

**RESPONSE TO THE RECOMMENDATIONS OF THE
HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON
LEGAL AND CONSTITUTIONAL AFFAIRS (THE COMMITTEE)
ON THE FAMILY LAW AMENDMENT (SHARED PARENTAL
RESPONSIBILITY) BILL 2005 (THE BILL)**

Facilitating shared parenting

Recommendation 1

The Committee recommends that to be consistent with the recommendation of the House of Representatives Standing Committee on Family and Community Affairs (the FCAC), which the Government agrees to, that all references to the term ‘joint parental responsibility’ in the Exposure Draft be replaced with references to ‘equal shared parental responsibility’.

1. The Government agrees with this recommendation and will amend the Bill accordingly.

Recommendation 2

The Committee recommends that paragraph (e) of the definition of major long-term issues, proposed for inclusion in section 60D(1) (item 6 of Schedule 1 of the Exposure Draft), be amended to ‘changes to the child’s living arrangements that make it significantly more difficult for a child to spend time with a parent’ and that a note be added to this provision to make it clear that major long-term issues do not include decisions that parents make about their new partners.

2. The Government agrees with this recommendation. The Government agrees that the provision should be more clearly targeted. Paragraph 60D(1)(e) will be amended to be consistent with the wording proposed by the Committee, which was based upon a suggestion by the Family Law Council.
3. To support this change, the Government will also insert a note into the Bill to provide clarity to readers, in particular self-represented litigants. It should be noted that notes generally do not have legal effect.¹

Recommendation 3

The Committee recommends that the final sentence of the note following subsection 61DA(1) (item 11 of Schedule 1 of the Exposure Draft), dealing with the presumption of equal shared parental responsibility, be deleted.

4. The Government agrees with this recommendation. The Government will amend the note in subsection 61DA(1), as the first two sentences will be sufficient to achieve the purpose of the note.

¹ Section 13(3) of the *Acts Interpretation Act 1901* which provides that marginal notes, footnotes and endnotes are not to be taken as part of an Act.

Recommendation 4

The Committee recommends that section 65DAA be amended to provide that the court shall, in making parenting orders in situations where there is equally shared parental responsibility, consider whether equal time with both parents is in the best interests of the child and reasonably practicable.

5. The Government agrees with this recommendation and will amend the Bill accordingly.
6. Equal time arrangements will not be in the best interests of the child and reasonably practicable in all cases. In such cases, the Government will require the court to also consider whether a substantial and significant time arrangement, which would include time other than weekends or holidays and aspects of both a child's routine and special occasions, is in the best interests of the child and reasonably practicable.
7. Furthermore, the Government will amend the Bill to include a number of factors suggested by the Family Law Council to guide the court in its consideration of when the arrangements discussed above are reasonably practicable. These factors will include:
 - the capacity or potential capacity of the parties to communicate and resolve differences concerning the child's care, welfare and development
 - the proximity of the two households
 - the parties capacity or potential capacity to implement the arrangement; and
 - the benefit to the child of the arrangement.
8. The court will also be able to consider whether parties should attend further dispute resolution services to develop their capacity to agree and communicate.

Recommendation 5

The Committee recommends that the obligation on advisers at proposed subsection 63DA(2) (item 14 of Schedule 1 of the Exposure Draft) should include (additional to other obligations) to:

- Inform parents that if the child spending 'equal time' with both parents is practicable and in the best interests of the child that they should consider this option.
9. The Government agrees with this recommendation and will amend the Bill accordingly.
 10. The Government will also insert a requirement that where equal time arrangements are not in the best interests of the child and reasonably

practicable, that the adviser should also inform the parents that they could consider a substantial and significant time arrangement (as discussed in recommendation 4). Equal time arrangements are more likely to work where parties show capacity (or potential capacity) to communicate and resolve issues that might arise. This may be evidenced by their capacity to negotiate a parenting agreement. Where equal time is not appropriate then parents should still be encouraged to consider other arrangements that ensure both parents are able to participate in a range of activities with their children.

Recommendation 6

The Committee recommends that section 63DA (at item 14 of Schedule 1 of the Exposure Draft) be amended to better focus attention on ensuring decisions made in developing parenting plans are made in the best interests of the child.

11. The Government agrees with this recommendation. This should encourage parents to better focus on the child's best interest when making agreements.

Recommendation 7

The Committee recommends that the note attached to proposed section 63DA (item 14 of Schedule 1 of the Exposure Draft) be redrafted as follows:

- Paragraph (a) requires the advisers to inform the people that they should consider the option of the child spending equal time with each of them. An adviser may, but is not obliged to, advise as to what would be appropriate in the circumstances.

12. The Government agrees with this recommendation and will amend the Bill in accordance with the response to recommendations 4 and 5. The Committee considered the second sentence of the note to be unnecessarily negative. Accepting this aspect of the Committee's recommendation will recast the note into more positive language.

