child specialists in resolving conflict.

4.10 FLS recommends that the proposed paragraph 11G(1)(b) be amended so that failure to comply with an instruction from a specialist would only constitute non-compliance if the party had no reasonable excuse.

4.11 FLS recommends that the proposed legislation should include an explicit reference to any exclusionary principles regarding mandatory referral to counselling or family dispute resolution.

4.12 FLS recommends that the Family Court of Australia and Family Court of Western Australia be consulted about the proposed definition of *member of the Court personnel* to ensure that this definition has the correct description of *registrar*.

Schedule 5 – Removal of references to residence and contact

5.1 FLS recommends that further consideration be given before removing the references to *residence* and *contact* from the Family Law Act.

Background to submission

1. In June 2003, the House of Representatives Standing Committee on Family and Community Affairs was asked by the former Attorney-General and former Minister for Children and Youth Affairs to conduct an inquiry into child custody arrangements in the event of family separation. The Committee's report *Every picture tells a story* was released in December 2003 and included a range of recommendations for reform of the family law system. In July 2004 the Prime Minister released a Framework Statement which outlined the Government's proposed response to the Committee's report. The Government released its final response to Committee report in June 2005[7].

2. The *Family Law Amendment (Shared Parental Responsibility) Bill 2005* (the Bill) was released for public consultation on 23 June 2005. At the same time, the Government referred the Bill to the House of Representatives Standing Committee on Legal and Constitutional Affairs for report in August 2005.

3. Submissions to the Inquiry were invited by 15 July 2005. The Family Law Section of the Law Council of Australia (FLS) has been given permission by the Committee Secretariat to lodge its submission on 18 July 2005. FLS notes that it is regrettable that the community has had just a little over three weeks to consider the hundreds of amendments contained in the Bill which underpins the significant package of reforms to the family law system proposed by the Government.

4. The Bill is a key component of the Government's package of family law reforms initially announced by the Prime Minister in July 2004. The estimated cost of the package is $397 million over four years[8].

FLS Comments

5. The Family Law Section of the Law Council of Australia (FLS) is the professional association for practising family lawyers in Australia. Its membership consists of approximately 2,000 family law practitioners, from all Australian States and Territories.

---

7 The Government also released a discussion paper *A new family law system: implementation of reforms* in November 2004.

8 Explanatory Statement, Family Law Amendment (Shared Parental Responsibility) Bill 2005, Circulated by the authority of the Attorney-General, the Honourable Philip Ruddock MP, June 2005.

6. Members of FLS represent parents and children from the very beginning of their process of separation through to finalisation of their family arrangements. In the course of the journey, lawyers facilitate an infinite variety of solutions because each family is unique and the needs of each family are different.

7. The FLS comments provided in the attached tables follow the format of the five schedules in the Bill, namely:

Schedule 1 – *Shared parental responsibility*
Schedule 2 – *Compliance regime*
Schedule 3 – *Amendments relating to the conduct of child-related proceedings*
Schedule 4 – *Changes to dispute resolution*
Schedule 5 – *Removal of references to residence and contact.*

Family Law Amendment (Shared Parental Responsibility) Bill 2005

Schedule 1 – Shared parental responsibility

General comments

1. Part VII of the Family Law Act has been continuously amended over the 30 years since it was enacted in 1975 (with virtually a complete rewrite as recently as 1995). As a result it has become complex and difficult to navigate – and provisions which should go together are often many pages apart. By way of example:

   1.1 Parental responsibility and parenting orders are introduced in Division 2 (ss61A-E). However parenting orders are not explained or defined until Division 5 (s64A-C) some 22 sections and 10 pages of legislation later.

   1.2 The criteria for the making of parenting orders (including the paramountcy of the best interests of children: s65E) are found in Division 6. However the mechanism for determining best interests is not to be found until Section 68F in Division 10 (some 90 sections and 40 pages of legislation further on, and interspersed with provisions in relation to powers of arrest and dealing with arrested persons, removal of children from the jurisdiction, child maintenance, child bearing expenses, location and recovery orders, child abuse, welfare orders, passport orders and injunctions).

   1.3 The jurisdiction of the Australian courts to make orders in relation to children are not found until Division 12 in s69C (who may institute proceedings) and s69E (what children are covered) (more than 90 pages and some 130 sections into the Part).

2. The amending provisions in the Bill, as currently drafted, will perpetuate this confusion and FLS strongly recommends that the opportunity be taken to restructure Part VII [Children] so that its contents are arranged in a more logical and helpful sequence, with the relevant provisions grouped together. **Recommendation 1.1**

3. In addition to section 4 [Interpretation] of the Family Law Act 1975 (FLA) there are more than 40 provisions (several of them major) in Part VII [Children] of the Act which contain definitions. The proposed Bill adds a number of new or amends existing definitions. FLS recommends that all relevant definitions contained in section 4 [Interpretation] and Part VII [Children] of the Act be collated and grouped together in a single Dictionary. Ideally, this recommendation should be extended so that all definitions (including interpretations in section 4(1) of the FLA are collated together in a single Dictionary. **Recommendation 1.2**

4. The concept of *abuse* has been imported into:

   4.1 Paragraph 60B (2)(b) [Principles underlying objects of the Act];
   4.2 Paragraph 60I(8)(b) [Attending family dispute resolution before applying for Part VII order];
   4.3 Section 60J [Family dispute resolution not attended because of child abuse or family violence];
   4.4 Section 61DA [Presumption of joint parental responsibility when making parenting orders]; and
   4.5 Subsection 68F(1A).

5. While FLS agrees that abuse is a very relevant consideration in these provisions, we are concerned that the currently narrow definition of *abuse* in relation to a child may have the unintended consequence of excluding certain behaviour, which does not fall within the existing definition of *abuse*, but that should be considered under the abovementioned provisions. For example, the definition of *abuse* in relation to a child does not refer to the child witnessing violence, notwithstanding the clear evidence and view in all professions dealing with children that a child may be abused simply by being exposed to violence. Similarly, the behaviour of a parent, while not falling within the existing definition of *abuse* might also be very relevant to the abovementioned provisions e.g. a parent with a mental illness. FLS recommends that this problem could be remedied by providing a broader definition of *abuse* in the Family Law Act. **Recommendation 1.3**

Item	Proposed amendment	FLS Comment
2	**60B Objects of Part and principles underlying it** (1) The objects of this Part are: (a) to ensure that children receive adequate and proper parenting to help them achieve their full potential; and (b) to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children; and (c) to ensure that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child. (2) The principles underlying these objects are: (a) except when it is or would be contrary to a child's best interests: (i) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and (ii) children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development; and (iii) parents jointly share duties and responsibilities concerning the care, welfare and development of their children; and (iv) parents should agree about the future parenting of their children; and (v) children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture); and	1. Item 2 repeals the current section 60B and substitutes a new section 60B. 2. FLS recommends that the introductory words *'except when it is or would be contrary to a child's best interests'* (see paragraph 60B(2)(a)) also be used as introductory words in subsection 60B(1). Section 60B(1) would then read: *(1) The objects of this Part are:* *(a) except when it would be contrary to a child's best interests:* *(i) to ensure that children receive adequate and proper parenting to help them achieve their full potential; and* *(ii) to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children; and* *(iii) to ensure that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child.* **Recommendation 1.4** 3. FLS recommends that a 'note' be added to the end of the proposed section 60B to make it clear that the objects provisions, and the principles underlying those objects, do not displace the court's obligations, under section 65E of the Family Law Act, to regard the best interests of the child as the paramount consideration. **Recommendation 1.5**

Item	Proposed amendment	FLS Comment
2 contd	**60B Objects of Part and principles underlying it (contd)** (b) children need to be protected from physical or psychological harm caused, or that may be caused, by: (i) being subjected or exposed to abuse or family violence or other behaviour; or (ii) being directly or indirectly exposed to abuse or family violence or other behaviour that is directed towards, or may affect, another person. (3) For the purposes of subparagraph (2)(a)(v), an Aboriginal child's or Torres Strait Islander child's right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right: (a) to maintain a connection with that culture; and (b) to have the support, opportunity and encouragement necessary: (i) to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and (ii) to develop a positive appreciation of that culture.	4. On a more general note, FLS is concerned that the proposed amendments to sections 60B and 68F will establish a hierarchy, within a hierarchy, of considerations each with seemingly different impact. If the amendments proceed, Part VII [Children] of the Family Law Act will contain *Objects*, *Principles underlying the objects*, *Primary considerations* and *Additional considerations*. 5. It is not clear if it is the intention of the proposed legislation to give more weight to, for example, primary considerations over additional considerations. 6. FLS is particularly concerned at the split of *primary* and *additional* considerations (see subsections 68F(1A) and 2)) as we believe that this will only encourage argument, that wasn't otherwise there, about which consideration carries the greater weight. 7. Please also refer to *General Comment* 2 above regarding definition of abuse. 8. FLS recommends that further consideration be given to the proposed changes to sections 60B and 68F. **Recommendation 1.6**
3	**60D Defined expressions** (1) In this Part: ***Aboriginal child*** means a child of the Aboriginal race of Australia.	9. Item 3 inserts a definition for *Aboriginal child*. 10. FLS recommends that the definition of *Aboriginal child* be amended to read: *Aboriginal child* means a child who is a descendant of the indigenous inhabitants of Australia. **Recommendation 1.7**

Item	Proposed amendment	FLS Comment
5	**60D Defined expressions** (1) In this Part: ***component*** of parental responsibility for a child means a particular duty, power, responsibility or authority which, by law, parents have in relation to children.	11. Item 5 inserts a definition for *component* of parental responsibility. 12. FLS submits that the expression *component* is vague and susceptible to misinterpretation. FLS recommends that further consideration be given to the definition of *component* in the Family Law Act. **Recommendation 1.8**
6	**60D Defined expressions** (1) In this Part: ***major long-term issues***, in relation to a child, means issues about the care, welfare and development of the child of a long-term nature and includes (but is not limited to) issues of that nature about: (a) the child's education (both current and future); and (b) the child's religious and cultural upbringing; and (c) the child's health; and (d) the child's name; and (e) significant changes to the child's living arrangements.	13. Item 6 inserts a definition for *major long-term issue*. 14. FLS queries why it is necessary to include a definition of *major long-term issues*. The mere presence of a definition is likely to encourage dispute and applications about certain aspects of parental responsibility [as occurred after the introduction of the *Family Law Reform Act 1995*]. FLS recommends that further consideration be given to the definition major long-term issues in the Family Law Act. **Recommendation 1.9**
7	**60D Defined expressions** (1) In this Part: ***relative*** of a child means: (a) a step-father or step-mother of the child; or (b) a brother, sister, half-brother, half-sister, step-brother or step-sister of the child; or (c) a grandparent of the child; or (d) an uncle or aunt of the child; or (e) a nephew or niece of the child; or (f) a cousin of the child	15. Item 7 inserts a definition of *relative*. 16. FLS recommends that the definition of *step-father* and *step-mother* in paragraph (a) be replaced with step-parent. Step-parent is subsequently defined later in section 60D in the Act, whereas there is no definition of step-father or step-mother. **Recommendation 1.10**

Item	Proposed amendment	FLS Comment
9	**60I Attending family dispute resolution before applying for Part VII order** *Object of this section* (1) The object of this section is to ensure that all persons who have a dispute about matters that may be dealt with by an order under this Part (a ***Part VII order***) attempt to resolve that dispute by family dispute resolution before the Part VII order is applied for. *Phase 1 (from commencement to 30 June 2007)* (2) The dispute resolution provisions of the *Family Law Rules 2004* impose the requirements for dispute resolution that must be complied with before an application is made to the Family Court of Australia for a parenting order. (3) By force of this subsection, the dispute resolution provisions of the *Family Law Rules 2004* also apply to an application to a court (other than the Family Court of Australia) for a parenting order. Those provisions apply to the application with such modifications as are necessary. (4) Subsection (3) applies to an application for a parenting order if the application is made: (a) on or after the commencement of this section; and (b) before 1 July 2007. *Phase 2 (from 1 July 2007 to 30 June 2008)* (5) Subsections (7) to (11) apply to an application for a Part VII order in relation to a child if: (a) the application is made on or after 1 July 2007 and before 1 July 2008; and (b) none of the parties to the proceedings on the application have applied, before 1 July 2007, for a Part VII order in relation to the child. *Phase 3 (from 1 July 2008)* (6) Subsections (7) to (11) apply to all applications for a Part VII order in relation to a child that are made on or after 1 July 2008. *Requirement to attempt to resolve dispute by family dispute resolution before applying for a parenting order*	17. Item 9 inserts a new Subdivision E [Family dispute resolution] which contains section 60I [Attending family dispute resolution before applying for Part VII order] and section 60J [Family dispute resolution not attended because of child abuse or family violence]. 18. Subsection 60I(8) provides, inter alia, that a court must not hear a Part VII [Children] application unless a certificate is filed regarding attendance at family dispute resolution. Subsection 60I(7) is subject to a number of exceptions set out in subsection 60I(8). FLS is concerned about the subjective criteria in subparagraphs 60I(8)(b) and (c) regarding abuse/family violence and contravention with serious disregard for obligations under the order. It is not clear who will make the decision about whether or not this criterion has been met in order to allow an application to be filed. Is it intended that the registry filing clerk will make the decision? FLS recommends that further consideration is required in relation to decisions made under subparagraphs 60I(8)(b) and (c). **Recommendation 1.11** 19. FLS welcomes the inclusion of paragraph 60I(8)(d) regarding urgency but strongly recommends that this provision be given greater prominence and appear at the beginning of subsection 60I(8) - not buried toward the end of subsection 60I(8) as currently proposed. **Recommendation 1.12**

Item	Proposed amendment	FLS Comment
9 contd	**60I Attending family dispute resolution before applying for Part VII order (contd)** (7) Subject to subsection (8), a court exercising jurisdiction under this Act must not hear an application for a Part VII order in relation to a child unless the applicant files in the court a certificate by a family dispute resolution practitioner to the effect that: (a) the applicant has attended family dispute resolution with the practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with; or (b) the applicant did not attend family dispute resolution of that kind but the applicant's failure to do so was due to the refusal, or the failure, of the other party or parties to the proceedings to attend. The certificate must be filed with the application for the Part VII order. (8) Subsection (7) does not apply to an application for a Part VII order in relation to a child if: (a) the applicant is applying for the order: (i) to be made with the consent of all the parties to the proceedings; or (ii) in response to an application that another party to the proceedings has made for a Part VII order; or (b) the court is satisfied that there are reasonable grounds to believe that: (i) there has been abuse of the child by one of the parties to the proceedings; or (ii) there would be a risk of abuse of the child if there were to be a delay in applying for the order; or (iii) there has been family violence by one of the parties to the proceedings; or (iv) there is a risk of family violence by one of the parties to the proceedings; or	20. FLS queries the time limit [6 months] imposed in subparagraph 60I(8)(c). If a contravention application is filed and the respondent has behaved in a way that showed a serious disregard for his or her obligations under the order there seems little point in forcing them to attend family dispute resolution. In these circumstances there is little prospect of the respondent co-operating and this provision may simply act as a means by which they can further delay proceedings. 21. FLS recommends that the time limit be removed from subparagraph 60I(8)(c) so that all contravention applications, where the respondent has shown a serious disregard for his or her obligations under the order, can be brought straight to the court for determination. **Recommendation 1.13** 22. Please also refer to *General Comment* 2 above regarding definition of *abuse*.

Item	Proposed amendment	FLS Comment
9 contd	**60I Attending family dispute resolution before applying for Part VII order (contd)** (c) all the following conditions are satisfied: (i) the application is made in relation to a particular issue; (ii) a Part VII order has been made in relation to that issue within the 6 months before the application is made; (iii) the application is made in relation to a contravention of the order by a person; (iv) the person has behaved in a way that showed a serious disregard for his or her obligations under the order; or (d) the application is made in circumstances of urgency; or (e) one or more of the parties to the proceedings is unable to participate effectively in family dispute resolution (whether because of an incapacity of some kind, physical remoteness from dispute resolution services or for some other reason); or (f) other circumstances specified in the regulations are satisfied. (9) If: (a) a person applies for a Part VII order; and (b) the person does not, before applying for the order, attend family dispute resolution with a family dispute resolution practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with; and (c) subsection (7) does not apply to the application because of subsection (8); the court must consider making an order that the person attend family dispute resolution with a family dispute resolution practitioner and the other party or parties to the proceedings in relation to that issue or those issues.	

Item	Proposed amendment	FLS Comment
9 contd	**60I Attending family dispute resolution before applying for Part VII order (contd)** (10) The validity of: (a) proceedings on an application for a Part VII order; or (b) any order made in those proceedings; is not affected by a failure to comply with subsection (7) in relation to those proceedings. (11) In this section: ***dispute resolution provisions*** of the *Family Law Rules* means: (a) Rule 1.05 of those Rules; and (b) Part 2 of Schedule 1 to those Rules; to the extent to which they deal with dispute resolution.	

Item	Proposed amendment	FLS Comment
11	**61DA Presumption of joint parental responsibility when making parenting orders** (1) When making a parenting order in relation to a child, the court must apply a presumption that it is in the best interests of the child for the child's parents to have parental responsibility for the child jointly. Note: The presumption provided for in this subsection is a presumption that relates solely to the allocation of parental responsibility for a child as defined in section 61B. It does not provide for a presumption about the amount of time the child spends with each of the parents (this issue is dealt with in section 65DAA). Joint parental responsibility does not involve or imply the child spending an equal amount of time, or a substantial amount of time, with each parent. (2) The presumption does not apply if there are reasonable grounds to believe that a parent of the child (or a person who lives with a parent of the child) has engaged in: (a) abuse of the child or another child who, at the time, was a member of the parent's family (or that person's family); or (b) family violence. (3) The presumption does not apply if: (a) the court is making a parenting order that is an interim order; and (b) the court considers that it is not appropriate to apply the presumption in making that interim order. (4) The presumption may be rebutted by evidence that satisfies the court that it would not be in the best interests of the child for the child's parents to have parental responsibility for the child jointly.	23. Item 11 inserts section 61DA [Presumption of joint parental responsibility when making parenting orders] and section 61DB [Application of presumption of joint parental responsibility after interim parenting order made]. 24. FLS recommends that subsections 61DA(3) be deleted. Please see comment below. **Recommendation 1.14** 25. Please also refer to *General Comment* 2 above regarding definition of *abuse*.

