The Parliament of the Commonwealth of Australia

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

House of Representatives
Standing Committee on Legal and Constitutional Affairs

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Canberra

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Foreword

Family Law is one of the most challenging policy issues that parliamentarians deal with in their day to day interaction with the Australian public. It is not surprising that many individuals have strongly held views on whether the current system operates equitably and impartially. Relationship break-down and all that follows from it are among the most traumatic events in a person's life. How he or she emerges from that experience, and the degree it is possible to continue to have a positive relationship with any children from the relationship depend on a large number of factors, not all of which can be addressed by government through legislation. It is a sad but true observation that the Parliament cannot legislate to make people respond to family breakdown reasonably, rationally or co-operatively.

In 2003 the House of Representatives Standing Committee on Family and Community Affairs (the FCAC), released its report, *Every picture tells a story*. That report unequivocally advocated the concept of shared parental responsibility, within the context that the best interests of the child are paramount. The government released its response to the FCAC recommendations on 23 June 2005, and simultaneously referred to the Standing Committee on Legal and Constitutional Affairs the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005, the legislative implementation of the response of the government. The Committee has responded to the challenge posed by the Attorney-General to review the Exposure Draft in a limited time frame with a strong desire to make the proposed legislation the best it can possibly be.

The *Family Law Act* 1975 is a complex piece of legislation and has been subject to regular review and amendment since its enactment. The Exposure Draft under review by the Committee is another attempt to revise and update the Act to implement changing government policy and public demands for a less adversarial system in family law matters. While the Exposure Draft had its critics, most

people who contacted the Committee acknowledged the merit in what the Attorney-General and government were attempting to do. The arguments largely focused on whether the proposed changes went far enough, or too far.

The Committee was conscious that its Terms of Reference specifically directed that we not re-open discussions on policy issues such as the rejection of the proposal of 50/50 custody in favour of the approach of sharing of parental responsibility. The Committee accepted this direction and conducted the inquiry accordingly. In keeping with the FCAC report and the government response, the Committee has commented on equal shared parental responsibility, and the importance of ensuring consideration as an option, whether it is in the best interests of the child, and reasonably practicable, for both parents to spend equal time with the child.

I would like to thank the members of the Committee for their hard work in conducting this inquiry under very tight time constraints and for their non-partisan and objective approach to the difficult issues involved. The fact that so many were able to participate in hearings on short notice is a reflection of the importance that family law matters has for all parliamentarians because of its impact on Australian families.

The corporate knowledge brought to the inquiry by Mrs Kay Hull MP, the Hon Alan Cadman MP and the Hon Roger Price MP, former Chair and members of the House of Representatives Family and Community Affairs Committee, was invaluable.

I would also like to place on record my thanks to all of the individuals and organisations who contacted the Committee to express their views on the Exposure Draft and on family law issues more generally. It was a matter of some frustration to many that the time frame did not permit the Committee to conduct public hearings and consultations around Australia with all who wished to have their say in person. The Committee did attempt to hear from a representative range of views. I would like to assure all who made submissions to the inquiry that all views were taken into account by the Committee.

The Hon Peter Slipper MP
Chairman

Membership of the Committee

Chairman	The Hon Peter Slipper MP	
Deputy Chairman	Mr John Murphy MP	
Members	Mrs Kay Hull MP	
	The Hon Duncan Kerr SC MP	
	Mr Daryl Melham MP	
	Ms Sophie Panopoulos MP	
	Ms Nicola Roxon MP	
	Mr Patrick Secker MP	
	Mr David Tollner MP	
	Mr Malcolm Turnbull MP	
	Hon Alan Cadman MP	(appointed to the Committee on 7 July 2005 for this inquiry)
	Hon Roger Price MP	(appointed to the Committee on 13 July 2005 for this inquiry)

Committee Secretariat

Secretary	Ms Joanne Towner
Inquiry Secretary	Dr Nicholas Horne
Research Officer	Ms Emily Howie
Adviser	Ms Alison Playford
Administrative Officers	Ms Emily Davis (until 24/6/2005)
	Ms Kate Tremble (from 27/6/2005)
	Ms Jazmine De Roza

Terms of reference

The Committee will inquire into the provisions of the draft Bill.

Specifically, the Committee will consider whether these provisions are drafted to implement the measures set out in the Government's response to the House of Representatives Standing Committee on Family and Community Services inquiry into child custody arrangements in the event of family separation, titled *Every Picture Tells a Story*, namely to:

a) encourage and assist parents to reach agreement on parenting arrangements after separation outside of the court system where appropriate

b) promote the benefit to the child of both parents having a meaningful role in their lives

c) recognise the need to protect children from family violence and abuse, and

d) ensure that the court process is easier to navigate and less traumatic for the parties and children.

The Committee should not re-open discussions on policy issues such as the rejection of the proposal of 50/50 custody in favour of the approach of sharing of parental responsibility.

The inquiry was referred to the Committee by the Commonwealth Attorney-General, the Hon Philip Ruddock MP, on 23 June 2005.

List of abbreviations

ALSWA	Aboriginal Legal Service of Western Australia
CCP	Children's Cases Program
FCAC	House of Representatives Standing Committee on Family and Community Affairs
FaCS	Family and Community Services Department (Commonwealth)
FLC	Family Law Council
FLS	Family Law Section of the Law Council of Australia
FRC	Family Relationship Centre
SPCA	Shared Parenting Council of Australia

List of recommendations

2 Facilitating shared parenting

Recommendation 1 (paragraph 2.13)

The Committee recommends that to be consistent with the recommendation of the FCAC, which the government agrees to, that all references to the term 'joint parental responsibility' in the Exposure Draft be replaced with references to 'equal shared parental responsibility'.

Recommendation 2 (paragraph 2.29)

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

Recommendation 3 (paragraph 2.36)

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

Recommendation 4 (paragraph 2.59)

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

Recommendation 5 (paragraph 2.67)

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

- Inform parents that if the child spending 'equal time' with both parents is practicable and in the best interests of the child that they should consider this option.

Recommendation 6 (paragraph 2.68)

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

Recommendation 7 (paragraph 2.71)

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

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

Recommendation 8 (paragraph 2.80)

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

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

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

Recommendation 9 (paragraph 2.120)

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

Family violence means conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person's family that causes that or any other member of the person's family *reasonably to*

fear for, or to be *reasonably* apprehensive about, his or her personal well being or safety.

Recommendation 10 (paragraph 2.130)

The Committee recommends that the *Family Law Act* 1975 should be amended to include an explicit provision that courts exercising family law jurisdiction should impose a costs order where the court is satisfied that there are reasonable grounds to believe that a false allegation has been knowingly made.

Recommendation 11 (paragraph 2.146)

The Committee recommends where allegations of family violence or abuse are made in a family law proceeding that there should be an explicit provision in the *Family Law Act* 1975 giving the court power to seek reports from State and Territory agencies about the investigations by those agencies into those allegations of family violence or abuse.

Recommendation 12 (paragraph 2.149)

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

Recommendation 13 (paragraph 2.152)

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

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

Recommendation 14 (paragraph 2.154)

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

Recommendation 15 (paragraph 2.162)

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

Recommendation 16 (paragraph 2.172)

The Committee recommends:

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

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

Recommendation 17 (paragraph 2.176)

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

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

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

Recommendation 18 (paragraph 2.179)

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

Recommendation 19 (paragraph 2.195)

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

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

Recommendation 20 (paragraph 2.213)

The Committee recommends that Division 11 of the *Family Law Act* 1975 be redrafted into clear and concise language as recommended by the Family Law Council in its letter of advice to the Attorney-General of November 2004.

3 Resolution outside the legal system

Recommendation 21 (paragraph 3.58)

The Committee recommends that:

(a) the exception to attendance at dispute resolution on the basis of family violence and child abuse in proposed paragraph 60I(8)(b) be permitted upon the swearing and filing of an affidavit asserting the existence of family violence or child abuse; and

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

Recommendation 22 (paragraph 3.67)

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

Recommendation 23 (paragraph 3.68)

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

Recommendation 24 (paragraph 3.92)

The Committee recommends that proposed section 60J be redrafted to provide that the Rules of Court will contain a provision requiring an applicant to file, in the preliminary stage of a proceeding, a certificate by

a family counsellor or family dispute resolution practitioner to the effect that the family counsellor or family dispute resolution practitioner has given the applicant information about the issue or issues relating to the orders sought by the applicant.

Recommendation 25 (paragraph 3.105)

The Committee recommends that the government amend the commencement provisions contained in the scheme for implementation of Phases 2 and 3 in proposed section 60I by replacing references to time with references to outcomes, in particular that:

- Phase 2 is to commence once 40 Family Relationship Centres are operational; and
- Phase 3 is to commence after all 65 Family Relationship Centres are operational.

Recommendation 26 (paragraph 3.134)

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

Recommendation 27 (paragraph 3.135)

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

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

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

Recommendation 28 (paragraph 3.139)

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

Recommendation 29 (paragraph 3.155)

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

Recommendation 30 (paragraph 3.183)

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

Recommendation 31 (paragraph 3.189)

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

Recommendation 32 (paragraph 3.211)

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

Recommendation 33 (paragraph 3.228)

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

Recommendation 34 (paragraph 3.246)

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

4 Less adversarial court processes for parenting matters

Recommendation 35 (paragraph 4.42)

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

> (2)(b) if the parties to the proceedings consent and the court is satisfied that the consent was not given under coercion – to the extent that they are not proceedings under this Part.
>
> (3) This Division also applies to any other proceedings between the parties that involve the court exercising jurisdiction under this Act and that arise from the breakdown of the parties' marital relationship, if the parties to the proceedings consent and the court is satisfied that the consent was not given under coercion.

Recommendation 36 (paragraph 4.50)

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

Recommendation 37 (paragraph 4.67)

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

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

- The importance of the evidence in the proceeding; and
- The nature of the cause of action or defence and the nature of the subject matter of the proceeding; and

- The probative value of the evidence; and
- The powers of the court (if any) to adjourn the hearing, to make another order or to give a direction in relation to the evidence.

Recommendation 38 (paragraph 4.72)

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

5 Compliance regime

Recommendation 39 (paragraph 5.75)

The Committee recommends that the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005 be amended so as to insert a single provision at the appropriate point at the beginning of Division 13A of the *Family Law Act* 1975 which applies to all Subdivisions in Division 13A and which contains the following elements:

- The section applies if:

  ⇒ a parenting order has been made in relation to a child (whether before or after the commencement of Division 13A); and

  ⇒ after the parenting order was made, the parents of the child made a parenting plan that dealt with a matter dealt with in the parenting order; and

  ⇒ proceedings are brought under this Division in relation to a parenting order; and

  ⇒ the parenting plan was in force when the contravention or alleged contravention of the parenting order occurred.

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

  ⇒ have regard to the terms of the parenting plan; and

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

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

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

Recommendation 40 (paragraph 5.81)

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

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

(b) the proposed subparagraph 70NG(1)(e)(iv) of the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005 be deleted.

The Committee also recommends that a provision be inserted into Division 13A of the *Family Law Act* 1975 enabling the court to make a costs order against a party to proceedings where:

(a) the court is satisfied that the party has made more than one contravention application for minor or technical contraventions of a primary order(s); and

(b) relief for those applications has not been granted.

6 Other issues

Recommendation 41 (paragraph 6.11)

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

Recommendation 42 (paragraph 6.20)

The Committee recommends that sections 62G, 68G and 68L be amended to specifically include that the views of the child be sought by Child Representatives and family and child specialists unless not

appropriate due to the child's age, maturity or unless there is a specific circumstance that makes this inappropriate.

Recommendation 43 (paragraph 6.35)

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

Recommendation 44 (paragraph 6.39)

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

Recommendation 45 (paragraph 6.47)

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

Recommendation 46 (paragraph 6.49)

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

Recommendation 47 (paragraph 6.54)

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

Recommendation 48 (paragraph 6.58)

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

Recommendation 49 (paragraph 6.66)

The Committee recommends that resources be allocated to enable a rewriting of the *Family Law Act* 1975 as soon as possible.

Recommendation 50 (paragraph 6.71)

That the *Family Law Act* 1975 be redrafted to provide a consolidated dictionary or glossary of defined terms, to assist in easier comprehension

of the Act. The definitions should avoid merely being a cross-reference to another section of the Act.

7 Drafting issues

Recommendation 51 (paragraph 7.3)

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

Recommendation 52 (paragraph 7.8)

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

Recommendation 53 (paragraph 7.12)

The Committee recommends that:

(a) proposed subdivision AAA and subdivision AA be renumbered, to be subdivisions AA and AAA respectively; and

(b) the heading to existing AA be amended to 'Court's powers where contravention or contravention without reasonable excuse not established'.

Recommendation 54 (paragraph 7.19)

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

(a) schedule 2, Part 1, after line 3, of the Exposure Draft, insert a heading *Family Law Act 1975*;

(b) items 72 and 75 of Schedule 5 be amended to clarify if the existing paragraphs (ca) in sections 67K(1) and 67T are to be deleted or remain;

(c) a new item be inserted in Schedule 1, amending subsection 68F(3) of the Act, to delete 'in subsection (2)' and insert 'in subsections (1A) and (2)'; and

(d) delete the reference to paragraph 70NG(3)(c) in proposed paragraph 70NJA(2)(b) (in Schedule 2, item 12), and replace with 70NJ(3)(c).

8 Wider issues

Recommendation 55 (paragraph 8.7)

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

Recommendation 56 (paragraph 8.46)

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

Recommendation 57 (paragraph 8.54)

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

Recommendation 58 (paragraph 8.60)

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

Recommendation 59 (paragraph 8.69)

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

1

Introduction

Background to the inquiry

1.1 In December 2003 the House of Representatives Standing Committee on Family and Community Affairs (FCAC) released its report into child custody arrangements in the event of family separation, *Every picture tells a story*.[1] In its report the Committee recommended significant changes to the family law system, including a number of amendments to the *Family Law Act* 1975.

1.2 On 23 June 2005 the Government released its response to that report. In releasing the response, the Attorney-General described the proposed changes as 'the most significant changes to the family law system in 30 years'.[2]

1.3 The Government's response to the FCAC's recommendations has a number of components. The most significant are:

- A commitment of $397 million over four years in the 2005-06 Budget, including for 65 Family Relationship Centres (FRCs) to be rolled out over the next four years

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1 This report can be accessed at: http://www.aph.gov.au/house/committee/fca/childcustody/report.htm. It is hereafter referred to as the FCAC report.

2 *Government responds to 'watershed' child custody report*, press release by the Attorney-General, 23 June 2005.

- Establishment of the Child Support Taskforce, which has now reported to the Government, and
- Major changes to the Family Law Act, as set out in the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005, also released on 23 June 2005, and referred to the House of Representatives Standing Committee on Legal and Constitutional Affairs for inquiry.

The Committee's inquiry and report

Referral of the inquiry

1.4 In referring the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005 to the House of Representatives Standing Committee on Legal and Constitutional Affairs, the Attorney-General requested that the Committee inquire into the provisions of the proposed Bill, considering specifically whether these provisions were drafted to implement the measures set out in the Government response to the *Every picture tells a story* report.

1.5 In examining the Exposure Draft the Committee was asked to focus on whether the draft did the following:

- Encourage and assist parents to reach agreement on parenting arrangements after separation outside of the court system where this was appropriate
- Promote the benefit to the child of both parents having a meaningful role in their lives
- Recognise the need to protect children from family violence and abuse, and
- Ensure that the court process is easier to navigate and less traumatic for the parties and the children.

1.6 The Committee was specifically directed not to re-open discussions on policy issues such as the rejection of the proposal for 50/50 custody in favour of the approach of sharing of parental responsibility and it was therefore necessary for the Committee to proceed on this basis. Although this was clearly stated in the inquiry material, a number of individuals and groups attempted to revisit this issue. The

Committee found that, in discussing the adequacy of the Exposure Draft in fulfilling the aims set out in the preceding paragraph, it was inevitable that discussion would focus on what the concepts of 'shared parental responsibility' and 'substantial' contact meant in practice. These matters are discussed in more detail in Chapter 2.

Conduct of the inquiry

1.7 The Committee was assisted greatly in its work through the presence of the former Chair of the House of Representatives Family and Community Affairs Committee, Mrs Kay Hull MP as a member of this Committee. In addition, membership of the Committee was supplemented for this inquiry by the addition of two other members of the former Family and Community Affairs Committee, the Hon Alan Cadman MP and the Hon Roger Price MP. All three members brought a deep understanding of the issues surrounding separation and family breakdown to the inquiry. Mr Daryl Melham MP, a long-standing member of the Committee, was unable to participate in the inquiry due to pre-existing commitments. As a result, Mr Melham was not able to endorse or comment on the findings of the Committee.

1.8 An advertisement inviting submissions to the inquiry was placed in The Australian newspaper on 29 June 2005. Letters seeking submissions were also sent to approximately 250 organisations and individuals likely to have an interest in the subject matter of the inquiry.

1.9 The Committee received 88 submissions, 15 supplementary submissions, and 44 exhibits. Details of submissions received are at Appendix A to this report, with exhibits listed at Appendix C.

1.10 The Committee commenced its consideration of the Exposure Draft with a private briefing on the provisions of the Bill, given by officers of the Attorney-General's Department on 4 July 2005. The Committee subsequently released the transcript of that briefing publicly. Public hearings were held in Melbourne on 20 July 2005, in Sydney on 21 July 2005, and in Canberra on 25 and 26 July 2005. Due to the tight reporting deadline it was not possible for the Committee to conduct extensive hearings throughout Australia, however the Committee endeavoured to hear a representative cross-section of views. Evidence was taken by video link from a number of interstate witnesses. Details of hearings and witnesses are listed in Appendix B.

1.11 The Committee received a number of items of correspondence from the general public raising their concerns about the current operation of the family law system. As the comments were broad in nature and did not specifically address the Terms of Reference, the Committee was unable to accept these letters and emails as submissions to the inquiry. However, the Committee did find them valuable as a tool in bearing witness to the impact of family law legislation and the operations of the court on individuals and their families. A list of those who sent correspondence to the Committee is at Appendix D to this report.

The report

1.12 In this report the Committee considers the provisions of the draft Bill and their implementation of the measures in the Government response to the 2003 report of the House of Representatives Standing Committee on Family and Community Affairs, *Every picture tells a story*. The report examines the issues surrounding shared parenting, as proposed in the Exposure Draft in Chapter 2.

1.13 Chapter 3 deals with mechanisms for family dispute resolution outside of the legal system and the new arrangements envisaged to avoid the necessity of becoming involved in court processes at the initial stages. Chapter 4 examines how the Exposure Draft proposes that the court processes themselves will be less adversarial in nature.

1.14 Chapter 5 of the report deals with the range of issues associated with compliance. Chapter 6 deals with several other issues relating to the Exposure Draft that arose in the course of the inquiry, including terminology and contact with family members other than a parent. Chapter 7 details minor technical issues arising from the way the Exposure Draft has been prepared.

1.15 The final Chapter of the report deals with a number of issues that are not strictly within the Terms of Reference set by the Attorney-General, but which the Committee believes are of importance to the ultimate success or otherwise of the proposed legislative changes.

2

Facilitating shared parenting

Introduction

2.1 This Chapter examines whether the proposed Bill, and specifically the presumption of equal shared parental responsibility, promotes shared parenting and implements the government's response to the House of Representatives Standing Committee on Family and Community Affairs report on the inquiry into child custody arrangements in the event of family separation *Every picture tells a story* (the FCAC report).

2.2 In particular, the Committee examines how the presumption of equal shared parental responsibility could facilitate shared parenting, and the impact of requiring parents who have equal shared parental responsibility to make joint decisions on major long term issues. The obligation on advisers and the court to consider the time parents spend with their children is considered and the specific problems in decision making in relocation cases.

2.3 The impact of the proposed amendments on handling of or levels of family violence and abuse, as well as contrasting concerns that the proposals do not adequately address the opportunity for making false allegations of family violence and abuse are also examined. In addition, there are recommendations to simplify the structure of Part VII of the *Family Law Act* 1975 better to focus attention on the best interests of the child. Proposed amendments to the factors that the court must consider in determining the best interest of the child are also addressed.

Presumption of joint parental responsibility

2.4 Recommendation 1 of the FCAC report stated:

> …that Part VII of the *Family Law Act* 1975 be amended to create a clear presumption that can be rebutted in favour of equal shared parental responsibility, as a first tier in post separation decision making.[1]

2.5 The Government's response to Recommendation 1 was:

> …The Government agrees with this recommendation and will introduce amendments to Part VII of the Family Law Act to require the court to apply a presumption (or starting point) of joint parental responsibility. Joint parental responsibility will mean that parents will continue to share the key decisions in a child's life after separation, regardless of how much time the child spends with each parent. One or both parents will be able to submit that the presumption is not appropriate in a particular case. The best interests of the child will remain the most important factor to be taken into account. The primary factors in determining the best interests of the child will be the benefit to the child of having a meaningful relationship with both parents and the need to protect the child from physical or psychological harm.[2]

2.6 Recommendation 2 of FCAC stated:

> …that Part VII of the *Family Law Act* 1975 be amended to create a clear presumption against shared parental responsibility with respect to cases where there is entrenched conflict, family violence, substance abuse or established child abuse, including sexual abuse.[3]

2.7 The Government response to Recommendation 2 was:

> The government agrees with this recommendation in relation to cases involving violence or child abuse. While the amendments will not introduce a separate presumption against joint parental responsibility in these cases, the courts will be required not to apply the presumption in favour of

1 FCAC report, Recommendation 1.
2 Government Response to FCAC Report, June 2005, pp.5-6.
3 FCAC report, Recommendation 2.

joint parental responsibility where there is evidence of violence or child abuse.

- The government has decided not to create a presumption against joint parental responsibility in cases involving substance abuse and entrenched conflict.[4]

2.8 Part 2 and 3 of Recommendation 3 of the FCAC report were that the Act be amended to:

- define 'shared parental responsibility' as involving a requirement that parents consult with one another before making decisions about major long term issues relevant to the care, welfare and development of children, including but not confined to education – present and future, religious and cultural upbringing, health, change of surname and usual place of residence.
- clarify that each parent may exercise parental responsibility in relation to the day to day care of the child when the child is actually in his or her care subject to any orders of the court/tribunal necessary to protect the child and without the duty to consult with the other parents.[5]

2.9 The Government response to that recommendation was:

> The government agrees with this recommendation and will introduce amendments to the Act to implement the changes proposed by the committee. The amendments will be child-focused and so will refer to the need to ensure that children are given the maximum extent possible, consistent with their best interests. The government will also make an additional change to the objects of the Act to include the preservation of a child's right to safety, in keeping with the committee's conclusions at paragraph 2.29.

2.10 Section 61DA of the draft Bill proposes a new presumption of joint parental responsibility that will be a starting point for the court in making parenting orders, except in cases involving family violence or abuse. The presumption will be able to be rebutted where there is evidence that joint parental responsibility is not in the best interests of the child.

2.11 A number of witnesses expressed concern with the term 'joint'. The Shared Parenting Council in evidence expressed disappointment that:

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4 Government Response to FCAC report, Recommendation 2, June 2005, p.5.

5 FCAC report, Recommendation 3.

> …there appears a reluctance in the draftsman to properly effect not only the presumption of shared parental responsibility but also the concept of shared parenting.[6]

2.12 The Committee does not consider that the Exposure Draft implements the government's response to the FCAC in providing a presumption of joint parental responsibility. The Committee is concerned that the term 'joint' parental responsibility may be seen by some as different from 'equal shared' parental responsibility. The Committee recommends that the term 'joint parental responsibility' be replaced with 'equal shared parental responsibility' consistent with the recommendation of the FCAC report.

Recommendation 1

2.13 **The Committee recommends that to be consistent with the recommendation of the FCAC, which the government agrees to, that all references to the term 'joint parental responsibility' in the Exposure Draft be replaced with references to 'equal shared parental responsibility'.**

2.14 The Committee considers that an obligation not just to consult but to reach decisions jointly about major long term issues will promote shared parenting and will assist in ensuring that both parents are able to have a meaningful involvement in their children's lives.

2.15 The Committee notes that this is only one of the measures in the Bill to promote shared parenting. The effectiveness of other measures is discussed later in this Chapter (see paragraphs 2.163 to 2.213).

2.16 The FCAC report makes it clear that shared decision making needs to be viewed and supported as a valued part of post separation parenting.[7] How much time children should spend with each parent is a separate consideration. The issue of time is discussed at paragraphs 2.30 to 2.59.

What does equal shared parental responsibility mean?

2.17 Where there is equal shared parental responsibility proposed section 65DAC requires that both parents jointly make decisions about major long term issues. Major long term issues are defined in subsection

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

7 FCAC Report, paragraph 2.32.

60D(1) as including decisions relating to education, religious and cultural upbringing, health, name and significant changes to a child's living arrangements. Proposed subsection 65DAC(2) requires parents to make such decisions jointly. Subsection 65DAC(3) provides that joint decision making requires that parents have to consult each other about those matters and make a genuine effort to come to a joint decision.

2.18 On minor issues, there is no obligation on the person with the day to day care of a child to consult. The Shared Parenting Council of Australia expressed concern that:

> …the Bill does not 'clarify that each parent may exercise parental responsibility in relation to the day to day care of the child when the child is actually in his or her care subject to any orders of the court/tribunal necessary to protect the child and without the duty to consult with the other parent'.[8]

2.19 The Committee considers that section 65DAE in the Exposure Draft, which specifies that there is no need for parents to consult on issues that are not major long term ones, is adequate to address this concern.

2.20 A number of other submissions to the Committee were supportive of the inclusion of a clear definition of major long term issues.[9] However a number of submissions raised concerns that the requirement to consult on major long term issues may increase the level of litigation.[10]

2.21 The Law Society of NSW in its submission stated:

> …to impose joint parental responsibility on parents who did not parent in this fashion before separation is a recipe for conflict. It is also potentially de-stabilising for a child. Moreover, there is no guarantee that an uninvolved parent will become involved just because of the presumptions. The presumption places the committed parent in a position where he or she is subject to the power of the uncommitted parent. The presumption will, however, work best for committed parents who can communicate with each other and who are able to satisfactorily manage their conflict.[11]

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8 Shared Parenting Council of Australia, *Submission 70*, p.3.

9 See for example Shared Parenting Council of Australia, *Submission 70*, p.8.

10 See for example Family Law Section of the Law Council of Australia, *Submission 47*, p. 5 and *Proof transcript of evidence*, 20 July 2005, p.15.

11 Law Society of NSW, *Submission 81*, p.4.

2.22 In particular concerns were raised about proposed subparagraph (e) of the definition of major long term issues at section 60D. This currently provides that 'significant changes to the child's living arrangements' are a major long term issue. There is concern that this goes too far in broadening the scope of what is a major long term issue.

2.23 The Family Court in its submission expressed concerns about the apparent breadth of this subparagraph and gave evidence that this could potentially prevent a new partner moving into a residence where the child lives without a joint decision with the former spouse.[12]

2.24 The Family Law Council recommended that in order to reduce the potential for litigation about such issues and to better focus this provision on relocation cases that the paragraph be reworded as follows:

> 'changes to the child's living arrangements that make it significantly more difficult for a parent to spend time with a child.'[13]

2.25 The Attorney-General's Department in its submission noted:

> This factor is not intended to cover situations where a child relocates to another residence within the same locality, unless this produces a significant change. 'Major long term issues' is not intended to cover trivial matters.[14]

2.26 The Attorney-General's Department makes clear that while living with a new partner is not defined as a major long term issue and would not require consultation with the other parent, if having a new partner results in significant changes to a child's living arrangements, both parents will be required to consult and seek to reach agreement. The Department suggested this is appropriate given the impact on the child and on the capacity of a parent to exercise parental responsibility in relation to that child.[15] In evidence to the Committee the Department stated:

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12 Family Court of Australia, *Submission 53*, p.6. Chief Justice Bryant, *Proof transcript of evidence*, 26 July 2005, pp.15-17.

13 Family Law Council, *Submission 33,* p.5.

14 Attorney-General's Department, *Submission 46.1*, p. 8.

15 Attorney-General's Department, *Submission 46.1*, p.11.

> If you choose to form a different relationship outside the original relationship, that does not necessarily impact on the parenting of the children. It is when it impacts on the parenting of the children.[16]

2.27 While the Committee acknowledges that new expanded dispute resolution services will hopefully decrease litigation, the Committee considers that the key issue about decisions related to where a child lives is the capacity for the other parent to maintain and develop a relationship by spending time with that child. This is particularly relevant for relocation cases.

2.28 The Committee considers it would be inappropriate to legislate in a way that might allow ex-partners to be able to litigate about or even veto their spouse or former spouse's new relationships. While the Committee considers that the suggestion by the Family Law Council would assist in averting such disputes, the Committee suggests alternative wording. The Committee also recommends a note be included in the legislation to make it clear that it is not intended to include decisions about new partners.

Recommendation 2

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

Link between the presumption of equal shared parental responsibility and time

2.30 Proposed section 61DA which is the presumption of equal shared parental responsibility, has a note that attempts to clarify that the presumption relates solely to the allocation of parental responsibility and that it does not deal with the amount of time spent with each child. The note provides:

> The presumption provided for in this subsection is a presumption that relates solely to the allocation of parental

16 Mr Duggan, *Proof transcript of evidence*, 26 July 2005, p.66.

> 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.[17]

2.31 The Attorney-General's Department in its submission explained that the note directs the reader to section 65DAA which deals with the issue of time. The Department makes it clear that notes to legislation do not have legal effect. The intention of a note is to provide assistance to readers and, in particular self-represented litigants.[18]

2.32 The Shared Parenting Council in its submission (which was endorsed by a number of groups) expressed strong concerns that such notes are 'unnecessarily negative and restrictive'.[19]

2.33 In contrast the Law Council considered the note to be very important and suggested that it be made an operative provision. The Law Council recommended addition of a provision to the effect that an order under section 65DAA does not detract from equal shared parental responsibility nor does it imply that a child must spend equal or substantial time with each parent. [20]

2.34 While acknowledging the concerns of the Law Council, the Committee considers that the meaning of equal shared parental responsibility is made clear by proposed section 65DAC which requires decisions on major long term issues to be made jointly.

2.35 The Committee concludes that the note does provide a useful cross reference to the provisions about time. However, the first two sentences of the note are sufficient for that purpose. The note will aid self represented litigants in understanding the distinction in the Act between the sharing of decision making and decisions that address the time the child spends with each parent.

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17 Item 11 Schedule 1, Exposure Draft, Family Law Amendment (Shared Parental Responsibility) Bill at subsection 61DA(1).

18 Attorney-General's Department, *Submission 46.1*, p.13.

19 Shared Parenting Council of Australia, *Submission 70*, p.3.

20 Law Council, *Submission 47.1*, p.2.

Recommendation 3

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

Obligation to consider 'time'

2.37 The Committee considers that the provisions related to the time each parent spends with their child to be a key aspect of shared parenting.

2.38 Recommendation 5 of the FCAC report was:

> The committee recommends that Part VII of the *Family Law Act* 1975 be further amended to:
>
> - Require mediators, counsellors, and legal advisers to assist parents for whom the presumption of shared parental responsibility is applicable, develop a parenting plan
> - Require courts/tribunal to consider the terms of any parenting plan in making decisions about the implementation of parental responsibility in disputed cases;
> - Require mediators, counsellors and legal advisers to assist parents for whom the presumption of shared parental responsibility is applicable, to first consider a starting point of equal time where practicable; and
> - Require courts/tribunals to first consider substantially shared parenting time when making orders where each parent wishes to be the primary carer.[21]

2.39 The government response to that report was:

> The government agrees with this recommendation in principle. Changes to the Act will require mediators, counsellors, and legal advisers to provide information about what a parenting plan is, the possible content of such a plan and appropriate organisations or individuals who can assist in the development of parenting plans. Where they are providing advice to parents about parenting plans, they would also be required to inform parents that they could consider substantially shared parenting time as an option where it is in the best interests of the child and practicable.

21 FCAC report recommendation 5.

> A judge or magistrate would be required to take into account the terms of the most recent parenting plan if the parents subsequently end up in court over a parenting issue.
>
> Changes to the Act will also require courts to first consider substantially shared parenting time when making orders in cases where there is joint parental responsibility and each parent wishes to be the primary carer. Whether substantially shared parenting time is ordered will depend on the best interests of the child.[22]

Obligation on the court

Concerns about use of the term 'substantial' rather than 'equal'

2.40 Section 65DAA of the proposed Bill requires the court to consider the child spending substantial time with both their parents in cases where the parents have joint parental responsibility, both parents want this, it is in the best interests of the child and reasonably practicable.

2.41 This provision is clearly intended to facilitate shared parenting and to implement Recommendation 5 of the FCAC report outlined above.

2.42 A number of submissions were concerned that the reference to substantial time is not adequate and does not appropriately implement the recommendation of the FCAC report. The Shared Parenting Council of Australia submission (which receives support from a number of other submissions) stated:

> The reference to 'substantial' is not adequate and 'equal time or substantially equal time is more appropriate'.[23]

2.43 In evidence it was suggested that the term 'substantial' could be taken to mean as little as 5% of parenting time.[24]

2.44 The Committee notes that in evidence the Family Court of Australia stated:

> The law lives with words like 'substantial' and 'considerable' in other contexts as well, such as property allocation. Those words are flexible but not completely meaningless.

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22 Government Response to FCAC June 2005 p.7.

23 Shared Parenting Council of Australia, *Submission 70*, p.3.

24 See Mr Miller, *Proof transcript of evidence,* 26 July 2005, p.55; and Mr Williams, *Proof transcript of evidence*, 25 July 2005, p.54.

> Experience shows that we can live with this sort of word, and, despite its lack of precision, it is better than nothing and it does tend to point people in a particular direction.[25]

2.45 Justice O'Ryan also stated:

> It is more likely that you could find that it is not reasonably practicable if you had the phrase 'equal time' as opposed to 'substantial time'. In other words, there may be more discretion to find it is reasonably practicable if you leave the phrase 'substantial time'. That is just an argument. If you have 'equal time' then it might be easier to find that the presumption should not apply.[26]

2.46 The Chief Justice suggested:

> …I think you have to bear in mind that parties do still bring their cases to court, so the argument between the parties is going to be that there should be equal time. Certainly the act talks about substantial time, but that has to be interpreted in the context of the case before you, in which the parties will make the argument for equal time.[27]

2.47 As noted at paragraph 2.86 a number of witnesses and submissions suggested proposed section 65DAA is unnecessary, as it could increase the risk of exposure to family violence or might lead in someway to displacing the best interest requirement.[28]

2.48 The Committee rejects these concerns on the basis that it is clear that the provision is only relevant where equal shared parental responsibility applies. Equal shared parental responsibility will not apply in family violence and abuse cases unless there is evidence to suggest that it is in the best interests of the child. The court will also need to be satisfied that 'equal time' with both parents is in the best interests of the child as the paramount consideration. The recommendations made by the Committee to increase the prominence

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25 The Hon Richard Chisholm, *Proof transcript of evidence*, 26 July 2005 p.18.