Recommendation 8

The Committee recommends an additional provision be included in the *Family Law Act 1975* (the Act) that should a parent wish to change the residence of a child in such a way as to substantially affect the child's ability to either:

- Reside regularly with the other parent and extended family; or
- Spend time regularly with the other parent and other relatives,

the court must be satisfied on reasonable grounds that such relocation is in the best interests of the child.

13. The Government agrees with this recommendation in principle but notes that the Family Law Council is currently examining the issue of relocation more broadly and expects to issue a discussion paper on the issue. The Government will

request that the Family Law Council give particular consideration to this recommendation. The Government will then give further consideration to this recommendation and consider further amendments arising from both the recommendation and that advice.

Recommendation 9

The Committee recommends that the existing definition of ‘family violence’ be amended by qualifying it to ensure that there is an objective element as follows:

Family violence means conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person’s family that causes that or any other member of the person’s family *reasonably to* fear for, or to be *reasonably* apprehensive about, his or her personal well being or safety.

14. The Government agrees with this recommendation and will amend the Bill accordingly. The Committee’s consideration of this issue took account of differing views and is reflected in its recommendation.
15. This amendment will help to address concerns that false allegations of family violence are being made in family law proceedings, even where a fear of violence is far fetched or fanciful. This change will not make it harder for people to disclose family violence. It does not change the definition where there has been actual violence. The courts already impute an element of reasonableness when applying the existing definition of family violence. However, this change will clarify, particularly for self-represented litigants, that the court will only take account of issues of violence where the fear of harm is ‘reasonable’. This change does not suggest that any violence is acceptable. Family violence is a crime and should not be tolerated. Given the serious consideration that courts give to family violence in making parenting orders these matters should be objectively tested. In South Australia, the *Domestic Violence Act 1994* has for some time provided a concept of ‘reasonable’ fear or apprehension in relation to the definition of family violence.

Recommendation 10

The Committee recommends that the Act should be amended to include an explicit provision that courts exercising family law jurisdiction should impose a costs order where the court is satisfied that there are reasonable grounds to believe that a false allegation has been knowingly made.

16. The Government agrees with this recommendation. The Government notes that after consultation on the discussion paper *A new approach to the family law system* that it previously withdrew a cost provision that was limited to a false allegation made in the context of relying on one of the exceptions to compulsory dispute resolution. However, the Government supports the introduction of this provision given the higher test that the court be ‘satisfied on reasonable grounds that a false allegation has been knowingly made’, and its application beyond the exceptions to family dispute resolution. The Government notes that as a general principle, the courts impose costs for abuse of process.

Recommendation 11

The Committee recommends where allegations of family violence or abuse are made in a family law proceeding that there should be an explicit provision in the Act giving the court power to seek reports from State and Territory agencies about the investigations by those agencies into those allegations of family violence or abuse.

17. The Government agrees with this recommendation and an appropriate provision will be introduced to allow the courts to access information about family violence and abuse that may be held by State and Territory agencies.

Recommendation 12

The Committee recommends that the Government provide parliament a report on its progress in its discussions with the States and Territories about the better coordination of the Australian Government family law system and the domestic violence and child protection systems in the States and Territories.

18. The Government is using the opportunity of tabling this response to report on the progress of its discussions for better coordination between the family law system and the child protection systems.
19. The Government is developing a new Family Law Violence Strategy which includes measures such as:
 - Working with State Governments to improve investigation and reporting of family violence
 - Re-working provisions in the Family Law Act to ensure State apprehended violence orders work effectively and consistently with family law orders
 - Improving court processes for cases involving violence, similar to how we deal with child abuse in Project Magellan; and
 - Asking the Family Law Council to review how we could do better in dealing with cases involving violence.
20. On 8 August 2003, the Standing Committee of Attorneys-General (SCAG) agreed to establish a joint SCAG and Community Services Ministers' Advisory Council (CSMAC) working group to examine ways of better coordinating the Commonwealth's family law system with State and Territory child protection systems. The working group is chaired by the Commonwealth and has representatives from all jurisdictions (many jurisdictions have more than one representative on the working group). The working group is currently developing a paper on possible responses to recommendations 10-14 of the Family Law Council's 2002 report, *Family Law and Child Protection*. It is expected that the working group will present its final paper to SCAG for consideration at the first meeting of 2006.

21. The Family Law Council's recommendations fall into three categories.
- To increase the legislative power of State and Territory Children's and Youth Courts hearing a matter to make orders relating to residence and contact in appropriate circumstances.
 - To avoid duplication of proceedings by adopting a 'one court principle'. This principle is about determining the most appropriate forum for a matter to be heard, it does not involve either system taking over the role of the other.
 - To set up a forum for ongoing evaluation and observation of this system of cooperation. The Family Law Council recommends that a committee of representatives from both CSMAC and SCAG monitor the implementation of its other recommendations to ensure that better coordination is achieved.
22. In addition, the Family Court of Australia (the Family Court) has rolled out the Magellan project to registries in all States and Territories. This has involved the development of detailed protocols with child protection agencies. In addition, the Columbus project in Western Australia continues to provide a model for better managing child protection allegations in that jurisdiction.
23. The Government is progressing discussions with the States and Territories. The Government will continue to push for better coordination between the family law system and the State and Territory systems. The Government will publicise progress and outcomes made in this regard.