Item	Proposed amendment	FLS Comment
11	**61DB Application of presumption of joint parental responsibility after interim parenting order made** If there is an interim parenting order in relation to a child, the court must, in making a final parenting order in relation to the child, disregard the allocation of parental responsibility made in the interim order.	26. Item 11 inserts section 61DA [Presumption of joint parental responsibility when making parenting orders] and section 61DB [Application of presumption of joint parental responsibility after interim parenting order made]. 27. FLS is opposed to section 61DB and recommends that it be deleted. It is highly inappropriate for the court to disregard the factual circumstances that may evolve following interim orders and the resulting status quo. 28. FLS recommends that section 61DB be deleted. **Recommendation 1.15**

Item	Proposed amendment	FLS Comment
13	**63C Meaning of *parenting plan* and related terms** (1) A ***parenting plan*** is an agreement that: (a) is in writing; and (b) is or was made between the parents of a child; and (c) deals with a matter or matters mentioned in subsection (2). (2) A parenting plan may deal with one or more of the following: (a) the person or persons with whom a child is to live; (b) the time a child is to spend with another person or other persons; (c) the allocation of parental responsibility, or a particular component of parental responsibility, for a child; (d) if 2 or more persons are to have parental responsibility, or a component of parental responsibility, for a child jointly—the form of consultations those persons are to have with one another about decisions to be made in the exercise of that responsibility or that component; (e) the communication a child is to have with another person or other persons; (f) maintenance of a child; (g) the process to be used for resolving disputes about the terms or operation of the plan; (h) the process to be used for changing the plan to take account of the changing needs or circumstances of the child or the parties to the plan; (i) any aspect of the care, welfare or development of the child or any other aspect of parental responsibility for a child. Note: Paragraph (f)—If the *Child Support (Assessment) Act 1989* applies, provisions in a parenting plan dealing with the maintenance of a child (as distinct from child support under that Act) are unenforceable and of no effect (see subsection 63G(5) of this Act). A parenting plan may, however, also operate as a child support agreement (see section 63CAA of this Act).	29. Item 13 repeals the current subsection 63C(2) and substitutes new subsections 63C(2)-63(2C). 30. FLS queries the reference to *maintenance of a child* in paragraph 63C(2)(f). Child maintenance (as opposed to child support) is rare. Notwithstanding the *Note* at the end of subsection 63C(2), the reference to *maintenance of a child* is likely to be misleading to self-represented litigants who may think they can use a parenting plan to deal with maintenance of a child as distinct from child support. 31. FLS recommends that the words *child support* be used in place of *maintenance*. **Recommendation 1.16** 32. Due to the effect of subsequent parenting plans overriding earlier orders [proposed section 64D], subsection 63C(1) should be amended to provide that parenting plans must be in writing and signed and dated by both parties and have a cooling off period [see comment 37 and recommendation 1.18]

Item	Proposed amendment	FLS Comment
13 contd	**63C Meaning of *parenting plan* and related terms (contd)** (2A) The person referred to in subsection (2) may be, or the persons referred to in that subsection may include, either a parent of the child or a person other than the parent of the child (including a grandparent or other relative of the child). (2B) Without limiting paragraph (2)(c), the plan may deal with the allocation of responsibility for making decisions about major long-term issues in relation to the child. (2C) The other communication referred to in paragraph (2)(e) includes (but is not limited to) communication by: (a) letter; and (b) telephone, email or any other electronic means. (3) An agreement may be a parenting plan: (a) whether made before or after the commencement of this section; and (b) whether made inside or outside Australia; and (c) whether other persons as well as a child's parents are also parties; and (d) whether it deals with other matters as well as matters mentioned in subsection (2). Note: One of the other matters with which a parenting plan may deal is child support (see section 63CAA). (4) Provisions of a parenting plan that deal with matters other than the maintenance of a child are ***child welfare provisions***. (5) Provisions of a parenting plan that deal with the matter mentioned in paragraph (2)(f) are ***child maintenance provisions***. (6) A ***registered parenting plan*** is a parenting plan: (a) that was registered in a court under section 63E as in force at any time before the commencement of the *Family Law Amendment Act 2003*; and (b)that continued to be registered immediately before the commencement of the *Family Law Amendment Act 2003*.	

Item	Proposed amendment	FLS Comment
16	**64B Meaning of *parenting order* and related terms** (1) A ***parenting order*** is: (a) an order under this Part (including an order until further order) dealing with a matter mentioned in subsection (2); or (b) an order under this Part discharging, varying, suspending or reviving an order, or part of an order, described in paragraph (a). (2) A parenting order may deal with one or more of the following: (a) the person or persons with whom a child is to live; (b) the time a child is to spend with another person or other persons; (c) the allocation of parental responsibility, or a particular component of parental responsibility, for a child; (d) if 2 or more persons are to have parental responsibility, or a component of parental responsibility, for a child jointly—the form of consultations those persons are to have with one another about decisions to be made in the exercise of that responsibility or that component; (e) the communication a child is to have with another person or other persons; (f) maintenance of a child; (g) the steps to be taken before an application is made to a court for a variation of the order to take account of the changing needs or circumstances of: (i) a child to whom the order relates; or (ii) the parties to the proceedings in which the order is made; (h) the process to be used for resolving disputes about the terms or operation of the order; (i) any aspect of the care, welfare or development of the child or any other aspect of parental responsibility for a child. The person referred to in this subsection may be, or the persons referred to in this subsection may include, either a parent of the child or a person other than the parent of the child (including a grandparent or other relative of the child). Note: Paragraph (f)—A parenting order cannot deal with the maintenance of a child if the *Child Support (Assessment) Act 1989* applies.	33. Item 16 repeals the current subsections 64B(2) to (4) and substitutes new subsections 64B(2) to (4A). 34. FLS queries the reference to *maintenance of a child* in paragraph 64B(2)(f). Notwithstanding the *Note* at the end of subsection 64B(2), the reference to *maintenance of a child* is likely to be misleading to self-represented litigants who may think that the court can make an order dealing with the maintenance of a child as distinct from child support. 35. FLS recommends that the words *child support* be used in place of *maintenance*. **Recommendation 1.17**

Item	Proposed amendment	FLS Comment
16 contd	**64B Meaning of *parenting order* and related terms (contd)** (3) Without limiting paragraph (2)(c), the order may deal with the allocation of responsibility for making decisions about major long-term issues in relation to the child. (4) The other communication referred to in paragraph (2)(e) includes (but is not limited to) communication by: (a) letter; and (b) telephone, email or any other electronic means. (4A) Without limiting paragraphs (2)(g) and (h), the parenting order may provide that the parties to the proceedings must consult with a family dispute resolution practitioner to assist with: (a) resolving any dispute about the terms or operation of the order; or (b) reaching agreement about changes to be made to the order. (5) To the extent (if at all) that a parenting order deals with the matter mentioned in paragraph (2)(f), the order is a ***child maintenance order***. (6) For the purposes of this Act: (a) a parenting order that provides that a child is to live with a person is ***made in favour*** of that person; and (b) a parenting order that provides that a child is to spend time with a person is ***made in favour*** of that person; and (c) a parenting order that provides that a child is to have communication with a person is ***made in favour*** of that person; and (d) a parenting order that: (i) allocates parental responsibility, or a particular component of parental responsibility, for a child to a person; or (ii) provides that a person is to have parental responsibility, or a particular component of parental responsibility, for a child jointly with another person; is ***made in favour*** of that person. (9) In this section: ***this Act*** includes: (a) the standard Rules of Court; and (b) the related Federal Magistrates Rules.	

Item	Proposed amendment	FLS Comment
19	**64D Parenting orders subject to later parenting plans** Unless the court determines otherwise, a parenting order in relation to a child is taken to include a provision that the order is subject to a parenting plan that is: (a) entered into subsequently by the child's parents; and (b) agreed to, in writing, by any other person (other than the child) to whom the parenting order applies.	36. Item 19 inserts a new section 64D [Parenting orders subject to later parenting plans]. 37. FLS has no objection to this provision, which elevates the legal significance of parenting plans, on the basis that parenting plans are in writing and are signed and dated by both parties and have a cooling off period. FLS recommends that this provision will require an amendment to subsection 63C. **Recommendation 1.18**
26	**68F How a court determines what is in a child's best interests** (1) Subject to subsection (3), in determining what is in the child's best interests, the court must consider the matters set out in subsections (1A) and (2). (item 25 schedule 1) (1A) 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. (2) Additional considerations are: (a) any views 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 views; (b) the nature of the relationship of the child with each of the child's parents and with other persons (including any grandparents or other relative of the child); (ba) 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;	38. Item 26 amends section 68F [How a court determines what is in a child's best interests] by inserting a new subsection 68F(1A) and making various changes to subsection 68F(2). 39. FLS is opposed to the creation of two tiers of what is in the child's best interests, that is, primary and additional considerations (see subsections 68F (1A) and (2)). 40. By splitting the *considerations* into *primary* and *additional* this is likely to create unnecessary argument about the relationship between each set of considerations and the relative weight that is to be given to each consideration. The potential is highlighted by the mandatory requirement governing *primary* considerations in subsection 68F(1A) and the discretionary nature of the *additional* considerations in subsection 68F(2). 41. FLS recommends that the current format of 68F be maintained with all considerations (both *primary* and additional) listed under the one section and for the court to apply discretion as it considers appropriate. **Recommendation 1.19**

Item	Proposed amendment	FLS Comment
26 contd	**68F How a court determines what is in a child's best interests (contd)** (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 (including any grandparent or other relative of the child), with whom he or she has been living; (d) the practical difficulty and expense of a child spending time with and communicating 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 (including any grandparent or other relative of the child), to provide for the needs of the child, including emotional and intellectual needs; (f) the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child's parents, and any other characteristics of the child that the court thinks are relevant; (fa) if the child is an Aboriginal child or a Torres Strait Islander child: (i) the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with the other people who share that culture); and (ii) the likely impact any proposed parenting order under this Part will have on that right;	42. If this provision is adopted as proposed in the Bill an amendment will be required to subsection 68F(3) to include a reference to subsection 68F(1A). 43. FLS queries the relevance of paragraph 68F(2)(j) when the issue of family violence is already covered in paragraph 68F(2)(i). Isn't the relevant consideration the impact of family violence rather than whether a final or contested order has been made? FLS recommends that further consideration be given to the references to family violence in paragraph 68F(2)(j). **Recommendation 1.20**

Item	Proposed amendment	FLS Comment
26 contd	**68F How a court determines what is in a child's best interests (contd)** (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, if: (i) the order is a final order; or (ii)the making of the order was contested by a person; (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. (3) If the court is considering whether to make an order with the consent of all the parties to the proceedings, the court may, but is not required to, have regard to all or any of the matters set out in subsection (2). (4) For the purposes of paragraph (2)(fa), an Aboriginal child's or a Torres Strait Islander child's right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right: (a) to maintain a connection with that culture; and (b) to have the support, opportunity and encouragement necessary: (i) to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and (ii) to develop a positive appreciation of that culture.	

Family Law Amendment (Shared Parental Responsibility) Bill 2005

Schedule 2 – Compliance regime

General comments

1. FLS is concerned that the proposed amendments will produce a legislative scheme which is too complex. FLS is also concerned that the complexity and some specific provisions of the scheme will tend to undermine the two key messages if compliance is to be successfully promoted: that orders must be strictly complied with; and that if the orders are no longer suitable or workable then an application to vary should be made without delay

2. Dealing with complexity, FLS notes that under the proposed amendments there would be six possible outcomes to a contravention application, each of which may provide the Court with a different range of options:

   (i) No contravention proven.
   (ii) Contravention proven but reasonable cause established.
   (iii) Contravention proven but of a "technical or minor" nature.
   (iv) Contravention proven but not of a "technical or minor" nature.
   (v) Contravention proven and there has been previous contravention proceedings which resulted in a sanction or the taking of an action, or which were simply adjourned.
   (vi) Contravention involving serious disregard of obligations.

   In addition the scheme is set out in a cascade of provisions which will not be easily understood without legal training; and even then some considerable focussing of the mind will be required by a lawyer or judicial officer who is not frequently dealing with contravention applications. Division 13A [of Part VII] of the Act will have 5 separate subdivisions including A, AAA and AA in that order.

3. Dealing with the message conveyed by the proposed scheme, FLS believes that the amendments as drafted may convey the idea that some orders do not need to be obeyed nor an application made to vary them. They introduce the concept of 'minor or technical' contraventions. Parents could be expected to argue, sometimes successfully, that a minor or technical contravention might include not facilitating telephone contact, being repeatedly late, or failing to make a child available for a single day or a few hours of contact. The option for a court to adjourn a contravention application also implies that an application to vary may be a means of forestalling a contravention application and that *ex post facto* applications to vary are seen as acceptable. While we are not suggesting that a court should not have an adjournment power, it should be expressed as an option to be used only where the best interests of the child require it.

4. FLS recommends that the contravention process be simplified. These provisions will often be used by self-represented litigants as well as qualified lawyers and they need to be clear and simple. Apart from making the legislation accessible, simplification is likely to reduce cost and delay and promote the message that parenting orders must be obeyed; and if they are seen to be impractical or unsuitable then an application must immediately be made to vary them. **Recommendation 2.1**

5. To achieve the objective of simplification, FLS suggests that the existing Subdivisions B and C and the current amendments be redrafted with the following objectives in mind:

   (i) That when any contravention application is before it a court may vary the relevant parenting orders.
   (ii) That a party may make a simple application for compensatory contact and costs along the lines suggested by FLS (refer FLS position paper at *Attachment A* to this submission).
   (iii) That there be a single contravention process in which the court has the power to impose higher penalties for serious or repeat contraventions.

Comments on specific provisions

Item	Proposed amendment	FLS Comment
3	**Subdivision AAA—Court's power to make order compensating person for time lost even if reasonable excuse for contravention** **70NEAA Application of Subdivision** This Subdivision applies if: (a) a primary order has been made, whether before or after the commencement of this Subdivision; and (b) the primary order is a parenting order in relation to a child; and (c) a court having jurisdiction under this Act is satisfied that a person has, whether before or after the commencement, committed a contravention (the ***current contravention***) of the primary order; and (d) the current contravention resulted in a person not spending time with the child (or the child not living with a person for a particular period); and (e) the person referred to in paragraph (c) proves that he or she had a reasonable excuse for the current contravention. Note: If the person does not have a reasonable excuse for a contravention, the court has the power to make an order compensating a person for time lost under paragraph 70NG(1)(e) (in stage 2 of the parenting compliance regime) or 70NJ(3)(ca) (in stage 3 of the parenting compliance regime).	1. FLS recommends that Subdivision AAA be re-numbered. The *FLA (SPR) Bill 2005* proposes that Subdivision AAA be inserted into the Family Law Act to follow the existing Subdivision A. FLS submits that this numbering sequence which starts with Subdivision A, followed by Subdivision AAA and then followed by Subdivision AA is unnecessarily confusing. **Recommendation 2.2**

Item	Proposed amendment	FLS Comment
---	**Subdivision AA—Court's powers where contravention without reasonable excuse not established** 70NEB Court's power to vary parenting order (1) The court may make an order varying a parenting order if: (a) proceedings in relation to the parenting order are brought before a court having jurisdiction under this Act and it is alleged in those proceedings that a person (the ***respondent***) committed a contravention of the primary order; and (b) either: (i) the court is not satisfied that the respondent has committed a contravention of the parenting order; or (ii) the court is satisfied that the respondent has committed a contravention of the parenting order but the respondent proves that the respondent had a reasonable excuse for the contravention. (2) Subsection (1) applies whether the parenting order is made before or after the commencement of this Subdivision.	2. Subdivision AA was inserted into the Family Law Act by the *Family Law Amendment Act 2005* (which came into effect on 6 July 2005). While acknowledging that Subdivision AA is not part of the proposals contained in the *FLA (SPR) Bill 2005*, it is relevant to provide comment as this Subdivision has an impact on the Bill. 3. FLS recommends that Subdivision AA be renamed "*Subdivision AA-Court's powers where contravention or contravention without reasonable excuse not established*". This is on the basis that paragraph 70NEB(1)(b) provides that the court may vary a parenting order if the court is not satisfied that the respondent has committed a contravention (subparagraph 70NEB(1)(b)(i)) or that a contravention has been committed but the respondent proves reasonable excuse (subparagraph 70NEB(1)(b)(ii)). **Recommendation 2.3**

Item	Proposed amendment	FLS Comment
6	**70NG Powers of court** (1) If this Subdivision applies, the court may do any or all of the following: (a) make an order directing: (i) the person who committed the current contravention; or (ii) that person and another specified person; to attend a post-separation parenting program; Note: Before making an order under this paragraph, the court must consider seeking the advice of a family and child specialist about the services appropriate to the person's needs (see section 11E). (b) make a further parenting order that compensates a person for time the person did not spend with the child (or time the child did not live with the person) as a result of the current contravention; (ba) make any other order varying the order so contravened; (c) adjourn the proceedings to allow either or both of the parties to the primary order to apply for a further parenting order under Division 6 of Part VII that discharges, varies or suspends the primary order or revives some or all of an earlier parenting order. (d) if the current contravention is not of a minor or technical nature—make an order requiring the person who committed the current contravention to enter into a bond in accordance with section 70NGA;	4. Section 70NG of the Family Law Act has been amended by the addition of paragraphs 70NG(1)(d) (e) and (f), and subsections 70NG(1AA) and (1AB). 5. FLS is opposed to introduction of the phrase '*minor or technical nature*' – see subparagraphs 70NG(1)(d), 70NG(1)(e)(iv) and 70NG(1)(f). FLS believes that the addition of the phrase '*minor or technical nature*' will lead to unnecessary applications and arguments about the interpretation of that phrase. The use of this phrase adds an unnecessary layer of complexity in situations where the court already has the discretion to take such matters into account. FLS recommends that further consideration be given to the introduction of the phrase *minor or technical nature*. **Recommendation 2.4** 6. FLS recommends that subsection 70NG(1A) should be amended to include a provision that, in deciding whether or not to adjourn the proceedings, the court must have regard to compliance with the primary parenting order. **Recommendation 2.5**

Item	Proposed amendment	FLS Comment
6	**70NG Powers of court contd.....** (e) if: (i) the current contravention is a contravention of a parenting order in relation to a child; and (ii) the current contravention resulted in a person not spending time with the child (or the child not living with a person for a particular period); and (iii) the person referred to in subparagraph (ii) reasonably incurs expenses as a result of the contravention; and (iv) the current contravention is not of a minor or technical nature; make an order requiring the person who committed the current contravention to compensate the person referred to in subparagraph (ii) for some or all of the expenses referred to in subparagraph (iii); (f) if the current contravention is not of a minor or technical nature—make an order that the person who committed the current contravention pay some or all of the costs of another party, or other parties, to the proceedings under this Subdivision. (1AA)If: (a) the current contravention is a contravention of a parenting order in relation to a child; and (b) the contravention resulted in a person not spending time with the child (or the child not living with a person for a particular period); the court must consider making an order under paragraph (1)(b) to compensate the person for the time the person did not spend with the child (or the time the child did not live with the person) as a result of the contravention. (1AB) The court must not make an order under paragraph (1)(b) if it would not be in the best interests of the child for the court to do so.	

Item	Proposed amendment	FLS Comment
6	**70NG Powers of court contd.....** (1A) In deciding whether to adjourn the proceedings as mentioned in paragraph (1)(c), the court must have regard to the following: (a) whether the primary order was made by consent; (b) whether either or both of the parties to the proceedings in which the primary order was made were represented in those proceedings by a legal practitioner; (c) the length of the period between the making of the primary order and the occurrence of the current contravention; (d) any other matters that the court thinks relevant. (2) The court must not make an order under paragraph (1)(a) directed to a person other than the person who committed the current contravention unless: (a) the person brought the proceedings before the court in relation to the current contravention or is otherwise a party to those proceedings; and (b) the court is satisfied that it is appropriate to direct the order to the person because of the connection between the current contravention and the carrying out by the person of his or her parental responsibilities in relation to the child or children to whom the primary order relates. (3) If the court makes an order under paragraph (1)(a), the principal executive officer of the court must ensure that the provider of the program concerned is notified of the making of the order.	