26 Justice O'Ryan, Family Court of Australia, *Proof transcript of evidence,* 26 July 2005, p.29

27 Chief Justice Bryant, Family Court of Australia, *Proof transcript of evidence,* 26 July 2005, p.29. See also Family Court of Australia, *Submission 53.1*, p.7.

28 See for example, Professor Belinda Fehlberg, Law School of Melbourne, *Submission 29*, p.6, Albury-Wodonga Community Legal Services, *Submission 65*, Family Court of Australia, *Submission 53*, p.29 and National Abuse Free Contact Campaign, *Submission 8*, p.6.

of provisions related to the best interests of the child should alleviate the concerns raised.[29]

2.49 The Committee also notes submissions that exactly equal time arrangements in fact may only be both in the best interests of the child and reasonably practicable in some situations.[30] The Dads in Distress representative noted:

> …having equal time in there takes the punch out of the argument. Most guys will not take 50-50. Most guys will be working and will not be able to take that equal time. But it starts at that point and you work back from there.[31]

2.50 The Lone Fathers Association noted:

> We know that in many cases completely shared or equal parenting would not and could not work because of the vast distances apart from each other that people live. But there is no reason why it might not work in places like the ACT, country towns and places like that.[32]

2.51 The position raised by the Lone Fathers Association was that:

> We believe that as a starting point the words should say 'equal parenting time'. People would then look at the law as being at least fair to both of them if they had equal parenting time as a discussion at the table and could then work out why it can or cannot work.[33]

2.52 The Committee is strongly of the view that all parenting orders should be made in the best interests of the child and has made recommendations to clarify this within the legislation. However, the Committee does not consider that the use of the term 'substantial' in section 65DAA adequately implements recommendation 5 of the FCAC report which was accepted in principle by the Government.

2.53 The Committee considers that the FCAC recommendation that courts consider 'substantial sharing of parenting time' is based on the premise that there would be consideration of 'equal parenting time'.

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29 See Recommendation 16 and 17.

30 Federation of Community Legal Centres (Vic) Inc, *Submission 31*, p.4; Albury-Wodonga Community Legal Service, *Submission 65*, p.2.

31 Mr Miller, Dads in Distress, *Proof transcript of evidence* , 26 July 2005, p. 55.

32 Mr Williams, *Proof transcript of evidence*, 25 July 2005, p.45.

33 Mr Williams, *Proof transcript of evidence,* 25 July 2005, p.45.

This is based on the discussion in the FCAC report. At paragraph 2.38 of the FCAC report that Committee stated:

> The committee also believes that shared residence arrangements should become the norm, wherever practicable, rather than the current emphasis on sole residence'.[34]

2.54 The FCAC Committee concluded:

> A key part of the committee's view of shared parenting is that 50/50 shared residence (or physical custody) should be considered as a starting point for discussion and negotiation. The committee acknowledges that there is a weight of professional opinion that stability in a primary home and routine is optimal for young children in particular. The objective is that in the majority of families, parents would consider the appropriateness of a 50/50 arrangement in their particular circumstances taking into account the wishes of the child and that each parent should have an equal say as to where the child resides.
>
> In the end how much time a child should spend with each parent after separation, should be a decision made by parents or by others on their behalf, in the best interests of the child concerned and on the basis of what arrangements work for that family.[35]

2.55 The Committee sees particular merit in the submission of the Shared Parenting Council of Australia (supported by a number of other submissions) that:

> …Recommendation 5 of the Report, was a fundamental and key recommendation arrived at after extensive community and departmental consultation, which has been accepted by the Government. The Committee [FCAC Committee] did not reject the 'notion' of 50/50 shared time in certain circumstances. It rejected the idea of a presumption of equal shared custody….
>
> Implementation of this fundamental recommendation has not been implemented in the following areas-
>
> (a) the Report has not provided a process that the Courts (or counsellors, mediators and arbitrators) are to follow to

34 FCAC report, p.31.

35 FCAC report, p.32.

ensure that equal parenting time orders are considered in the first instance.

Note: This is not describing a presumption that a 50/50 shared parenting Order will be the likely Order in the majority of circumstances, but providing that this is the first style of order that a Court (or counsellors, mediators and arbitrators) will consider when it is reasonably practicable to do so after a shared parental responsibility outcome has been arrived at.

(b) The legislation has not directly provided for a Court to make equal or substantially equal parenting time orders in appropriate circumstances notwithstanding these may be opposed by one or both of the parents.[36]

Conclusion

2.56 The Committee has sympathy with the submissions and witnesses who expressed concern that the substantial time provisions may not operate to facilitate shared parenting. The Committee does not consider that a requirement to consider 'substantial' time adequately implements the recommendations of the FCAC report which was accepted in principle by the Government.

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

2.58 The Committee does not consider that this recommendation reopens the debate on a rebuttable presumption of 50/50 custody, which was rejected by the FCAC Committee. The term 'custody' encompasses both parental responsibility and time. If this recommendation is implemented the Bill will provide a rebuttable presumption about equal shared parental responsibility (or decision making) and, if that applies, a requirement then to consider whether equal time is in the best interests of the child and reasonably practicable.

36 Shared Parenting Council of Australia, *Submission 70*, p. 5.

Recommendation 4

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

Obligation on advisers

2.60 Chapter 3 contains a discussion of the obligations on advisers more generally. Proposed subsection 63DA(2) provides that:

> If an adviser gives people advise 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 spending substantial time with each of them is
>
> (1) practicable; and
>
> (2) in the best interests of the child;
>
> they could consider the option of an arrangement of that kind.

2.61 This is also intended to implement recommendation 5 of the FCAC report which was:

> ...that the Family Law Act be amended to require mediators, counsellors, and legal advisers to assist parents for whom the presumption of shared parental responsibility is applicable, to first consider a starting point of equal time where practicable.[37]

2.62 The Government's response to the report was:

> The Government agrees with this recommendation in principle. Changes to the Act will require mediator's counsellors and legal advisers to assist parents for whom the presumption of shared parental responsibility is applicable to develop a parenting plan. Where they are required to provide advice to parents about parenting plans, they would also be required to inform parents that they could consider

37 FCAC report, recommendation 5.

substantially sharing parenting time as an option where it is in the best interests of the child and practicable.[38]

2.63 The Committee also considers that the Exposure Draft does not implement the government's response to the FCAC report, as it does not implement the recommendation of the FCAC report, which was accepted in principle by the government that advisers suggest parents consider a starting point of equal time. This view is consistent with the submission of the Shared Parenting Council of Australia (endorsed by a number of other submissions).[39]

2.64 The Committee notes that other witnesses opposed the requirement for advisers to inform separating couples that if the child spending substantial time with each parent is practicable and in the best interests of the child that they could consider the option of substantially sharing parenting time.[40] There was concern that requiring advisers to raise one type of arrangement, namely substantially sharing parenting time, will give undue authority to that arrangement, particularly considering that there is not evidence that substantially sharing parenting time is best for children in a significant proportion of cases. Despite the insertion of 'best interests of the child', the concern is that the emphasis is actually on parents' 'right' to equality of access to children, and not what is in the best interests of the child in the particular case. [41]

2.65 The Family Court raised the concern that section 63DA, about advisers, does not sufficiently indicate that the best interests of the child are paramount.[42] Its view was that in fulfilling their obligations to inform parents to consider entering into parenting plans, the matters to be dealt with in a parenting plan and where they can get assistance to develop a parenting plan (subsection 63DA(1) and 63DA(2)(b)), an adviser would clearly have to cover the issue of substantially sharing parenting time (in section 63DA(2)(a)). The Court therefore recommended that section 63DA(2)(a) be deleted. The Court's alternate, and less preferred, position was to insert the words

38 Government response to FCAC Report, June 2005, p.7.

39 Shared Parenting Council, *Submission 70*, pp. 4-5.

40 See for example, National Network Women's Legal Services, *Submission 23*, p.12.

41 See for example National Network Women's Legal Services, *Submission 23*, p.13; Dr McInnes, National Council of Single Mothers and their Children, *Proof transcript of evidence,* 20 July 2005, p. 63.

42 Family Court of Australia, *Submission 53*, p.23.

'in accordance with section 68F(2)' in sections 63DA(2)(a)(ii) and (f) so as to ensure that the appropriate matters are taken into account.

Conclusion

2.66 The Committee considers that to properly implement the FCAC recommendation which has been accepted 'in principle' by the government, the requirement in the Exposure Draft on advisers to suggest the option of substantially sharing of time should be amended in line with the FCAC report recommendation to require advisers to suggest the option of equal sharing of time. This is an important means to promote the benefit to the child of both parents having a meaningful role in their lives.

Recommendation 5

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

- **Inform parents that if the child spending 'equal time' with both parents is practicable and in the best interests of the child that they should consider this option.**

Recommendation 6

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

2.69 A number of witnesses and submissions also raised concerns with the note attached to Section 63DA.[43] The note provides:

> 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.[44]

43 See for example Shared Parenting Council of Australia, *Submission 70*; and Men's Rights Agency, *Submission 74*, p.9.

44 Section 63DA, item 14, Schedule 1, Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill.

2.70 The Committee agrees with concerns that the note accompanying this section is unnecessarily negative. However, the Committee considers that the note is useful in particular to advisers (many of whom will not be legally qualified) and to self represented litigants.[45] The Committee recommends that the note be recast into a more positive frame.

Recommendation 7

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

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

Relocation cases

2.72 The Committee heard considerable concerns about how the issue of equal shared parental responsibility affects relocation cases. As was noted by Chief Justice Bryant in evidence before the Committee:

> Relocation cases are the hardest cases that the court does, unquestionably. If you read the judgments, in almost every judgment at first instance and by the full court you will see the comment that these cases are heart-wrenching, they are difficult and they do not allow for an easy answer. Internationally, they pose exactly the same problems as they pose in Australia. I have heard them described as cases which pose a dilemma rather than a problem: a problem can be solved: a dilemma is insoluble.[46]

2.73 The Lone Fathers Association in evidence before the Committee raised considerable concerns with the courts handling of relocation cases.[47] Concerns were also raised in evidence by the Family Law Practitioners Association of Queensland Ltd. who stated that:

45 The Committee notes its Recommendation 29 at paragraph 3.155 that the issue of immunity of dispute resolution practitioners be referred to an appropriate government advisory body for research and consideration.

46 Chief Justice Bryant, *Proof transcript of evidence*, 26 July 2005. p.8.

47 Mr Williams, *Proof transcript of evidence*, 25 July 2005, p.45.

> Not uncommonly, people get up and do a runner. Very commonly, they are ordered back until conclusion of proceedings, and proceedings in those circumstances are generally expedited so they can be dealt with within, say, six months. Sometimes the court does not do that. I do not know that I necessarily agree with it when it does not.[48]

2.74 The Family Law Practitioners Association of Queensland Ltd. also noted:

> …I think it is a really difficult area to be prescriptive about. There is certainly an acceptance in family law of the right of an adult – a parent – to freedom of movement. That creates a tension between that right and the best interests of the child.[49]

2.75 The Shared Parenting Council of Australia (supported by a number of other submissions) recommended that section 68F of the Act should include a provision that:

> …should a parent wish to change the residence of a child in such a way as to substantially affect the child's ability to reside regularly with the other parent and extended family, the court must be satisfied on reasonable grounds that such a relocation is in the best interests of the child.[50]

2.76 In evidence before the Committee the Family Law Council noted that this may not be necessary. The representative stated:

> At the end of the day when the court makes a final determination in relation to where a child should live then it is the paramount principle in terms of the best interests of the child that will apply. Therefore whether it is a relocation or whether it is a dispute as to how much time a child should spend with a particular parent, the best interests of the child is the determining factor for the court.[51]

2.77 The representative also stated:

> ...I think the proposal that we are making, in terms of changes to the child's living arrangements that make it significantly

48 Mr Leembruggen, *Proof transcript of evidence*, 25 July 2005, p.24.

49 Mr Leembruggen, *Proof transcript of evidence*, 25 July 2005, p.24.

50 Shared Parenting Council of Australia, *Submission 70*, p.7.

51 Mrs Davies, *Proof transcript of evidence*, 25 July 2005, p.83.

more difficult for a parent to spend time with the child, would cover that eventuality.[52]

Conclusion

2.78 The Committee agrees with the assessment of the Family Law Council that the proposal in Recommendation 2, relating to the definition of major long term issues that need to be decided, would significantly address concerns about relocation. The Committee notes concerns about restricting the freedom of movements of parents. However, the Committee considers that there would be benefit in adding a specific provision to ensure that it is clear that relocation decisions are to be made in the best interests of the child as recommended by the Shared Parenting Council of Australia.

2.79 The Committee also considers that the provision should cover both those situations where the change in residence of one parent affects the ability of the child to either reside with the other parent (or other relatives) in situations where there is joint residence arrangements and to cover situations where there is not joint residence but the change impacts on the ability of the child to spend time with the other parent.

Recommendation 8

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

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

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

52 Mrs Davies, *Proof transcript of evidence*, 25 July 2005, p.84.

Exceptions to application of the presumption of equal shared parental responsibility – family violence and abuse

2.81 It is clear in the Exposure Draft that the presumption of joint parental responsibility would not apply if there were reasonable grounds to believe that a parent of the child (or a person who lives with a parent of a child) has engaged in family violence or abuse of the child (or another child who is a member of the parent's family).[53]

2.82 The Explanatory Statement describes the government's policy behind this:

> This exception recognises the impact that violence and abuse in the home of either parent can have on the ability to exercise the joint decision making requirement of joint parental responsibility.[54]

2.83 This statement is consistent with the recommendations of the FCAC. The Committee agrees that the equal sharing of parental responsibility is inappropriate where there is family violence and abuse.

2.84 Concerns were raised with the Committee that the provisions may themselves spark conflict which may lead to further family violence and abuse or create the opportunity for false allegations of family violence and abuse. There was also considerable debate about the definitions of family violence and abuse currently in the Act and about whether 'reasonable grounds' is the appropriate test to determine whether the exception is met. Almost all submissions and witnesses agreed there was a need to ensure family violence and abuse allegations are investigated at an early stage. The establishment of an investigative unit to undertake this task within the Family Court was recommended by a number of bodies.[55] These issues are discussed below [paragraphs 2.131 to 2.145].

2.85 The concerns expressed about family violence and abuse in the context of shared parenting, were also raised about the exception to

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53 Proposed subsection 61DA(2) at Item 11 Schedule 1 of the Exposure Draft of the Family Law Amendment (Shared Parental) Responsibility Bill.

54 Explanatory Statement to the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005, p.4.

55 See for example National Council of Single Mothers and their Children, *Submission 20*, recommendation 6, p.5; Ms Hume, *Proof transcript of evidence*, 20 July 2005, p.53. See also Ms Hollonds, Relationships Australia, *Proof transcript of evidence*, 21 July 2005, p.20; Women's House Shelta, *Submission 35*, p.6.

compulsory attendance at family dispute resolution. That aspect is discussed in Chapter 3.

Increased risk of violence and abuse

2.86 Considerable concern was expressed that the presumption of equal shared parental responsibility (and the focus on increasing shared parenting more generally) will increase the risk of family violence and abuse occurring.

2.87 A number of submissions and witnesses suggested that despite attempts in the Exposure Draft to address the issues surrounding family violence and abuse, an unforeseen consequence of the presumption of equal shared parental responsibility is that it could result in increased risk of exposure to violence and abuse towards women and children.[56]

2.88 The concern was expressed that the emphasis on equal shared parental responsibility and the requirement to make decisions on major long term issues jointly could, and is frequently, used by abusive non-resident parents to continue a pattern of controlling behaviour.[57]

2.89 The evidence presented to support this concern primarily is based on the research done in 2001 regarding implementation of the 1995 amendments by Rhoades, Harrison and Graycar titled *The Family Law Reform Act 1995: the first three years*.[58]

2.90 In particular there was concern expressed about what would be required to meet the test of 'reasonable grounds' in the exception to the presumption. There was concern that it may be difficult to prove allegations of family violence and abuse as some people may agree to equal shared parental responsibility rather than disclose violence or abuse when it is not appropriate. [59]

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56 See for example National Network of Women's Legal Services, *Submission 23*, p.3. This submission was endorsed by a number of groups. See also SPARK Resource group, *Submission 16*, pp.1 and 7 and Dr McInnes, National Council of Single Mothers and their Children, *Proof transcript of evidence*, 20 July 2005, pp.52-54.

57 National Network of Women's Legal Services, *Submission 23,* p.9, quoting Rhoades, Graycar and Harrison, *The Family Law Reform Act 1995: the first three years, 2001* at page 2.

58 Ms Hume, National Abuse Free Contact Campaign, *Proof transcript of evidence,* 20 July 2005, p.53

59 See for example Dr Lesley Laing, University of Sydney, *Submission 25*, p.2; and SPARK Resource Centre, *Submission 16*, p.7.

2.91 This test is also applicable to the exceptions to compulsory dispute resolution discussed in Chapter 3.

2.92 The Family Court of Australia in its submission provided reference to the High Court authority in *George v Rockett:*

> …that where a statue prescribes that there must be 'reasonable grounds' for a 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. Presumably, those grounds would have to be credible and sworn to.[60]

2.93 The Attorney-General's Department in its submission stated:

> …the government considers that family violence and child abuse cannot be tolerated. There are a number of provisions in the Exposure Draft which focus on ensuring that a child is protected from family violence and child abuse. The new principles in item 2 of Schedule 1 specifically refer to the need for a child to be protected from the risk of physical or psychological harm caused by family violence or child abuse.
>
> Both the presumption of joint parental responsibility (item 11, Schedule 1) and the requirement to attend family dispute resolution prior to going to court (item 9, Schedule 1), will not apply in cases involving family violence and child abuse. In those cases, the court will not be obliged to consider the child spending time with both parents.
>
> The best interests of the child will remain the paramount consideration. In determining what is in the best interests of the child, one of the primary factors that the court will need to consider is the need to protect the child from violence or harm (item 26, Schedule 1). The new format of section 68F elevates the importance of the safety of the child in the court's considerations.
>
> …Schedule 3 of the Exposure Draft contains amendments to implement new procedures for the conduct of those family law matters that do go to court. The more active case management approach will ensure that allegations of family

60 (1990) 170 CLR 104, (1990) 93 ALR 483.

> violence and child abuse are dealt with at an earlier stage in the court process. Judicial officers will be better able to ensure that appropriate evidence is before them, to assist the court to better address these issues in the proceedings.
>
> Screening for family violence and child abuse will also be a very important role of the Family Relationship Centres (announced in the 2005-06 Budget) and the centres will also be able to provide information and advice to victims of family violence about their options and about support services available. There is funding of $7 million to increase specialist family violence services and 30 new children's contact services to help ensure children and parents are protected from violence and abuse during contact.[61]

Conclusion

2.94 After considering these issues, and in particular the response of the department, the Committee concludes that the standard of 'reasonable grounds to believe', in relation to the presumption of equal shared parental responsibility, is appropriate. This is particularly so given that the consequence of a finding of family violence or abuse is that the presumption of equal shared parental responsibility will not apply and the court will need to be convinced equal shared parental responsibility is in the best interests of the child. This objective test ensures there is appropriate evidence before the court.

2.95 On the material before it, the Committee is also of the view the Bill does not substantially increase the risk of family violence or abuse occurring. In paragraphs 4.45 to 4.50 in Chapter 4, about how proceedings in children's matters are conducted, the Committee makes further recommendations to address the concerns raised about the possibility of exposure to family violence and abuse.

Increased risk of false allegations of violence and abuse

2.96 There was considerable variation in the evidence provided to the Committee about the extent to which false allegations of family violence and abuse are made in family law cases. At one extreme

61 Attorney-General's Department, *Submission 46.1*, pp.6-7.

some witnesses gave evidence that false allegations are rarely made, others suggested that it is a very common practice.[62]

2.97 The Lone Fathers' Association stated:

> In the light of this reality, it is not appropriate for mere allegations of domestic violence or abuse to be taken as sufficient reason for avoiding dispute resolution. The LFAA has seen evidence suggesting that the rate of unfounded allegations may be as high as 85%.[63]

2.98 It was suggested that fathers are falsely accused of family violence and sexual abuse in order to gain advantage in legal proceedings and to gain an apprehended violence order.[64]

2.99 Conversely, the National Network of Women's Legal Services stated:

> …It is a highly questionable notion that people would 'make up' allegations of violence or abuse in order to avoid attending free FDR where their matter might be resolved so that they can, instead, with limited or no support embark on court proceedings that may be protracted, costly or that they are unlikely to be legally aided for. People generally issue court proceedings for good reasons and as a last resort.[65]

2.100 The Chief Justice of the Family Court provided evidence that determining allegations of abuse is always difficult. She suggested that by the time these cases came to court there are usually a number of pieces of evidence to corroborate the allegations made. She later noted that:

> …There are occasions on which the court finds that the allegations are completely untrue and without merit. Most cases – and research support this now – are not maliciously false allegations. In the majority of cases the person who is making them believes for various reasons that something has happened, probably because there are all these little bits of

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62 For examples of those who do not consider false allegations occur often see Mr Kennedy, Family Law Section, Law Council of Australia, *Proof transcript of evidence*, 20 July 2005, p.17-18; and Ms Hume, National Abuse Free Contact Campaign, *Proof transcript of evidence*, 20 July 2005, p.53. For examples of those who consider false allegations are common see Mr Miller, Dads in Distress, *Proof transcript of evidence*, 26 July 2005, p.52; Mr Williams, Lone Fathers Association, *Proof transcript of evidence* , 25 July 2005, p.49 and 55.

63 Lone Fathers Association, *Submission 48*, p.3.

64 Mr Miller, *Proof transcript of evidence*, 26 July 2005, p. 52.

65 National Network of Women's Legal Services, *Submission 23*, p.6.

> information. There are some but they are much less frequent than the ones that are malicious. I would not say that there are none but the more common ones are where the party simply believes that it all happened – maybe erroneously – and at the final hearing the court will make those findings. If it is the case that a party has mischievously made allegations, or believes them to such an extent in the face of overwhelming evidence that they are simply not true, then the court will in appropriate circumstances remove the child and the child will go to the other parent.[66]

2.101 A number of witnesses from professional organisations provided evidence that false allegations were made on occasions.[67] The Law Council gave evidence that:

> We see a lot of allegations where people have really convinced themselves it is true. When they are tested it is perhaps not as bad as they thought it was. Apart from the more radical client, we do not see a great number of false allegations in that sense.[68]

Conclusion

2.102 On the evidence before it the Committee is unable to determine to what extent the allegations of family violence and abuse made in family law proceedings are actually false but accepts that these allegations do occur. The Committee considers it may be useful for longitudinal research into this issue to be commissioned from a government advisory or research body. This is discussed further at paragraphs 2.153 to 2.154 and Recommendation 14.

2.103 The Committee notes the concerns by all groups about the adequacy of existing state systems to investigate allegations and the lack of capacity of the court to investigate allegations. These concerns are compounded by the length of time it can take to obtain a judicial determination in a family law matter. Suggestions to improve the capacity to the court to gather information about investigation of

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

67 See Ms Hollonds, Relationship Australia, *Proof transcript of evidence* 21 July 2005, pp.19-20; Mrs Roots, Catholic Welfare Australia, *Proof transcript of evidence,* 25 July 2005, pp.3-4; Mr Leembruggen, Family Law Practitioners Association of Queensland Ltd*, Proof transcript of evidence* 25 July 2005, p.25.

68 Mr Kennedy, *Proof transcript of evidence*, 20 July 2005, p.17.

allegations of family violence and abuse are discussed at paragraphs 2.131 to 2.145.

2.104 The Attorney-General's Department in its submission noted that:

> …the tests that have been set for reliance on family violence and child abuse, both as an exception to attendance at family dispute resolution and for application of the presumption, are objective tests and will require evidence.
>
> Schedule 3 of the Exposure Draft also contains amendments to implement new procedures for the conduct of those family law matters that do go to court. The more active case management approach will ensure that allegations of violence and abuse are dealt with at an earlier stage in the court process and that judicial officers are better able to ensure that appropriate evidence is before them to assist the court to better address these proceedings.[69]

2.105 In conclusion the Department noted:

> The Government will give further consideration to these issues and deal with the States and Territories to better ensure a greater emphasis on the proper investigation of these issues.[70]

2.106 While the Committee notes the objective test and the changes proposed in Schedule 3 the Committee does not consider that these measures are sufficient to address the concerns raised.

Addressing the potential for false allegations to be made

2.107 To address concerns that false allegations are made, some submissions suggested that family violence and abuse should be an exception to the presumption about equal shared parental responsibility only where it is 'substantiated' or 'proven'.[71] In contrast as noted above concerns were also raised about the difficulties in disclosure of family violence and abuse and of proving that this has occurred.[72]

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

70 Attorney-General's Department, *Submission 46*, p.7.

71 See for example Men's Confraternity, *Submission 40, pp.4-8*; Dads in Distress, *Submission 41,* p.1.

72 See for example Ms Hamey, Women's Legal Services NSW, *Proof transcript of evidence,* 21 July 2005, p.70.

2.108 The Shared Parenting Council of Australia (endorsed by a number of other submissions), recommended insertion of the word 'serious' before family violence in both the presumption and where this factor is an exception to compulsory attendance at dispute resolution.[73] In evidence the representative clarified that the concern was only in relation to the use of the term 'family violence' and not in relation to the use of the term 'abuse'.[74] As an example of what might constitute non serious violence the representative cited:

> …a loud argument outside a house, for instance. A case I had last week was mediation between a father and a mother who had an arrangement going that for some reason had broken down. He was aggravated by this, he drank too much and he went round and shouted at the mother and children inside the house 'I want to see my kids!' That was it. She applied, quite reasonably, and got an AVO. That was all settled in the mediation that followed.
>
> …no violence is good, we are not talking about quality – but there are forms of violence that are less serious than others. That is one example. A mere passing argument, for instance, can sometimes be identified as a threat of violence, but it is not serious and it is a one off situation, whereas if this particular father had got drunk and thrown a rock through the window or hit someone or went around repeatedly, of course the level of seriousness goes up.[75]

2.109 Other witnesses were concerned about this approach and thought the current definition is appropriate.[76] The Committee has considered these submissions and considers that a better approach would be to amend the definition of family violence existing within the Act to ensure greater objectivity.

Definitions of family violence and abuse

2.110 To address concerns about the impact of family violence, abuse and false allegations of family violence and abuse, there were suggestions

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73 Shared Parenting Council of Australia, *Submission 70*. See also further discussion in Chapter 3 paragraphs 3.21 to 3.60.

74 Mr Green, *Proof transcript of evidence,* 25 July 2005, p.33.

75 Mr Green, *Proof transcript of evidence,* 25 July 2005, p.34.

76 Mrs Davies, *Proof transcript of evidence,* 25 July 2005, p.87. Chief Justice Bryant, *Proof transcript of evidence,* 26 July 2005, p.24.

put to the Committee that the existing definitions of both family violence and abuse be amended. There were suggestions to both broaden and to narrow the existing definitions.

2.111 The Committee notes that the FCAC report did not contain any recommendations to amend the existing definitions of family violence or abuse although it did recommend that entrenched conflict and substance abuse should be grounds for exception to the application of a presumption of equal shared parental responsibility.[77] The government response rejected those proposed exceptions to the presumption and did not address the definition of family violence for the reasons addressed in the footnote.[78] This Committee does not propose to reopen those proposed exceptions to the presumption. The proposed Bill does not contain any amendment to the existing definitions although the definition of abuse is moved to section 4 of the Act (the general definitions section).

2.112 Family violence and abuse are currently defined in section 60D of Part VII of the *Family Law Act* 1975. The definitions were inserted into the Act as part of the amendments to the Act made in 1995.

> *Family violence* means conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person's family that causes that or any other member of the person's family to fear for, or to be apprehensive about, his or her personal well being or safety.
>
> *abuse*, in relation to a child, means:
>
> (a) an assault, including a sexual assault, of the child which is an offence under a law, written or unwritten, in force in the State or Territory in which the act constituting the assault occurs; or

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77 FCAC report, Recommendation 2.

78 'The government considers that, in relation to substance abuse, a better approach would be for the courts to take into account the effect of substance abuse on parental behaviour in deciding whether joint parental responsibility is in the best interests of the child.

In relation to entrenched conflict, it could be argued that any case that reaches a final court hearing involves entrenched conflict. Making entrenched conflict a ground for applying a presumption against joint parental responsibility could mean the courts would rarely be able to apply the proposed new presumption in favour of joint parental responsibility. The government considers that the presumption of joint parental responsibility should apply, noting that the impact of conflict and the ability of parents to communicate over parenting arrangements are matters for the courts to consider when deciding any particular case.' Government Response to FCAC report, Recommendation 2, p. 5.

> (b) a person involving a child in a sexual activity with that person or another person in which the child is used, directly or indirectly, as a sexual object by the first mentioned person or the other person, and where there is unequal power in the relationship between the child and the first-mentioned person.

2.113 The Law Council recommended that the definition of abuse be expanded to specifically refer to situations where a child witnesses violence.[79] The Queensland Law Society suggested that the existing definition of family violence is too narrow as it restricts violence as being towards a person or property of a person who is a member of the perpetrator's family. They considered the meaning is not wide enough to cover all the possible scenarios and situations in which a child may witness or be exposed to violence. The Queensland Law Society submitted the definition should be widened to include violence towards any person or property of a person.[80]

2.114 A number of submissions also suggested that where one parent has undertaken behaviour to alienate the child from the other parent that this should be included in the definition of abuse.[81]

2.115 There were also concerns raised that the formulation of abuse in relation to the presumption of equal shared parental responsibility was limited to abuse of the child by a family member or a person who lives with a family member and that this might not cover a paedophile who has abused other children but not within the family context.[82]

2.116 In contrast a number of other groups considered the definition of family violence is too wide.[83] The Shared Parenting Council of Australia in evidence noted:

> Family violence needs to be better qualified…. Left vague, it can suggest anything from a heated argument about arrangements for a child to someone hitting a person over the head with an axe. Left as it is it runs the risk of increasing litigation to the extent that it will defeat the real purpose of

79 Family Law Section of the Law Council of Australia, *Submission 47*, p.2.

80 Queensland Law Society, *Submission 30*, p.2.

81 See for example Men's Confraternity, *Submission 40,* p.9.

82 Miss Dowey, *Proof transcript of evidence,* 21 July 2005, p. 62.

83 See for example, *Submission 44,* pp.1-2.

> the bill and our general purpose, which is to protect children from serious and entrenched forms of violence and indeed conflict that impacts on them in a serious way.[84]

2.117 In evidence the Attorney-General's Department stated:

> The breadth of the definition of violence and child abuse and those sorts of issues is regularly raised with the department and the Attorney. The dilemma, however, is precisely the issues this Committee was grappling with earlier this morning – that is, what is an acceptable level of violence? The definition that is in the legislation at the moment has been there for a long time and is well understood by the courts.[85]

2.118 The Family Law Council also gave evidence that it was not concerned about the definition of family violence.[86]

Conclusion

2.119 While the Committee notes that the definitions of family violence and abuse were not an issue addressed by either the FCAC Report or the government's response the Committee has concerns that false allegations could be made and considers the definition of family violence would be better qualified by inserting an objective element into the existing definition.

Recommendation 9

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

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

84 Mr Michael Green QC, *Proof transcript of evidence,* 25 July 2005, p.29.

85 Mr Duggan, *Proof transcript of evidence,* 26 July 2005, p.62.

86 Mrs Davies, *Proof transcript of evidence,* 25 July 2005, p. 87.

Penalty for false allegations

2.121 A further way to address false allegations is deterrence by ensuring appropriate penalties for the making of false allegations. A number of witnesses supported this approach.[87]

2.122 The offence of perjury currently exists in the criminal law to address false statements made in any court. In addition contempt provisions are already available within the *Family Law Act* 1975.[88] There is already a capacity for the court to impose costs although the general cost provision in the *Family Law Act* 1975 is that each party bears their own costs.[89]

2.123 Evidence was provided to the Committee that there is a perception that perjury cases are rarely prosecuted and that contempt and the general costs provision are rarely used.[90]

2.124 The Committee notes that the criminal offence of perjury is difficult to prove as there is a requirement for evidence to establish, at the standard of beyond reasonable doubt, that there was an intention to deceive. The Committee notes that the Australian Federal Police are responsible for the investigation of perjury allegations and the Department of Public Prosecutions is responsible for prosecutions.

2.125 The Lone Fathers Association recommended that sufficient funding should be provided to make possible the proper prosecution of suspected cases of perjury. [91]

2.126 While the Committee agrees that appropriate funding should be provided for investigation of the criminal offence of perjury, it considers an alternative approach may be useful. The Committee considers there is merit in an explicit provision in the Act for the imposition of cost penalties by the court dealing with the family law proceeding where false allegations are knowingly made.[92]

2.127 This approach avoids the need for separate criminal proceedings which may not be appropriate given that parents need to maintain an

87 Mr Williams, Lone Fathers Association, *Proof transcript of evidence,* 25 July 2005, p.55. See also Mr Millard, *Submission 1,* p.3.

88 See Part XIIIB of the *Family Law Act* 1975.

89 Section 117(2) *Family Law Act* 1975 and Section 117(1) *Family Law Act* 1975.

90 Chief Justice Bryant, *Proof transcript of evidence,* 26 July 2005, p.14; see also Mr Williams, Lone Fathers Association, *Proof transcript of evidence,* 25 July 2005, p.56.

91 Lone Fathers Association, *Submission 48,* p.7.

92 Mrs Davies, *Proof transcript of evidence,* 25 July 2005, p.86.

ongoing parenting relationship. It ensures that a penalty is imposed at the same time as the family court determination rather than relying on the possibility of protracted criminal proceedings at a later date. The Committee notes concerns about limitations on the courts power to investigate allegations of family violence and abuse.

