4

Less adversarial court processes for parenting matters

Introduction

4.1 The FCAC report recommended that:

> …the Commonwealth government establish a national, statute based, Families Tribunal with power to decide disputes about shared parenting responsibility (as described in Chapter 2) with respect to future parenting arrangements that are in the best interests of the child/ren, and property matters by agreement of the parents. The Families Tribunal should have the following essential features:
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> - It should be child inclusive, non adversarial, with simple procedures that respect the rules of natural justice.
> - Members of the Families Tribunal should be appointed from professionals practising in the family relationships area.
> - The Tribunal should first attempt to conciliate the dispute.
> - A hearing on the dispute should be conducted by a panel of three members comprising a mediator, a child psychologist or other professional able to address the child's perspective and a legally qualified member.
> - Legal counsel, interpreters or other experts should be involved in proceedings at the sole discretion of the

> Tribunal. Experts should be drawn from an accredited panel maintained by the Tribunal.[1]

4.2 In its response to the FCAC report, the government did not accept this recommendation but indicated that it would introduce legislative changes to render court processes less adversarial:

> The Government does not agree with this recommendation. It considers the committee's objectives can be better met through the new network of Family Relationship Centres and through changes to court processes.
>
> Through the new centres, separated couples will be able to access a non-adversarial way of resolving disputes at a much earlier stage in their separation, before conflict has escalated and disputes have become entrenched. For those families who do need to go to court, the government will introduce less adversarial court processes for parenting matters.[2]

4.3 This Chapter will focus on these legislative changes as included in the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005.

4.4 The terms of reference for the inquiry require the Committee to consider whether the provisions of the proposed Bill are drafted to implement the measures set out in the Government's response to the FCAC report. Specifically in the context of less adversarial proceedings, the Committee is required to consider whether the proposed Bill is drafted to ensure that the court process is less traumatic and easier to navigate for the parties and children.

Provisions in the draft Bill

4.5 Schedule 3 of the draft Bill contains the provisions relating to less adversarial court processes. The Explanatory Statement for the draft Bill states that:

> Schedule 3 implements a range of amendments to provide legislative support for a less adversarial approach to be adopted in all child-related proceedings under the Act. This

1 FCAC report, pp.xxiv, 104 (recommendation 12).

2 Government response to the FCAC report, p.12.

> approach relies on active management of proceedings by judicial officers in a way that considers the impact of the proceedings on the child and not just the outcome of the proceedings.
>
> The intention is to ensure that the case management practices adopted by the courts will promote the best interests of the child by encouraging parents to focus on their children and on their parenting responsibilities.[3]

4.6 In terms of the structure of the Commonwealth *Family Law Act* 1975, Schedule 3 creates a new Division 1A for insertion into Part VII of the Act.[4] This new Division contains almost all of the provisions relating to less adversarial court processes.[5]

4.7 The Explanatory Statement also indicates that the approach taken in the amendments

> …largely reflects that taken by the Family Court of Australia in its pilot of the Children's Cases Program. The approach contains provisions about procedure already located in the *Federal Magistrates Act 1999*. It also reflects provisions related to the management of cases that are found in the *United Kingdom Civil Procedure Rules* and the NSW *Children and Young Persons (Care and Protection) Act 1998*.[6]

4.8 The major changes to the *Family Law Act* 1975 introduced by Schedule 3 of the draft Bill are set out below.

Application and definition of 'child-related proceedings'

4.9 Under the new section 60KA, Division 1A will apply to proceedings that are:

- Wholly under Part VII; and

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3 Explanatory Statement to the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005, p.13.

4 Part VII deals with post-separation court proceedings concerning children.

5 Earlier in this report the Committee recommends that Division 1A be moved to a later position in the Act; see Chapter 2 paragraphs 2.171 – 2.172 above.