Recommendation 13

The Committee recommends that a reference be given to an appropriate Parliamentary Committee to inquire into the impact of the following matters with particular reference to measures that the Commonwealth may initiate on its own or with the cooperation of States and Territory Governments to:

- Improve effective protection of persons who are or may be victims of family violence;
- Examine the effectiveness of legal and law enforcement mechanisms and their costs;
- Consider the degree to which Commonwealth, State and Territory agencies, individually or in co-operation, are able to deliver just and cost effective outcomes;
- Assess the effectiveness of initiatives in public education prevention and rehabilitation; and
- Examine the alleged incidence of false allegations of family violence.

24. As noted in the response to recommendation 12, the Government is developing a new Family Law Violence Strategy. The Government already has a range of

initiatives to address issues of family violence. In particular, the Government recognises the need for better information about allegations of violence arising in family law proceedings and improved cooperation with State and Territory agencies.

25. These issues involve significant overlap with State and Territory responsibilities. The Government needs to further consider these issues before referring them to a Parliamentary Committee. The Government will refer this recommendation to the Family Law Council for further research and recommendations about better coordination of existing services. The Government will then further consider a possible reference to a Parliamentary Committee.

Recommendation 14

The Committee recommends that the Government commission longitudinal research into the issue of the impact of family violence and abuse in family law proceedings.

26. The Government agrees with this recommendation. The Government considers that research would assist in policy formulation by providing a source of objective evidence in this highly contested area. As part of the response to *Every picture tells a story*, the Government allocated funding for longitudinal research into outcomes for families attending the courts or other dispute resolution services outside the court system. It would be appropriate to include research into the impact of family violence and abuse in family law proceedings, as these issues are critical to both the success of the new system and longer term outcomes for families. The Government has also announced it will commission independent research about how the courts currently deal with allegations of family violence.

Recommendation 15

The Committee recommends that the presumption of equal shared parental responsibility should generally be applied at an interim hearing although the court should retain discretion not to apply the presumption if it thought it to be inappropriate. The court should continue to have regard to all the circumstances that are in the best interests of the child when making both interim and final orders. This should be made explicit in the Exposure Draft.

27. The Government agrees with this recommendation. The Government will amend the Bill so that, instead of the presumption not applying (unless the court considers it necessary to apply), the presumption should apply (unless the court considers it inappropriate to apply).

Recommendation 16

The Committee recommends:

(a) co-locating section 65E related to the best interests of the child as the paramount consideration in parenting orders and section 68F related to how the court determines what is in the best interests of the child at the start of subdivision 5 of Part VII about parenting orders; and

(b) proposed Division 1A come later in the Act.

28. The Government agrees with the need to give greater prominence to these provisions. In relation to recommendation 16(a), the Government will relocate the existing section 65E and Subdivision B from Division 10 (which includes section 68F and other provisions relating to determining the best interests of the child) and move them to Subdivision D of Division 1 in Part VII (Introductory). As a result, these provisions will therefore be placed directly after the objects and principles provisions of Part VII. Appropriate ‘signposts’ will be included in the Bill to direct readers to other relevant provisions. The Government considers that these changes will assist to give greater visibility and emphasis to the best interests principle.
29. In relation to recommendation 16(b), the Government will relocate Division 1A, which is the Schedule of the Bill dealing with the conduct of child-related proceedings, after Division 12 (Proceedings and jurisdiction).

Recommendation 17

The Committee recommends that the objects set out in proposed subsection 60B(1) of Part VII to be amended to:

(a) make more explicit reference to the need for consistency and the paramountcy of the best interests of the child; and

(b) to recognise as an object the safety of the child (as currently set out in proposed paragraph 60B(2)(b) of the Bill (as amended by recommendation 16).

30. The Government agrees with this recommendation. In relation to recommendation 17(a), the Government will amend the provision to better reflect the paramountcy of the child’s best interests.
31. In relation to recommendation 17(b), the Government will amend the Bill so that the safety principle becomes an object of Part VII.

Recommendation 18

The Committee recommends that paragraph (b) of proposed subsection 60B(2) be amended to provide that children need to be protected from physical or psychological harm from exposure to abuse, neglect or family violence. (Consistent with recommendation 17 this should become an object of Part VII rather than a principle).

32. The Government agrees with this recommendation. This will clarify the meaning of the provision, particularly for self-represented litigants.

Recommendation 19

Consistent with Recommendation 18, the Committee recommends that paragraph 68F(1A)(b) of the Exposure Draft be redrafted to provide as a primary consideration in determining the best interests of the child:

- the need to protect children from physical or psychological harm, or from exposure to abuse, neglect or family violence.