2.128 The Committee notes that the government discussion paper *A new approach to the family law system* contained a proposal for a specific cost provision for false allegations that arose in the context of the compulsory dispute resolution provision. The departmental submission stated that the government decided not to proceed with that measure because there were concerns that this would discourage people from relying on the exceptions where there were genuine family violence and abuse issues. Another consideration was that the measure did not satisfy other groups who did not consider this provision would be an effective deterrent.[93] That issue is discussed further at paragraphs 3.50 -3.57 in Chapter 3.

Conclusion

2.129 The Committee concludes that the *Family Law Act* 1975 should contain an explicit provision directing the courts to impose costs penalties where they are satisfied that false allegations have knowingly been made. Such a penalty would not prevent criminal prosecution in appropriate cases. A specific provision would make clear the intention that costs should be imposed in these circumstances.

Recommendation 10

2.130 **The Committee recommends that the *Family Law Act* 1975 should be amended to include an explicit provision that courts exercising family law jurisdiction should impose a costs order where the court is satisfied that there are reasonable grounds to believe that a false allegation has been knowingly made.**

Investigation of allegations of family violence and abuse

2.131 As discussed previously, much of the concern about family violence and abuse is in the difficulty in establishing whether family violence or abuse has actually occurred. This is relevant both to ensure that appropriate protection of children and to ensure that false allegations are dealt with promptly and properly.

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

2.132 A number of witnesses drew the attention of the Committee to provisions in New Zealand legislation.[94]

2.133 Section 60 of the New Zealand *Care of Children Act* 2004[95] requires a court to determine 'as soon as practicable' whether an allegation of violence is proven. Where the court is satisfied that there has been violence (defined as physical violence or sexual abuse[96]) the court must not make an order giving the party who committed the violent acts day to day care for the child or any contact other than supervised contact with the child unless the court is satisfied the child will be safe while with the party who committed the violent act.

2.134 There is a difficult jurisdictional issue in Australia in implementing such a regime as investigation of allegations of family violence and abuse are the responsibility of the States and Territories.

2.135 There has also been concern expressed to the Committee about the lack of evidence required for violence orders within some States and Territories.[97]

2.136 The Attorney-General's Department stated:

> ….the government has concerns that these matters are often not given sufficient priority for investigation by relevant State and Territory authorities.
>
> In relation to child abuse, the government is pleased with the national rollout of the Family Court's Magellan project and the recent extension of the Magellan project to NSW. The Magellan project involves the Family Court more actively managing parenting disputes involving allegations of serious physical and/or sexual abuse against children. It is built on inter-organisational agreements that create a series of strong collaborative arrangements between the Court and relevant State and Territory agencies, including child protection authorities and legal aid. The Family Court of Western

94 See for example Ms Hume, National Abuse Free Contact Campaign, *Proof transcript of evidence,* 20 July 2005, p.56; Ms Fletcher, National Network of Women's Legal Services, *Proof transcript of evidence,* 21 July 2005, p. 50.

95 Previously section 16B of the *New Zealand Guardianship Act* 1968

96 Section 58, *Care of Children Act* 2004 (NZ)

97 See for example Mr Williams, Lone Fathers Association, *Proof transcript of evidence,* 25 July 2005, p.48; also Mr Miller, Dads in Distress, *Proof transcript of evidence,* 26 July 2005, p .54; Mr Leembruggen, Family Law Practitioners Association QLD, *Proof transcript of evidence,* 25 July 2005, p.25.

> Australia has also implemented the Columbus project, which involves active case management by that Court of those cases that involve both allegations of child abuse and of domestic violence.
>
> In addition, the Standing Committee of Attorneys-General has established a working group to consider ways of better coordinating the Commonwealth's family law system with child protection systems at State and Territory levels. One of the issues being examined is the development of model protocols between the family courts and state agencies to ensure appropriate information is available to the family courts in cases where there are allegations of child abuse.[98]

2.137 While the Committee appreciates the value of the initiatives outlined by the department, the Committee concludes they will not fully address the concerns raised.

2.138 This issue was recognised by the FCAC which recommended:

> That an investigative arm of the Families Tribunal should also be established with powers to investigate allegations of violence and child abuse in a timely and credible manner comprised of those with suitable experience. It should be clear that the role is limited to family law cases and does not take away from the States and Territories responsibilities for child protection.[99]

2.139 The recommendation of FCAC was based on consideration of the recommendations of an earlier Family Law Council report that examined the interaction between the family law system and the State and Territory child protection systems. That report had also recommended a Commonwealth child protection body be established.[100]

2.140 The government response to the FCAC report was:

> The government notes the Committee's concerns about the need for allegations of violence and child abuse to be investigated in a timely and credible manner. As the Families Tribunal is not part of this response, the option of an investigative arm is not available. The government considers

98 Attorney-General's Department, *Submission 46*, pp.6-7.

99 FCAC report, recommendation 16.

100 Family Law Council, *Family Law and Child Protection*, September 2002.

> that, to avoid duplication, better coordination of the family law system and the States and Territories is a preferable mechanism rather than establishing additional investigative bodies. It is important that the States and Territories fulfil their obligations in respect to investigating child abuse.[101]

Conclusion

2.141 The Committee notes that a number of witnesses and submissions have suggested that as there is not to be a family tribunal, an investigative body should be attached to the Family Court of Australia.[102]

2.142 The Committee notes that the primary responsibility to investigate allegations of abuse and family violence lies with the States and Territories. The Committee is aware that investigations may not currently occur into all allegations that arise in family law proceedings.

2.143 The Committee considers that there should be a specific provision in the legislation to allow courts exercising family law jurisdiction to seek to be provided from relevant State and Territory agencies a report of any investigation that has been made into the allegations.

2.144 While the Committee recognises that not all allegations will have been investigated by the States and Territories where such reports do exist the capacity to seek reports should assist the courts to ensure that in exercising family law jurisdiction they have the capacity to quickly determine the substance of allegations made in the context of the family law proceedings and to thus ensure appropriate protections or to ensure that any false allegations are promptly addressed.

2.145 The Committee considers that this provision would be an appropriate inclusion within Schedule 3 of the Exposure Draft as a further means to promote less adversarial proceedings. The inquisitorial nature of the request by the court to the State and Territory agencies or courts is consistent with the general approach in Schedule 3.

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101 Government response to FCAC Report, June 2005 at p.14.

102 See for example Ms Hume, National Abuse Free Contact Campaign, *Proof transcript of evidence*, 20 July 2005, p.53; National Council of the Single Mothers and their Children Inc, *Submission 20*, recommendation 6, p.5.

Recommendation 11

2.146 **The Committee recommends where allegations of family violence or abuse are made in a family law proceeding that there should be an explicit provision in the *Family Law Act* 1975 giving the court power to seek reports from State and Territory agencies about the investigations by those agencies into those allegations of family violence or abuse.**

2.147 Implementation of Recommendation 11 will require cooperation with State and Territory courts and agencies to ensure that appropriate investigations of allegations does occur. The Committee notes at paragraph 2.140 above that the Government considers, to avoid duplication, better coordination of the family law system and the States and Territories is preferable to establishing additional investigative bodies.

2.148 The Committee agrees with this approach but considers that the further steps are necessary to increase liaison with the States and Territories to ensure that appropriate investigation of allegations that arise in family law proceedings does occur. The Committee considers that it would be useful for the Government to report to Parliament about the progress of these measures.

Recommendation 12

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

2.150 The Committee has more general concerns about the approaches used in the investigation of allegations of domestic violence. The Committee received evidence about the tests used to establish the existence of violence within particular States and Territories and concerns about inconsistencies in the approach.[103]

2.151 The Committee does not consider it is in a position to address those issues at this stage as they are outside of its terms of reference. The Committee recommends that a reference be given to an appropriate Parliamentary Committee to inquire into the impact of the following matters with particular reference to measures that the

103 See for example Lone Fathers Association, Submission 48 and *Submission 44*, p.2.

Commonwealth may initiate on its own or with the cooperation of States and Territory Governments to:

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

Recommendation 13

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

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

2.153 As foreshadowed at paragraph 2.102 the Committee also has some concerns about the limited nature of research into the issue of family violence and abuse in family law proceedings before the

Committee.[104] The Committee is of the view that there would be a benefit to all participants in the family law system for there to be a longitudinal study of issues surrounding family violence and abuse in the family law system in particular the prevalence of false allegations and false denials.

Recommendation 14

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

Application and effect of the presumption of equal shared parental responsibility in interim hearings

2.155 Subsection 61DA(3) of the Exposure Draft provides the court a discretion not to apply the presumption of joint parental responsibility in interim hearings. The Explanatory Statement provides that this covers a situation where a court will have limited evidence relating to the application of the presumption.[105]

2.156 The Shared Parenting Council of Australia stated that the non application of the presumption of joint parental responsibility in interim matters is 'unacceptable' and recommended that the court be required to consider the presumption when making interim orders.[106]

2.157 Section 61DB also provides that the court must disregard any allocation of parental responsibility that is contained in an interim order when making final orders. The Explanatory Statement of the Exposure Draft provides that this is intended to address concerns that a person may obtain an unwarranted advantage in a final hearing by a finding made at an interim stage.[107]

2.158 The Family Court of Australia and the Law Council expressed considerable concern with section 61DB. They suggested that

104 The Committee does note that there is some examination of these issues in the Rhoades, Graycar and Harrison research on the Family Law Reform Act 1995: the first three years (discussed at paragraph 2.89)

105 Explanatory Statement of the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill, p.4.

106 Shared Parenting Council of Australia, *Submission 70*, p.7

107 Explanatory Statement of the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill, p.5.

although in contested proceedings the court does not take account of the interim order, the circumstances that led to an interim order may continue to be relevant to a final order which must be made with the paramount consideration being the best interests of the child. [108]

2.159 The Law Council suggested retaining the discretion not to apply the presumption at the interim stage but that the limits of the courts consideration should be made clearer on the face of the legislation. They suggested inclusion of an explicit statement that the court should 'disregard the existence of any allocation of parental responsibility in an interim order' and that '…the court may take into account any facts or circumstances which are relevant to the making of the final parenting order whether those facts or circumstances occurred before or after making the final order.[109]

2.160 Section 61DB may have been inserted partially to address concerns that once a decision has been made about residence of the child, the length of time until a final hearing can mean that a status quo is established that is very difficult to refute. However a number of groups considered that the section fails to stop the establishment of a status quo.[110]

Conclusion

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

Recommendation 15

2.162 **The Committee recommends that the presumption of equal shared parental responsibility should generally be applied at an interim hearing although the court should retain discretion not to apply the presumption if it thought it to be inappropriate. The court should continue to have regard to all the circumstances that are in the best**

108 Mr Bartfeld QC, Family Law Section, Law Council of Australia, *Proof transcript of evidence,* 20 July 2005, pp.22-23.

109 Family Law Section, Law Council of Australia, *Submission 47.1*, p.3.

110 Shared Parenting Council of Australia, *Submission 70*, p.7.

interests of the child when making both interim and final orders. This should be made explicit in the Exposure Draft.

Other measures in the draft Bill facilitating shared parenting

2.163 While equal shared parental responsibility is about both parents sharing decisions (not time) there are a number of other measures in the draft Bill intended to facilitate shared parenting. These measures stem primarily from the FCAC report.[111]

2.164 The Attorney-General's Department in its submission stated:

> …the legislation clearly contains a number of provisions that will help to ensure that both parents have a greater share in the parenting responsibilities for their child after separation. The provisions in the Bill will ensure that children will benefit from having a meaningful involvement with both of their parents. The provisions are deliberately child focussed. The key provisions are:
>
> - Item 2 of Schedule 1 adds as an objective, ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives to the maximum extent possible consistent with their best interests.
> - Item 26 of Schedule 1 provides that a primary consideration in determining the best interests of the child will be the benefit to the child of having a meaningful relationship with both parents.
> - Item 11 of Schedule 1 provides a starting point or presumption of shared parental responsibility. Item 23 of Schedule 1 includes the new section 65DAC which clarifies that the effect of an order providing for joint parental responsibility is that decisions about major long-term issues affecting the child have to be made jointly.
> - Item 23 Schedule 1 requires the court to consider a child spending substantial time with both their parents where there is joint parental responsibility, both parents want this and it is reasonably practicable.
> - The amendments to the enforcement provisions in Schedule 2 will significantly strengthen the parenting

111 See recommendations 3 and 5 of the government's response to the FCAC report at Appendix D to this report.

> compliance regime and improve compliance with court orders providing for shared parenting.[112]

2.165 The proposed amendments are discussed in detail in paragraphs 2.166 to 2.213 below. The issue of time has been already discussed at paragraphs 2.37 to 2.67. The Committee considers the Exposure Draft generally implements the government's response to these recommendations and the Committee makes recommendations to further facilitate shared parenting and to clarify the provisions.

Amendment to the objects and principles of Part VII

2.166 The draft Bill proposes that the object provision about children in Part VII of the *Family Law Act* 1975 be amended to ensure consideration of the benefit to children of having a meaningful relationship with both parents. The Bill proposes a direct link between the objects and the list of factors the court must consider in determining the best interests of the child. The Bill also proposes an amendment to the principles provision to recognise the need to protect a child. The formulation of this provision comes from the existing list of factors to determine the best interests of the child.

2.167 The possible need for complete redrafting of the *Family Law Act* 1975 is discussed at Chapter 6. A number of suggestions were addressed to the Committee about the structure of Part VII and in particular the objects and principles in that Part.

2.168 A number of submissions and witnesses expressed concern that the paramountcy of the best interest of the child principle was difficult to locate within the Act. This is in part due to the complexity of the drafting of the Act and in particular the impact of the amendments in creating a hierarchy of factors to be considered including the objects, principles and two tiers of best interest factors.[113]

2.169 The Attorney-General's Department noted that :

> Section 65E is the guiding principle for the Divisions in Part VII that relate to the resolution of disputes by the court. The best interests of the child will continue to be the paramount consideration of the court in determining proceedings relating to children. The government does not consider that

112 Attorney-General Department, *Submission 46*, pp.7-8.

113 See for example Family Law Section of the Law Council, *Submission 47*, p.3. See in particular, recommendations 1.4 and 1.5 at viii.

> the court will have difficulty in coming to terms with the application of the principle in light of the proposed amendments to the Act.[114]
>
> The provisions that follow the objects provision (with the exception of the definitions provision) are designed to provide guidance to parties on coming to agreement about child-related matters outside of the court system. For example, Division 2 details the concept of parental responsibility and Division 4 outlines parenting plans. This is another reason for considering moving the proposed new Division 1A.
>
> From Division 5, the provisions focus on the resolution of disputes by the court and the making of court orders. Section 65E is the guiding principle for the court when making such orders. The government considers that this is a logical progression for Part VII.[115]

2.170 The best interest of the child is expressly made the paramount consideration in a number of sections of Part VII. In particular section 65E provides that it is the paramount consideration in making interim and final parenting orders. It is also the paramount consideration in subsection 63H(2) (setting aside parenting plans), subsection 65L(2) (assistance or supervision of parenting orders), section 67L (location orders), section 67(V) recovery orders, and subsection 67ZC(2) (welfare orders). A number of other sections in the Act also require consideration of the best interests of the child. The provisions related to how the court determines the best interests of the child are in subdivision B of Division 10 of Part VII.

Conclusion

2.171 The Committee agrees that the current drafting of the best interest provisions in Part VII is difficult to follow and may detract from a focus that the paramount consideration in making parenting orders is the best interest of the child. The issue of the possible redraft of the entire Act is further discussed at Chapter 6. The Committee considers the best interest provisions should be co-located at the start of the section on parenting orders in Part VII and that new Division 1A about child related proceedings could be moved to later in Part VII.

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114 Attorney-General's Department, Submission 46.2, p.2.

115 Attorney-General's Department, *Submission 46.2*, p.3.

Recommendation 16

2.172 **The Committee recommends:**

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

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

2.173 A number of witnesses also expressed concern that having an object about meaningful involvement with parents and a principle about a child's right to safety could be perceived as implying that a child's safety was subordinate to a parent's right to a meaningful involvement. There was also concern that the best interest principle is not clearly stated in the objects provision of Part VII. [116]

2.174 The Attorney-General's Department stated:

> Consideration could be given to reflecting the best interests of the child in the objects provision. The suggestion put forward by the Family Law Section of the Law Council in its submission and endorsed by the Family Court in its appearance before the Committee is a possible model.
>
> As discussed in issue 2, consideration could be given to making the safety of the child (as set out in paragraph 60B(2)(b) of the Bill) an object in subsection 60B(1).[117]

Conclusion

2.175 The Committee rejects the concern that safety is intended to be made subordinate to both parents having meaningful involvement with their child, but acknowledges that the drafting of the objects and principles is complicated and could be misleading. The objects and principles should be redrafted to ensure that there is clearer reference to the best interests of the child and to identify as part of the objects rather than as a principle the need for safety for the child. The

116 See for example National Council of Single Mothers and their Children Inc., *Submission 20*, p. 8.

117 Attorney-General's Department, *Submission 46.2*, p.3.

Committee considers some minor redrafting could address the concerns raised about this issue.

Recommendation 17

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

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

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

2.177 There were also concerns expressed about the lack of clarity in the drafting of the new principle about safety. While the Committee notes that this is taken directly from the existing subsection 68F(2)(g) the Committee agrees that it is unnecessarily complex. The Committee also agrees with the suggestion of the Shared Parenting Council of Australia and other submissions that the term 'other behaviour' should be defined.[118]

Conclusion

2.178 The Committee considers the approach suggested in evidence by the Former Justice Richard Chisholm representing the Family Court of Australia is useful. He suggested that the principle could be made clearer by just stating that children need to be protected from physical or psychological harm from exposure to abuse, neglect or family violence.[119]

Recommendation 18

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

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118 See Shared Parenting Council of Australia, *Submission 70*. See also Mr Gaal and Mr Mc Naughton, *Submission 58.*

119 The Hon Richard Chisholm, *Proof transcript of evidence,* 26 July 2005, p. 3.

Best interests of the child

2.180 One thing that was common across most witnesses and submissions was acknowledgement that the best interest of the child needs to be the foremost consideration in determining post separation parenting arrangements. The Committee endorses this approach. Recommendation 16 ensures the current provisions in the proposed Bill relating to the best interest of the child are made more prominent within Part VII of the Act.

2.181 The draft Bill amends the factors that the court must consider to determine what is in the best interests of the child. In particular the draft Bill contains two primary factors that the court should give additional weight to. The first is the benefit to the child of having a meaningful relationship with both parents. The second is the need to protect the safety of the child which is currently part of the list of factors that the court must consider at subsection 68F(2) of the *Family Law Act* 1975.

2.182 This provision does not come directly from the recommendations of the FCAC report although it is mentioned in the government's response to that report as a means of assisting in facilitating shared parenting.[120]

2.183 A number of submissions were supportive of this two tier approach.[121] However, a number of other submissions and witnesses raised concerns about the operation of a two tier approach. In particular concerns were raised that the two tiers may conflict with each other and about how a hierarchy would operate.[122]

2.184 The Law Council raised concern that the two tiers were unnecessary and added to confusion about the weight to be given to those factors compared to other factors. They considered that in situations where there was conflict between these two primary factors, it would be easier to resolve where they are just a part of a larger set of factors to be considered.[123]

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120 See response to Recommendation 1 at page 5, Discussion Paper *Anew family law system; Government Response to Every Picture tells a story,* November 2004.

121 See for example, Family Law Council, *Submission 33,* p.4.

122 Mr Altobelli, *Proof transcript of evidence*, 21 July 2005, p.13; National Network of Women's Legal Services, *Submission 23*, p.14.

123 Mr Kennedy, *Proof transcript of evidence,* 20 July 2005, pp.16-17.

2.185 The Attorney-General's Department, in response, noted:

> In relation to the proposed subsection 68F(1A), the government's intention is to better direct the court's attention to the objects of Part VII of the Act. The government does not consider that this amendment will unduly complicate matters for the court. Under subsection 68F(2) the court is currently required to consider a number of factors in determining the best interests of the child.
>
> The court is therefore used to dealing with weighing competing issues and, depending on the particular circumstances of the matter, elevating the importance of one factor over another.[124]

2.186 The Attorney-General's Department, in its submission, stated:

> The government believes that elevating the two considerations to become the primary factors will lead to clearer decisions by the courts, based principally on these considerations.
>
> The intention of separating these factors into two tiers is to elevate the importance of the primary factors and to better direct the court's attention to the revised objects of Part VII of the *Family Law Act 1975*. The government considers it important to link the objectives of Part VII into operative provisions. This will lead to a more consistent focus on the court achieving the key elements of the objects of Part VII.
>
> The elevation of these considerations, particularly that relating to ensuring a meaningful ongoing relationship between parents and children, is consistent with the proposal to introduce a presumption in favour of joint parental responsibility.
>
> This change will almost certainly have an impact on how cases are decided. For example, it is likely that the outcome in relocation cases will be affected as there will now be more importance placed upon the ongoing relationship with both parents than there has been in the past. [125]

124 Attorney-General's Department, *Submission 46.2,* p.1.

125 Attorney-General's Department, *Submission 46,* p.7.

2.187 The Family Court of Australia opposed the two tier approach. In evidence before the Committee the Family Court suggested there was a structural problem:

> The real problem with section 68F(2) is that it elevates some things above others, and you just do not really know what that means. I do not know that there is any easy way to work that out. If the legislation is passed, I guess that one day I will be on a full court which will have to work it out, but I do not much relish that task.[126]

2.188 The Court also noted there is an additional concern about the primary factors overriding some quite significant things such as the views of children.[127]

2.189 The Attorney-General's Department noted the views expressed by Family Court and provided the following response:

> …what we would say is that it is not unusual for the court to have to weigh various factors and to give some greater priority than others. It is something it does all the time. The government's view is that the particular two factors that are mentioned as primary factors are indeed the factors that the court should give most weight to – and that is the intention.[128]

2.190 The Department noted:

> Where both considerations apply to a particular matter, the government anticipates that the court will then give consideration to the additional factors in subsection 68F(2) in order to determine what is in a child's best interest. For example, the willingness and ability of a parent to facilitate a close and continuing relationship between the child and the other parent or any views that may be expressed by the child.[129]

2.191 Despite the concerns raised about the two tier approach to considering the best interests of the child the Committee considers that the primary factors do draw appropriate attention to the objects

126 Chief Justice Bryant, *Proof transcript of evidence,* 26 July 2005, p.21.

127 Chief Justice Bryant, *Proof transcript of evidence,* 26 July 2005, p.22.

128 Mr Duggan, Proof transcript of evidence, 26 July 2005, p.81.

129 Attorney-General's Department; *Submission 46*.2, p.3.

provisions in a positive way and will assist to focus the attention of the court to those objects particularly in relocation cases.

Formulation of the safety provision

2.192 As discussed at paragraph 2.177 the Committee notes concerns that that the formulation of the existing section 68F(2)(g), which describes the need to protect a child, is unduly complex and that the term 'other behaviour' should be defined.[130]

2.193 The Committee endorses the suggestion of former Justice Richard Chisholm that the drafting could be made clearer by simply stating that children need to be protected from physical or psychological harm from exposure to abuse, neglect or family violence.[131]

2.194 The Committee has recommended that this approach be adopted in the formulation of the objects.[132] This approach is consistent with the intention of government that the primary considerations in determining the best interests of the child should reflect the objects of the Part.

Recommendation 19

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

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

The factors in determining best interests –'friendly parent' provision

2.196 In addition to the inclusion of primary factors to be considered in determining the best interests of a child, the proposed Bill adds an additional secondary factor the court must consider. The draft Bill provides that the court must also consider:

130 Shared Parenting Council, *Submission 70*. See also Mr Gaal and Mr McNaughton, *Submission 58*.

131 The Hon Richard Chisholm, *Proof transcript of evidence*, 26 July 2005, p3.

132 Recommendations 17 and 18.

> (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.[133]

2.197 The Committee understands the intention of this provision is to facilitate shared parenting. This provision has become known as the 'friendly parent' provision.

2.198 A number of groups raised concern about the impact of the provision. In evidence the National Abuse Free Contact Campaign representative stated:

> …the friendly parent provision, which will systematically obstruct people from declaring issues of violence.[134]

2.199 The submission of the National Council of Single Mothers and their Children Inc. stated:

> The 'friendly parent' provision has been a manifest boon, wherever it has been implemented, to parents who use violence or abuse. Parents who use violence and abuse welcome the opportunity to threaten and harm their targets whilst protective parents seeking to avoid threats and injury have every reason to avoid the violent parent.[135]

2.200 They recommended this provision not be included. They also recommended implementation of an investigative unit into child protection (see paragraphs 2.131 to 2.145) and implementation of the Family Law Council letter of advice to the Attorney-General reviewing Division 11 of the *Family Law Act* 1975 which addresses family violence and in particular the interaction with State and Territory orders.[136]

2.201 The purpose of Division 11, set out in section 68Q, of the *Family Law Act* 1975 is to:

- Resolve inconsistencies between Division 11 contact orders and family violence orders;

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133 Item 30, Schedule 1 Exposure Draft, proposed 68F(2)(ba).

134 Ms Hume, National Abuse Free Contact Campaign, *Proof transcript of evidence,* 20 July 2005, p.55.

135 National Council of Single Mothers and their Children, *Submission 20*, p.8.

136 Family Law Council: *Review of Division 11 Family Violence*, 16 November 2003 available at http://www.ag.gov.au/agd/WWW/flcHome.nsf/Page/Letters_of_Advice_Letters_Violence_-_Division_11_of_the_Family_Law_Act_1975.

- To ensure that Division 11 contact orders do not exposes people to family violence; and
- Respect the right of a child to have contact, on a regular basis, with both the child's parents where contact is diminished by the making or variation of a family violence order; and it is in the best interests of the child to have contact with both parents on a regular basis.

2.202 The letter of advice from the Family Law Council followed a review of the operation of Division 11 by Kearney, McKenzie and Associates, prepared for the Office of the Status of Women in February 1998. That report concluded that Division 11 was not working in practice. Recommendation 1 of the Family Law Council letter of advice to the Attorney-General was that Division 11 required redrafting into clear, concise language that can be readily understood by the people who must use and implement it. Attachment A of Council's letter of advice provides a proposed redraft of Division 11. In particular they recommend:

- Redraft of 68P to provide a new definition of contact order that incorporates the elements of the current definitions of 'Division 11 contact order' and 'section 68R contact order';
- Repeal of 69Q(c) and amendment of 68T to provide a clearer statement of the principles to be applied by State and Territory courts – in particular to provide that a court must have regard to the need to protect all family members from the threat of family violence and; subject to that, the child's right to contact with both parents, provided such contact is not contrary to the best interests of the child;
- Amendment of 68T so that there shall be no power for a court of a State or Territory to make a contact order as part of a family violence proceeding; and
- Retention of the currently specified period of 21 days with respect to the operation of 68T(5).

2.203 The Shared Parenting Council of Australia in its submission endorsed the recognition of the friendly parent concept as part of the checklist of factors the court must consider.[137]

137 Shared Parenting Council of Australia, *Submission 70*, p.8.

Conclusion

2.204 The Committee concludes it is appropriate for the court to have to consider the willingness to maintain a relationship with the other parent. This is only one factor of the numerous secondary factors that the court is considering. Concerns about the impact on violence are unwarranted given that the court must consider the safety of the child as a primary consideration in determining the best interests.

Factors in determining best interests – interim and uncontested violence orders

2.205 Another proposed amendment to the factors that the court must consider when determining the best interests of the child is to limit consideration of family violence orders to final orders or contested orders (paragraph 68F(2)(j)).

2.206 A number of submissions and witnesses were supportive of this change as a means to address concerns that violence orders are too easily obtained in the State and Territory systems and often contain false allegations of family violence and abuse.[138]

2.207 The National Network of Women's Legal Services (which was endorsed by a number of other submissions), raised some concerns and recommended that this provision not be amended:

> We do not consider that this amendment will make much difference in practice as it is our experience that the Family Court pays little regard to family violence orders that are not final or contested in any event.
>
> However, this sends an unfortunate and inappropriate message about the weight to be given to orders legitimately made by other courts to promote non violent behaviour.
>
> It also fails to recognise that interim and ex parte orders are frequently obtained in urgent circumstances for good reasons, but, due to the documented problems with family violence orders processes, victims of violence can drop out of the system before obtaining a final order.[139]

138 See for example Shared Parenting Council of Australia, *Submission* 70, p. 8.

139 National Network of Women's Legal Services, *Submission 23*, p.16.

2.208 In evidence Chief Justice Bryant indicated that she does not consider this amendment to be a problem as the court would almost invariably hear about the facts that underlie it.[140]

2.209 The Department in its supplementary submission stated:

> The intention of this subsection is to ensure that uncontested interim family violence orders are not an independent factor in determining the best interests of the child. This should address concern that allegations of violence can be taken into account that were later found to be without substance.
>
> The government does not consider this amendment has the potential to place children at risk. In determining the best interests of the child , the court will consider, as a primary factor, the need to protect children from physical or psychological harm under subsection 68F(1A). The court may also have regard to:
>
> - any family violence involving the child or a member of the child's family under paragraph 68F(2)(i) of the Act; and
> - final or contested family violence orders under paragraph 68F(2)(j).
>
> If there are pending family violence orders, it will be a matter for the court in each particular case whether it chooses to wait for the determination of the issues of family violence by the State or Territory court. Alternatively, the court hearing the parenting application may draw its own conclusions about the violence as it impacts on the best interests of the child.[141]

2.210 After consideration of these issues the Committee concludes that the proposed amendment to section 68F(2)(j) is appropriate and will not significantly increase the risks of family violence occurring.

2.211 This amendment will assist in addressing the issues discussed earlier in this Chapter of the perceptions that exist that the court relies on false allegations of violence or abuse.

2.212 The Committee concludes that to assist in addressing concerns raised about the possible effect of the changes to the best interest factors in terms of family violence it would be appropriate for the Government

140 See Chief Justice Bryant, *Proof transcript of evidence*, 26 July 2005, p.26.

141 Attorney-General's Department, *Submission 46.1,* p.21.

to implement the recommendations in the Family Law Council letter of advice on Division 11 of the *Family Law Act* 1975.[142]

Recommendation 20

2.213 **The Committee recommends that Division 11 of the *Family Law Act* 1975 be redrafted into clear and concise language as recommended by the Family Law Council in its letter of advice to the Attorney-General of November 2004.**

142 Available at http://www.ag.gov.au/agd/www/Flchome.nsf/ – Attachment A of the letter of advice sets out a proposed redraft of Division 11.

3

Resolution outside the legal system

3.1 This Chapter looks at the legislative scheme for diverting separating couples to family dispute resolution before an application for parenting orders can be filed in court. This Chapter considers:

- The requirement to attend dispute resolution and the exceptions to that requirement.
- The newly defined roles of family counsellors, family dispute resolution practitioners and family and child specialists.
- Approval regimes and quality control mechanisms for counselling and family dispute resolution practitioners.
- Parenting plans and their development outside of the legal system.

Resolution of disputes before entering the legal system

The requirement to attend dispute resolution

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

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

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

3.3 The role of the courts in parenting matters, according to the FCAC report, would therefore be limited to the determination of the 'hard cases' involving entrenched conflict, family violence, abuse, substance abuse and also the enforcement of orders.[2]

3.4 The government agreed to this recommendation, although it altered some of the exceptions to the requirement. In its response the government stated that it would introduce amendments to the Act to require parenting disputes to go to an accredited dispute resolution practitioner before going to court, with some exceptions. The government did not include the FCAC report's recommendations of exemptions in cases involving entrenched conflict or substance abuse.[3]

3.5 The government proposed that the dispute resolution services necessary to meet the new requirement will be provided by the new Family Relationship Centres and other approved organisations and practitioners in existing family services or in private practice. Accreditation standards will be developed under the Act.[4]

3.6 The draft Bill proposes a court must not hear an application for an order under Part VII in relation to a child unless the applicant files in court a certificate that the applicant has attended family dispute resolution with the other party or parties to the proceedings in relation to the issues that the orders would deal with.[5] The object of the proposed section 60I is expressly stated:

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

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

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

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

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

5 Proposed subsection 60I(7).

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

3.7 The Explanatory Statement notes:

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

Community response to compulsory dispute resolution

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

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

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

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6 Proposed subsection 60I(1)

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

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

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

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

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

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

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

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

3.12 One witness asserted that forced mediation has a history of disadvantaging women.[13]

3.13 The government envisages that lawyers will not be present in the compulsory dispute resolution process. Some witnesses expressed concern about this provision, stating that lawyers should be present at mediations, or at least that access to legal advice prior to attendance at mediation may, in some situations, be beneficial to reaching a fully informed decision through a mediation process.[14] This was raised in particular to address the power imbalance that results from the fear of harm in cases of family violence and child abuse.

3.14 Certainly compulsory dispute resolution was opposed by some groups on the basis that the compulsory nature of the dispute

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

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

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

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

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

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

Conclusion

3.16 The Committee is of the view that in order to overcome these concerns, the family dispute resolution practitioners will need to be highly skilled and experienced practitioners.

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

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

3.18 There are a number of exceptions to the requirement to attend dispute resolution.[17] The requirement will not apply to people who seek consent orders or orders in response to another application under Part VII relating to children. There will also be exceptions where:

- There are 'reasonable grounds to believe' that there has been (or is a risk of) family violence or abuse;
- In a contravention application there has been a serious disregard of recent court orders;

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

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

17 See proposed section 60I(8).

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

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

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

Exception in cases involving family violence or child abuse

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

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

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

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

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

3.23 It is clear that the Exposure Draft seeks to strike a balance between protecting victims of family violence and abuse by creating the exception, but also providing some disincentive to knowingly making false allegations of family violence and abuse by requiring that the court be objectively satisfied *on reasonable grounds* that there has been such family violence or abuse.

3.24 A number of witnesses raised concerns about the exception to compulsory attendance at family dispute resolution in cases involving family violence or child abuse. The concern was that the protection that is intended to be afforded to victims of family violence and abuse will not be borne out in practice; that for people in situations of family violence and abuse the court processes would be harder to navigate; there would be increased risk of delay in court process and a resulting pressure not to disclose concerns about family violence or abuse.[21]

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

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

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

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

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

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

3.26 The Attorney-General's Department submitted that there are a number of disincentives in the Bill to making false allegations; first, where it is determined that false allegations have been made, the court will have the power to award costs; and secondly, the provision in the proposed subsection 60I(9), which allows the court to order parties to attend dispute resolution, notwithstanding that they fall within an exception in subsection 60I(8).[24]

3.27 The Committee notes that although this exception is available, people in violent and abusive situations can still opt to attend dispute resolution if they wish. Family Services Australia gave evidence to the Committee that existing services currently deal with very high conflict cases:

> …currently we see people every day who are in very high conflict and we make calls about whether they need to be seen in separate rooms in separate parts of the building or whatever, but we will still do a mediation by shuttle if necessary. There are some cases where we would not do it, and I need to be clear about that as well.[25]

'Reasonable grounds'

3.28 There was considerable debate on the test that the draft Bill creates, that the court be *satisfied on reasonable grounds* that there is, or there is a risk of, family violence or child abuse.