6 Explanatory Statement to the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005, p.13.

- Partly under Part VII to the extent that they are proceedings under Part VII and, if the parties consent, to the extent that they are not proceedings under Part VII.[7]

4.10 Division 1A will also apply under section 60KA to any other proceedings between the parties that involve the court exercising jurisdiction under the Act and that arise from the breakdown of the parties' marital relationship, if the parties consent.[8]

4.11 Section 60KA further defines all proceedings to which Division 1A will apply (i.e. proceedings wholly or partly under Part VII and other proceedings as indicated above) as 'child-related proceedings'.[9]

4.12 Section 60KA also provides that consent given for subsections 60KA(2) and (3) must be in the form prescribed by the applicable Rules of Court and may be revoked by a party with the leave of the court.[10]

4.13 Under the new section 60KC, Division 1A will also apply to the hearing of child-related proceedings in Chambers.

Court duties and powers

4.14 Schedule 3 of the draft Bill contains a number of provisions governing the conduct of child-related proceedings.

4.15 The new section 60KB specifies four principles to which the court will have to give effect in performing duties and exercising powers, whether under Division 1A or otherwise, in relation to child-related proceedings and in making other decisions about the conduct of child-related proceedings.[11] These principles are:

- The court is to consider the needs and concerns of the child or children concerned in determining the conduct of the proceedings (principle 1).
- The court is to actively direct, control and manage the conduct of the proceedings (principle 2).

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7 Subsections 60KA(1) and (2).
8 Subsection 60KA(3).
9 Subsection 60KA(4).
10 Subsections 60KA(5) and (6).
11 Subsection 60KB(1).

- The proceedings are, as far as possible, to be conducted in a way that will promote cooperative and child-focused parenting by the parties (principle 3).
- The proceedings are to be conducted without undue delay and with as little formality, and legal technicality and form, as possible (principle 4).[12]

4.16 The Explanatory Statement for the draft Bill states that these principles will 'guide the court in implementing the less adversarial approach.'[13]

4.17 In giving effect to the four principles, under the new section 60KE the court will be required to observe a number of duties as follows:

- Deciding which of the issues in the proceedings require full investigation and hearing and which may be disposed of summarily;
- Deciding the order in which the issues are to be decided;
- Giving directions or making orders about the timing of steps that are to be taken in the proceedings;
- Considering, in deciding whether a particular step is to be taken, whether the likely benefits of taking the step justify the costs of taking it;
- Making appropriate use of technology;
- If considered appropriate, encouraging the parties to use family dispute resolution or family counselling;
- Dealing with as many aspects of the matter as it can on a single occasion; and
- Dealing with the matter, where appropriate, without requiring the parties' physical attendance at court.[14]

4.18 Under the new section 60KD, the court will have the ability to exercise a power under Division 1A on its own initiative or at the request of one or more of the parties to proceedings.

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12 Subsections 60KB(3)-(6). Under subsection 60KB(2) regard will have to be had to the principles in interpreting Division 1A.

13 Explanatory Statement to the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005, p.13.

14 Subsection 60KE(1).

4.19 Further, under the new section 60KF, if at any time after the commencement of child-related proceedings the court considers that it may assist in the resolution of the dispute between the parties, the court may do any or all of the following: make a finding of fact in relation to the proceedings; determine a matter arising out of the proceedings; make an order in relation to an issue arising out of the proceedings.

Evidentiary provisions

4.20 A key feature of Schedule 3 of the draft Bill is a series of evidentiary provisions regulating the application of certain evidentiary rules in child-related proceedings and setting out duties and powers for the court in relation to evidence in such proceedings.

4.21 The new section 60KG will prevent the application of certain parts of the Commonwealth *Evidence Act* 1995 to child-related proceedings unless the court decides otherwise. Under section 60KG the following parts of the *Evidence Act* 1995 will not apply to child-related proceedings:

- Divisions 3, 4, and 5 of Part 2.1 (which deal with general rules about giving evidence, examination in chief, re-examination and cross-examination) other than sections 26, 30, 36, and 41 (which deal with court control over questioning of witnesses; interpreters; examination of a person without a subpoena or other process; and improper questions).
- Parts 2.2 and 2.3 (which deal with documents and other evidence including demonstrations, experiments and inspections).
- Parts 3.2 to 3.8 (which deal with hearsay, opinion, admissions, evidence of judgments and convictions, tendency and coincidence, credibility and character).[15]

4.22 The court however will still be able to apply one or more of these provisions of the *Evidence Act* 1995 if:

15 Subsection 60KG(1). Section 190 of the *Evidence Act* 1995 currently provides that if the parties consent, the court can dispense with the application of these parts of the Act. Subsection 60KG(3) ensures that a common law rule which would have been prevented from operating due to the provisions of the *Evidence Act* 1995 will not be revived by virtue of subsection 60KG(1).

