

Resolution outside the legal system

- 3.1 This Chapter looks at the legislative scheme for diverting separating couples to family dispute resolution before an application for parenting orders can be filed in court. This Chapter considers:
- The requirement to attend dispute resolution and the exceptions to that requirement.
 - The newly defined roles of family counsellors, family dispute resolution practitioners and family and child specialists.
 - Approval regimes and quality control mechanisms for counselling and family dispute resolution practitioners.
 - Parenting plans and their development outside of the legal system.

Resolution of disputes before entering the legal system

The requirement to attend dispute resolution

- 3.2 *Every picture tells a story* (the FCAC report) recommended change to the family law system in order to encourage separating couples, wherever possible, to resolve disputes without recourse to the court system. The FCAC report recommended:

... that the *Family Law Act 1975* be amended to require separating parents to undertake mediation or other forms of dispute resolution before they are able to make an application

to a court/tribunal for a parenting order, except when issues of entrenched conflict, family violence, substance abuse or serious child abuse, including sexual abuse, require direct access to courts/tribunal.¹

- 3.3 The role of the courts in parenting matters, according to the FCAC report, would therefore be limited to the determination of the 'hard cases' involving entrenched conflict, family violence, abuse, substance abuse and also the enforcement of orders.²
- 3.4 The government agreed to this recommendation, although it altered some of the exceptions to the requirement. In its response the government stated that it would introduce amendments to the Act to require parenting disputes to go to an accredited dispute resolution practitioner before going to court, with some exceptions. The government did not include the FCAC report's recommendations of exemptions in cases involving entrenched conflict or substance abuse.³
- 3.5 The government proposed that the dispute resolution services necessary to meet the new requirement will be provided by the new Family Relationship Centres and other approved organisations and practitioners in existing family services or in private practice. Accreditation standards will be developed under the Act.⁴
- 3.6 The draft Bill proposes a court must not hear an application for an order under Part VII in relation to a child unless the applicant files in court a certificate that the applicant has attended family dispute resolution with the other party or parties to the proceedings in relation to the issues that the orders would deal with.⁵ The object of the proposed section 60I is expressly stated:

...to ensure that all persons who have a dispute about matters that may be dealt with by a ... Part VII ... order attempt to

1 FCAC report, pp.xxiii, 63 (recommendation 9).

2 FCAC report, , pp.xxv, 105 (Recommendation 17): Note the report also recommended that the government establish a Families Tribunal, however this was not agreed to in the government's response. Under that proposal the role of the courts would also have been to review decisions of that tribunal.

3 Government response to the FCAC report, p.9.

4 Government response to the FCAC report, p.9.

5 Proposed subsection 60I(7).

resolve that dispute by family dispute resolution before the Part VII order is applied for.⁶

3.7 The Explanatory Statement notes:

This change will assist people to resolve family relationship issues outside the court system, which will have the benefits of providing flexible solutions, minimising conflict and avoiding costly court procedures.⁷

Community response to compulsory dispute resolution

3.8 The government's approach to compulsory dispute resolution was stated by the Attorney-General's Department:

The most important change is the requirement for compulsory attendance at family dispute resolution which will ensure that more parents attempt this process prior to entering the legal system. While it is the case that under the current Family Law Rules there is a requirement to attempt alternative dispute resolution prior to filing an application in the court the government's expansion of services will be entirely independent of the court and its processes. The intention is that attendance at family dispute resolution should be seen not as part of a court process and done without the need for lawyers. There will be no need to register consent orders to reach agreement with the greater reliance [placed] on parenting plans. It will also ensure that parents have information about the range of services and options that are available to them, so that entrenched conflict is avoided in many cases.⁸

3.9 In the evidence before the Committee, there was considerable support for the encouragement of separating couples to reach agreement on parenting outside of the court system.⁹ The new process is seen as a simplification of the existing processes.¹⁰

6 Proposed subsection 60I(1)

7 Explanatory Statement to the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005, p.2. The Statement can be accessed at: <http://www.aph.gov.au/house/committee/laca/familylaw/explanatorymemorandum.pdf>.

8 Attorney-General's Department, *Submission 46*, p.8.

9 See for example: Relationships Australia, *Submission 37*, p.5; Family Law Council, *Submission 33*, p.2; Department of Family and Community Services, *Submission 59*, p.3.

10 See for example, Families Australia, *Submission 52*, p.2.

- 3.10 However, some witnesses raised concerns with compulsory dispute resolution. First, a concern was that a negotiation process will not yield workable solutions, particularly as the point in time in which the negotiation is to occur is at the end of a relationship when emotions are running high.

The determination to keep lawyers and courts out of the negotiating process may not be palatable to all. The separation time is traumatic; how can people be expected to make sound decisions, even with a counsellor present, decisions that may well be regretted later?¹¹

- 3.11 Another concern was that any power imbalance that existed during the relationship will not be addressed or corrected in the dispute resolution process. The weaker party in a relationship may continue to be subjected to undue influence from the stronger party post-separation, particularly during the dispute resolution process, resulting in outcomes that are not truly workable.

For instance, if a relationship has been one-sided before the break up, the 'weaker' party is hardly going to become so empowered through a mediator that he/she will not continue to be subservient to the dominant one's wishes.¹²

- 3.12 One witness asserted that forced mediation has a history of disadvantaging women.¹³
- 3.13 The government envisages that lawyers will not be present in the compulsory dispute resolution process. Some witnesses expressed concern about this provision, stating that lawyers should be present at mediations, or at least that access to legal advice prior to attendance at mediation may, in some situations, be beneficial to reaching a fully informed decision through a mediation process.¹⁴ This was raised in particular to address the power imbalance that results from the fear of harm in cases of family violence and child abuse.
- 3.14 Certainly compulsory dispute resolution was opposed by some groups on the basis that the compulsory nature of the dispute

11 Country Women's Association of New South Wales, *Submission 26*, p.3.

12 Country Women's Association of New South Wales, *Submission 26*, p.3.

13 National Abuse Free Contact Campaign, *Submission 8*, p.4.

14 See for example National Network of Women's Legal Services, *Submission 23*, appendix para.22.

resolution may compromise the benefits that it might otherwise produce.¹⁵

- 3.15 Relationships Australia gave evidence that the practitioners should have 'high levels of qualifications, skills and training in order to deal with the complex presenting issues of domestic violence, mental illness and high levels of conflict.'¹⁶

Conclusion

- 3.16 The Committee is of the view that in order to overcome these concerns, the family dispute resolution practitioners will need to be highly skilled and experienced practitioners.
- 3.17 The Committee considers that the requirement to attend dispute resolution before applying to court for parenting orders implements the government's policy to encourage resolution of parenting matters outside of the court system. Many of the concerns raised by witnesses will be addressed by the exemptions to the dispute resolution process. The Committee considers that the success of the compulsory dispute resolution provisions will depend largely on the successful implementation, staffing and resourcing of the new Family Relationship Centres and the maintenance of resources for existing family services. There is further discussion of the issues surrounding the implementation of Family Relationship Centres in Chapter 8 below.

The operation of the exceptions to the requirement to attend dispute resolution

- 3.18 There are a number of exceptions to the requirement to attend dispute resolution.¹⁷ The requirement will not apply to people who seek consent orders or orders in response to another application under Part VII relating to children. There will also be exceptions where:
- There are 'reasonable grounds to believe' that there has been (or is a risk of) family violence or abuse;
 - In a contravention application there has been a serious disregard of recent court orders;

15 See for example National Network of Women's Legal Services, *Submission 23*, p.7.

16 Relationships Australia, *Submission 37*, p. 5.

17 See proposed section 60I(8).

- The application is made in circumstances of urgency; or
- Where the party is unable to participate effectively in family dispute resolution.

3.19 The Attorney-General's Department envisages that where an exception is claimed, a judicial officer such as a registrar exercising delegated judicial power will assess whether the reliance on the exception is appropriate, prior to a judge hearing the substance of the matter. The applicant will be required to provide some evidence in support of their claim for an exception, particularly where the court is required to be satisfied on reasonable grounds that there is family violence or child abuse.¹⁸

3.20 During consultations prior to the release of the Exposure Draft there was a proposal for the provision to contain an award of costs against people who wrongly sought to avoid the dispute resolution provisions. This was abandoned by the government as it was seen to provide a disincentive to persons genuinely seeking to fall within one of the exceptions.¹⁹

Exception in cases involving family violence or child abuse

3.21 The Attorney-General's Department submitted that the rationale for the exemption to the requirement to attend dispute resolution in cases involving family violence and child abuse was to prevent the compelling of people to attend dispute resolution in inappropriate circumstances. The draft Bill reflects that family violence and abuse have an impact on the capacity of the parties to participate effectively in a dispute resolution process. For further discussion of issues arising in cases of family violence and abuse and the use of those terms see Chapter 2 above.

3.22 However, the Attorney-General's Department stated that it is necessary to establish a significant threshold for satisfying the court that there is family violence or abuse in order to deter parties from making false allegations for the purpose of avoiding attendance at dispute resolution.²⁰

18 Attorney-General's Department, *Submission 46.1*, p.10.

19 Attorney-General's Department, *Submission 46.1*, p.9.

20 Attorney-General's Department, *Submission 46.1*, pp.9,12.

- 3.23 It is clear that the Exposure Draft seeks to strike a balance between protecting victims of family violence and abuse by creating the exception, but also providing some disincentive to knowingly making false allegations of family violence and abuse by requiring that the court be objectively satisfied *on reasonable grounds* that there has been such family violence or abuse.
- 3.24 A number of witnesses raised concerns about the exception to compulsory attendance at family dispute resolution in cases involving family violence or child abuse. The concern was that the protection that is intended to be afforded to victims of family violence and abuse will not be borne out in practice; that for people in situations of family violence and abuse the court processes would be harder to navigate; there would be increased risk of delay in court process and a resulting pressure not to disclose concerns about family violence or abuse.²¹

The provision and the associated section 60J appear to create significant obstacles for a potential applicant to negotiate to issue a court application where they allege there is violence or abuse. On their face, they leave scope for requiring multiple court hearings to determine whether cases should be allowed to proceed. This makes the court process harder to navigate for applicants who fear violence or abuse and risks causing significant delays that may endanger the potential applicant or their child.²²

- 3.25 The Shared Parenting Council of Australia expressed the opposing concern that the provision would be used by parties to avoid mediation or dispute resolution in cases where it is not necessary for the court to be involved. They stated:

All that we are trying to do is to exclude the possibility that a separated partner will use this [provision] as an excuse on a very trivial matter, on a very trivial and passing occurrence [of violence], to avoid the intervention of counselling and mediation.²³

21 See for example National Network of Women's Legal Services, *Submission 23*, p.8.

22 Ms Fletcher, National Network of Women's Legal Services, *Proof transcript of evidence*, 21 July 2005, p.49.

23 Mr Green QC, *Proof transcript of evidence*, 25 July 2005 p.36; see also Festival of Light, *Submission 69*, p.5 where they assert that an accused parent is entitled to a presumption of innocence and should only be penalised if an accusation is established by an appropriate standard of proof.