3.29 The Attorney-General's Department gave evidence about the rationale behind the proposed section. To the maximum extent possible, the government wishes to ensure that disputes are resolved outside the courts and in order to achieve this objective the government has made the threshold to actually get to court quite high. The department acknowledged the difficulty in striking the balance between protecting victims of family violence and abuse on one hand, and encouraging as many people as possible to use alternative dispute resolution processes on the other.[26]

3.30 It is unclear, from reading the draft Bill, exactly how the court will deal with cases of family violence and abuse that come before it. In particular it is unclear at which point in the proceeding the

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

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

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

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

Is reasonable grounds the appropriate test?

3.31 As stated previously, the legal authority for what constitutes 'reasonable grounds' is found in *George v Rockett*[27] (see Chapter 2 paragraph 2.92 above).

3.32 Some witnesses raised concerns that 'reasonable grounds' creates an inappropriate test in the context of the exception to compulsory dispute resolution. There was concern that it is difficult to prove allegations of violence and abuse.[28] The application of such a test was seen as too great an onus to place on persons wishing to seek an exemption, particularly in light of the evidentiary problems associated with family violence and child abuse, which generally occurs behind closed doors and without independent witnesses.[29]

3.33 The National Abuse Free Contact Campaign expressed the concern that insofar as the threshold discourages women from disclosing abuse, it puts children's safety in jeopardy.[30]

3.34 The NNWLS gave evidence that:

> A party should be able to elect to use the court system if they disclose violence or abuse. A sworn statement could be given if necessary.[31]

3.35 The NNWLS submitted that proposed section 60I be amended to allow for a family dispute resolution practitioner to certify that a dispute is not suitable for family dispute resolution due to family violence or other issues.[32] The Victorian Aboriginal Legal Service Inc

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

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

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

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

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

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

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

3.36 The NNWLS submitted that an alternative dispute resolution path be established specifically for cases of violence, including the provision of legal advice and representation, which can assist to redress the power imbalance between parties.[34] Other witnesses supported the use of legal advice and representation as a useful means of addressing power imbalances in relationships in a mediation context.[35]

3.37 On the other hand, Men's Confraternity submitted that the court must be satisfied that there are proven and substantiated grounds.[36] Although the Shared Parenting Council of Australia did not make the point specifically in relation to the exception to dispute resolution, it recommended that family violence in the Act should be changed to serious family violence.[37]

3.38 It is important to consider the consequences of a finding at this stage. The impact of a finding that there are reasonable grounds in proposed section 60I may operate to negate the presumption of equal shared parental responsibility in proposed section 61DA when the court is making its final determination. As discussed in Chapter 2 paragraphs 2.81 – 2.83 above, the reasonable grounds test also applies to the application of the presumption of equal shared parental responsibility. That is, a finding at an interim hearing about proposed section 60I is likely to have a considerable effect on the determination of rights in the substantive proceedings.

The means to establish reasonable grounds

3.39 There is concern about what will be required to meet the test of 'reasonable grounds' in the exception to attendance at dispute resolution on the basis of family violence or child abuse.

3.40 The Family Court submitted that any proposed paragraph 60I(8)(b) determination relating to abuse or family violence would require a decision to be made. Although a sworn statement may ordinarily

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.45 National Legal Aid stated:

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

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

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

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

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

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

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

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

3.48 The Committee is concerned that interim hearings will be created, particularly where final hearings would be the appropriate place to make any determinations or findings of such a serious nature.

3.49 The Committee is mindful of the balance being sought by the government in proposed paragraph 60I(8)(b), but is concerned that the application of the provision will create an unnecessarily high burden on applicants in violent or abusive domestic situations, particularly as the provision is procedural in nature.

Alternative model

3.50 The Committee poses an alternative model for the operation of the exception. The Committee proposes that an exception to attendance at compulsory dispute resolution on the basis of family violence or abuse be available to an applicant upon the provision by the applicant of a sworn statement that the dispute is not suitable for family dispute resolution on the basis of family violence or abuse. The Act will expressly impose penalties where the court is satisfied that there are reasonable grounds that the applicant has knowingly made a false allegation. The exception in proposed paragraph 60I(8)(b) would therefore be dealt with on the papers, without the need for a hearing. This picks up, to some extent, the submissions of the NNWLS above.[46]

3.51 The Committee is aware that a cost provision was previously deleted from proposed section 60I on the basis that it constituted an unnecessary disincentive to claiming an exception (see paragraph 3.20 above). However, in light of the lower threshold to claiming the exception under the Committee's model, a penalty can now be set to act as deterrence to unsubstantiated allegations.

3.52 The Committee envisages that under its model the nature of any penalty that would flow from the court being satisfied that a false allegation of abuse or family violence has been knowingly made may or may not be in the form of an award of costs. As with the new compliance regime, the penalty could be set in terms of time spent with the child, costs, compensation or a fine. The nature of the

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

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

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

3.53 As the issue of family violence or abuse will have an impact on the application of the presumption of equal shared parental responsibility, it is anticipated that the issues would be raised in a more fulsome manner in the course of the rest of the proceeding and dealt with at the final hearing. A final hearing is the appropriate place for the testing of such serious allegations.

3.54 The Attorney-General's Department indicated that this plan would be difficult because it poses a low threshold to avoid dispute resolution, and the government's key concern is that as many parties as possible use the dispute resolution path.[47]

3.55 The department also expressed concern about research that shows that once these allegations are made the conflict becomes entrenched. For that reason, there should be disincentive to the making of allegations that are without substance.[48]

3.56 The Committee believes that the necessary disincentive to knowingly making false allegations would be provided by the express provision for penalties in the event that the court is satisfied on reasonable grounds that a false allegation has been made intentionally. It also notes that the proposed subsection 60I(9), which requires the court to consider referring the matter to dispute resolution in any event, operates as a deterrent to claiming the exception.[49]

3.57 The Committee is concerned about the capacity for proposed paragraph 60I(8)(b) to spark a new species of litigation. The Committee believes that its alternative model would avoid the potential for increased litigation on a procedural matter that the provision as presently drafted could create.

Recommendation 21

3.58 **The Committee recommends that:**

(a) the exception to attendance at dispute resolution on the basis of family violence and child abuse in proposed paragraph 60I(8)(b) be permitted upon the swearing and filing of an

47 See Mr Duggan, *Proof transcript of evidence*, 26 July 2005, p. 69.

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

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

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

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

3.59 The Committee notes that it received some evidence in relation to whether a judge or registrar would make any decision, under the drafting of proposed subsection 60I(8) in the Exposure Draft, that there are reasonable grounds to believe that there has been family violence or abuse.[50]

3.60 In any event, on the basis of Recommendation 21 above that the exception can be claimed upon the swearing and filing of an affidavit, it is not necessary for the Committee to make a recommendation in respect of who would decide any test based on reasonable grounds.

Other exceptions to attendance at family dispute resolution

Serious disregard for contraventions

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

> (c) all the following conditions are satisfied:
>
> (i) the application is made in relation to a particular issue;
>
> (ii) a Part VII order has been made in relation to that issue within the 6 months before the application is made;
>
> (iii) the application is made in relation to a contravention of the order by a person;
>
> (iv) the person has behaved in a way that showed a serious disregard for his or her obligations under the order…

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

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

3.62 The Family Court considered that this provision would be problematic in practice, as in order to prove the breach and the serious disregard for orders a final hearing would be required. The Court suggested that the provision be amended to:

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

3.63 The benefit of the rewording would be to add a 'reasonable grounds to believe' test that is more suited to determination at an interim hearing. In the absence of this alteration, the Family Court contended that section 140 of the *Evidence Act* 1995 (Cth) and the *Briginshaw* standard would apply to require a higher standard of proof to be satisfied, in light of the severity of the consequences of the findings.[52]

3.64 Some witnesses raised concerns, whilst conceding that a time limit is necessary, that six months was too short a period. Twelve months was raised as a more appropriate period of time.[53]

3.65 The Family Law Section of the Law Council of Australia (the FLS) noted that in cases where the respondent has shown serious disregard for orders, there is little point in forcing that person to a dispute resolution process in any case, as there is little prospect of cooperation.[54] As such the FLS recommended that the time limit be removed so that in all contravention applications which show serious disregard for the order, the matter can be brought directly before the court.[55]

Conclusion

3.66 The Committee is concerned that the 6 month period is an arbitrary one and that those cases of serious disregard for court orders are more appropriately dealt with by the court than through a dispute resolution process.

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52 Family Court, *Submission 53*, p.9.

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

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

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

Recommendation 22

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

Recommendation 23

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

An increase in litigation?

3.69 A number of witnesses raised the concern that subsection 60I(8) will increase litigation, rather than reduce it.[56] According to the Family Court, around 30% of cases filed include allegations of violence or abuse or a risk thereof.[57] The Court identified a number of hypothetical circumstances that may arise out of the practical operation of proposed subsection 60I(8) that will, if they occur, require significant increases in judicial time in order to hear applications for exemption certificates.[58]

3.70 The Attorney-General's Department urged the Committee to see the amendments to the Act as a part of an overall package of reforms that would create a cultural shift towards resolution of disputes outside of the court system and co-operative parenting after separation. Any short term increase in litigation would be reduced in the medium to long term by the increased recognition of the role of family dispute resolution services.[59]

3.71 The Attorney-General's Department recognised that there is a risk that parties would litigate about whether a person meets one of the exceptions to the requirement to attend dispute resolution. But it stated that the exceptions are necessary to ensure that people are not

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

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

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

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

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

3.72 The Committee is concerned that the exceptions may create new matters over which parties might litigate. It appears to be inevitable that where a question is to be determined, parties will litigate. The concern is that this litigation may be prohibitive for persons without resources who may have valid reasons to claim the exceptions in proposed section 60I and that it may create undue pressure on court resources.

3.73 The Committee believes that its recommendation to make the exception in cases of family violence and child abuse available upon the filing of a sworn statement will significantly reduce the likelihood of a major increase in litigation flowing from proposed section 60I.

The court must consider ordering dispute resolution in any event

3.74 Even where a person satisfies the court on reasonable grounds that their case is one in which one of the exceptions in proposed subsection 60I(8) can be claimed, the court is directed to consider making an order that the parties attend dispute resolution nonetheless.[61]

3.75 This proposed section was opposed by a number of witnesses, who recommended that either the section not be introduced at all, or that at least it should not apply to cases involving family violence or abuse.[62] In cases involving family violence or abuse, it was contended, it would always be inappropriate to direct parties *against their will* to attend dispute resolution processes.[63]

3.76 The Attorney-General's Department explained that this provision forms part of a deterrence element in the Exposure Draft that seeks to deter people from using the exceptions in proposed subsection 60I(8) except where it is appropriate.[64]

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

61 Proposed subsection 60I(9).

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

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

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

Conclusion

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

Section 60J certificate

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

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

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

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65 Proposed section 60J.

66 Proposed subsection 60J(2).

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

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

3.81 A number of witnesses recommended to the Committee that this additional requirement to file a certificate should not be introduced.[69] In fact the Family Court submitted that the matters are largely caught by proposed subsections 60I(7)-(11), and may create an unnecessary further hurdle for applicants and an unnecessary utilisation of court resources.

3.82 In any event, the Family Court contended that the distinction between violence and abuse or the risk of violence or abuse is unnecessary:

> The Court can not see any immediate reason for a distinction between cases where there has been abuse or violence as against cases where there is a risk of abuse or violence. The previous s 60I does not draw such a distinction (see 60I(8)(b)). The Explanatory Statement seems to say that 'risk' is a greater problem than past abuse or violence. But would not past abuse or violence constitute a risk of future abuse or violence?[70]

3.83 Where there has been violence or abuse that would ordinarily be sufficient to raise grounds of a risk of violence of abuse. A person would therefore be required to file a certificate where they claim the exception in proposed subsection 60I(8) on the basis that there has been abuse or family violence, and then the same facts of abuse or family violence would be likely to prove the exception.[71]

3.84 The Family Issues Committee of the Law Society of New South Wales submitted that as proposed section 60J presupposes a determination that there are reasonable grounds to believe there has been child abuse or family violence:

> It is difficult to understand the reason for not proceeding with a hearing on the substantive application when there has been a determination about such serious matters…
>
> Given that the parties are already involved in court proceedings, it is likely to be more logical and effective if the family [and child] specialist was to provide the information.

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

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

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

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

3.85 National Legal Aid submitted:

> If the court is satisfied that there has been family violence or child abuse, surely the relevant information can be provided by the court or by a court based family and child specialist?[73]

3.86 The Committee accepts the concerns raised by the Family Court and other witnesses that the operation of proposed section 60J would be problematic in practice. However many of those concerns were raised on the assumption that a person had already satisfied the court on reasonable grounds that there is family violence or abuse. On the basis of Recommendation 21 above, an applicant will file a sworn affidavit in order to claim the exception.

3.87 It is still necessary, however, to ensure that the rationale behind proposed section 60J (as outlined by the Attorney-General's Department) is fulfilled in the Act. The Committee supports the intention of the proposed section to ensure that in cases of family violence or child abuse the person wishing to go to court is apprised of the relevant information about the services and options available to them, particularly alternatives to court action.

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

3.89 The Committee believes that this approach satisfies the intention stated by the Attorney-General's Department to ensure that persons access all necessary and relevant information from family counsellors or family dispute resolution practitioners before they go to court. The procedural step in the Rules of Court will establish a norm that can be easily communicated to applicants, by registry staff and written materials, upon filing of proceedings.

3.90 In those cases where a party does not attend a family counsellor or family dispute resolution practitioner prior to going to court, despite

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

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

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

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

Recommendation 24

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

Phased introduction of compulsory dispute resolution

3.93 The draft Bill proposes that the requirement to attend dispute resolution be phased in over a three year period.[74]

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

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

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

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

3.97 The Attorney-General's Department noted:

> The introduction of a requirement to attend dispute resolution before an application for a Part VII order may be heard by the court will undoubtedly result in an increased demand for family dispute resolution services. The government has allocated significant resources in the 2005-06 Budget to ensure that such services will be readily available. In particular, substantial funds have been allocated to the establishment of Family Relationship Centres. It is the responsibility of the Attorney-General's Department and the Department of Family and Community Services to ensure that the roll out of the Family Relationship Centres occurs in accordance with the government's statements, and the Department fully expects that this will occur....
>
> Significant delays in accessing family dispute resolution services are not expected, and waiting times are likely to be much less than those involved in obtaining a hearing for non-urgent matters in court.[75]

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

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

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

> could occur in the rollout and establishment of services. FaCS proposes that the Committee considers Phase 2 rolling out from 1 January 2008 to 31 December 2008 and Phase 3 rolling out on or after 1 January 2009. Alternatively, FaCS proposes that the Committee considers Phase 2 rolling out from 1 December 2007 to 30 November 2008 and Phase 3 rolling out on or after 1 December 2008.[76]

3.99 The Committee is very concerned that, prior to the legislation being considered formally by the Parliament, one of the two implementing agencies is already sounding warnings about the timeframe in which to put services into place.

3.100 Catholic Welfare Australia also raised concerns about the availability of the highly skilled, highly qualified and highly experienced staff that will be needed in the Family Relationship Centres. Their concern was that those staff would be recruited from existing services and that this would lead to ongoing workforce shortages and skills shortages in the existing services. This will have an impact on the roll-out of Family Relationship Centres.[77]

3.101 Witnesses from Catholic Welfare Australia were less concerned about the staging of the roll-out, so long as the monitoring and development of the procedures and policies is sufficient. In their view, it is the operational aspect of the Family Relationship Centres that is the key issue, rather than the bill itself:

> Realistically, a staged roll-out gives us some time to monitor and evaluate the impact of the family relationship centres and the way in which they operate and the sorts of commercial models that are used to develop them and so on. The staged roll-out approach gives us some time to do that, provided that ongoing monitoring is occurring as they are rolled out.[78]

3.102 The Committee is also concerned about the availability of services that are required to be provided in order for the legislation to be given proper effect. This raised the question whether it is appropriate that the legislation contain phased implementations, particularly because it relies upon services that do not presently exist and without a

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

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

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

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

3.103 It may be preferable that the legislation only expressly refers to the first stage and that following the roll-out of services in the community the legislation be further amended in terms of Phase 2 and Phase 3.

3.104 The Committee believes that best approach is for proposed section 60I to be amended to make the commencement of Phases 2 and 3, contingent upon the operation of Family Relationship Centres and not by reference to forward dates.

Recommendation 25

3.105 **The Committee recommends that the government amend the commencement provisions contained in the scheme for implementation of Phases 2 and 3 in proposed section 60I by replacing references to time with references to outcomes, in particular that:**

- **Phase 2 is to commence once 40 Family Relationship Centres are operational; and**
- **Phase 3 is to commence after all 65 Family Relationship Centres are operational.**

The dispute resolution structure

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

> The committee recommends that a shop front single entry point into the broader family law system be established attached to an existing Commonwealth body with national geographic spread and infrastructure, with the following functions:
>
> - provision of information about shared parenting, the impact of conflict on children and dispute resolution options;
> - case assessment and screening by appropriately trained and qualified staff;
> - power to request attendance of both parties at a case assessment process; and

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

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

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

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

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

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

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

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

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

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

Change in terminology

3.111 Schedule 4 of the proposed Bill amends the counselling and dispute resolution provisions in the existing Family Law Act. There is a distinction made between family dispute resolution and family counselling that will ensure that the new compulsory dispute resolution provision will only apply to processes that are aimed at resolution, not processes that are fundamentally designed to deal with personal or relationship issues. There is also a distinction made between services offered by the court and those in the community. The explanatory statement suggests that the amendments:

> …implement the Government's policy of encouraging separating and divorcing parents to utilise counselling and dispute resolution services without the need to go to court.[83]

3.112 The terminology of dispute resolution has been amended considerably by the Exposure Draft. The term primary dispute resolution has been removed from the Act, as has 'family and child counsellor', 'family and child counselling', 'family and child mediator' and 'family and child mediation'.

3.113 There are new definitions of 'family counsellor', 'family counselling', 'family dispute resolution practitioner' and 'family dispute resolution'. These, along with arbitration services, will be the non court based family services. It should be noted, however, that the definitions of both allow for court staff to provide those services where necessary.

3.114 The Family Court, the Family Court of WA and the Federal Magistrates' Court will appoint 'family and child specialists' as the court based services, who will provide services to people involved in family law proceedings as well as to the court.[84]

3.115 The Attorney-General's Department explained that these new provisions support other amendments in the Exposure Draft, such as proposed section 60I, so that services are defined on the basis of whether they are concerned with resolving disputes or personal and interpersonal issues.[85]

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

84 Proposed Part III of the Act.

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

Family counselling

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

Family dispute resolution

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

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

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

Family and Child Specialists

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

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86 Proposed section 10A.
87 Proposed sections 10C and 10D.
88 See proposed subsection 10H(2).
89 Proposed sections 10K and 10L.
90 Proposed section 10M.

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

Confidentiality and admissibility of communications

3.120 The major difference between 'family counsellors' and 'family dispute resolution practitioners' (on the one hand) and 'family and child specialists' is that communications with a family and child specialist will *not* be confidential. Communications will be admissible and family and child specialists will enjoy the same immunity and protection as Family Court judges.[92] The Chief Executive Officer of each court will be able to delegate the functions of family and child specialists to particular court staff.

3.121 The rationale for this is to make it clear when court staff are providing confidential and inadmissible services and when they are not, as their title will suggest the terms of confidentiality and admissibility.[93]

3.122 The draft Bill provides that communications with family counsellors and family dispute resolution practitioners are confidential, but that in the following situations family counsellors and family dispute resolution practitioners may disclose the communications:

- Where making a referral to another medical or other professional for consultation, with consent of the party;
- In order to protect a child from harm;
- Preventing or lessening a serious and imminent threat to the life or health or property of a person;
- Enabling the practitioner to properly discharge his or her functions as a practitioner;
- Assisting a child representatives to represent a child properly;

91 Proposed section 11A.

92 Proposed sections 11C and 11D.

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

- Complying with the law of the Commonwealth, a State or Territory; and
- For research relevant to families (minus the personal information).[94]

3.123 There is a clear need to balance the confidentiality of counselling and dispute resolution sessions (which enhance the ability to achieve successful outcomes) with the need to make disclosure in order to protect the welfare of a child. As the FLS state:

> The central issue is balancing competing interests: the *private* interest in maintaining confidentiality because this enhances the effectiveness of dispute resolution, versus the *public* interest in facilitating disclosures where there is a supervening public purpose. FLS believes that the current system strikes the right balance and we have reservations about tipping the balance in favour of greater permissible disclosures.[95]

3.124 The Attorney-General's Department noted that the key changes in the Exposure Draft relate to the admissibility of communications made to a professional to whom a party is referred by a family counsellor (s 10D(1)(b)) and a family dispute resolution practitioner (s 10L(1)(b)). Those communications will now be inadmissible, and family counsellors and family dispute resolution practitioners are required to make the professional aware of that fact in the making of the referral.

3.125 The FLS contended that some of the other disclosure categories for family counselling and family dispute resolution practitioners are too broad. Where counsellors or family dispute resolution practitioners are given the ability to make disclosures merely for the purpose of enabling the proper discharge of their functions or for the purpose of assisting a child representative that ability should be limited to disclosure 'in circumstances relating to a serious threat to the welfare of a child.' The amendments refer to proposed paragraph 10C(3)(d) and (e) and proposed paragraphs 10K(3)(d) and (e).[96]

3.126 The Committee accepts the concerns raised by the FLS in relation to proposed paragraphs 10C(3)(d) and 10K(3)(d), but not to paragraph

94 See proposed sections 10C and 10K .

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

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

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

3.127 The Committee acknowledges concerns that the headings of proposed sections 10C and 10K are misleading insofar as they appear to state that communications with family counsellors and family dispute resolution practitioners are confidential. The proposed sections outline a number of circumstances in which disclosure of otherwise confidential communications can be made and as such the heading should not contain any misleading implication that all communications are confidential. This is addressed in Chapter 7 at paragraphs 7.4 – 7.8 below.

3.128 The Committee is concerned that the provisions of subsection 10C(3) provide insufficient guidance as to the circumstances in which a disclosure of a communication made while the counsellor is conducting family counselling should be disclosed. The Committee believes the provision should be redrafted to more clearly identify those circumstances—and to set out a narrower set of circumstances in which disclosure should be mandatory.

3.129 The Committee is aware that Part VII, Division 8, Subdivision D contains mandatory notification provisions. Where a member of the court personnel, a family counsellor, a family dispute resolution practitioner or an arbitrator has reasonable grounds to suspect that a child has been abused or is at risk of abuse, the person must make a notification to a prescribed child welfare authority. There is a non-mandatory notification provision for suspected ill treatment and psychological harm.[97]

3.130 The Committee believes the circumstances in which disclosure should be mandatory in proposed section 10C (and in the equivalent provision in relation to family dispute resolution practitioners, proposed section 10K) is where the communication relates to matters disclosed to the counsellor where disclosure may prevent or lessen a serious or imminent threat to the life or health of a person or where

97 See section 67ZA.

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

Conclusion

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

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

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

3.133 The Committee's concerns in relation to counsellors in section 10C apply equally to the provisions relating to confidentiality of communications with family dispute resolution practitioners under section 10K.

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

Recommendation 26

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

Recommendation 27

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

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

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

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

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

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

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

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

> (6) Nothing in this section prevents a family dispute resolution practitioner from:
>
> (a) disclosing information necessary for the practitioner to give a certificate of the kind mentioned in subsection 60I(7) or subsection 60J(1); or
>
> (b) communicating a matter to a party with the consent of the other party or parties.[101]

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

Recommendation 28

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

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

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

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

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

102 See proposed section 11C.

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

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

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

3.143 As stated above, the Exposure Draft grants the same immunity and protection as that of a judge of the Family Court to practitioners conducting *facilitative* dispute resolution, but not in the conduct of *advisory* dispute resolution. The rationale is historic, as the government has sought to retain the immunities in their current form, albeit applied to newly defined roles.

3.144 Processes that were previously referred to as 'family and child mediation' will in future fall within the new definition of facilitative dispute resolution. Facilitative dispute resolution practitioners will effectively retain the immunity that currently applies to mediators under section 19M of the Act.

3.145 Where advice is given in the context of dispute resolution processes, the current Act would classify the process as 'family and child counselling', which does not attract immunity. Under the amendments, advisory dispute resolution is the process defined by the provision of advice and therefore advisory dispute resolution practitioners do not have immunity under the proposed Bill (see proposed section 10M).

3.146 The FLS recommended that further consideration be given to the excision of advisory dispute resolution practitioners from the immunity. The FLS stated:

> By limiting immunity to facilitative processes only, there is a real risk that advisory dispute resolution processes would be stifled, at a time when, looking at dispute resolution in Australia generally, advisory dispute resolution processes are in their ascendancy.[104]

3.147 A real issue in a clinical setting is whether advisory and facilitative dispute resolution can be separated. Family Services Australia stated:

> There are many operational issues in relation to this clause. It would be very difficult for Practitioners to isolate their

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

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

3.148 Family Services Australia also stated:

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

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

3.150 Family Services Australia stated:

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

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

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

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

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

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

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

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

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

Conclusion

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

Recommendation 29

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

Obligations to provide information

Existing obligations

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

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

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

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

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

3.158 Under the proposed Bill, family counsellors, family dispute resolution practitioners, arbitrators, legal practitioners and the courts will all be obliged to provide documents to people considering instituting proceedings which contain information about the legal and possible social effects of the proposed proceedings, the services provided by family counsellors and family dispute resolution practitioners, the steps involved in the proposed proceedings and arbitration facilities.[112] In addition in certain circumstances there is a requirement to assist people with information about help with possible reconciliation.

3.159 It appears from the proposed Bill that information about reconciliation is intended to be prescribed in regulations.[113]

3.160 The Committee is of the view that the draft Bill adequately implements the government's policy of providing information to separating couples in order to encourage a negotiated agreement.

Developing parenting plans with 'advisers'

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

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

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

113 See proposed sections 12C and 12D.

3.162 Proposed section 63DA of the Exposure Draft places obligations on 'advisers' to:

- Inform separating couples that they could consider entering into a parenting plan in relation to the child and refer them to services for further assistance on the development and content of the plan(s 63DA(1));
- Where an adviser gives advice on the development of a parenting plan, they must inform separating couples:
  - ⇒ that they could consider substantially sharing parenting time where it is practicable and in the best interests of the child (paragraph 63DA(2)(a));
  - ⇒ of matters that may be dealt with in a parenting plan (paragraph 63DA(2)(b));
  - ⇒ of the operation of any pre-existing parenting order (paragraph 63DA(2)(c));
  - ⇒ of the desirability of including provisions concerning the form of consultations, the process for resolving disputes and the process for changing the plans in the terms of the plan (paragraph 63DA(2)(d));
  - ⇒ of the availability of programs to help people who have difficulty complying with a parenting plan (paragraph 63DA(2)(e)); and
  - ⇒ that pursuant to proposed section 65DAB the court must have regard to the terms of the most recent parenting plan (paragraph 63DA(2)(f)).

3.163 These provisions are consistent with the government's response to the FCAC report. The FCAC report recommended that mediators, counsellors and legal advisers assist parents exercising shared parental responsibility to develop a parenting plan.[114] The government agreed in principle, stating that the Family Law Act would be amended by inserting a requirement that mediators, counsellors and legal advisers provide information about what a parenting plan is, the possible content of such a plan and appropriate organisation or individuals who could assist further. Those professionals would also be required to inform separating couples that they could consider substantially sharing parenting time.[115] The

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

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

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

3.164 The Attorney-General's Department envisages that the information that advisers are required to provide under this provision will be through written means, such as brochures. According to the department, this will ensure the accuracy, consistency and comprehensiveness of the information and avoid any concern that advisers who are not legal practitioners will be required to give legal advice.[117]

3.165 Proposed section 63DA is also seen to be a key provision in the government's encouragement of out of court settlement, as the development of parenting plans will mean that fewer people will seek orders from the court.[118]

Practical application in clinical setting

3.166 The difficulties for practitioners were said to lie in understanding their obligations as they arise in the many sections of the Act.[119]

3.167 Catholic Welfare Australia raised a concern that although the law is precise in its definitions, in practice counsellors and mediators will work in ways that fall within a number of the definitions, as the legal distinctions are meaningless. In particular they raised the issue of mediation in a rural setting where one person may have the responsibility for the mediation, counselling and family dispute resolution.[120]

3.168 The change in terminology for counselling and mediation was broadly welcomed in submissions received by the Committee. Some witnesses considered that the new terminology provides clarification to what is currently a confusing aspect of the Act.[121]

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

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

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

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

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

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

Use of term 'adviser'

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.173 Relationships Australia suggested that where family counsellors and family dispute resolution practitioners are termed 'advisers' in respect of their obligations to provide information (in proposed section 63DAC), the term adviser could be substituted with the term 'consultant', 'counsellor', 'mediator', or 'conciliator'.[129]

3.174 While the Committee notes the genuine concern expressed by practitioners in the sector, it does not consider that any issue of problems with indemnity will be borne out. The Committee cannot support an amendment to the Exposure Draft on the basis of the evidence before it.

Obligations to provide legal advice?

3.175 Relationships Australia submitted:

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

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

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

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

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

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

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

i. the subject matter of the dispute;

ii. possible outcomes of the dispute;

iii. the application of the law;

iv. an area of professional expertise besides the law… [emphasis added]

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

Recommendation 30

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

Court to consider referral

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

> If, under this Act, a court has the power to:
>
> (a) order a person to attend family counselling or family dispute resolution; or
>
> (b) order a person to participate in a course, program or other service (other than arbitration); or
>
> (c) order a person to attend appointments with a family and child specialist; or

135 Proposed section 11F.

136 See proposed sections 13B and 13C.

137 Proposed section 11E.

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

the court:

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

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

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

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

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

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

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

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

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

> …and, if the advice is sought, inform the parties of the source and content of the advice.[139]

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

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

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

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

Conclusion

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

Recommendation 31

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

Approved organisations and quality control

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

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

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

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

141 Proposed sections 10E and 10N.

3.193 The approval of a program will relate to the type of funding it receives. The Attorney-General's Department state that a decision as to whether a program is funded will be made according to the guidelines for that program, but that such a decision is independent of the process for approval under the Act. Ordinarily once an organisation is approved for funding it would then be able to be approved under the Act. This is said to reflect current practices, as all approved organisations are currently funded under the Family Relationships Services Program (or FRSP). Requirements for funding achieve the aim of ensuring quality is maintained in the provision of services.[142]

3.194 All organisations currently approved will be taken to be approved under the amendments.

3.195 The most significant change is that under the current Act only non-profit organisations may apply for approval, whereas under the proposed bill the limitation to non-profit organisations is removed.

3.196 The Explanatory Statement explains that:

> The requirements that the organisations be 'voluntary' or non-profit has been removed. This widens the pool of organisations eligible for approval to include organisations that operate on a for-profit basis. This should assist in ensuring that a range of organisations can tender to provide the increased services announced in the 2005 Budget. The Government will be able to select the tender that will provide the best outcomes.[143]

3.197 The Attorney-General's Department submitted that under its proposed new family law system it is necessary for a wide range of organisations to be providing dispute resolution and counselling services and that this will be assisted by opening up the approval system to for-profit organisations.[144]

3.198 Current providers expressed concern that the approval process for the new Family Relationship Centres should maintain the high standards that are currently required of the Family Relationships Service

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

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

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

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

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

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

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

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

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

3.202 In particular, under Division 2 of Part 5, minimum levels of qualifications, training and experience for practitioners are

145 See for example Relationships Australia, *Submission 37*, p.4.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Recommendation 32

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

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

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

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

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

Parenting plans

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

3.213 The Explanatory Statement to the Exposure Draft notes:

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

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

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

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

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

159 See proposed subsection 63C(2).

160 See proposed subsection 63C(2A).

3.216 In contrast to court orders, parenting plans can be varied or revoked by agreement in writing between the parties to the plan (except where they have been registered under the Act).[161] It is important to note that parenting plans were previously registrable under the *Family Law Act* 1975, however registered plans were not often used and the registration provisions of the Act were repealed in 2003. In order to be more widely used, the parenting plans need to be flexible.

3.217 The draft Bill contains a number of amendments to the provisions about parenting plans. These give parenting plans a new legal effect.

3.218 A number of submissions endorsed the new approach to parenting plans, particularly as a cheaper and more flexible way of handling conflict. For example, the Family Law Council contended:

> Council endorses the provisions in the Bill for increasing use of alternative dispute resolution interventions as they can often provide better, more cost effective and more enduring ways of handling conflict for separating parents.[162]

3.219 It was generally agreed that as circumstances change and children grow older, there is a need for the parenting arrangements to adapt to the circumstances.

3.220 There were some reservations, however, about whether parenting plans would afford proper protection to parties in certain circumstances.

Problems of unsupervised agreements

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

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

161 See section 63D.

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

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

3.222 The Family Law Practitioners Association of Queensland Ltd stated:

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

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

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

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

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

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

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

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

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

3.225 The Family Law Practitioners Association of Queensland Ltd emphasised that using parenting plans to vary orders that are minor, such as swapping weekends, is appropriate. Its view was that any substantive change to orders using a plan should be subject to either a cooling off period or certification by a legal practitioner.[168]

3.226 The FLS' recommendation was that where the Exposure Draft allows parenting plans to vary orders (or previous plans), they must have built-in protections. The FLS suggested that the Act should stipulate that parenting plans must be in writing, signed and dated by both parties and should contain a cooling off period. The cooling off period could allow for, among other things, either of the parties to obtain legal advice.[169] The Committee believes that where the parenting plan is developed as part of a formal dispute resolution process that there should be no cooling off period but that a cooling off period could be considered in other cases.