33. The Government agrees with this recommendation. The Government considers that simpler drafting should not change the application of the provision.

34. The Government has also further considered the two tier approach to consideration of best interests and notes the concerns that have been expressed about the complexity of the drafting and possible unintended consequences. However, the Government considers that the two tier structure currently in the Bill is valuable, and it will be retained in the Bill.

35. In order to clarify that the primary factors should be the most important in the consideration of the court, a note has been inserted into the provisions which states that making primary considerations is consistent with the objects of Part VII as set out in section 60B. The court must therefore consider the matters set out having regard to the objects and principles and in particular the benefit to the child of a meaningful relationship with both parents and the need to protect a child from physical or psychological harm or from exposure to abuse, neglect or family violence.

Recommendation 20

The Committee recommends that Division 11 of the Act be redrafted into clear and concise language as recommended by the Family Law Council in its letter of advice to the Attorney-General of November 2004.

36. The Government agrees with this recommendation and will amend Division 11. The Government considers that the changes proposed by the Family Law Council will make the Division easier to understand, in particular for self-represented litigants. The Division has been redrafted with slight modifications to the Family Law Council recommendations, including a

limitation on the capacity of State courts to alter family law orders to situations where there is additional material available.

37. Division 11 deals with the relationship between contact orders made by courts exercising jurisdiction under the Act and family violence orders made under a prescribed law of a State or Territory to protect a person from family violence. The amendments to the Bill will make the Division clearer, more concise and easier to understand by the people who use and implement it, in particular, for State and Territory Magistrates making family violence orders.

Resolution outside the legal system

Recommendation 21

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 affidavit asserting the existence of family violence and 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.

38. The Government does not agree with recommendation 21(a). The Government considers that some consideration of the existence of family violence or child abuse is required by a judicial officer, as the threshold to avoid family dispute resolution proposed by the Committee is too low. Consideration by a judicial officer at an early stage, for example a directions hearing or case assessment conference, would provide the opportunity to make appropriate interim orders as to whom the child will reside with and spend time with. It will also allow for possible referral of the matter to family dispute resolution, whether appropriate reports to State or Territory investigating authorities have been made and whether there are any other processes that may be of assistance to the parties.
39. The Government also considers that the move to a less adversarial approach will also have the effect of better dealing with allegations of violence earlier in the court proceedings.
40. The Government agrees with recommendation 21(b). As discussed above in relation to Recommendation 10, the Government considers a costs provision is appropriate where it is limited to circumstances where it is established that the false allegation was ‘knowingly made’.

Recommendation 22

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 dispute resolution under proposed subsection 60I(7).

41. The Government does not agree with this recommendation. The Government considers that, rather than removing the time period entirely, it be extended to twelve months, as suggested by the National Alternative Dispute Resolution Advisory Council (NADRAC). It is important that the requirement to attend family dispute resolution not be undermined by an unlimited time period, as there are considerable benefits for parties in attending dispute resolution processes, even for high conflict parents.

Recommendation 23

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.

42. The Government agrees with this recommendation. The Government will amend the Bill to introduce the reasonable grounds test, as it would make clear the standard to apply and be more suited to determination at an interim hearing.

Recommendation 24

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.

43. The Government does not agree with this recommendation. The Government does not consider that it is appropriate for this requirement to be in Rules of Court, but that it should be in the Act.
44. In order to make this process less bureaucratic, section 60J will be amended to remove the requirement for the family counsellor or family dispute resolution practitioner to provide a certificate attesting that the required information has been provided, and instead will require the applicant to affirm, as part of the court application process, that they have received this information. If the applicant has not received the information, the court will be required to consider referring the applicant to a counsellor or dispute resolution practitioner outside the court to obtain that information.
45. The Bill also proposes an exception to this requirement where there is a risk of child abuse or family violence if there is a delay in the court hearing the matter. This exception ensures that those matters involving high risk or immediate

violence are heard by the court as soon as possible, minimising the risk of violence to the parties or the children.

46. Additionally, the Government will also amend this provision to clarify what is meant by ‘issues’. The intention of this provision is to require a person to obtain information from a family counsellor or family dispute resolution practitioner about what services and options are available to them, so that they are aware of any alternatives to court action and services that may assist them in their particular circumstances.

Recommendation 25

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 once 65 Family Relationship Centres are operational.

47. The Government agrees with this recommendation in principle. The Government considers that this recommendation would be difficult to implement due to the lack of certainty about when the particular numbers of Centres are operational.
48. As an alternative, the Government is of the view that the concerns of the Committee could be addressed by providing for commencement on Proclamation. This would ensure that the provisions do not come into operation without the necessary support services being available and would satisfy the Committee’s major concern. The Government does not, at this stage, expect any delay in the rollout of the Family Relationship Centres or other family law reforms.

Recommendation 26

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.

