SUBMISSION
of
THE FAMILY COURT OF AUSTRALIA

to the
Standing Committee on Legal and Constitutional Affairs

on the
Inquiry into the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005

Introductory Comments

1 The Court accepts that, in response to the recommendations of the House of Representatives Committee Report, *Every Picture Tells a Story*, the Government wishes to place a greater emphasis on the principle of shared parental responsibility and to spell out more clearly what is meant by it. However, the Court is concerned that the drafting may not effectively achieve the policy objective, largely because it has been approached by making a series of additions to, and subtractions from, the existing Part VII of the *Family Law Act 1975* (Cth) ("the Act"). The Court considers that a better result may be achieved by a complete re-write of Part VII. Such an approach may better express the structure of the regime created by enabling the educative/exhortative provisions to be drawn together at the beginning (including the concepts in s 60B and s 61B and s 61C) and the proscriptions of what courts can do when an application is made to them to be separately set out. This would help both the community at large and the Courts to have a clearer understanding of the Government's policy objective and of the distinctions intended to be drawn between what law applies when there are no Court orders and what law the Courts are required to apply when orders are sought.

2 The amendments in the Exposure Draft seem to reflect the Government's aim to put greater emphasis on the concept of shared parental responsibility and to make it better understood. The Court understands that this is a policy matter, and beyond the terms of reference of this Committee. However, translating what are essential social concepts into legislation that can be interpreted into clear and enforceable orders is problematic. The Court is concerned that in some instances the wish to express certain concepts will make the Act more complex and difficult to understand. This is an Act that more than any other should be clear about its meaning in every section.

3 It is within this context the Court proposes to make comments about the particular sections in the Exposure Draft. The Court's comments relate to the sections of the Act as amended.

Specific comments

4 The Court's specific comments are recorded below the relevant section of the proposed legislation to which they refer.

Section

4 (1AA) A reference in this Act to a person or people involved in proceedings is a reference to:

(a) any of the parties to the proceedings; and

(b) any child whose interests are considered in, or affected by, the proceedings; and

(c) any person whose conduct is having an effect on the proceedings.

Commentary

5 The Court's concern is that this is a new definition, and considerably widens the class of persons to whom an obligation arises under certain provisions of the Act. For example, s 11A provides that a family and child specialist's functions include assisting and advising (s 11A(a))and helping resolve disputes (s 11A(c)) in relation to, inter alia, *people involved in the proceedings*. Given the wide definition in s 4(1AA) that includes ***any*** *person whose conduct is having an effect on the proceedings*, the family and child specialist could be required to assist and advise a step-parent, or brother, cousin, partner, grandparent or wider class of person, as long as their conduct was having an effect on proceedings. The Court questions whether the legislation really intended to

impose such an obligation on the family and child specialists. The Court suggests that subpara (c) be deleted from the definition.

6 Alternatively, to solve the problem highlighted by s 11A, the wording in that section could be changed to provide as follows:

The functions of family and child specialists are to provide services in relation to proceedings under this Act, ***and may include***:

Section

10C Communications in family counselling etc. are confidential

10D Communications in family counselling etc. are inadmissible

10K Communications in family dispute resolution etc. are confidential

10L Communications in family dispute resolution etc. are inadmissible

Commentary

7 10C; 10D; 10K; 10L: the abbreviation "etc" used in the headings should be omitted. It only has the potential for doubt/confusion.

Section

Division 2—Courts' use of family and child specialists

11E Courts to consider seeking advice from family and child specialists

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

(a) order a person to attend family counselling or family dispute resolution; or

(b) order a person to participate in a course, program or other service (other than arbitration); or

(c) order a person to attend appointments with a family and child specialist; or

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

the court:

(e) may, before exercising the power, seek the advice of:

(i) if the court is the Family Court or the Federal Magistrates Court—a family and child specialist nominated by the Chief Executive Officer of that court; and

(ii) if the court is the Family Court of a State—a family and child specialist of that court; or

(iii) if the court is not mentioned in subparagraph (i) or (ii)—an appropriately qualified person (whether or not an officer of the court);

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

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

Commentary

8 This section deals with the ability of the Court to order parties to attend appointments with a family and child specialist, presumably outside of the Court system. The structure of the section is that if the Court has the power, for example, to order a person to attend or participate in a course or program then the Court may, before exercising the power seek the advice of inter alia, a family and child specialist within the Court as to the services appropriate to the needs of the person who it is envisaged the Court will order to attend such program. Subsection (f) would be better expressed in the Court's submission by changing the wording to read:

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

9 The Court also suggests that if advice is to be sought then it should be sought transparently, affording the parties if appropriate an opportunity to be heard. The Court submits that this could be achieved by the addition of the words at the end of sub-s (e).

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

10 This amendment is suggested to ensure that at all times the proceedings are conducted in a transparent way and the parties have a right to be heard on an informed basis when the power is exercised.

Section

60B Objects of Part and principles underlying it

(1) The objects of this Part are:

(a) to ensure that children receive adequate and proper parenting to help them achieve their full potential; and

(b) to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children; and

(c) to ensure that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child.

Commentary

11 This section deals with the objects of this part of the Act, and the underlying principles. The Court suggests that a new object that would become subparagraph (a) be inserted namely

(a) to promote and fulfil the best interests of children as the primary object

12 In the view of the Court this object should be emphasised not withstanding that it is referred to in a negative, rather than positive way in s 60B(2)(a). Understandably many parties, especially those who are without the benefit of legal advice, focus on "the objects" to the exclusion of recognition of what is sought to be achieved by the principles and other sections of the Act. Although s 65E continues to provide that children's best interests are paramount in making a parenting order, in the Court's

submission it would be helpful to include it as the primary object as it is ultimately the determinate upon which the Court will make orders.

13 The Court suggests that s 60B(1)(c) would be better expressed as a principle in lieu of s 60B(2)(a)(ii) rather than an object as it adds nothing to (a) and (b) because if they are achieved, then a meaningful relationship will have been established.

14 The Court is concerned that if both sub-paragraphs remain as they are, the differences in the wording is not immediately clear and might lead to confusion between the objects and the principles expressed.

15 The underlying principles provision is particularly important because it must be read as directed to putting the objects in s 60B(1) into effect and s 43(c) requires the Court to have regard to the need to protect the "rights of children".

16 The proposed changes to s 60B are significant but do not derive from any specific recommendations in the Committee's report.

Section

60B (2) The principles underlying these objects are:

(a) except when it is or would be contrary to a child's best interests:

(i) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and

(ii) children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development; and

(iii) parents jointly share duties and responsibilities concerning the care, welfare and development of their children; and

(iv) parents should agree about the future parenting of their children; and

(v) children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture); and

(b) children need to be protected from physical or psychological harm caused, or that may be caused, by:

(i) being subjected or exposed to abuse or family violence or other behaviour; or

(ii) being directly or indirectly exposed to abuse or family violence or other behaviour that is directed towards, or may affect, another person.

Commentary

17 The proposed s 60B(2)(a)(iii) implies that the intention is for parents to jointly share all duties and responsibilities of parenthood. This is confusing and probably unnecessary in the light of s 61C which contains the fundamental statement that each parent has parental responsibility for a child (this responsibility exists until altered by Court order) and the scheme of the proposed rebuttable presumption in favour of joint parental responsibility which only applies in some circumstances. The Court does not consider s 60B(2)(a)(iii) is necessary given s 61C which has been largely overlooked in the amendments.

18 The Court submits that sub-s (b)(i) would benefit from the inclusion of the words after "other behaviour" *that in some way puts a child's safety at risk*. Without those words, the words "other behaviour" have no context.

Section

60D(1) ***major long-term issues***, in relation to a child, means issues about the care, welfare and development of the child of a long-term nature and includes (but is not limited to) issues of that nature about:

(a) the child's education (both current and future); and

(b) the child's religious and cultural upbringing; and

(c) the child's health; and

(d) the child's name; and

(e) significant changes to the child's living arrangements.

Commentary

19 The Court has some concerns about the apparent breadth of this sub-paragraph. The Explanatory Statement says in relation to sub-para (e) "this will include any substantial changes to the type and location of the residence in which the child usually lives".

20 The Court's first concern is that the potential meaning of the section is much wider than the type and location of residence, and, if that is what the subsection is intended to convey, it would be better expressed by saying:

(e) . . any substantial changes to the location of the residence in which the child usually lives.

21 See also the Court's discussion of this definition under s 65DAC where this definition has operation.

Section

Subdivision E—Family dispute resolution

60I Attending family dispute resolution before applying for Part VII order

Object of this section

(1) The object of this section is to ensure that all persons who have a dispute about matters that may be dealt with by an order under this Part (a ***Part VII order***) attempt to resolve that dispute by family dispute resolution before the Part VII order is applied for.

Phase 1 (from commencement to 30 June 2007)

(2) The dispute resolution provisions of the *Family Law Rules 2004* impose the requirements for dispute resolution that must be complied with before an application is made to the Family Court of Australia for a parenting order.

(3) By force of this subsection, the dispute resolution provisions of the *Family Law Rules 2004* also apply to an application to a court (other than the Family Court of Australia) for a parenting order. Those provisions apply to the application with such modifications as are necessary.

(4) Subsection (3) applies to an application for a parenting order if the application is made:

(a) on or after the commencement of this section; and

(b) before 1 July 2007.

Phase 2 (from 1 July 2007 to 30 June 2008)

(5) Subsections (7) to (11) apply to an application for a Part VII order in relation to a child if:

(a) the application is made on or after 1 July 2007 and before 1 July 2008; and

(b) none of the parties to the proceedings on the application have applied, before 1 July 2007, for a Part VII order in relation to the child.

Phase 3 (from 1 July 2008)

(6) Subsections (7) to (11) apply to all applications for a Part VII order in relation to a child that are made on or after 1 July 2008.

Requirement to attempt to resolve dispute by family dispute resolution before applying for a parenting order

(7) Subject to subsection (8), a court exercising jurisdiction under this Act must not hear an application for a Part VII order in relation to a child unless the applicant files in the court a certificate by a family dispute resolution practitioner to the effect that:

(a) the applicant has attended family dispute resolution with the practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with; or

(b) the applicant did not attend family dispute resolution of that kind but the applicant's failure to do so was due to the refusal, or the failure, of the other party or parties to the proceedings to attend.

The certificate must be filed with the application for the Part VII order.