- 3.26 The Attorney-General's Department submitted that there are a number of disincentives in the Bill to making false allegations; first, where it is determined that false allegations have been made, the court will have the power to award costs; and secondly, the provision in the proposed subsection 60I(9), which allows the court to order parties to attend dispute resolution, notwithstanding that they fall within an exception in subsection 60I(8).²⁴
- 3.27 The Committee notes that although this exception is available, people in violent and abusive situations can still opt to attend dispute resolution if they wish. Family Services Australia gave evidence to the Committee that existing services currently deal with very high conflict cases:
- ...currently we see people every day who are in very high conflict and we make calls about whether they need to be seen in separate rooms in separate parts of the building or whatever, but we will still do a mediation by shuttle if necessary. There are some cases where we would not do it, and I need to be clear about that as well.²⁵

'Reasonable grounds'

- 3.28 There was considerable debate on the test that the draft Bill creates, that the court be *satisfied on reasonable grounds* that there is, or there is a risk of, family violence or child abuse.
- 3.29 The Attorney-General's Department gave evidence about the rationale behind the proposed section. To the maximum extent possible, the government wishes to ensure that disputes are resolved outside the courts and in order to achieve this objective the government has made the threshold to actually get to court quite high. The department acknowledged the difficulty in striking the balance between protecting victims of family violence and abuse on one hand, and encouraging as many people as possible to use alternative dispute resolution processes on the other.²⁶
- 3.30 It is unclear, from reading the draft Bill, exactly how the court will deal with cases of family violence and abuse that come before it. In particular it is unclear at which point in the proceeding the

24 Attorney-General's Department, *Submission 46.1*, p.9.

25 Ms Hannan, *Proof transcript of evidence*, 25 July 2005 p.70.

26 Mr Duggan, *Proof transcript of evidence*, 26 July 2005, pp.67, 69.

availability of the exception would be determined, the amount of evidence required to satisfy the court on reasonable grounds and even whether a judge or a registrar would make such a decision. These issues also arise in Chapter 2.

Is reasonable grounds the appropriate test?

- 3.31 As stated previously, the legal authority for what constitutes 'reasonable grounds' is found in *George v Rockett*²⁷ (see Chapter 2 paragraph 2.92 above).
- 3.32 Some witnesses raised concerns that 'reasonable grounds' creates an inappropriate test in the context of the exception to compulsory dispute resolution. There was concern that it is difficult to prove allegations of violence and abuse.²⁸ The application of such a test was seen as too great an onus to place on persons wishing to seek an exemption, particularly in light of the evidentiary problems associated with family violence and child abuse, which generally occurs behind closed doors and without independent witnesses.²⁹
- 3.33 The National Abuse Free Contact Campaign expressed the concern that insofar as the threshold discourages women from disclosing abuse, it puts children's safety in jeopardy.³⁰
- 3.34 The NNWLS gave evidence that:
- A party should be able to elect to use the court system if they disclose violence or abuse. A sworn statement could be given if necessary.³¹
- 3.35 The NNWLS submitted that proposed section 60I be amended to allow for a family dispute resolution practitioner to certify that a dispute is not suitable for family dispute resolution due to family violence or other issues.³² The Victorian Aboriginal Legal Service Inc

27 (1990) 170 CLR 104; (1990) 93 ALR 483.

28 See for example Dr Lesley Laing, *Submission 25*, p.2; No To Violence, *Submission 11*, p.2; National Network of Women's Legal Services, *Submission 23*, p.7.

29 National Network of Women's Legal Services, *Submission 23*, pp.6-7.

30 Ms Hume, *Proof transcript of evidence*, 20 July 2005, p.57.

31 Ms Fletcher, *Proof transcript of evidence*, 21 July 2005, p.49; See similar submissions from the Manly-Warringah Women's Resource Centre Ltd, *Submission 43*, p.4; National Abuse Free Contact Campaign, *Submission 8*, p.4; National Council for Single Mothers and their Children Inc, *Submission 20*, p.4; New South Wales Women's Refuge Resource Centre, *Submission 22*, p.6.

32 National Network of Women's Legal Services, *Submission 23*, p.8; Ms Fletcher, *Proof transcript of evidence*, 21 July 2005, p.49; see also Women's Legal Service of South Australia Inc, *Submission 61*, p.8 and Professor Belinda Fehlberg, *Submission 29*, p.4.

contended that staff of a refuge that had involvement with a person should be able to provide sufficient evidence of violence to satisfy the court that it is not possible for that person to go to counselling.³³

- 3.36 The NNWLS submitted that an alternative dispute resolution path be established specifically for cases of violence, including the provision of legal advice and representation, which can assist to redress the power imbalance between parties.³⁴ Other witnesses supported the use of legal advice and representation as a useful means of addressing power imbalances in relationships in a mediation context.³⁵
- 3.37 On the other hand, Men's Confraternity submitted that the court must be satisfied that there are proven and substantiated grounds.³⁶ Although the Shared Parenting Council of Australia did not make the point specifically in relation to the exception to dispute resolution, it recommended that family violence in the Act should be changed to serious family violence.³⁷
- 3.38 It is important to consider the consequences of a finding at this stage. The impact of a finding that there are reasonable grounds in proposed section 60I may operate to negate the presumption of equal shared parental responsibility in proposed section 61DA when the court is making its final determination. As discussed in Chapter 2 paragraphs 2.81 – 2.83 above, the reasonable grounds test also applies to the application of the presumption of equal shared parental responsibility. That is, a finding at an interim hearing about proposed section 60I is likely to have a considerable effect on the determination of rights in the substantive proceedings.

The means to establish reasonable grounds

- 3.39 There is concern about what will be required to meet the test of 'reasonable grounds' in the exception to attendance at dispute resolution on the basis of family violence or child abuse.
- 3.40 The Family Court submitted that any proposed paragraph 60I(8)(b) determination relating to abuse or family violence would require a decision to be made. Although a sworn statement may ordinarily

33 Mr Inglis, *Proof transcript of evidence*, 20 July 2005, p.50.

34 Ms Fletcher, *Proof transcript of evidence*, 21 July 2005, p.54.

35 See for example Ms Hamey, Women's Legal Services New South Wales, *Proof transcript of evidence*, 21 July 2005, p.71.

36 Men's Confraternity, *Submission 40*, p.5.

37 Shared Parenting Council of Australia, *Submission 70*, p.9.

provide a reasonable basis for belief, it is unlikely to be enough in most family violence and abuse cases where an early finding is likely to have ramifications on the presumption of equal shared parental responsibility:

...most respondents (the Court assumes that the violence/abuse category will be the largest) will stand to lose the benefit of the presumption of joint parental responsibility under s 61DA – certainly at an interim hearing – if they admit that the applicant’s allegations of violence and/or abuse provide a reasonable basis...³⁸

3.41 The Family Issues Committee of the Law Society of New South Wales submitted:

Allegation [*sic*] of abuse or risk of abuse are almost always contested, and usually require significant evidence to be placed before a court and usually require some type of report by an independent expert. The Family Issues Committee questions whether there will be a two-step process with a consequence of more court appearances and possible costs, that is, one hearing so that the court can be satisfied about the abuse/family violence grounds and a subsequent hearing of the substantive application.³⁹

3.42 On the basis of *George v Rockett* it seems certain that evidence will be required in order to satisfy the court. The Family Court stated that in order to establish ‘reasonable grounds’ some evidence will need to be filed, but the extent of that evidence would need to be determined. The Family Court told the Committee that in most cases where violence or child abuse is currently alleged, by the time the case is heard by the court there are four or five sources of evidence that support such an allegation.⁴⁰

3.43 In cases where the allegation is disputed, a hearing of some sort would also be required.⁴¹ The exact process is unclear, but it is certain that the court would need to hold a hearing, possibly an extra, interim hearing before a judge in order to determine whether reasonable grounds exist. The Family Court stated:

38 Family Court of Australia, *Submission 53*, p.10.

39 Law Society of New South Wales, *Submission 81*, p.2.

40 Chief Justice Bryant, *Proof transcript of evidence*, 26 July 2005, p.25.

41 Family Court of Australia, *Submission 53*, p.9.

We thought that because of the way it was drafted it really requires some sort of judicial determination; that you could not leave it to a registrar to decide when someone files the document. There would be some cases where it would not require a separate hearing of any kind. If there were an interim application, for example, you would deal with it as a threshold part of the interim application. But not every case has an interim application, and I think that because of the way the legislation is drafted you would need some sort of interim determination, in many cases as an extra step.⁴²

3.44 The Family Issues Committee of the Law Society of New South Wales submitted:

...it is likely that the provisions of section 60I are likely to add complexity and expense to proceedings and at the same time leave gaps in the protection of children.⁴³

3.45 National Legal Aid stated:

Whatever approach is taken it is important to avoid a major contested hearing up front in order to settle the jurisdictional issue, especially as the substantive hearing is almost certainly going to involve the same issues.⁴⁴

3.46 The Committee is concerned that the provision as it is currently drafted could create a new species of litigation, with the associated imposition on judicial time and resources. The creation of new hearings would, far from simplifying the process, more likely create delays, and provide a disincentive for people without funding to claim the exemption. The disincentive may then result in compelling some parties to attend dispute resolution, where they have a genuine need to avoid such a process with a violent or abusive ex partner.

3.47 The Committee notes the Family Court's evidence in relation to the hearing of abuse allegations at final hearings:

At the final hearing of abuse allegations you get an opportunity to have all of the evidence tested and then you have to make decisions about whether it is or is not

42 Chief Justice Bryant, *Proof transcript of evidence*, 26 July 2005 p.23.

43 Law Society of New South Wales, *Submission 81*, p.4.

44 National Legal Aid, *Submission 24*, p.3.

happening. There are occasions on which the court finds that the allegations are completely untrue and without merit.⁴⁵

- 3.48 The Committee is concerned that interim hearings will be created, particularly where final hearings would be the appropriate place to make any determinations or findings of such a serious nature.
- 3.49 The Committee is mindful of the balance being sought by the government in proposed paragraph 60I(8)(b), but is concerned that the application of the provision will create an unnecessarily high burden on applicants in violent or abusive domestic situations, particularly as the provision is procedural in nature.

Alternative model

- 3.50 The Committee poses an alternative model for the operation of the exception. The Committee proposes that an exception to attendance at compulsory dispute resolution on the basis of family violence or abuse be available to an applicant upon the provision by the applicant of a sworn statement that the dispute is not suitable for family dispute resolution on the basis of family violence or abuse. The Act will expressly impose penalties where the court is satisfied that there are reasonable grounds that the applicant has knowingly made a false allegation. The exception in proposed paragraph 60I(8)(b) would therefore be dealt with on the papers, without the need for a hearing. This picks up, to some extent, the submissions of the NNWLS above.⁴⁶
- 3.51 The Committee is aware that a cost provision was previously deleted from proposed section 60I on the basis that it constituted an unnecessary disincentive to claiming an exception (see paragraph 3.20 above). However, in light of the lower threshold to claiming the exception under the Committee's model, a penalty can now be set to act as deterrence to unsubstantiated allegations.
- 3.52 The Committee envisages that under its model the nature of any penalty that would flow from the court being satisfied that a false allegation of abuse or family violence has been knowingly made may or may not be in the form of an award of costs. As with the new compliance regime, the penalty could be set in terms of time spent with the child, costs, compensation or a fine. The nature of the

45 Chief Justice Bryant, *Proof transcript of evidence*, 26 July 2005, p.25.

46 The National Network of Women's Legal Services submitted that a sworn statement provided by the applicant should be sufficient to satisfy the court on reasonable grounds; Ms Fletcher, *Proof transcript of evidence*, 21 July 2005, p.56. See also National Network of Women's Legal Services, *Submission 23*, p.8.

penalty to be imposed can be considered and determined by the government.

- 3.53 As the issue of family violence or abuse will have an impact on the application of the presumption of equal shared parental responsibility, it is anticipated that the issues would be raised in a more fulsome manner in the course of the rest of the proceeding and dealt with at the final hearing. A final hearing is the appropriate place for the testing of such serious allegations.
- 3.54 The Attorney-General's Department indicated that this plan would be difficult because it poses a low threshold to avoid dispute resolution, and the government's key concern is that as many parties as possible use the dispute resolution path.⁴⁷
- 3.55 The department also expressed concern about research that shows that once these allegations are made the conflict becomes entrenched. For that reason, there should be disincentive to the making of allegations that are without substance.⁴⁸
- 3.56 The Committee believes that the necessary disincentive to knowingly making false allegations would be provided by the express provision for penalties in the event that the court is satisfied on reasonable grounds that a false allegation has been made intentionally. It also notes that the proposed subsection 60I(9), which requires the court to consider referring the matter to dispute resolution in any event, operates as a deterrent to claiming the exception.⁴⁹
- 3.57 The Committee is concerned about the capacity for proposed paragraph 60I(8)(b) to spark a new species of litigation. The Committee believes that its alternative model would avoid the potential for increased litigation on a procedural matter that the provision as presently drafted could create.