Item	Proposed amendment	FLS Comment
8	**70NGA Bonds** (1) This section provides for bonds that a court may require a person to enter into under paragraph 70NG(1)(d). (2) A bond is to be for a specified period of up to 2 years. (3) A bond may be: (a) with or without surety; and (b) with or without security. (4) The conditions that may be imposed on a person by a bond include (without limitation) conditions that require the person: (a) to attend an appointment (or a series of appointments) with a family and child specialist; or (b) to attend family counselling; or (c) to attend family dispute resolution; or (d) to be of good behaviour. (5) If a court proposes to require a person to enter into a bond, it must, before making the requirement, explain to the person, in language likely to be readily understood by the person: (a) the purpose and effect of the proposed requirement; and (b) the consequences that may follow if the person: (i) fails to enter into the bond; or (ii) having entered into the bond—fails to act in accordance with the bond.	7. FLS recommends that the conditions that may be imposed on a person by a bond in subsection 70NGA(4) be extended to include a condition that a party comply with a court order. **Recommendation 2.6** 8. FLS recommends that section 70NM (Bonds under stage 3 of the parenting compliance regime) be amended in a similar fashion to include a condition that a party comply with a court order. **Recommendation 2.7**

Item	Proposed amendment	FLS Comment
9	**70NJ Powers of court** (1) Subject to subsection (2), this Subdivision applies if: (a) a primary order has been made, whether before or after the commencement of this Division; and (b) a court having jurisdiction under this Act is satisfied that a person has, whether before or after that commencement, committed a contravention (the ***current contravention***) of the primary order; and (ba) the person does not prove that he or she had a reasonable excuse for the current contravention; and (c) either subsection (1A) or (1B) applies. Note: For the standard of proof to be applied in determining whether a contravention of the primary order has been committed, see section 140 of the *Evidence Act 1995*. (1A) For the purposes of paragraph (1)(c), this subsection applies if: (a) no court has previously: (i) made an order imposing a sanction or taking an action in respect of a contravention by the person of the primary order; or (ii) under paragraph 70NG(1)(c), adjourned proceedings in respect of contravention by the person of the primary order; and (b) the court dealing with the current contravention is satisfied that the person has behaved in a way that showed a serious disregard of his or her obligations under the primary order. (1B) For the purposes of paragraph (1)(c), this subsection applies if a court has previously: (a) made an order imposing a sanction or taking an action in respect of a contravention by the person of the primary order; or (b) under paragraph 70NG(1)(c), adjourned proceedings in respect of a contravention by the person of the primary order.	9. Section 70NJ has been amended by the addition of a new subsection 70NJ(2A), and subparagraphs 70NJ(3)(ca), (f) (g) and (h). 10. FLS strongly opposes subsection 70NJ(2A). It is highly inappropriate to impose automatic costs sanctions in children's cases. The court already has sufficient discretion to order costs in appropriate circumstances. 11. The use of *prime facie* mandatory penalties in parenting contravention cases, such as subsection 70NJ(2A) in relation to automatic costs sanctions, is likely to work unfairly in some cases and we offer the following examples: 11.1 Although the mere fact that proceedings have been adjourned under subsection 70NG(1)(c) says nothing about the alleged earlier contravention, which may or may not have occurred, a costs order is mandatory (see subsection 70NJ(2A)) if no other sanction is suitable for the current contravention. The earlier contravention application may have been adjourned, for example, because the applicant recognised that it was unlikely to succeed. 11.2 The same unintended result would occur if there had been a previous contravention which was of a '*minor or technical nature*' and this would be the case if the current contravention was also "minor or technical".

Item	Proposed amendment	FLS Comment
9 contd	**70NJ Powers of court (contd)** (2) This Subdivision does not apply if the court dealing with the current contravention is satisfied that it is more appropriate for that contravention to be dealt with under Subdivision B. (2A) If this Subdivision applies, the court must, in relation to the person who committed the current contravention: (a) make an order under paragraph (3)(g), unless the court is satisfied that it would not be in the best interests of the child concerned to make that order; and (b) if the court makes an order under paragraph (3)(g)—consider making another order (or other orders) under subsection (3) that the court considers to be the most appropriate of the orders under subsection (3) in the circumstances; and (c) if the court does not make an order under paragraph (3)(g)—make at least one order under subsection (3), being the order (or orders) that the court considers to be the most appropriate of the orders under subsection (3) in the circumstances. (2B) This section applies whether the primary order was made, and whether the current contravention occurred, before or after the commencement of this Division. (3) The orders that are available to be made by the court are: (a) if the court is empowered under section 70NK to make a community service order—to make such an order; or (b) to make an order requiring the person to enter into a bond in accordance with section 70NM; or (c) if the person has contravened a parenting order—subject to subsection (5), to make an order varying the order so contravened; or	11.3 There are numerous circumstances where a costs order against an impecunious parent could work hardship against children(other than the child who is the subject of the contravention) who are in the care of that parent. 11.4 The imposition of a costs order could deprive a parent of the funds necessary to continue with parenting proceedings which were in the best interests of children. For example, a contravening parent might lose the financial resources necessary to ensure that sexual abuse allegations were heard and determined by the court. 12. FLS recommends that further consideration be given to the presumption of automatic costs sanctions proposed in subsection 70NJ(2A). **Recommendation 2.8**

Item	Proposed amendment	FLS Comment
9 contd	**70NJ Powers of court (contd)** (ca) to make a further parenting order that compensates a person for time the person did not spend with the child (or the time the child did not live with the person) as a result of the current contravention, unless it would not be in the best interests of the child concerned to make that order; or (d) to fine the person not more than 60 penalty units; or (e) subject to subsection (6), to impose a sentence of imprisonment on the person in accordance with section 70NO. (f) if: (i) the current contravention is a contravention of a parenting order in relation to a child; and (ii) the current contravention resulted in a person not spending time with the child (or the child not living with a person for a particular period); and (iii) the person referred to in subparagraph (ii) reasonably incurs expenses as a result of the contravention; and to make an order requiring the person who committed the current contravention to compensate the person referred to in subparagraph (ii) for some or all of the expenses referred to in subparagraph (iii); or (g) to make an order that the person who committed the current contravention pay all of the costs of another party, or other parties, to the proceedings under this Subdivision; or (h) to make an order that the person who committed the current contravention pay some of the costs of another party, or other parties, to the proceedings under this Subdivision.	

Item	Proposed amendment	FLS Comment
9 contd	**70NJ Powers of court (contd)** (4) If a court varies or discharges under section 70NL a community service order made under paragraph (3)(a), the court may give any directions as to the effect of the variation or discharge that the court considers appropriate. (5) When making an order under paragraph (3)(c) varying a parenting order, the court, in addition to regarding, under section 65E, the best interests of the child as the paramount consideration, must, if any of the following considerations is relevant, take that consideration into account: (a) the person who contravened the parenting order did so after having attended, after having refused or failed to attend, or after having been found to be unsuitable to take any further part in, a post-separation parenting program or a part of such a program; (b) there was no post-separation parenting program that the person who contravened the parenting order could attend; (c) because of the behaviour of the person who contravened the parenting order, it was not appropriate, in the court's opinion, for the person to attend a post-separation parenting program, or a part of such a program; (d) the parenting order was a compensatory parenting order made under paragraph 70NG(1)(b) after the person had contravened a previous order under this Act affecting children. (6) The court must not make an order imposing a sentence of imprisonment on a person under this section in respect of a contravention of a child maintenance order made under this Act unless the court is satisfied that the contravention was intentional or fraudulent.	

Item	Proposed amendment	FLS Comment
9 contd	**70NJ Powers of court (contd)** (6A) The court must not make an order imposing a sentence of imprisonment on a person under this section in respect of: (a) a contravention of an administrative assessment of child support made under the *Child Support (Assessment) Act 1989*; or (b) a breach of a child support agreement made under that Act; or (c) a contravention of an order made by a court under Division 4 of Part 7 of that Act for a departure from such an assessment (including such an order that contains matters mentioned in section 141 of that Act). (7) An order under this section may be expressed to take effect immediately, at the end of a specified period or on the occurrence of a specified event. (8) When a court makes an order under this section, the court may make any other orders that the court considers necessary to ensure compliance with the order that was contravened.	

Item	Proposed amendment	FLS Comment
12	**70NJA Effect of parenting plan** (1) This section applies if: (a) a parenting order has been made in relation to a child (whether before or after the commencement of this Subdivision); and (b) after the parenting order was made, the parents of the child made a parenting plan that dealt with a matter dealt with in the parenting order; and (c) proceedings are brought in relation to a contravention of the parenting order in relation to that matter; and (d) the parenting plan was in force when the contravention occurred. Note: An action that would otherwise contravene a parenting order may not be a contravention because of a subsequent inconsistent parenting plan. Whether this is the case or not depends on the terms of the parenting order (see section 64D). (2) In exercising its powers under section 70NJ, the court must: (a) have regard to the terms of the parenting plan; and (b) consider whether to exercise its powers under paragraph 70NG(3)(c) to make an order varying the parenting order to include (with or without modification) some or all of the provisions of the parenting plan.	13. Section 70NJA elevates the legal significance of parenting plans. FLS has no in principle objection to this provision on the basis that parenting plans are in writing and are signed and dated by both parties and include a cooling off period. FLS recommends that this provision will require an amendment to subsection 63C. **Recommendation 2.9**
---	**Other comments**	14. FLS notes that Subdivision A and AAA do not contain provisions about the effect of parenting plans. Similar provisions are proposed in Subdivision AA (s.70NEC), Subdivision B (s.70NGB) and Subdivision C (s.70NJA). FLS recommends that Subdivision A and AAA also include a provision about the effect of parenting plans. **Recommendation 2.10**

Family Law Amendment (Shared Parental Responsibility) Bill 2005

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

Item	Proposed amendment	FLS Comment
4	***Division 1A—Principles for conducting child-related proceedings*** **Subdivision A—Proceedings to which this Division applies** **60KA Proceedings to which this Division applies** (1) This Division applies to proceedings that are wholly under this Part. (2) This Division also applies to proceedings that are partly under this Part, but only: (a) to the extent that they are proceedings under this Part; and (b) if the parties to the proceedings consent—to the extent that they are not proceedings under this Part. (3) This Division also applies to any other proceedings between the parties that involve the court exercising jurisdiction under this Act and that arise from the breakdown of the parties' marital relationship, if the parties to the proceedings consent. (4) Proceedings to which this Division applies are ***child-related proceedings***. (5) Consent given for the purposes of paragraph (2)(b) or subsection (3) must be given in the form prescribed by the applicable Rules of Court. (6) A party to proceedings may, with the leave of the court, revoke a consent given for the purposes of paragraph (2)(b) or subsection (3).	1. Item 4 inserts a new Division 1A [Principles for conducting child-related proceedings] into the FLA. 2. FLS is opposed to subsections 60KA(2) and (3). These provisions extend the principles for conducting child related proceedings to other proceedings, if the parties consent. By way of example, this means that, if parties consent, the rules of evidence will not apply (unless the court directs – see proposed Subdivision D of Division 1A of Part VII) in proceedings relating to, *inter alia*, property matters; spousal maintenance; orders and injunctions including proceedings where orders binding third parties are sought; subsection 60KG(1) and paragraph 60KG(2)(b). 3. FLS is concerned that a weaker party may be forced into providing consent to subsections 69KA(2) and (3) by a stronger party. It is also very likely that subsections 69KA(2) and (3) will work against self-represented litigants who will be encouraged to give up the rules of evidence. Very often the outcome of a property case depends upon the outcome of a parenting case, and the inability to run cases together will represent an increase in costs to parties and a further drain on the resources of the courts.

Item	Proposed amendment	FLS Comment
4 contd	***Division 1A—Principles for conducting child-related proceedings*** **Subdivision A—Proceedings to which this Division applies** ***60KA Proceedings to which this Division applies*** **(contd)**	4. The prospect and expense of running two hearings, that is, to separate the children's issues from other issues may also unfairly coerce a party into providing consent under subsection 60KA(3). Conversely, a well funded party may use the opportunity to split hearings as a tactic to wear down their spouse. It is inconceivable that where proceedings involve third parties those parties will consent to doing away with the rules of evidence. 5. The Explanatory Statement for the Bill indicates that the '*intention of extending the application of the new Division [i.e. Division 1A] to other matters consented to by the parties is to ensure that people are able to resolve all elements of their dispute using the one process, should they choose to do so*'. FLS submits that this explanation is misleading as this facility to dispense with the rules of evidence, by consent, is already available to parties under section 190 of the Evidence Act (Cth). 6. FLS recommends further discussion about the impact of proposed subsections 60KA(2) and (3) of the Family Law Act. **Recommendation 3.1**

Item	Proposed amendment	FLS Comment
4 contd	***Division 1A—Principles for conducting child-related proceedings*** **Subdivision A—Proceedings to which this Division applies** **60KB Principles for conducting child-related proceedings** ***Application of the principles*** (1) The court must give effect to the principles in this section: (a) in performing duties and exercising powers (whether under this Division or otherwise) in relation to child-related proceedings; and (b) in making other decisions about the conduct of child-related proceedings. (2) Regard is to be had to the principles in interpreting this Division. *Principle 1* (3) The first principle is that the court is to consider the needs and concerns of the child or children concerned in determining the conduct of the proceedings. *Principle 2* (4) The second principle is that the court is to actively direct, control and manage the conduct of the proceedings. *Principle 3* (5) The third principle is that the proceedings are, as far as possible, to be conducted in a way that will promote cooperative and child-focused parenting by the parties. *Principle 4* (6) The fourth principle is that the proceedings are to be conducted without undue delay and with as little formality, and legal technicality and form, as possible.	7. FLS is concerned at the introduction of the expressions *legal technicality* and *form* in subsection 60KB(6). 8. These expressions have no clear definition or meaning and are more likely to encourage argument about the meaning of 'technicality' and 'form' that might not otherwise have occurred. 9. Further, subsection 97(3) of the Family Law Act, already provides that the court '*shall proceed without undue formality and shall endeavour to ensure that the proceedings are not protracted*'. 10. FLS recommends that further consideration be given to inserting the expression *legal technicality* and *form* in subsection 60KB(6). **Recommendation 3.2**

Item	Proposed amendment	FLS Comment
4 contd	**Subdivision D—Matters relating to evidence** **60KG Rules of evidence not to apply unless court decides** (1) The following provisions of the *Evidence Act 1995* do not apply to child-related proceedings: (a) Divisions 3, 4 and 5 of Part 2.1 (which deal with general rules about giving evidence, examination in chief, re-examination and cross-examination) (other than sections 26, 30, 36 and 41); Note: Section 26 is about the court's control over questioning of witnesses. Section 30 is about interpreters. Section 36 relates to examination of a person without subpoena or other process. Section 41 is about improper questions. (b) Parts 2.2 and 2.3 (which deal with documents and other evidence including demonstrations, experiments and inspections); (c) Parts 3.2 to 3.8 (which deal with hearsay, opinion, admissions, evidence of judgments and convictions, tendency and coincidence, credibility and character). (2) The court may apply one or more of the provisions of a Division or Part mentioned in subsection (1) to an issue in the proceedings, if: (a) for an issue relating to proceedings under this Part—the court considers it necessary in the best interests of the child or children concerned to do so; and (b) for an issue relating to proceedings that are not under this Part—the court considers it necessary in all the circumstances to do so. (3) Subsection (1) does not revive the operation of a rule of common law that, but for subsection (1), would have been prevented from operating because of a provision of a Division or Part mentioned in that subsection.	11. FLS is strongly opposed to section 60KG [Rules of evidence not to apply unless court decides]. 12. Subsection 60KG(1) effectively abolishes the current structure provided by the Evidence Act (Cth) and replaces this with nothing more than a power for the Judge to make orders about evidence. 13. Judges and Federal Magistrates will have to develop a whole new body of common law because the structure of the Evidence Act (Cth) has been taken away. A new (and unnecessary) secondary body of common law will have to evolve to replace the current evidence law. It must be remembered that the provisions of section 190 of the Evidence Act were utilised by the Family Court in order to have consenting couples enter the Children's Cases Program. If Judges are given powers to direct how proceedings are to be conducted, the device previously adopted becomes unnecessary. 14. Section 60KG(1) sets out the parts of the Evidence Act (Cth) that do not apply to child-related proceedings. 15. Paragraph 60KG(1)(a), in effect, deletes section 27 of the Evidence Act and as a result a party to the proceedings loses the right to question any witness- and thus loses the right to cross-examine. FLS submits that it is one thing to limit cross-examination to relevant issues or to time, but this is a major shift in the legal process which is not called for on any view of what is intended to be achieved by the Children's Cases Program.

Item	Proposed amendment	FLS Comment
4 contd	**Subdivision D—Matters relating to evidence** **60KG Rules of evidence not to apply unless court decides (contd)**	16. Paragraph 60 KG(1)(b) provides that Parts 2.2 and 2.3 of the Evidence Act (Cth) (which deal with documents and other evidence including demonstrations, experiments and inspections) do no apply to child-related proceedings. In effect, this removes a simplifying process for proof of documents or voluminous documents and does not replace it with anything else. Further, the abolition of the original document rule is overturned with nothing left in its place. 17. Paragraph 60KG(1)(c) provides that Parts 3.2 to 3.8 of the Evidence Act (Cth) do not apply to child-related proceedings. FLS notes that Part 3.8 of the Evidence Act (Cth) applies only to criminal proceedings (see section 109). The fact that this is included in the proposed amendments is a good illustration that not enough thought has been given to the issues and consequences of the proposed amendments. 18. Paragraph 60KG(1)(c) provides that Part 3.7 [Credibility] of the Evidence Act (Cth) does not apply in child-related proceedings. The credibility test in Part 3.7 excludes evidence which goes only to credit. Does this now mean that there can be debates about whether evidence which goes only to credit is to be included? A similar problem occurs with hearsay (see comment 18).

Item	Proposed amendment	FLS Comment
4 contd	**Subdivision D—Matters relating to evidence** **60KG Rules of evidence not to apply unless court decides (contd)**	19. Paragraph 60KG(1)(c) provides that Part 3.2 [Hearsay] of the Evidence Act (Cth) does not apply in child-related proceedings. Does this now mean that judges and federal magistrates will have to sift through mountains of material to determine whether or not it is relevant? FLS submits that the hearsay rule should not be compulsorily abolished. There are adequate grounds for the admission of hearsay (See Sections 63 and 64 of the Evidence Act) to permit the rule to remain. 20. Paragraph 60KG(1)(c) provides that Part 3.3 [Opinion] of the Evidence Act (Cth) does not apply in child-related proceedings. The impact of this provision is that where unhelpful and uneducated opinion evidence is now excluded this amendment will cause such material to be included in the new scheme, with the Judge having to sift through what is always unhelpful material before excluding it. Further, by removing the opinion rule this effectively abolishes the expert provisions including the power of experts to give evidence upon an ultimate issue or common knowledge. 21. FLS notes that subsection 60KG(2) would, theoretically, make it possible for the court to apply Part 3.8 to civil proceedings when the Evidence Act (Cth) limits this Part to criminal proceedings.