3.227 The National Council for Single Mothers and their Children Inc contended that the Act ought to provide for children's wishes to be taken into account in the making of parenting plans.[170]

Recommendation 33

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

Consideration of parenting plans by a court

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

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

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

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

171 See proposed section 65DAB.

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

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

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

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

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

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

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

> Unless the court determines otherwise, a parenting order in relation to a child is taken to include a provision that the order is subject to a parenting plan that is:
>
> (a) entered into subsequently by the child's parents; and
>
> (b) agreed to, in writing, by any other person (other than the child) to whom the parenting order applies.

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

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

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

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

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

> The intention of section 64D is that, to the extent of any inconsistency, a parenting order should cease to have effect in circumstances where parents subsequently make a parenting plan that deals with a matter in a court order. This does not mean that the parenting plan itself is enforceable (parenting plans have no legal enforceability), but does mean that after the commencement of these provisions, where this default provision is included in the parenting order, there will no longer be a right to enforce the previous court order (to the extent of inconsistency with the new parenting plan).
>
> Therefore, people can only lose the capacity to enforce their existing parenting order within the court system if they agree to this in writing in a parenting plan. The unenforceability will be limited to the extent to which the later plan is inconsistent with the earlier orders. Item 14 of Schedule 1 [obligation on advisers] ensures that they will be advised about the effect of entering into a parenting plan.
>
> The government will fund the Family Relationship Centres to provide appropriate support for people to agree on parenting plans. The Centres will also find support services to assist people to implement the plan, without the need to use the court system.[176]

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

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

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

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

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

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

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

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

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

3.238 The concern raised by the Court was the status of different arrangements will be technical and complex to determine for the Court, and cannot provide certainty for parties. This was supported by Relationships Australia, who felt that parties may have an expectation that parenting plans have a legal status.[180]

3.239 The Family Court considered that proposed section 64D may be counter-productive as its complexity may act as a disincentive to entering into parenting plans or, where parenting plans are used, the courts may need to engage in highly technical disputes in order to determine the terms and their impact on orders.[181] The Family Court contended that the point at which problems will become manifest with parenting plans is where one party seeks to enforce the original parenting orders, and therefore their status could be dealt with in the compliance provisions.[182] Parenting plans and compliance are discussed further in Chapter 5 at paragraphs 5.71 – 5.76 below.

3.240 The Family Law Council sought amendment to proposed section 64D to expressly provide that in certain, appropriate cases the court could make orders that could only be changed by the subsequent order of

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

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

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

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

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

3.241 The FLS recommended:

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

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

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

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

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

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

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

185 FLS, *Submission 47.1*, p 4

Recommendation 34

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

4

Less adversarial court processes for parenting matters

Introduction

4.1 The FCAC report recommended that:

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

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

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

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

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

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

Provisions in the draft Bill

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

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

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

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

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

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

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

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

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

Application and definition of 'child-related proceedings'

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

- Wholly under Part VII; and

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

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

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

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

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

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

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

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

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

Court duties and powers

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

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

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

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

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

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

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

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

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

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

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

14 Subsection 60KE(1).

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

Evidentiary provisions

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

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

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

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

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

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

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

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

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

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

16 Subsection 60KG(2).

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

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

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

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

Matters arising from the evidence

Support for Schedule 3

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

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

4.28 The Shared Parenting Council of Australia stated that:

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18 Subsection 60KI(1).

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

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

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

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

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

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

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

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

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

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

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

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

26 *Submission 57*, p.1.

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

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

Issues raised in relation to Schedule 3

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

Constitutional validity

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

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

Evaluation of the Children's Cases Program

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

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

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

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

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

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

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

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

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

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

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

4.37 The Department also stated that:

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

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

Application of Schedule 3

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

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

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

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

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

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

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

4.40 The Explanatory Statement for the Draft Bill states that:

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

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

Recommendation 35

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

(2)(b) **if the parties to the proceedings consent and the court is**

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

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

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

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

satisfied that the consent was not given under coercion – to the extent that they are not proceedings under this Part.

(3) **This Division also applies to any other proceedings between the parties that involve the court exercising jurisdiction under this Act and that arise from the breakdown of the parties' marital relationship, if the parties to the proceedings consent and the court is satisfied that the consent was not given under coercion.**

The principles and duties for conducting child-related proceedings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Recommendation 36

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

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

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

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

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

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

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

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

The evidentiary provisions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4.58 The Court further stated that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Recommendation 37

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

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

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

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

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

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

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

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

Family Court of Australia technical amendments

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

Recommendation 38

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

Conclusion

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

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

63 See paragraphs 4.71 – 4.72 below.

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

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

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

5

Compliance regime

5.1 The FCAC report recommended that:

> …the immediate implementation of the following additions to contact enforcement options:
>
> - a cumulative list of consequences for breaches;
> - reasonable but minimum financial penalties for first and subsequent breaches;
> - on a third breach within a pattern of deliberate defiance of court orders, consideration to a parenting order in favour of the other parent; and
> - retaining the ultimate sanction of imprisonment.[1]

5.2 In its response to the FCAC report, the government stated that it:

> …agrees with the committee's concern that the contact enforcement options in the Act need to be strengthened. In addition to the financial penalties and cumulative list of consequences already in the Act, the government will introduce the following new measures:
>
> - a requirement that the courts consider 'make-up' contact if contact has been missed through a breach of an order. Unlike most enforcement provisions, it will not be necessary to prove that the breach was intentional. This will make it easier to obtain make-up contact and help those parents who are missing out on seeing their children;
> - a power to award compensation for reasonable expenses incurred by a person but which were wasted due to a breach of an order. This might include airfares or other

1 FCAC report, pp.xxvi, 106-07 (recommendation 21).

> tickets purchased but not used or travel expenses incurred by the person to collect a child but the child was not handed over;
> - in cases involving a series of breaches or a serious disregard of court orders, a presumption that legal costs will be awarded against the party that has breached the order, unless it is not in the best interests of the child; and
> - a discretion to impose a bond for all breaches of orders.
>
> As recommended by the committee, imprisonment will be retained as an ultimate sanction.[2]

5.3 The Committee notes that the individual measures specified in the government response differ somewhat from those proposed in recommendation 21 of the FCAC report.

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

5.5 The terms of reference for the inquiry require the Committee to consider whether the provisions of the proposed Bill are drafted to implement the measures set out in the Government's response to the FCAC report.

Provisions in the draft Bill

5.6 Schedule 2 of the draft Bill contains most of the provisions relating to the compliance regime; some new provisions are also located in Schedules 4 and 5 of the draft Bill. The Explanatory Statement for the draft Bill states that:

> Schedule 2 implements a range of amendments to strengthen the existing enforcement regime relating to Part VII orders in the Act. The amendments ensure that enforcement applications can be dealt with appropriately by the court, particularly given the object that children have a meaningful relationship with both parents.[3]

2 Government response to the FCAC report, p.16.

3 Explanatory Statement to the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005, p.11.

5.7 In terms of the structure of the Commonwealth *Family Law Act* 1975, the draft Bill makes changes to the current compliance regime in Division 13A of Part VII of the Act.[4] The major changes to the Act introduced by the new compliance provisions are set out below.

Standard of proof

5.8 Under the new section 70NEA, the standard of proof to be applied in determining matters in proceedings under Division 13A will be proof on the balance of probabilities. This standard of proof will also apply to the determination of whether a person who contravened an order under the *Family Law Act* 1975 affecting children had a reasonable excuse for the contravention.[5]

5.9 Under the new section 70NEA also the court will only be able to make orders for certain criminal penalties in response to contraventions of orders if it is satisfied beyond reasonable doubt that the grounds for making the order exist.[6]

5.10 The Explanatory Statement for the draft Bill states that the new section 70NEA:

> …provides clarification of the standard of proof to be applied by the court in considering enforcement applications. The current test provided by section 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 stricter standard of proof, much closer to the standard of beyond reasonable doubt because of the possibility of criminal sanctions being applied.
>
> To ensure that expectations about 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 consequences and that a stricter standard of proof beyond reasonable doubt should apply to those matters in stage 3 of

4 Part VII deals with post-separation court proceedings concerning children. The compliance regime in Division 13A deals with consequences of failure to comply with orders, and other obligations, that affect children.

5 Subsections 70NEA(1) and (2).

6 Subsection 70NEA(3). The orders are those in paragraphs 70NJ(3)(a),(d),(e) and 70NN(8)(a) (orders for community service, fines, and imprisonment) and are currently available to the court.

the parenting compliance regime in circumstances where the court is considering applying a criminal penalty.[7]

Changes to stage 1 of the compliance regime

5.11 Currently, stage 1 of the compliance regime in the *Family Law Act* 1975 applies when a court is making a parenting order and provides that the court must include in the order particulars of the obligations created and the consequences that may follow contravention.[8]

5.12 The new sections 70NEAA and 70NEAB, which comprise a new Subdivision AAA in Division 13A, will apply where there has been a contravention of a parenting order but there is a reasonable excuse for the contravention. These new sections will constitute, in effect, a new intermediate stage that will be applicable after stage 1 but prior to stage 2.

5.13 The new section 70NEAA provides that Subdivision AAA will apply if:

- A primary parenting order has been made in relation to a child; and
- The court is satisfied that a person has committed a contravention of the order; and
- The contravention resulted in a person not spending time with the child or the child not living with a person for a particular period; and
- The person who committed the contravention proves that he or she had a reasonable excuse for the contravention.[9]

5.14 Under the new section 70NEAB, the court may make a further parenting order compensating for lost time the person who, as a result of the contravention of the parenting order, did not spend time with the child or did not have the child living with them. The court must consider making such an order.[10]

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7 Explanatory Statement to the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005, p.11.

8 Among other requirements – see current section 65DA in Division 6 of Part VII of the Act.

9 Paragraphs 70NEAA(a)-(e).

10 Subsection 70NEAB(1).

5.15 Under section 70NEAB also, however, the court must not make the compensatory order if it would not be in the best interests of the child.[11]

5.16 For section 70NEAA, the existence of a reasonable excuse will be determined under the new sections 70NE(2) and (3) as follows:

> (2) A person (the *respondent*) is taken to have had a reasonable excuse for contravening a parenting order to the extent to which it deals with whom a child is to live with in a way that resulted in the child not living with a person in whose favour the order was made if:
>
> (a) the respondent believed on reasonable grounds that the actions constituting the contravention were necessary to protect the health or safety of a person (including the respondent or the child); and
>
> (b) the period during which, because of the contravention, the child did not live with the person in whose favour the order was made was not longer than was necessary to protect the health or safety of the person referred to in paragraph (a).
>
> (3) A person (the *respondent*) is taken to have had a reasonable excuse for contravening a parenting order to the extent to which it deals with whom a child is to spend time with in a way that resulted in a person and a child not spending time together as provided for in the order if:
>
> (a) the respondent believed on reasonable grounds that not allowing the child and the person to spend time together was necessary to protect the health or safety of a person (including the respondent or the child); and
>
> (b) the period during which, because of the contravention, the child and the person did not spend time together was not longer than was necessary to protect the health or safety of the person referred to in paragraph (a).[12]

5.17 A further new section 70NEC sets out the court's duties where section 70NEB applies and where, after a parenting order has been made, the parents make a parenting plan that deals with a matter dealt with in the order and is in force when the contravention of the order allegedly

11 Subsection 70NEAB(2).

12 New subsections 70NE(2) and (3) are in Schedule 5 of the draft Bill.

occurs. In such a case the court must have regard to the terms of the parenting plan and consider making an order under section 70NEB varying the parenting order to include some or all of the provisions of the parenting plan.[13]

Changes to stage 2 of the compliance regime

5.18 Currently, stage 2 of the compliance regime in the *Family Law Act* 1975 is applicable where there is a contravention of a primary order with no proven reasonable excuse, and where there have been no previous contraventions or where there have been previous contraventions and the court considers it appropriate to apply this stage. The court is able to select an appropriate course(s) of action (such as making an order) from a list in section 70NG.[14]

5.19 The Explanatory Statement for the draft Bill states that:

> To strengthen the existing enforcement regime, the court will be given a wider menu of options that it must consider at both stages 2 and 3 of the parenting compliance regime.[15]

5.20 Under the new paragraph 70NG(1)(a), the court may make an order directing the person who committed the contravention (or that person and another specified person) to attend a post-separation parenting program. Before making such an order, the court must consider seeking the advice of a family and child specialist about the services appropriate to the person's needs.[16]

5.21 If the court makes an order under the new paragraph 70NG(1)(a), the new subsection 70NG(3) will require the principal executive officer of the court to ensure that the provider of the program concerned is notified of the making of the order.[17]

5.22 Under the new paragraph 70NG(1)(b), the court may make a further parenting order compensating for lost time the person who, as a

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13 The court has the power to vary parenting orders under section 70NEB, which has been inserted into the Act by the separate *Family Law Amendment Act* 2005.

14 Stage 2 provisions are in the current Subdivision B. Primary orders can include child maintenance orders.

15 Explanatory Statement to the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005, p.11.

16 New paragraph 70NG(1)(a) is in Schedule 4 of the draft Bill.

17 New subsection 70NG(3) is in Schedule 4 of the draft Bill.

result of the contravention, did not spend time with the child or did not have the child living with them.

5.23 Under the new paragraph 70NG(1)(d), the court may, if the contravention is not of a minor or technical nature, make an order requiring the person who committed the contravention to enter into a bond in accordance with the new section 70NGA.

5.24 The new section 70NGA provides for bonds that the court may require a person to enter into under the new paragraph 70NG(1)(d). A bond must be for a specified period of up to 2 years; may be with or without surety and security; and may contain conditions requiring attendance at an appointment(s) with a family and child specialist, or attendance at family counselling, or attendance at family dispute resolution, or good behaviour.[18] If the court proposes to require a person to enter into a bond, it must explain the purpose and effect of the requirement and the consequences that may follow if the person fails to enter into the bond or fails to act in accordance with the bond.[19]

5.25 The Explanatory Statement for the Bill indicates that this new bond provision will give the court:

> …power to impose a bond at stage 2 where the consequences of failure to comply with the bond would be limited to civil penalties. This would distinguish it from the current bond provisions at stage 3 where there are clear criminal consequences.[20]

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

> A bond with 'surety' is given where a person promises to take responsibility for a party's performance of an undertaking. …A bond with 'security' requires a party to provide the court with some form of wealth in advance.[21]

5.27 Under the new paragraph 70NG(1)(e), if:

- The contravention is a contravention of a parenting order in relation to a child; and

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18 Subsections 70NGA(1)-(4).

19 Subsection 70NGA(5).

20 Explanatory Statement to the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005, p.11.

21 Attorney-General's Department, *Submission 46.1*, p.25.

- The contravention resulted in a person not spending time with the child or the child not living with a person for a particular period; and
- The person who lost time with the child reasonably incurs expenses as a result of the contravention; and
- The contravention is not of a minor or technical nature;

the court may make an order requiring the person who committed the contravention to compensate the person who lost time and incurred expenses for some or all of those expenses.

5.28 In relation to this new provision, the Explanatory Statement for the Bill indicates that:

> …at both stage 2 and stage 3 the court must consider awarding compensation for reasonable expenses incurred by a party (such as airfares wasted, other tickets or accommodation purchased but not used).[22]

5.29 Under the new paragraph 70NG(1)(f), if the contravention is not of a minor or technical nature, the court may make an order that the person who committed the contravention pay some or all of the costs of another party or parties to the proceedings.

5.30 Under the new subsection 70NG(1AA), if:

- The contravention is a contravention of a parenting order in relation to a child; and
- The contravention resulted in a person not spending time with the child or the child not living with a person for a particular period;
- The court must consider making an order under the new paragraph 70NG(1)(b) to compensate the person for the time the person did not spend with the child (or the time the child did not live with the person) as a result of the contravention.

5.31 Under the new subsection 70NG(1AB), however, the court must not make a compensatory order under paragraph 70NG(1)(b) if it would not be in the best interests of the child.

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22 Explanatory Statement to the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005, p.11.

5.32 A further new section 70NGB sets out the court's duties where proceedings are brought in relation to a contravention of a parenting order and where, after the parenting order was made, the parents made a parenting plan dealing with a matter dealt with in the order and in force when the contravention occurred. In such a case the court must have regard to the terms of the parenting plan and consider making an order under paragraph 70NG(1)(ba) varying the parenting order to include some or all of the provisions of the parenting plan.[23]

Changes to stage 3 of the compliance regime

5.33 Currently, stage 3 of the compliance regime in the *Family Law Act* 1975 is applicable where there is a contravention of a primary order with no proven reasonable excuse, and where there have been no previous contraventions but there has been a serious disregard for the primary order, or where there have been previous contraventions of primary orders. The court is able to make an appropriate order(s) from a list at section 70NJ(3) which includes community service orders, fines, and imprisonment.[24]

5.34 The Explanatory Statement for the draft Bill states that:

> To strengthen the existing enforcement regime, the court will be given a wider menu of options that it must consider at both stages 2 and 3 of the parenting compliance regime.[25]

5.35 The new subsection 70NJ(2A) provides that, in relation to a person who committed the contravention, the court must:

- Make an order under the new paragraph 70NJ(3)(g) unless the court is satisfied that it would not be in the best interests of the child concerned to make the order; and
- Consider, if the court makes an order under paragraph 70NJ(3)(g), making another order (or other orders) under subsection 70NJ(3) that the court considers to be the most appropriate of the orders under that subsection in the circumstances; and
- If the court does not make an order under paragraph 70NJ(3)(g), make at least one order under subsection 70NJ(3), being the

23 Paragraph 70NG(1)(ba) is current in the Act.

24 Stage 3 provisions are in the current subdivision C.

25 Explanatory Statement to the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005, p.11.

order/orders that the court considers to be the most appropriate of the orders under subsection 70NJ(3) in the circumstances.[26]

5.36 In relation to this new provision, the Explanatory Statement for the draft Bill states that there is:

> …a presumption that the court will order costs for legal expenses against the party who has breached the order, unless it is not in the best interests of the child. Where it is not in the best interests of the child to order costs at stage 3, the court must make one of the other orders available to it.[27]

5.37 Under the new paragraph 70NJ(3)(ca), the court may make a further parenting order compensating for lost time the person who, as a result of the contravention, did not spend time with the child or did not have the child living with them, unless it would not be in the best interests of the child concerned for the order to be made.

5.38 The new paragraph 70NJ(3)(f) provides that if:

- The contravention is a contravention of a parenting order in relation to a child; and
- The contravention resulted in a person not spending time with the child or the child not living with a person for a particular period; and
- The person who lost time with the child reasonably incurs expenses as a result of the contravention;

the court may make an order requiring the person who committed the contravention to compensate the person who lost time and incurred expenses for some or all of those expenses.

5.39 Under the new paragraph 70NJ(3)(g), the court may make an order that the person who committed the contravention pay all of the costs of another party or parties to the proceedings.

5.40 The new paragraph 70NJ(3)(h) provides that the court may make an order that the person who committed the contravention pay some of the costs of another party or parties to the proceedings.

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26 The new paragraph 70NJ(3)(g) relates to orders to pay legal costs and is covered below.

27 Explanatory Statement to the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005, p.12.

5.41 The new subsection 70NM(4) provides that a bond that the court may require a person to enter into under paragraph 70NJ(3)(b) may contain conditions requiring attendance at an appointment(s) with a family and child specialist, or attendance at family counselling, or attendance at family dispute resolution, or good behaviour.[28]

5.42 A further new section 70NJA sets out the court's duties where proceedings are brought in relation to a contravention of a parenting order and where, after the parenting order was made, the parents made a parenting plan dealing with a matter dealt with in the order and in force when the contravention occurred. In such a case the court must have regard to the terms of the parenting plan and consider making an order under paragraph 70NJ(3)(c) varying the parenting order to include some or all of the provisions of the parenting plan.[29]

Matters arising from the evidence

Support for the compliance provisions

5.43 Some support for the new compliance provisions in the draft Bill was expressed in evidence received by the Committee. The Family Law Council submitted that 'the provisions in schedule 2 should be given a reasonable opportunity to work' and that:

> The provisions in schedule 2 should be viewed in the context of the other measures. For example, parties will have to attend family dispute resolution prior to filing an enforcement application, unless one of the exceptions applies.[30]

5.44 One submission stated that the changes in Schedule 2 of the draft Bill 'help to clarify this part of the FLA',[31] while the Lone Fathers

28 New subsection 70NM(4) is in Schedule 4 of the draft Bill.

29 Paragraph 70NJ(3)(c) is current in the Act.

30 Family Law Council, *Submission 33*, p.6. The Council did note however that 'there may be cause for concern about the effect of these provisions on the more difficult cases, eg. those involving family violence' (p.6). The Council suggested that safeguards to stop parties coercing other parties into agreeing to parenting plans that override orders may need to be considered (p.6).

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

Association of Australia (LFAA) stated that the 'proposed new enforcement mechanisms are potentially useful'.[32]

Issues raised in relation to the compliance provisions

5.45 The main issues raised by the evidence in relation to the new compliance provisions in the draft Bill are detailed below.

Standard of proof

5.46 The Family Court of Australia was critical of the new section 70NEA in its submission:

> ...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.[33]

5.47 The Court indicated its preference for the *Briginshaw* standard, which is the civil standard of the balance of probabilities but which also requires the court to take into account other factors such as the seriousness of the allegation and the gravity of the consequences of a particular finding. The Court stated that:

> 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.[34]

5.48 The Court further indicated that:

> …the existing standard works well and provides the flexibility necessary to determine contravention applications which are by their nature already complex proceedings… 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

32 LFAA, *Submission 48*, pp.3-4. The LFAA also stated however that the 'reasonable excuse' specification should be altered to read 'reasonable and convincing' (p.4). The Association further submitted that the Family Court is 'either unable and/or unwilling to enforce its own orders on contact' (p.3).

33 Family Court of Australia, *Submission 53*, p.37.

34 Family Court of Australia, *Submission 53*, p.36.

> the appropriate penalties whereas the present proposals would inhibit that occurring in many cases, and potentially limit what penalties a court could impose.[35]

5.49 The Court recommended that the new section 70NEA be withdrawn from the draft Bill and that no changes be made to the existing standard of proof.[36]

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

> …courts require a very high standard of proof of a breach because of the possibility of criminal sanctions. …This provision [new section 70NEA] is intended to assist practitioners and in particular self-represented litigants as it clarifies the evidentiary standard that must be met. This will assist in case preparation.[37]

5.51 The Department submitted that the new provision will also improve matters due to the fact that the application of the *Briginshaw* standard is not necessarily suitable in all cases:

> The lower standard of 'balance of probabilities' will apply for cases where non-criminal sanctions are sought. This will make it easier to demonstrate contraventions than under the current system where a higher standard, which is something between the balance of probabilities and beyond reasonable doubt [the *Briginshaw* standard], may be applied to all contravention applications.[38]

5.52 The Men's Rights Agency submitted that the standard of proof should be the criminal standard of proof (i.e. beyond reasonable doubt) in all cases.[39]

5.53 While the Committee recognises that the *Briginshaw* standard may afford flexibility to the Family Court, it also considers that the new section 70NEA will be a useful and necessary clarification of the standards of proof which should be applied in proceedings under Division 13A.[40] For applicants seeking to prove a contravention, it will

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

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

37 Attorney-General's Department, *Submission 46.1*, p.23.

38 Attorney-General's Department, *Submission 46.1*, p.23.

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

40 The LFAA stated that 'Provisions in the legislation on the standard of proof required in dealing with contraventions need to be clear': *Submission 48*, p.4.

be clear that if they are only able to satisfy a contravention to the civil standard of proof (balance of probabilities), the court will move to consider a civil penalty. If however an applicant is able to establish the contravention to the criminal standard of proof (beyond reasonable doubt), they will be in a position to seek that the court consider applying criminal penalties as well as civil penalties.

5.54 For the court, the practical effect of the new section 70NEA will be that if the contravention has only been proved on the balance of probabilities, then only civil penalties will be available. If however the court is satisfied of a contravention to a standard beyond reasonable doubt, then both civil and criminal penalties will be available.

Complexity

5.55 The Family Law Section of the Law Council of Australia (FLS) expressed its concern that the new compliance provisions in the draft Bill:

> …will produce a legislative scheme which is too complex. FLS is also concerned that the complexity and some specific provisions of the scheme will tend to undermine the two key messages if compliance is to be successfully promoted: that orders must be strictly complied with; and that if the orders are no longer suitable or workable then an application to vary should be made without delay.[41]

5.56 The FLS recommended that:

> …the contravention process be simplified. These provisions will often be used by self-represented litigants as well as qualified lawyers and they need to be clear and simple. Apart from making the legislation accessible, simplification is likely to reduce cost and delay and promote the message that parenting orders must be obeyed; and if they are seen to be impractical or unsuitable then an application must immediately be made to vary them.[42]

5.57 The FLS suggested that the new provisions, as well as the existing Subdivisions B and C of the Act, could be redrafted along the following lines:

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41 FLS, *Submission 47*, p.19.

42 FLS, *Submission 47*, p.20.

- That when any contravention application is before it a court may vary the relevant parenting orders.
- That a party may make a simple application for compensatory contact and costs along the lines suggested by FLS.[43]
- That there be a single contravention process in which the court has the power to impose higher penalties for serious or repeat contraventions.[44]

5.58 The Committee recognises that complexity is a live issue regarding the new compliance provisions in the draft Bill, but is also aware that the intention of the government to have the draft Bill passed by the Parliament as soon as possible effectively precludes a complete redraft of the compliance provisions at this stage. The Committee notes its recommendation in Chapter 6 that resources be allocated for a redrafting of the *Family Law Act* 1975 as soon as possible and considers that a redraft of the compliance regime would need to be a priority focus for that process.[45] The Committee makes two suggestions in this Chapter to lessen the complexity of the new compliance provisions and the compliance process.[46]

Strength of enforcement

5.59 It was suggested in evidence to the Committee that the new compliance provisions are not severe enough in respect of deliberate breaches and continual breaches.[47]

5.60 The Attorney-General's Department stated in its submission that:

> The government considers the changes to the enforcement provisions provide the court with significantly more options to enforce orders, while allowing the court sufficient discretion to ensure that the most appropriate orders are made in the best interests of the children.
>
> The amendments contained in the Bill to strengthen the existing enforcement regime are about providing the court with a greater range of options to appropriately deal with contraventions. …the provisions do place greater obligations

43 Refer FLS position paper at *Attachment A* to FLS submission.

44 FLS, *Submission 47*, p.20.

45 See paragraphs 6.65 – 6.66 in Chapter 6.

46 See paragraphs 5.74 – 5.75 and 5.79 – 5.81 below.

47 Mr Bennet, *Submission 5*, p.3; Dads in Distress, *Submission 41*, p.2.

on the court to make orders compensating the party who has not had contact as a result of the breach.[48]

Conclusion

5.61 The Committee recognises that the balance between sufficiently strong enforcement and necessary discretion for the court, especially in the context of the best interests of the child, is difficult to strike. The Committee considers that the new compliance provisions in the draft Bill do significantly increase the enforcement options for the court (particularly the compensation for lost time/expenses and costs provisions) while still maintaining the necessary judicial discretion.

Withholding contact, burden of proof, and penalties for harassment applications

5.62 More than one submission criticised the new provisions for not recognising the legitimacy of a parent withholding contact where there are safety concerns for a child due to violence and abuse.[49] It was submitted that the provisions should recognise the withholding of contact for child safety reasons, that the burden of proof for establishing that contact was not provided should be placed on the party bringing the application for the contravention, and that penalties should be available to the court when applications are found to be without substance and for harassment purposes.[50]

Conclusion

5.63 The Committee acknowledges these concerns, but considers that the criticism is unjustified. The new subsections 70NE(2) and (3) will provide that a person (the respondent to a contravention application) will be taken to have had a reasonable excuse for contravening a parenting order where that person believed on reasonable grounds that the action of withholding contact was necessary to protect the

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

49 SPARK Resource Centre Inc, *Submission 16*, p.8; National Council of Single Mothers and their Children, *Submission 20*, p.10.

50 SPARK Resource Centre Inc, *Submission 16*, pp.8-9; National Council of Single Mothers and their Children, *Submission 20*, p.10; New South Wales Women's Refuge Resource Centre, *Submission 22*, p.14; National Abuse Free Contact Campaign, *Submission 8*, p.10. The Sole Parents' Union recommended that that the new provisions should take account of a child's rights to refuse contact: *Submission 38*, p.3.

health and safety of a person (including the respondent or the child).[51] It is also important to bear in mind that contravention applications only occur subsequent to the making of parenting orders by the court, and parenting orders must be made with the best interests of the child as the paramount consideration. Protection of the child from family violence and physical and psychological harm will have been taken into account as part of this process.

5.64 In terms of the burden of proof, while the applicant will need to establish that the contravention occurred, the Committee considers it only appropriate in such circumstances that the onus for establishing a reasonable excuse for contravention should be on the party relying on that excuse. The Committee also notes that, where applications are found to be without substance and motivated by harassment, the court is able, under the current Act, to deal with such cases using either the provisions relating to frivolous and vexatious litigants (section 118), cost penalties (section 117(2)), or the contempt provisions (section 35).

Bonds

5.65 In regard to the new subsections 70NGA(4) and 70NM(4) regarding bonds, the FLS recommended that an additional condition regarding court order compliance be inserted into these provisions:

> FLS recommends that the conditions that may be imposed on a person by a bond in subsection 70NGA(4) be extended to include a condition that a party comply with a court order. …FLS recommends that section 70NM (Bonds under stage 3 of the parenting compliance regime) be amended in a similar fashion…[52]

Conclusion

5.66 The Committee does not agree with this recommendation. The insertion of an extra condition for court order compliance in the new subsections 70NGA(4) and 70NM(4) is not necessary given that the court already has the power to make orders under section 70NG.

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51 See paragraph 5.16 above.

52 FLS, *Submission 47*, p.26.

The costs provision – section 70NJ(2A)

5.67 A number of submissions expressed concerns regarding the new subsection 70NJ(2A). The FLS indicated its opposition to this section:

> FLS strongly opposes the proposed subsection 70NJ(2A) of the FLA regarding automatic costs sanctions in contravention applications. It is highly inappropriate to impose automatic costs sanctions in children's cases, even on a *prima facie* basis. The court already has sufficient discretion to order costs in appropriate circumstances.[53]

5.68 National Legal Aid stated that:

> NLA expresses some concern about the lack of discretion in this provision and suggests that the wording be amended to provide that "the court must consider" making such an order.[54]

5.69 The New South Wales Law Society suggested in relation to the new subsection 70NJ(2A) that the 'court should have a discretion in relation to costs.'[55]

Conclusion

5.70 In the Committee's view, the new subsection 70NJ(2A) is not inappropriate. The provision is not automatic as it gives the court discretion to not make an order for costs under paragraph 70NJ(3)(g) if this would not be in the best interests of the child. Further, the Committee considers that subsection 70NJ(2A) is a suitable provision to include in the final stage of the Act's compliance regime where cases involving repeated contraventions of orders or serious disregard for orders will come before the Court. The new subsection is also suitable given the context of other penalties available to the court under section 70NJ. The Committee agrees with the comments of the Family Court regarding the new subsection 70NJ(2A):

> I think we thought that all that was being provided for in the legislation was that, where there was a serious disregard for an order on a contravention, there should be a presumption of costs unless it was in the best interests of the child not to

53 FLS, *Submission 47*, p.iv.

54 National Legal Aid, *Submission 24*, p.4.

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

> order them. We thought that there were relatively few cases and that, if that was what the parliament wanted to do – if it wanted the message to be loud and clear that you should not contravene orders in those cases – that was a good message and, provided that there was sufficient to allow you to depart from that in a case where it really required it, that was all right. So we did not think that there was any real difficulty with that limited provision.[56]

Effect of parenting plans

5.71 In its submission, the FLS recommended that provisions akin to the new sections 70NEC, 70NGB and 70NJA be inserted elsewhere in the Act for completeness:

> FLS notes that Subdivision A and AAA do not contain provisions about the effect of parenting plans. Similar provisions are proposed in Subdivision AA (s.70NEC), Subdivision B (s.70NGB) and Subdivision C (s.70NJA). FLS recommends that Subdivision A and AAA also include a provision about the effect of parenting plans.[57]

5.72 Conversely, the Family Court suggested that the new sections 70NEC, 70NGB and 70NJA are unnecessary[58] and suggested that the three new sections could be replaced with a single provision:

> …consideration might perhaps be given to replacing all these provisions with a simple provision that made it clear than [*sic*] 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.[59]

Conclusion

5.73 The Committee understands the Court's view that the three new sections are unnecessary, but considers that, in the interests of clarity,

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56 Chief Justice Bryant, *Proof transcript of evidence*, 26 July 2005, pp.33-34.

57 FLS, *Submission 47*, p.32.

58 Family Court, *Submission 53*, pp.27-28.

59 Family Court, *Submission 53*, p.28.

some comprehensive provision needs to be in place to state the requirement that, in the relevant circumstances, the court must have regard to parenting plans and consider making an order varying the parenting order to include some or all of the provisions of the parenting plan. This is also necessary to explicate the potential legal effect of parenting plans for litigants.

5.74 This said, the Committee is also conscious that three separate but essentially identical provisions in separate areas of the Act may be something of an overcomplication. The Committee believes therefore that a single provision:

- Inserted at an appropriate point at the beginning of Division 13A;
- Embodying the requirements of each of the proposed sections 70NEC, 70NGB and 70NJA; and
- Applying to all subdivisions in Division 13A (including Subdivision A and the new Subdivision AAA);

would go some way towards meeting the recommendations of both the FLS and the Family Court. The new sections 70NEC, 70NGB and 70NJA could then be removed.

Recommendation 39

5.75 **The Committee recommends that the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005 be amended so as to insert a single provision at the appropriate point at the beginning of Division 13A of the *Family Law Act* 1975 which applies to all Subdivisions in Division 13A and which contains the following elements:**

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

alleged contravention of the parenting order occurred.

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

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

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

5.76 As discussed in Chapter 3, the new section 64D in Schedule 1 of the draft Bill has the effect of making parenting orders subject to subsequent parenting plans. In its submission the Family Court also considered that section 64D is either unnecessary or that its intent could also be addressed by a single provision within the compliance regime.[60] The Committee is of the view however that the new section 64D is a useful provision as it makes it clear, on the face of the parenting order, exactly what will be the effect of subsequent parenting plans. The provisions in the compliance regime will only be relevant for those parenting orders which are not affected by section 64D (for example parenting orders made prior to the commencement of these provisions).