- For an issue relating to proceedings under Part VII, the court considers it necessary in the best interests of the child or children concerned to do so; and
- For an issue relating proceedings not under Part VII, the court considers it necessary in all the circumstances to do so.[16]

4.23 The new section 60KH provides that, if the court decides under subsection 60KG(2) to apply the law against hearsay to child-related proceedings, then:

- Evidence of a representation made by a child about a matter relevant to the welfare of the child or another child which would not otherwise be admissible as evidence due to the law against hearsay will not be inadmissible in the proceedings only because of the law against hearsay.
- The court may give such weight (if any) as it thinks fit to evidence admitted under subsection 60KG(2).[17]

4.24 Under the new section 60KI, the court in giving effect to the principles set out in section 60KB may:

- Give directions or make orders about the matters in relation to which the parties are to present evidence;
- Give directions or make orders about who is to give evidence in relation to each remaining issue;
- Give directions or make orders about how particular evidence is to be given;
- If the court considers that expert evidence is required, give directions or make orders about the matters in relation to which an expert is to provide evidence, the number of experts who may provide evidence in relation to a matter, and how an expert is to provide the evidence; and

16 Subsection 60KG(2).

17 Subsections 60KH(1) – (3). Under subsection 60KH(4), section 60KH will apply regardless of any other Act or rule of law. In section 60KH 'child' is defined as a person under 18, and 'representation' includes an express or implied representation, orally or in writing, and a representation inferred from conduct (subsection 60KH(5)). Subsections 60KH(2)-(5) restate the current section 100A of the *Family Law Act* 1975 which is accordingly repealed by the draft Bill.

- Ask questions of, and seek information or the production of evidence from, parties, witnesses and experts on matters relevant to the proceedings.[18]

4.25 Under section 60KI the court may also regulate the evidence given by giving directions or making orders concerning the use, form, duration, and content of written and oral evidence.[19]

4.26 In child-related proceedings concerning an Aboriginal or Torres Strait Islander child, section 60KI also allows the court to receive into evidence the transcript of evidence in any other proceedings from the court, another court or a tribunal and draw any conclusions of fact from that transcript that it thinks proper. The court may also adopt any recommendation, finding, decision or judgment of those courts or tribunals.[20] Section 60KI is discussed further at paragraphs 6.55 – 6.58 in Chapter 6.

Matters arising from the evidence

Support for Schedule 3

4.27 Considerable support for the Schedule 3 provisions was expressed in evidence received by the Committee. In particular, the goal of rendering court processes less adversarial received strong endorsement. Professor Lawrence Moloney, for example, told the Committee that:

> …it is extremely gratifying to see that, after almost 30 years, the court has also begun to embrace non-adversarial ways of hearing cases and making decisions.[21]

4.28 The Shared Parenting Council of Australia stated that:

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18 Subsection 60KI(1).

19 Subsection 60KI(2). For example, the court may give directions or make orders about the use of written submissions, the length of written submissions, time limits for the giving of evidence, the giving of particular evidence orally, restrictions on the presentation of evidence of a particular kind, limits on the number of witnesses who are to give evidence in the proceedings.

20 Subsection 60KI(3). Section 60KI(3) is a modified version of section 86 of the Commonwealth *Native Title Act* 1993.

21 Professor Moloney, *Proof transcript of evidence*, 20 July 2005, p.26.

> The accent will now be on non-adversarial proceedings in the court and on doing away with the rules of evidence, and, I believe, the effective rolling-out of the children's cases pilot approach to practice and procedure, which is already happening very effectively here in Sydney. All of those things are really marvellous.[22]

4.29 One submission stated that the 'move towards a less adversarial approach in determining these matters [child-related proceedings] is commended',[23] while the Federation of Community Legal Centres (Vic) indicated that it 'welcomes an adoption of a less adversarial process in assessing children and property decisions in relationship breakdowns.'[24] The Family Law Council expressed its support for the Schedule 3 provisions, and the Family Court of Australia indicated that it supports the direction taken by Schedule 3 of the draft Bill.[25] The aims of reducing the formality of proceedings and considering the impact of proceedings on children were also commended.[26]