Item	Proposed amendment	FLS Comment
4 contd	**Subdivision D—Matters relating to evidence** **60KG Rules of evidence not to apply unless court decides (contd)**	22. FLS is also concerned that subsection 60KG(2) overlooks the protection of a person's rights. FLS submits that, perhaps a test which is adopted from section 190(4) of the Evidence Act (Cth) may be appropriately inserted in this provision. Subsection 190(4) of the Evidence Act provides: *(4) Without limiting the matters that the court may take into account in deciding whether to exercise the power conferred by subsection (3), it is to take into account:* *(a) the importance of the evidence in the proceeding; and* *(b) the nature of the cause of action or defence and the nature of the subject matter of the proceeding; and* *(c) the probative value of the evidence; and* *(d) the powers of the court (if any) to adjourn the hearing, to make another order or to give a direction in relation to the evidence.* 23. FLS recommends further discussion regarding the impact of the proposed section 60KG of the Family Law Act. **Recommendation 3.3**

Item	Proposed amendment	FLS Comment
4 contd	**60KH Evidence of children** (1) This section applies if the court applies the law against hearsay under subsection 60KG(2) to child-related proceedings. (2) Evidence of a representation made by a child about a matter that is relevant to the welfare of the child or another child, which would not otherwise be admissible as evidence because of the law against hearsay, is not inadmissible in the proceedings solely because of the law against hearsay. (3) The court may give such weight (if any) as it thinks fit to evidence admitted under subsection (2). (4) This section applies despite any other Act or rule of law. (5) In this section: ***child*** means a person under 18. ***representation*** includes an express or implied representation, whether oral or in writing, and a representation inferred from conduct.	

Item	Proposed amendment	FLS Comment
4 contd	**60KI Court's general duties and powers relating to evidence** (1) In giving effect to the principles in section 60KB, the court may: (a) give directions or make orders about the matters in relation to which the parties are to present evidence; and (b) give directions or make orders about who is to give evidence in relation to each remaining issue; and (c) give directions or make orders about how particular evidence is to be given; and (d) if the court considers that expert evidence is required—give directions or make orders about: (i) the matters in relation to which an expert is to provide evidence; and (ii) the number of experts who may provide evidence in relation to a matter; and (iii) how an expert is to provide the expert's evidence; and (e) ask questions of, and seek information or the production of evidence from, parties, witnesses and experts on matters relevant to the proceedings. (2) Without limiting subsection (1) or section 60KF, the court may give directions or make orders: (a) about the use of written submissions; or (b) about the length of written submissions; or (c) about limiting the time for oral argument; or (d) about limiting the time for the giving of evidence; or (e) that particular evidence is to be given orally; or (f) that particular evidence is to be given by affidavit; or (g) that evidence in relation to a particular matter not be presented by a party; or (h) that evidence of a particular kind not be presented by a party; or	24. As a general principle, FLS is in favour of the provisions in this section to permit the operation of the Children Cases Program on a non-consensual basis and submits that if this section is enacted, there is no valid reason to enact Section 60 KG and thereby do away with the benefits and advantages of the Evidence Act.

Item	Proposed amendment	FLS Comment
4 contd	**60KI Court's general duties and powers relating to evidence (contd)** (i) about limiting cross-examination of a particular witness; or (j) about limiting the number of witnesses who are to give evidence in the proceedings. (3) In child-related proceedings concerning an Aboriginal child or Torres Strait Islander child, the court may, for the purposes of section 61F: (a) receive into evidence the transcript of evidence in any other proceedings before: (i) the court; or (ii) another court; or (iii) a tribunal; and draw any conclusions of fact from that transcript that it thinks proper; and (b) adopt any recommendation, finding, decision or judgment of any court, person or body of a kind mentioned in any of subparagraphs (a)(i) to (iii). Note: Section 61F requires the court to have regard to any kinship obligations and child-rearing practices of Aboriginal or Torres Strait Islander culture relevant to an Aboriginal or Torres Strait Islander child.	

Family Law Amendment (Shared Parental Responsibility) Bill 2005

Schedule 4 – Changes to dispute resolution

Item	Proposed amendment	FLS Comment
32	**10C Communications in family counselling etc. are confidential** (1) A family counsellor must not disclose a communication made to the counsellor while the counsellor is conducting family counselling. (2) Despite subsection (1), a family counsellor may disclose a communication to a person to whom the counsellor refers a person, for medical or other professional consultation, if consent to the disclosure of the communication is given by: (a) if the person who made the communication is 18 or over—that person; or (b) if the person who made the communication is a child under 18: (i) each person who has parental responsibility (within the meaning of Part VII) for the child; or (ii) a court. (3) Despite subsection (1), a family counsellor may disclose a communication if the counsellor reasonably believes the disclosure is necessary for the purpose of: (a) protecting a child from harm (whether physical, sexual, psychological or financial); or (b) preventing or lessening a serious and imminent threat to: (i) the life or health of a person; or (ii) the property of a person; or	1. Item 32 repeals the following parts of the Family Law Act: • Part II [Counselling Organisations and Mediation Organisations] and • Part III [Primary Dispute Resolution]. 2. Parts II and III are replaced by the following new Parts: • Part II [Non-court based family services]; • Part III [Family and Child Specialists]; • Part IIIA [Obligations to inform people about non-court based family services and about court's processes and services]; and • Part IIIB [Court's powers in relation to court and non-court based family services] 3. Subsection 10C(1) provides that communications in family counselling are confidential. Subsection 10C(3) lists a broad category of circumstances where disclosure by the Family Counsellor is permitted. Subsection 10D(1) then provides that notwithstanding the permissible disclosures in subsection 10C(3) communication made in family counselling is inadmissible but for the very limited categories referred to in subsection 10D(2) [abuse or risk of abuse of child under 18]. The same issues arise in the context of the provisions found in the proposed Division 2 [Family Dispute Resolution] – see subsections 10K(1), 10K(3), 10L(1) and 10L(2) regarding communications in family dispute resolution.

Item	Proposed amendment	FLS Comment
32 contd	**10C Communications in family counselling etc. are confidential (contd)** (c) reporting the commission, or preventing the likely commission, of an offence involving: (i) violence or a threat of violence to a person; or (ii) intentional damage to property of a person or a threat of damage to property; or (d) enabling the counsellor to properly discharge his or her functions as a counsellor; or (e) if a child is separately represented under an order under section 68L—assisting the person representing the child to do so properly; or (f) complying with a law of the Commonwealth, a State or a Territory. (4) Despite subsection (1), a family counsellor may disclose a communication in order to provide information (other than personal information within the meaning of section 6 of the *Privacy Act 1988*) for research relevant to families. (5) Evidence that would be inadmissible because of section 10D is not admissible merely because subsection (3) or (4) authorises its disclosure. Note: This means that the counsellor's evidence is inadmissible in court, even if subsection (3) or (4) allows the counsellor to disclose it in other circumstances. (6) Nothing in this section prevents a family counsellor from disclosing information necessary for the counsellor to give a certificate of the kind mentioned in subsection 60J(1) of this Act or paragraph 16(2A)(a) of the *Marriage Act 1961*. (7) In this section: *communication* includes admission.	4. As a matter of principle FLS believes that maintaining confidentiality in family counselling and family dispute resolution is fundamental to successful outcomes in these processes. The greater the assurance of confidentiality that can be given to a party participating in a counselling or dispute resolution process, the more likely it is that a party will participate without reservation, thus significantly enhancing the prospects of a successful outcome. 5. The role of any law regulating such processes must be to balance the principle of confidentiality, with any competing principles that mandate a disclosure because of a supervening public interest. 6. The issue in the present context is whether the permissible disclosures in subsection 10C(3) [and 10L(3)] are an acceptable derogation from what must otherwise be a fairly compelling principle of confidentiality. 7. In general terms, FLS has no issue with the disclosure categories listed in paragraphs 10C(3)(a)-(c) and (f) [or 10K(3)(a)-(c) and (f)]. Our main concern rests with paragraphs 10C(3)(d) and (e) [and 10K(3)(d) and (e)].

Item	Proposed amendment	FLS Comment
32 contd	**10C Communications in family counselling etc. are confidential (contd)**	8. Paragraph 10C(3)(d) provides that a family counsellor may disclose a communication for the purposes of *enabling the counsellor to properly discharge his or her functions as a counsellor*. The provision means nothing to anyone except, presumably, to a family counsellor (see same provision for family dispute resolution practitioners under subsection 10K(3)(d)). Perhaps greater clarity could be achieved in terms of what was intended here. Disclosure to ensure protection of the welfare of children is already encompassed in paragraphs 10C(3)(a)-(c) and it is difficult to see what further disclosure might be appropriate. FLS would be less concerned if this provision were limited to disclosure of a communication relating to a serious threat to the welfare of a child. 9. Paragraph 10C(3)(e) provides that a family counsellor may disclose a communication for the purposes of *assisting the person representing the child to do so properly* (see same provision for family dispute resolution practitioners under subsection 10K(3)(e)). FLS wonders whether adequate thought has been given to the *disadvantages* of allowing a disclosure which would otherwise have been in breach of the principle of confidentiality, merely in the interests of assisting a child representative. Further, what does the concept of *assisting ... properly...* actually mean? Isn't the affect of paragraph 10C(3)(e) (and 10K(3)(e)) going to be that participants in these processes will be reluctant to say things if a child representative is appointed, or is likely to be appointed?

32 contd	**10C Communications in family counselling etc. are confidential (contd)**	10. Subsection 10C(3)(e) (and subsection 10K(3)(e)) can easily cut through the *without prejudice* privilege and legal professional privilege and even, conceivably, the privilege against self-incrimination. Any statement made in the course of family counselling or family dispute resolution which would otherwise have the benefit of these exclusionary principles would be undermined by the permissible disclosure created by paragraph 10C(3)(e) (and 10K(3)(e)). FLS is concerned that all of this might occur in the context of a proposed change that was not driven or motivated by a particular problem or defect. 11. FLS would also be less concerned if these provisions were limited to disclosure of a communication relating to a serious threat to the welfare of a child.

Item	Proposed amendment	FLS Comment
32 contd	**10D Communications in family counselling etc. are inadmissible** (1) Evidence of anything said, or any admission made, by or in the company of: (a) a family counsellor conducting family counselling; or (b) a person (the ***professional***) to whom a family counsellor refers a person for medical or other professional consultation, while the professional is carrying out professional services for the person; is not admissible: (c) in any court (whether or not exercising federal jurisdiction); or (d) in any proceedings before a person authorised to hear evidence (whether the person is authorised by a law of the Commonwealth, a State or a Territory, or by the consent of the parties). (2) Subsection (1) does not apply to: (a) an admission by an adult that indicates that a child under 18 has been abused or is at risk of abuse; or (b) a disclosure by a child under 18 that indicates that the child has been abused or is at risk of abuse; unless, in the opinion of the court, there is sufficient evidence of the admission or disclosure available to the court from other sources. (3) Nothing in this section prevents a family counsellor from disclosing information necessary for the counsellor to give a certificate of the kind mentioned in subsection 60J(1) of this Act or paragraph 16(2A)(a) of the *Marriage Act 1961*. (4) A family counsellor who refers a person to a professional (within the meaning of paragraph (1)(b)) must inform the professional of the effect of this section.	12. Section 10D provides that most communications made in family counselling (and family dispute resolution – see section 10L) are inadmissible. However, by creating a fairly expansive category of permissible disclosures under subsection 10C(3) (and 10K(3) for family dispute resolution), doesn't this create a situation where material facts that are otherwise confidential, become admissible through *other* means? 13. In short, it may not possible to admit into evidence what a father may have said at counselling but, if having learnt something as a result of the disclosure made at counselling, it can then be proved in another way and without actually seeking to admit the communication made in counselling, we have, in effect, made admissible that which was inadmissible. 14. The central issue is balancing competing interests: the *private* interest in maintaining confidentiality because this enhances the effectiveness of alternative dispute resolution, versus the *public* interest in facilitating disclosures where there is a supervening public purpose. FLS believes that the current system strikes the right balance and we have reservations about tipping the balance in favour of greater permissible disclosures. 15. FLS recommends that paragraphs 10C(3)(d) and (e) and 10K(3)(d) and (e)) be amended so as to limit disclosure to circumstances relating to a serious threat to the welfare of a child. **Recommendation 4.1**

Item	Proposed amendment	FLS Comment
32 contd	**10J Definition of *family dispute resolution practitioner*** A ***family dispute resolution practitioner*** is a person who is: (a) authorised by an approved family dispute resolution organisation to offer family dispute resolution on behalf of the organisation; or (b) engaged under section 38R to perform family dispute resolution services under this Act; or (c) an officer or staff member of the Family Court authorised by the Chief Executive Officer to provide family dispute resolution under this Act; or (d) an officer or staff member of the Federal Magistrates Court authorised by the Chief Executive Officer of that court to provide family dispute resolution under this Act; or (e) appointed under a law of a State as a dispute resolution practitioner in relation to the Family Court of that State; or (f) a person, other than a person mentioned in paragraph (a), (b), (c), (d) or (e), who meets the requirements specified in the regulations.	16. Section 10J contains the definition of a *family dispute resolution practitioner* which can include a person who meets the requirements specified in the regulations (see subsection 10J(f)). 17. FLS will reserve comment on this provision until we have the opportunity to consider the proposed regulations. FLS recommends that the proposed regulations be made available for comment as soon as possible. **Recommendation 4.2**

Item	Proposed amendment	FLS Comment
32 contd	**10K Communications in family dispute resolution etc. are confidential** (1) A family dispute resolution practitioner must not disclose a communication made to the practitioner while the practitioner is conducting family dispute resolution. (2) Despite subsection (1), a family dispute resolution practitioner may disclose a communication to a person to whom the practitioner refers a person, for medical or other professional consultation, if consent to the disclosure of the communication is given by: (a) if the person who made the communication is 18 or over—that person; or (b) if the person who made the communication is a child under 18: (i) each person who has parental responsibility (within the meaning of Part VII) for the child; or (ii) a court. (3) Despite subsection (1), a family dispute resolution practitioner may disclose a communication if the practitioner reasonably believes the disclosure is necessary for the purpose of: (a) protecting a child from harm (whether physical, sexual, psychological or financial); or (b) preventing or lessening a serious and imminent threat to: (i) the life or health of a person; or (ii) the property of a person; or (c) reporting the commission, or preventing the likely commission, of an offence involving: (i) violence or a threat of violence to a person; or (ii) intentional damage to property of a person or a threat of damage to property; or (d) enabling the practitioner to properly discharge his or her functions as a practitioner; or	18. Subsection 10K(1) provides that a family dispute resolution practitioner must not disclose a communication made to the practitioner while the practitioner is conducting family dispute resolution. There are several exceptions referred to in subsection 10K(3) which have been discussed previously (see 3-14 above). 19. Curiously, there is no exception for disclosure based on the consent of the participants in the process. Thus, a family dispute resolution practitioner might be conducting a mediation and using the typical joint sessions/private caucus model. The family dispute resolution practitioner would, under a strict reading of subsection 10K(1), not be able to disclose to the father a communication made to him by the mother, even though such communication was authorized and was, indeed, part of the process of facilitating resolution. 20. FLS queries if this is the intention of the provision? FLS recommends that further consideration be given to the impact of not allowing a family dispute resolution practitioner to disclose a communication if the parties consent. One option is to amend subsection 10K(6) to include read as follows: *(6) Nothing in this section prevents a family dispute resolution practitioner from:* *(a) disclosing information necessary for the practitioner to give a certificate of the kind mentioned in subsection 60I(7) or subsection 60J(1); or* *(b) communicating a matter to a party with the consent of the other party or parties.* **Recommendation 4.3**

Item	Proposed amendment	FLS Comment
32 contd	**10K Communications in family dispute resolution etc. are confidential (contd)** (e) if a child is separately represented under an order under section 68L—assisting the person representing the child to do so properly; or (f) complying with a law of the Commonwealth, a State or a Territory. (4) Despite subsection (1), a family dispute resolution practitioner may disclose a communication in order to provide information (other than personal information within the meaning of section 6 of the *Privacy Act 1988*) for research relevant to families. (5) Evidence that would be inadmissible because of section 10L is not admissible merely because subsection (3) or (4) authorises its disclosure. Note: This means that the practitioner's evidence is inadmissible in court, even if subsection (3) or (4) allows the practitioner to disclose it in other circumstances. (6) Nothing in this section prevents a family dispute resolution practitioner from disclosing information necessary for the practitioner to give a certificate of the kind mentioned in subsection 60I(7) or subsection 60J(1). (7) In this section: *communication* includes admission.	

Item	Proposed amendment	FLS Comment
32 contd	**10M Family dispute resolution practitioners have immunity sometimes** In conducting facilitative dispute resolution, a family dispute resolution practitioner has the same protection and immunity as a Judge of the Family Court has in performing the functions of a Judge. Note: A family dispute resolution practitioner does not have immunity while conducting advisory dispute resolution.	21. Section 10M provides that family dispute resolution practitioners have immunity only when conducting *facilitative* dispute resolution i.e. non-advisory dispute resolution. Thus, a member of the court staff who is conducting family dispute resolution of an advisory nature (e.g. conciliation as traditionally understood) would not have immunity – FLS queries how they are protected? 22. By limiting immunity to facilitative processes only, there is a real risk that advisory dispute resolution processes would be stifled, at a time when, looking at dispute resolution in Australia generally, advisory dispute resolution processes are in their ascendancy. In any event, FLS believes it is somewhat inconsistent to say that judges and arbitrators have immunity, but family dispute resolution practitioners providing advisory dispute resolution do not. 23. This distinction is not so much an issue for lawyers, who will have their own professional indemnity cover, but for non-lawyer practitioners who may be open to suit for negligence if they purport to give advice. 24. FLS recommends that further consideration be given to the limitation of immunity provided under proposed section 10M of the Family Law Act. **Recommendation 4.4**

Item	Proposed amendment	FLS Comment
32 contd	**10R Family dispute resolution practitioners must comply with regulations** (1) The regulations may prescribe requirements to be complied with by family dispute resolution practitioners in relation to the family dispute resolution services they provide. (2) The regulations may prescribe penalties not exceeding 10 penalty units in respect of offences against regulations made for the purposes of subsection (1).	25. Section 10R provides that family dispute resolution practitioners must comply with the requirements set out in the regulations. Failure to comply may attract a fine of 10 penalty units. 26. FLS will reserve comment on this provision until we have the opportunity to consider the proposed regulations. 27. FLS recommends that the proposed regulations be made available for comment as soon as possible. **Recommendation 4.5**
32 contd	**10S Definition of *arbitration*** (1) ***Arbitration*** is a process (other than the judicial process) in which parties to a dispute present arguments and evidence to an arbitrator, who makes a determination to resolve the dispute. (2) Arbitration may be either: (a) ***section 13E arbitration***—which is arbitration of Part VIII proceedings carried out as a result of an order made under section 13E; or (b) ***relevant property or financial arbitration***—which is arbitration (other than section 13E arbitration) of: (i) Part VIII proceedings, Part VIIIA proceedings, Part VIIIB proceedings or section 106A proceedings; or (ii) any part of such proceedings; or (iii) any matter arising in such proceedings; or (iv) a dispute about a matter with respect to which such proceedings could be instituted.	28. FLS is concerned that the section 10S definition of *arbitration* is perhaps too restrictive and does not recognise the diversity of contexts in which arbitration takes place. 29. The main issue for FLS is that the definition describes arbitration as being a process in which parties *present arguments and evidence.* We already have models of arbitration in Australia where that, technically, does not take place e.g. a referral of matters to arbitration on the papers in writing or otherwise. 30. FLS recommends that consideration be given to broadening the definition of arbitration in the proposed section 10S of the Family Law Act. **Recommendation 4.6**

Item	Proposed amendment	FLS Comment
32 contd	**10T Definition of *arbitrator*** An ***arbitrator*** is a person who meets the requirements prescribed in the regulations to be an arbitrator.	31. Section 10T provides that an *arbitrator* is a person who meets the requirements prescribed in regulation. 32. The *Family Law Regulations 1984* currently set out the prescribed requirements for an arbitrator (see regulation 67B). It is not clear if changes are proposed to these regulations or if new regulations are proposed. 33. FLS will, therefore, reserve comment on this provision. FLS recommends that any proposed regulations be made available for comment as soon as possible. **Recommendation 4.7**
32 contd	**Part III – Family and child specialists**	34. The proposed Part III of the Act [Family and child specialists] creates the office of *family and child specialist* (these are now commonly referred to as court counsellors). The proposed section 11C makes all communication to such person admissible in evidence. 35. FLS submits that the description family and child specialist does not accurately reflect the functions of this position, in which all communication is now reportable to the court. FLS believes that the office is more appropriately described as *Family Assessor* and recommends that the description be changed throughout the proposed Part III. **Recommendation 4.8**

Item	Proposed amendment	FLS Comment
32 contd	**11C Communications with family and child specialists are admissible** (1) Evidence of anything said, or any admission made, by or in the company of: (a) a family and child specialist performing the functions of a family and child specialist; or (b) a person (the ***professional***) to whom a family and child specialist refers a person for medical or other professional consultation, while the professional is carrying out professional services for the person; is admissible in proceedings under this Act. Note 1: Communications with family and child specialists are not confidential (except in the special circumstances set out in subsection 38BD(3) in relation to specialists having several roles). Note 2: Subsection (1) does not prevent things said or admissions made by or in the company of family and child specialists from being admissible in proceedings other than proceedings under this Act.	36. The proposed section 11C introduces a new era of reportable counselling, a significant cultural change in Family Law. 37. FLS is concerned at the speed with which these changes are being advanced and wonders whether or not it has been adequately thought through. FLS notes that, under the current proposals, because everything said to a family and child specialist will be admissible, in time, they will no longer have a role in the resolution of conflict and their role will be limited to assisting with adjudication. 38. FLS recommends that further consideration be given to the proposed section 11C and the role of family and child specialists in resolving conflict. **Recommendation 4.9**

Item	Proposed amendment	FLS Comment
32 contd	**11C Communications with family and child specialists are admissible (contd)** (2) Subsection (1) does not apply to a thing said or an admission made by a person who, at the time of saying the thing or making the admission, had not been informed of the effect of subsection (1). (3) Despite subsection (2), a thing said or admission made is admissible even if the person who said the thing or made the admission had not been informed of the effect of subsection (1), if: (a) it is an admission by an adult that indicates that a child under 18 has been abused or is at risk of abuse; or (b) it is a disclosure by a child under 18 that indicates that the child has been abused or is at risk of abuse; unless, in the opinion of the court, there is sufficient evidence of the admission or disclosure available to the court from other sources.	