Other recommendations for amendments

5.77 The FLS opposed the inclusion of the phrase 'minor or technical nature' in the new paragraphs 70NG(1)(d), 70NG(1)(f), and subparagraph 70NG(1)(e)(iv):

> FLS believes that the addition of the phrase '*minor or technical nature*' will lead to unnecessary applications and arguments about the interpretation of that phrase. The use of this phrase adds an unnecessary layer of complexity in situations where the court already has the discretion to take such matters into account.[61]

60 Family Court, *Submission 53*, pp.27-28.

61 FLS, *Submission 47*, p.23.

5.78 The FLS recommended that 'further consideration be given to the introduction of the phrase'.[62]

5.79 The Committee agrees with the concerns of the FLS on this issue. The phrase 'minor or technical nature' has the potential to unduly complicate the process and could lead to increased litigation regarding its meaning. The phrase is also unnecessary given that the court already has a discretion under section 70NG(1) regarding the making of orders and is therefore able to take such matters into account. The Committee is of the view that the phrase should be removed from the provisions in the draft Bill.

5.80 At the same time, the Committee is aware that there is potential for one party in proceedings to make repeated applications for technical or minor contraventions with a view to harassing or inconveniencing the other party. The Committee considers that the court should be able to order costs against the applicant party in such circumstances.

Recommendation 40

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

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

(b) the proposed subparagraph 70NG(1)(e)(iv) of the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005 be deleted.

The Committee also recommends that a provision be inserted into Division 13A of the *Family Law Act* 1975 enabling the court to make a costs order against a party to proceedings where:

(a) the court is satisfied that the party has made more than one contravention application for minor or technical contraventions of a primary order(s); and

62 FLS, *Submission 47*, p.23.

(b) relief for those applications has not been granted.

5.82 The FLS also made two drafting suggestions concerning renumbering the new Subdivision AAA and renaming the new Subdivision AA:

> FLS recommends that Subdivision AAA be re-numbered. The *FLA (SPR) Bill 2005* proposes that Subdivision AAA be inserted into the Family Law Act to follow the existing Subdivision A. FLS submits that this numbering sequence which starts with Subdivision A, followed by Subdivision AAA and then followed by Subdivision AA is unnecessarily confusing.[63]
>
> FLS recommends that Subdivision AA be renamed "*Subdivision AA- Court's powers where contravention or contravention without reasonable excuse not established*". This is on the basis that paragraph 70NEB(1)(b) provides that the court may vary a parenting order if the court is not satisfied that the respondent has committed a contravention (subparagraph 70NEB(1)(b)(i)) or that a contravention has been committed but the respondent proves reasonable [*sic*] excuse (subparagraph 70NEB(1)(b)(ii)).[64]

5.83 The Committee agrees with these drafting suggestions and recommends accordingly in Chapter 7.[65]

Compliance outside the court

5.84 The Committee notes that the courts are not the only venues envisaged as having a role in compliance. In its submission the Attorney-General's Department stated that:

> Enforcement cases are often cases that involve the most entrenched and bitter conflict between couples. …The Government believes that that the courts are not necessarily the best place to settle such disputes. The significant increase in both the contact orders program and children's contact centres help provide alternative to court based options.[66]

5.85 While the Committee is supportive of the intention to utilise legitimate non-court alternatives such as the Contact Orders Program,

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63 FLS, *Submission 47*, p.21.

64 FLS, *Submission 47*, p.22.

65 See paragraphs 7.9 – 7.12 in Chapter 7.

66 Attorney-General's Department, *Submission 46*, p.5.

children's contact centres and the Family Relationship Centres to address compliance issues, it has concerns regarding the evaluation and monitoring of the Family Relationship Centres and strong concerns regarding the accreditation of contact services. These issues are dealt with more fully in Chapter 8.[67]

Conclusion

5.86 The Committee concludes that the new compliance provisions in Schedule 2 of the draft Bill have been drafted to implement the measures in the government response to the FCAC report. The Committee notes that the statement in the government response that there will be 'a discretion to impose a bond for all breaches of orders' has not been implemented in respect of contraventions under the new Subdivision AAA, but the Committee is aware that this would not be appropriate given that the new Subdivision AAA deals with contraventions involving a reasonable excuse.

67 See paragraphs 8.33 – 8.54 in Chapter 8.

6

Other issues

6.1 This Chapter examines a miscellaneous range of items in the Exposure Draft. Some of these (such as changes to terminology and increased recognition of grandparents) arise directly from the Government response to recommendations in the FCAC Report. Others matters arose from the Committee's examination of the Bill or were raised with the Committee during the course of the inquiry process. The issues that are examined in this Chapter are:

- The changes to terminology to remove reference to 'residence' and 'contact' from the Act.
- How the Bill addresses the views of children and the related change in terminology from consideration of children's 'wishes' to 'views'.
- The consistency of the Bill with the United Nations Convention on the Rights of the Child.
- Provisions allowing better recognition of the role of grandparents and other relatives.
- Changes in the Bill aimed at improving recognition of Aboriginal and Torres Strait Islander kinship and child rearing practices and the related issue of the definition of Aboriginal child used in the existing Act.
- The complexity of the structure and drafting of the current Act and suggestions that a dictionary or glossary of defined terms be produced.

Terminology

6.2 The report of the Family and Community Affairs Committee (FCAC) recommended that the *Family Law Act* 1975 be further amended to remove the language of 'residence' and 'contact' in making orders between parents and replace it with family friendly terms such as 'parenting time'.[1] Those terms themselves arose as a result of reforms to the Act in 1995 that sought to decrease the concept of ownership or possession of children.

6.3 In its response to the FCAC report, the government indicated that the terms 'residence' and 'contact' would be removed from the Act, replaced by use of:

> ... the concept of 'parenting orders' rather than 'parenting time'. It considers that this is a simpler way to ensure that the Act focuses on the relationship that parents have with their children rather than the time a child spends with each parent.[2]

6.4 The Exposure Draft accordingly implements that response, with the concepts of 'residence orders', 'contact orders' and 'specific purpose orders' replaced with the more generic reference to 'parenting orders'. The Explanatory Statement of the Bill notes that 'in the majority of cases, references to 'residence' will be replaced with 'lives with'. References to 'contact' will be replaced with 'spends time with' and 'communicates with' in the majority of cases.' [3]

6.5 Schedule 5 of the proposed Bill consists of consequential amendments to remove the terms 'residence' and 'contact' from the Family Law Act and from the *Australian Citizenship Act* 1948, the *Australian Passports Act* 2005, the *Child Support Assessment Act* 1989 and the *Migration Act* 1958.

6.6 The proposed changes were supported by a number of groups and organisations as another attempt to change the attitudes that surround the current terms of residence and contact.[4] However, others were critical of the proposed changes, believing that they will

1 FCAC report, recommendation 4.

2 Government response to FCAC report, pp.6-7.

3 Explanatory Statement, p.21.

4 See for example, Family Services Australia, *Proof transcript of evidence*, 25 July 2005, p.61; Family Law Council, *Proof transcript of evidence*, 25 July 2005, p.85.

lead to confusion, may make parenting orders harder to understand, and will be unlikely to change the perception of parents in conflict who see things in terms of 'winners' and 'losers'.[5]

6.7 Professor Fehlberg from the Law School, University of Melbourne, commented:

> 'Contact' and 'residence' are neutral terms which describe the matters they refer to in a more accurate and less confusing way than do the proposed changes. The existing terminology should not be changed in the hope that changing language can change the way people think – especially given that, as acknowledged in the Explanatory Statement, this was so clearly not achieved following changes to the Act in 1996.[6]

6.8 Another submission, from the Far North Fathers group, advocated simply the use of the term 'be with'.[7] However, the Committee does not see any benefit from the introduction of more imprecise terminology and supports the proposed use of 'lives with' and 'spends time/communicates with' as proposed in the Exposure Draft.

6.9 The Family Law Section of the Law Council of Australia (FLS) noted that 'the terminology used has repercussions in terms of the international recognition of orders made in Australia and for Australia's obligations under international conventions that touch on family law issues'. They went on to identify problems in particular with US courts in making them 'understand that 'residence' and 'contact' actually meet the criteria in the various conventions in terms of international child support, child abduction and a whole range of other issues relating to children.' [8]

6.10 One proposed solution was to include in the revised Act a dictionary or some other provision that would clarify the language of the Act for the purposes of international interpretation. In a supplementary submission, the FLS strongly supported a dictionary of definitions, containing 'supporting notes for those terms which have application outside the Family Law Act. This will ensure that the language used

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5 See for example, National Network of Women's Legal Services, *Submission 23*, p.20; Albury Wodonga Community Legal Service, *Submission 65,* p.1; Family Law Section of the Law Council of Australia, *Submission 47*, p.60.

6 Professor B Fehlberg, *Submission 29*, pp.11-12.

7 Far North Fathers, *Submission 62*, p.1.

8 Mr Kennedy, *Proof transcript of evidence*, 20 July 2005, p.7.

in the Family Law Act, irrespective of what that is, is readily understood and transferable to the international community'.[9]

Recommendation 41

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

Children's views

6.12 The Family Law Act currently provides for the wishes of children to be taken into account including in determining their best interests. The FCAC report recommended that 'all 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'.[10] The Government indicated its agreement in principle with this recommendation, noting that it will continue to support initiatives 'that enable services and decision-making agencies to directly involve children in decision-making where appropriate'.[11]

6.13 As discussed in Chapter 4, specific provisions in Schedule 3 of the Exposure Draft provide that:

- In revised subsection 60KH(2)[12], if the court applies the law against hearsay to child-related proceedings, evidence of a representation made by a child about a matter relevant to the welfare of the child or another child that would not be otherwise admissible due to the law against hearsay, will not be inadmissible solely for that reason
- In revised subsections 60KH(3) and (4), the court may give such weight (if any) as it thinks fit to evidence admitted under subsection 60KH(2)

9 FLS, *Submission 47.1*, p.1.

10 FCAC report, recommendation 13.

11 Government response to FCAC report, p.12.

12 This proposed provision replaces existing section 100A of the Act, which will be repealed by Schedule 3, item 5 of the Exposure Draft.

- In subsection 60KH(5) child means a person under 18; 'representation' includes an express or implied representation, whether oral or in writing, and a representation inferred from conduct.

6.14 Many submissions supported greater child-inclusive practices, and saw the removal of the child's 'wishes' as appropriate 'as children are then not being asked to choose between their parents'.[13]

6.15 The Law Society of South Australia noted that 'there is no clear indication in the Bill as to how the child will be assisted through the process to express those views. For example, can the child seek to express their views directly to the judicial officer?'[14]

6.16 The way in which children's views will be determined was raised with officers of the Attorney-General's Department who advised that the Family Law Council had recently reported to the Attorney-General on the role of Child Representatives. The Attorney-General is now considering further legislative amendments arising from that report.[15] It was also noted that the Family Court has issued guidelines for Child Representatives.[16] The question then arose as to whether guidelines are sufficient in and of themselves, or whether there should be some legislative backing for the principles in the guidelines.

6.17 The proposed section 68G requires the court to consider any views expressed by a child in deciding whether to make a particular parenting order in relation to the child. In doing so, the court may inform itself of any views expressed by a child by having regard to anything contained in a report given to the court under subsection 62G(2). Alternatively, the court may be informed of the views of the child 'by such other means as the court thinks appropriate'. While it is possible that the court may consider it appropriate to consult the child directly on their views, this is not specifically provided for in section 68G.

6.18 Section 68L of the Act provides that the court may make an order that the child is to be separately represented under certain circumstances. Section 68M provides that the child may be made available for a

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13 Albury-Wodonga Community Legal Service, *Submission 65*, p.3.

14 Law Society of South Australia, *Submission 28*, p.1.

15 Mr Duggan, *Proof transcript of evidence*, 26 July 2005, p.85.

16 The guidelines can be viewed at: http://www.familycourt.gov.au/presence/connect/www/home/directions/guidelines_for_child_representatives/

psychiatric or psychological examination for the purpose of preparing a report about the child for use in connection with proceedings. However, again there is no specific reference in any of these sections that the Child Representative or another person preparing a report for use by the court should seek the views of the child. The Exposure Draft currently does not propose any change to section 86L, and proposed amendments to section 68M relate to determining the category of persons who may be directed to make the child available.

6.19 The Committee believes that, in keeping the enhanced emphasis on involving children in decisions affecting them, sections 62G, 68G and 68L should contain a proposal that the views of the child be sought directly, unless there are specific circumstances that would make this inappropriate (for example because of the age and maturity of the child or some other factor).

Recommendation 42

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

6.21 In addition to those provisions, the Exposure Draft also proposes to substitute the term children's 'views' for the existing term of children's 'wishes'.

6.22 The Explanatory Statement accompanying the draft Bill notes:

> Research has found that the use of the word 'wishes' means that children may feel that they need to make decisions about their future and that they do not necessarily want to do this, even though they want to be heard. By referring to 'views' in the Act, children may still be heard and their views taken into account, but they should not feel that they need to make a decision. This approach is consistent with the wording in the United Nations Convention on the Rights of the Child at Article 12. …
>
> References to a child's views will not exclude a child from expressing his or her 'wishes' if they want to do this.[17]

17 Explanatory Statement, pp.9-10.

6.23 Most submissions supported the proposed change from wishes to views[18], although National Legal Aid argued that both terms should be used i.e. that the provision read 'any views or wishes expressed by the child...' as they believe some children 'do... have definite wishes and want to express them.'[19]

6.24 The Committee supports the change in terminology from wishes to views, and does not believe it necessary for both terms to be used in the legislation.

6.25 The Family Court of Australia also had concerns that the views of the child, as expressed in the revised section 68F would see the 'relegation of the views of children to a mere 'additional consideration', (and)...seems to suggest that they would always or at least commonly be outweighed by one of the 'primary' considerations'.[20] While the Committee notes these concerns, the Committee does not believe that it was the intention of the FCAC to set children's views as pre-eminent, but rather to encourage 'opportunities for appropriate inclusion of children in the decisions that affect them' as noted in paragraph 6.12 above.

Consistency with United Nations Convention on the Rights of the Child

6.26 Concern was also expressed that the change in terminology might affect Australia's obligations under the United Nations Convention on the Rights of the Child. Article 12(1) of the Convention states:

> States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.[21]

6.27 The existing paragraph 68F(2)(a) closely mirrors the language of the Convention. The Attorney-General's Department has noted that 'the wording will also more closely reflect that of the Convention as 'wishes' is to be amended to 'views' '.[22]

6.28 Similarly, concern about the term 'best wishes of the child' appears misplaced. The Attorney-General's Department pointed out that

18 See for example Catholic Welfare Australia, *Submission 45*, p.3,

19 National Legal Aid, *Submission 24*, p.4.

20 Family Court of Australia, *Submission 53*, p.34.

21 Attorney-General's Department, *Submission 46.1*, p.20.

22 Attorney-General's Department, *Submission 46.1*, p.20.

there is no definition of the best interests of the child in the UN Convention, and the introduction of a hierarchy in proposed subsection 68F(1A) 'is not inconsistent with Australia's obligations under the Convention'.[23]

6.29 The Aboriginal Legal Service of Western Australia (ALSWA) argued that the words 'and the child's views' be deleted from the proposed subparagraph 60B(3)(b)(i) and subsection 68F(4), as it reflects:

> ...a popular but erroneous mainstream notion that culture equals products (for example language, law, religion, music, art) about which one can have a view and can therefore accept or reject, 'have' or 'lose'. This is incorrect, and dehumanising for Aboriginal and Torres Strait Islander peoples (and presumably also for other non-mainstream Australians).[24]

6.30 While the Committee acknowledges the sentiment behind this view, it does not support the removal of these words from the Exposure Draft.

Contact with grandparents and other relatives

6.31 Recommendation 23 of the FCAC report proposed that paragraphs 68F(2)(b) and (c) of the Family Law Act be amended to explicitly refer to grandparents. Recommendation 24 of the report advocated that contact with grandparents and extended family members be considered by parents when developing parenting plans, and if in the best interest of the child, make specific plans for contact with those individuals in the parenting plan. As part of that same recommendation, the FCAC also urged the government to develop a range of strategies to ensure that grandparents, and extended family members, are included in mediation and family counselling activities, again where it is in the best interests of the child, and that a wider public education campaign on grandparents' status be included in information on the Family Law Act.[25]

6.32 The Government supported both of these recommendations. In addition to explicit inclusion in paragraphs 68F(2)(b), (c)(ii) and (e) of

23 Attorney-General's Department, *Submission 46.1*, p.20.

24 Aboriginal Legal Service of Western Australia (Inc), *Submission 54*, pp.4-5.

25 FCAC report, recommendation 24.

reference to grandparents and other relatives, the Exposure Draft proposes:

- Inclusion of grandparents and other relatives of the child in the class of persons with whom a child can live, spend time etc under a parenting order (proposed subsection 64B(2) and subsection 63C(2A));
- Definition of a relative (subsection 60D(1) includes a range of categories including grandparents, aunts, uncles etc); and
- A note to proposed subsection 13C(3) of the Act where an order to attend counselling or family dispute resolution can require the parties to the proceedings to encourage the participation of specific other persons who are likely to be affected, including grandparents and other relatives.

6.33 The Committee agrees with comments by Relationships Australia and others that the changes set out in the Exposure Draft strengthen the role of grandparents and the extended family and encourage the recognition of the valuable role that grandparents play in the life of children.[26]

6.34 In addition to the above references, the Family Law Council proposed an amendment to the new subparagraph 60B(2)(a)(ii), to add to the end of the subparagraph the words 'such as grandparents and other relatives'.[27]

Recommendation 43

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

6.36 A note of caution was raised by the National Alternative Dispute Resolution Advisory Council, who questioned the necessity of the wider definition of relatives when considering the best interests of the child.

> It has the potential to involve the child in an extensive array of conflict, including between two united parents and the family member of one or the other parent, and to further

26 Relationships Australia, *Submission 37*, p.6. See also Country Women's Association of NSW, *Submission 26*, p.4; Family Mediation Centre, *Submission 17,* p.1; Family Law Council, *Submission 33*, p.5; Catholic Welfare Australia, *Submission 45,* p.3.

27 Family Law Council, *Submission 33*, p.5.

> divide a child's time between parties other than the parents. It is suggested that where the parents are in agreement, there should be a compelling reason before a court would make an order inconsistent with that agreement.[28]

6.37 The Committee considered this matter but in the light of the concept of the best interests of the child, believes it would be a very remote possibility that a court would order contact with a member of the extended family where that contact was opposed by both parents.

6.38 The FLS noted that the definition of *relative* in the proposed new subsection 60D(1) uses *step-father* and *step-mother*. The FLS proposed that these be replaced by *step-parent*, a term already defined in section 60D of the Act, unlike *step-mother* or *step-father*.[29] The Committee supports this proposal.

Recommendation 44

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

Aboriginal and Torres Strait Islander issues

6.40 The FCAC report made no specific recommendations relating to Aboriginal and Torres Strait Islander children. However, the Bill contains a number of amendments that implement the Family Law Council's December 2004 Report, *Recognition of Traditional Aboriginal and Torres Strait Islander Child-Rearing Practices: Response to Recommendation 22: Pathways Report, Out of the Maze.* The amendments emphasise the need for better consideration of the kinship obligations and child rearing practices of Aboriginal and Torres Strait Islander children.

6.41 The Family Law Council report examined the recommendations about this issue from the Pathways Report. The Pathways recommendations came from examination of the issue in a number of earlier reports including the Australian Law Reform Commission report *The Recognition of Aboriginal Customary Laws* in 1986, the *Royal*

28 National Alternative Dispute Resolution Advisory Council, *Submission 60*, p.4.

29 FLS, *Submission 47*, p.5.

Commission into Black Deaths in Custody 1991 and the *Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their families* in 1997.

6.42 In preparing its report, the Family Law Council sought comment from a range of Aboriginal and Torres Strait Islander organisations.[30] Those recommendations were considered by government and have been included in the Exposure Draft of the Bill.

6.43 The Exposure Draft proposes changes to recognise 'Aboriginal and Torres Strait Islander children's right to maintain a connection with the lifestyle, culture and traditions of their peoples...and may foster the involvement of extended families and whole communities in the lives of children.'[31] The Committee supports the inclusion of the changes in this Bill.

Definition of Aboriginal child

6.44 Schedule 1, items 3 and 8 respectively of the Exposure Draft insert in section 60D of the Act the following definitions:

> *Aboriginal child* means a child of the Aboriginal race of Australia
>
> *Torres Strait Islander child* means a child who is a descendant of the indigenous inhabitants of the Torres Strait Islands

6.45 The Committee notes that the definition of *Aboriginal child* was already in the Act (existing subsection 68F(4)) and is deleted from that subsection by Schedule 1, item 36 of the Bill and then inserted in section 60D). The Committee was unable to determine if there was any specific reason for the variation in the two definitions. The Aboriginal Legal Service of Western Australia proposed that the definition of *Aboriginal child* be amended to 'A child who is a descendant of Aboriginal people of Australia'.[32] The Family Law Section of the Law Council of Australia made a similar suggestion,

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30 The Family Law Council received submissions from the Aboriginal and Torres Strait Islander Commission; the National Aboriginal and Torres Strait islanders Legal Services Secretariat; the Aboriginal and Torres Strait Islander Women's Legal and Advisory Service; the Women's Legal Resources Centre and the Aboriginal Legal Service of Western Australia (Source: Attorney-General's Department, *Submission 46.1*, p.37).

31 Family Law Council, *Submission 33*, p.4.

32 Aboriginal Legal Service of Western Australia (Inc), *Submission 54*, p.4.

recommending the definition be '*Aboriginal child* means a child who is a descendant of the indigenous inhabitants of Australia'.[33]

6.46 The Committee believes that the definitions of *Aboriginal child* and *Torres Strait Islander child* should be standardised and that emphasis in terms of Aboriginal children be moved from that of race, to that of descendant of the indigenous inhabitants.

Recommendation 45

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

6.48 Similarly, the ALSWA has proposed that the definition of Aboriginal or Torres Strait Islander culture proposed in Schedule 1, item 4 of the Bill, be amended to 'includes the Aboriginal or Torres Strait Islander lifestyle and traditions *of the relevant community/communities*'.[34] The ALSWA argued:

> Like Asian people, African peoples, and European peoples, Aboriginal and Torres Strait Islander peoples comprise many different groups, each with a distinct lifestyle and traditions. In family law proceedings it is only the lifestyle and traditions of the community or communities to which the child belongs that are relevant...[35]

Recommendation 46

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

6.50 In its submission, the ALWSA proposed that section 61F of the Act be amended to refer to '...child-rearing practices, of *the relevant* Aboriginal or Torres Strait Islander culture that are relevant to the child' (words to be inserted italicized).[36]

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33 Family Law Section, Law Council of Australia, *Submission 47*, p.4.

34 Aboriginal Legal Service of Western Australia (Inc), *Submission 54*, p.4.

35 Aboriginal Legal Service of Western Australia (Inc), *Submission 54*, p.4.

36 Aboriginal Legal Service of Western Australia (Inc), *Submission 54*, p.5.

6.51 The Committee does not support this recommendation, as it notes that proposed section 61F already explicitly states 'that are relevant to the child'. The proposed insertion is therefore unnecessary.

6.52 The ALWSA also recommended that the proposed definition of a 'relative' include:

- in the case of an Aboriginal child, a person regarded under the customary law or tradition of the child's community as the equivalent of a person mentioned [elsewhere in the definition]
- in the case of a Torres Strait Islander child, a person regarded under the customary law or tradition of the Torres Strait Islands as the equivalent of a person mentioned [elsewhere in the definition].[37]

6.53 The Committee has no objection to this proposal being examined further by the Department.

Recommendation 47

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

Subsection 60KI(3)

6.55 Section 60KI deals with a court's general duties and powers relating to evidence. Subsection 60KI(3) proposes that in child-related proceedings concerning an Aboriginal or Torres Strait Islander child, the court may receive into evidence the transcript of evidence in any other proceedings before the court, another court or tribunal and draw any conclusions it may consider proper. Further it may adopt any recommendation, finding, decision or judgment of any court, person or body mentioned in this subsection. The subsection is specifically directed towards section 61F, which required the court to have regard to kinship and child-rearing practices of Aboriginal or Torres Strait Islander culture.[38]

6.56 The issue emerged during hearings as to whether the provisions of this subsection should be extended beyond the Aboriginal and Torres Strait Islander communities, to encompass all children involved in

37 Aboriginal Legal Service of Western Australia (Inc), *Submission 54*, p.4.

38 See Exposure Draft, Schedule 3, item 4.

proceedings before the courts. While some felt that it may already be within the capacity of the courts to examine the proceedings before another court or tribunal in regard to the broader community,[39] or that the same problems did not exist in regard to the wider community in obtaining cultural and other information,[40] others felt that explicitly extending the provision to all children would be helpful.[41]

6.57 The Committee could determine no adverse impact from the removal of provisions in subsection 60KI(3) that limit its application to Aboriginal or Torres Strait Islander children. Indeed, the Committee believes that extending the provision of 60KI(3) to all children may assist in addressing some of the issues raised in Chapter 2 in regard to claims of family violence and abuse.

Recommendation 48

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

Structure of the Act

6.59 The changes to the Family Law Act proposed by the Exposure Draft are but the latest in a long line of legislative amendments to the original legislation. In the last 12 months alone the Act has been amended on three separate occasions,[42] and this Exposure Draft, if passed by the Parliament, will be the fourth.

6.60 The result of the cumulative amendments was described in the following terms:

> The Court [is concerned]...about the structure of the Act, particularly Part VII and its complexity both in wordiness and in the juxtaposition of various sections, principles, objects

39 Mr Bartfeld, *Proof transcript of evidence*, 20 July 2005, p.21.

40 Mr Duggan, *Proof transcript of evidence,* 26 July 2005, p.82.

41 Dr McInnes, *Proof transcript of evidence,* 20 July 2005, p.60; Law Society of New South Wales, *Submission 81*, p.10.

42 *Family Law Amendment (Annuities) Act 2004*; *Bankruptcy and Family Law Legislation Amendment Act 2005*; and the *Family Law Amendment Act 2005*.

> and presumptions. ... 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.[43]

6.61 The Chief Justice of the Family Court, the Hon Diana Bryant argued:

> We are concerned that, because of the amendments over the years to the legislation, a document which of all documents—perhaps of all acts of the parliament—should be the easiest document to read is one of the most complex, and this legislation will make it even more complex. ...
>
> My first preference would be to rewrite the whole act; my second preference would be to rewrite part VII in a better way; and my third preference, I suppose, would be that we fix up part VII so that it is a bit better, and taking out the maintenance section and putting it in a different part would be one of those suggestions.[44]

6.62 The Family Law Section of the Law Council of Australia expressed similar concerns about the structural problems of the heavily amended Act:

> For example, parental responsibility and parenting orders are introduced in division 2, but they are not explained or defined until division 5, which is some 22 sections, or 10 pages, later on in the legislation. The criteria for parenting orders, including the paramountcy of the welfare of the children, is found in division 6, but it is not for another 90 sections, or 40 pages, of legislation that we actually get to see the mechanism for considering 'best interests'. The jurisdiction of the court to make orders in relation to children and on who can apply for orders does not present itself until some 90 pages, or 130 sections, into part VII. So there is a structural problem whereby even we as lawyers find it very difficult to negotiate our way around a very complex piece of legislation...[45]

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

44 Chief Justice Bryant, *Proof transcript of evidence*, 26 July 2005, pp.2-3.

45 Mr Kennedy, *Proof transcript of evidence*, 20 July 2005, p.2.

6.63 The Attorney-General's Department commented on the value of rewriting just part VII:

> Part VII is an area that has been amended a number of times since it was enacted in 1995 or 1996. Again, it might well be done in isolation of the other parts of the legislation, but we query the value of dealing again in a piecemeal approach with reform of that nature. It is not just part VII that has been amended a lot...It seems to me—again, as a personal point of view without having consulted the Attorney—that, if you were thinking about rewriting the legislation, it would be a task that would best be done including the whole legislation and not just one part.[46]

6.64 Other submissions called for the Act to be renumbered.[47]

6.65 The Committee supports the redrafting of part VII as part of the proposed changes in the Family Law Amendment (Shared Parental Responsibility) Bill 2005, to group relevant sections together and make it a more user-friendly document. However, the Committee acknowledges that the government's desire to have the shared parental responsibility amendments in place as soon as possible effectively rules out a complete restructuring of part VII (and indeed of the entire Act) prior to the introduction of the Family Law Amendment (Shared Parental Responsibility) Bill 2005. The Committee sees merit in a complete rewrite of the Act as soon as possible in order to simplify structure and to group like provisions together for ease of use. This will assist in ensuring the development of a new body of jurisprudence following the shared parenting reforms and improve ease of access for all users of the Act.

Recommendation 49

6.66 **The Committee recommends that resources be allocated to enable a rewriting of the *Family Law Act* 1975 as soon as possible.**

6.67 The Committee was also informed that one of the difficulties for users of the Act, including the legal profession, was that definitions in the current Act are not all grouped together. For example, Section 4 of Schedule 1 of the Act contains a long list of definitions. Further

46 Mr Duggan, *Proof transcript of evidence*, 26 July 2005, p.64.

47 Queensland Law Society, *Submission 30*, pp.1-2; Family Law Practitioners of Queensland, *Proof transcript of evidence,* 25 July 2005, p.18.

definitions are found in Part VII of the Act (section 60D *Defined expressions*). The Family Law Section of the Law Council of Australia (FLS) were among those calling for all relevant definitions contained in the various parts of the Act to be grouped together in a single dictionary.[48]

6.68 In addition to definitions not being accessible in one place, a further frustration was that the definitions are not self contained, as the definition is often cross-referenced to another part of the Act. For example, in section 4 of the Act:

> *Arbitration* has the meaning given by section 10S. ...
>
> *Facilitative dispute resolution* has the meaning given by subsection 10H(2).
>
> *Family and child specialist* has the meaning given by section 11B.

6.69 The Queensland Law Society noted:

> (This cross-referencing)...complicates the interpretation of the Act as a whole and the new amendments significantly. The drafters should give consideration...to a complete dictionary to the Act or a section setting out all definitions used throughout the legislation.[49]

6.70 While cross-referencing may be a legislative device to avoid repeating certain definitions, the Committee believes that the extensive use of cross-referencing of definitions complicates and hinders the understanding of the Act, particularly for the self-represented litigants who make up approximately half of those taking action in the Family Court.

Recommendation 50

6.71 **That the *Family Law Act* 1975 be redrafted to provide a consolidated dictionary or glossary of defined terms, to assist in easier comprehension of the Act. The definitions should avoid merely being a cross-reference to another section of the Act.**

48 Family Law Section, Law Council of Australia, *Submission 47*, p.ii.

49 Queensland Law Society, *Submission 30*, p.2.

7

Drafting issues

7.1 In examining the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005 a number of issues relating to the technical drafting of the legislation emerged. These are detailed below.

Use of 'etc' in headings

7.2 The Committee notes the use of 'etc' in headings in the proposed new sections, specifically in sections 10C, 10D, 10K and 10L. The Committee agrees with the Family Court of Australia submission that 'etc' should not be used in the headings as it can lead to confusion.[1]

Recommendation 51

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

Formulation of section headings

7.4 Former Justice of the Family Court of Australia, the Hon Richard Chisholm in evidence to the Committee made a number of suggestions regarding proposed section titles.

> When I was looking at the headings, or the section titles, it seemed to me that some of them were written in a curious way. I have tried to indicate what the problem is. It is, I suggest, that section titles should not attempt to actually state

1 Family Court of Australia, *Submission 53*, p.3.

> the law but indicate the subject matter or general import of the section. For example, section 10C says, 'Communications in family counselling et cetera are confidential'. That is the statement, which is like a statement of law. Then of course if you look at the section itself you find that they are only sometimes confidential, or confidential to some extent. ... There is a series of section titles which are in the form of actually stating the law rather than telling you what the section is about. ... there could be a problem of competition between the section title and the section itself to determine its meaning.[2]

7.5 The section headings specifically identified were 10C, 10D, 10K, 10L, 10M, 11C and 11D.

7.6 In addition, former Justice Chisholm was critical of complicated expressions in a further four section headings: 61C, 62B, 65K and 70NEAB. To illustrate his concerns, the proposed heading to 65K in the Exposure Draft is as follows:

> 65K What happens when parenting order that deals with who a child lives with does not make provision in relation to death of parent with whom child lives

While the original text of the heading in the Act is little better and just as convoluted, the Committee does agree with former Justice Chisholm that a better formulation in this case might be:

> 65K Death of parent with whom child lives pursuant to order

or words of similar effect.

7.7 Committee Members acknowledge that they are not legal drafters, but believe that simplification wherever possible will make the Act more comprehensible for all users.

Recommendation 52

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

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2 Hon Richard Chisholm, *Proof transcript of evidence*, 26 July 2005, p.4.

7.9 In Schedule 2, item 3 of the Exposure Draft proposes the insertion of a new Subdivision AAA in the Act, immediately following existing Subdivision A. The Family Law Section of the Law Council of Australia (FLS) recommended that:

> …Subdivision AAA be renumbered. The *FLA (SPR) Bill 2005* proposes that Subdivision AAA be inserted into the Family Law Act to follow the existing Subdivision A. FLS submits that this numbering sequence which starts with Subdivision A, followed by Subdivision AAA and then followed by Subdivision AA is unnecessarily confusing.[3]

7.10 The FLS also recommended that:

> …Subdivision AA be renamed '*Subdivision AA- Court's powers where contravention or contravention without reasonable excuse not established*'. This is on the basis that paragraph 70NEB(1)(b) provides that the court may vary a parenting order if the court is not satisfied that the respondent has committed a contravention (subparagraph 70NEB(1)(b)(i)) or that a contravention has been committed but the respondent proves a reasonable excuse (subparagraph 70NEB(1)(b)(ii)).[4]

7.11 This matter was discussed earlier in Chapter 5.

Recommendation 53

7.12 **The Committee recommends that:**

(a) proposed subdivision AAA and subdivision AA be renumbered, to be subdivisions AA and AAA respectively; and

(b) the heading to existing AA be amended to 'Court's powers where contravention or contravention without reasonable excuse not established'.

Other minor technical amendments

7.13 Schedule 2, Part 1, after line 3, of the Exposure Draft, a heading *Family Law Act 1975* should be inserted for consistency (see Schedule 1 of the Bill).

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3 FLS, *Submission 47*, p.21.

4 FLS, *Submission 47*, p.22.

7.14 Schedule 5, item 72 amends paragraph 67K(1) to delete sub-paragraphs (a) to (c) and replace them with paragraphs (a) to (ca). However, subsection 67K(1) already contains an existing paragraph (ca). The material to be inserted should be renumbered to reflect this.