(8) Subsection (7) does not apply to an application for a Part VII order in relation to a child if:

(a) the applicant is applying for the order:

(i) to be made with the consent of all the parties to the proceedings; or

(ii) in response to an application that another party to the proceedings has made for a Part VII order; or

(b) the court is satisfied that there are reasonable grounds to believe that:

(i) there has been abuse of the child by one of the parties to the proceedings; or

(ii) there would be a risk of abuse of the child if there were to be a delay in applying for the order; or

(iii) there has been family violence by one of the parties to the proceedings; or

(iv) there is a risk of family violence by one of the parties to the proceedings; or

(c) all the following conditions are satisfied:
  (i) the application is made in relation to a particular issue;
  (ii) a Part VII order has been made in relation to that issue within the 6 months before the application is made;
  (iii) the application is made in relation to a contravention of the order by a person;
  (iv) the person has behaved in a way that showed a serious disregard for his or her obligations under the order; or
(d) the application is made in circumstances of urgency; or
(e) one or more of the parties to the proceedings is unable to participate effectively in family dispute resolution (whether because of an incapacity of some kind, physical remoteness from dispute resolution services or for some other reason); or
(f) other circumstances specified in the regulations are satisfied.

(9) If:
(a) a person applies for a Part VII order; and
(b) the person does not, before applying for the order, attend family dispute resolution with a family dispute resolution practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with; and
(c) subsection (7) does not apply to the application because of subsection (8);

the court must consider making an order that the person attend family dispute resolution with a family dispute resolution practitioner and the other party or parties to the proceedings in relation to that issue or those issues.

(10) The validity of:
(a) proceedings on an application for a Part VII order; or
(b) any order made in those proceedings;

is not affected by a failure to comply with subsection (7) in relation to those proceedings.

(11) In this section:

dispute resolution provisions of the *Family Law Rules* means:
(a) Rule 1.05 of those Rules; and
(b) Part 2 of Schedule 1 to those Rules;

to the extent to which they deal with dispute resolution.

Commentary

Effect on proceedings

22 An applicant for exemption will have to file an application for that exemption. The legislation does not prevent that party from simultaneously filing an application for Part VII orders, but the Court is of the view that the exemption is drafted in such a way that a ground must be found to have been made out before a hearing of the application for Part VII orders commences.

Reasonable grounds– sections 60I and 60J

23 In *George v Rockett* (1990) 170 CLR 104; (1990) 93 ALR 483, the High Court held that where a statute prescribes that there must be "reasonable grounds" for a state of mind, it requires the existence of facts sufficient to induce that state of mind in a reasonable person. It is not necessary for the judicial officer to personally hold the relevant suspicion or belief but it must objectively appear to a reasonable person, and not merely the alleging party, that reasonable grounds exist for the suspicion or belief. Presumably, those grounds would have to be credible and sworn to.

24 The issue of how evidence will be presented to satisfy the test of "reasonable grounds to believe" will need to be determined and rules of court made.

25 Certainly some evidence will be required (presumably an affidavit) and if the respondent contests the evidence and the grounds for the exemption, then some form of hearing will be required. It is likely in some cases this will involve increased cost and delay.

The resource implications

26 Whilst considering the burden of proof issues, s 60I(8)(c), which provides another exemption ground, should be considered here (emphasis added):

"(c) all of the following conditions are satisfied:

(i) the application is made in relation to a particular issue;

(ii) a Part VII order has been made in relation to that issue within 6 months before the application is made;

(iii) the application is made in relation to a contravention of the order by a person;

(iv) **the person has behaved in a way that showed a serious disregard for his or her obligations under the order:"**...

In practice however, the section might prove problematic. The concern with sub-paragraph (c), particularly (iv), is that in order to determine whether a person has behaved in a way that showed "a serious disregard for his or her obligations under the order", at least two elements would need to be established:

1. that a breach had been proved; and
2. that the Court was satisfied it was a breach that showed a "serious disregard."

It is difficult to envisage in all but very clear cases how the "reasonable grounds to believe" test could be applied without a final hearing.

27 The remedy might be for the exemption in 8(c) to read: "if an application for contravention is filed within 6 months of an order being made." However, it is suggested that the section could be better applied if it read as follows:

> "(c) the application is a contravention application and in the application the applicant alleges contravention of an order (or part of an order) made less than six months before the date of filing and the court is satisfied that there are reasonable grounds to believe that the party alleged to have contravened the order has behaved in a way that showed a serious disregard for his or her obligations under the order."

28 That seems to cover the intended field and harmonise the standard of proof at the "reasonable grounds to believe" level. Unless the standard of proof is harmonised in this way, section 140 of the *Evidence Act 1995* (Cth) would apply, as would *Briginshaw*, to require a high standard of proof (before granting an exemption), because such a finding, made in the context of a contravention application, could eventually attract a penalty, including imprisonment.

29 The Court wishes to raise this primarily as a resource issue based on the assumption that significant numbers of parents (and other applicants) will want to seek an exemption. The grounds for this assumption include:

29.1 The Court's observation is that about 30% of matters include allegations of violence, or abuse, or the risk of one or both of these. Assuming the same proportion in the Federal Magistrates Court, that alone amounts to a significant number of applicants who will believe that they have grounds for an exemption under sub-s (8)(b), and who will not want to sit down with the other party and talk about the violence/abuse issues.

29.2 There are significant numbers of applicants who regard their circumstances as urgent (other than those who might qualify under sub-s 8(c)), in other words, violence and abuse are by no means the only grounds on which parties now seek abridgments of time. The Court cannot estimate numbers, but cases of perceived urgency (unrelated to violence or abuse) would add to the sub-s (8)(b) numbers.

29.3 There will be an unquantifiable number of applicants who do not qualify for a certificate but who simply do not want to go down the path of attending at a Family Relationships Centre (or other mediation) for any number of reasons and who will try to find something in sub-s (8)(e) [inability of a party to participate effectively] that will give them an exemption – the other party's drug abuse, alcohol abuse, or mental illness are some examples that spring to mind.

29.4 Exemptions under s 60I(8)(c) [recent breach of order showing serious disregard] will probably not add many to the number of applications for exemption, but the areas covered by the other exemption categories will, the Court considers, produce a significant number of applications for an exemption, and, for the reasons advanced, the Court considers that no application for a Part VII order can be heard until the exemption application has been dealt with.

29.5 That would not really be a problem if the Court could reasonably anticipate that large numbers of respondents would turn up on the return of the application and admit enough of the facts alleged for the court to grant an exemption.

29.6 But this will not happen, because most respondents (the Court assumes that the violence/abuse category will be the largest) will stand to lose the benefit of the presumption of joint parental responsibility under s 61DA — certainly at an interim hearing — if they admit that the applicant's allegations of violence and/or abuse provide a reasonable basis for the purpose of obtaining a certificate.

29.7 The Court considers that a court would be unlikely to apply the presumption to an interim situation if an exemption has been granted on the grounds of violence or abuse.

29.8 Further, in the Family Court's view it would be clearer if the exceptions in 60I(8)(f) were set out in the legislation and as was referred to in the Court's response to the discussion paper, the Court's pre-action protocols provide a useful model for the exceptions that should apply.

30 One superficially attractive answer to the problem of dealing with exemption applications would be to introduce rules to dispense with the requirement for service of such applications, and deal with them on an "ex parte" basis.

31 Given the serious consequences that the findings sufficient to grant an exemption could have, some of which are identified above, the Court does not consider that such an approach would satisfy either the requirements of natural justice, or the requirement in *Family Law Act* s 123, that rules are to be "not inconsistent with this Act".

32 If the above analysis/prognosis is accepted, the proposed legislation could have a very significant impact on court resources, requiring significant amounts of judicial time to conduct hearings for exemption certificates, a function that is additional to the present

workload of the court, and does not, of itself, take away any part of the existing workload.

60J Family dispute resolution not attended because of child abuse or family violence

(1) If:

(a) an application for a Part VII order in relation to a child is made on or after 1 July 2008; and

(b) subsection 60I(7) does not apply to the application because the court is satisfied that there are reasonable grounds to believe that:

(i) there has been abuse of the child by one of the parties to the proceedings; or

(ii) there has been family violence by one of the parties to the proceedings;

a court must not hear the application unless the applicant files in the court a certificate by a family counsellor or family dispute resolution practitioner to the effect that the counsellor or practitioner has given the applicant information about the issue or issues that the order would deal with.

(2) Subsection (1) does not apply if the court is satisfied that there are reasonable grounds to believe that:

(a) there would be a risk of abuse of the child if there were to be a delay in applying for the order; or

(b) there is a risk of family violence by one of the parties to the proceedings.

(3) The validity of:

(a) proceedings on an application for a Part VII order; or

(b) any order made in those proceedings;

is not affected by a failure to comply with subsection (1) in relation to those proceedings.

Commentary

33 The Court can not see any immediate reason for a distinction between cases where there has been abuse or violence as against cases where there is a risk of abuse or violence. The previous s 60I does not draw such a distinction (see 60I(8)(b)). The Explanatory Statement seems to say that "risk" is a greater problem than past abuse or violence. But would not past abuse or violence constitute a risk of future abuse or violence?

34 Given that s 60I(7-11) applies when application is made on after 1 July 2008 there would seem little point in the section. Also it introduces the prospect of two certificates being needed or of their need to be two hearings about these issues. The point is that if s 60I(7) does not apply because of abuse or family violence then s 60J(2) would certainly be satisfied.

Division 1A

Introduction

35 Schedule 3 of the Exposure Draft of the *Family Law Amendment (Shared Parental Responsibility) Bill* 2005 seeks to insert Division 1A in Part VII of the Act.

36 Division 1A deals with the principles for conducting child-related proceedings. To a large extent the Exposure Draft reflects well the needs of the Children's Cases Program based on the experience that has emerged from the conduct of this program. The direction that Schedule 3 has taken is supported.

37 Comments below relate to some technical drafting issues that need to be addressed.

Division 1A—Principles for conducting child-related proceedings

Subdivision A—Proceedings to which this Division applies

60KA Proceedings to which this Division applies

(1) This Division applies to proceedings that are wholly under this Part.

(2) This Division also applies to proceedings that are partly under this Part, but only:
  (a) to the extent that they are proceedings under this Part; and
  (b) if the parties to the proceedings consent—to the extent that they are not proceedings under this Part.

(3) This Division also applies to any other proceedings between the parties that involve the court exercising jurisdiction under this Act and that arise from the breakdown of the parties' marital relationship, if the parties to the proceedings consent.

(4) Proceedings to which this Division applies are ***child-related proceedings***.

(5) Consent given for the purposes of paragraph (2)(b) or subsection (3) must be given in the form prescribed by the applicable Rules of Court.

(6) A party to proceedings may, with the leave of the court, revoke a consent given for the purposes of paragraph (2)(b) or subsection (3).