Item	Proposed amendment	FLS Comment
32 contd	**11F Court may order parties to attend appointments with a family and child specialist** (1) A court exercising jurisdiction in proceedings under this Act may order one or more parties to the proceedings to attend an appointment (or a series of appointments) with a family and child specialist. Note: Before exercising this power, the court must consider seeking the advice of a family and child specialist about the services appropriate to the parties' needs (see section 11E). (2) When making an order under subsection (1), the court must inform the parties of the effect of section 11G (consequences of failure to comply with order). (3) The court may make orders under this section: (a) on its own initiative; or (b) on the application of: (i) a party to the proceedings; or (ii) a person representing a child under an order made under section 68L. **11G Consequences of failure to comply with order under section 11F** (1) If a person who is ordered to attend an appointment with a family and child specialist under section 11F fails to comply with: (a) the order made by the court; or (b) any instruction the specialist gives to the person; the specialist must report the failure to the court. (2) On receiving the report, the court may make any further orders it considers appropriate. (3) The court may make orders under subsection (2): (a) on its own initiative; or (b) on the application of: (i) a party to the proceedings; or (ii) a person representing a child under an order made under section 68L.	39. Section 11F creates a regime for compulsory attendances with a family and child specialist. The new context needs to be appreciated – such attendances are not for the purposes of facilitating resolution of the conflict but rather preparing a report to assist in decision-making. It is, therefore, irrelevant to consider whether cases are appropriate and suitable, because the purpose of the reference is not to facilitate resolution but to put in train the consideration of a report. 40. Section 11G sets out the consequences of failing to comply with an order under section 11F. 41. Paragraph 11G(1)(b) provides that if a party fails to comply with an instruction given by the family and child specialist the specialist must report the failure to the court. FLS is concerned that a failure to comply with the instructions that the specialist gives to a parent (for example) could arise from a reluctance to disclose what would otherwise be privileged. For example, what if the specialist instructs a parent to reveal the nature of advice given by a lawyer, or to make a disclosure that would otherwise be self-incriminating? FLS queries whether this is what is intended in this context? 42. As a consequence, FLS submits that paragraph 11G(1)(b) is too broad and recommends that it be amended so that failure to comply with an instruction from a specialist would only constitute non-compliance if the party had no reasonable excuse. **Recommendation 4.10**

Item	Proposed amendment	FLS Comment
32 contd	**13A Objects of this Part** (1) The objects of this Part are: (a) to facilitate access to family counselling: (i) to help married couples considering separation or divorce to reconcile; and (ii) to help people adjust to separation or divorce; and (iii) to help people adjust to court orders under this Act; and (b) to encourage people to use dispute resolution mechanisms (other than judicial ones) to resolve matters in which a court order might otherwise be made under this Act, provided the mechanisms are appropriate in the circumstances and proper procedures are followed; and (c) to encourage people to use, in appropriate circumstances, arbitration to resolve matters in which a court order might otherwise be made, and to provide ways of facilitating that use; and (d) to give the court the power to require parties to proceedings under this Act to make use of court or non-court based family services appropriate to the needs of the parties. (2) The object mentioned in paragraph (1)(b) also lies behind the general requirement in section 60I for family dispute resolution services to be used before applications for orders under Part VII are made.	

Item	Proposed amendment	FLS Comment
32 contd	**Division 3—Referrals to family counselling, family dispute resolution and other family services** **13C Court may refer parties to family counselling, family dispute resolution and other family services** (1) A court exercising jurisdiction in proceedings under this Act may, at any stage in the proceedings, make one or more of the following orders: (a) that one or more of the parties to the proceedings attend family counselling; (b) that the parties to the proceedings attend family dispute resolution; (c) that one or more of the parties to the proceedings participate in an appropriate course, program or other service. Note 1: Before making an order under this section, the court must consider seeking the advice of a family and child specialist about the services appropriate to the parties' needs (see section 11E). Note 2: The court can also order parties to attend appointments with a family and child specialist (see section 11F). (2) The court may suggest a particular purpose for the attendance or participation. (3) The order may require the party or parties to encourage the participation of specified other persons who are likely to be affected by the proceedings. Note: For example, the participation of children, grandparents and other relatives may be encouraged. (4) The court may make any other orders it considers reasonably necessary or appropriate in relation to the order. (5) The court may make orders under this section: (a) on its own initiative; or (b) on the application of: (i) a party to the proceedings; or (ii) a person representing a child under an order made under section 68L.	43. The proposed section 13C creates a regime for mandatory referrals to family counselling and family dispute resolution but there appear to be no safeguards to ensure that the processes used *are appropriate in the circumstances and proper procedures are followed* (picking up the words in the proposed *Objects* paragraph 13A(1)(b)) 44. Is it intended that the current Regulation 62 of the *Family Law Regulations 1984* (which prescribes that cases are *not* appropriate for mediation when there is violence, safety issues, inequality in bargaining power, risk of abuse, issues of emotional psychological and physical health, etc) will continue or are new regulations are proposed? 45. If it is intended that these exclusionary principles will be covered in the Regulations (or elsewhere) FLS recommends that the proposed legislation should include an explicit reference to the exclusionary principles. **Recommendation 4.11**

Item	Proposed amendment	FLS Comment
48	**Subdivision C—Interpretation and application of Part 60D Defined expressions** (1) In this Part ***member of the court personnel*** means: (a) a family and child specialist; or (b) the Registrar or a Deputy Registrar of a Registry of the Family Court of Australia; or (c) the Registrar or a Deputy Registrar of the Family Court of Western Australia; or (d) a Registrar of the Federal Magistrates Court.	46. Item 48 repeals the current definition of *member of the Court personnel* and substitutes a new definition. 47. The Family Court has recently advised that its registrars are now known as either *senior registrar* or *registrar*. Similarly, registrars in the Family Court of Western Australia are known as registrars. Each court also has a principle registrar. 48. FLS recommends that the Family Court of Australia and Family Court of Western Australia be consulted about the proposed definition of *member of the Court personnel* to ensure that this definition has the correct description for *registrar*. **Recommendation 4.12**

Family Law Amendment (Shared Parental Responsibility) Bill 2005

Schedule 5 – Removal of references to residence and contact

General comment

1. The Bill proposes that the current references to *residence* and *contact* be removed from the Family Law Act (and other legislation[1]) in order to emphasise the more 'family-focused' term of 'parenting orders'. References to *residence* will be replaced with *lives with* and references to *contact* will be replaced by *spends time with* and *communicates with*.

2. As noted in the Explanatory Statement to the Bill the change in terminology from *custody* to *residence* and *access* to *contact*, introduced in 1995, did not result in changing the culture of 'ownership' of children as expected. Many litigants, and the media, to this day still refer to the pre-1995 terms of *custody* and *access*. FLS submits that the changing the labels, yet again, will not bring about any substantial change to the way parents (or the general public, the court, mediators, counsellors or lawyers) consider parenting issues and has the potential to cause further unnecessary confusion.

3. FLS recommends that further consideration be given before removing the references to *residence* and *contact* from the Family Law Act. **Recommendation 5.1**

---

1 *Australian Citizenship Act 1948*, *Australian Passports Act 2005* and *Child Support (Assessment) Act 1989*.

ATTACHMENT A

FAMILY LAW SECTION
LAW COUNCIL OF AUSTRALIA

CONTRAVENTION OF CONTACT ORDERS
DISCUSSION PAPER

1. The enforcement of parenting orders has long been an area of significant concern for many parents. This paper focuses on contravention of contact orders.

2. One of the conclusions reached in the 1992 Report of the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the *Family Law Act 1975* (FLA) was that, generally, the Family Court was not fully using its powers or making the best use of the flexibility of the FLA, particularly regarding penalties for the enforcement of court orders. [1]

3. In particular, the Joint Select Committee recommended that a more detailed study be conducted of enforcement cases and the causes of the discontent with such cases. That detailed study was undertaken by the Family Law Council, which reported in June 1998. The Family Law Council recommended, *inter alia*, that a three-stage compliance regime for the enforcement of parenting orders be introduced. The *Family Law Amendment Act 2000* gave effect to this recommendation.

4. The three-stage compliance regime provides as follows:

   - stage 1 – prevention - aimed at improving communication between separated parents and educating parents about their respective responsibilities in relation to their children and the responsibilities imposed by orders;
   - stage 2 - remedial measures - to help parents resolve issues of conflict about parenting; and
   - stage 3 – sanctions - ensuring that, as a last resort, a court takes other action in relation to a parent who deliberately disregards a court order.

5. The *Family Law Amendment Act 2005* made further changes to the three-stage compliance regime by creating a new subdivision in Division 13A of Part VII of the FLA which will provide courts with the power to vary on its own motion orders relating to children at a hearing on a contravention application. The proposed amendments also clarify the court's power to send parties in contravention proceedings to counselling and post-separation parenting programs.[2]

---

1 Further Revised EM Family Law Amendment Bill 2000

2 EM Family Law Amendment Bill 2005

6. Contravention of contact orders is a common event during post-separation parenting. Contraventions can occur for a variety of reasons. For example:

   - a parent may not want to comply
   - a child may refuse to comply
   - there may be reasonable cause for non-compliance (such as a child's illness), or
   - the order may be unsuitable and therefore difficult to comply with. Instead of bringing applications to vary the 'unworkable order', the experience is that parties tend instead to bring contravention applications.

7. While non-compliance can be serious in nature or repetitive, often non-compliance is relatively minor.

8. FLS believes that all non-compliance should be dealt with vigorously, expeditiously and with priority over most other court proceedings. Achieving this is likely to require additional resources.

9. Non-compliance should be dealt with by the court in a matter which emphasises that:

   - orders must be obeyed
   - non-compliance will always be treated as a serious and important matter by the courts, and
   - if orders are regarded by a parent as being unsuitable then that parent carries the responsibility of seeking a variation of the order. Parents should not be encouraged to think that the unsuitability of an order is something that need only be raised at a contravention hearing.

10. FLS also believes that the current process for contravention proceedings would be improved by the development of a special procedure for minor non-compliance (see paragraph 11.5 below). The procedure should be simple and inexpensive and it should encourage settlement. The court outcome from this type of contravention proceeding should be limited to compensatory contact and, where appropriate, costs orders.

11. FLS makes the following recommendations:

    11.1 All contravention applications should be dealt with by the courts as a matter of priority, with an expectation that there will be a hearing on the first return date and that that return date will be within four weeks of filing the application. This recommendation will almost certainly require more court resources initially but if it leads to the development of a public perception that orders must be obeyed then in the long run non-compliance may be reduced.

11.2 In accordance with the High Court's decision in Briginshaw the standard of proof should vary in accordance with the seriousness of the allegations and the likely penalties in the circumstances of a particular case. For the purpose of clarification it may be desirable to codify the standard of proof with a new provision in the *Family Law Act 1975.*

11.3 Attendance at a post-separation parenting education program should not be seen as the likely penalty in contravention proceedings.

11.4 Post-order counselling should generally be ordered when contact orders are made. This would require additional counselling resources. The purpose of the post-order counselling would be to track the success of the orders and the response of the parents to the orders, and to encourage variation of the orders where that would make compliance more likely. Post-order counselling (or mediation) should be used on a regular basis to ensure parties know their obligations in relation to the orders; to help parties learn to accept and not resent the orders and encourage parties to co-operate with respect to the orders. Post-order counselling is appropriate both for orders made by judicial decision and for orders made by consent during proceedings.

11.5 As an alternative to a "contravention application" that a new procedure be offered to applicants. The application would be for "compensatory contact" and the burden of proof would be simply the balance of probabilities. The application would invite the respondent to resolve the application by agreeing to compensatory contact and the respondent would be invited to suggest when that compensatory contact should take place. If the respondent agreed to compensatory contact then the respondent would also be invited to participate in a PDR process to discuss when the compensatory contact should occur, other matters relating to post-separation parenting and non-compliance issues. The proceedings would not continue if compensatory contact was agreed.

If the respondent elected not to acknowledge that compensatory contact should take place then the matter would proceed to a hearing. The court would only be able to order compensatory contact, and also costs where appropriate.

In the view of FLS a reasonable number of parents, who would otherwise have been applicants in contravention proceedings, may elect to use the new procedure. Firstly, because it would be more likely to result in settlement and secondly if there was no settlement then the lower standard of proof would be more likely to result in a successful outcome than would be the case in traditional contravention proceedings. Applicants are aware that minor contact contraventions are unlikely to result in serious penalties.

The acknowledgement by the respondent that compensatory contact should occur or the finding of a court that such contact should occur could be taken into account by a court that might later be asked to hear contravention proceedings.

11.6 Contravention and compensatory contact applications should be dealt with prior to the court considering any application to vary contact orders.

11.7 PDR should not be mandatory before a parent can make a contravention or compensatory contact application. Compulsory PDR delays the enforcement process and sends a message to separated parents that contact non-compliance generally leads only to PDR. This conveys the impression that contact orders need not be strictly complied with and that non-compliance is regarded as trivial.

11.8 When hearing a contravention application the Court should be able to impose the full range of penalties as may be appropriate to the case and the findings of the Court.

Please Note - Shaded Sections are not repealed – See Section 60KG (1) (a) of the exposure draft.

Division 3 — General rules about giving evidence

SECTION 26 COURT'S CONTROL OVER QUESTIONING OF WITNESSES

26 The court may make such orders as it considers just in relation to:

(a) the way in which witnesses are to be questioned; and

(b) the production and use of documents and things in connection with the questioning of witnesses; and

(c) the order in which parties may question a witness; and

(d) the presence and behaviour of any person in connection with the questioning of witnesses.

SECTION 27 PARTIES MAY QUESTION WITNESSES

27 A party may question any witness, except as provided by this Act.

SECTION 28 ORDER OF EXAMINATION IN CHIEF, CROSS-EXAMINATION AND RE-EXAMINATION

28 Unless the court otherwise directs:

(a) cross-examination of a witness is not to take place before the examination in chief of the witness; and

(b) re-examination of a witness is not to take place before all other parties who wish to do so have cross-examined the witness.

SECTION 29 MANNER AND FORM OF QUESTIONING WITNESSES AND THEIR RESPONSES

29(1) **[Form of questioning]**

A party may question a witness in any way the party thinks fit, except as provided by this Chapter or as directed by the court.

29(2) **[Evidence in narrative form]**

A witness may give evidence wholly or partly in narrative form if:

(a) the party that called the witness has applied to the court for a direction that the witness give evidence in that form; and

(b) the court so directs.

29(3) **[Direction]**

Such a direction may include directions about the way in which evidence is to be given in that form.

29(4) **[Explanatory material]**

Evidence may be given in the form of charts, summaries or other explanatory material if it appears to the court that the material would be likely to aid its comprehension of other evidence that has been given or is to be given.

SECTION 30 INTERPRETERS

30 A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.

SECTION 31 DEAF AND MUTE WITNESSES

31(1) **[Deaf witnesses]**

A witness who cannot hear adequately may be questioned in any appropriate way.

31(2) **[Mute witnesses]**

A witness who cannot speak adequately may give evidence by any appropriate means.

31(3) **[Court directions]**

The court may give directions concerning either or both of the following:

(a) the way in which a witness may be questioned under subsection (1) ;

(b) the means by which a witness may give evidence under subsection (2) .

31(4) **[Right to use interpreter]**

This section does not affect the right of a witness to whom this section applies to give evidence about a fact through an interpreter under section 30 .

SECTION 32 ATTEMPTS TO REVIVE MEMORY IN COURT

32(1) **[Use of document to revive memory]**

A witness must not, in the course of giving evidence, use a document to try to revive his or her memory about a fact or opinion unless the court gives leave.

32(2) **[Matters to take into account]**

Without limiting the matters that the court may take into account in deciding whether to give leave, it is to take into account:

(a) whether the witness will be able to recall the fact or opinion adequately without using the document; and

(b) whether so much of the document as the witness proposes to use is, or is a copy of, a document that:

(i) was written or made by the witness when the events recorded in it were fresh in his or her memory; or

(ii) was, at such a time, found by the witness to be accurate.

32(3) **[Readings from document]**

If a witness has, while giving evidence, used a document to try to revive his or her memory about a fact or opinion, the witness may, with the leave of the court, read aloud, as part of his or her evidence, so much of the document as relates to that fact or opinion.

32(4) **[Directions concerning production of document]**

The court is, on the request of a party, to give such directions as the court thinks fit to ensure that so much of the document as relates to the proceeding is produced to that party.

SECTION 33 EVIDENCE GIVEN BY POLICE OFFICERS

33(1) **[Use of written statement]**

Despite section 32 , in any criminal proceeding, a police officer may give evidence in chief for the prosecution by reading or being led through a written statement previously made by the police officer.

33(2) **[Requirements concerning statement]**

Evidence may not be so given unless:

(a) the statement was made by the police officer at the time of or soon after the occurrence of the events to which it refers; and

(b) the police officer signed the statement when it was made; and

(c) a copy of the statement had been given to the person charged or to his or her lawyer a reasonable time before the hearing of the evidence for the prosecution.