7.15 Schedule 5, item 75 amends section 67T to delete paragraphs (a) to (c) and replace them with paragraphs (a) to (ca). However, section 67T already contains an existing paragraph (ca). The material to be inserted should be renumbered to reflect this.

7.16 Schedule 1, item 26 amends section 68F of the Act, to insert a new subsection (1A) which sets out primary considerations to be considered in deciding what is in a child's best interests. Subsection (3) currently states that 'If the court is considering whether to make an order with the consent of all 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)'. It appears to be an oversight that there is no reference to subsection (1A) also being considered. The Committee believes that subsection (3) should be amended to read 'have regard to all or any of the matters set out in *subsections (1A) and (2)*.'

7.17 The new paragraph 70NJA(2)(b) (inserted by Schedule 2, item 12 of the Exposure Draft) currently reads:

> (b) consider whether to exercise its powers under paragraph 70NG(3)(c) to make an order varying the parenting order to include (with or without modification) some or all of the provisions of the parenting plan.

7.18 There is no paragraph 70NG(3)(c) and the reference should be to paragraph 70NJ(3)(c).

Recommendation 54

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

(a) schedule 2, Part 1, after line 3, of the Exposure Draft, insert a heading *Family Law Act 1975*;

(b) items 72 and 75 of Schedule 5 be amended to clarify if the existing paragraphs (ca) in sections 67K(1) and 67T are to be deleted or remain;

(c) a new item be inserted in Schedule 1, amending subsection

68F(3) of the Act, to delete 'in subsection (2)' and insert 'in subsections (1A) and (2)'; and

(d) delete the reference to paragraph 70NG(3)(c) in proposed paragraph 70NJA(2)(b) (in Schedule 2, item 12), and replace with 70NJ(3)(c).

8

Wider issues

8.1 In the course of the inquiry several issues emerged that, while not strictly part of the Committee's Terms of Reference, are relevant in terms of achieving the stated policy objectives of the government in regard to these reforms: encouraging shared parenting, reducing the adversarial nature of proceedings, making court processes less traumatic, and protecting children from family violence and abuse. These matters are discussed briefly in this Chapter and in the Committee's opinion would benefit from greater consideration by government.

8.2 Specifically, this Chapter examines:

- The possible 'unintended consequences' that may arise from the proposed amendments and the need for evaluation of the impact of the legislation.
- Issues that may arise in the implementation of the Family Relationships Centres that will be critical to the success of the government's aims.
- The accreditation and resourcing of children's contact centres.
- The need for longer term community education about the new family law provisions.
- The role of case law in family law proceedings.

Impact of the legislation

8.3 In evidence to the Committee, several organisations raised concerns about the 'unintended consequences' of the 1995 family law reforms and their concern that the changes proposed in the exposure draft would have a similar effect.[1]

8.4 Concern was also expressed to the Committee that the proposed amendments in the exposure draft would lead to increased litigation, rather than less:

> I remain concerned that history has shown that whenever the Government has sought to amend the Family Law Act in the past in significant ways, such as in 1996, it led to an increased number of contested applications being filed. I am concerned that this legislation will result in an increase in litigation over parental responsibility...[2]

8.5 While some research had been done on attempting to quantify the nature of those consequences and whether the impacts were of immediate or continuing impact, the Committee is concerned that many of the claims were anecdotal in nature. Former Justice Richard Chisholm observed:

> I think it would be tremendously valuable to set up some serious monitoring or assessment of the impact of this legislation. There are a number of organisations that would have the structure to do it—they would need to be resourced—for example, perhaps the Australian Law Reform Commission or the Institute of Family Studies. I could imagine a project that would be substantial, although not overwhelming, which might involve some things that you can count, like how many applications are being made and that sort of thing, but would also involve a qualitative component of taking a cohort of people going through the system, interviewing them and interviewing their lawyers and people at the family relationships centre to get a feel for how it is working as well as the number crunching. ...

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1 See for example, Law Society of New South Wales, *Proof transcript of evidence*, 21 July 2005, p.16; National Association of Community Legal Centres, *Proof transcript of evidence* 21 July 2005, p.50.

2 Queensland Law Society, *Submission 30*, p.1.

I would envisage a kind of staged exercise...[3]

8.6 The Committee supports the proposal for quantitative and qualitative research into the impact of the Bill as part of the evaluation of these reforms, both in terms of their immediate and short term impact and for their longer term effects.

Recommendation 55

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

Establishment and operation of Family Relationship Centres

8.8 In its initial briefing to the Committee on the Exposure Draft, the Attorney-General's Department indicated that they viewed the proposed legislation as the third tranche of the government's response to the *Every Picture Tells a Story* report. The first part of the response was the May 2005 federal budget announcement of an extra $400 million for additional services, including 65 Family Relationship Centres (FRCs) to be rolled out over the next four years. The second stage was the Child Support Task Force report, publicly released in June 2005 and which is currently being considered by government.[4]

8.9 On 31 July 2005 the Attorney-General announced the location of the first 15 FRCs. The selection process for organisations to run these first centres is to start around October 2005. The initial 15 centres will be located in each State and Territory, in regional centres as well as capital cities.[5]

8.10 While the Committee strongly supports the establishment of the Family Relationship Centres as a key mechanism in changing the

3 Hon Richard Chisholm, *Proof transcript of evidence*, 26 July 2005, pp.35-36.

4 Mr Duggan, *Proof transcript of evidence*, 4 July 2005, p.2.

5 *Family Relationship Centres unveiled*, Press release, Attorney-General, 31 July 2005. The first 15 FRCs will be in Lismore, Sutherland, Wollongong, and Penrith (NSW); Mildura, Sunshine, Frankston and Ringwood (VIC); Townsville and Strathpine (QLD); Joondalup (WA); Salisbury (SA); Hobart (Tas); Darwin (NT); and Canberra (ACT).

culture of dispute resolution within the family law system, the Committee is troubled by issues related to the establishment and proposed operations of the FRCs. The Committee commented earlier (Chapter 3, paragraphs 3.93 – 3.105) on the roll-out of the FRCs and expressed concern that the phasing in of the family dispute resolution mechanisms would be adversely affected if the establishment of the FRCs was delayed for any reason.

8.11 The Attorney-General's Department did advise the Committee that the FRCs will not be the sole providers of family dispute resolution services, as '...the services will also be provided by individuals who meet the requirements for family dispute resolution practitioners under the Regulations and by other approved organisations'.[6] However, the Committee has already raised concerns about accreditation standards and professional standards for those providing family dispute resolution and other services earlier in the report (see Chapter 3, paragraphs 3.190 – 3.211).

8.12 Despite consultation by the Attorney-General's Department in late 2004/early 2005,[7] there appears to still be a high level of uncertainty about the FRCs and how they will operate. A number of other concerns were raised about the FRCs, based largely on the lack of information publicly available in regard to their location, the tendering process, staffing, provision of services to families in rural and remote areas, and the interaction of the FRCs with the rest of the family law system.

8.13 In regard to the quality issues in relation to the FRCs, Family Services Australia noted the following requirements:

- need to establish an industry driven approach to quality assurance...;
- an ongoing monitoring process needs to be identified and clear criteria established to take action in relation to providers that fail to meet quality assurance standards;
- ongoing research and evaluation of the new FRCs is critical;
- success of the first FRCs will be critical to the long term viability of the model and the promotion of positive public perception – it is critical to resource FRCs with

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

7 Attorney-General's Department, *Submission 46.3*, p.2.

appropriately skilled and experienced staff and to monitor the performance through national accreditation;

- priority must be given to existing FRSP providers with significant expertise in the area of working with separating parents in high conflict and are familiar with child protection issues in the selection process for FRCs; and
- best practice standards must be identified and implemented nationally...[8]

8.14 It is not clear what evaluation mechanisms will be put in place for the FRCs once they became operational. As one member of the Committee commented:

> ...what we are buying is the pig in the poke. This is a legislative framework that refers everybody through an unascertainable process where we are not certain whether there will be any uniformity. We know it will be tendered out to a number of different providers, some of which have different cultural values, different religious values and different social values. They operate in different circumstances and we do not know what the administrative arrangements will be. So we are basically buying the requirement to send people through this without having the slightest idea of whether or not we are going to be satisfied with the ultimate outcome. [9]

8.15 It may well be the case that as the first FRCs are established under Phase 1 of the roll-out that many of these concerns will be addressed. The Committee does note with concern, however, the following comment by the Attorney-General's Department:

> We will be rolling out 15 in this coming year to be up and running by the middle of next year, 25 in the following year and 25 in the year after that. Certainly we regard the first 15 as places to see how the specifications that we are currently developing actually work in practice. **We will be well into the next round of the selection process while the first results be coming in. We will not be stopping the roll out while we wait to see how those first ones operate**; we will be using them as demonstration models to help develop the

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

9 Hon Duncan Kerr SC MP, *Proof transcript of evidence,* 26 July 2005, p.74.

> different ways they might operate in rural and metropolitan areas.[10] (emphasis added)

8.16 On the basis of this approach, the evaluation of the first round of centres will not necessarily be able to inform the second round, and any problems that have arisen may be in danger of being repeated.

Services for rural and remote Australia

8.17 The geographic distribution of the FRCs was of concern to some witnesses, particularly as the exact location of the centres is still being determined.

8.18 Typical of the concerns was the comment by the Women's Legal Service of South Australia Inc:

> A common obstacle faced by regional, remote and rural communities is access to services — government or non-government. Are we to burden struggling families from remote or rural areas with few resources and on low or no income to access and where applicable compulsorily attend mainly metropolitan based FRC? Such impracticality will undoubtedly ensure that Indigenous and rural families fall through the cracks again.[11]

8.19 Catholic Welfare Australia also raised concerns about the level of service outside urban centres:

> ...we ask what rural and remote children are offered by these proposals. The current proposals are exclusively metrocentric—that is, they revolve around metropolitan and large regional centres with significant resources and a diversity of services on call. If our rural and remote children are to be assisted, we must develop programs and interventions that are designed specifically for their circumstances and resources appropriately. Metropolitan services adapted to fit into a remote or rural setting are unlikely to yield significant benefits.[12]

8.20 Family Services Australia also noted that:

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10 Ms Pidgeon, *Proof transcript of evidence,* 26 July 2005, p.62.

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

12 Mr Quinlan, *Proof transcript of evidence,* 25 July 2005, p.2.

> There would need to be a whole suite of services in rural and remote areas around family relationship centres for them to work because they cannot provide any long-term work with families. So if you are going to plonk a family relationship centre in Broome, for example, there are not any services that are going to be able to support a relationship centre. You have to put the services in as well, wherever you put them.[13]

8.21 The Attorney-General's Department responded to those concerns, indicating that it was looking at outreach services:

> Some of the centres will be located in regional centres, but because there will not be enough to be in every regional centre, we are looking at outreach services — about providing services in other parts of the region and providing specifically services to rural areas that may not have any real access at the moment. We would hope to have a range of different ways of doing that. There may be a combination of having a sort of travelling circuit or regular visits. But we could also, with the appropriate training and resources, use organisations in smaller towns and smaller regional areas to provide some of the services as agents. ...
>
> There are a range of strategies, not relying on telephone but using face-to-face services backed up by telephone communications technology — not relying on telecommunications technology. We heard very clearly that people want face-to-face services.[14]

8.22 In further evidence tendered to the Committee, the Attorney-General's Department indicated that the package of funding for the FRCs also included $10.6 million over four years specifically for outreach service to rural and Indigenous communities. The Department explained:

> This will enable visits to more geographically distant areas than would otherwise be possible. In addition, it is intended that flexible outreach service delivery models be developed, for example through partnership, brokerage or sub-contracting arrangements. Where possible and with appropriate training and resources, organisations in rural areas may be used as agents. Alternative means of

13 Ms Hannan, *Proof transcript of evidence*, 25 July 2005, p.65.

14 Ms Pidgeon and Mr Syme, *Proof transcript of evidence,* 26 July 2005, p.61.

> communication, such as telephone, video-conferencing or internet, will also [be] used. A specific Indigenous outreach strategy will be developed.[15]

8.23 The Committee notes the geographic distribution of the first 15 centres announced by the Attorney-General (see paragraph 8.9 above). The distribution of the remaining 50 is not publicly available. The Department did indicate the type of factors to be taken into account in deciding the locations of the centres.[16]

Service delivery

8.24 Although non-judicial dispute resolution is strongly welcomed in principle, there is a concern that the dispute resolution services will not be available to facilitate the new requirements. In order to be effective, the Family Relationships Centres must be equitable and accessible.

8.25 The government has committed to providing separating couples with an assessment consultation and thereafter the first three hours of dispute resolution sessions will be free. Some witnesses expressed the concern that in some cases three hours will not be sufficient to make any substantial progress in dispute resolution and that there should be sufficient flexibility so that the three hours is able to be increased in cases of need.[17]

8.26 Another issue is the availability of skilled workers to provide the highly skilled dispute resolution services required. The first concern is whether sufficiently qualified persons exist to fill the roles of family dispute resolution practitioners, and a resulting concern is the draining effect that the establishment of Family Relationship Centres might therefore have on the highly skilled staff at existing family services program providers.[18]

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15 Attorney-General's Department, *Submission 46.3*, p.3.

16 These were: population of the catchment area; proportion of divorced or separated people with children; proportion with oldest child under 5 years old; the number of blended families; separations in the last 6 months and 3 years; Child Support Agency clients; people receiving parenting payments; Domestic Violence Hotline referrals; the accessibility of the proposed FRCs to people elsewhere in the region; the location of courts and other government funded services. Attorney-General's Department, *Submission 46.3*, p.4.

17 See for example, Relationships Australia, *Submission 37*, p.5.

18 See for example, National Alternative Dispute Resolution Advisory Council, *Submission 60*, p.1; Catholic Welfare, *Proof transcript of evidence,* 25 July 2005, p.14.

8.27 The Lone Fathers' Association considered that the government should ensure that the organisations responsible for running the Family Relationship Centres are not gender or ideologically biased.[19]

Screening for abuse

8.28 The FCAC report recommended that one of the important roles of service providers at the new centres (and all family law service providers) would be to screen for issues of entrenched conflict, family violence, substance abuse, child abuse and to provide direct referral to the courts for urgent legal protection.[20]

8.29 The government's response was that the staff in the Family Relationship Centres will be trained to screen for a range of issues, including family violence and child abuse, and to make the appropriate referrals to other services or to courts. New accreditation standards for counsellors and dispute resolution practitioners will include skills in screening for such issues. [21]

8.30 The Attorney-General's Department submitted that screening for family violence and child abuse will be an important role for Family Relationship Centres, who will provide information and advice to victims of family violence. There is also considerable funding to specialist family violence services and additional contact services to protect parties from violence and abuse during contact.[22]

8.31 Family Services Australia (FSA) perceive the role of family dispute resolution practitioners as critical to establishing a system that can fast-track cases where it is in the best interests of children:

> The role of Family Dispute Resolution (FDR) Practitioners is critical in assisting the court to identify those cases where lengthy court waiting periods would endanger the health and well being of children and provision needs to be made for practitioners to be able to convey this information when required. It is critical that these practitioners are highly skilled, qualified and resourced in order to identify situations of family violence and determine a path of action that is in *the*

19 Lone Fathers Association of Australia, *Submission 48*, p.6.

20 FCAC report, recommendation 15.

21 Government response to FCAC report, p.13.

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

> *best interests of children*. These skills need to be linked to best practice guidelines and competency standards.[23]

8.32 FSA recommended that a system be developed to identify and manage priority cases in the best interests of children. The Committee supports this view and anticipates that in any evaluation of the FRCs this issue will be addressed.

Evaluation of the FRCs

8.33 In regard to assessing the success of the Family Relationship Centres, the Sole Parents' Union noted:

> [There is mention of]...an implementation review after 12 months but does not provide any indication as to how the success of the family relationship centres will be measured. We strongly believe that such measures and key performance indicators need to be developed prior to implementation....[24]

8.34 FSA, the largest national industry representative body for community based family and relationship sector organisations, also noted that 'an ongoing monitoring process needs to be identified and clear criteria established to take action in relation to providers that fail to meet quality assurance standards'.[25]

8.35 Catholic Welfare Australia supported the need for monitoring of the FRCs as they were rolled out:

> ...the timetable for the roll-out is less important than the adequate monitoring and development of those procedures and policies as they are rolled out. Realistically, a staged roll-out gives us some time to monitor and evaluate the impact of the family relationship centres and the way in which they operate and the sorts of commercial models that are used to develop them and so on. The staged roll-out approach gives us some time to do that, provided that ongoing monitoring is occurring as they are rolled out. ...
>
> I am not convinced yet that there are solid structures in place to assess, monitor, evaluate and consider the interface between the application of the bill and the broad raft of

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

24 Sole Parents' Union, *Submission 38*, attachment p.5.

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

> existing services that are on the ground at the moment. That is going to be an ongoing challenge for us...[26]

8.36 The Committee is also concerned as to whether there will be some mechanism for clients of the FRC to provide feedback on their operation, not just to the particular centre itself, but to an independent body, perhaps involved in accreditation of the centres.

8.37 Professor Moloney from La Trobe University, while strongly supportive of the FRCs, warned that the manner of their roll-out, their ease of identification and the publicity they receive will be crucial to their long term success. To assist in maximising the effectiveness of the FRCs, Professor Moloney suggested:

> ...the family relationship centres need at this stage to be pulled together by an individual in a senior chief executive officer position who can take senior executive responsibility for family relationship centres. ... I strongly urge the committee to think seriously about having a senior chief executive officer who can pull this together in a way that makes sense and that links in ... with the Family Court and the Federal Magistrates Court.[27]

8.38 In discussions with the Committee, Professor Moloney acknowledged that the CEO model might not be the most appropriate given that the services will be provided on a contract basis following an open tender process, with the Commonwealth not having line responsibility for the day to day operations of the centres. However, the Committee supports Professor Moloney's observation that 'some sort of overarching accountability around best practice' needs to be considered.[28]

Interaction with the rest of the family law network

8.39 Another issue related to the FRCs was the way in which they will interact with the courts and existing services.

8.40 Catholic Welfare Australia expressed the following concern:

> The messages given at meetings with the Departments are that the FRCs would be one of many places that families can enter the Family Law system. However, in the Explanatory

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

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

28 Professor Moloney, *Proof transcript of evidence*, 20 July 2005, p.31.

> Statement to the Bill, the emphasis appears to be that once rolled out, the 65 FRCs will be the 'single entry point' for the vast majority of cases, except for those dealing with family violence or abuse, 'serious disregard' for a contravention order, circumstances of urgency, and where a party is unable to participate effectively in family dispute resolution.[29]

8.41 Concern was expressed as to whether the FRCs will have appropriate structures in place to engage with broader family services providers. In oral evidence, the Executive Director of Catholic Welfare explained:

> It is uncertain precisely what model the 65 centres will adopt in the end—whether there will be a lead agency with funding to manage other agencies in a geographic area, a consortium of agencies or a national approach. There is a great deal of uncertainty about that. It has great potential to have a major and detrimental impact on the sector more broadly if that process is not managed appropriately and carefully.[30]

8.42 This concern was also expressed by Family Services Australia, who argued that the FRCs:

> ...need to be heavily connected and the services provided in those centres need to be provided by people who know and understand the work that is involved. They should not simply be administrative centres; they require some high-level intake and assessment services to enable that triage to happen appropriately.[31]

8.43 As with other implementation aspects of the FRCs, the Committee believes it will be extremely important for there to be effective monitoring of the FRCs as they are established, to meet these concerns.

Services for specific groups

8.44 Representatives from Aboriginal and Torres Strait Islander groups also raised with the Committee their concerns that the existing court and support facilities were not adequately resourced to deal with the needs of Aboriginal and Torres Strait Islander communities and this

29 Catholic Welfare Australia, *Submission 45*, p.2.

30 Mr Quinlan, *Proof transcript of evidence*, 25 July 2005, p.8.

31 Mr O'Hare, *Proof transcript of evidence,* 25 July 2005, pp.64-65.

needed to be addressed when the FRCs are tendered for and established. The Victorian Aboriginal Legal Service (VALS) argued:

> ...there should be Koori [*sic*] counsellors or mediators available to the Indigenous Australian community if people are to be directed to compulsory Family Dispute Resolution before they can go to Court. There should be funding for Koorie mediators and funding for Koorie organisations to help Indigenous Australians use the new system as a result of amendments to the Act. What exactly the Relationship Centres will look like is unclear at this stage.[32]

8.45 VALS went on to make a number of suggestions including the possibility of Koorie Outreach Workers, additional funding for Indigenous organisations to provide new services, and to ensure that the tendering process maximises the capacity of Indigenous organisations to participate in the tender process for the establishment of FRCs. [33]

Recommendation 56

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

Contact Centres

8.47 The Contact Orders Program is funded by the Australian Government to assist separating families in high conflict over contact arrangements. The FCAC report recommended the significant expansion of the contact orders program as part of measures to support shared parenting. [34]

8.48 In May 2005 the government announced 15 new services to be established under the Contact Orders Program, bringing the number of services around Australia to 20.[35] While this is to be commended, the provision of the additional services will be over a four year period, and will still not address the level of demand for such services.

32 Victorian Aboriginal Legal Service, *Submission 73*, p.3.

33 Victorian Aboriginal Legal Service, *Submission 73*, p.3.

34 FCAC report, recommendations 8, 10.

35 Press release, *Contact Orders Program expands to help families in crisis*, Attorney-General, dated 21 July 2005.

8.49 The Committee was shocked to discover that only those small number of contact services that are government funded are currently accredited and monitored. The majority of private services receive no federal funding and are not subject to monitoring or assessment. Standards therefore varied enormously, and there was an increased risk they were exposing their clients and staff to risk of violence on a daily basis.

8.50 Ms Barbara Hanson, Convenor of the Australian Children's Contact Services Association informed the Committee that when contact centres were first established about 10 years ago, 'ACCSA tried to encourage all contact centres to use ACCSA standards...There are lots of things that contact centres need to address. We actually have people who are doing this privately. All they are doing is ringing up and saying to solicitors that they are quite prepared to do it, which is quite scary'.[36]

8.51 Catholic Welfare Australia noted:

> We operate four child contact centres. ...we would support the accreditation of the centres. Their staff needs to be highly skilled. I think when they were conceived it was thought you could get child-care workers to do this role. We know that is not in the best interests of the children who pass through these centres, so we would endorse accreditation and high standards for these centres wholeheartedly.[37]

8.52 The Attorney-General's Department advised the Committee that a process to develop accreditation standards has commenced. The Department has funded the Community Services and Health Industry Skills Council 'to develop competency-based accreditation standards and a suite of qualifications for family counsellors, dispute resolution practitioners and workers in Children's Contact Centres'. The Department expects that the accreditation requirements will be introduced into the legislation in about 18 to 24 months.[38]

8.53 The Committee believes it is essential that accreditation and the associated training and resourcing of contact centres, both funded and non-funded, be a high priority for the government.

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36 Ms Barbara Hanson, *Proof transcript of evidence*, 20 July 2005, p.74.

37 Mrs Roots, *Proof transcript of evidence*, 25 July 2005, p.11.

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

Recommendation 57

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

Public education and awareness

8.55 The FCAC report recommended that in the lead up to the implementation of its recommendation there should be a public awareness campaign to inform the community about the reform and its benefits.[39] In its response the government agreed that there needed to be a community education campaign to accompany the family law reforms. The 2005-06 Budget contained an appropriation of $5.7 million for a community education campaign. The government noted 'Family Relationship Centres will also have an important role in promoting and educating the community on positive shared parenting'.[40]

8.56 A number of submissions commented on the need to improve the community's understanding of the operations of the family law system and the proposed new changes. For example, the Commonwealth Department of Family and Community Services recommended that:

> ... a user-friendly guide to the new Family Law Act be developed for a broad community education campaign and for reference for separated parents. The guide needs to be written in a plain English style, providing explanation and examples of the key concepts such as 'meaningful involvement', 'the best interests of children', 'abuse or family violence or other such behaviour'.[41]

8.57 Relationships Australia commented that at the moment:

> ...there is a very negative attitude to divorce. In fact there is even a negative attitude to seeking parenting advice...
>
> Combined with community education campaigns that promote positive family relationships they should highlight

39 FCAC report, recommendations 6 and 22.

40 Government response to FCAC report, p.7.

41 Commonwealth Department of Family and Community Services, *Submission 59*, p.9.

> to people that they will need help and that it is acceptable to seek assistance and that this is beneficial rather than shameful.[42]

8.58 The National Network of Indigenous Women's Legal Services reinforced the importance of educational material and information from the FRCs being culturally appropriate.[43]

8.59 The Committee believes that the quality of the public education campaign and the ongoing information provided to clients of the FRCs will be crucial in determining the public acceptance of the centres and the new model for family dispute resolution. The Committee notes, however, that the funding allocated for a national education campaign on the new family law system is only for financial years 2005-06 and 2006-07.[44] This is of concern to the Committee, particularly as only the first phase of compulsory dispute resolution will be in place by June 2007. The Committee believes that the public education campaign, provided that it focuses on information explaining government policies, programs and services in the area of family law, will need to be extended beyond the two years currently allocated in the Budget.

Recommendation 58

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

Case law

8.61 The submission from the Shared Parenting Council of Australia raised the question of the role of case law and precedent in outcomes for cases in the family law courts. The SPCA recommended that

> ...the legislation includes a clear statement to override existing Case Law precedent, which effectively could prohibit

42 Ms Hollonds, *Proof transcript of evidence*, 21 July 2005, p.30.

43 National Network of Indigenous Women's Legal Services, *Proof transcript of evidence,* 21 July 2005, pp 37-40.

44 *Portfolio Budget Statement 2005-06*, Attorney-General's Department, p.28.

> an equal shared parenting order in cases where, for example, the parties have been or are in legal conflict.[45]

8.62 In evidence before the Committee representatives of the SPCA expanded on the reasons for this recommendation:

> Where that act has caused a difficulty is in the case law precedent that has been developed over 30 years. The point we are making in our submission...is that, even though there are new provisions and amendments made for providing for the government policy, I have not yet seen and have been unable to identify a provision in there that legislates away the case law that prohibits this occurring.[46]

8.63 The SPCA subsequently provided some examples of where they felt case law had adversely affected decision making in the courts.[47]

8.64 The Committee raised this matter with the Chief Justice of the Family Court, who responded in the following terms:

> I have to say that I do not really agree with that. Perhaps I can explain it in this way: I do not think that applies in children's proceedings. There are very few cases that have precedent value. ... From what I have read in the press and so forth, there seems to be a view that there is some inherent line, if you like, that judges take based on precedent. In my experience, that is not the case. ...
>
> You do not see cases relied on for precedent value...My feeling is that people do not agree with the court's interpretation—that is, the individual judge's interpretation—of the best interests of the child. This is where the criticism comes from.[48]

8.65 In commenting on the issue of whether the law should be more codified and less reliant on case law, Mrs Davies from the Family Law Council observed:

> My concern in relation to that is the fact that it is, as we know, a very changing environment and case law is able to respond to different circumstances, whereas the legislation may not be reviewed at such a regular interval. It provides guidance for

45 Shared Parenting Council of Australia, *Submission 70*, p.5.

46 Mr Greene, *Proof transcript of evidence,* 25 July 2005, p.37.

47 Shared Parenting Council of Australia, *Submission 70.1*.

48 Chief Justice Bryant, *Proof transcript of evidence,* 26 July 2005, pp.7-10.

> people who were providing information and advice, whether they are lawyers, social scientists or other practitioners, as to the way the law in being implemented at any particular time.
>
> ...
>
> My understanding is that if there is legislative change subsequent to case law, it is the legislative change that takes precedence.[49]

8.66 In a later submission to the Committee, the FLC argued strongly against the removal of case law:

> A possible consequence of removal of case law would be increased litigation as parties litigate issues that are currently considered to be settled.
>
> Therefore the Family Law Council would not support an amendment that removed case law and notes that it would be likely to go against the government's objective of 'encouraging and assisting parents to reach agreements on parenting arrangements after separation outside of the court system where appropriate'.[50]

8.67 The Chief Justice referred to her policy of having as many family law cases as possible reported on the internet and elsewhere, with identifying details removed.

> I think that the value in a single decision is that people can read about a decision and then say: 'This is like my case' or 'This isn't like my case.' ...If people had more access to cases and could read more of them, then they would get a feel for the cases... But when the best interests of the child are paramount, it means that every case is decided on the facts of that case. That is the very advantage of the system that we have. The other side is that it does not allow for a formulaic response to individual cases. For my part, the answer is to get as many decisions as possible out there that people can have access to and can see.[51]

8.68 The Committee supports the Family Court's attempts to better publicise the decisions in cases as a way of assisting members of the

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49 Mrs Nicola Davies, *Proof transcript of evidence,* 25 July 2005, p.91.

50 Family Law Council *Submission 33.1*, p.2.

51 Chief Justice Bryant, *Proof transcript of evidence*, 26 July 2005, pp.6-7.

community to understand the way in which the legislation is applied. In regard to the impact of case law, the Committee notes the range of opinions expressed, summarised as follows: the SPCA arguing that it had an adverse impact on decision-making in the courts; the Family Court asserting that there really wasn't any useful case law as such, with decisions decided on the individual facts; and the Family Law Council indicating that case law played a useful role in decision-making. The Committee notes that, if the views of the SPCA are correct, then existing case law had the potential to frustrate the policy innovations proposed by the government in this Bill. The Committee believes that the impact of case law should be examined as part of the review of the implementation of this legislation, as recommended at Recommendation 55 above.

Recommendation 59

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

The Hon Peter Slipper MP
Chairman

Dissenting report—Ms Nicola Roxon MP

Summary of dissenting report

When the draft Bill was first released I put out a statement in my capacity as the Shadow Attorney-General outlining the five principles against which the Bill should be measured.

Those principles were that:

1. the 'best interests of the child' remain the paramount consideration in resolving all parenting disputes;
2. the family law system is able to ensure the safety of children and parents from violence and abuse;
3. the system is fair to both mothers and fathers;
4. disputes can be dealt with according to the particular needs of each case, rather than adopting simplistic one-size-fits-all solutions; and
5. without compromising the above, that the system is responsive, accessible and affordable.

Unfortunately, participation in this Committee has not assured me that the changes proposed in the draft Bill are consistent with these principles.

There are so many changes proposed to the 'best interests of the child test' that it is hard to see if it will remain paramount—and paramount over the rights and desires of any parent.

My most serious concerns relate to the second and third principles.

I am certain that this draft Bill is missing opportunities to improve the responsiveness of the family law system to family violence and abuse, and I fear it could in fact make matters worse.

I also worry that, in attempting to address the bad outcomes that have been experienced by some non-resident parents in the family law system, the

Government has not looked at ways to address the difficulties experienced by many resident parents. In fact, some of the changes could add to these problems.

It is about time the parenting debate was broadened to look at the wider needs of families in meeting the demands of caring for their children—either as an intact family, or after separation. My report expands upon the urgent need to broaden the debate about shared parenting to embrace a concept involves much more than merely changes to the family law system.

As far as the fourth and fifth principles are concerned, meeting them will depend on the effectiveness of the Family Relationship Centre roll-out. Although the FRC plan is attractive, it is an ambitious project. It is inevitable that it will face implementation problems in areas such as choice of locations, accreditation of staff, development of protocols for screening violence cases and even basic physical security. None of these problems are insurmountable, but they will rely on the Government's careful management.

The Committee did not receive assurances that the Government even recognises these potential problems, let alone that it had developed strategies to identify and solve them. It now seems that the Government intends to rort the FRC roll out for party-political purposes, which totally undermines the hope for careful and responsible implementation of the program for the benefit of families.

Given the following, I dissent from the Report and reserve my position on the draft Bill.

Background

As a parliamentarian, I strongly support the committee system of the Parliament and the opportunity it provides to examine complex issues and reach agreement across party groups. Unfortunately, the value of committee work is undermined if, as in this case, unrealistic timeframes are set by the Government.

I accept that this Report reflects a hard-working committee's genuine attempt to make constructive recommendations to government. A number of members put in particular effort to make the Report a useful one, within the constraints of time and the terms of reference. I have contributed to the Report in this light.

In addition to the unreasonable timeframe, the Committee's ability to analyse the Bill was limited by the Government's failure to answer even the most basic questions about their implementation plans. The success of these changes depends on the proper and adequate roll out the Family Relationship Centres.

Two days before this Committee was due to report the reason for the Government's secrecy on implementation became clear—they are treating implementation as a party-political issue, not a public policy issue. A new committee of only Coalition members, most of whom hold marginal seats, has now been set up to oversee the development of selection and performance criteria for the Centres. This is totally inappropriate and a shocking conflict of interest. It is a sure sign that pork-barrelling is to be given a higher priority than genuine family needs.

The Attorney-General has further insulted this Committee by already producing and distributing material promoting changes proposed in the draft Bill as if a supportive Committee report and Parliamentary approval for his Bill was a foregone conclusion. It is a contemptuous way to treat a Committee and will particularly embarrass Government members who, I know, took this task seriously.

In these circumstances, I must express my reservations about the Government's Bill and its handling of the family law reform agenda.

As the Shadow Attorney-General, I expressly reserve my right in the other parliamentary and public forums to revisit and, perhaps reject, both a range of provisions in the draft Bill and the Committee recommendations.

Introduction

The draft Bill under consideration is extremely complex, heavily contested and covers an important area of law affecting many thousands of families.

I am particularly concerned about how families blighted by violence will be affected by the cumulative impact of changes proposed in the draft Bill and in a number of the Committee's Recommendations. Throughout this process, constant assertions have been made about the lack of research and evidence surrounding the level of violence in the community. But the Government persists in ignoring research by its own funded research bodies—such as Partnerships Against Domestic Violence and the Australian Family and Domestic Violence Clearinghouse—and then takes steps that run counter to the research that does exist.

I am increasingly concerned that the developing concept of shared parenting is being created in a contextual vacuum. The proposals to insert this concept into the law are made with a mind to some of the hardest cases. But nothing is being done to help promote the concept before family breakdown. Further, in the manner proposed in the draft Bill and in some cases made worse by the Committee's recommendations, I am concerned that the idea of shared parenting responsibility has returned to a debate about time rather than decision making, and appears to

be developing as a one-way street, with rights for non-resident parents and responsibilities for resident parents. I discuss this in more detail below.