49. The Government agrees with this recommendation in principle. In order to avoid the inclusion in the legislation of provisions that are unnecessary (in that their intended effect is already achieved by other provisions), the Government will amend paragraphs 10C(3)(a) and 10K(3)(a) to clarify that disclosures that the family counsellor or family dispute resolution practitioner believes are necessary for the purpose of protecting a child from harm or risk of harm are allowed. Paragraphs 10C(3)(d) and 10K(3)(d) will be deleted. The Government considers that this will ensure that all the disclosures contemplated as allowable by the Committee in its recommended amendment of paragraphs 10C(3)(d) and 10K(3)(d) are permitted, while restricting disclosures

in a manner consistent with the Committee's recommendation and avoiding the creation of an ineffectual provision.

Recommendation 27

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.

50. The Government agrees that, in order to provide guidance to family counsellors and family dispute resolution practitioners, sections 10C and 10K should be amended to delineate circumstances in which disclosure is mandatory from those circumstances in which disclosure may occur, at the discretion of the family counsellor or family dispute resolution practitioner.
51. The Government considers that it is only appropriate to mandate disclosure of communications where the body or individual to whom communications are to be disclosed is able to be prescribed in the legislation. As a result, disclosure of communications made in family counselling or family dispute resolution will be mandatory where such disclosure is required to comply with a law of the Commonwealth, a State or a Territory (such as a law relating to the reporting of child abuse or mistreatment).
52. The Government does not believe that it is appropriate to require a family counsellor or family dispute resolution practitioner to assess the competing interests of affected people before a discretionary disclosure may be made. Such a requirement would impose an additional burden on family counsellors and family dispute resolution practitioners and could result in increased litigation over whether the interests were appropriately considered.

Recommendation 28

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.

53. The Government agrees with this recommendation and will amend the provisions accordingly.
54. In order to safeguard children involved in family dispute resolution or family counselling, the issue of disclosure of communications made by children will be approached in the same manner as disclosure of children's communications on referral – that is, such disclosure should only be made with the consent of each person who has parental responsibility for the child or with the consent of a court (paragraphs 10C(2)(b) and 10K(2)(b)).
55. Such disclosure would allow the efficient operation of family dispute resolution conducted using shuttle mediation or a joint sessions/ private caucus model. In such situations it is imperative that the family dispute resolution practitioner is able to disclose communications made by one party to the other, where that disclosure is authorised. It is also conceivable that the disclosure of communications to other parties could be desirable in conducting family counselling.

Recommendation 29

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.

56. The Government agrees with this recommendation. The Government requested advice from NADRAC and the Family Law Council on this issue. NADRAC and the Family Law Council have now advised the Government that it is not appropriate for any family dispute resolution practitioners to have immunity. Based on that advice, section 10M will be removed from the Bill.

Recommendation 30

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.

57. The Government agrees with this recommendation. However, as outlined in the Government's response to recommendation 29, the Government has decided to remove immunity for all family dispute resolution practitioners (whether they conduct advisory or facilitative dispute resolution). As the distinction between facilitative and advisory dispute resolution was only relevant to the application

of the immunity for family dispute resolution practitioners, the distinction between facilitative and advisory dispute resolution in subsection 10H(2) is no longer required.

Recommendation 31

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.

58. The Government agrees with this recommendation. Section 11E provides that where a court has the power to order a person to attend family counselling, family dispute resolution, a course, program or service, or an appointment with a family and child specialist, it may seek the advice of either a family and child specialist (if it is a court that has family and child specialists) or an appropriately qualified professional, either within the court or outside it (such as a professional employed by a Family Relationship Centre). The section aims to ensure that the court makes orders that are appropriate to the circumstances and needs of the parties, and which take into account the family services available in different areas.
59. The Government considers that any measure that increases the transparency of court processes by ensuring parties are informed when, and from whom, the judge seeks advice will address this problem and build trust by providing reassurance to parties that they are active participants in, rather than observers of, their family law matter.

Recommendation 32

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.

60. The Government agrees with this recommendation. The Government has already commissioned the Community Services and Health Industry Skills Council (CSHISC) to develop competency-based standards and a suite of qualifications for family counsellors and family dispute resolution practitioners across the family law system, including in the Family Relationship Centres. The CSHISC project is due to be completed before the introduction of compulsory dispute resolution. In the meantime, the current provisions in the Act with respect to qualifications will continue to apply.
61. The Government will be putting in place an evaluation of the Family Relationship Centres. In addition, all organisations receiving new or existing funding under the Family Relationships Services Program (FRSP) will be subject to its ongoing evaluation processes. This includes meeting the FRSP standards and providing regular reports on service delivery issues to the Department of Family and Community Services.

Recommendation 33

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.

62. The Government agrees with this recommendation in part. In the Act, a parenting plan is an agreement, made in writing between parents, dealing with arrangements about their children. The Government will implement the additional requirements that the plans be signed and dated to make them more certain.
63. Parenting plans are voluntary agreements. A party can seek to change the terms of their agreement at any time. The agreement is not legally enforceable. A cooling off period is therefore unnecessary.