Subdivision B—Principles for conducting child-related proceedings

60KB Principles for conducting child-related proceedings

Application of the principles

(1) The court must give effect to the principles in this section:
  (a) in performing duties and exercising powers (whether under this Division or otherwise) in relation to child-related proceedings; and
  (b) in making other decisions about the conduct of child-related proceedings.

(2) Regard is to be had to the principles in interpreting this Division.

Principle 1

(3) The first principle is that the court is to consider the needs and concerns of the child or children concerned in determining the conduct of the proceedings.

Principle 2

(4) The second principle is that the court is to actively direct, control and manage the conduct of the proceedings.

Principle 3

(5) The third principle is that the proceedings are, as far as possible, to be conducted in a way that will promote cooperative and child-focused parenting by the parties.

Principle 4

(6) The fourth principle is that the proceedings are to be conducted without undue delay and with as little formality, and legal technicality and form, as possible.

Commentary

38 This section deals with principles for conducting child related proceedings. The principles are of necessity fairly broad principles and there are concerns that it might be available to argue (without merit) that proceedings have not been conducted without undue delay, formality, legal technicality, form etc, and there may be reasonable disagreement about what each of these terms may mean in a particular case or circumstance. There should therefore be a provision that contravention of the principles or duties does not affect the validity of any order made in child related proceedings. It is suggested that this problem would be overcome by a provision that provided that non-compliance with the principles does not invalidate any order made such as the provision in s 60I(10).

39 In addition, the Explanatory Statement makes no reference to the application of the principles for conducting child-related proceedings to contravention applications under Division 13A. These applications would be subject to s 60KA unless exempted. The nature of contravention proceedings with the possibility of significant penalties including imprisonment, require certainty and clarity of process at the beginning and throughout. The evidence admitted should be consistent with the seriousness of the proceedings. As the outcome in terms of penalty is not known until the conclusion of the hearing, it could be prejudicial to allow evidence which, if it were not for this section would be inadmissible. In addition, if consent was given to hear property proceedings with child-related proceedings the present draft would arguably require contravention proceedings under Part XIIIA and Part XIIIB to be dealt with under Part VII Division 1A as well.

40 The Court suggests that if section 60KA (1) were amended as follows, there would still be flexibility to apply the section in an appropriate case.

(7) s 60KA (1) and (2) does not apply to Division 13 A , Part XIIIA or Part XIIIB, unless a court otherwise orders.

41 Some confusion may emerge from the use of the term '*concerns of the child'* in Principle 1 which has been explained in the Explanatory Statement. It is suggested therefore that the section use the terms of the Explanatory Statement such as "*the impact that the conduct of the proceedings may have on the child*".

60KC This Division also applies to proceedings in Chambers

A Judge, Judicial Registrar, Registrar, Federal Magistrate or magistrate, who is hearing child-related proceedings in Chambers, has all of the duties and powers that a court has under this Division.

Commentary

42 There are concerns about the use of the expression "in Chambers" because it can mean different things in different courts. In this context it is intended to refer to matters which take place other than in open court. The most usual case would be where a Judge remains in private chambers but nevertheless accords all of the requirements of natural justice to the parties who are not physically required to attend. Normally they would attend by either telephone or video conference facility and the proceedings would be recorded. The only difference from being in a court room would be that the public would not be entitled to enter the Judge's chambers where as they would if the telephone link or video link were conducted in the court room. Thus it would be helpful if the section read "*a Judge, Judicial Registrar, Registrar, Federal Magistrate or Magistrate, who is hearing child related proceedings other than in open court, has all of the duties and powers that a court has under this Division.*" If this suggested amendment finds favour then it might be prudent to amend s 97(1A) in the same manner.

60KD Powers under this Division may be exercised on court's own initiative

The court may exercise a power under this Division:

(a) on the court's own initiative; or

(b) at the request of one or more of the parties to the proceedings.

Commentary

43 The structure of Subdivision B (particularly with respect to this section) makes it clear that the ability for the court to perform any of the duties or powers, laid out in the sections which follow s 60KD, of its own initiative is supported. This is a core feature of a less adversarial approach to the conduct of a hearing.

Subdivision C—Duties and powers related to giving effect to the principles

60KE General duties

(1) In giving effect to the principles in section 60KB, the court must:

(a) decide which of the issues in the proceedings require full investigation and hearing and which may be disposed of summarily; and

(b) decide the order in which the issues are to be decided; and

(c) give directions or make orders about the timing of steps that are to be taken in the proceedings; and

(d) in deciding whether a particular step is to be taken—consider whether the likely benefits of taking the step justify the costs of taking it; and

(e) make appropriate use of technology; and

(f) if the court considers it appropriate—encourage the parties to use family dispute resolution or family counselling; and

(g) deal with as many aspects of the matter as it can on a single occasion; and

(h) deal with the matter, where appropriate, without requiring the parties' physical attendance at court.

(2) Subsection (1) does not limit subsection 60KB(1).

Commentary

44 Subsection (1) is mandatory in relation to how the Court must operate in matters of practice and procedure. The concerns previously expressed in relation to s 60KB apply to this section as well. It might be available to argue that if proceedings have not been conducted as set out that the validity of an order made is thereby affected and a general provision (eg s 60I(10)) preserving the validity of proceedings would be useful.

60KF Power to make determinations, findings and orders at any stage of proceedings

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:

(a) make a finding of fact in relation to the proceedings;

(b) determine a matter arising out of the proceedings;

(c) make an order in relation to an issue arising out of the proceedings.

Note: For example, the court may choose to use this power if the court considers that making a finding of fact at a particular point in the proceedings will help to focus the proceedings.

Commentary

45 Section 60KF supports the capacity for the Judge to make decisions about any one or more of the issues which are in dispute. It needs to be clear that this capacity exists from the commencement up to the conclusion of the trial when a final judgment is given, rather than having it all happen at the end of the trial when final orders are made and judgment is given. This direction would be made clearer if the words *'and before making final orders'* or words to that effect (before the conclusion of the hearing) were inserted after '*proceedings*' in line 1. In addition, *'resolution'* in line 2 should be changed to '*determination*' to make it clear that this is an exercise of judicial power, not a mediation or dispute resolution event.

46 As this is a new power inserted into the Act in relation to the conduct of child-related proceedings, it is suggested that where the Court makes findings prior to the final determination of proceedings, in order to avoid the possibility of this alone giving rise to a Judge having to disqualify him or herself from further hearing of the application, that a provision be inserted along the following lines as s 60KF(2) *'A Judge is not disqualified in sitting in the proceedings only because of the fact that he or she has exercised any of the powers in 60KF(1)(a), (b) or (c) prior to the final determination of the proceedings.'*

Subdivision D—Matters relating to evidence

60KG Rules of evidence not to apply unless court decides

(1) The following provisions of the *Evidence Act 1995* do not apply to child-related proceedings:

(a) Divisions 3, 4 and 5 of Part 2.1 (which deal with general rules about giving evidence, examination in chief, re-examination and cross-examination) (other than sections 26, 30, 36 and 41);

Note: Section 26 is about the court's control over questioning of witnesses. Section 30 is about interpreters. Section 36 relates to examination of a person without subpoena or other process. Section 41 is about improper questions.

(b) Parts 2.2 and 2.3 (which deal with documents and other evidence including demonstrations, experiments and inspections);

(c) Parts 3.2 to 3.8 (which deal with hearsay, opinion, admissions, evidence of judgments and convictions, tendency and coincidence, credibility and character).

(2) The court may apply one or more of the provisions of a Division or Part mentioned in subsection (1) to an issue in the proceedings, if:

(a) for an issue relating to proceedings under this Part—the court considers it necessary in the best interests of the child or children concerned to do so; and

(b) for an issue relating to proceedings that are not under this Part—the court considers it necessary in all the circumstances to do so.

(3) Subsection (1) does not revive the operation of a rule of common law that, but for subsection (1), would have been prevented from operating because of a provision of a Division or Part mentioned in that subsection.

Commentary

47 Section 60KG(1) provides that certain rules of evidence are not to apply unless the Court decides otherwise. The Explanatory Statement indicates that the Subdivision 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.

48 The Explanatory Statement correctly suggests that the approach taken largely reflects that taken by the Family Court in its pilot of the Children's Cases Program. It makes reference to provisions related to the management of cases found in the *United Kingdom Civil Procedure Rules* and the New South Wales *Children and Young Persons (Care and Protection) Act 1998* (NSW). The Explanatory Statement goes on to say that the sub-division provides that most of the rules of evidence referred to in s 190(1) of the *Evidence Act 1995* (Cth) do not apply in child-related proceedings unless the court considers that it is in the best interests of the child to apply one or more of those provisions to a particular issue or issues in the proceedings. The Explanatory Statement says *"this will allow the court to better control how evidence is received in the proceedings"* and further, *"the key will be that the judicial officer will need to consider in each case exactly what is required".*

49 As the Court indicated in its response to the Government's Discussion Paper, *A New Approach to the Family Law System*, there are different views among judges in the Court about the expediency of the section being drafted in this way. In the circumstances, both views are hereafter identified, whilst accepting that in the end it is probably a matter of policy.

50 It is the common view that in child-related proceedings the Court should be able to dispense with many of the rules of evidence referred to in s 190(1) but some members of the Court consider that that should be achieved by the Court having the discretion to dispense with the rules rather than having the discretion to apply them in the way that s 60KG is presently drafted. That view is held because rules of evidence such as the rules against hearsay and the opinion rules are long-established and provide well recognised principles to ensure that the Court can control the volume and type of evidence that is presented and to ensure that the proceedings are conducted fairly. If they do not apply then the Court will be required to receive what would otherwise be inadmissible evidence from both parties and then assess how that evidence can be used. Thus it is said, having the rules of evidence in place but subject to dispensation will better achieve the objects referred to in the Explanatory Statement.

51 However, 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

52 The Australian Law Reform Commission in its recently released Discussion Paper *Review of the Uniform Evidence Acts* (DP 69) reviewing the operation of the Evidence Act has considered the appropriateness of abolishing the hearsay rule in criminal and civil proceedings. In relation to hearsay in civil proceedings the Commission observed (7.283) that from initial consultations it was apparent that the hearsay rule is often ignored in civil proceedings. However, the Commission proposed that there be no change to the uniform Evidence Acts (7.285).

53 The Commission did make the following observations about evidence in children's cases:

53.1 Family law proceedings raise a particular set of evidentiary concerns, notably in connection with evidence in children's cases (18.59).