History

33(3) **[``police officer"]**

A reference in this section to a police officer includes a reference to a person who, at the time the statement concerned was made, was a police officer.

SECTION 34 ATTEMPTS TO REVIVE MEMORY OUT OF COURT

34(1) **[Directions concerning production]**

The court may, on the request of a party, give such directions as are appropriate to ensure that specified documents and things used by a witness otherwise than while giving evidence to try to revive his or her memory are produced to the party for the purposes of the proceeding.

34(2) **[Non-compliance with directions]**

The court may refuse to admit the evidence given by the witness so far as it concerns a fact as to which the witness so tried to revive his or her memory if, without reasonable excuse, the directions have not been complied with.

SECTION 35 EFFECT OF CALLING FOR PRODUCTION OF DOCUMENTS

35(1) **[No requirement to tender document]**

A party is not to be required to tender a document only because the party, whether under this Act or otherwise:

(a) called for the document to be produced to the party; or

(b) inspected it when it was so produced.

35(2) **[Entitlement of party producing document to tender]**

The party who produces a document so called for is not entitled to tender it only because the party to whom it was produced, or who inspected it, fails to tender it.

SECTION 36 PERSON MAY BE EXAMINED WITHOUT SUBPOENA OR OTHER PROCESS

36(1) **[Subpoena not duly served]**

The court may order a person who:

(a) is present at the hearing of a proceeding; and

(b) is compellable to give evidence in the proceeding;

to give evidence and to produce documents or things even if a subpoena or other process requiring the person to attend for that purpose has not been duly served on the person.

36(2) **[Penalties and liabilities]**

A person so ordered to give evidence or to produce documents or things is subject to the same penalties and liabilities as if the person had been duly served with such a subpoena or other process.

36(3) **[Use of document produced]**

A party who inspects a document or thing produced to the court because of subsection (1) need not use the document in evidence.

Division 4 — Examination in chief and re-examination

SECTION 37 LEADING QUESTIONS

37(1) **[Circumstances where permitted]**

A leading question must not be put to a witness in examination in chief or in re-examination unless:

(a) the court gives leave; or

(b) the question relates to a matter introductory to the witness's evidence; or

(c) no objection is made to the question and (leaving aside the party conducting the examination in chief or re-examination) each other party to the proceeding is represented by a lawyer; or

(d) the question relates to a matter that is not in dispute; or

(e) if the witness has specialised knowledge based on the witness's training, study or experience — the question is asked for the purpose of obtaining the witness's opinion about a hypothetical statement of facts, being facts in respect of which evidence has been, or is intended to be, given.

37(2) **[Question concerning public investigation, etc]**

Unless the court otherwise directs, subsection (1) does not apply in civil proceedings to a question that relates to an investigation, inspection or report that the witness made in the course of carrying out public or official duties.

37(3) **[Written statement or report]**

Subsection (1) does not prevent a court from exercising power under rules of court to allow a written statement or report to be tendered or treated as evidence in chief of its maker.

Note: ``Leading question'' is defined in the Dictionary.

SECTION 38 UNFAVOURABLE WITNESSES

38(1) **[Manner of questioning]**

A party who called a witness may, with the leave of the court, question the witness, as though the party were cross-examining the witness, about:

(a) evidence given by the witness that is unfavourable to the party; or

(b) a matter of which the witness may reasonably be supposed to have knowledge and about which it appears to the court the witness is not, in examination in chief, making a genuine attempt to give evidence; or

(c) whether the witness has, at any time, made a prior inconsistent statement.

38(2) **[Cross-examination]**

Questioning a witness under this section is taken to be cross-examination for the purposes of this Act (other than section 39).

38(3) **[Matters relevant to credibility]**

The party questioning the witness under this section may, with the leave of the court, question the witness about matters relevant only to the witness's credibility.

Note: The rules about admissibility of evidence relevant only to credibility are set out in Part 3.7 .

38(4) **[Time for questioning]**

Questioning under this section is to take place before the other parties cross-examine the witness, unless the court otherwise directs.

38(5) **[Direction as to order of questioning]**

If the court so directs, the order in which the parties question the witness is to be as the court directs.

38(6) **[Matters to be taken into account]**

Without limiting the matters that the court may take into account in determining whether to give leave or a direction under this section, it is to take into account:

(a) whether the party gave notice at the earliest opportunity of his or her intention to seek leave; and

(b) the matters on which, and the extent to which, the witness has been, or is likely to be, questioned by another party.

38(7) **[Liability to be cross-examined]**

A party is subject to the same liability to be cross-examined under this section as any other witness if:

(a) a proceeding is being conducted in the name of the party by or on behalf of an insurer or other person; and

(b) the party is a witness in the proceeding.

SECTION 39 LIMITS ON RE-EXAMINATION

39 On re-examination:

(a) a witness may be questioned about matters arising out of evidence given by the witness in cross-examination; and

(b) other questions may not be put to the witness unless the court gives leave.

Division 5 — Cross-examination

SECTION 40 WITNESS CALLED IN ERROR

40 A party is not to cross-examine a witness who has been called in error by another party and has not been questioned by that other party about a matter relevant to a question to be determined in the proceeding.

SECTION 41 IMPROPER QUESTIONS

41(1) **[Power to disallow]**

The court may disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the question is:

(a) misleading; or

(b) unduly annoying, harassing, intimidating, offensive, oppressive or repetitive.

41(2) **[Matters to be taken into account]**

Without limiting the matters that the court may take into account for the purposes of subsection (1), it is to take into account:

(a) any relevant condition or characteristic of the witness, including age, personality and education; and

(b) any mental, intellectual or physical disability to which the witness is or appears to be subject.

SECTION 42 LEADING QUESTIONS

42(1) **[When leading questions can be asked]**

A party may put a leading question to a witness in cross-examination unless the court disallows the question or directs the witness not to answer it.

42(2) **[Matters relevant to decision to disallow]**

Without limiting the matters that the court may take into account in deciding whether to disallow the question or give such a direction, it is to take into account the extent to which:

(a) evidence that has been given by the witness in examination in chief is unfavourable to the party who called the witness; and

(b) the witness has an interest consistent with an interest of the cross-examiner; and

(c) the witness is sympathetic to the party conducting the cross-examination, either generally or about a particular matter; and

(d) the witness's age, or any mental, intellectual or physical disability to which the witness is subject, may affect the witness's answers.

42(3) **[Power to disallow]**

The court is to disallow the question, or direct the witness not to answer it, if the court is satisfied that the facts concerned would be better ascertained if leading questions were not used.

42(4) **[Power to control]**

This section does not limit the court's power to control leading questions.

Note: ``Leading question'' is defined in the Dictionary.

SECTION 43 PRIOR INCONSISTENT STATEMENTS OF WITNESSES

43(1) **[Cross-examination]**

A witness may be cross-examined about a prior inconsistent statement alleged to have been made by the witness whether or not:

(a) complete particulars of the statement have been given to the witness; or

(b) a document containing a record of the statement has been shown to the witness.

43(2) **[Evidence of statement]**

If, in cross-examination, a witness does not admit that he or she has made a prior inconsistent statement, the cross-examiner is not to adduce evidence of the statement otherwise than from the witness unless, in the cross-examination, the cross-examiner:

(a) informed the witness of enough of the circumstances of the making of the statement to enable the witness to identify the statement; and

(b) drew the witness's attention to so much of the statement as is inconsistent with the witness's evidence.

43(3) **[Re-opening case to adduce evidence]**

For the purpose of adducing evidence of the statement, a party may re-open the party's case.

History

SECTION 44 PREVIOUS REPRESENTATIONS OF OTHER PERSONS

44(1) **[Restriction on cross-examination]**

Except as provided by this section, a cross-examiner must not question a witness about a previous representation alleged to have been made by a person other than the witness.

44(2) **[Circumstances where cross-examination allowed]**

A cross-examiner may question a witness about the representation and its contents if:

(a) evidence of the representation has been admitted; or

(b) the court is satisfied that it will be admitted.

44(3) **[Use of document containing representation]**

If subsection (2) does not apply and the representation is contained in a document, the document may only be used to question a witness as follows:

(a) the document must be produced to the witness;

(b) if the document is a tape recording, or any other kind of document from which sounds are reproduced — the witness must be provided with the means (for example, headphones) to listen to the contents of the document without other persons present at the cross-examination hearing those contents;

(c) the witness must be asked whether, having examined (or heard) the contents of the document, the witness stands by the evidence that he or she has given;

(d) neither the cross-examiner nor the witness is to identify the document or disclose any of its contents.

44(4) **[Identification of document]**

A document that is so used may be marked for identification.

SECTION 45 PRODUCTION OF DOCUMENTS

45(1) **[Application of section]**

This section applies if a party is cross-examining or has cross-examined a witness about:

(a) a prior inconsistent statement alleged to have been made by the witness that is recorded in a document; or

(b) a previous representation alleged to have been made by another person that is recorded in a document.

45(2) **[When document must be produced]**

If the court so orders or if another party so requires, the party must produce:

(a) the document; or

(b) such evidence of the contents of the document as is available to the party;

to the court or to that other party.

45(3) **[Powers of court]**

The court may:

(a) examine a document or evidence that has been so produced; and

(b) give directions as to its use; and

(c) admit it even if it has not been tendered by a party.

45(4) **[Inadmissible document or evidence]**

Subsection (3) does not permit the court to admit a document or evidence that is not admissible because of Chapter 3.

45(5) **[Tender of document]**

The mere production of a document to a witness who is being cross-examined does not give rise to a requirement that the cross-examiner tender the document.

SECTION 46 LEAVE TO RECALL WITNESSES

46(1) **[Circumstances where leave may be granted]**

The court may give leave to a party to recall a witness to give evidence about a matter raised by evidence adduced by another party, being a matter on which the witness was not cross-examined, if the evidence concerned has been admitted and:

(a) it contradicts evidence about the matter given by the witness in examination in chief; or

(b) the witness could have given evidence about the matter in examination in chief.

46(2) **[Matter raised by evidence adduced by another party]**

A reference in this section to a matter raised by evidence adduced by another party includes a reference to an inference drawn from, or that the party intends to draw from, that evidence.

PART 2.2 — DOCUMENTS

SECTION 47 DEFINITIONS

47(1) **[Document in question]**

A reference in this Part to a ***document in question*** is a reference to a document as to the contents of which it is sought to adduce evidence.

47(2) **[Copy of document in question]**

A reference in this Part to a copy of a document in question includes a reference to a document that is not an exact copy of the document in question but that is identical to the document in question in all relevant respects.

Note: Section 182 gives this section a wider application in relation to Commonwealth records and certain Commonwealth documents.

History

SECTION 48 PROOF OF CONTENTS OF DOCUMENTS

48(1) **[Methods of adducing evidence]**

A party may adduce evidence of the contents of a document in question by tendering the document in question or by any one or more of the following methods:

(a) adducing evidence of an admission made by another party to the proceeding as to the contents of the document in question;

(b) tendering a document that:

(i) is or purports to be a copy of the document in question; and

(ii) has been produced, or purports to have been produced, by a device that reproduces the contents of documents;

(c) if the document in question is an article or thing by which words are recorded in such a way as to be capable of being reproduced as sound, or in which words are recorded in a code (including shorthand writing) — tendering a document that is or purports to be a transcript of the words;

(d) if the document in question is an article or thing on or in which information is stored in such a way that it cannot be used by the court unless a device is used to retrieve, produce or collate it — tendering a document that was or purports to have been produced by use of the device;

(e) tendering a document that:

(i) forms part of the records of or kept by a business (whether or not the business is still in existence); and

(ii) is or purports to be a copy of, or an extract from or a summary of, the document in question, or is or purports to be a copy of such an extract or summary;

(f) if the document in question is a public document — tendering a document that is or purports to be a copy of the document in question and that is or purports to have been printed:

(i) by the Government Printer or by the government or official printer of a State or Territory; or

(ii) by authority of the government or administration of the Commonwealth, a State, a Territory or a foreign country; or

(iii) by authority of an Australian Parliament, a House of an Australian Parliament, a committee of such a House or a committee of an Australian Parliament.

48(2) **[Availability of document to party]**

Subsection (1) applies to a document in question whether the document in question is available to the party or not.

48(3) **[Use of evidence]**

If the party adduces evidence of the contents of a document under paragraph (1) (a), the evidence may only be used:

(a) in respect of the party's case against the other party who made the admission concerned; or

(b) in respect of the other party's case against the party who adduced the evidence in that way.

48(4) **[Document not available or not in issue]**

A party may adduce evidence of the contents of a document in question that is not available to the party, or the existence and contents of which are not in issue in the proceeding, by:

(a) tendering a document that is a copy of, or an extract from or summary of, the document in question; or

(b) adducing from a witness evidence of the contents of the document in question.

Note 1: Clause 5 of Part 2 of the Dictionary is about the availability of documents.

Note 2: Section 182 gives this section a wider application in relation to Commonwealth records and certain Commonwealth documents.

History

SECTION 49 DOCUMENTS IN FOREIGN COUNTRIES

49 No paragraph of subsection 48(1) (other than paragraph 48(1) (a)) applies to a document that is in a foreign country unless:

(a) the party who adduces evidence of the contents of the document in question has, not less than 28 days (or such other period as may be prescribed by the regulations or by rules of court) before the day on which the evidence is adduced, served on each other party a copy of the document proposed to be tendered; or

(b) the court directs that it is to apply.

Note: Section 182 gives this section a wider application in relation to Commonwealth records and certain Commonwealth documents.

History

SECTION 50 PROOF OF VOLUMINOUS OR COMPLEX DOCUMENTS

50(1) **[Summary of documents]**

The court may direct that a party may adduce evidence of the contents of 2 or more documents in question in the form of a summary if:

(a) application is made to it by the party before the hearing concerned; and

(b) it is satisfied that it would not otherwise be possible conveniently to examine the evidence because of the volume or complexity of the documents in question.

History

50(2) **[Opportunity to examine or copy documents]**

The court may only make such a direction if the party seeking to adduce the evidence in the form of a summary has:

(a) served on each other party a copy of the summary that discloses the name and address of the person who prepared the summary; and

(b) given each other party a reasonable opportunity to examine or copy the documents in question.

History

50(3) **[Application of opinion rule]**

The opinion rule does not apply to evidence adduced in accordance with a direction under this section.

SECTION 51 ORIGINAL DOCUMENT RULE ABOLISHED

51 The principles and rules of the common law that relate to the means of proving the contents of documents are abolished.

Note: Section 182 gives the provisions of this Part a wider application in relation to Commonwealth records and certain Commonwealth documents.

History

PART 2.3 — OTHER EVIDENCE

SECTION 52 ADDUCING OF OTHER EVIDENCE NOT AFFECTED

52 This Act (other than this Part) does not affect the operation of any Australian law or rule of practice so far as it permits evidence to be adduced in a way other than by witnesses giving evidence or documents being tendered in evidence.

SECTION 53 VIEWS

53(1) **[Demonstration, experiment or inspection]**

A judge may, on application, order that a demonstration, experiment or inspection be held.

53(2) **[Presence of parties, judge and jury]**

A judge is not to make an order unless he or she is satisfied that:

(a) the parties will be given a reasonable opportunity to be present; and

(b) the judge and, if there is a jury, the jury will be present.

53(3) **[Matters to be taken into account]**

Without limiting the matters that the judge may take into account in deciding whether to make an order, the judge is to take into account the following:

(a) whether the parties will be present;

(b) whether the demonstration, experiment or inspection will, in the court's opinion, assist the court in resolving issues of fact or understanding the evidence;

(c) the danger that the demonstration, experiment or inspection might be unfairly prejudicial, might be misleading or confusing or might cause or result in undue waste of time;

(d) in the case of a demonstration — the extent to which the demonstration will properly reproduce the conduct or event to be demonstrated;

(e) in the case of an inspection — the extent to which the place or thing to be inspected has materially altered.

53(4) **[Experimentation by court]**

The court (including, if there is a jury, the jury) is not to conduct an experiment in the course of its deliberations.

53(5) **[Inspection of exhibits]**

This section does not apply in relation to the inspection of an exhibit by the court or, if there is a jury, by the jury.

SECTION 54 VIEWS TO BE EVIDENCE

54 The court (including, if there is a jury, the jury) may draw any reasonable inference from what it sees, hears or otherwise notices during a demonstration, experiment or inspection.

PART 3.2 — HEARSAY

Division 1 — The hearsay rule

SECTION 59 THE HEARSAY RULE — EXCLUSION OF HEARSAY EVIDENCE

59(1) **[Admissibility]**

Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person intended to assert by the representation.

59(2) **[Asserted fact]**

Such a fact is in this Part referred to as an ***asserted fact*** .

59(3) **[Applicability]**

Subsection (1) does not apply to evidence of a representation contained in a certificate or other document given or made under regulations made under an Act other than this Act to the extent to which the regulations provide that the certificate or other document has evidentiary effect.

Note: Specific exceptions to the hearsay rule are as follows:

- evidence relevant for a non-hearsay purpose (section 60);

- first-hand hearsay:
  — civil proceedings, if the maker of the representation is unavailable (section 63) or available (section 64);
— criminal proceedings, if the maker of the representation is unavailable (section 65) or available (section 66);
- business records (section 69);
- tags and labels (section 70);
- telecommunications (section 71);
- contemporaneous statements about a person's health etc (section 72);
- marriage, family history or family relationships (section 73);
- public or general rights (section 74);
- use of evidence in interlocutory proceedings (section 75);
- admissions (section 81);
- representations about employment or authority (subsection 87(2));
- exceptions to the rule excluding evidence of judgments and convictions (subsection 92(3));
- character of and expert opinion about accused persons (sections 110 and 111).

Other provisions of this Act, or of other laws, may operate as further exceptions.

Examples:

(1) D is the defendant in a sexual assault trial. W has made a statement to the police that X told W that X had seen D leave a night club with the victim shortly before the sexual assault is alleged to have occurred. Unless an exception to the hearsay rule applies, evidence of what X told W cannot be given at the trial.

(2) P had told W that the handbrake on W's car did not work. Unless an exception to the hearsay rule applies, evidence of that statement cannot be given by P, W or anyone else to prove that the handbrake was defective.

(3) W had bought a video cassette recorder and written down its serial number on a document. Unless an exception to the hearsay rule applies, the document is inadmissible to prove that a video cassette recorder later found in D's possession was the video cassette recorder bought by W.

History

SECTION 60 EXCEPTION: EVIDENCE RELEVANT FOR A NON-HEARSAY PURPOSE

60 The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of the fact intended to be asserted by the representation.

SECTION 61 EXCEPTIONS TO THE HEARSAY RULE DEPENDENT ON COMPETENCY

61(1) **[Capability of giving rational reply]**

This Part does not enable use of a previous representation to prove the existence of an asserted fact if, when the representation was made, the person who made it was not competent to give evidence about the fact because he or she was incapable of giving a rational reply to a question about the fact.

61(2) **[Contemporaneous representations]**

This section does not apply to a contemporaneous representation made by a person about his or her health, feelings, sensations, intention, knowledge or state of mind.

Note: For the admissibility of such contemporaneous representations, see section 72 .

61(3) **[Presumption of competence]**

For the purposes of this section, it is presumed, unless the contrary is proved, that when the representation was made the person who made it was competent to give evidence about the asserted fact.