4.30 The Aboriginal Legal Service of Western Australia (ALSWA) signalled its endorsement of Schedule 3, particularly the new section 60KI(3):

> ALSWA supports and applauds the Bill's section 60KI(3), which has potential to be of great assistance to the court and parties in proceedings as well as saving a great deal of time and cost in establishing relevant facts. ALSWA also supports and applauds the move towards court procedures tailor-made to the circumstances. This also saves time and cost in establishing relevant facts, and opens the door to the court developing more culturally-appropriate processes for its Aboriginal and Torres Strait Islander clients.[27]

4.31 The National Council of Single Mothers and their Children stated that the 'focus on the child is a welcome change in direction', but also submitted that 'the capacity for the court to inform itself of the child's

22 Mr Green QC, *Proof transcript of evidence*, 25 July 2005, p.28.

23 Ms Ballantyne, *Submission 32*, p.1.

24 Federation of Community Legal Centres (Vic) Inc, *Submission 31*, p.3. The Federation did state however that less adversarial processes would only be workable if factors such as family violence and power inequalities were recognised at the outset: *Submission 31*, p.3.

25 Family Law Council, *Submission 33*, p.5; Family Court of Australia, *Submission 53*, p.12.

26 *Submission 57*, p.1.

27 Aboriginal Legal Service of Western Australia (Inc), *Submission 54*, p.6. ALSWA did suggest however that the term 'as possible' in the new subsections 60KB(5) and (6) be replaced with terminology reflective of natural justice and review entitlements.

circumstances and risks to the child's safety has still to be improved.'[28] Support in principle for the aim of rendering court processes less adversarial was expressed by the National Network of Women's Legal Services and the Queensland Law Society.[29]

Issues raised in relation to Schedule 3

4.32 The main issues raised by the evidence in relation to Schedule 3 of the draft Bill are detailed below.

Constitutional validity

4.33 During a briefing on the draft Bill provided for the Committee by the Attorney-General's Department, the issue of the constitutional validity of Schedule 3 was raised.[30] The Committee notes subsequent evidence from the Attorney-General's Department stating that:

> The government received legal advice on the less adversarial approach to child-related matters contained in Schedule 3. That advice concluded that the provisions in that Schedule were likely to be within Commonwealth constitutional power.[31]

Evaluation of the Children's Cases Program

4.34 Concern was expressed regarding the evaluation of the Family Court's Children's Cases Program (CCP), which underpins the approach embodied in Schedule 3 of the draft Bill. The Men's Rights Agency indicated that it would not endorse the changes in Schedule 3 until the Sydney trial of the Program is 'openly assessed by independent reviewers'.[32] Professor Belinda Fehlberg expressed concern regarding the fact that the evaluation is not yet complete:

> …the decision to mandate less adversarial procedures… is premature, given that evaluations of the Children's Cases

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28 National Council of Single Mothers and their Children Inc, *Submission 20*, p.11. The NSW Women's Refuge Resource Centre and the SPARK Resource Centre Inc made virtually identical statements: see *Submission 22*, p.15, and *Submission 16*, p.9.

29 National Network of Women's Legal Services, *Submission 23*, p.18; Queensland Law Society, *Submission 30*, p.2.

30 Mr Duggan, *Transcript of Evidence*, 4 July 2005, p.26.

31 Attorney-General's Department, *Submission 46.1*, Attachment 3.

32 Men's Rights Agency, *Submission 74*, p.13.

> Program… are not complete, and that it is as yet unclear whether this model is appropriate for separating families who use the court system.[33]

4.35 Accordingly, Professor Fehlberg recommended deferral of Schedule 3 until the evaluation of the CCP is complete and the findings have been considered.[34] The National Network of Women's Legal Services also noted that the evaluation of the CCP is not yet complete and recommended deferral of Schedule 3.[35]

4.36 In its submission, the Attorney-General's Department indicated that:

> Initial data from [the Children's Cases Program] is very encouraging. There have now been some 126 cases finalised out of the 220 that have been accepted into the project. There have not yet been any appeals from the decisions that have been made. The full evaluation is expected in early 2006.[36]

4.37 The Department also stated that:

> The government's view is that Schedule 3 of the Bill is drafted sufficiently broadly to allow for flexibility in adopting any appropriate findings or recommendations that result from the evaluation of the Children's Cases Program.[37]

4.38 In light of the results from the CCP to date and the fact that Judges involved in the Program have had positive experiences as indicated by the Family Court (see paragraphs 4.57 – 4.58 below), the Committee does not see that it would be necessary to defer the commencement of Schedule 3 of the draft Bill until the evaluation of the CCP is completed. Further, the Attorney-General's Department indicates that Schedule 3 will be able to accommodate any changes that may be necessary as a result of the final evaluation.