Recommendation 21

3.58 **The Committee recommends that:**

- (a) the exception to attendance at dispute resolution on the basis of family violence and child abuse in proposed paragraph 60I(8)(b) be permitted upon the swearing and filing of an**
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47 See Mr Duggan, *Proof transcript of evidence*, 26 July 2005, p. 69.

48 Mr Duggan, *Proof transcript of evidence*, 26 July 2005, p.70.

49 See Attorney-General's Department, *Submission 46.1*, p.9.

affidavit asserting the existence of family violence or child abuse; and

(b) the provision that contains this exception expressly state the penalties to be applied if the court is satisfied on reasonable grounds that a false allegation was knowingly made in the above affidavit.

- 3.59 The Committee notes that it received some evidence in relation to whether a judge or registrar would make any decision, under the drafting of proposed subsection 60I(8) in the Exposure Draft, that there are reasonable grounds to believe that there has been family violence or abuse.⁵⁰
- 3.60 In any event, on the basis of Recommendation 21 above that the exception can be claimed upon the swearing and filing of an affidavit, it is not necessary for the Committee to make a recommendation in respect of who would decide any test based on reasonable grounds.

Other exceptions to attendance at family dispute resolution

Serious disregard for contraventions

- 3.61 One exception to attending dispute resolution is provided in cases of contravention of an existing parenting order that is less than six months old and in which the contravener shows a 'serious disregard' for obligations under the order.⁵¹ The proposed section is in the following terms:

(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...

50 Attorney-General's Department, *Submission 46.1*, p.10; Chief Justice Bryant, *Proof transcript of evidence*, 26 July 2005, p.23; FLS, *Submission 47*, p.6.

51 Proposed section 60I(8)(c).

- 3.62 The Family Court considered that this provision would be problematic in practice, as in order to prove the breach and the serious disregard for orders a final hearing would be required. The Court suggested that the provision be amended to:
- (c) the application is a contravention application and in the application the applicant alleges contravention of an order (or part of an order) made less than six months before the date of filing and the court is satisfied that there are reasonable grounds to believe that the party alleged to have contravened the order has behaved in a way that showed a serious disregard for his or her obligations under the order.
- 3.63 The benefit of the rewording would be to add a ‘reasonable grounds to believe’ test that is more suited to determination at an interim hearing. In the absence of this alteration, the Family Court contended that section 140 of the *Evidence Act 1995* (Cth) and the *Briginshaw* standard would apply to require a higher standard of proof to be satisfied, in light of the severity of the consequences of the findings.⁵²
- 3.64 Some witnesses raised concerns, whilst conceding that a time limit is necessary, that six months was too short a period. Twelve months was raised as a more appropriate period of time.⁵³
- 3.65 The Family Law Section of the Law Council of Australia (the FLS) noted that in cases where the respondent has shown serious disregard for orders, there is little point in forcing that person to a dispute resolution process in any case, as there is little prospect of cooperation.⁵⁴ As such the FLS recommended that the time limit be removed so that in all contravention applications which show serious disregard for the order, the matter can be brought directly before the court.⁵⁵

Conclusion

- 3.66 The Committee is concerned that the 6 month period is an arbitrary one and that those cases of serious disregard for court orders are more appropriately dealt with by the court than through a dispute resolution process.
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52 Family Court, *Submission 53*, p.9.

53 National Alternative Dispute Resolution Advisory Council, *Submission 60*, p.2.

54 FLS, *Submission 47*, p.iii.

55 FLS, *Submission 47*, p.7.

Recommendation 22

- 3.67 **The Committee recommends that the time limit in proposed paragraph 60I(8)(c) be removed so that all cases involving serious disregard for court orders are exempted from compulsory attendance at dispute resolution under proposed subsection 60I(7).**

Recommendation 23

- 3.68 **The Committee recommends that proposed paragraph 60I(8)(c) be amended to provide that the court be satisfied on reasonable grounds that a person has showed serious disregard for his or her obligations under the order.**

An increase in litigation?

- 3.69 A number of witnesses raised the concern that subsection 60I(8) will increase litigation, rather than reduce it.⁵⁶ According to the Family Court, around 30% of cases filed include allegations of violence or abuse or a risk thereof.⁵⁷ The Court identified a number of hypothetical circumstances that may arise out of the practical operation of proposed subsection 60I(8) that will, if they occur, require significant increases in judicial time in order to hear applications for exemption certificates.⁵⁸
- 3.70 The Attorney-General's Department urged the Committee to see the amendments to the Act as a part of an overall package of reforms that would create a cultural shift towards resolution of disputes outside of the court system and co-operative parenting after separation. Any short term increase in litigation would be reduced in the medium to long term by the increased recognition of the role of family dispute resolution services.⁵⁹
- 3.71 The Attorney-General's Department recognised that there is a risk that parties would litigate about whether a person meets one of the exceptions to the requirement to attend dispute resolution. But it stated that the exceptions are necessary to ensure that people are not

56 See for example Family Law Committee of NSW Young Lawyers, *Submission 56*, p.1.

57 Family Court, *Submission 53*, p.10.

58 Family Court, *Submission 53*, p.10.

59 Attorney-General's Department, *Submission 46.1*, p.7.

compelled to dispute resolution in cases where it would be inappropriate.⁶⁰

- 3.72 The Committee is concerned that the exceptions may create new matters over which parties might litigate. It appears to be inevitable that where a question is to be determined, parties will litigate. The concern is that this litigation may be prohibitive for persons without resources who may have valid reasons to claim the exceptions in proposed section 60I and that it may create undue pressure on court resources.
- 3.73 The Committee believes that its recommendation to make the exception in cases of family violence and child abuse available upon the filing of a sworn statement will significantly reduce the likelihood of a major increase in litigation flowing from proposed section 60I.

The court must consider ordering dispute resolution in any event

- 3.74 Even where a person satisfies the court on reasonable grounds that their case is one in which one of the exceptions in proposed subsection 60I(8) can be claimed, the court is directed to consider making an order that the parties attend dispute resolution nonetheless.⁶¹
- 3.75 This proposed section was opposed by a number of witnesses, who recommended that either the section not be introduced at all, or that at least it should not apply to cases involving family violence or abuse.⁶² In cases involving family violence or abuse, it was contended, it would always be inappropriate to direct parties *against their will* to attend dispute resolution processes.⁶³
- 3.76 The Attorney-General's Department explained that this provision forms part of a deterrence element in the Exposure Draft that seeks to deter people from using the exceptions in proposed subsection 60I(8) except where it is appropriate.⁶⁴

60 Attorney-General's Department, *Submission 46.1*, p.9.

61 Proposed subsection 60I(9).

62 National Network of Women's Legal Services, *Submission 23*, p.9; Women's Legal Service of South Australia, *Submission 61*, p.8.

63 See for example National Network of Women's Legal Services, *Submission 23*, p.9; Professor Belinda Fehlberg, *Submission 29*, p.4.

64 Attorney-General's Department, *Submission 46.1*, p.9.

Conclusion

3.77 As stated at paragraph 3.27 above, the Committee heard evidence from Family Services Australia that existing services currently provide mediation and dispute resolution services to separating couples in high conflict situations. Although it may be inappropriate to send couples to dispute resolution, this is a matter best left to the court in its determination of the individual case before it. The court will be in the best position to exercise its discretion on the basis of the nature of the situation and conflict, the individuals involved and the level of violence or abuse that has occurred.

Section 60J certificate

3.78 In cases where an exemption to attending dispute resolution is successfully claimed on the basis of family violence or abuse, the proposed Bill contains a requirement that the court not hear the application unless the applicant files a certificate to the effect that a counsellor or dispute resolution practitioner has supplied the applicant with information about the issues that the orders would deal with.⁶⁵ There is also an exception to this requirement where the court has reasonable grounds to believe that there would be a risk of family violence or abuse.⁶⁶

3.79 The Attorney-General's Department explained that this provision is included to ensure that in cases of family violence or abuse the person wishing to go to court is apprised of the relevant information about the services and options available to them, particularly alternatives to court action. The exception to the requirement to file a certificate reflects that the delay in obtaining a certificate may itself raise a risk of family violence or abuse.⁶⁷

3.80 One suggestion was made that the Exposure Draft should be amended so as to provide that other service providers, such as lawyers and court registries, would be able to provide such a certificate.⁶⁸

65 Proposed section 60J.

66 Proposed subsection 60J(2).

67 Attorney-General's Department, *Submission 46.1*, p.6.

68 National Alternative Dispute Resolution Advisory Council, *Submission 60*, p.2.

- 3.81 A number of witnesses recommended to the Committee that this additional requirement to file a certificate should not be introduced.⁶⁹ In fact the Family Court submitted that the matters are largely caught by proposed subsections 60I(7)-(11), and may create an unnecessary further hurdle for applicants and an unnecessary utilisation of court resources.
- 3.82 In any event, the Family Court contended that the distinction between violence and abuse or the risk of violence or abuse is unnecessary:
- The Court can not see any immediate reason for a distinction between cases where there has been abuse or violence as against cases where there is a risk of abuse or violence. The previous s 60I does not draw such a distinction (see 60I(8)(b)). The Explanatory Statement seems to say that 'risk' is a greater problem than past abuse or violence. But would not past abuse or violence constitute a risk of future abuse or violence?⁷⁰
- 3.83 Where there has been violence or abuse that would ordinarily be sufficient to raise grounds of a risk of violence or abuse. A person would therefore be required to file a certificate where they claim the exception in proposed subsection 60I(8) on the basis that there has been abuse or family violence, and then the same facts of abuse or family violence would be likely to prove the exception.⁷¹
- 3.84 The Family Issues Committee of the Law Society of New South Wales submitted that as proposed section 60J presupposes a determination that there are reasonable grounds to believe there has been child abuse or family violence:
- It is difficult to understand the reason for not proceeding with a hearing on the substantive application when there has been a determination about such serious matters...
- Given that the parties are already involved in court proceedings, it is likely to be more logical and effective if the family [and child] specialist was to provide the information.

69 See for example National Network of Women's Legal Services, *Submission 23*, p.8; Professor Belinda Fehlberg, *Submission 29*, p.3.

70 Family Court, *Submission 53*, p.11.

71 Family Court, *Submission 53*, p.11.

Alternatively, the solicitor for the applicant could give this information.⁷²

- 3.85 National Legal Aid submitted:
- If the court is satisfied that there has been family violence or child abuse, surely the relevant information can be provided by the court or by a court based family and child specialist?⁷³
- 3.86 The Committee accepts the concerns raised by the Family Court and other witnesses that the operation of proposed section 60J would be problematic in practice. However many of those concerns were raised on the assumption that a person had already satisfied the court on reasonable grounds that there is family violence or abuse. On the basis of Recommendation 21 above, an applicant will file a sworn affidavit in order to claim the exception.
- 3.87 It is still necessary, however, to ensure that the rationale behind proposed section 60J (as outlined by the Attorney-General's Department) is fulfilled in the Act. The Committee supports the intention of the proposed section to ensure that in cases of family violence or child abuse the person wishing to go to court is apprised of the relevant information about the services and options available to them, particularly alternatives to court action.
- 3.88 The Committee considers that section 60J should be redrafted to provide that the Rules of Court will contain a provision that requires an applicant to file, in the preliminary stage of a proceeding, a certificate by a family counsellor or family dispute resolution practitioner to the effect that the counsellor or family dispute resolution practitioner has given the applicant information about the issue or issues relating to the orders sought by the applicant.
- 3.89 The Committee believes that this approach satisfies the intention stated by the Attorney-General's Department to ensure that persons access all necessary and relevant information from family counsellors or family dispute resolution practitioners before they go to court. The procedural step in the Rules of Court will establish a norm that can be easily communicated to applicants, by registry staff and written materials, upon filing of proceedings.
- 3.90 In those cases where a party does not attend a family counsellor or family dispute resolution practitioner prior to going to court, despite

72 Law Society of New South Wales, *Submission 81*, p.3.

73 National Legal Aid, *Submission 24*, p.3.

being required to by the Rules of Court, the court will have power to order them to do so where appropriate. Under proposed section 13C the court has power to make orders of its own initiative and at any stage in the proceeding referring one or more of the parties to the proceeding to attend family counselling, family dispute resolution or an appropriate course, program or other service. As discussed earlier, the Court also has power under proposed subsection 60I(9) to order the attendance at family dispute resolution.