Division 2 — ``First-hand'' hearsay

SECTION 62 RESTRICTION TO ``FIRST-HAND'' HEARSAY

62(1) **[Previous representation based on personal knowledge]**

A reference in this Division (other than in subsection (2)) to a previous representation is a reference to a previous representation that was made by a person who had personal knowledge of an asserted fact.

62(2) **[Personal knowledge]**

A person has personal knowledge of the asserted fact if his or her knowledge of the fact was, or might reasonably be supposed to have been, based on something that the person saw, heard or otherwise perceived, other than a previous representation made by another person about the fact.

SECTION 63 EXCEPTION: CIVIL PROCEEDINGS IF MAKER NOT AVAILABLE

63(1) **[Application of section]**

This section applies in a civil proceeding if a person who made a previous representation is not available to give evidence about an asserted fact.

63(2) **[Application of hearsay rule]**

The hearsay rule does not apply to:

(a) evidence of the representation that is given by a person who saw, heard or otherwise perceived the representation being made; or

(b) a document so far as it contains the representation, or another representation to which it is reasonably necessary to refer in order to understand the representation.

Note 1: Section 67 imposes notice requirements relating to this subsection.

Note 2: Clause 4 of Part 2 of the Dictionary is about the availability of persons.

History

SECTION 64 EXCEPTION: CIVIL PROCEEDINGS IF MAKER AVAILABLE

64(1) **[Application of section]**

This section applies in a civil proceeding if a person who made a previous representation is available to give evidence about an asserted fact.

64(2) **[Application of hearsay rule]**

The hearsay rule does not apply to:

(a) evidence of the representation that is given by a person who saw, heard or otherwise perceived the representation being made; or

(b) a document so far as it contains the representation, or another representation to which it is reasonably necessary to refer in order to understand the representation;

if it would cause undue expense or undue delay, or would not be reasonably practicable, to call the person who made the representation to give evidence.

Note: Section 67 imposes notice requirements relating to this subsection. Section 68 is about objections to notices that relate to this subsection.

History

64(3) **[Where maker called to give evidence]**

If the person who made the representation has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given by:

(a) that person; or

(b) a person who saw, heard or otherwise perceived the representation being made;

if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation.

64(4) **[Document containing representation]**

A document containing a representation to which subsection (3) applies must not be tendered before the conclusion of the examination in chief of the person who made the representation, unless the court gives leave.

Note: Clause 4 of Part 2 of the Dictionary is about the availability of persons.

SECTION 65 EXCEPTION: CRIMINAL PROCEEDINGS IF MAKER NOT AVAILABLE

65(1) **[Application of section]**

This section applies in a criminal proceeding if a person who made a previous representation is not available to give evidence about an asserted fact.

65(2) **[Application of hearsay rule]**

The hearsay rule does not apply to evidence of a previous representation that is given by a person who saw, heard or otherwise perceived the representation being made, if the representation was:

(a) made under a duty to make that representation or to make representations of that kind; or

(b) made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication; or

(c) made in circumstances that make it highly probable that the representation is reliable; or

(d) against the interests of the person who made it at the time it was made.

Note: Section 67 imposes notice requirements relating to this subsection.

65(3) **[Representation made while giving evidence]**

The hearsay rule does not apply to evidence of a previous representation made in the course of giving evidence in an Australian or overseas proceeding if, in that proceeding, the defendant in the proceeding to which this section is being applied:

(a) cross-examined the person who made the representation about it; or

(b) had a reasonable opportunity to cross-examine the person who made the representation about it.

Note: Section 67 imposes notice requirements relating to this subsection.

65(4) **[More than one defendant]**

If there is more than one defendant in the criminal proceeding, evidence of a previous representation that:

(a) is given in an Australian or overseas proceeding; and

(b) is admitted into evidence in the criminal proceeding because of subsection (3) ;

cannot be used against a defendant who did not cross-examine, and did not have a reasonable opportunity to cross-examine, the person about the representation.

65(5) **[Reasonable opportunity to cross-examine]**

For the purposes of subsections (3) and (4) , a defendant is taken to have had a reasonable opportunity to cross-examine a person if the defendant was not present at a time when the cross-examination of a person might have been conducted but:

(a) could reasonably have been present at that time; and

(b) if present could have cross-examined the person.

65(6) **[Authenticated transcript or recording]**

Evidence of the making of a representation to which subsection (3) applies may be adduced by producing a transcript, or a recording, of the representation that is authenticated by:

(a) the person to whom, or the court or other body to which, the representation was made; or

(b) if applicable, the registrar or other proper officer of the court or other body to which the representation was made; or

(c) the person or body responsible for producing the transcript or recording.

65(7) **[Representation against interests of maker]**

Without limiting paragraph (2) (d), a representation is taken for the purposes of that paragraph to be against the interests of the person who made it if it tends:

(a) to damage the person's reputation; or

(b) to show that the person has committed an offence for which the person has not been convicted; or

(c) to show that the person is liable in an action for damages.

65(8) **[Evidence adduced or tendered by defendant]**

The hearsay rule does not apply to:

(a) evidence of a previous representation adduced by a defendant if the evidence is given by a person who saw, heard or otherwise perceived the representation being made; or

(b) a document tendered as evidence by a defendant so far as it contains a previous representation, or another representation to which it is reasonably necessary to refer in order to understand the representation.

Note: Section 67 imposes notice requirements relating to this subsection.

History

65(9) **[Evidence of another representation about matter]**

If evidence of a previous representation about a matter has been adduced by a defendant and has been admitted, the hearsay rule does not apply to evidence of another representation about the matter that:

(a) is adduced by another party; and

(b) is given by a person who saw, heard or otherwise perceived the other representation being made.

Note: Clause 4 of Part 2 of the Dictionary is about the availability of persons.

SECTION 66 EXCEPTION: CRIMINAL PROCEEDINGS IF MAKER AVAILABLE

66(1) **[Application of section]**

This section applies in a criminal proceeding if a person who made a previous representation is available to give evidence about an asserted fact.

66(2) **[Application of hearsay rule]**

If that person has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given by:

(a) that person; or

(b) a person who saw, heard or otherwise perceived the representation being made;

if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation.

66(3) **[Representation concerning evidence]**

If a representation was made for the purpose of indicating the evidence that the person who made it would be able to give in an Australian or overseas proceeding, subsection (2) does not apply to evidence adduced by the prosecutor of the representation unless the representation concerns the identity of a person, place or thing.

66(4) **[Tendering document containing representation]**

A document containing a representation to which subsection (2) applies must not be tendered before the conclusion of the examination in chief of the person who made the representation, unless the court gives leave.

Note: Clause 4 of Part 2 of the Dictionary is about the availability of persons.

SECTION 67 NOTICE TO BE GIVEN

67(1) **[Requirement of reasonable notice]**

Subsections 63(2) , 64(2) and 65(2) , (3) and (8) do not apply to evidence adduced by a party unless that party has given reasonable notice in writing to each other party of the party's intention to adduce the evidence.

History

67(2) **[Manner of giving notice]**

Notices given under subsection (1) are to be given in accordance with any regulations or rules of court made for the purposes of this section.

67(3) **[Contents of notice]**

The notice must state:

(a) the particular provisions of this Division on which the party intends to rely in arguing that the hearsay rule does not apply to the evidence; and

(b) if subsection 64(2) is such a provision — the grounds, specified in that provision, on which the party intends to rely.

67(4) **[Court direction]**

Despite subsection (1) , if notice has not been given, the court may, on the application of a party, direct that one or more of those subsections is to apply despite the party's failure to give notice.

67(5) **[Conditions of direction]**

The direction:

(a) is subject to such conditions (if any) as the court thinks fit; and

(b) in particular, may provide that, in relation to specified evidence, the subsection or subsections concerned apply with such modifications as the court specifies.

SECTION 68 OBJECTIONS TO TENDER OF HEARSAY EVIDENCE IN CIVIL PROCEEDINGS IF MAKER AVAILABLE

68(1) **[Time for objection]**

In a civil proceeding, if the notice discloses that it is not intended to call the person who made the previous representation concerned because it:

(a) would cause undue expense or undue delay; or

(b) would not be reasonably practicable;

a party may, not later than 21 days after notice has been given, object to the tender of the evidence, or of a specified part of the evidence.

68(2) **[Grounds of objection]**

The objection is to be made by giving to each other party a written notice setting out the grounds on which the objection is made.

History

68(3) **[Determination]**

The court may, on the application of a party, determine the objection at or before the hearing.

68(4) **[Costs where objection unreasonable]**

If the objection is unreasonable, the court may order that, in any event, the party objecting is to bear the costs (ascertained on a solicitor and client basis) incurred by another party:

(a) in relation to the objection; and

(b) in calling the person who made the representation to give evidence.

Note: Subsection (4) differs from subsection 68(4) of the NSW Act.

History

Division 3 — Other exceptions to the hearsay rule

SECTION 69 EXCEPTION: BUSINESS RECORDS

69(1) **[Application of section]**

This section applies to a document that:

(a) either:

(i) is or forms part of the records belonging to or kept by a person, body or organisation in the course of, or for the purposes of, a business; or

(ii) at any time was or formed part of such a record; and

(b) contains a previous representation made or recorded in the document in the course of, or for the purposes of, the business.

69(2) **[Application of hearsay rule]**

The hearsay rule does not apply to the document (so far as it contains the representation) if the representation was made:

(a) by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact; or

(b) on the basis of information directly or indirectly supplied by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact.

69(3) **[Representation in connection with proceeding or investigation]**

Subsection (2) does not apply if the representation:

(a) was prepared or obtained for the purpose of conducting, or for or in contemplation of or in connection with, an Australian or overseas proceeding; or

(b) was made in connection with an investigation relating or leading to a criminal proceeding.

69(4) **[No record in accordance with system]**

If:

(a) the occurrence of an event of a particular kind is in question; and

(b) in the course of a business, a system has been followed of making and keeping a record of the occurrence of all events of that kind;

the hearsay rule does not apply to evidence that tends to prove that there is no record kept, in accordance with that system, of the occurrence of the event.

69(5) **[Personal knowledge]**

For the purposes of this section, a person is taken to have had personal knowledge of a fact if the person's knowledge of the fact was or might reasonably be supposed to have been based on what the person saw, heard or otherwise perceived (other than a previous representation made by a person about the fact).

Note 1: Sections 48 , 49 , 50 , 146 , 147 and subsection 150(1) are relevant to the mode of proof, and authentication, of business records.

Note 2: Section 182 gives this section a wider application in relation to Commonwealth records.

SECTION 70 EXCEPTION: CONTENTS OF TAGS, LABELS AND WRITING

70(1) **[Application of hearsay rule]**

The hearsay rule does not apply to a tag or label attached to, or writing placed on, an object (including a document) if the tag or label or writing may reasonably be supposed to have been so attached or placed:

(a) in the course of a business; and

(b) for the purpose of describing or stating the identity, nature, ownership, destination, origin or weight of the object, or of the contents (if any) of the object.

Note: Section 182 gives this subsection a wider application in relation to Commonwealth records.

70(2) **[Application to Customs or Excise prosecutions]**

This section, and any provision of a law of a State or Territory that permits the use in evidence of such a tag, label or writing as an exception to a rule of law restricting the admissibility or use of hearsay evidence, does not apply to:

(a) a Customs prosecution within the meaning of Part XIV of the *Customs Act 1901* ; or

(b) an Excise prosecution within the meaning of Part XI of the *Excise Act 1901.*

Note 1: Subsection (2) does not appear in section 70 of the NSW Act.

Note 2: Section 5 extends the application of this subsection to proceedings in all Australian courts.

History

SECTION 71 EXCEPTION: TELECOMMUNICATIONS

71 The hearsay rule does not apply to a representation contained in a document recording a message that has been transmitted by electronic mail or by a fax, telegram, lettergram or telex so far as the representation is a representation as to:

(a) the identity of the person from whom or on whose behalf the message was sent; or

(b) the date on which or the time at which the message was sent; or

(c) the message's destination or the identity of the person to whom the message was addressed.

Note 1: Division 3 of Part 4.3 contains presumptions about telexes, lettergrams and telegrams.

Note 2: Section 182 gives this section a wider application in relation to Commonwealth records.

SECTION 72 EXCEPTION: CONTEMPORANEOUS STATEMENTS ABOUT A PERSON'S HEALTH ETC.

72 The hearsay rule does not apply to evidence of a representation made by a person that was a contemporaneous representation about the person's health, feelings, sensations, intention, knowledge or state of mind.

SECTION 73 EXCEPTION: REPUTATION AS TO RELATIONSHIPS AND AGE

73(1) **[Application of hearsay rule]**

The hearsay rule does not apply to evidence of reputation concerning:

(a) whether a person was, at a particular time or at any time, a married person; or

(b) whether a man and a woman cohabiting at a particular time were married to each other at that time; or

(c) a person's age; or

(d) family history or a family relationship.

73(2) **[Application to evidence adduced by defendant]**

In a criminal proceeding, subsection (1) does not apply to evidence adduced by a defendant unless:

(a) it tends to contradict evidence of a kind referred to in subsection (1) that has been admitted; or

(b) the defendant has given reasonable notice in writing to each other party of the defendant's intention to adduce the evidence.

History

73(3) **[Application to evidence adduced by prosecutor]**

In a criminal proceeding, subsection (1) does not apply to evidence adduced by the prosecutor unless it tends to contradict evidence of a kind referred to in subsection (1) that has been admitted.

SECTION 74 EXCEPTION: REPUTATION OF PUBLIC OR GENERAL RIGHTS

74(1) **[Application of hearsay rule]**

The hearsay rule does not apply to evidence of reputation concerning the existence, nature or extent of a public or general right.

74(2) **[Application to evidence adduced by prosecutor]**

In a criminal proceeding, subsection (1) does not apply to evidence adduced by the prosecutor unless it tends to contradict evidence of a kind referred to in subsection (1) that has been admitted.

SECTION 75 EXCEPTION: INTERLOCUTORY PROCEEDINGS

75 In an interlocutory proceeding, the hearsay rule does not apply to evidence if the party who adduces it also adduces evidence of its source.

PART 3.3 — OPINION

SECTION 76 THE OPINION RULE

76(1) **[Admissibility]**

Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.

76(2) **[Applicability]**

Subsection (1) does not apply to evidence of an opinion contained in a certificate or other document given or made under regulations made under an Act other than this Act to the extent to which the regulations provide that the certificate or other document has evidentiary effect.

Note: Specific exceptions to the opinion rule are as follows:

- summaries of voluminous or complex documents (subsection 50(3));
- evidence relevant otherwise than as opinion evidence (section 77);
- lay opinion (section 78);
- expert opinion (section 79);
- admissions (section 81);
- exceptions to the rule excluding evidence of judgments and convictions (subsection 92(3));
- character of and expert opinion about accused persons (sections 110 and 111).

Other provisions of this Act, or of other laws, may operate as further exceptions.

Examples:

(1) P sues D, her doctor, for the negligent performance of a surgical operation. Unless an exception to the opinion rule applies, P's neighbour, W, who had the same operation, cannot give evidence of his opinion that D had not performed the operation as well as his own.

(2) P considers that electrical work that D, an electrician, has done for her is unsatisfactory. Unless an exception to the opinion rule applies, P cannot give evidence of her opinion that D does not have the necessary skills to do electrical work.

History

SECTION 77 EXCEPTION: EVIDENCE RELEVANT OTHERWISE THAN AS OPINION EVIDENCE

77 The opinion rule does not apply to evidence of an opinion that is admitted because it is relevant for a purpose other than proof of the existence of a fact about the existence of which the opinion was expressed.

SECTION 78 EXCEPTION: LAY OPINIONS

78 The opinion rule does not apply to evidence of an opinion expressed by a person if:

(a) the opinion is based on what the person saw, heard or otherwise perceived about a matter or event; and

(b) evidence of the opinion is necessary to obtain an adequate account or understanding of the person's perception of the matter or event.

SECTION 79 EXCEPTION: OPINIONS BASED ON SPECIALISED KNOWLEDGE

79 If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.

SECTION 80 ULTIMATE ISSUE AND COMMON KNOWLEDGE RULES ABOLISHED

80 Evidence of an opinion is not inadmissible only because it is about:

(a) a fact in issue or an ultimate issue; or

(b) a matter of common knowledge.

PART 3.4 — ADMISSIONS

[Note: ***Admission*** is defined in the Dictionary.]

SECTION 81 HEARSAY AND OPINION RULES: EXCEPTION FOR ADMISSIONS AND RELATED REPRESENTATIONS

81(1) **[Evidence of admissions]**

The hearsay rule and the opinion rule do not apply to evidence of an admission.

81(2) **[Evidence of related representations]**

The hearsay rule and the opinion rule do not apply to evidence of a previous representation:

(a) that was made in relation to an admission at the time the admission was made, or shortly before or after that time; and

(b) to which it is reasonably necessary to refer in order to understand the admission.

Note: Specific exclusionary rules relating to admissions are as follows:

- evidence of admissions that is not first-hand (section 82);
- use of admissions against third parties (section 83);
- admissions influenced by violence etc (section 84);
- unreliable admissions of accused persons (section 85);
- records of oral questioning of accused persons (section 86).

Example:

D admits to W, his best friend, that he sexually assaulted V. In D's trial for the sexual assault, the prosecution may lead evidence from W:

(a) that D made the admission to W as proof of the truth of that admission; and

(b) that W formed the opinion that D was sane when he made the admission.

SECTION 82 EXCLUSION OF EVIDENCE OF ADMISSIONS THAT IS NOT FIRST-HAND

82 Section 81 does not prevent the application of the hearsay rule to evidence of an admission unless:

(a) it is given by a person who saw, heard or otherwise perceived the admission being made; or

(b) it is a document in which the admission is made.

History

SECTION 83 EXCLUSION OF EVIDENCE OF ADMISSIONS AS AGAINST THIRD PARTIES

83(1) **[Application of hearsay and opinion rules]**

Section 81 does not prevent the application of the hearsay rule or the opinion rule to evidence of an admission in respect of the case of a third party.

83(2) **[Consent]**

The evidence may be used in respect of the case of a third party if that party consents.

83(3) **[Consent re part of evidence]**

Consent cannot be given in respect of part only of the evidence.

83(4) **[``third party"]**

In this section:

third party means a party to the proceeding concerned, other than the party who:

(a) made the admission; or

(b) adduced the evidence.

SECTION 84 EXCLUSION OF ADMISSIONS INFLUENCED BY VIOLENCE AND CERTAIN OTHER CONDUCT

84(1) **[Admissions excluded]**

Evidence of an admission is not admissible unless the court is satisfied that the admission, and the making of the admission, were not influenced by:

(a) violent, oppressive, inhuman or degrading conduct, whether towards the person who made the admission or towards another person; or

(b) a threat of conduct of that kind.

84(2) **[Application of exclusion]**

Subsection (1) only applies if the party against whom evidence of the admission is adduced has raised in the proceeding an issue about whether the admission or its making were so influenced.

SECTION 85 CRIMINAL PROCEEDINGS: RELIABILITY OF ADMISSIONS BY DEFENDANTS

85(1) **[Application of section]**

This section applies only in a criminal proceeding and only to evidence of an admission made by a defendant:

(a) in the course of official questioning; or

(b) as a result of an act of another person who is capable of influencing the decision whether a prosecution of the defendant should be brought or should be continued.

85(2) **[Likelihood that truth adversely affected]**

Evidence of the admission is not admissible unless the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected.