Application of Schedule 3

4.39 The Family Law Section of the Law Council of Australia (FLS) indicated its opposition to the new subsections 60KA(2) and (3),

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33 Professor Fehlberg, *Submission 29*, p.9.

34 Professor Fehlberg, *Submission 29*, p.10.

35 National Network of Women's Legal Services, *Submission 23*, p.18.

36 Attorney-General's Department, *Submission 46.1*, p.26. The Shared Parenting Council of Australia stated that the Sydney pilot of the CCP has been very effective (see paragraph 4.28 above), and Women's Legal Services NSW also indicated that the pilot had been quite successful: Ms Hamey, *Proof transcript of evidence*, 21 July 2005, p.76.

37 Attorney-General's Department, *Submission 46.1*, p.27.

which, due to the application of section 60KG, will mean that, if there is consent by the parties, certain rules of evidence will not apply to a range of proceedings – for example property matters, spousal maintenance, and orders and injunctions. The FLS expressed concern that these provisions could result in weaker parties being forced into providing consent by stronger parties, and could also force the hand of self-represented litigants into providing consent due to the costs involved in having separate hearings.[38] The FLS recommended further discussion about the impact of the new subsections 60KA(2) and (3).[39]

4.40 The Explanatory Statement for the Draft Bill states that:

> The intention of extending the application of the new Division to other matters consented to by the parties is to ensure that people are able to resolve all elements of their dispute using the one process, should they choose to do so.[40]

4.41 The Committee does consider however that, given the range of matters in the *Family Law Act* 1975 apt to come within Division 1A of Schedule 3 and the possibility for coercion to be placed on parties to obtain their consent, an amendment to the proposed paragraph 60KA(2)(b) and the proposed subsection 60KA(3) is warranted to guard against this possibility. The Committee notes that the Family Court, in its submission, has recommended that Division 13A of Part VII (along with Parts XIIIA and XIIIB of the Act) be exempted from the application of subsections 60KA(1) and (2) unless otherwise ordered by the Court.[41]

Recommendation 35

4.42 **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**

38 FLS, *Submission 47*, pp.33-34.

39 FLS, *Submission 47*, p.34.

40 Explanatory Statement to the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005, p.13.

41 Family Court, *Submission 53*, p.13. See also paragraphs 4.71 – 4.72 below.

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.**

The principles and duties for conducting child-related proceedings

4.43 In relation to the principles in the new section 60KB, the FLS was critical of the expressions 'legal technicality' and 'form' in the new subsection 60KB(6):

> These expressions have no clear definition or meaning and are more likely to encourage argument about the meaning of 'technicality' and 'form' that might not otherwise have occurred. Further, subsection 97(3) of the Family Law Act, [*sic*] already provides that the court '*shall proceed without undue formality and shall endeavour to ensure that the proceedings are not protracted*.'[42]

4.44 The FLS recommended that further consideration be given to the insertion of the expressions 'legal technicality' and 'form' in section 60KB(6).[43] The Committee does not consider, however, that these expressions are so obscure as to be likely to present difficulties, particularly for the court.[44] Further, while subsection 97(3) of the *Family Law Act* 1975 does already require the court to proceed without undue formality or protraction, the particular goal of Schedule 3 of less adversarial and more easily navigable court processes suggests that it is appropriate for Division 1A to have its own statement of these requirements.

4.45 Professor Fehlberg expressed concern regarding the requirement under the new subsection 60KB(1) that the court must give effect to the principles, and also suggested that the third principle (cooperative and child-focused parenting by the parties) will be inappropriate in

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42 FLS, *Submission 47*, p.35.