Recommendation 34

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.

64. The Government agrees with this recommendation in principle. The Government will amend the Bill to include an explicit provision making clear the power of the court, in ‘exceptional circumstances’ to make orders that can only be changed by the subsequent order of the court and not by a subsequent parenting plan. The Government anticipates that this would include a situation where a court has concerns that the later parenting plan would not be made in the best interests of a child.

Less adversarial court processes for parenting matters

Recommendation 35

The Committee recommends that the words ‘and the court is satisfied that the consent was not given under coercion’ be inserted into the proposed paragraph 60KA(2)(b) and the proposed subsection 60KA(3) of the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005 so that these provisions read as follows:

(2)(b) if the parties to the proceedings consent and the court is satisfied that the consent was not given under coercion – to the extent that they are not proceedings under this Part.

(3) This Division also applies to any other proceedings between the parties that involve the court exercising jurisdiction under this Act and that arise from the

breakdown of the parties' marital relationship, if the parties to the proceedings consent and the court is satisfied that the consent was not given under coercion.

65. The Government agrees with this recommendation. The Government will amend the Bill to guard against the possibility of coercion being placed upon parties to consent to the principles applying in proceedings other than Part VII proceedings (eg. property matters). The Government does note, however, that it is likely that a court would have been alert to this issue anyway.

Recommendation 36

The Committee recommends that a new principle stating that 'proceedings are to be conducted in a way that will safeguard the child or children concerned and the parties against family violence, child abuse, and child neglect' be inserted into the proposed section 60KB of the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005.

66. The Government agrees with this recommendation and will insert this principle to give emphasis to the protection of the child in less adversarial proceedings. The Government agrees with the Committee in considering that this change 'will not only assist the court in dealing with allegations of violence, abuse and neglect, but with actual incidences of these things also.' This is consistent with the greater emphasis on the safety of children in the objects provision of Part VII (as discussed in recommendation 17).

Recommendation 37

The Committee recommends that the proposed section 60KG of the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005 be amended to include an additional requirement that the court may only apply one or more of the provisions of the *Evidence Act* 1995 mentioned in the proposed subsection 60KG(1) to an issue in child-related proceedings in exceptional circumstances.

The Committee also recommends that a new provision be inserted into the proposed section 60KG(2) requiring the court to take the following factors into account when deciding whether to apply one or more of the specified provisions of the *Evidence Act* 1995 to an issue in child-related proceedings:

- The importance of the evidence in the proceeding; and
- The nature of the cause of action or defence and the nature of the subject matter of the proceeding; and
- The probative value of the evidence; and
- The powers of the court (if any) to adjourn the hearing, to make another order or to give a direction in relation to the evidence.

67. The Government agrees with this recommendation and will amend the Bill accordingly. As stated by the Committee, these factors would ‘provide greater surety of justice for the parties to the proceedings’.

Recommendation 38

The Committee recommends that the set of technical amendments to the proposed sections 60KA, 60KB, 60KC, 60KE, 60KF, 60KG, and 60KI of the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005 suggested by the Family Court of Australia in paragraphs 38, 40-42, 44-46, 54.1, 54.3-54.4, and 55-57 of its submission be given careful consideration by the Government.

68. The Government agrees with this recommendation and has implemented the Family Court’s suggested amendments with one exception. Contrary to the suggestion made by the Family Court, the Government considers that the provisions relating to a less adversarial process in child-related proceedings should apply to contravention applications. The Government considers that a less adversarial process should be the aim for litigation in relation to children’s issues in general.

Compliance regime

Recommendation 39

The Committee recommends that the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005 be amended so as to insert a single provision at the appropriate point at the beginning of Division 13A of the Act which applies to all Subdivisions in Division 13A and which contains the following elements:

The section applies if:

- a parenting order has been made in relation to a child (whether before or after the commencement of Division 13A); and
- after the parenting order was made, the parents of the child made a parenting plan that dealt with a matter dealt with in the parenting order; and
- proceedings are brought under this Division in relation to a parenting order; and
- the parenting plan was in force when the contravention or alleged contravention of the parenting order occurred.

In exercising its powers under this Division, the court must:

- have regard to the terms of the parenting plan; and
- consider whether to exercise its powers under this Division to make an order varying the parenting order to include (with or without modification) some or all of the provisions of the parenting plan.

The existing note in the proposed sections 70NEC, 70NGB and 70NJA be retained in the single section.

Consequentially, the proposed sections 70NEC, 70NGB and 70NJA of the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005 should be deleted from the draft Bill.

69. The Government agrees with this recommendation and will amend the Bill so that the repetition of the provisions relating to parenting plans at three separate points throughout Division 13A, which relate to the consequences of failure to comply with orders and other obligations that affect children, is avoided. The Government considers that this amendment will simplify the provision, particularly for self-represented litigants.
70. Further, in response to the Committee's concerns about the complexity of Division 13A, the Government has implemented significant changes to simplify the Division. The Bill will be amended so that there is a clear sequence which more clearly distinguishes the powers of the court depending on the type of contravention before it, rather than the 3 stage parenting compliance regime (for example, where there is a finding of a contravention and a reasonable excuse). The Government considers this reorganisation to be a significant improvement to the current Division 13A.