53.2 It noted the issue of contention concerning the relationship between the *Evidence Act 1995* (Cth) and the *Family Law Act 1975* (Cth) being the extent to which the Family Court is bound by the rules of evidence in children's matters—especially in light of the 'paramountcy principle' (18.62-18.68)

53.3 It referred specifically to the Children's Cases Program, the waiver by consent of some of the rules of evidence in accordance with s 190 of the Evidence Act, and the possibility of legislative amendment (18.69-18.77), but confined its enquiry to where evidentiary provisions to facilitate the extension of the Children's Cases Program should be located. It concluded that the Act should remain the primary location for evidentiary provisions applicable to family law proceedings (18.80). This was bolstered by the Commissions' policy position that the uniform Evidence Acts should remain Acts of general application.

54 In the event that the rules of evidence are not to apply then the Court makes the following submissions:

54.1 It is strongly suggested that the "best interests" test for the exercise of the discretion should be deleted and sub-s (2) read as follows:

"The court may apply one or more of the provisions of a Division of Part mentioned in subsection (1) to an issue in the proceedings if the Court considers it necessary in all the circumstances to do so."

54.2 The reasons for this are that the 'best interests' of a child is really a conclusion reached after hearing evidence. It is difficult to see how such a test could logically or practically be applied to determine whether certain evidence is admissible given that the evidence would have to be before the Court already to then apply the test

54.3 It is suggested that a change be made to sub-s (1). That subsection provides that certain provisions of the Evidence Act do not apply to child-related proceedings. Amongst others are, pts 3.2 to 3.8 which deal with hearsay, opinion, admissions, evidence of judgments and convictions, tendency and coincidence, credibility and character. It would be appropriate to provide a provision, in circumstances where such evidence is admitted, for the Court to give such weight (if any) as it thinks fit to such evidence. Indeed, s 60KH(3) which relates to evidence of children is such a provision. It is suggested that a similar provision be inserted after sub-s (1) which would be (1A) as follows:

"The court may give such weight (if any) as it thinks fit to evidence admitted under subsection (1)."

54.4 In relation to sub-s (3) whilst the subsection deals with the possible revival of the operation of a rule of common law it does not deal with a possible revival of a rule of relevant State or Territory law otherwise applicable to proceedings. This may be an oversight and suggest that sub-s (3) be amended to read as follows:

"Subsection (1) does not revive the operation of a rule of Common Law or otherwise applicable State or Territory law, that, but for subsection (1), would have been prevented from operating because of a provision of a Division or Part mentioned in that subsection."

60KH Evidence of children

(1) This section applies if the court applies the law against hearsay under subsection 60KG(2) to child-related proceedings.

(2) Evidence of a representation made by a child about a matter that is relevant to the welfare of the child or another child, which would not otherwise be admissible as evidence because of the law against hearsay, is not inadmissible in the proceedings solely because of the law against hearsay.

(3) The court may give such weight (if any) as it thinks fit to evidence admitted under subsection (2).

(4) This section applies despite any other Act or rule of law.

(5) In this section:

child means a person under 18.

representation includes an express or implied representation, whether oral or in writing, and a representation inferred from conduct.

60KI Court's general duties and powers relating to evidence

(1) In giving effect to the principles in section 60KB, the court may:
  (a) give directions or make orders about the matters in relation to which the parties are to present evidence; and
  (b) give directions or make orders about who is to give evidence in relation to each remaining issue; and
  (c) give directions or make orders about how particular evidence is to be given; and
  (d) if the court considers that expert evidence is required—give directions or make orders about:
    (i) the matters in relation to which an expert is to provide evidence; and
    (ii) the number of experts who may provide evidence in relation to a matter; and
    (iii) how an expert is to provide the expert's evidence; and
  (e) ask questions of, and seek information or the production of evidence from, parties, witnesses and experts on matters relevant to the proceedings.

(2) Without limiting subsection (1) or section 60KF, the court may give directions or make orders:
  (a) about the use of written submissions; or
  (b) about the length of written submissions; or
  (c) about limiting the time for oral argument; or
  (d) about limiting the time for the giving of evidence; or
  (e) that particular evidence is to be given orally; or
  (f) that particular evidence is to be given by affidavit; or
  (g) that evidence in relation to a particular matter not be presented by a party; or
  (h) that evidence of a particular kind not be presented by a party; or
  (i) about limiting cross-examination of a particular witness; or
  (j) about limiting the number of witnesses who are to give evidence in the proceedings.

(3) In child-related proceedings concerning an Aboriginal child or Torres Strait Islander child, the court may, for the purposes of section 61F:
  (a) receive into evidence the transcript of evidence in any other proceedings before:
    (i) the court; or
    (ii) another court; or
    (iii) a tribunal;
  and draw any conclusions of fact from that transcript that it thinks proper; and
  (b) adopt any recommendation, finding, decision or judgment of any court, person or body of a kind mentioned in any of subparagraphs (a)(i) to (iii).

Note: Section 61F requires the court to have regard to any kinship obligations and child-rearing practices of Aboriginal or Torres Strait Islander culture relevant to an Aboriginal or Torres Strait Islander child.

Commentary

55 Section 60KI(1) is technically incorrect, as courts seek *evidence* rather than *information* and production of *documents or things* rather than *evidence*. Therefore '*information*' on line 1 should be replaced with '*evidence*' and '*evidence*' on line 2 should be replaced with '*documents or things*'. It is suggested that the drafting of sub-s (1)(e) could simply be improved by amending sub-para (e) as follows *"ask questions of, and seek evidence or the production of documents or things from, parties, witnesses and experts on matters relevant to the proceedings."*

56 As to s 60KI(2)(i) in a less adversarial model for hearing children's cases the judge should have the power to not allow any cross examination of a witness in appropriate circumstances. Whilst it could be argued that a capacity to limit includes limiting to none, it would be instructive to self representing parties and others if it is clear on the face of the legislation that a judge could, in an appropriate case, prevent any cross examination of a witness. Such a power would have to be exercised judicially and in compliance with the rules of natural justice. To this end, the words '*or not allowing*' should be inserted after '*limiting*'.

Role of Mediator

57 Whilst the Court has not yet settled what its final model is with respect to the participation of the family and child specialist in the first stage of the hearing it is suggested that a provision like the following be included to clarify the question about the status of what is said by that person on the occasions when a judge chooses to include them.

Prior to or during the hearing the court may appoint/require a family and child specialist with a view to assisting the parties

- *in coming to a better understanding of the effect on the child or children of particular issues or behaviours from a social science perspective,*
- *assisting in the identification of relevant issues,*
- *resolving relevant issues,*

and, if requested, informing the parents about the existence of programs to assist with parenting issues.

However in the absence of agreement, the court must not take any opinions expressed by a family and child specialist into account in determining the issues in the case unless such opinions are given as part of sworn evidence in the case.

Section

61DA Presumption of joint parental responsibility when making parenting orders

(1) When making a parenting order in relation to a child, the court must apply a presumption that it is in the best interests of the child for the child's parents to have parental responsibility for the child jointly.

Note: The presumption provided for in this subsection is a presumption that relates solely to the allocation of parental responsibility for a child as defined in section 61B. It does not provide for a presumption about the amount of time the child spends with each of the parents (this issue is dealt with in section 65DAA). Joint parental responsibility does not involve or imply the child spending an equal amount of time, or a substantial amount of time, with each parent.

(2) The presumption does not apply if there are reasonable grounds to believe that a parent of the child (or a person who lives with a parent of the child) has engaged in:

(a) abuse of the child or another child who, at the time, was a member of the parent's family (or that person's family); or

(b) family violence.

(3) The presumption does not apply if:

(a) the court is making a parenting order that is an interim order; and

(b) the court considers that it is not appropriate to apply the presumption in making that interim order.

(4) The presumption may be rebutted by evidence that satisfies the court that it would not be in the best interests of the child for the child's parents to have parental responsibility for the child jointly.

Commentary

58 The Court is concerned that as presently drafted, this section would require a court to apply the presumption (and in some cases to hear evidence it if was not to apply) even where the parties are not seeking an order about parental responsibility. For example, the parties may only be seeking an order about the place where handover occurs yet the Court would still be required to address the presumption as to parental responsibility.

59 The Court suggest this could be easily overcome by amending sub-s (1) as follows:

(1) When making a parenting order allocating parental responsibility in relation to a child, the court must apply a presumption ……

Section

61DB Application of presumption of joint parental responsibility after interim parenting order made

If there is an interim parenting order in relation to a child, the court must, in making a final parenting order in relation to the child, disregard the allocation of parental responsibility made in the interim order.

Commentary

60 The Court has considerable concerns about this section. It appears to the Court as it is presently drafted the Court may never have regard to the terms of an interim parenting order made about parental responsibility. Considering the effect of this provision it is necessary to understand how the Court would make a final order. In contested proceedings the Court would consider evidence about the matters relevant to the welfare of the child or children and that evidence would inevitably include evidence of existing orders and existing arrangements.

61 This section cannot surely mean that when making a final parenting order the Court cannot ever make an order for parental responsibility in the same terms as an interim parenting order in relation to the child.

62 Similarly, it surely cannot mean in making a final parenting order, the court Cannot have regard, among other things, to the circumstances in which the child has been

living since the interim order and the way in which the parents have exercised parental responsibility in accordance with the interim order. That would be a matter of fact.

63 It is therefore hard to understand what the section actually means. It may be intended to mean that in making a final parenting order the Court should have regard to all of the appropriate matters in the Act and not simply make an order in terms of the interim order. If that is what it means then it is quite unnecessary as the Court is obliged to consider all of the other sections in the Act and could not properly make an order without doing so.

64 But in any event the allocation of parental responsibility made in the interim order might be a very relevant factor for the Court. For example, if a father was exercising parental responsibility as allocated in the interim order and exercising it well and appropriately, that would surely be a matter that the Court would want to take into account in deciding whether a similar order or another order should be made as a final order. It is hard to see why a Court must be required to disregard that evidence or the existence of the order itself.

65 In the Court's view the section should be removed from the draft. However, if it is to remain then in the Court's view it is imperative that the word in the second line "must" should be changed to "may".

Section

63DA Obligations of advisers

(1) If an adviser gives advice or assistance to people in relation to parental responsibility for a child following the breakdown of the relationship between those people, the adviser must:
  (a) inform them that they could consider entering into a parenting plan in relation to the child; and
  (b) inform them about where they can get further assistance to develop a parenting plan and the content of the plan.