43 FLS, *Submission 47*, p.35.

44 The Committee notes also that these expressions were taken from subsection 93(2) of the New South Wales *Children and Young Persons (Care and Protection) Act* 1998.

cases involving violence or abuse.[45] Professor Fehlberg recommended that:

> …s60KB(1) be amended to state that the court 'must consider' rather than 'must give effect' to the principles set out in s60KB(2).
>
> …s60KB(2) be amended to include as Principle 1, 'The first principle is that the proceedings are to be conducted in a way that will ensure that children and their parents are safeguarded against family violence, and child abuse, neglect and ill-treatment'.[46]

4.46 The Committee does not agree with the first of these recommendations. Merely requiring the court to consider the principles (particularly principles 2 and 4)[47] would have the potential to seriously undermine the effective conduct of less adversarial child-related proceedings.

4.47 In relation to the third principle, the Attorney-General's Department has stated that:

> Implementation of this principle potentially provides an opportunity for much closer participation of children in appropriate cases and a much greater focus on their children's interests by disputing parents. This is in part because the greater judicial management of the hearing process is intended to make it much more flexible and able to respond to the dynamics of the case as it progresses.[48]

4.48 While it is certainly to be hoped that such positive changes in child participation and parenting focus will transpire as a result of the third principle, the Committee sees considerable merit in the insertion of an additional principle seeking to ensure the safeguarding of children and parties against family violence, child abuse, and child neglect. This will help the court to ensure that, in cases where there is violence, child abuse, and child neglect, proceedings are less traumatic for the parties and children. According to the Attorney-

45 Professor Fehlberg, *Submission 29*, p.10.

46 Professor Fehlberg, *Submission 29*, p.10.

47 Principle 2 states that the court is to actively direct, control and manage the conduct of the proceedings; principle 4 states that the proceedings are to be conducted without undue delay and with as little formality, and legal technicality and form, as possible.

48 Attorney-General's Department, *Submission 46.1*, pp.27-28.

General's Department, it is intended that the provisions in Schedule 3 of the draft Bill will enable the court to better deal with allegations of violence and abuse:

> The more active case management approach [envisaged in Schedule 3] will ensure that allegations of violence and abuse are dealt with at an earlier stage in the court process and that judicial officers are better able to ensure that appropriate evidence is before them to assist the court to better address these issues in the proceedings.[49]

4.49 The insertion of an additional principle for the safeguarding of children and parties against family violence, child abuse and child neglect will not only assist the court in dealing with allegations of violence, abuse, and neglect, but with actual incidences of these things also. The number to be allocated to the new principle is not significant given that, under the new subsection 60KB(1), the court will be required to give effect to all of the principles.

Recommendation 36

4.50 **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.**

4.51 In relation to the duties to be observed by the court in the new section 60KE, Professor Fehlberg further submitted that 'the powers set out in this section should be permissive, not mandatory', and accordingly recommended that subsection 60KE(1) be amended 'to state that the court 'may' rather than 'must''.[50]

4.52 In its submission, the Attorney-General's Department stated that:

> …the amendments in section 60KE will ensure the active management of proceedings by judicial officers in such a way that considers the impact of the proceedings on the child and not just the outcome of the proceedings.[51]

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49 Attorney-General's Department, *Submission 46*, p.6.

50 Professor Fehlberg, *Submission 29*, pp.10-11.

51 Attorney-General's Department, *Submission 46.1*, p.28.

4.53 The Committee is of the view that amending proposed subsection 60KE(1) so as to give the court discretion rather than a duty would not be desirable for the same reason given at paragraph 4.46 above regarding the proposed amendment for the principles section.

The evidentiary provisions

4.54 Many of the issues raised in relation to Schedule 3 of the draft Bill revolved around the evidentiary provisions. The FLS indicated its outright opposition to the new section 60KG:

> FLS is strongly opposed to section 60KG… Judges and Federal Magistrates will have to develop a whole new body of common law because the structure of the Evidence Act (Cth) has been taken away.[52]

4.55 The FLS raised concerns with various elements of the new section 60KG including the loss of the right to cross-examine, the exclusion of documentary proof rules, the exclusion of the credibility test, the exclusion of the hearsay and opinion rules, and the effect on individual rights (paragraphs 60KG(1)(a)-(c) and subsection 60KG(2)). The FLS recommended that there be further discussion regarding the impact of the new section 60KG.[53]