- 3.91 The Committee's approach will not stop the court from exercising jurisdiction if a certificate is not filed. The Committee believes that the court is in the best position, as the arbiter in the individual case, to assess whether the applicant should be referred to dispute resolution or counselling.

Recommendation 24

- 3.92 **The Committee recommends that proposed section 60J be redrafted to provide that the Rules of Court will contain a provision requiring an applicant to file, in the preliminary stage of a proceeding, a certificate by a family counsellor or family dispute resolution practitioner to the effect that the family counsellor or family dispute resolution practitioner has given the applicant information about the issue or issues relating to the orders sought by the applicant.**

Phased introduction of compulsory dispute resolution

- 3.93 The draft Bill proposes that the requirement to attend dispute resolution be phased in over a three year period.⁷⁴
- 3.94 Phase 1 will apply to proceedings filed from commencement of the provisions till 30 June 2007. During this phase the dispute resolution provisions of the *Family Law Rules 2004*, which currently operate in the Family Court, will be extended to applications made in the Federal Magistrates' Court and other courts exercising jurisdiction in family law for that period. These rules impose requirements for dispute resolution to be complied with before an application is made for a parenting order.

74 See proposed subsections 60I(2)-(6)

3.95 Phase 2 will apply the new dispute resolution requirement provisions contained in proposed section 60I of the Exposure Draft to applications made from 30 June 2007 to 30 June 2008. The proposed amendments introducing compulsory attendance at dispute resolution will apply to new clients of the court, and only parties who have previously applied for a Part VII order will be exempt.

3.96 Phase 3 will commence after 30 June 2008 and the compulsory dispute resolution provisions will apply to all applications made to the court.

3.97 The Attorney-General's Department noted:

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

Significant delays in accessing family dispute resolution services are not expected, and waiting times are likely to be much less than those involved in obtaining a hearing for non-urgent matters in court.⁷⁵

3.98 In contrast to the confidence of the Attorney-General's Department that the facilities required to support the new family dispute mechanisms would be available, the Department of Family and Community Services (FaCS), was more cautious in regard to the roll-out of the FRCs in its submission:

Critical to these provisions is the timing of the Bill's enactment to ensure that the roll out of services is able to match the dispute resolution provisions. FaCS supports phase 1 of the rollout. FaCS acknowledges Phase 2 and Phase 3 and would ask the Committee to consider whether there should be additional lead time for the establishment of the Family Relationship Centres to allow for any difficulties that

75 Attorney-General's Department, *Submission 46.1*, pp. 35-36.

could occur in the rollout and establishment of services. FaCS proposes that the Committee considers Phase 2 rolling out from 1 January 2008 to 31 December 2008 and Phase 3 rolling out on or after 1 January 2009. Alternatively, FaCS proposes that the Committee considers Phase 2 rolling out from 1 December 2007 to 30 November 2008 and Phase 3 rolling out on or after 1 December 2008.⁷⁶

- 3.99 The Committee is very concerned that, prior to the legislation being considered formally by the Parliament, one of the two implementing agencies is already sounding warnings about the timeframe in which to put services into place.
- 3.100 Catholic Welfare Australia also raised concerns about the availability of the highly skilled, highly qualified and highly experienced staff that will be needed in the Family Relationship Centres. Their concern was that those staff would be recruited from existing services and that this would lead to ongoing workforce shortages and skills shortages in the existing services. This will have an impact on the roll-out of Family Relationship Centres.⁷⁷
- 3.101 Witnesses from Catholic Welfare Australia were less concerned about the staging of the roll-out, so long as the monitoring and development of the procedures and policies is sufficient. In their view, it is the operational aspect of the Family Relationship Centres that is the key issue, rather than the bill itself:
- Realistically, a staged roll-out gives us some time to monitor and evaluate the impact of the family relationship centres and the way in which they operate and the sorts of commercial models that are used to develop them and so on. The staged roll-out approach gives us some time to do that, provided that ongoing monitoring is occurring as they are rolled out.⁷⁸
- 3.102 The Committee is also concerned about the availability of services that are required to be provided in order for the legislation to be given proper effect. This raised the question whether it is appropriate that the legislation contain phased implementations, particularly because it relies upon services that do not presently exist and without a

76 Department of Family and Community Services, *Submission 59*, p.4.

77 Mr Quinlan, *Proof transcript of evidence*, 25 July 2005, p.5.

78 Mr Quinlan, *Proof transcript of evidence*, 25 July 2005, p.5.

guarantee that the services will be provided. It is also far in advance of the making available of such services.

- 3.103 It may be preferable that the legislation only expressly refers to the first stage and that following the roll-out of services in the community the legislation be further amended in terms of Phase 2 and Phase 3.
- 3.104 The Committee believes that best approach is for proposed section 60I to be amended to make the commencement of Phases 2 and 3, contingent upon the operation of Family Relationship Centres and not by reference to forward dates.

Recommendation 25

- 3.105 **The Committee recommends that the government amend the commencement provisions contained in the scheme for implementation of Phases 2 and 3 in proposed section 60I by replacing references to time with references to outcomes, in particular that:**
- **Phase 2 is to commence once 40 Family Relationship Centres are operational; and**
 - **Phase 3 is to commence after all 65 Family Relationship Centres are operational.**

The dispute resolution structure

- 3.106 The FCAC report envisaged that a new family law process would be characterised by the creation of a new agency that would operate as a first port of call or 'single entry point' for separating couples:

The committee recommends that a shop front single entry point into the broader family law system be established attached to an existing Commonwealth body with national geographic spread and infrastructure, with the following functions:

- provision of information about shared parenting, the impact of conflict on children and dispute resolution options;
- case assessment and screening by appropriately trained and qualified staff;
- power to request attendance of both parties at a case assessment process; and

- referral to external providers of mediation and counselling services with programs suitable to the needs of the family's dispute including assistance in the development of a parenting plan.⁷⁹

3.107 Although the government did not implement the FCAC's proposal for a family tribunal, it has decided to establish 65 Family Relationship Centres that will provide a variety of services. The government response stated:

As well as the information, case assessment, screening and referral recommended by the committee, the centres will also provide practical advice and assistance to parents, including help in developing a parenting plan. The centres themselves will provide dispute resolution and will also refer parents to other mediation, counselling or specialist services they may need.⁸⁰

3.108 The government has committed to providing the first three hours of dispute resolution free of charge. Some parents will get additional services for free, whilst others who can afford it will pay for the services.⁸¹

3.109 The Family Relationship Centres will be tendered out to the non-government sector, many of whom currently provide similar services in the community. Although they may be run by various groups, the Family Relationship Centres will operate under a single badge or logo, and 'will be a national service network with nationally consistent goals and standards.' The government also plans to launch a national advice line and a website.⁸²

3.110 The Family Relationship Centres themselves do not feature in the draft Bill. However the statutory obligations of persons providing certain services, some of whom will operate within Family Relationship Centres and existing dispute resolution services and some of whom will operate privately, are set out in some detail in the draft Bill. This has been done by repealing many of the current provisions in the Act relating to mediation and counselling and redefining the various forms of primary dispute resolution procedures, their nature, ancillary obligations and immunities.

79 FCAC report, pp.xxiii-xxiv, 103 (recommendation 11).

80 Government response to the FCAC report, p.11.

81 Government response to the FCAC report, p.11.

82 Government response to the FCAC report, p.11.

Change in terminology

- 3.111 Schedule 4 of the proposed Bill amends the counselling and dispute resolution provisions in the existing Family Law Act. There is a distinction made between family dispute resolution and family counselling that will ensure that the new compulsory dispute resolution provision will only apply to processes that are aimed at resolution, not processes that are fundamentally designed to deal with personal or relationship issues. There is also a distinction made between services offered by the court and those in the community. The explanatory statement suggests that the amendments:
- ...implement the Government's policy of encouraging separating and divorcing parents to utilise counselling and dispute resolution services without the need to go to court.⁸³
- 3.112 The terminology of dispute resolution has been amended considerably by the Exposure Draft. The term primary dispute resolution has been removed from the Act, as has 'family and child counsellor', 'family and child counselling', 'family and child mediator' and 'family and child mediation'.
- 3.113 There are new definitions of 'family counsellor', 'family counselling', 'family dispute resolution practitioner' and 'family dispute resolution'. These, along with arbitration services, will be the non court based family services. It should be noted, however, that the definitions of both allow for court staff to provide those services where necessary.
- 3.114 The Family Court, the Family Court of WA and the Federal Magistrates' Court will appoint 'family and child specialists' as the court based services, who will provide services to people involved in family law proceedings as well as to the court.⁸⁴
- 3.115 The Attorney-General's Department explained that these new provisions support other amendments in the Exposure Draft, such as proposed section 60I, so that services are defined on the basis of whether they are concerned with resolving disputes or personal and interpersonal issues.⁸⁵

83 Explanatory Statement to the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005, p.17.

84 Proposed Part III of the Act.

85 Attorney-General's Department, *Submission 46.1*, p.29.

Family counselling

3.116 Family counselling is defined as a process in which a family counsellor helps one or more persons (including children) with personal and interpersonal issues, including issues in relation to marriage or relating to the care of children.⁸⁶ Communications in family counselling are confidential and inadmissible (with limited exceptions).⁸⁷ Family counsellors do not have any immunity from prosecution.

Family dispute resolution

3.117 Family dispute resolution is a non-judicial process in which an independent practitioner helps people affected or likely to be affected by separation or divorce to assist them to resolve some or all of their disputes with each other. There are two types of dispute resolution:

- *advisory* dispute resolution – which is provided by ‘among other things, providing advice’ on the subject matter of the dispute, possible outcomes, application of the law and an area of professional expertise available besides the law.
- *facilitative* dispute resolution – which is defined as dispute resolution that is provided without provision of advice on the areas stated in advisory dispute resolution.⁸⁸

3.118 Family dispute resolution is confidential (with certain exceptions) and inadmissible.⁸⁹ In conducting facilitative dispute resolution (where no advice is provided) the practitioner will have the same protection and immunity as a Judge of the Family Court. Advisory dispute resolution does not attract this immunity.⁹⁰

Family and Child Specialists

3.119 Under the proposed legislation a new role of court-appointed family and child specialists is created. This partially encompasses the current role of court mediators. The functions of family and child specialists are to:

86 Proposed section 10A.

87 Proposed sections 10C and 10D.

88 See proposed subsection 10H(2).

89 Proposed sections 10K and 10L.

90 Proposed section 10M.

- Assist and advise people involved in proceedings;
- Assist and advise the courts, and give evidence, in relation to proceedings including reporting to the court;
- Help people involved in proceedings resolve their disputes;
- Report to courts under sections 55A and 62G; and
- Advise the court about appropriate referrals.⁹¹

Confidentiality and admissibility of communications

- 3.120 The major difference between ‘family counsellors’ and ‘family dispute resolution practitioners’ (on the one hand) and ‘family and child specialists’ is that communications with a family and child specialist will *not* be confidential. Communications will be admissible and family and child specialists will enjoy the same immunity and protection as Family Court judges.⁹² The Chief Executive Officer of each court will be able to delegate the functions of family and child specialists to particular court staff.
- 3.121 The rationale for this is to make it clear when court staff are providing confidential and inadmissible services and when they are not, as their title will suggest the terms of confidentiality and admissibility.⁹³
- 3.122 The draft Bill provides that communications with family counsellors and family dispute resolution practitioners are confidential, but that in the following situations family counsellors and family dispute resolution practitioners may disclose the communications:
- Where making a referral to another medical or other professional for consultation, with consent of the party;
 - In order to protect a child from harm;
 - Preventing or lessening a serious and imminent threat to the life or health or property of a person;
 - Enabling the practitioner to properly discharge his or her functions as a practitioner;
 - Assisting a child representatives to represent a child properly;