(2) If an adviser gives advice to people in connection with the making by those people of a parenting plan in relation to a child, the adviser must:
  (a) inform them that, if the child spending substantial time with each of them is:
    (i) practicable; and
    (ii) in the best interests of the child;
  they could consider the option of an arrangement of that kind; and
  (b) inform them of the matters that may be dealt with in a parenting plan in accordance with subsection 63C(2); and
  (c) inform them that, if there is a parenting order in force in relation to the child, the order may (because of section 64D) include a provision that the order is subject to a parenting plan they enter into; and
  (d) inform them about the desirability of including in the plan:
    (i) if they are to have parental responsibility, or a component of parental responsibility, for the child jointly under the plan—provisions of the kind referred to in paragraph 63C(2)(d) (which deals with the form of consultations between the parties to the plan) as a way of avoiding future conflicts over, or

misunderstandings about, the matters covered by that paragraph; and

(ii) provisions of the kind referred to in paragraph 63C(2)(g) (which deals with the process for resolving disputes between the parties to the plan); and

(iii) provisions of the kind referred to in paragraph 63C(2)(h) (which deals with the process for changing the plan to take account of the changing needs or circumstances of the child or the parties to the plan); and

(e) explain to them, in language they are likely to readily understand, the availability of programs to help people who experience difficulties in complying with a parenting plan; and

(f) inform them that section 65DAB requires the court to have regard to the terms of the most recent parenting plan in relation to the child when making a parenting order in relation to the child if it is in the best interests of the child to do so.

Note: Paragraph (a) only requires the adviser to inform the people that they should consider the option of the child spending substantial time with each of them. The adviser does not have to advise them as to whether that option would be appropriate in their particular circumstances.

(3) In this section:

adviser means a person who is:

(a) a legal practitioner; or

(b) a family counsellor; or

(c) a family dispute resolution practitioner; or

(d) a family and child specialist.

Commentary

66 The Court considers that s 63DA is unnecessary in the form that it appears. The matters in sub-s (1) and (2)(b)(f) have to be complied with, regardless of the arrangement the parties ultimately agree on, but the Court's concerns as to whether the provisions sufficiently indicate that the best interests of the child are paramount would be met if sub-s (2)(a) was deleted. However, the matters in sub-s (1) and (2)(b) have to be complied with regardless of the arrangement the parties ultimately agree on, and this clearly includes the subject matter of sub-s (2)(a). Accordingly apart from anything else, sub-s (2)(a) should be deleted. Alternatively, although in the Court's view this would be the least desirable option, s 63DA(2)(a)(ii) and (f) could be amended to include the words "in accordance with s 68F(2)." This, the Court notes, would be particularly important as only one of the four potential advisers would be legally qualified and thus more guidance as to what constitutes matters to be taken into account in determining the best interests of the child should be properly spelt out.

Section

64B Meaning of *parenting order* and related terms

(1) A ***parenting order*** is:

(a) an order under this Part (including an order until further order) dealing with a matter mentioned in subsection (2); or

(b) an order under this Part discharging, varying, suspending or reviving an order, or part of an order, described in paragraph (a).

(2) A parenting order may deal with one or more of the following:

(a) the person or persons with whom a child is to live;

(b) the time a child is to spend with another person or other persons;

(c) the allocation of parental responsibility, or a particular component of parental responsibility, for a child;

(d) if 2 or more persons are to have parental responsibility, or a component of parental responsibility, for a child jointly—the form of consultations those persons are to have with one another about decisions to be made in the exercise of that responsibility or that component;

(e) the communication a child is to have with another person or other persons;

(f) maintenance of a child;

(g) the steps to be taken before an application is made to a court for a variation of the order to take account of the changing needs or circumstances of:

(i) a child to whom the order relates; or

(ii) the parties to the proceedings in which the order is made;

(h) the process to be used for resolving disputes about the terms or operation of the order;

(i) any aspect of the care, welfare or development of the child or any other aspect of parental responsibility for a child.

The person referred to in this subsection may be, or the persons referred to in this subsection may include, either a parent of the child or a person other than the parent of the child (including a grandparent or other relative of the child).

Note: Paragraph (f)—A parenting order cannot deal with the maintenance of a child if the *Child Support (Assessment) Act 1989* applies.

(3) Without limiting paragraph (2)(c), the order may deal with the allocation of responsibility for making decisions about major long-term issues in relation to the child.

(4) The other communication referred to in paragraph (2)(e) includes (but is not limited to) communication by:

(a) letter; and

(b) telephone, email or any other electronic means.

(4A) Without limiting paragraphs (2)(g) and (h), the parenting order may provide that the parties to the proceedings must consult with a family dispute resolution practitioner to assist with:

(a) resolving any dispute about the terms or operation of the order; or

(b) reaching agreement about changes to be made to the order.

Commentary

67 Section 64B(2)(e) and (4) need some consideration. In sub-s (4), *other communication* is referred to as being something referred to in (2)(e). However, there is no reference to *other communication* in that paragraph. This could be cured by the removal of the word *other* in sub-s (4).

Section

64D Parenting orders subject to later parenting plans

Unless the court determines otherwise, a parenting order in relation to a child is taken to include a provision that the order is subject to a parenting plan that is:

(a) entered into subsequently by the child's parents; and

(b) agreed to, in writing, by any other person (other than the child) to whom the parenting order applies.

Commentary

Background

68 It is common that as circumstances change, parenting orders become unworkable in particular respects. For example, a parenting order might provide that contact should occur at a grandparent's home. The grandparent becomes ill, and the parties agree that contact should occur somewhere else, eg at an aunt's home. It would be possible for the parties to obtain a consent order making the necessary variation, but this would take time and money, and, where there is no dispute, the parties may simply adopt the new practice and leave the order alone.

69 The new practice could be seen as problematical because it is not in accordance with the court order. However the difficulty should not be overstated. If one party took contravention proceedings complaining that the other did not comply with the contact arrangements in the order, it would be easy for the respondent to defend the application: the party would clearly have a "reasonable excuse" for not providing contact at the grandparent's house. The contravention application would clearly be hopeless, possibly mischievous, and the Court would no doubt make a costs order in favour of the respondent. The situation would be the same whether or not the new practice was contained in a parenting agreement. Under the existing law, it would be open to the Court in such contravention proceedings to amend the order having regard to the new practice: s 70NG(1)(ba) and (c). In the simple example given the Court would obviously do so.

70 Considering the existing law, and the need for change: when parties by agreement depart from the parenting regime created by a court order, if the parties wish to bring the new arrangement into conformity with their legal obligations, they need to get a consent order embodying the new regime. This may well be an inconvenient and expensive step. On the other hand, there will be no problem if the parties simply carry out the new regime. If difficulties arise, it is possible that one party will unreasonably bring contravention proceedings complaining that the other has breached the court order, but this will be uncommon: it will normally be apparent that such an application will be doomed to failure, and the Court would be likely to consider what new parenting orders should be made. Nevertheless, there is currently no explicit provision to this effect, and the Court can readily understand that the Government would want to encourage parenting plans by inserting a specific provision dealing with the situation. However, for reasons to be stated, the Court has reservations about whether s 64D is an appropriate provision to do so.

The purpose of the new s 64D

71 The overall purpose is set out in the Explanatory Statement: A primary aim of these amendments is to encourage and assist parents to reach agreement on parenting arrangements after separation and to document that agreement through workable parenting plans.

In relation to s 64D

72 This section specifies that unless the court orders otherwise, it is a term of all parenting orders that they are subject to later parenting plans. The effect of this is that a parenting order will terminate to the extent of inconsistency with a later parenting plan. The Court can modify or exclude this provision if it does not consider that it is in the best interests of the child. This provision recognises that the party's circumstances may change and encourages parents to agree on new arrangements in a parenting plan, rather than return to court. Where the subsequent parenting plan affects third parties other than the parents, the agreement in writing of those parties will be required.

73 In addition, in Schedule 2 where the Court does not include this provision in a parenting order and there is a contravention, the Court will be required to consider the subsequent parenting plan when considering whether to vary the parenting order.

74 These provisions will allow maximum flexibility for parties to come to an agreement, even where there is a parenting order in force and will give parenting plans increased legal status.

The present draft

75 In the opening words (the qualification), the word "determines" seems inappropriate. It usually refers to factual determinations. Presumably the qualification is intended to deal with the court *making an order* to the effect that the later parenting plan will not have the effect that s 64D would otherwise give it.

76 The Government's intention might be to allow the court to nullify the effect of s 64D when first making the parenting order.[1] That might perhaps be more aptly expressed by saying "*Unless the parenting order otherwise specifies, it will be taken to include . . .*"

77 Alternatively, the Government might have intended that the court could *at a later stage* make an order nullifying s 64D in relation to the original parenting order. If so, the opening words might aptly be "*Unless the court orders otherwise . . .*"

78 Those words would probably include both situations, so that it would be unnecessary to complicate the section by specifically including each situation. The Court notes that on this formula only the court that made the original parenting order could nullify s 64D. If it is intended to allow any court applying the Act to have this power, the formula would be "*Unless a court orders otherwise ...*"

"Subject to" a parenting plan - meaning and implications

79 As a result of previous amendments in 2003, parenting plans can no longer create enforceable obligations. Thus the effect of s 64D is that a document that cannot itself create enforceable legal obligations can nevertheless override an enforceable court order.

80 Taking the earlier example, assume that the parties had made a parenting plan, which provided for contact to occur, not at the grandparent's home, but at the aunt's home. Since the parenting order would be "subject to" the parenting plan, the parenting plan would mean that there would be no obligation to have contact at the grandparent's home. However since parenting plans cannot create legal obligations, there would be no obligation on the parties to have contact at the aunt's home.

Possible complication and confusion

81 While this outcome might be readily understandable to family lawyers, it is somewhat curious, and might not be understood by many family members. They might assume, perhaps, that if the parenting plan could override the original order, it could also create

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1 The second sentence of the Note to s 70NEC, referring to "the terms of the parenting order", suggests that this was the intention.

new obligations. In other words, it could vary the original order. But this appears not to be the case. If so, the operation of s 64D might cause confusion and misunderstanding.

82 The risk of confusion would be greater in the case of more complex changes. Suppose, for example, a parenting order provided in some detail for a regime of contact that varied somewhat for each of three children. Suppose that one of the children (Child A) went to boarding school, or became ill, or became involved in some organised sport or activity that led the parties to make a new set of arrangements for him, and some minor consequential changes in the regime for one of the other children, Child B, but no change for the third child, Child C. The result would be complex: the arrangements for Child A would be entirely unenforceable (the parenting plan having nullified the relevant clauses of the parenting order, and not creating new obligations); the arrangements for Child B would be enforceable in part (the elements of the arrangement relating to her that were not changed by the parenting plan); and the arrangements for Child C would remain enforceable (because the court-ordered regime remains in place, unaffected by the parenting plan). There could be additional difficulty caused by the interaction of the unenforceable with the enforceable aspects of the arrangements.

83 It is difficult to imagine that the parties would be able to keep track of the legal consequences, and, in the event of breach of the arrangements, contravention proceedings would be complex indeed.