4.56 Other submissions also expressed strong concerns relating to the evidentiary provisions in Schedule 3 of the draft Bill:

> To remove the requirements for Court proceedings to be conducted according to the Rules of Evidence is fraught with potential danger and difficulties. …It will create a whole host of further difficulties for the Judge in determining which evidence is to be given weight… It will cause there to be even greater wasted time during trials having to sort through argument about which evidence can be relied on and admitted into evidence and which can not [*sic*].[54]
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> The abolition of the rules about opinion evidence will… prolong trials, increase costs and divert the courts from the reliable evidence. …It is impossible for the court to determine the best interests of a particular child without hearing the

52 FLS, *Submission 47*, p.36. The Law Society of New South Wales questioned the appropriateness of section 60KG: *Submission 81*, p.8.

53 FLS, *Submission 47*, pp.36-39.

54 Queensland Law Society, *Submission 30*, pp.2-3.

> evidence about that particular child. The evidence to be admitted will therefore need to be determined before the court is able to decide what is in the best interests of that child.[55]
>
> The suspension of provisions of the Evidence Act is problematic for reasons related to why some cases are considered to be unsuitable for CCP… it is thought that some issues require proper testing by means of admissible evidence and cross-examination. This is particularly the case with serious allegations of child abuse or domestic violence. …giving the court discretion to apply the rules of evidence to an issue in the proceedings is also problematic, as it will create scope for greater adversarialism as parties seek to put arguments to the trial judge as to whether or not the rules of evidence should be applied to a particular issue.[56]

4.57 In its submission however, the Family Court indicated that Judges involved in the CCP have had positive experiences with a default position of evidence rules not applying:

> …the Judges who have been hearing the cases in the successful Children's Cases Program upon which the sections were modelled, and others, support the position in the Exposure Draft. That is for a number of reasons including because it promotes uniformity and consistency in the hearing of children's cases. Important features of the Children's Cases Program have included the opportunity for parties to directly address the Court without being inhibited by the rules of evidence. This has had important consequences in not only promoting the opportunity of settlement at the earliest stage but also to make it clear at that point as to what the real issues are.
>
> It has also been the experience of the Judges that they are better able to control the volume and type of evidence. These features have led to considerable savings in costs to the parties through the reduction of hearing time. In the event that an issue warrants it, the draft legislation enables a court to exercise its discretion to apply the rules of evidence.[57]

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55 *Submission 68*, pp.1-2.

56 Professor Fehlberg, *Submission 29*, p.11.

57 Family Court, *Submission 53*, p.17.

4.58 The Court further stated that:

> …the views of those who have had experience with the Children's Cases Program is that it is helpful and in fact enables them to control the evidence that comes in, so that the argument that a lot of extraneous hearsay comes in does not occur.[58]

4.59 The Court also noted that provisions preventing evidence rules from applying as the default position exist in State legislation:

> …all of the states, I think, have a similar provision in their child protection legislation – that is, the provisions of the Evidence Act do not apply.[59]

4.60 An example is subsection 93(3) of the New South Wales *Children and Young Persons (Care and Protection) Act* 1998 which provides that:

> The Children's Court is not bound by the rules of evidence unless, in relation to particular proceedings or particular parts of proceedings before it, the Children's Court determines that the rules of evidence, or such of those rules as are specified by the Children's Court, are to apply to those proceedings or parts.[60]

4.61 There are comparable provisions in other State Acts. Paragraph 45(1)(a) of the South Australian *Children's Protection Act* 1993, for example, provides that, in any proceedings under the Act, 'the Court is not bound by the rules of evidence but may inform itself as it thinks fit'. Section 105 of the Queensland *Child Protection Act* 1999 provides similarly: 'In a proceeding, the Children's Court is not bound by the rules of evidence, but may inform itself in any way it thinks appropriate.' Paragraph 82(1)(d) of the Victorian *Children and Young Persons Act* 1989 provides that the Children's Court 'may inform itself on a matter in such manner as it thinks fit, despite any rules of evidence to the contrary'.