Recommendation 40

The Committee recommends that, as the phrase 'if the current contravention is not of a minor or technical nature' – in the proposed subsection 70NG(1) is unnecessary and has the potential to unduly complicate court process and increase litigation:

- (a) the phrase be deleted from proposed paragraphs 70NG(1)(d) and 70NG(1)(f) of the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005; and
- (b) the proposed subparagraph 70NG(1)(e)(iv) of the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005 be deleted.

The Committee also recommends that a provision be inserted into Division 13A of the Act enabling the court to make a costs order against a party to proceedings where:

- (a) the court is satisfied that the party has made more than one contravention application for minor or technical contraventions of a primary order(s); and
- (b) relief for those applications has not been granted.

71. The Government agrees with this recommendation. The Government considers that the proposed additional costs provision will also add clarity to existing provisions and make it clear, in particular for self-represented litigants, that where there are a series of applications for breaches where no relief is provided, there will be potential costs implications.

Other issues

Recommendation 41

The Committee recommends that the Government assess whether the proposed changes in terminology, to remove the terms ‘residence’ and ‘contact’ will affect recognition of parental rights under international law, and consider including a specific provision or a dictionary or definitions in the Act to clarify this.

72. The Government agrees with this recommendation. On assessing the impact of the proposed changes in terminology on international law, the Government is confident that they will not affect the recognition of parental rights. The Government considers that items 97-99 in Schedule 8 of the Bill address this issue, and that the terms ‘lives with’ and ‘spends time with’ are sufficiently clear for courts in other countries to consider. The terms ‘residence’ and ‘contact’ are not universal terms. In fact, a number of overseas countries retain the use of terms such as ‘custody’.
73. Even though the Government is confident that the international law issues are appropriately dealt with, it agrees that a dictionary would assist in ensuring clarity around this issue. A dictionary which includes Part VII terms has been inserted into the Bill. A more complete dictionary for the entire Act will be considered for introduction in the next appropriate legislative vehicle.

Recommendation 42

The Committee recommends that sections 62G, 68G and 68L be amended to specifically include that the views of the child be sought by Child Representatives and family and child specialists unless not appropriate due to the child’s age, maturity or unless there is a specific circumstance that makes this inappropriate.

74. The Government agrees with this recommendation and will amend the Bill to clarify the requirement that child representatives ensure the court is fully informed of the child’s wishes where the child expresses such views. The Government will also implement a range of the recommendations of the recent Family Law Council report *Pathways for Children: A review of children’s representation in family law*.

Recommendation 43

The Committee recommends that the proposed subparagraph 60B(2)(a)(ii) be amended to include specific reference to grandparents and other relatives.

75. The Government agrees with this recommendation. This change is consistent with other amendments in the Bill to facilitate greater involvement of extended family members in the lives of children.

Recommendation 44

The Committee recommends that the definition of *relative* in subsection 60D(1) be amended, to replace ‘step-father or step-mother’ with ‘step-parent’.

76. The Government agrees with this recommendation and will amend the Bill to further simplify the legislation.

Recommendation 45

The Committee recommends that the definition of Aboriginal child proposed in Schedule 1, item 3 of the Bill for inclusion in section 60D of the Act be redrafted along the lines of ‘a child who is a descendent of the Aboriginal people of Australia.’

77. The Government agrees with this recommendation and will amend the Bill accordingly. The amendment will ensure that the definition is consistent with the definition of a Torres Strait Islander child.
78. The Government notes that the Committee was unable to determine whether there was a specific reason for the variation in the two definitions. Despite further enquiries into their origin, the Government can find no convincing reason not to accept the Committee’s recommendation.

Recommendation 46

The Committee recommends that the definition of Aboriginal or Torres Strait Islander culture be amended to include the words ‘of the relevant community/communities’, to reflect the differences in lifestyle and tradition that exist among Australia’s Indigenous population.

79. The Government agrees with this recommendation. This amendment will assist to better reflect the differences in lifestyle and tradition that exists among Australia’s Indigenous population.

Recommendation 47

The Committee recommends that the definition of ‘relative’ be examined to determine if explicit mention should be made of persons considered under Indigenous customary law to be the equivalent of others mentioned in the definition.

80. The Government does not agree with this recommendation. This issue has been previously examined by the Government. It is inappropriate to include a concept of Indigenous customary law in the definition of relative. The existing definition of relative is broad and there is capacity for other persons of significance to Indigenous people to be considered by the courts under existing family law legislation.

Recommendation 48

The Committee recommends that a new subsection 60KI(4) be inserted, to extend the provisions set out in subsection 60KI(3) to all child-related proceedings.