Section 64D might be counter-productive

84 Having regard to these matters, it is possible that the actual impact of s 64D might be contrary to the Government's expressed intentions. The complexity of the consequences, and the difficulty in explaining them to many families, might lead people to avoid parenting plans. And where parenting plans were used, the section might lead to highly technical disputes, again contrary to the Government's expressed intentions to minimise adversarial and acrimonious litigation.

A fresh approach?

85 The Court understands that the present review is technical only. However if the Committee considers that there are likely to be technical problems with s 64D of the kind indicated, it might wish to consider alternatives, or invite the Government to do so. The Court therefore makes the following further comment.

Focusing on compliance

86 Perhaps the key problem that s 64D addresses is that there may be a tension between the need for flexibility and the need for legal regulation by court orders. As a practical matter, where actual arrangements become different from those prescribed by an order, real problems are mainly likely to occur if one party seeks to enforce the court order. The Court refers, therefore, to the provisions relating to the compliance regime (Schedule 2).

87 The new s 70NEC provides that in the situation of a parenting order and a later inconsistent parenting plan, in contravention proceedings the court may have regard to the parenting plan and consider whether to vary the parenting order. The omission of that section would make no difference. Under the existing provisions, the position is exactly the same if, rather than making a parenting plan, the parties simply adopted a different regime. The court would obviously consider revising the parenting order in the light of the subsequent regime.

88 Similarly, new s 70NGB and new s 70NJA deal with the impact of later parenting plans in relation to the making of compliance orders. They say that in considering what orders to make under those sections, the court may have regard to the parenting plan, and consider varying the parenting order to include (with or without modification) some elements of the parenting plan. Again, those provisions appear unnecessary. It is obvious that the terms of a parenting order, like the terms of an arrangement that the

parties put in place without a parenting order, would be taken into account by the court as a result of having a general power to vary parenting orders when contravention proceedings come before it.

89 It follows that consideration might perhaps be given to replacing all these provisions with a simple provision that made it clear than in dealing with compliance matters, the court could take into account, in determining whether there was a breach of an order, and whether there was a reasonable excuse for any breach, whether to vary the parenting order, and what other order to impose under s 70NG and 70NJ, the terms of any parenting plan, and any arrangements agreed to or acted upon by the parties since the parenting order was made.

Implementing the proposal

90 For example, under the present law, s 70NG (1) provides that the court may
- (a) make an order in respect of the person who committed the current contravention…:
- (b) make a further parenting order that compensates for contact or residence forgone as a result of the current contravention;
- (ba) make any other order varying the order so contravened;
- (c) adjourn the proceedings to allow either or both of the parties to the primary order to apply for a further parenting order under Division 6 of Part VII that discharges, varies or suspends the primary order or revives some or all of an earlier parenting order.

91 Subsection (1A) deals with the matters the court should take into account when considering an adjournment under paragraph (1)(c), namely
- (a) whether the primary order was made by consent;
- (b) whether either or both of the parties to the proceedings in which the primary order was made were represented in those proceedings by a legal practitioner;
- (c) the length of the period between the making of the primary order and the occurrence of the current contravention;
- (d) any other matters that the court thinks relevant.

92 In order to implement the present suggestion, a new subsection could be added providing in substance, that in considering what order to make under this section, the Court may (or, if preferred, "must") take into account
- (a) the terms of any parenting plan made by the parties since the making of the relevant parenting order, and
- (b) any arrangements agreed to or acted upon by the parties since the parenting order was made.

93 Such an approach would be simpler than the exposure draft, and might encourage the use of parenting plans without leading to the difficulties inherent in s 64D, which would then be unnecessary. The addition of paragraph (b) would make it clear that the court should also have regard to actual changes in regime that the parties have put in place by agreement, even if they did not prepare a parenting plan.

Section

65D Court's power to make parenting order

(1) In proceedings for a parenting order, the court may, subject to sections 61DA (presumption of joint parental responsibility when making parenting orders) and 65DAB (parenting plans) and this Division, make such parenting order as it thinks proper.

Note: Division 4 of Part XIIIAA (International protection of children) may affect the jurisdiction of a court to make a parenting order.

(2) Without limiting the generality of subsection (1) and subject to section 61DA (presumption of joint parental responsibility when making parenting orders) and 65DAB (parenting plans) and this Division, a court may make a parenting order that discharges, varies, suspends or revives some or all of an earlier parenting order.

Commentary

94 In the Court's view this is a confusing section. It would be difficult to apply the subsections of 65D in practice. The section would read more easily and the Court believes be more easily understood if the reference to s 61DA (presumption of joint parental responsibility) and s 65DAB (parenting plans) were omitted in sub-ss (1) and (2). They are unnecessary as there are already sections which provide for the applicability of the presumption and for the court to have regard to parenting plans. If it is sought to remind parties or the Court that certain presumptions apply and that there are relevant sections concerning parenting plans, this could be achieved better by a note to this effect which in the Court's view would make the sections easier to understand.

Section

65DAA Court to consider child spending substantial time with each parent in certain circumstances

(1) If:

(a) a parenting order provides (or is to provide) that a child's parents are to have parental responsibility for the child jointly; and

(b) both parents wish to spend substantial time with the child;

the court must consider making an order to provide (or including provision in the order) for the child to spend substantial time with each of the parents.

Note: The effect of section 65E is that in deciding whether to go on to make a parenting order for the child to spend substantial time with each of the parents, the court will regard the best interests of the child as the paramount consideration.

(2) Subsection (1) does not apply if it is not reasonably practicable for the child to spend substantial time with each of the parents.

Commentary

95 The Court has concerns about the effect of this section on current orders and potential future litigation. The Court wishes to bring to the Committee's attention that there are many existing orders that already provide that a child's parents are to have parental responsibility jointly and, as drafted, this provision would involve the situation where both parties wish to spend substantial time with the child the Court must consider making an order that the child spend substantial time with each of the parents and may genuinely result in a considerable amount of applications now being brought before the Court in cases in which there are parenting orders providing for joint parental responsibility. The section as presently drafted could lead to an expectation that, despite the fact that the Court is required to have regard to the best interests of the child, and even though other arrangements have been in place, some kind of shared arrangement is the likely outcome.

96 If the section is to remain then to overcome this problem, it could read as follows:

(1) When making a parenting order allocating joint parental responsibility, in circumstances where both parents wish to spend substantial time with the child, the Court must consider making an order to provide, or include provision in the order, for the child spend substantial time with each of the parents.

97 The Court also suggests that if the section remains as is, the note be slightly amended to add the word *relevant* at the beginning of the sentence so that it would read "*the relevant effects of section 65E*".

Section

65DAC Effect of parenting order that provides for joint parental responsibility

(1) This section applies if, under a parenting order:
  (a) 2 or more persons are to have parental responsibility, or a component of parental responsibility, for a child jointly; and
  (b) the exercise of parental responsibility, or that component of parental responsibility, involves making a decision about a major long-term issue in relation to the child.

(2) The order is taken to require the decision to be made jointly by those persons.

  Note: Subject to any court orders, decisions about issues that are not major long-term issues are made by the person with whom the child is spending time without a need to consult the other person (see section 65DAE).

(3) The order is taken to require each of those persons:
  (a) to consult the other person in relation to the decision to be made about that issue; and
  (b) to make a genuine effort to come to a joint decision about that issue.

(4) To avoid doubt, this section does not require any other person to establish, before acting on a decision about the child communicated by one of those persons, that the decision has been made jointly.

Commentary

98 This section deals with the effect of a parenting order that provides for joint parental responsibility. In considering this section, it is necessary to have regard to the definition of major long-term issues in s 60D namely:
(a) the child's education (both current and future); and
(b) the child's religious upbringing; and
(c) the child's health; and
(d) the child's name; and
(e) significant changes to the child's living arrangements.

99 Sub-section (e) is a new subsection, introducing a new element into the Act.

100 The effect of s 65DAC is that where the exercise of parental responsibility involves making a decision about a long term issue in relation to the child:
(2) the order is taken to require the decision to be made jointly by those persons;
(3) the order is taken to require each of those persons
  (a) to consult the other person in relation to the decision to be made about that issue; and
  (b) to make a genuine effort to come to a joint decision about that issue.

101 The effect of this combined with s 60D(1)(e) requires the parties not only to advise each other of significant changes to the child's living arrangements, to consult about the decision and make a genuine attempt to come to a joint decision, but also requires the decision to be made jointly (see sub-s (2)). Thus one might logically expect that a parent with whom the child is living or spending time, who wishes to remarry for example, would consult with the other parent and make a genuine effort to obtain agreement to the changed living arrangements. But is it really intended that they must reach agreement about the remarriage; and if they do not, is the parent who remarries guilty of contravening the Act?

102 There has been concern expressed to the Parliamentary Committee and noted in the report *Every Picture Tells a Story* that the Court does not satisfactorily enforce its orders. In the Court's view a failure to act jointly where there was no agreement, such as in the example given, could lead to anticipation by the parties that the court would punish one of the parties for contravention. There may be circumstances in which that might be a reasonable outcome, such as the unilateral move to another state, but there will be other situations, like the remarriage of one party contrary to the agreement of the other, where such a result would be absurd.

103 The fact is that it is simply not possible to require a decision to be made jointly where parties do not agree and for that reason it seems the Court that sub-s (2) should be removed from s 65DAC. Not only is it unachievable but it will often be unenforceable and may give rise to expectations that simply can not be met. Whilst understanding the need to instil the ethos of joint decision making, in the Court's view sub-s (2) tries to go too far in this attempt. The objects and principles in the Act already enshrine this ethos and sub-s (3) which requires consultation and a genuine effort to come to a decision, is about its practical application.

104 In the circumstances the Court suggests it is better to omit sub-s (2) altogether. The practical reality is that after consultation and having made a genuine effort to come to a joint decision about an issue, the parties will either be able to agree or they will not. To apply legal consequences (which is the effect of having a section in the Act) when a decision to be made jointly cannot be made jointly, would, the Court suggests, be confusing and possibly lead to litigation over a variety of issues.

105 An alternative that retains the requirement to make decisions jointly may be to limit the effect of sub-s (e) of the definition of *major long-term issues* in s 60D(1) as suggested in the commentary to that section.

Section

68F How a court determines what is in a child's best interests

(1) Subject to subsection (3), in determining what is in the child's best interests, the court must consider the matters set out in subsections (1A) and (2).

(1A) The primary considerations are:

(a) the benefit to the child of having a meaningful relationship with both of the child's parents; and

(b) the need to protect the child from physical or psychological harm caused, or that may be caused, by:

(i) being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or

(ii) being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person.