4.62 The Committee recognises that the new evidentiary provisions in Schedule 3 of the draft Bill envisage a different way of conducting proceedings under the *Family Law Act* 1975. Given this, it is understandable that doubts and concerns have been raised regarding

58 Chief Justice Bryant, *Proof transcript of evidence*, 25 July 2005, p.50.

59 Chief Justice Bryant, *Proof transcript of evidence*, 25 July 2005, p.49.

60 The Explanatory Statement for the draft Bill indicates that this NSW Act was drawn on for the framing of Schedule 3; see paragraph 4.7 and footnote 44 above.

the functioning of the provisions in practice and their effect on proceedings.

4.63 The Committee is very conscious, however, that the new evidentiary provisions are integral to the element of active judicial management in Schedule 3 – an element which is critical to the Schedule's goal of less adversarial court processes. In the Committee's view also, it is significant that the new provisions are supported by Judges in the CCP who have had positive experiences with similar provisions in conducting hearings. This gives a good indication of how the evidentiary provisions will operate in practice. Further, it is telling that a number of State Acts contain provisions which provide for much wider (i.e. complete) exemptions from the application of evidentiary rules, and have done so in some cases for well over 10 years.

4.64 The Committee supports the proposed evidentiary provisions but considers that the threshold for applying the rules of evidence should be set higher in the draft Bill than is currently the case. The new section 60KG should provide that, in addition to the consideration of the best interests of the child, the court can only apply the relevant rules of evidence to child-related proceedings in exceptional circumstances.

4.65 The FLS submitted that a provision adopted from subsection 190(4) of the *Evidence Act* 1995 could be inserted into subsection 60KG(2) to ensure that individual rights were not overlooked.[61] Subsection 190(4) of the *Evidence Act* 1995 requires the court to take the following factors into account when exercising its power not to apply certain rules of evidence to civil cases:

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

4.66 The Committee believes that incorporating this into subsection 60KG(2) would be a sensible measure. Requiring the court to take these factors into account when deciding whether it should apply the

61 FLS, *Submission 47*, p.39.

rules of evidence in child-related proceedings would provide greater surety of justice for the parties to the proceedings.

Recommendation 37

4.67 **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.**

4.68 The Committee agrees with one other concern raised by the FLS regarding the possibility of the unintended application of State evidence legislation:

> The next comment I would make about excluding the Evidence Act is that, if that were done, section 79 of the Judiciary Act is triggered, and the unintended consequence of that would be that the evidence acts of the various states would then apply in those states where the court was sitting. So, for example, the Family Court – or the Federal Magistrates Court, for that matter – sitting in New South Wales, would be subjected to the New South Wales Evidence Act by virtue of the operation of the Judiciary Act, which is identical in form to the Commonwealth Evidence Act. So there would be no

> difference to any practitioners in New South Wales or any cases in New South Wales.[62]

4.69 The Committee notes that this issue is addressed in the amendments proposed by the Family Court.[63]

4.70 The Law Society of New South Wales expressed a concern that the new section 60KC might militate against natural justice and submitted that the section should contain some guidance on appropriate matters to be heard in chambers.[64] The Committee notes that Rule 11.16 of the Family Law Rules 2004 currently requires that trials must be heard in open court and that judicial officers who determine cases in chambers must record details of the case and sign the record.[65]

Family Court of Australia technical amendments

4.71 The Family Court proposed a number of complex technical amendments for several of the sections in Schedule 3 of the draft Bill. The Committee is of the view that these amendments should be closely examined by the government.

Recommendation 38

4.72 **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.**

Conclusion

4.73 The Committee believes that Schedule 3 of the draft Bill has much to commend it. The new provisions will help to ensure that child-related proceedings under the *Family Law Act* 1975 will be child-focused, less adversarial, less traumatic and easier to navigate. The principle of

62 Mr Bartfeld QC, *Proof transcript of evidence*, 20 July 2005, p.12.

63 See paragraphs 4.71 – 4.72 below.

64 Law Society of New South Wales, *Submission 81*, p.7.

65 Provisions conferring jurisdiction on judicial officers in chambers exist in other federal Acts, for example section 32A of the *Federal Court of Australia Act* 1976 and section 13 of the *Federal Magistrates Act* 1999.

active judicial management combined with the other operative provisions in the new Division 1A will mean that the court will be able to conduct proceedings in a manner that is appropriate and comprehensible for the parties and children in each case. The Committee's recommendations, however, are necessary to ensure that Schedule 3 is properly equipped to fulfil its purpose.