81. The Government agrees with this recommendation. However, rather than introducing an additional provision, the Government has amended subsection 60KI(3) to apply to all child-related proceedings.
82. A note has also been inserted to acknowledge that this provision may be particularly relevant to Aboriginal or Torres Strait Islander children.

Recommendation 49

The Committee recommends that resources be allocated to enable a rewriting of the Act as soon as possible.

83. The Government accepts this recommendation in principle. The complexity of the legislation and the benefits of a rewrite are acknowledged. This is a matter for the Parliamentary Business and Budget processes.

Recommendation 50

That the Act be redrafted to provide a consolidated dictionary or glossary of defined terms, to assist in easier comprehension of the Act. The definitions should avoid merely being a cross-reference to another section of the Act.

84. The Government accepts this recommendation in principle. A dictionary which includes Part VII terms has been inserted into the Bill. A more complete dictionary for the entire Act will be considered for introduction in the next appropriate legislative vehicle.

Drafting issues

Recommendation 51

The Committee recommends that the headings to proposed sections 10C, 10D, 10K and 10L be amended to delete 'etc'.

85. The Government agrees with this recommendation and will amend the Bill accordingly.

Recommendation 52

The Committee recommends that the headings to sections 10C, 10D, 10K, 10L, 10M, 11C, 11D, 61C, 62B, 65K and 70NEAB be redrafted to ensure that they indicate the subject matter of the section rather than state the law, and to make them as clear as possible.

86. The Government agrees to this recommendation and will amend the Bill accordingly.

Recommendation 53

The Committee recommends that:

- (a) proposed subdivision AAA and subdivision AA be renumbered, to be subdivisions AA and AAA respectively; and
- (b) the heading to existing AA be amended to 'Court's powers where contravention or contravention without reasonable excuse not established'.

87. The Government agrees with this recommendation. The Government considers that these technical amendments suggested by the Family Law Section of the Law Council of Australia will assist to clarify the legislation, particularly for self-represented litigants.

Recommendation 54

The Committee recommends that the following minor technical amendments to the Family Law Amendment (Shared Parental Responsibility) Bill 2005, be made:

- (a) schedule 2, Part 1, after line 3, of the Exposure Draft, insert a heading '*Family Law Act 1975*';
- (b) items 72 and 75 of Schedule 5 be amended to clarify if the existing paragraphs (ca) in sections 67K(1) and 67T are to be deleted or remain;
- (c) a new item be inserted in Schedule 1, amending subsection 68F(3) of the Act, to delete 'in subsection (2)' and insert 'in subsections (1A) and (2)'; and
- (d) delete the reference to paragraph 70NG(3)(c) in proposed paragraph 70NJA(2)(b) (in Schedule 2, item 12), and replace with 70NJ(3)(c).

88. The Government agrees with this recommendation. These are technical amendments which will be reflected in the Bill.

Wider issues

Recommendation 55

The Committee recommends that the Government task an independent organisation to monitor and evaluate the effect of the Family Law Amendment (Shared Parental Responsibility) Bill 2005 after its enactment. The evaluation should have both qualitative and quantitative components.

89. The Government agrees with the need for appropriate monitoring and evaluation of the effect of the legislation. The Government is giving further consideration to how this monitoring and evaluation will be conducted.

Recommendation 56

The Committee recommends that an independent review of the operations and location of the Family Relationship Centres be conducted after the first centres have been in operation for 12 months.

90. The Government agrees with this recommendation. The Government will be putting in place an independent evaluation of the Family Relationship Centres. The first stage will evaluate the centres after the first 15 centres have been in operation for 12 months.

Recommendation 57

The Committee recommends that the Government introduce a system of accreditation and evaluation for all Contact Centres as a matter of urgency.

91. In order to ensure the quality of services delivered by family counsellors, family dispute resolution practitioners and workers in Government funded children's contact services, competency-based accreditation standards are currently being developed by the Community Services and Health Industry Skills Council (CSHISC). These standards will form the minimum requirements for family counsellors, family dispute resolution practitioners and workers in funded children's contact services.
92. Children's contact services that do not receive Government funding may also choose to adopt the standards, which will act as a best practice benchmark for the provision of contact services. The Bill will contain a framework for the introduction of the accreditation system.

Recommendation 58

The Committee recommends that the National Education Campaign associated with the new family law provisions be extended beyond financial year 2006-07, provided that it focuses on objective information explaining Government policies, programs and services in this area.

93. This is a matter for consideration in the budget process. The 2005-06 Budget contains \$5.7 million over 2 years for the Attorney-General's Department and the Department of Family and Community Services for an initial community education campaign primarily to publicise the legislative changes to the Act.

Recommendation 59

The Committee recommends that an examination of the impact of case law be included as part of the review of the implementation of these legislative reforms (see Recommendation 55).

94. The Government agrees to this recommendation. This issue will be examined as part of the ongoing review and monitoring of the family law reforms.