91 Proposed section 11A.

92 Proposed sections 11C and 11D.

93 Explanatory Statement to the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005, p.19.

- Complying with the law of the Commonwealth, a State or Territory; and
 - For research relevant to families (minus the personal information).⁹⁴
- 3.123 There is a clear need to balance the confidentiality of counselling and dispute resolution sessions (which enhance the ability to achieve successful outcomes) with the need to make disclosure in order to protect the welfare of a child. As the FLS state:
- The central issue is balancing competing interests: the *private* interest in maintaining confidentiality because this enhances the effectiveness of 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.⁹⁵
- 3.124 The Attorney-General's Department noted that the key changes in the Exposure Draft relate to the admissibility of communications made to a professional to whom a party is referred by a family counsellor (s 10D(1)(b)) and a family dispute resolution practitioner (s 10L(1)(b)). Those communications will now be inadmissible, and family counsellors and family dispute resolution practitioners are required to make the professional aware of that fact in the making of the referral.
- 3.125 The FLS contended that some of the other disclosure categories for family counselling and family dispute resolution practitioners are too broad. Where counsellors or family dispute resolution practitioners are given the ability to make disclosures merely for the purpose of enabling the proper discharge of their functions or for the purpose of assisting a child representative that ability should be limited to disclosure 'in circumstances relating to a serious threat to the welfare of a child.' The amendments refer to proposed paragraph 10C(3)(d) and (e) and proposed paragraphs 10K(3)(d) and (e).⁹⁶
- 3.126 The Committee accepts the concerns raised by the FLS in relation to proposed paragraphs 10C(3)(d) and 10K(3)(d), but not to paragraph
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94 See proposed sections 10C and 10K .

95 FLS, *Submission 47*, p.47.

96 FLS, *Submission 47*, pp.x, 44-46; see also Queensland Law Society, *Submission 30*, p.4, who raised concerns that the exceptions are too broad.

(e) in each of those sections. The Committee considers that where family counsellors and family dispute resolution practitioners make disclosures for the purpose of the proper discharge of their functions, it would be a prudent safeguard to make sure that those disclosures are only made in circumstances concerning a serious threat to a child's welfare. This is not appropriate in relation to child representatives, as their role is one of advocate for the child and they should be assisted in that important function wherever possible.

- 3.127 The Committee acknowledges concerns that the headings of proposed sections 10C and 10K are misleading insofar as they appear to state that communications with family counsellors and family dispute resolution practitioners are confidential. The proposed sections outline a number of circumstances in which disclosure of otherwise confidential communications can be made and as such the heading should not contain any misleading implication that all communications are confidential. This is addressed in Chapter 7 at paragraphs 7.4 – 7.8 below.
- 3.128 The Committee is concerned that the provisions of subsection 10C(3) provide insufficient guidance as to the circumstances in which a disclosure of a communication made while the counsellor is conducting family counselling should be disclosed. The Committee believes the provision should be redrafted to more clearly identify those circumstances – and to set out a narrower set of circumstances in which disclosure should be mandatory.
- 3.129 The Committee is aware that Part VII, Division 8, Subdivision D contains mandatory notification provisions. Where a member of the court personnel, a family counsellor, a family dispute resolution practitioner or an arbitrator has reasonable grounds to suspect that a child has been abused or is at risk of abuse, the person must make a notification to a prescribed child welfare authority. There is a non-mandatory notification provision for suspected ill treatment and psychological harm.⁹⁷
- 3.130 The Committee believes the circumstances in which disclosure should be mandatory in proposed section 10C (and in the equivalent provision in relation to family dispute resolution practitioners, proposed section 10K) is where the communication relates to matters disclosed to the counsellor where disclosure may prevent or lessen a serious or imminent threat to the life or health of a person or where

97 See section 67ZA.

the disclosure relates to the commission, or may prevent the likely commission, of an offence involving serious harm to a child.

Conclusion

- 3.131 The Committee notes Catholic Welfare's comments when asked whether the basis for disclosure under proposed section 10C(3) should be more prescriptive:

Each family dynamic is different and discretion will be practiced whether it is defined or not. Not matter how good the definition, there will always be situations that fall outside of the definition. It is imperative that extremely skilled practitioners are employed to conduct interviews, and that the legislation offers them guidance. It is also essential that a supportive environment is provided for families and practitioners working with such situations when disclosures are made. Agreed standards of good practice should define the context as well as the practice and there must be a monitoring system to ensure compliance with these standards.⁹⁸

- 3.132 The Committee accepts that in respect of the other matters included in subsection 10C(3) it would be impossible to remove the requirement for counsellors to weigh up the competing interests inherent in making such a judgment. However the Committee believes it would assist those who may find themselves placed in the position of having to make such a judgment if the section was redrafted to reflect a general presumption against disclosure, coupled with a clear statement that notwithstanding that presumption, where the law permits disclosure, a disclosure should be made if, but only if, the interests of another person or persons substantially outweigh the private interests of the person making the communication.
- 3.133 The Committee's concerns in relation to counsellors in section 10C apply equally to the provisions relating to confidentiality of communications with family dispute resolution practitioners under section 10K.

98 Catholic Welfare, *Submission 45.1*, p.6

Recommendation 26

- 3.134 **The Committee recommends that the disclosure provisions in the proposed paragraphs 10C(3)(d) and 10K(3)(d) be limited to circumstances relating to a serious threat to the welfare of a child.**

Recommendation 27

- 3.135 **The Committee recommends that proposed subsections 10C(3) and 10K(3) be divided into those circumstances in which disclosure is mandatory and those cases in which disclosure is at the discretion of the practitioner. In particular:**

- **Disclosure should be mandatory where the communication relates to matters disclosed to the counsellor where disclosure may prevent or lessen a serious or imminent threat to the life or health of a person or where the disclosure relates to the commission, or may prevent the likely commission, of an offence involving serious harm to a child.**
- **Disclosure should be discretionary in the remaining circumstances identified in proposed subsections 10C(3) and 10K(3).**

Where disclosure is discretionary the proposed sections should be redrafted to reflect a general presumption against disclosure, coupled with a clear statement that notwithstanding that presumption, where the law permits disclosure, a disclosure should be made if, but only if, the interests of another person or persons substantially outweigh the private interests of the person making the communication.

- 3.136 The FLS also noted that whilst proposed section 10K provides that a family dispute resolution practitioner must not disclose communications made during family dispute resolution, there is no exception for disclosure based on the consent of participants to the process.⁹⁹ The circumstances in which this may arise were described as follows:

...a family dispute resolution practitioner might be conducting a mediation and using the typical joint sessions/private caucus model. The family dispute

⁹⁹ FLS, *Submission 47*, p.49.

resolution practitioner would, under a strict reading of 10K(1), not be able to disclose to the father a communication made to him by the mother, even though such communication was authorised and was, indeed, part of the process of facilitating resolution.¹⁰⁰

3.137 The FLS proposed an amendment to proposed subsection 10K(6) in the following terms:

(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.¹⁰¹

3.138 The Committee recognises the concern of the FLS and considers that it is important to allow disclosure where a participant has consented to such disclosure. However the Committee is also mindful of issues of consent in relation to children. If disclosure on this basis is preferred, then the Act should be worded so as to protect disclosures by children.

Recommendation 28

3.139 **The Committee recommends that proposed sections 10C and 10K be amended to provide for disclosure of communications where there is consent of participants to the process.**

3.140 As stated above, services provided by family and child specialists will not be confidential and communications with family and child specialists will be admissible as evidence in court (provided a person has been informed that their disclosures would be admissible).¹⁰²

3.141 The FLS raised a concern that ‘family and child specialist’ is an inappropriate descriptor for a role in which all communication is reportable to the court. They recommend that the office of family and child specialist be described as ‘family assessor’ throughout the Act.¹⁰³

100 FLS, *Submission 47*, p.49.

101 FLS, *Submission 47*, p.49.

102 See proposed section 11C.

103 FLS, *Submission 47*, p.vi and p.53.

- 3.142 The Committee does not consider that on the evidence before it a case is made out for a further change in terminology in the manner suggested by the FLS.

Immunity of dispute resolution practitioners, counsellors and Family and Child Specialists

- 3.143 As stated above, the Exposure Draft grants the same immunity and protection as that of a judge of the Family Court to practitioners conducting *facilitative* dispute resolution, but not in the conduct of *advisory* dispute resolution. The rationale is historic, as the government has sought to retain the immunities in their current form, albeit applied to newly defined roles.
- 3.144 Processes that were previously referred to as ‘family and child mediation’ will in future fall within the new definition of facilitative dispute resolution. Facilitative dispute resolution practitioners will effectively retain the immunity that currently applies to mediators under section 19M of the Act.
- 3.145 Where advice is given in the context of dispute resolution processes, the current Act would classify the process as ‘family and child counselling’, which does not attract immunity. Under the amendments, advisory dispute resolution is the process defined by the provision of advice and therefore advisory dispute resolution practitioners do not have immunity under the proposed Bill (see proposed section 10M).
- 3.146 The FLS recommended that further consideration be given to the excision of advisory dispute resolution practitioners from the immunity. The FLS stated:
- 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.¹⁰⁴
- 3.147 A real issue in a clinical setting is whether advisory and facilitative dispute resolution can be separated. Family Services Australia stated:
- There are many operational issues in relation to this clause. It would be very difficult for Practitioners to isolate their

104 FLS, *Submission 47*, p.51.

practice in this way, and for clients to differentiate between advisory and facilitative dispute resolution.¹⁰⁵

3.148 Family Services Australia also stated:

In order to effectively meet the needs of families, FDR Practitioners have a broad skill set which allows them to switch from facilitative to advisory dispute resolution at any stage of service intervention.¹⁰⁶

3.149 The Committee is concerned that in practice, dispute resolution practitioners do switch between advisory and facilitative methods. Insofar as they practice both methods, the distinction between where their actions are afforded immunity and where they are not is not sufficiently clear.

3.150 Family Services Australia stated:

In practice, that becomes somewhat difficult in that people quite often move in terms of servicing the best needs of the client and the case that is presented between advisory and facilitative resolution. For that reason, it may be easier to give immunity to both facilitative and advisory roles to cater for the fact that the distinction may become somewhat difficult to maintain.¹⁰⁷

3.151 The Attorney-General's Department clearly stated that the differentiation between advisory and facilitative dispute resolution is made in order to reflect the immunities as they exist under the current Act.¹⁰⁸

3.152 The Family Law Council suggested that the immunity of family dispute resolution practitioners should be reconsidered on the basis that few other professionals are afforded immunity from liability for negligence. The Council implied that only where mediation is conducted in court processes should immunity be afforded to the mediator.¹⁰⁹

105 Family Services Australia, *Submission 78*, p.2.

106 Family Services Australia, *Submission 78*, p.4; see also Mrs Roots, Catholic Welfare Australia, *Proof transcript of evidence*, 25 July 2005, p.8.

107 Mr O'Hare, *Proof transcript of evidence*, 25 July 2005, p.63.

108 Attorney-General's Department, *Submission 46.1*, Attachment 2, p.15.

109 Family Law Council, *Submission 33*, p.7.

- 3.153 However Family Services Australia recommended to the Committee that all family dispute resolution practitioners should be given immunity – that is, they should be protected when acting in either an advisory or a facilitative capacity.¹¹⁰

Conclusion

- 3.154 The Committee notes that there is a wide range of views on the matter of immunity for family dispute resolution practitioner. On the basis of the evidence taken in the inquiry, the Committee is not in a position to make a recommendation as to the appropriate manner in which to deal with the question of immunity. The question of immunity requires substantial consideration by an appropriate government advisory body.