85(3) **[Matters to be taken into account]**

Without limiting the matters that the court may take into account for the purposes of subsection (2) , it is to take into account:

(a) any relevant condition or characteristic of the person who made the admission, including age, personality and education and any mental, intellectual or physical disability to which the person is or appears to be subject; and

(b) if the admission was made in response to questioning:

(i) the nature of the questions and the manner in which they were put; and

(ii) the nature of any threat, promise or other inducement made to the person questioned.

SECTION 86 EXCLUSION OF RECORDS OF ORAL QUESTIONING

86(1) **[Application of section]**

This section applies only in a criminal proceeding and only if an oral admission was made by a defendant to an investigating official in response to a question put or a representation made by the official.

86(2) **[Acknowledgment that document true record]**

A document prepared by or on behalf of the official is not admissible to prove the contents of the question, representation or response unless the defendant has acknowledged that the document is a true record of the question, representation or response.

86(3) **[Form of acknowledgment]**

The acknowledgment must be made by signing, initialling or otherwise marking the document.

86(4) **[``document"]**

In this section:

``document" does not include:

(a) a sound recording, or a transcript of a sound recording; or

(b) a recording of visual images and sounds, or a transcript of the sounds so recorded.

SECTION 87 ADMISSIONS MADE WITH AUTHORITY

87(1) **[Circumstances where court can admit representation]**

For the purpose of determining whether a previous representation made by a person is also taken to be an admission by a party, the court is to admit the representation if it is reasonably open to find that:

(a) when the representation was made, the person had authority to make statements on behalf of the party in relation to the matter with respect to which the representation was made; or

(b) when the representation was made, the person was an employee of the party, or had authority otherwise to act for the party, and the representation related to a matter within the scope of the person's employment or authority; or

(c) the representation was made by the person in furtherance of a common purpose (whether lawful or not) that the person had with the party or one or more persons including the party.

87(2) **[Application of hearsay rule]**

For the purposes of this section, the hearsay rule does not apply to a previous representation made by a person that tends to prove:

(a) that the person had authority to make statements on behalf of another person in relation to a matter; or

(b) that the person was an employee of another person or had authority otherwise to act for another person; or

(c) the scope of the person's employment or authority.

SECTION 88 PROOF OF ADMISSIONS

88 For the purpose of determining whether evidence of an admission is admissible, the court is to find that a particular person made the admission if it is reasonably open to find that he or she made the admission.

SECTION 89 EVIDENCE OF SILENCE

89(1) **[Unfavourable inference not allowed]**

In a criminal proceeding, an inference unfavourable to a party must not be drawn from evidence that the party or another person failed or refused:

(a) to answer one or more questions; or

(b) to respond to a representation;

put or made to the party or other person in the course of official questioning.

89(2) **[Inadmissible evidence]**

Evidence of that kind is not admissible if it can only be used to draw such an inference.

89(3) **[Where silence in issue]**

Subsection (1) does not prevent use of the evidence to prove that the party or other person failed or refused to answer the question or to respond to the representation if the failure or refusal is a fact in issue in the proceeding.

89(4) **[``inference"]**

In this section:

``inference" includes:

(a) an inference of consciousness of guilt; or

(b) an inference relevant to a party's credibility.

SECTION 90 DISCRETION TO EXCLUDE ADMISSIONS

90 In a criminal proceeding, the court may refuse to admit evidence of an admission, or refuse to admit the evidence to prove a particular fact, if:

(a) the evidence is adduced by the prosecution; and

(b) having regard to the circumstances in which the admission was made, it would be unfair to a defendant to use the evidence.

Note: Part 3.11 contains other exclusionary discretions that are applicable to admissions.

PART 3.5 — EVIDENCE OF JUDGMENTS AND CONVICTIONS

SECTION 91 EXCLUSION OF EVIDENCE OF JUDGMENTS AND CONVICTIONS

91(1) **[Proof of fact in issue]**

Evidence of the decision, or of a finding of fact, in an Australian or overseas proceeding is not admissible to prove the existence of a fact that was in issue in that proceeding.

91(2) **[Use of inadmissible evidence]**

Evidence that, under this Part, is not admissible to prove the existence of a fact may not be used to prove that fact even if it is relevant for another purpose.

Note: Section 178 (Convictions, acquittals and other judicial proceedings) provides for certificate evidence of decisions.

SECTION 92 EXCEPTIONS

92(1) **[Evidence of grant of probate, etc]**

Subsection 91(1) does not prevent the admission or use of evidence of the grant of probate, letters of administration or a similar order of a court to prove:

(a) the death, or date of death, of a person; or

(b) the due execution of a testamentary document.

92(2) **[Evidence of conviction]**

In a civil proceeding, subsection 91(1) does not prevent the admission or use of evidence that a party, or a person through or under whom a party claims, has been convicted of an offence, not being a conviction:

(a) in respect of which a review or appeal (however described) has been instituted but not finally determined; or

(b) that has been quashed or set aside; or

(c) in respect of which a pardon has been given.

92(3) **[Application of hearsay and opinion rules]**

The hearsay rule and the opinion rule do not apply to evidence of a kind referred to in this section.

SECTION 93 SAVINGS

93 This Part does not affect the operation of:

(a) a law that relates to the admissibility or effect of evidence of a conviction tendered in a proceeding (including a criminal proceeding) for defamation; or

(b) a judgment *in rem* ; or

(c) the law relating to *res judicata* or issue estoppel.

PART 3.6 — TENDENCY AND COINCIDENCE

SECTION 94 APPLICATION

94(1) **[Evidence of credibility]**

This Part does not apply to evidence that relates only to the credibility of a witness.

94(2) **[Proceedings for bail or sentencing]**

This Part does not apply so far as a proceeding relates to bail or sentencing.

94(3) **[Tendency, etc, a fact in issue]**

This Part does not apply to evidence of:

(a) the character, reputation or conduct of a person; or

(b) a tendency that a person has or had;

if that character, reputation, conduct or tendency is a fact in issue.

SECTION 95 USE OF EVIDENCE FOR OTHER PURPOSES

95(1) **[Inadmissible evidence]**

Evidence that under this Part is not admissible to prove a particular matter must not be used to prove that matter even if it is relevant for another purpose.

95(2) **[Evidence that cannot be used]**

Evidence that under this Part cannot be used against a party to prove a particular matter must not be used against the party to prove that matter even if it is relevant for another purpose.

SECTION 96 FAILURE TO ACT

96 A reference in this Part to doing an act includes a reference to failing to do that act.

SECTION 97 THE TENDENCY RULE

97(1) **[Rule]**

Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind, if:

(a) the party adducing the evidence has not given reasonable notice in writing to each other party of the party's intention to adduce the evidence; or

(b) the court thinks that the evidence would not, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

History
97(2) **[Exceptions]**

Paragraph (1) (a) does not apply if:

(a) the evidence is adduced in accordance with any directions made by the court under section 100 ; or

(b) the evidence is adduced to explain or contradict tendency evidence adduced by another party.

Note: The tendency rule is subject to specific exceptions concerning character of and expert opinion about accused persons (sections 110 and 111). Other provisions of this Act, or of other laws, may operate as further exceptions.

SECTION 98 THE COINCIDENCE RULE

98(1) **[Rule]**

Evidence that 2 or more related events occurred is not admissible to prove that, because of the improbability of the events occurring coincidentally, a person did a particular act or had a particular state of mind if:

(a) the party adducing the evidence has not given reasonable notice in writing to each other party of the party's intention to adduce the evidence; or

(b) the court thinks that the evidence would not, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

History
98(2) **[Related events]**

For the purposes of subsection (1) , 2 or more events are taken to be related events if and only if:

(a) they are substantially and relevantly similar; and

(b) the circumstances in which they occurred are substantially similar.

98(3) **[Exceptions]**

Paragraph (1) (a) does not apply if:

(a) the evidence is adduced in accordance with any directions made by the court under section 100 ; or

(b) the evidence is adduced to explain or contradict coincidence evidence adduced by another party.

Note: Other provisions of this Act, or of other laws, may operate as exceptions to the coincidence rule.

SECTION 99 REQUIREMENTS FOR NOTICES

99 Notices given under section 97 and 98 are to be given in accordance with any regulations or rules of court made for the purposes of this section.

SECTION 100 COURT MAY DISPENSE WITH NOTICE REQUIREMENTS

100(1) **[Direction concerning application of tendency rule]**

The court may, on the application of a party, direct that the tendency rule is not to apply to particular tendency evidence despite the party's failure to give notice under section 97 .

100(2) **[Direction concerning application of coincidence rule]**

The court may, on the application of a party, direct that the coincidence rule is not to apply to particular coincidence evidence despite the party's failure to give notice under section 98 .

100(3) **[Time of application]**

The application may be made either before or after the time by which the party would, apart from this section, be required to give, or to have given, the notice.

100(4) **[Notice of application]**

In a civil proceeding, the party's application may be made without notice of it having been given to one or more of the other parties.

100(5) **[Conditions and time of direction]**

The direction:

(a) is subject to such conditions (if any) as the court thinks fit; and

(b) may be given either at or before the hearing.

100(6) **[Examples of conditions that may be included]**

Without limiting the court's power to impose conditions under this section, those conditions may include one or more of the following:

(a) a condition that the party give notice of its intention to adduce the evidence to a specified party, or to each other party other than a specified party;

(b) a condition that the party give such notice only in respect of specified tendency evidence, or all tendency evidence that the party intends to adduce other than specified tendency evidence;

(c) a condition that the party give such notice only in respect of specified coincidence evidence, or all coincidence evidence that the party intends to adduce other than specified coincidence evidence.

SECTION 101 FURTHER RESTRICTIONS ON TENDENCY EVIDENCE AND COINCIDENCE EVIDENCE ADDUCED BY PROSECUTION

101(1) **[Application to criminal proceedings]**

This section only applies in a criminal proceeding and so applies in addition to sections 97 and 98 .

101(2) **[Probative value and prejudicial effect]**

Tendency evidence about a defendant, or coincidence evidence about a defendant, that is adduced by the prosecution cannot be used against the defendant unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant.

101(3) **[Exception: tendency evidence]**

This section does not apply to tendency evidence that the prosecution adduces to explain or contradict tendency evidence adduced by the defendant.

101(4) **[Exception: coincidence evidence]**

This section does not apply to coincidence evidence that the prosecution adduces to explain or contradict coincidence evidence adduced by the defendant.

PART 3.7 — CREDIBILITY

SECTION 102 THE CREDIBILITY RULE

102 Evidence that is relevant only to a witness's credibility is not admissible.

Note 1: Specific exceptions to the credibility rule are as follows:

- evidence adduced in cross-examination (sections 103 and 104);
- evidence in response to unsworn statements (section 105);
- evidence in rebuttal of denials (section 106);
- evidence to re-establish credibility (section 108);
- character of accused persons (section 110).

Other provisions of this Act, or of other laws, may operate as further exceptions.

Note 2: Section 108A makes provision as to the admission of evidence that is relevant only to the credibility of a person who has made a previous representation.

History

SECTION 103 EXCEPTION: CROSS-EXAMINATION AS TO CREDIBILITY

103(1) **[Substantial probative value]**

The credibility rule does not apply to evidence adduced in cross-examination of a witness if the evidence has substantial probative value.

103(2) **[Matters to be taken into account]**

Without limiting the matters to which the court may have regard in deciding whether the evidence has substantial probative value, it is to have regard to:

(a) whether the evidence tends to prove that the witness knowingly or recklessly made a false representation when the witness was under an obligation to tell the truth; and

(b) the period that has elapsed since the acts or events to which the evidence relates were done or occurred.

SECTION 104 FURTHER PROTECTIONS: CROSS-EXAMINATION OF ACCUSED

104(1) **[Application to criminal proceedings]**

This section applies only in a criminal proceeding and so applies in addition to section 103 .

104(2) **[Leave by court]**

A defendant must not be cross-examined about a matter that is relevant only because it is relevant to the defendant's credibility, unless the court gives leave.

104(3) **[Circumstances where leave not required]**

Despite subsection (2) , leave is not required for cross-examination by the prosecutor about whether the defendant:

(a) is biased or has a motive to be untruthful; or

(b) is, or was, unable to be aware of or recall matters to which his or her evidence relates; or

(c) has made a prior inconsistent statement.

104(4) **[Rule governing giving of leave]**

Leave must not be given for cross-examination by the prosecutor about any matter that is relevant only because it is relevant to the defendant's credibility unless:

(a) evidence has been adduced by the defendant that tends to prove that the defendant is, either generally or in a particular respect, a person of good character; or

(b) evidence adduced by the defendant has been admitted that tends to prove that a witness called by the prosecutor has a tendency to be untruthful, and that is relevant solely or mainly to the witness's credibility.

104(5) **[``Evidence"]**

A reference in paragraph (4) (b) to evidence does not include a reference to evidence of conduct in relation to:

(a) the events in relation to which the defendant is being prosecuted; or

(b) the investigation of the offence for which the defendant is being prosecuted.

104(6) **[Cross-examination by another defendant]**

Leave is not to be given for cross-examination by another defendant unless:

(a) the evidence that the defendant to be cross-examined has given includes evidence adverse to the defendant seeking leave to cross-examine; and

(b) that evidence has been admitted.

SECTION 105 FURTHER PROTECTIONS: DEFENDANTS MAKING UNSWORN STATEMENTS

105(1) **[Application of section]**

This section applies only in a criminal proceeding in which a defendant has, under a law of a State or Territory, made an unsworn statement.

105(2) **[When evidence as to credibility may be adduced]**

Evidence that is relevant only to the defendant's credibility may be adduced from a person other than the defendant if:

(a) the evidence has substantial probative value; and

(b) subsection (4) and (5) applies.

105(3) **[Matters affecting substantial probative value]**

Without limiting the matters to which the court may have regard in deciding whether the evidence has substantial probative value, it is to have regard to:

(a) whether the evidence tends to prove that the defendant knowingly or recklessly made a false representation when the defendant was under an obligation to tell the truth; and

(b) the period that has elapsed since the acts or events to which the evidence relates were done or occurred.

105(4) **[Evidence relevant to bias, etc]**

The evidence may be adduced if it is relevant to whether the defendant:

(a) is biased or has a motive to be untruthful; or

(b) is, or was, unable to be aware of or recall matters to which his or her statement relates; or

(c) has made a prior inconsistent statement.

105(5) **[Suggestion by defendant concerning character, etc]**

The evidence may, if the court gives leave, be adduced if the defendant has:

(a) suggested in his or her statement that he or she is of good character, either generally or in a particular respect; or

(b) suggested in his or her statement that a witness called by the prosecutor has a tendency to be untruthful, and the suggestion is relevant solely or mainly to the witness's credibility.

105(6) **[``Suggestion by defendant"]**

A reference in paragraph (5) (b) to a suggestion by the defendant does not include a reference to a suggestion about conduct relating to:

(a) the events in relation to which the defendant is being prosecuted; or

(b) the investigation of the offence for which the defendant is being prosecuted.

Note: The NSW Act has no equivalent provision for section 105 .

SECTION 106 EXCEPTION: REBUTTING DENIALS BY OTHER EVIDENCE

106 The credibility rule does not apply to evidence that tends to prove that a witness:

(a) is biased or has a motive for being untruthful; or

(b) has been convicted of an offence, including an offence against the law of a foreign country; or

(c) has made a prior inconsistent statement; or

(d) is, or was, unable to be aware of matters to which his or her evidence relates; or

(e) has knowingly or recklessly made a false representation while under an obligation, imposed by or under an Australian law or a law of a foreign country, to tell the truth;

if the evidence is adduced otherwise than from the witness and the witness has denied the substance of the evidence.

SECTION 107 EXCEPTION: APPLICATION OF CERTAIN PROVISIONS TO MAKERS OF REPRESENTATIONS

107 (Repealed by No 34 of 1997, s 3 and Sch 6.)

SECTION 108 EXCEPTION: RE-ESTABLISHING CREDIBILITY

108(1) **[Re-examination]**

The credibility rule does not apply to evidence adduced in re-examination of a witness.

108(2) **[Explanation or contradiction of evidence adduced]**

The credibility rule does not apply to evidence that explains or contradicts evidence adduced as referred to in section 105 , if the court gives leave to adduce that evidence.

History

108(3) **[Evidence of prior inconsistent statement]**

The credibility rule does not apply to evidence of a prior consistent statement of a witness if:

(a) evidence of a prior inconsistent statement of the witness has been admitted; or

(b) it is or will be suggested (either expressly or by implication) that evidence given by the witness has been fabricated or reconstructed (whether deliberately or otherwise) or is the result of a suggestion;

and the court gives leave to adduce the evidence of the prior consistent statement.

SECTION 108A ADMISSIBILITY OF EVIDENCE OF CREDIBILITY OF PERSON WHO HAS MADE A PREVIOUS REPRESENTATION

108A(1) **[Admissibility of evidence of credibility of person]**

If:

(a) because of a provision of Part 3.2 , the hearsay rule does not apply to evidence of a previous representation; and

(b) evidence of the representation has been admitted; and

(c) the person who made the representation has not been called, and will not be called, to give evidence in the proceeding;

evidence that is relevant only to the credibility of the person who made the representation is not admissible unless the evidence has substantial probative value.

108A(2) **[Whether evidence has substantial probative value]**

Without limiting the matters to which the court may have regard in deciding whether the evidence has substantial probative value, it is to have regard to:

(a) whether the evidence tends to prove that the person who made the representation knowingly or recklessly made a false representation when the person was under an obligation to tell the truth; and

(b) the period that elapsed between the doing of the acts or the occurrence of the events to which the representation related and the making of the representation.

History

PART 3.8 — CHARACTER

SECTION 109 APPLICATION

109 This Part applies only in a criminal proceeding.

SECTION 110 EVIDENCE ABOUT CHARACTER OF ACCUSED PERSONS

110(1) **[Evidence that defendant of good character]**

The hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced by a defendant to prove (directly or by implication) that the defendant is, either generally or in a particular respect, a person of good character.

110(2) **[Evidence that defendant not generally of good character]**

If evidence adduced to prove (directly or by implication) that a defendant is generally a person of good character has been admitted, the hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced to prove (directly or by implication) that the defendant is not generally a person of good character.

110(3) **[Character in a particular respect]**

If evidence adduced to prove (directly or by implication) that a defendant is a person of good character in a particular respect has been admitted, the hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced to prove (directly or by implication) that the defendant is not a person of good character in that respect.

110(4) **[Unsworn statement]**

A reference in this section to adducing evidence to prove a matter includes a reference to a defendant making an unsworn statement, under a law of a State or Territory, in which that matter is raised.

Note: Subsection (4) is not included in section 110 of the NSW Act.

SECTION 111 EVIDENCE ABOUT CHARACTER OF CO-ACCUSED

111(1) **[Opinion of person with specialised knowledge]**

The hearsay rule and the tendency rule do not apply to evidence of a defendant's character if:

(a) the evidence is evidence of an opinion about the defendant adduced by another defendant; and

(b) the person whose opinion it is has specialised knowledge based on the person's training, study or experience; and

(c) the opinion is wholly or substantially based on that knowledge.

111(2) **[Evidence to prove character evidence should not be accepted]**

If such evidence has been admitted, the hearsay rule, the opinion rule and the tendency rule do not apply to evidence adduced to prove that that evidence should not be accepted.

SECTION 112 LEAVE REQUIRED TO CROSS-EXAMINE ABOUT CHARACTER OF ACCUSED OR CO-ACCUSED

112 A defendant is not to be cross-examined about matters arising out of evidence of a kind referred to in this Part unless the court gives leave.