(2) Additional considerations are:

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

(b) the nature of the relationship of the child with each of the child's parents and with other persons (including any grandparent or other relative of the child);

(ba) the willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent;

(c) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:

(i) either of his or her parents; or

(ii) any other child, or other person (including any grandparent or other relative of the child), with whom he or she has been living;

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

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

(f) the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child's parents, and any other characteristics of the child that the court thinks are relevant;

(fa) if the child is an Aboriginal child or a Torres Strait Islander child:

(i) the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with the other people who share that culture); and

(ii) the likely impact any proposed parenting order under this Part will have on that right;

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

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

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

(i) the order is a final order; or

(ii) the making of the order was contested by a person;

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

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

(3) If the court is considering whether to make an order with the consent of all the parties to the proceedings, the court may, but is not required to, have regard to all or any of the matters set out in subsection (2).

(4) For the purposes of paragraph (2)(fa), an Aboriginal child's or a Torres Strait Islander child's right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right:

(a) to maintain a connection with that culture; and

(b) to have the support, opportunity and encouragement necessary:

(i) to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and

(ii) to develop a positive appreciation of that culture.

Commentary

Possible confusion and increased litigation

106 It is not clear that there is a need for the two-tier approach in s 68F. The two matters emphasised in tier one, namely the child's need for parents and the child's need for protection from violence, are both already given a great deal of emphasis elsewhere in the Act (eg ss 43, 60B, 68F, 68K), and it is difficult to see what practical benefit would be achieved by re-stating them in this fashion. The Court understands that the two-tier approach is intended to reflect the suggestions in *Every Picture Tells a Story*, but the Court has grave doubts that it would be effective in relation to the Government's objectives.

107 The Court is concerned that the two-tier approach (primary and additional factors) may have unintended consequences as discussed below.

Different interpretations of the significance of the two tiers

108 Firstly, it seems likely that there will be different interpretations of the significance of the two tiers. It might be argued, for example, that any primary consideration must necessarily outweigh any additional consideration (or to use a common term that might convey better what this means "anything in tier one must "trump" anything in tier two"). It might be argued that if the court has to compare a situation that involves a risk of failure to care adequately for a child against one that involves a risk of physical harm — for example, where one parent lives in a less safe suburb than another — the risk of physical harm must be given more weight, regardless of the relative likelihood, and the relative seriousness, of the two factors.

109 Such an interpretation could obviously have capricious results, and perhaps is not intended. But if the two-tier system does not operate in this way, it seems unclear in practice how the Court is to go about the process of weighing up cases that involve competing factors involving both tiers (which will be required in virtually every case).

110 Nor is it clear what weight a primary consideration has over an additional consideration. Is it a little more weight, a lot more weight, double the weight etc. It is difficult to envisage exactly how these factors would be weighed up.

111 It is likely that this problem will lead to legal confusion and encourage appeals: it would remain to be seen how far that issues would be resolved by rulings of the Full Court or the High Court.

Encouraging violence allegations

112 A second unintended consequence might be that the formula will encourage allegations of violence and thereby operate against the Government's intention to lessen the adversarial nature of proceedings and to improve the relationship between separated parents.

113 For example, in an ordinary case of the kind that is often litigated, a father might seek more involvement with the child than the mother proposes. The father would rely on paragraph (a). The mother would be under great pressure to meet this by finding something in paragraph (b) to support her. If, for example, the father has a record of occasional fights in bars, the mother would be very likely to bring this up, even if had only moderate relevance to the child's safety, lest she would be in what she might perceive as the weak position of having to rely on the second tier factors, such as, for example, the child's wishes, the child's positive relationship with the maternal grandparents, disruption to the child's education, and so on.

Children's views

114 In addition the Court has particular concerns about the impact of the proposed two-tier provision on the status to be given to children's views. The report *Every Picture Tells a Story* emphasises the importance of attending to children's views. Recommendation 13 was "that all the processes, services and decision-making agencies in the system have as a priority built in opportunities for appropriate inclusion of children in the decisions that affect them". Elsewhere, too, the Committee emphasised this matter: for example, the title of the Report refers to children's drawings, and Recommendation 7 refers to including "the perspective and needs of children" in decision-making. This theme appears to be reflected in the Exposure Draft's proposed change from children's "wishes" to children's "views". The Court itself is considering ways in which children could have a more direct involvement in the litigation provided that is in their interests.

115 The Court is concerned that the proposed amendment to s 68F is contrary to these developments. The relegation of the views of children to a mere "additional consideration", seems to suggest that that they would always or at least commonly be outweighed by one of the "primary" considerations. (For example, in a case where a child wishes to have contact with a parent, notwithstanding some violent incident, the proposed change to s 68F would appear to mean that the child's views should be given less weight.)

116 In short, the proposed draft seems to us to be demoting the views of children to lesser importance than they presently have in the structure of the Act. The Court sees nothing in the background documents to indicate that this was intended, and it appears contrary to the approach of the Committee, whose Report implies, the Court thinks, that the views of children would have no less standing than other considerations.

Wording of the new provisions

117 Turning to the wording of the new provisions the phrase "meaningful relationship" is not entirely clear. A relationship that is damaging to a child might well be seen as "meaningful" to one or more of the adults, and perhaps to the child. What child psychiatrists and psychologists refer to as an "anxious" attachment may be very meaningful both to the parent and the child, but nevertheless one that might be damaging to the child. If the intended focus is on nurturing relationships, or those that meet the child's needs, other terminology might perhaps be considered.

118 Paragraph (b) is potentially very broad, including protecting the child from psychological harm that may be caused by being exposed to "other behaviour". It is of course difficult to avoid imprecision in dealing with these matters, but the vagueness of such terms sits awkwardly with the idea that there are two distinct tiers, each having (in a way that is not clear) different weight or priority.

119 The Court is also concerned that the effect of subpara 1A(a) might inhibit the making of an order which might re-introduce contact between a child and parent which had been absent for a number of years but where they do not presently have a meaningful relationship.

120 The Court further expresses some concern that the words in s 68F(2)(ba) namely, a close and continuing relationship is different from the words in s 60B(1)(c) and s 68F(1A)(a) where the words *"meaningful relationship"* are used. The Court is unsure why different language is used and whether it is intended to mean the same thing. The Court doubts that this will be clear to those reading the Act, particularly un-represented parents.

121 Whilst the provision of the protection factor in s 68F(1A)(b) is something that should be supported, the best interest principle already gives preference to the welfare and safety of the child over "parental rights" and interests in respect of children and it would seem performs the intended function of s 68F(1A)(b)(i) and (ii).

Section

70NC Meaning of *contravened* an order

A person is taken for the purposes of this Division to have ***contravened*** an order under this Act affecting children if, and only if:

(a) where the person is bound by the order—he or she has:

(i) intentionally failed to comply with the order; or

(ii) made no reasonable attempt to comply with the order; or

(b) otherwise—he or she has:

(i) intentionally prevented compliance with the order by a person who is bound by it; or

(ii) aided or abetted a contravention of the order by a person who is bound by it.

Note: Parenting orders may be subject to any subsequent parenting plan (see section 64D). This means that an action that would otherwise contravene a parenting order may not be a contravention, because of a subsequent inconsistent parenting plan. Whether this is the case or not depends on the terms of the parenting order.

Commentary

122 The note highlights the significance of s 64D. If the order is subject to a subsequent parenting plan then that could very well affect the issue of contravention. The Court sees this as a dangerous result for the reasons already expressed.

70NEA Standard of proof

(1) Subject to subsection (3), the standard of proof to be applied in determining matters in proceedings under this Division is proof on the balance of probabilities.

(2) Without limiting subsection (1), that subsection applies to the determination of whether a person who contravened an order under this Act affecting children had a reasonable excuse for the contravention.

(3) The court may only make an order under:

(a) paragraph 70NJ(3)(a), (d) or (e); or

(b) paragraph 70NN(8)(a);

if the court is satisfied beyond reasonable doubt that the grounds for making the order exist.

Commentary

123 This is a new section which changes the standard of proof to be applied in determining matters in proceedings under this Division; in particular in proceedings in relation to contraventions. Section 140 of the *Evidence Act 1995* provides that the civil standard of proof, namely the balance of probabilities, applies but for the Court to take account of the gravity of matters. This is known as the *Briginshaw* test. The High Court *M v M* (1988) 166 CLR 69 quoted from Dixon J's judgment in *Briginshaw*, where His Honour described the test thus:

> *"The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences."*

Effect of changes

124 The Explanatory Statement says as follows: *"Item 2 provides clarification around the standard of proof to be applied by the Court in considering enforcement applications. The current test provided by s 140 of the Evidence Act 1995 ("the Evidence Act") is the civil standard of proof, the balance of probabilities, but for the Court to take account of the gravity of matters. In practice, the Court applies a much stricter standard, closer to beyond reasonable doubt, because of the possibility of criminal sanctions being applied.*

To ensure that expectations around the standard of proof are clear and realistic, the Bill specifies that a civil standard of proof applies to all matters where there are no criminal penalties, and that a stricter standard of proof, beyond reasonable doubt, should apply to those matters in Stage 3 of the parenting compliance regime in those circumstances where the Court is considering applying a criminal penalty."

125 It is the Court's view that although the Explanatory Statement suggests that the section ensures that "expectations around the standard of proof are clear and realistic", the effect of the amendments is to do the opposite, mainly to make it much more unclear and complex about what standard is to be applied.

126 Further, the Court does not agree with the comment in the Explanatory Statement that "the Court applies a stricter standard of proof." The *Briginshaw* standard in fact allows the Court to apply the *appropriate* standard, namely where the allegations are more serious and in all likelihood would lead to a criminal sanction, to apply a higher standard, but where that is obviously not the case, to apply a lower standard.

Problems with how contravention applications proceed

127 When a contravention is alleged, the applicant must prove the facts alleged to the relevant standard of proof, and then the issue of whether the order has been breached without reasonable excuse is addressed.

128 In making a finding about these matters, which are often contested, the Court must do so according to a particular standard of proof. If it is an issue in the proceeding whether particular facts occurred, and the Court makes a finding that those facts did occur, then the respondent may raise the defence of "reasonable excuse." The defence does not have to be raised until such time as the applicant has proved a breach of the order. In establishing and proving a breach of an order, the onus of proof is on the applicant. Once the breach of the order has been established on the facts, the onus of proof changes to the respondent, who then has the responsibility of establishing again on the facts whether there is a reasonable excuse for contravening an order affecting children (s 70NE).

129 If the Court then finds on the facts, again applying the appropriate standard, that there is no reasonable excuse, the Court will make a formal finding that the respondent has contravened the order without reasonable excuse. The question of what penalty should be applied then has to be considered by the Court.