Recommendation 29

- 3.155 **The Committee recommends that a consistent approach be taken to immunity for facilitative family dispute resolution practitioners and advisory dispute resolution practitioners. The question of immunity for family dispute resolution practitioners should be referred to an appropriate government advisory body for research and consideration on whether it is appropriate to extend immunity to all dispute resolution practitioners or remove such immunity.**

Obligations to provide information

Existing obligations

- 3.156 The *Family Law Act 1975* currently contains a number of obligations to provide information and advice. Division 2 of Part III contains an obligation on judges and legal practitioners to consider the possibility of reconciliation. Division 3 of Part III of the Act already requires courts and legal practitioners to let people know about the availability of dispute resolution and counselling services. Division 4 of Part III contains broad provisions ensuring courts and legal practitioners, direct people to counselling services. Section 17 is an obligation on the court to provide a document about the legal and possible social effects of the proposed proceedings and about counselling facilities. Division 5 of Part III currently imposes similar obligations on courts

¹¹⁰ Family Services Australia, *Submission 78*, p.2; Mr O'Hare, *Proof transcript of evidence*, 25 July 2005, p.63.

in relation to mediation and arbitration. These provisions are repealed in the Exposure Draft and replaced with new provisions requiring the provision of information.

- 3.157 The Exposure Draft aims to ensure that people receive useful information on services early in the process of separation or divorce, in the hope that such information may assist a resolution before conflict becomes entrenched. The Explanatory Statement states:

This will assist many couples to avoid escalating levels of conflict, putting people in a better position to negotiate their own agreements rather than requiring intervention by the courts.¹¹¹

- 3.158 Under the proposed Bill, family counsellors, family dispute resolution practitioners, arbitrators, legal practitioners and the courts will all be obliged to provide documents to people considering instituting proceedings which contain information about the legal and possible social effects of the proposed proceedings, the services provided by family counsellors and family dispute resolution practitioners, the steps involved in the proposed proceedings and arbitration facilities.¹¹² In addition in certain circumstances there is a requirement to assist people with information about help with possible reconciliation.
- 3.159 It appears from the proposed Bill that information about reconciliation is intended to be prescribed in regulations.¹¹³
- 3.160 The Committee is of the view that the draft Bill adequately implements the government's policy of providing information to separating couples in order to encourage a negotiated agreement.

Developing parenting plans with 'advisers'

- 3.161 The proposed Bill also contains obligations on advisers to provide information about parenting plans. 'Adviser', as used in this proposed section, is defined as a person who is a legal practitioner, a family counsellor, a family dispute resolution practitioner or a family and child specialist (subsection 63DA(3)).

111 Explanatory Statement to the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005, p.19; see also Attorney-General's Department *Submission 46.1*, p.29.

112 See proposed sections 12B, 12E, 12F and 12G.

113 See proposed sections 12C and 12D.

- 3.162 Proposed section 63DA of the Exposure Draft places obligations on ‘advisers’ to:
- Inform separating couples that they could consider entering into a parenting plan in relation to the child and refer them to services for further assistance on the development and content of the plan(s 63DA(1));
 - Where an adviser gives advice on the development of a parenting plan, they must inform separating couples:
 - ⇒ that they could consider substantially sharing parenting time where it is practicable and in the best interests of the child (paragraph 63DA(2)(a));
 - ⇒ of matters that may be dealt with in a parenting plan (paragraph 63DA(2)(b));
 - ⇒ of the operation of any pre-existing parenting order (paragraph 63DA(2)(c));
 - ⇒ of the desirability of including provisions concerning the form of consultations, the process for resolving disputes and the process for changing the plans in the terms of the plan (paragraph 63DA(2)(d));
 - ⇒ of the availability of programs to help people who have difficulty complying with a parenting plan (paragraph 63DA(2)(e)); and
 - ⇒ that pursuant to proposed section 65DAB the court must have regard to the terms of the most recent parenting plan (paragraph 63DA(2)(f)).
- 3.163 These provisions are consistent with the government’s response to the FCAC report. The FCAC report recommended that mediators, counsellors and legal advisers assist parents exercising shared parental responsibility to develop a parenting plan.¹¹⁴ The government agreed in principle, stating that the Family Law Act would be amended by inserting a requirement that mediators, counsellors and legal advisers provide information about what a parenting plan is, the possible content of such a plan and appropriate organisation or individuals who could assist further. Those professionals would also be required to inform separating couples that they could consider substantially sharing parenting time.¹¹⁵ The

114 FCAC report, pp.xxii, 43 (recommendation 5).

115 Government response to the FCAC report, p.7.

Department of Family and Community Services supported the role of adviser as raising awareness of parenting plans and their effect.¹¹⁶

- 3.164 The Attorney-General's Department envisages that the information that advisers are required to provide under this provision will be through written means, such as brochures. According to the department, this will ensure the accuracy, consistency and comprehensiveness of the information and avoid any concern that advisers who are not legal practitioners will be required to give legal advice.¹¹⁷
- 3.165 Proposed section 63DA is also seen to be a key provision in the government's encouragement of out of court settlement, as the development of parenting plans will mean that fewer people will seek orders from the court.¹¹⁸

Practical application in clinical setting

- 3.166 The difficulties for practitioners were said to lie in understanding their obligations as they arise in the many sections of the Act.¹¹⁹
- 3.167 Catholic Welfare Australia raised a concern that although the law is precise in its definitions, in practice counsellors and mediators will work in ways that fall within a number of the definitions, as the legal distinctions are meaningless. In particular they raised the issue of mediation in a rural setting where one person may have the responsibility for the mediation, counselling and family dispute resolution.¹²⁰
- 3.168 The change in terminology for counselling and mediation was broadly welcomed in submissions received by the Committee. Some witnesses considered that the new terminology provides clarification to what is currently a confusing aspect of the Act.¹²¹

116 Department of Family and Community Services, *Submission 59*, p.8.

117 Attorney-General's Department, *Submission 46.1*, p.16.

118 Attorney-General's Department, *Submission 46.1*, p.29.

119 Relationships Australia, *Submission 37.1*, p.2.

120 Mrs Roots, *Proof transcript of evidence*, 25 July 2005, p.6.

121 See for example, National Network of Women's Legal Services, *Submission 23*, p.19.

Use of term 'adviser'

3.169 The Committee heard evidence from a number of family service program providers indicating that the term 'adviser' is of concern to the sector.¹²² One issue is that the terminology becomes confusing for the public using the broader community service provision sector, where mediators and counsellors are not advisers.¹²³ Relationships Australia submitted:

The term adviser as a descriptor of family dispute resolution practitioners and family counsellors in section 63DA may have the serious unintended consequence of making the distinction between advisory and facilitative dispute resolution unclear.¹²⁴

3.170 Another concern raised is that the term adviser connotes the giving of advice, but that under the amendments, facilitative dispute resolution and family counselling can be conducted without the giving of advice. The work of family counselling and facilitative dispute resolution was described as:

...providing information or education/coaching, and option gathering that will inform parents or other care givers of their obligations under the *Family Law Act* and of the consequences of their decisions around children.¹²⁵

3.171 Currently mediators with Relationships Australia conduct themselves in such a way as to be characterised as facilitative dispute resolution practitioners. Relationships Australia said that their practitioners can:

...provide information, test options with clients, assist clients to negotiate the complex family law system through skilful questions and other strategic interventions that do not place them in an advice giving role.¹²⁶

3.172 The issue for the sector was said to be the ramifications (of proposed section 63DA) that the term 'adviser' would have on indemnity cover. The cost of indemnity cover for the giving of advice was described as 'prohibitive' and would preclude many mediators and counsellors

122 See for example, Relationships Australia, *Submission 37*, p.4; Catholic Welfare Australia, *Submission 45*, p.2.

123 See Catholic Welfare Australia, *Submission 45*, p.2.

124 See Relationships Australia, *Submission 37.1*, p.3.

125 Relationships Australia, *Submission 37*, p.4.

126 Relationships Australia, *Submission 37.1*, p.2.

from practicing.¹²⁷ Relationships Australia submitted that advisory dispute resolution equates to conciliation according to industry standards set out by NADRAC. Relationships Australia submitted:

The advisory role that conciliators have requires that they also have special indemnity cover to protect them in their advisory role. This means that the provision of this service is far more expensive than that of mediation. Most conciliation is conducted by legal practitioners who have indemnity cover for the advice they provide.¹²⁸

- 3.173 Relationships Australia suggested that where family counsellors and family dispute resolution practitioners are termed 'advisers' in respect of their obligations to provide information (in proposed section 63DAC), the term adviser could be substituted with the term 'consultant', 'counsellor', 'mediator', or 'conciliator'.¹²⁹
- 3.174 While the Committee notes the genuine concern expressed by practitioners in the sector, it does not consider that any issue of problems with indemnity will be borne out. The Committee cannot support an amendment to the Exposure Draft on the basis of the evidence before it.

Obligations to provide legal advice?

- 3.175 Relationships Australia submitted:

It is...not clear what a breach of the proposed obligations may result in. This would have particular importance for private practitioners because it can be envisaged that larger organisations such as Relationships Australia would put in place policies and procedures and written documentation to protect both their clients and their employees.¹³⁰

- 3.176 One witness contended that the Act could be misconstrued as requiring or entailing the giving of legal advice by non-legally qualified dispute resolution practitioners. In proposed subsection 10H(2) an advisory dispute resolution practitioner provides advice on, among other things, 'the application of the law'. Proposed subsection 10H(2) defines advisory dispute resolution as follows:
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127 Relationships Australia, *Submission 37*, p.4.

128 Relationships Australia, *Submission 37.1*, p.2.

129 Relationships Australia, *Submission 37*, p.4; Catholic Welfare Australia, *Submission 45*, p.2.

130 Relationships Australia, *Submission 37.1*, p.3.

(a) *advisory dispute resolution* – in which the family dispute resolution practitioner conducts family dispute resolution by, among other things, **providing advice on one or more** of the following:

- i. the subject matter of the dispute;
- ii. possible outcomes of the dispute;
- iii. the application of the law;**
- iv. an area of professional expertise besides the law...
[emphasis added]

3.177 According to NADRAC, where an advisory dispute resolution practitioner is not a lawyer, this would be problematic, and the act should be clear that people who are not legally qualified should not be giving legal advice.¹³¹

3.178 NADRAC also raised a concern that ‘advisers’ under section 63DA, who may or may not be legal practitioners, may be required by that section to provide legal advice.¹³²

3.179 Relationships Australia submitted that legal practitioners currently do most of the ‘conciliation’ work and that conciliation closely equates to advisory dispute resolution under the draft Bill.¹³³

3.180 The Committee notes that the Attorney-General's Department envisaged that where ‘advisers’ are under an obligation to provide information under proposed section 63DA that information will be provided in a brochure. In relation to proposed section 63DA, the Attorney-General's Department stated:

...as many advisers will not be legal practitioners, it would be inappropriate to expect them to provide advice about the legal implications of parenting plans. Carefully prepared written material will enable the information required under section 63DA to be provided by all advisers in a manner that addresses these two issues.¹³⁴

3.181 It is likely, although it is not clear from the evidence before the Committee, that the government will handle the obligations on

131 National Alternative Dispute Resolution Advisory Council, *Submission 60*, p.5.

132 National Alternative Dispute Resolution Advisory Council, *Submission 60*, p.3.

133 Relationships Australia, *Submission 37.1*, p.2.

134 Attorney-General's Department, *Submission 46.1*, pp.16-17.

advisory dispute resolution practitioners under proposed subsection 10H(2) in much the same way.

Conclusion

3.182 The Committee is concerned that although in practice the giving of information will be conducted through provision of brochures, that the Act, as currently drafted, nevertheless contains a requirement for people who are not legally trained to give advice on legal matters. Even if this will not be reflected in practice the statute should not contain such a requirement.

Recommendation 30

3.183 **The Committee recommends that proposed subsection 10H(2) should make clear that legal advice is not to be given by persons who are not qualified to give such advice.**

Court to consider referral

3.184 The court is empowered to order, at any time, that one or more parties to the proceeding attend an appointment with a family and child specialist.¹³⁵ There are also obligations on the court to consider making orders, in certain circumstances, referring a person to a family and child counsellor, family dispute resolution or an appointment with a family and child specialist or another family service.¹³⁶ Where the court is exercising its power to order attendance at one of these services, it must consider seeking the advice of a family and child specialist as to the appropriate services in respect of which to make the order.¹³⁷ The proposed section provides:

If, under this Act, a court has the power to:

- (a) order a person to attend family counselling or family dispute resolution; or
- (b) order a person to participate in a course, program or other service (other than arbitration); or
- (c) order a person to attend appointments with a family and child specialist; or

135 Proposed section 11F.

136 See proposed sections 13B and 13C.

137 Proposed section 11E.

- (d) advise or inform a person about family counselling, family dispute resolution or other courses, programs or services;

the court:

- (e) may, before exercising the power, seek the advice of:
 - (i) if the court is the Family Court or the Federal Magistrates Court – a family and child specialist nominated by the Chief Executive Officer of that court; and
 - (ii) if the court is the Family Court of a State – a family and child specialist of that court; or
 - (iii) if the court is not mentioned in subparagraph (i) or (ii) – an appropriately qualified person (whether or not an officer of the court);

as to the services appropriate to the needs of the person and the most appropriate provider of those services; and

- (f) must, before exercising the power, consider seeking that advice.

3.185 The Family Court suggested that proposed subsection (f) would be better expressed as:

(f) must, in any event before doing so, consider seeking such advice but is not obliged to seek it.¹³⁸

3.186 The Family Court raised the issue of transparency in seeking such advice, stating that where advice is sought the parties should be given the opportunity to be heard before the power is exercised. To that end it suggested that the following words be added to the end of subsection (e):

...and, if the advice is sought, inform the parties of the source and content of the advice.¹³⁹

3.187 The Attorney-General's Department submitted that these provisions will ensure that parties receive appropriate assistance at all stages of their case, and where possible can achieve a negotiated outcome.¹⁴⁰

138 Family Court, *Submission 53*, p.4.

139 Family Court, *Submission 53*, p.4.

140 Attorney-General's Department, *Submission 46.1*, p.30.

Conclusion

3.188 The Committee commends the ability of the court to seek a referral from an expert that will enable the court to make the most appropriate orders in the circumstances. It agrees with the Family Court that any referral should be done transparently and that the parties should be given the opportunity to be heard before the power is exercised.

Recommendation 31

3.189 **The Committee recommends that proposed section 11E be amended to ensure that any referral to a family and child specialist made by the court pursuant to that section is made after informing the parties of the source and content of the advice sought.**

Approved organisations and quality control

3.190 The Committee is of the view that government approval and accreditation of services are fundamental to the successful operation of the Exposure Draft. It follows that where the draft Bill or the court would send people to compulsory dispute resolution, there must be assurance as to the quality of the services to which people are diverted.

3.191 The Exposure Draft provides that the Attorney-General may only approve an organisation as a family counselling or a family dispute resolution organisation where satisfied that:

- The organisation is currently receiving, or has been selected to receive funding under a program or part of a program that has been designated by the Attorney-General; and
- The organisation is receiving, or has been selected to receive, that funding in order to provide services that include family counselling or family dispute resolution.¹⁴¹

3.192 The Attorney-General can then designate that an organisation is approved.

141 Proposed sections 10E and 10N.

- 3.193 The approval of a program will relate to the type of funding it receives. The Attorney-General's Department state that a decision as to whether a program is funded will be made according to the guidelines for that program, but that such a decision is independent of the process for approval under the Act. Ordinarily once an organisation is approved for funding it would then be able to be approved under the Act. This is said to reflect current practices, as all approved organisations are currently funded under the Family Relationships Services Program (or FRSP). Requirements for funding achieve the aim of ensuring quality is maintained in the provision of services.¹⁴²
- 3.194 All organisations currently approved will be taken to be approved under the amendments.
- 3.195 The most significant change is that under the current Act only non-profit organisations may apply for approval, whereas under the proposed bill the limitation to non-profit organisations is removed.
- 3.196 The Explanatory Statement explains that:
- The requirements that the organisations be 'voluntary' or non-profit has been removed. This widens the pool of organisations eligible for approval to include organisations that operate on a for-profit basis. This should assist in ensuring that a range of organisations can tender to provide the increased services announced in the 2005 Budget. The Government will be able to select the tender that will provide the best outcomes.¹⁴³
- 3.197 The Attorney-General's Department submitted that under its proposed new family law system it is necessary for a wide range of organisations to be providing dispute resolution and counselling services and that this will be assisted by opening up the approval system to for-profit organisations.¹⁴⁴
- 3.198 Current providers expressed concern that the approval process for the new Family Relationship Centres should maintain the high standards that are currently required of the Family Relationships Service

142 Attorney-General's Department, *Submission 46.1*, p.33.

143 Explanatory Statement to the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005, p.18.

144 Attorney-General's Department, *Submission 46.1*, p.30.

Program providers.¹⁴⁵ All funded organisations must meet the quality standards.

- 3.199 The Women's Legal Service of South Australia contended that the ability of for-profit organisations to tender for work would alter the quality of the service provided, as the objective of a for-profit service is necessarily geared towards making a profit, not the provision of services. They contended:

We fear that these services may be driven by fulfilling a quota at the cost of what is in the best interests of the children, it is concerned with the ends rather than the means. When the focus is on quantitative outputs and the sustainability of a Family Relationship Centre, the result may be that less time and effort will be used in drafting a parenting plan. This can only mean an increased number of litigants in the Family Court...¹⁴⁶

- 3.200 The Attorney-General's Department stated that quality will be maintained through the funding agreements with service providers, which set out reporting requirements (including independent auditing) and are transparently enforceable.¹⁴⁷ Until such time as new accreditation standards are introduced, the safeguards and quality control contained in the Family Law Regulations 1984 will continue to apply to family counselling and family dispute resolution services.

- 3.201 The Attorney-General's Department stated that Part 5 of the regulations would continue to apply, and set out a number of quality control measures. The Attorney-General's Department stated:

...although the quality of services is ensured mainly through the stringent requirements imposed under the FRSP funding agreements, Part 5 of the Regulations, which sets out requirements that must be complied with by family and child counsellors, family and child mediators and arbitrators, includes a number of quality control measures.¹⁴⁸

- 3.202 In particular, under Division 2 of Part 5, minimum levels of qualifications, training and experience for practitioners are
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145 See for example Relationships Australia, *Submission 37*, p.4.

146 Women's Legal Service of South Australia, *Submission 61*, p.5.

147 Attorney-General's Department, *Submission 46.1*, p.34.

148 Attorney-General's Department, *Submission 46.1*, p.34; see also Attorney-General's Department, *Submission 46.3*, p.2-3.

established. Also, parties to mediation are required to be assessed by a mediator to ensure that they are in a position to negotiate freely and family violence and safety, equality of bargaining power are addressed to ensure that the matter is appropriate for dispute resolution.¹⁴⁹

3.203 The Attorney-General's Department has commissioned the Community Services and Health Industry Skills Council (CSHISC) to develop 'competency-based accreditation standards and a suite of qualifications for family counsellors, dispute resolution practitioners and workers in Child Contact Centres.'¹⁵⁰ It is anticipated that these new accreditation requirements will be introduced into the legislation in 18 months to 2 years.¹⁵¹

3.204 Currently the standards are set at a program level and are applied to services that receive funding. Family Services Australia stated:

There is a requirement of that funding that they meet those standards, so it is dealt with in the contract specifications rather than in legislation. It does have some inconsistency in its application in that there are a number of organisations that have not met those requirements but whose funding is not removed, who continue to receive funding or receive new funding. We have expressed concern for some time that that is problematic and makes the system of standards meaningless in some ways.¹⁵²

3.205 The Committee is very concerned at reports that organisations currently receiving funding do not meet the standards set for such funding.

3.206 Family Services Australia raised the difficulty for individual practitioners who will be able to be accredited who may not have the resources, as an individual, to cope with the work:

Often the cases that we are dealing with are very high conflict and often quite dangerous. I certainly would not want to be a private practitioner doing some of this work.¹⁵³

149 Attorney-General's Department, *Submission 46.1*, p.34.

150 Attorney-General's Department, *Submission 46.1*, p.35.

151 Attorney-General's Department, *Submission 46.1*, p.35.

152 Mr O'Hare, *Proof transcript of evidence*, 25 July 2005, p.68.

153 Ms Hannan, *Proof transcript of evidence*, 25 July 2005, p.68.

3.207 Under new contracts there is also no requirement to be a member of an approved industry association, and practitioners will not be bound by the practice standards of that association.¹⁵⁴ Catholic Welfare Australia stated:

We do have a concern about the apparent shift away from IRBs [Industry Representative Bodies]. It may leave some organisations vulnerable to falling outside of those nets of accreditation. We have no specific opposition to broadening the agencies that might be involved in programs, but we do have a concern that the maintenance of quality standards in those programs is going to be a challenge without some sense of there being peak organisations who can support that.¹⁵⁵

3.208 Family Services Australia suggested that there is a need to establish an industry-driven approach to quality assurance, an ongoing monitoring process, ongoing research and evaluation of the Family Relationship Centres, priority to existing FRSP providers with expertise and implementation and identification of best practice standards.¹⁵⁶

3.209 Family Services Australia recommended that the professional requirements of family dispute resolution practitioners be enshrined in legislation.¹⁵⁷

3.210 The Committee recognises that accreditation and quality standards are a critical issue. The Committee urges the government to take into account the concerns that have been raised before this Committee in its assessment of the phased roll-out of the Family Relationships Centres and compulsory dispute resolution provisions. The ability to provide quality services should be considered a necessary precondition to the phased introduction of compulsory dispute resolution (see paragraphs 3.93 to 3.105 above).

Recommendation 32

3.211 The Committee recommends that the government introduce a system of accreditation and evaluation for all Family Relationship Centres and all family dispute resolution practitioners as a matter of urgency.

¹⁵⁴ Ms Hannan, *Proof transcript of evidence*, 25 July 2005, p.69.

¹⁵⁵ Mr Quinlan, *Proof transcript of evidence*, 25 July 2005, p.11.

¹⁵⁶ Family Services Australia, *Submission 78*, p.3.

¹⁵⁷ Family Services Australia, *Submission 78*, p.2.

Parenting plans

3.212 A parenting plan is an agreement, made in writing between parents, that deals with arrangements about their children. Parenting plans are simply an agreement between parents and are currently not legally enforceable.

3.213 The Explanatory Statement to the Exposure Draft notes:

A primary aim of these amendments is to encourage and assist parents to reach agreement on parenting arrangements after separation and to document the agreement through workable parenting plans. This is consistent with the Government's commitment to assisting parents resolve parenting disputes in a non-adversarial manner and help parents reach agreements without the need for legal proceedings.¹⁵⁸

3.214 The draft Bill states that a parenting plan may deal with one or more of the following:

- The person with whom the child is to live;
- The time a child is to spend with a person;
- The allocation of parental responsibility;
- The form of consultation to be had on the exercise of shared parental responsibility;
- Communications that a child is to have with another person;
- Maintenance;
- The process of resolving disputes about the terms of the parenting plan;
- The process for changing the plan where circumstances require it; and
- Any aspect of the care, welfare or development of the child.¹⁵⁹

3.215 'Persons' in that proposed section include parents, grandparents and other relatives of the child.¹⁶⁰

158 Explanatory Statement to the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005, p.7.

159 See proposed subsection 63C(2).

160 See proposed subsection 63C(2A).

- 3.216 In contrast to court orders, parenting plans can be varied or revoked by agreement in writing between the parties to the plan (except where they have been registered under the Act).¹⁶¹ It is important to note that parenting plans were previously registrable under the *Family Law Act* 1975, however registered plans were not often used and the registration provisions of the Act were repealed in 2003. In order to be more widely used, the parenting plans need to be flexible.
- 3.217 The draft Bill contains a number of amendments to the provisions about parenting plans. These give parenting plans a new legal effect.
- 3.218 A number of submissions endorsed the new approach to parenting plans, particularly as a cheaper and more flexible way of handling conflict. For example, the Family Law Council contended:
- Council endorses the provisions in the Bill for increasing use of alternative dispute resolution interventions as they can often provide better, more cost effective and more enduring ways of handling conflict for separating parents.¹⁶²
- 3.219 It was generally agreed that as circumstances change and children grow older, there is a need for the parenting arrangements to adapt to the circumstances.
- 3.220 There were some reservations, however, about whether parenting plans would afford proper protection to parties in certain circumstances.