130 It is at this point that the difficulties of the proposed amendment become apparent. Section 70NEA(3) provides the Court may only make an order under s 70NJ(3)(a),(d) or (e), namely a community service order, a fine or imprisonment or under s 70NN(8)(a), a bond additional to the community service order, (the punitive sections) if the Court is satisfied beyond reasonable doubt that the grounds for making that order exist. But the difficulty is that the findings of fact have to be made before consideration of which section applies takes place. Thus, the Court has to make findings of fact to a particular standard as to whether the contravention has occurred and whether there is a reasonable excuse. It is too late to apply a particular standard at the point where the Court is considering whether it can apply the punitive sections, because the findings of fact will already been made. There is no finding of fact and thus no relevant standard of proof to be applied in simply considering whether or not particular sections apply.

131 (The Court observes, notwithstanding s 70NEA, the note to s 70NJ(1), which is unamended, says "for the standard of proof to be required in determining whether a contravention of the primary order has been committed, see s 140 of the *Evidence Act 1995*." The Court observes, first, that this does not comply with what is said in the Explanatory Statement, "that a stricter standard of proof of beyond reasonable doubt should apply to those matters in Stage 3 of the parenting compliance regime in circumstances where the Court is considering applying a criminal penalty.")

132 As to the application of s 70NJ, where the applicant has established that the respondent has contravened the order without reasonable excuse the section applies if:-

(a) there has not previously been an order imposing a sanction for a contravention but the court is satisfied that the person has behaved in a way that showed a serious disregard of his or her obligations under the primary order; and

(b) where a court has been involved previously and made an order imposing a sanction or taking an action in respect to the previous contravention.

133 In both cases the Court may among other things apply the punitive sections, however it may only do so if it is satisfied beyond reasonable doubt that the grounds for making the order exist.

134 There are only two circumstances in which the punitive sections apply. The second requires no application of grounds at all - it is simply whether having proven the facts there has already been a previous contravention found rising from the same order. In most cases a court would not know this until the contravention was established and a penalty being considered. The first requires the Court only to be satisfied, from the facts already proved, that the applicant has shown a serious disregard for the order. In neither case is the Court at that point required to make any findings which would bring into play the standard of proof.

135 One obvious problem that could arise is that having found on the balance of probabilities that a contravention has been established but having heard that evidence and made the findings, the Court then wishes to determine that there has been a serious disregard for the order and apply punitive sections. The Court could be prevented from doing so if the parties had been made aware initially that the standard of proof was the lower standard.

136 Thus the Court thinks there will be confusion about how the standard of proof applies and that the application of this will make it more confusing for applicants, many of whom are self-represented, to bring an application for contravention.

137 In the Court's view the existing standard works well and provides the flexibility necessary to determine contravention applications which are by their nature already complex proceedings. For all of these reasons the Court has considerable doubt about whether this would achieve the objects which the Explanatory Statement indicates are the reasons for applying a different standard from that in the Act at present. Whilst acknowledging that running contravention applications can be difficult because of their nature, it is **not** the Court's experience that it is the standard of proof that creates difficulty for litigants. In the Court's view the flexibility of the existing standard enables the Court to apply the appropriate penalties whereas the present proposals would inhibit that occurring in many cases, and potentially limit what penalties a court could impose.

138 The Court's suggestion is that s 70NEA be withdrawn from the Act and there be no change to the existing applicable standard of proof. The Court is concerned that the changes will make it harder, and not easier, to enforce orders.

Section

Division 2—International child abduction

111B Convention on the Civil Aspects of International Child Abduction

(1) The regulations may make such provision as is necessary or convenient to enable the performance of the obligations of Australia, or to obtain for Australia any advantage or benefit, under the Convention on the Civil Aspects of International Child Abduction signed at The Hague on 25 October 1980 (the ***Convention***) but any such regulations shall not come into operation until the day on which that Convention enters into force for Australia.

(1A) In relation to proceedings under regulations made for the purposes of subsection (1), the regulations may make provision:

(a) relating to the onus of establishing that a child should not be returned under the Convention; and

(b) establishing rebuttable presumptions in favour of returning a child under the Convention; and

(c) relating to a Central Authority within the meaning of the regulations applying on behalf of another person for a parenting order that deals with the person or persons with whom a child is to spend time or communicate if the outcome of the proceedings is that the child is not to be returned under the Convention.

(1B) The regulations made for the purposes of this section must not allow an objection by a child to return under the Convention to be taken into account in proceedings unless the objection imports a strength of feeling beyond the mere expression of a preference or of ordinary wishes.

(1C) A Central Authority within the meaning of the regulations may arrange to place a child, who has been returned to Australia under the Convention, with an appropriate person, institution or other body to secure the child's welfare until a court exercising jurisdiction under this Act makes an order (including an interim order) for the child's care, welfare or development.

(1D) A Central Authority may do so despite any orders made by a court before the child's return to Australia.

(1E) Any regulations made for the purposes of this section to give effect to Article 21 (rights of access) of the Convention may have effect regardless of:

(a) whether an order or determination (however described) has been made under a law in force in another Convention country (within the meaning of the regulations made for the purposes of this section), with respect to rights of access to the child concerned; or

(b) if the child was removed to Australia—when that happened; or

(c) whether the child has been wrongfully removed to, or retained in, Australia.

(2) Because of amendments of this Act made by the *Family Law Reform Act 1995*:

(a) a parent or guardian of a child is no longer expressly stated to have custody of the child; and

(b) a court can no longer make an order under this Act expressed in terms of granting a person custody of, or access to, a child.

(3) The purpose of subsection (4) is to resolve doubts about the implications of these changes for the Convention. That is the only purpose of the subsection.

(4) For the purposes of the Convention:

(a) each of the parents of a child should be regarded as having rights of custody in respect of the child unless the parent has no parental responsibility for the child because of any order of a court for the time being in force; and

(b) subject to any order of a court for the time being in force, a person:

(i) with whom a child is to live under a parenting order; or

(ii) who has parental responsibility, or a component of parental responsibility, for a child under a parenting order;

should be regarded as having rights of custody in respect of the child; and

(c) subject to any order of a court for the time being in force, a person who has parental responsibility for a child because of the operation of this Act or another Australian law and is responsible for the day-to-day or long-term care, welfare and development of the child should be regarded as having rights of custody in respect of the child; and

(d) subject to any order of a court for the time being in force, a person:

(i) with whom a child is to spend time under a parenting order; or

(ii) with whom a child is to communicate under a parenting order;

should be regarded as having a right of access to the child.

Note: The references in paragraphs (b) and (d) to parenting orders also cover provisions of parenting agreements registered under section 63E (see section 63F, in particular subsection (3)).

(5) Subsection (4) is not intended to be a complete statement of the circumstances in which, under the laws of the Commonwealth, the States and the Territories, a person has, for the purposes of the Convention, custody of, or access to, a child, or a right or rights of custody or access in relation to a child.

(5A) Subsections (1A) and (2) to (5) do not, by implication, limit subsection (1).

(6) Expressions used in this section have the same meaning as they have in Part VII.

Commentary

139 The Convention is concerned with the wrongful removal or retention of children in breach of "rights of custody" which the Convention does not define other than to say that those rights "shall include rights relating to the care of the person of a child and, in particular, the right to determine the child's place of residence."

140 The Convention also concerns itself with "rights of access" which, although not defined, are said to "include the right to take a child for a limited period of time to a place other than the child's habitual residence."

141 The Convention also enables the various States to request a determination by the State of habitual residence as to whether or not the removal or retention was wrongful (ie in breach of a right of custody).

142 In order to assist a foreign Court in better understanding the terminology used by the legislature regarding parental rights which may or may not amount to rights of custody under the Convention, the drafter has thought it expedient to spell out these matters in the legislation.

143 The only concern with the proposed amendments lies in their failure to explain the reach of the many existing residence and contact orders that will remain in force after these amendments are introduced. It may be that the transitional provisions of the amending Act will deal with the problem and give effect to those orders as if they were orders made using the new wording, but if the purpose of these sections is to explain to a foreign court what the new terminology means, there might still need to be some indication in the legislation drawing attention to the earlier changes and their effect for Convention purposes.

144 The Court suggests that sub-s (4) be redrafted.

(4) For the purposes of the Convention:

(a) each of the parents of a child should be regarded as having rights of custody in respect of the child unless the parent has no parental responsibility for the child because of any order of a court for the time being in force; and

(b) subject to any order of a court for the time being in force, a person who has a parenting order made prior to the commencement of [name of amending Act] in relation to a child that is to any extent:
(i) a residence order; or
(ii) a specific issues order under which the person is responsible for the day-to-day or long-term care, welfare and development of the child
should be regarded as having rights of custody in respect of the child; and

(c) subject to any order of a court for the time being in force, a person:

(i) with whom a child is to live under a parenting order; or
(ii) who has parental responsibility, or a component of parental responsibility, for a child under a parenting order;
should be regarded as having rights of custody in respect of the child; and

(d) subject to any order of a court for the time being in force, a person who has parental responsibility for a child because of the operation of this Act or another Australian law and is responsible for the day-to-day or long-term care, welfare and development of the child should be regarded as having rights of custody in respect of the child; and

(e) subject to any order of a court for the time being in force, a person who has a contact order prior to the commencement of [name of amending Act]in relation to a child should be regarded as having a right of access to the child and

(f) subject to any order of a court for the time being in force, a person:
(i) with whom a child is to spend time under a parenting order; or
(ii) with whom a child is to communicate under a parenting order;
should be regarded as having a right of access to the child.

Note: The references in paragraphs (b) and (d) to parenting orders also cover provisions of parenting agreements registered under s 63E (see s 63F, in particular subsection (3)).

Schedule 5 – Removal of references to residence and contact

145 Items 3 – 34 relate to the *Child Support (Assessment) Act 1989* (Cth). Almost all of these items substitute "care of" or "care for" for "contact" when in the *Family Law Act 1975* (Cth) the term that is to be used in lieu of contact is "spend time with". It appears to the Court that "care" is not used at all in the Family Law Act. In the Court's view, this could create confusion. The Court believes it is preferable to use consistent terminology where possible.

Final Comments

146 The Court concludes, as it started, by again expressing its concern about the structure of the Act, particularly Part VII and its complexity both in wordiness and in the juxtaposition of various sections, principles, objects and presumptions. The Court urges this Committee to consider recommending to Parliament that funds be made available for the Act to be re-written or at least Part VII to be re-written so that it becomes easier to read. The Act must be read by many non-lawyers including those who will be involved in Family Relationship Centres as well as self represented litigants, and ought to be an easy document to read and understand. The Court's concern is that the amendments to the Act, particularly the recent ones, make it a very difficult document to comprehend.