Problems of unsupervised agreements

- 3.221 Although there was general praise for the flexibility afforded by parenting plans, the lack of any court supervision or scrutiny was a cause for concern for some witnesses. One issue that arose in respect of parenting plans was the risk that any power imbalance in the relationship would be manifested in any agreement. This is particularly important where parties are agreeing to vary orders made by the court. The FLS stated:

I have seen a number of recent instances where women in particular have been really coerced into agreeing to a change to an order in circumstances that are not appropriate. We do

¹⁶¹ See section 63D.

¹⁶² Family Law Council, *Submission 33*, p.2; see also Relationships Australia, *Submission 37*, p.3 and Department of Family and Community Services, *Submission 59*, p.4.

not want to discourage parents from being able to vary an order informally...On the other hand, you do need a degree of protection to deal with those situations of power imbalance...¹⁶³

3.222 The Family Law Practitioners Association of Queensland Ltd stated:

I observed many occasions where a spouse was pressured into making a written agreement. Typically, prepared drafts are placed before the spouse with a demand that it be signed. Whilst domestic violence may not be a factor, commonly there are power imbalances in relationships which can be exploited to ensure a compliant, weaker spouse. I have no doubt that the provisions as they are currently drafted do not provide sufficient protection for that weaker spouse.¹⁶⁴

3.223 Concerns were expressed that without legal advice some people may agree to terms of parenting plans that were disadvantageous, the result of undue influence or entered into without sufficient consideration of the consequences.¹⁶⁵ Victorian Aboriginal Legal Service Cooperative also raised the importance of legal advice in certain circumstances:

If a person comes from a disadvantaged background, if a person is not aware of their rights or if one person is, there is a potential for the stronger party to take advantage of that during the mediation process. We are aware that there may be a need for a registrar at the court to inform a person, before directing them to a centre, that legal advice is an option and where to seek it. We would argue that that might result in a better outcome with a parenting plan, because there is no chance of it being unworkable or unfair.¹⁶⁶

3.224 Professor Belinda Fehlberg recommended that s 63DA(1) and (2) be amended to require 'advisers' to consider the risk of family violence, abuse, neglect or ill treatment, with the ability to refer such cases to the court system.¹⁶⁷

163 See Mr Kennedy, *Proof transcript of evidence*, 20 July 2005, p.4.

164 Mr Leembruggen, *Proof transcript of evidence*, 25 July 2005, pp.18; see also p.22.

165 See for example, Mr Kennedy, *Proof transcript of evidence*, 20 July 2005, p.9.

166 Ms Jubb, *Proof transcript of evidence*, 20 July 2005, p.47; See similar comments by National Network of Women's Legal Services, *Submission 23*, p.11 and Women's Legal Service of South Australia Inc, *Submission 61*, p.7.

167 Professor Belinda Fehlberg, *Submission 29*, p.5

- 3.225 The Family Law Practitioners Association of Queensland Ltd emphasised that using parenting plans to vary orders that are minor, such as swapping weekends, is appropriate. Its view was that any substantive change to orders using a plan should be subject to either a cooling off period or certification by a legal practitioner.¹⁶⁸
- 3.226 The FLS' recommendation was that where the Exposure Draft allows parenting plans to vary orders (or previous plans), they must have built-in protections. The FLS suggested that the Act should stipulate that parenting plans must be in writing, signed and dated by both parties and should contain a cooling off period. The cooling off period could allow for, among other things, either of the parties to obtain legal advice.¹⁶⁹ The Committee believes that where the parenting plan is developed as part of a formal dispute resolution process that there should be no cooling off period but that a cooling off period could be considered in other cases.
- 3.227 The National Council for Single Mothers and their Children Inc contended that the Act ought to provide for children's wishes to be taken into account in the making of parenting plans.¹⁷⁰

Recommendation 33

- 3.228 **The Committee recommends that there be a requirement that parenting plans are signed and dated and that, unless the parenting plan has been demonstrated to have been developed as part of a formal family dispute resolution process, there is a cooling off period of seven clear days prior to a court having the ability to have regard to them.**

Consideration of parenting plans by a court

- 3.229 Under the draft Bill, where a court makes a parenting order it must have regard to the terms of the most recent parenting plan, if doing so would be in the best interests of the child.¹⁷¹ The intention of this provision is to ensure that the court recognises pre-existing parenting arrangements and is aware of those that have broken down.¹⁷²

168 Mr Leembruggen, *Proof transcript of evidence*, 25 July 2005, pp.17, 25.

169 FLS, *Submission 47*, p.iii.

170 Dr McInnes, *Proof transcript of evidence*, 20 July 2005, p.62.

171 See proposed section 65DAB.

172 Attorney-General's Department, *Submission 46.1*, p.16.

3.230 The Family Law Council described this provision as a ‘half way house’ to registration:

...to lend some gravitas to the document whilst at the same time enabling the plan to remain a non-legal document which could be easily amended to reflect changing circumstances. This might improve the potential appeal of parenting plans to some clients.¹⁷³

3.231 The Attorney-General’s Department in its submission stated:

The provision simply ensures that the court is made aware of arrangements agreed to by the parents which have broken down. The court is still required to make a decision in the best interest of the child but information about the agreement may assist the court in considering the appropriate parenting orders to make.¹⁷⁴

3.232 In addition to this there are a number of other provisions that give parenting plans increased legal effect. When enforcing parenting orders the court must have regard to any subsequent parenting plan.¹⁷⁵ This issue is discussed in Chapter 5 below.

3.233 The Bill also proposes a new section 64D which provides for the insertion of a default provision which would have the effect of making the parenting orders subject to any subsequent parenting plan. Proposed section 64D provides:

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.

3.234 The Attorney-General’s Department in its submission stated:

...The use of a default provision in parenting orders to achieve the policy intention ensures that there is an appropriate exercise of judicial power by the court because the court retains a discretion not to include this provision if it is inappropriate.

173 Family Law Council, *Submission 33*, p.3.

174 Attorney-General’s Department, *Submission 46.1*, p.16.

175 See proposed sections 70NEC, 70NGB, and 70NJA.

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

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

The government will fund the Family Relationship Centres to provide appropriate support for people to agree on parenting plans. The Centres will also find support services to assist people to implement the plan, without the need to use the court system.¹⁷⁶

3.235 Some witnesses thought these could be useful. One witness stated:

Swaps often occur that technically breach orders. This provision enables weekends to be swapped – and it might be at short notice. That need seems to be met by these plans...¹⁷⁷

3.236 A number of witnesses said that the manner in which parenting plans interact with parenting orders, in particular their legal status and their effect on orders, was unclear.¹⁷⁸ Concerns expressed in respect of proposed section 64D came primarily from representatives of the legal profession and the Family Court of Australia.

3.237 A broader concern raised by the Family Court is that although parenting plans are not legally enforceable themselves, they have the ability to override a legally enforceable court order, and that this

176 Attorney-General's Department, *Submission 46.1*, pp. 14-15.

177 Mr Leembruggen, *Proof transcript of evidence*, 25 July 2005, p.19.

178 See National Network of Women's Legal Services, *Submission 23*, p.11; National Alternative Dispute Resolution Advisory Council, *Submission 60*, p.3.

consequence may not be easily understood by family members. The Family Court provided the following example of how the complexity arises:

...a parenting order might provide that contact should occur at a grandparent's home. The grandparent becomes ill, and the parties agree that contact should occur somewhere else, eg at an aunt's home...assume that the parties had made a parenting plan, which provided for contact to occur, not at the grandparent's home but at the aunt's home. Since the parenting order would be 'subject to' the parenting plan, the parenting plan would mean that there would be no obligation to have contact at the grandparent's home. However since parenting plans cannot create legally enforceable obligations, there would be no obligation on the parties to have contact at the aunt's home.¹⁷⁹

- 3.238 The concern raised by the Court was the status of different arrangements will be technical and complex to determine for the Court, and cannot provide certainty for parties. This was supported by Relationships Australia, who felt that parties may have an expectation that parenting plans have a legal status.¹⁸⁰
- 3.239 The Family Court considered that proposed section 64D may be counter-productive as its complexity may act as a disincentive to entering into parenting plans or, where parenting plans are used, the courts may need to engage in highly technical disputes in order to determine the terms and their impact on orders.¹⁸¹ The Family Court contended that the point at which problems will become manifest with parenting plans is where one party seeks to enforce the original parenting orders, and therefore their status could be dealt with in the compliance provisions.¹⁸² Parenting plans and compliance are discussed further in Chapter 5 at paragraphs 5.71 – 5.76 below.
- 3.240 The Family Law Council sought amendment to proposed section 64D to expressly provide that in certain, appropriate cases the court could make orders that could only be changed by the subsequent order of

179 Family Court, *Submission 53*, p.25-26.

180 See Ms Mertin-Ryan, *Proof transcript of evidence*, 21 July 2005, p.25.

181 Family Court, *Submission 53*, p.27; The National Alternative Dispute Resolution Advisory Council also expressed concern that parenting plans would increase litigation: *Submission 60*, p.3.

182 Family Court, *Submission 53*, p.27.

the court.¹⁸³ The Family Court suggested amending the words 'Unless the court determines otherwise' to read 'Unless the parenting order otherwise specifies...' or 'Unless the court orders otherwise' or 'Unless a court orders otherwise', depending on the intention of parliament.¹⁸⁴

3.241 The FLS recommended:

...that the legislation make it clear that parenting plans are subject to the ultimate supervision of the court, and that the court has the power to consider the terms and effect of the plan and the circumstances in which it was entered into. The issue of whether or not a plan is legitimately or appropriately entered into will only arise if one of the parties subsequently takes the matter to court.¹⁸⁵

3.242 The Committee recognises that the focus on parenting plans in the proposed Bill is a key aspect of ensuring co-operative child focused arrangements occurring outside of the legal system. Recommendation 33 will assist in ensuring that these plans are not entered into without proper consideration and are made without undue pressure.

3.243 The Committee is concerned that the operation of proposed section 64D may create expectations that parenting plans have a greater legal status than is the case, particularly in cases that involve a significant power imbalance, family violence or abuse.

3.244 Explaining the effect of parenting plans will be an important role for advisers situated in Family Relationship Centres, approved organisations and operating as sole practitioners. Ensuring that the effect of parenting plans is properly understood will also need to be a significant component of the proposed community education campaign that will accompany these changes.

3.245 The Committee endorses the suggestion by the Family Law Council and the Family Court that proposed section 64D should be redrafted to make clearer the power of the court to include an explicit provision in a parenting order where it would be inappropriate for a subsequent parenting plan to make a court order unenforceable.

183 Family Law Council, *Submission 33*, p.6.

184 Family Court, *Submission 53*, p.26.

185 FLS, *Submission 47.1*, p 4

Recommendation 34

- 3.246 **The Committee recommends that proposed section 64D should be amended to expressly provide that in exceptional cases the court could make orders that could only be changed by the subsequent order of the court and not by a subsequent parenting plan.**