There are also significant risks that the draft Bill would increase, not decrease litigation. Importantly, many changes in the Bill will only be effective, and work fairly, if other government plans are fully and properly implemented. It is frustrating to be asked to comment on the Bill and the legal requirements that it will create without any assurance that necessary preconditions, such as proper service delivery, will be adequately delivered.

In this dissenting report I set out my concerns relating to:

- the timeframe the Committee had to consider the exposure draft
- the narrowness of the debate about shared parenting and its implications
- family violence, and
- some reservations about specific Committee recommendations.

Timeframe

The inadequacy of this Report, and the need for my dissenting report, stem largely from the Government's unrealistic timing demands.

The Government took eighteen months from the tabling of the first report, *Every Picture Tells a Story*, to draft and release the *Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005.* On referring the exposure draft here, it demanded that the Committee call for submissions, hold public hearings and draft a report in just seven weeks.

This extremely short period made it very hard for interested organisations and community members to put in thoughtful and detailed submissions. It made it next to impossible for Committee members to be thoroughly prepared and briefed for each hearing. Hearing dates were set at such short notice that not all members could attend. Even with the best will in the world and hours of hard work from the secretariat, it is unavoidable that proper attention has not been given to the detail of all submissions—some of which were still being received as we were trying to draft the recommendations.

Just as importantly, there has not been enough time to extensively debate and carefully consider each of the recommendations and properly explore their impact.

While some recommendations deal with implementation issues and other matters not in the draft Bill itself, most of them reflect our collective attempts to help redraft and shape complex provisions of the *Family Law Act*. The provisions are often highly technical. Nonetheless, in practice their consequences could be vast.

There has been no opportunity to seek advice on the possible unintended consequences of our recommendations.

In some instances, while I agree with the thrust of the recommendations, I am conscious that our proposals were not put to us in submissions and that others have not had the opportunity to address them. Good examples of this are Recommendation 9—which would insert an objective element into the fear of the apprehension of violence in the definition of family violence—and Recommendation 36—which seeks to provide a principle that proceedings will be conducted in a way that provides a safeguard for children in violent families using the less adversarial process proposed in the Bill. In these circumstances, although our recommendations seem sensible or attractive, they may have unforeseen consequences. Further discussion and public consultation might highlight problems or benefits in these approaches that Committee members did not consider.

These complaints about the rushed and incomplete processes would have been enough to justify my reservations. Nonetheless, I also have some serious substantive concerns about the Bill and the Committee's Report which I detail below.

The broader shared parenting debate

I strongly support the social change in recent decades that has seen more fathers play an active and substantial role in the parenting of their children. In my view, more can and should be done to encourage genuinely shared parenting for the benefit of children, as well as mums and dads. Unfortunately, most of the public debate has been about family law and tends to focus on the impact of this phenomenon on separated families. In fact, the issue is far more complex and needs more support and attention generally, including in intact families. Constructive shared parenting arrangements when a family is intact no doubt make it easier to share parenting if the family separates. I also think it is not too much to hope that better shared parenting in intact families would reduce some of the stressors that cause family breakdown.

To the frustration of many mums and dads, the Howard Government has given very little attention to removing the barriers and constraints on shared parenting at the "front end". Among other things, these barriers include the lack of family friendly working conditions for both men and women and tax incentives that only apply if one parent ceases work, not if both work part-time. If the Government is serious about shared parenting—for both intact and separated families— there is much more that can be done outside family law, for example in workplaces or tax reform. Parental leave and carers leave, for example, need to be more broadly available. The Government needs to ensure that family friendly options that do

exist, like those in the recent AIRC decision, survive the proposed industrial relations reforms. I suspect that more parents consider work to be the main obstacle to fulfilling their parenting responsibilities, rather than unco-operative ex-partners, but the Government has taken no action, or has plans to makes things worse, in these other areas.

The Government's attention has focussed only on changing the law at the "back end", when relationships have already fallen apart. This has skewed the debate so that the broad concept of shared parenting has narrowed to be almost exclusively concerned with non-resident parents who want more responsibility for their children after separation. These are legitimate desires and there are important issues to be addressed. But shared parenting should be a broader concept. For example, the flip-side of this problem should also be considered. What do we do to assist those parents who struggle to get their ex-partners to take more responsibility for their children? The Bill ignores this issue altogether.

Shared parenting is to be supported, but it has to be a two way street. The Government seems to assume that the only impediment to shared parenting is difficult residential parents. In doing so, they have ignored the many residential parents who would like to see their ex-partners take a more active role in parenting.

In fact, shared parental responsibility has become a bit of a misnomer as the debate seems more focussed on 'rights' than on 'responsibilities'. At its worst, too narrow a view of shared parenting allows non-resident parents to pick and choose the responsibilities they want to exercise in their relationships with their children. They might, for example, consistently fail to turn up for their allotted contact, but nonetheless stand on their right to decide what school the child attends. No doubt most non-resident parents have a more reasonable attitude to shared parenting. The Bill, however, only looks at the issue from the perspective of non-resident parents dealing with difficult resident parents, but fails to consider the opposite scenario.

Because of this, the Committee's recommendations to encourage the genuine sharing of responsibility for children are very limited. There is an uncomfortable silence in our Report over the obligations all parents should have to a child. Piece-by-piece many of the changes are fine, but when they are put together it is clear that the Bill fails to present a whole or balanced picture that meets the needs of the varied family structures within our community.

I have reservations that these changes may increasingly mean that the resident parent will have their lives totally constrained by the demand for all manner of matters to be consented to by their ex-partner, while there is no comparable constraint on the non-resident partner. The result is a reform full of rights for non-residential parents, but short on responsibilities.

If we take the example of a mother with primary residence of the child, the law gives her no way of requiring more involvement from the father. Yet these changes would give the non-resident father the right to demand full consultation (and possibly the right of veto) over where she lives and who she lives with. In trying to address the legitimate interests of those fathers who want more involvement with their children, we may be creating huge problems for those separated families where the father refuses to take more responsibility for the child but wants to continue to exercise ongoing control over the mother's life.

It goes totally unacknowledged that many residential parents would like their ex-partners to take on more responsibility and care for their children. None of the changes in the draft Bill or in the Committee Report support, encourage or require a non-resident parent to do so.

A good example is the troublesome debate over where a parent resides. The proposed Bill would make it more difficult for a resident parent to freely choose where they live with the child, but there is no complementary obligation on a non-resident parent to reside in a convenient location to ensure contact can easily continue.

The problem is also evident in the changes proposed to the compliance regime (see, for example, discussion at 5.14 and 5.62). These are all focussed on penalties for the parent who denies another contact but Bill and Committee have given no consideration, for example, to providing recourse against a non-resident parent who persistently fails to turn up for contact.

The nub of my concern is that the Government's approach to family law, and to some extent the tone of the Committee's Report, is disproportionately concerned with the plight of non-resident parents and considers shared responsibility as a one way street. Although I have no doubt that some non-resident parents have suffered unjust outcomes through the family law system, and it is right that we should consider solutions that would iron out these problems, it is erroneous to assume that non-resident parents have been the only ones to suffer bad outcomes. The danger of this assumption is that we design lop-sided solutions, rather than designing a system that is fair to both mums and dads.

There is also danger in seeing family law reform as a tug-of-war between resident and non-resident parents. We need to avoid a mindset that assumes that solutions to problems faced by one group are met by imposing more rules, restrictions and penalties on the other. If this happens we lose sight of the paramount objective of family law—to ensure the best interests of children are met.

Violence (in a vacuum) – and allegations of violence

I am similarly uncomfortable that we have left unaddressed the very real concerns over the capacity of the Family Law Act and the Family Court to help protect people from family violence. Some of the changes recommended in this Report do emphasise the need to put higher priority on safety and these proposals are very welcome. Other changes need State and Territory co-operation and are rightly beyond the scope of this inquiry.

But there is an uneasy implication, from the extensive attention given to the issue in the Bill and the Report, that false allegations of violence are our primary concern. My main concern is to protect people from harm and to ensure any changes we recommend improve the capacity of the law to do this, or at the very least do not make the situation worse.

I cannot share the conclusions of the Committee that the proposed changes do not increase the risk of family violence or abuse (see para 2.95 shared parenting; 2.204 friendly parent provision and 2.210 violence orders). We simply have insufficient evidence to reach these conclusions.

In fact, I believe there is substantial risk that the Bill prioritises meaningful relationships with parents over safety of children. The Committee's conclusions that the Bill is adequate in these areas are made, in a number of instances, on the basis of scant or no evidence at all.

I am extremely conscious that the Committee did not draw on any expert advice about violence (even from the Commonwealth-funded Australian Family and Domestic Violence Clearinghouse) and relied only on the submissions put to us. Often these submissions were in direct conflict.

The Committee sensibly rejected the urgings of some submissions to narrow the definition of violence to 'serious' violence. This would have sent the terrible message that some violence in families is acceptable when it simply is not. We must be totally clear about this.

The Committee does, however, recommend a change to the definition of family violence which adds an objective component to the apprehension of fear (Paras 2.110 – 2.120 Recommendation 9). Whilst I understand the argument for changing the definition (and it is vastly preferably to other submissions) it was not a change proposed in the Bill and we have not had the benefit of the community's view on this question. It would be a major change and should not be undertaken without further consultation and expert advice, particularly on the ways in which fear and manipulation can be used in violent relationships. I am not convinced, as the Committee is at para 2.109, that the existing 'reasonable grounds' test in Schedule 1 is inadequate and needs this further change.

The Government has missed this opportunity to use the reform process as an opportunity to consider new ways to improve the family law system's ability to deal with family violence. For example, I would urge them to consider an expansion of the definition of violence to include those situations where a child witnesses or is exposed to violence. The Law Council and Queensland Law Society made submissions to this effect (para 2.113). This would also be consistent with Recommendation 18.

I want to clearly state for the record that I do not accept that false allegations are made in large numbers of cases, and the evidence before us made clear that it was indeed rare. I believe there is too much focus by the Government and in the Report on a very small number of cases and too little attention is given to the handling of matters where there is violence.

I understand the devastation and injustice caused by false allegations and see the argument for introducing protections to make sure such allegations are not made lightly or maliciously. But we have a competing challenge to ensure we do not make it harder for people to disclose violence. Under-reporting is already an established and recognised problem and I would not wish to support any change that might provide a further disincentive to people to raise their legitimate fears or concerns about violence or abuse.

In determining the best interests of the child, the importance that the Court be informed of concerns about violence or abuse cannot be understated.

Concerns relating to specific recommendations

In addition to these major concerns, I also want to address a number of other specific matters that arise in the Report.

Chapter 2 recommendations:

The original FCAC Report rejected the presumption of 50/50 joint custody but proposed 'equal shared parenting responsibility'—a concept that embraced shared decision-making affecting the child, not time. The Government response, and the proposed Bill, use the term 'joint parental responsibility'. Recommendation 1 wants to return to the use of the term 'equal'. I have reservations about whether this term has a different meaning and whether, along with other changes recommended by the Committee, this might imply a shift of emphasis to time rather than responsibility. The Government should seek and provide advice on the meaning of both terms before adopting this Recommendation.

I am also concerned that, if adopted, the provisions will create unrealistic expectations and feed an incorrect assumption that the Committee embraces a

presumption of equal time with both parents. Recommendation 1, in combination with a number of other recommendations (for example, 3 and 4) which remove references to 'time' and 'substantial time', emphasise my fear that the Committee might be recommending changes that return to the presumption of equal time spent with each parent by accident (or stealth), even though this was rejected by the original committee and we were instructed not to reopen this debate in our terms of reference.

Unlike the rest of the Committee, I remain concerned that the new s 65DAC (and definition in s 60D(1)) will increase litigation over which "major long term issues" demand consultation and agreement between the parties. In essence, this leaves every resident parent at risk of an ex-spouse controlling or contesting a large range of issues affecting their parenting and living arrangements. Although the Report discussion acknowledges this risk, and deals with one such risk by recommending the addition of a note that excludes decisions parents make about new partners, I do not believe this is adequate. We received advice on a similar provision that a note would have no legal effect. I am of the view that the definition in s 60D(1)(e) should be limited to questions of location, as originally recommended by the FCAC and agreed by the Government. Even if my view is accepted I am concerned at the 'one way street' model of shared parenting this sets up, as discussed above in more general terms.

In this context, Recommendation 40 is also problematic. It leaves open the door to parties bringing compliance applications for minor or trivial matters and has the scope to exacerbate the amount of litigation in this area, not reduce it. I prefer the Government's position to leave this unchanged rather than the Committee recommendation.

As I have already mentioned, I fear the Committee was unduly concerned about false allegations of violence despite the evidence of many witnesses (and particularly the court) that they are rare. I do not support the call for more funding to be provided to prosecute perjury in family law matters (para 2.126). I disagree with the Committee's focus and conclusions on false allegations of violence and prefer the Government's views in the exposure draft Bill. Para 2.128 explains the Government's reason for not proceeding with a costs measure was that it might discourage people raising genuine instances of violence and abuse. I share this concern and cannot support Recommendation 10—although I acknowledge it is an attempt to grapple with a particularly difficult problem.

In stark contrast to this, the Committee does not recommend changes that would acknowledge the circumstances in which withholding contact might be justified on safety grounds (see argument at 5.62) and declines to make a recommendation that penalties should be available if a contravention application is found to be without substance or made for the purpose of harassment.

Paras 2.175-2.176 and 2.180-2.191 discuss the 'best interest of the child test'. I support safety being given priority over all other matters, but I do not support the two-tiered approach proposed in the Bill and persuasively argued against by the Court (who, after all, have to apply the test). The 'best interests of the child test' is, correctly, the central and paramount principle in family law. If it is to be a workable test it should be as clear and unambiguous as possible. I share the fears of the Law Council and Chief Justice Bryant that the two-tiered test might unduly complicate the test.

Chapter 3 and 8

The Government's plan to resolve more matters out of court is a good one, but requires proper implementation and funding of programs not covered by the *Family Law Act* or the draft Bill being considered. To some extent we are putting the cart before the horse to approve changes to the law and simply trust that the Government delivers on the service side.

The critical issue here is to ensure that the Family Relationship Centre program is rolled out in time, but with due consideration to the many implementation problems it can be expected to face.

Even the Department of Family and Community Services expresses concern about the ambitious timetable for introducing compulsory dispute resolution reliant on a full (and successful) roll out of the FRCs. There is enormous uncertainty about how FRCs will be funded, tendered, staffed and managed (see paras 8.8-8.16). The Government has been quite contemptuous of the Committee in this regard, providing virtually no information to the Committee on the details.

Worryingly, key issues—such as accreditation of FRCs and protocols for screening for violence to ensure inappropriate matters are not forced into conciliation—are not dealt with in the draft Bill and only fleetingly in the Report. We were told accreditation standards for FRCs are to be developed but nothing has been given to the Committee (see paras 3.5, 3.190-3.211). Recommendation 32 calls for proper accreditation for FRCs and I urge the Government to work with the industry and get proper accreditation systems in place prior to the roll out commencing.

In fact, on the very last day of the Committee considering this Bill, MPs received a letter advising that the Attorney has set up a Government backbench committee to oversee selection and performance criteria of FRCs. Such a partisan approach is bizarre and not a good foundation for overseeing the establishment and quality control of these important services. Quality control and protocols for screening for violence are hardly the sort of matters that should be left to the Coalition backbench to determine.

The provision of three hours free consultations is assumed, but nothing in the draft Bill refers to this or makes exceptions to compulsory attendance if free services are not available. Recommendation 21 is one option that might better

address these concerns than the provision in the draft Bill, and has the virtue of making the process clearer. However, as with other recommendations, it has not been discussed more broadly. These are not minor matters and should be dealt with before compulsory dispute resolution is required.

If screening is not adequately conducted, families at risk will be forced into inappropriate face-to-face meetings. This is central to whether this system can work and it is a shame that the Committee makes no recommendation on it (see para 8.28-8.32). If the exceptions do not work clearly, an additional layer of litigation will blossom (para 3.46). It is inadequate that the Committee cannot form a conclusion about how, under the Bill, the Court would deal with matters involving violence that come before it (see para 3.30). Other changes recommended by the Committee that go to this point may not be accepted by Government. If there is no confidence in how the exception will work, the compulsory process should not be supported.

I note, also, that the Government did not accept the original FCAC recommendation to include "entrenched conflict" as an exemption to compulsory dispute resolution, but it should have and it would be desirable if it revisited this issue.

We should not make it a legal requirement to attend dispute resolution before a system is in place that people can use. Recommendation 25 attempts to address this issue by linking the commencement provisions to the number of services set up. This is an improvement on the draft Bill, but may still create the practical problem that users of the system may not know when each phase is in place. Further, establishment of the centres might not be enough to lay the groundwork for Phases 2 and 3. The inevitable teething problems that FRCs will face might also be grounds for delaying the implementation of the remaining phases. It would be preferable to only pass laws about Phase 1 at this stage and amend the Act as successful piloting occurs and the roll out is completed.

Chapter 4

While the shift to a less adversarial approach in family law matters involving children is generally supported, including by me, the Committee expresses reservations about a number of aspects of the change and how it will work. Many of these issues would be better answered if the Government waited until the review of the Children's Cases Pilot was complete. The Government has dragged its feet on so many other matters, it seems odd to then rush these significant changes through before proper results to come in from the pilot program.

In Recommendation 37 the Committee proposes a narrowing of the exceptions to cases in "exceptional circumstances". I'm not convinced this is warranted.

Advertising the changes – Recommendation 58

The draft Bill proposes significant changes to the operation of the family law system and there can be no doubt that informing people of the changes is a pre-requisite to making them work.

However, I am very wary of giving the Government *carte blanche* to determine the cost, content and style of the advertising campaign. The Howard Government has a track record of promoting new initiatives in a partisan manner, more concerned to the present the Coalition in a positive light than provide useful information to citizens.

The Government continues to refuse to implement proper guidelines for the expenditure of taxpayers' money on Government advertising campaigns.

Given this record, without seeing content of advertising material, I cannot in good conscience make a recommendation which urges further expenditure of tax-payers' money on advertisements that neither I, nor the Parliament, has seen or has control over.

Ms Nicola Roxon MP

Statement—the Hon Duncan Kerr SC MP, the Hon Roger Price MP, and Mr John Murphy MP

We do not dissent from the Report's recommendations. We believe that the Committee's recommendations, if adopted, will much improve the Bill and we want to express our appreciation for the work of the Chair and the Secretariat, who, in the very short time available, worked so well to assist members find much common ground.

However we do want to make two additional and critical observations.

First we want to strongly condemn the processes announced by the government for overseeing the selection criteria and performance criteria for the proposed Family Relationships Centres. These decisions have been given to a group of coalition marginal seat holders. We regard this as wrong in principle and as undermining our Committee's efforts.

Our Committee (as did the Committee of the last Parliament which produced the *Every picture tells a story* Report) worked hard to avoid partisan divisions. In the same way decisions on the location and performance criteria of these Centres, whose role will be central to the success or failure of the new scheme, should be made on rational, expert and non party political grounds, and, if parliamentary involvement is desired, by a bipartisan group, not by a committee of coalition marginal seat holders.

In the run up to the next federal election any partisan process is likely to see the centres being located where political advantages exists, rather than where they are most needed. Everyone's aim should be to remove such decisions, in such a heated and contested area, from the taint of improper influences. Instead the government, by appointing coalition marginal seat members to make these decisions, has opened the door to abuse. This decision should not stand.

Second, without dissenting from any of the recommendations made in the Report we want to express at least some similar reservations to those of our colleague, Nicola Roxon MP who has drawn our attention to the need to put some balance

back into the often heard (but not always justified) arguments and complaints that are made about bias in the family law area.

In particular, without elevating our concerns to the level of a dissent, we would join with her in noting that while the Committee's recommendations, if adopted, will provide increased protection when disputes arise for the legitimate interests of those parents who want to share care for their children our Report, and the Bill, leaves entirely unaddressed the even more difficult question of whether there should be any remedies available in the Family Court to assist a parent left with sole care of a child when the other parent walks away--expressing no interest in sharing the care of the child-- and not accepting any responsibility other than that forced on them by making compulsory child support payments.

Hon Duncan Kerr SC MP

Hon Roger Price MP

Mr John Murphy MP

A

Appendix A : List of Submissions

Submission	Individual/organisation
1.	Mr Mark Millard
2.	Name withheld
3.	Name withheld
4.	Name withheld
5.	Mr Paul Bennet
6.	Confidential
7.	Catholic Womens' League Tas Inc
8.	National Abuse Free Contact Campaign
9.	Mr Ron Baker
10.	Richard Hillman Foundation
11.	Male Family Violence Prevention Association Inc
12	Name withheld
13.	Name withheld
14.	Name withheld
15.	Women's Electoral Lobby Cairns
16.	SPARK Resource Centre Inc

17. Family Mediation Centre

18. Dr David Hudson

19. Name withheld

20. National Council of Single Mothers and their Children Inc

20.1 National Council of Single Mothers and their Children Inc (supplementary)

21. National Coalition of Mothers Against Child Abuse

22. NSW Women's Refuge Resource Centre

23. National Network of Women's Legal Services

23.1 National Network of Women's Legal Services (supplementary)

24. National Legal Aid

25. Dr Lesley Laing

26. Country Women's Association of New South Wales

27. Domestic Violence & Incest Resource Centre

28. Law Society of South Australia

29. Professor Belinda Fehlberg

30. Queensland Law Society

31. Federation of Community Legal Centres (Vic) Inc

32. Ms Melissa Ballantyne

33. Family Law Council

33.1 Family Law Council (supplementary)

34. Name withheld

35. Women's House Shelta

36. South Australian Council of Community Legal Services Inc

37. Relationships Australia

37.1 Relationships Australia (supplementary)

38. Sole Parents' Union

39. Centre for Child & Family Development

40.	Men's Confraternity
41.	Dads in Distress
42.	Ms Rachael Field
43.	Manly-Warringah Women's Resource Centre Ltd
44.	Name withheld
45.	Catholic Welfare Australia
45.1	Catholic Welfare Australia (supplementary)
46.	Commonwealth Attorney-General's Department
46.1	Commonwealth Attorney-General's Department (supplementary)
46.2	Commonwealth Attorney-General's Department (supplementary)
46.3	Commonwealth Attorney-General's Department (supplementary)
47	Law Council of Australia
47.1	Law Council of Australia (supplementary)
48.	Lone Fathers Association (Australia) Inc
48.1	Lone Fathers Association (Australia) Inc (supplementary)
49.	Law Society Northern Territory
50.	Name withheld
51.	Department of the Premier and Cabinet (WA)
52.	Families Australia
53.	Family Court of Australia
53.1	Family Court of Australia (supplementary)
54.	Aboriginal Legal Service of Western Australia Inc
55.	Mr Simon Hunt
56.	NSW Young Lawyers
57.	Name withheld
58.	Mr John W Gaal and Mr Philip B McNaughton (the Brethren)

59.	Commonwealth Department of Family and Community Services
60.	National Alternative Dispute Resolution Advisory Council
61.	Womens' Legal Service of South Australia Inc
62.	Far North Fathers
62.1	Far North Fathers (supplementary)
63.	National Association of Community Legal Centres
64.	Australian Children's Contact Services Association
65.	Ms Natalie Greenham
66.	Mrs Rona Joyner
67	National Network of Indigenous Women's Legal Services
68.	Name withheld
68.1	Name withheld
69.	Festival of Light
70.	Shared Parenting Council of Australia
70.1	Confidential (supplementary)
71.	Non Custodial Parents Party
72.	The OzyDads Network
73.	Victorian Aboriginal Legal Service Co-operative Ltd
74.	Men's Rights Agency
75.	Confidential
76.	NT Lone Fathers Association
77	Fatherhood Foundation
78	Family Services Australia
79	Blue Mountains Community Legal Centre
80	Dads on the Air
81	Law Society of New South Wales
82	Women's Legal Services NSW

83	Mr Roger Debois (Planetary Alliance for Fathers in Exile)
84.	NSW Commission for Children and Young People
85.	Women's Legal Service Brisbane
85.1	Confidential (supplementary)
86.	Dr Sarah Middleton
87.	NSW Attorney-General
88	Ms Zoe Rathus

B

Appendix B: Public Hearings

Monday, 4 July 2005 – Canberra[1]

Attorney General's Department

Mr Kym Duggan, Assistant Secretary, Family Law Branch

Ms Sue Pidgeon, Assistant Secretary, Family Pathways Branch

Ms Alison Playford, Principal Legal Officer, Family Law Branch

Ms Susan Noad, Acting Senior Legal Officer, Family Law Branch

Ms Michelle Warner, Senior Legal Officer, Family Pathways Branch

Wednesday 20 July 2005, Melbourne

Family Law Section, Law Council of Australia

Mr Ian Kennedy AM, Chair, Family Law Section

Mr Martin Bartfeld QC, Immediate past Chair, Family Law Section.

Professor Lawrence Moloney, Representative, Children in Focus, School of Public Health, La Trobe University

Victorian Aboriginal Legal Service Cooperative and the Elizabeth Hoffman House Aboriginal Women's Services Inc

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1 This meeting was originally a private briefing for the Committee on the details of the exposure draft. The Committee subsequently resolved to make the transcript publicly available.

Mr Robin Inglis, Research Officer, VALSC

Ms Greta Jubb, Research Officer, VALSC

Ms Rose Solomon, Chief Executive Officer, Elizabeth Hoffman House

Ms Eva Hudson, Outreach Worker, Elizabeth Hoffman House.

National Council of Single Mothers and their Children and the National Abuse Free Contact Campaign

Dr Elspeth McInnes, Convenor, NCSMTC

Ms Marie Hume, Representative, NAFCC

Australian Children's Contact Services Association

Ms Barbara Hanson, Convenor

Thursday 21 July 2005, Sydney

Law Society of New South Wales

Dr Tom Altobelli, Member, Family Issues Committee

Ms Maryanne Plastiras, Responsible Legal Officer, Family Issues Committee

Relationships Australia

Ms Mary Mertin-Ryan, National Director

Ms Anne Hollonds, Chief Executive Officer

Mr Tony Gee, Family and Child Mediator

National Network of Indigenous Women's Legal Service

Ms Denese Griffin, Coordinator

Ms Cleonie Quayle, Member

National Association of Community Legal Centres and the National Network of Women's Legal Services

Ms Joanna Fletcher, Law Reform Coordinator

Ms Katrina Finn, Policy Officer

Ms Suzanne Dowey

Women's Legal Service (NSW) and the Indigenous Women's Program

Ms Karen Mifsud, Supervising Solicitor, Domestic Violence Advocacy Service

Ms Dianne Hamey, Supervising Solicitor

Ms Rene Adams, Coordinator, Indigenous Women's Program Unit

Ms Jennifer Wong, Supervising Solicitor, Walgett Violence Prevention Unit

Monday 25 July 2005, Canberra

Catholic Welfare Australia

Mr Frank Quinlan, Executive Director

Mrs Margaret Roots, Director, Membership and Network Support

Family Law Practitioners Association of Queensland Inc

Mr Donald Leembruggen, Member

Shared Parenting Council of Australia

Mr Michael Green QC, President

Mr Geoffrey Greene, Founder and immediate past President

Mr Wayne Butler, Executive Secretary

Lone Fathers Association of Australia Inc

Mr Barry Williams, National President and Founder

Mr James Carter, Adviser

Family Services Australia

Mrs Sarah Lees, National Manager

Ms Jennifer Hannan, Vice President

Mr Tony O'Hare, Treasurer

Family Law Council

Mrs Nicola Davies, Member

Tuesday 26 July 2005, Canberra

Family Court of Australia

Chief Justice Diana Bryant

Justice Stephen O'Ryan, Judge

Hon Richard Chisholm, Honorary consultant and retired Judge

Dads in Distress

Mr Tony Miller, Founder and Director

Attorney-General's Department

Mr Kym Duggan, Assistant Secretary, Family Law Branch

Ms Sue Pidgeon, Assistant Secretary, Family Pathways Branch

Ms Susan Noad, Acting Senior Legal Officer, Family Law Branch

Ms Michelle Warner, Senior Legal Officer, Family Pathways Branch

Mr David Syme, Family Relationships Centres Development Section

C

Appendix C: List of Exhibits

From the Lone Fathers Association (Australia) Inc

1 (a) Comments by LFAA on the Protection Orders Legislation Review (ACT), April 2004

1 (b) Submission by the LFAA on the Protection orders Legislation Review (ACT), 2004

From the Department of the Premier and Cabinet (WA)

2. Copy of the Parental Support and Responsibility Bill 2005 (WA)

From Professor L Moloney

3. (a) Journal of Family Studies, Vol 9, No 1, April 2003

3. (b) Journal of Family Studies, Vol 9, No 2, October 2003

3 (c) Journal of Family Studies, Vol 10, No 1, April 2004

3 (d) Journal of Family Studies, Vol 10, No 2, October 2003

3 (e) Journal of Family Studies, Vol 11, No 1, April 2005

From Attorney-General's Department

4. Family Court of Australia: *Guidelines for The Child's Representative*

From Dr J Hirst

5. Dr John Hirst, paper on *Allegations of Sexual Abuse*

Provided by Dads on the Air

6 (a). Copy of email relating to public hearings on 20 and 21 July 2005

6(b) Copy of submission by Dads on the Air to the inquiry by the House of Representatives Family and Community Affairs inquiry

Provided by the Cleonie Quayle, National Network of Indigenous Women's Legal Services:

7 *Blackfellas, whitefellas and the hidden injuries of race*, by Mark McKenna

8. *Racialisation, criminalisation and punishment in the context of Australian nationhood and citizenship* by Chris Cunneen

9. Book review*: Conflict, politics and crime: Aboriginal communities and the police*, by Chris Cunneen

10. Article, *Dodson call for 'extreme' action to stop brutality*

11. *The inappropriateness of the criminal justice system – Indigenous Australian criminological perspective*, by Byron Davis

12. *Bringing them home* report – family law

13. *Addressing Family violence in Indigenous com*munities, Human Rights and Equal Opportunity Social Justice report, 2003

14. *NSW Aboriginal justice plan – discussion paper* by Chris Cunneen, Aboriginal Justice Advisory Council

15. *A national disgrace: Violence against women and children in Indigenous communities*, by Dr Carmen Lawrence

16. *Law and public order, including juvenile justice*. Submission to the United Nations Committee on the rights of the Child for their day of general discussion on the rights of Indigenous Children. Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission

17. *Addressing the needs of indigenous women in the family*, by Stephen Ralph

18. *Indigenous family violence – Australia's business* by Libby Carney

19. *Healing through yarning: the Aboriginal and Torres Strait Islander Family Mediation Program*, by Linda Fisher (Linda Fisher and Associates Pty Ltd NSW) and David Cox (Legal Aid Commission of NSW)

From Marie Hume, National Coalition of Mothers Against Child Abuse:

20. Fact Sheet #1: *The myth of false accusations of child abuse*, by Michael Flood, March 2005

21. Fact Sheet #2: *The myth of women's false accusations of domestic violence and misuse of protection orders*, by Michael Flood, March 2005

From Lone Fathers Association (NT)

22. Articles, NT News, *Its OK to keep men out*, 8 August 2004; and *Violence, like a knife, cuts both ways*, 5 July 2004

23. Correspondence from Mr Robert Kennedy, Coordinator, Lone Fathers Association NT, to the Human Rights and Equal Opportunity Commission, 29 June 2005, and attached article *Men Behaving Sadly* by Bettina Arndt, the Age, 8 December 1999

24 Copies of 3 advertisements in the NT News

25. Extract from the Family Law Act 1975 (section 68ZK)

26. Copy of correspondence and Addendum, Mr Robert Kennedy, Lone Fathers Association (NT) to the Northern Territory Minister for Family and Community Services, dated 25 May 2004

27. Study guide for Feminist Theory, Power and Knowledge, Deakin University, and associated material

28. Article, *Women-the new ruling elite*, in the Lone Father's Association Australia publication, June-July 2005

29. Questions with Notice to the Minister for Family Services and Minister for Child Support, and the Attorney-General, 2005 LFAA Conference, Canberra

30. Correspondence from Mr Robert Kennedy, Lone Fathers Association (NT) to members of the Northern Territory Legislative Assembly regarding parental child abduction, and comments on the Care and Protection of Children and Young People Act 2005

31. Correspondence from Mr Robert Kennedy, Lone Fathers Association (NT) to the Minister for Immigration and Ethnic Affairs, dated 19 July, and to HREOC, dated 19 July, regarding the administration of family heterosexual legal entities

From the Fatherhood Foundation

32. *Fathers in Families*

33. Copies of articles from the Fatherhood Foundation web site

34. Copy of comments on the proposed Family Law Amendment (Shared Parental Responsibility) Bill 2005 by the Lone Fathers Association of Australia (Inc)

From the Lone Fathers Association (Australia) Inc

35 Comments on the discussion paper on 'A new approach to the family law system' by the Lone Fathers Association, January 2005

From the Family Court of Australia

36(a) Copy of presentation to the Lone Fathers Association 2005 National Conference, 22 June 20-06 by Richard Foster, CEO, Family Court of Australia

36(b) 'Care and Protection of Children: Australian and New Zealand Experience', copy of paper delivered by the Hon Diana Bryant, Chief Justice, Family Court of Australia, at the 4th World Congress on Family Law and Children's Rights, South Africa, 20-23 March 2005

36(c) Copy of letter from the Mr B Williams, National President, Lone Fathers Association Australia to Mr Richard Foster, Family Court of Australia

D

Appendix D: List of Correspondence

The following individuals provided the Committee with comments on the family law system in general, and therefore the material was treated as correspondence.

Mr John Kluck

Mr Paul Johnson

Ms Nicky Ascott

Mrs Helen Harman

Mr Steve Moskal

Dr J and Mrs M Staska

Mr Tony Edwards

Mr Paul Turner

Mr Peter van de Voorde

Ms Barbara Reis

Ms Joan Hopkins

Ms Natasha Blackley

Mr Kirk Winters

Ms Tracey Young

Ms Joan Leske

Mr M and Ms R Bourne

Mr John Mills

Mr Simon Hunt

Mr Steven Popovski

Mr Anton Heyneke

Mr John Abbott

Dr David Hudson

Mr John Mills

Mr Roger Debois

Ms Robyn Stockton

Mr Jerry Himelfarb

Mr Henry Oorloff

Mr Tony Moss

Mr David Maybury

Mr James Adams

Mr Warren Welsh

Mr David Kelly

Mr Colin Moyle

Mr Paul S Spear

Ms Kay Muddiman

Mr Robert Taylor

Mrs Lea McKenzie

Mr Brendan Price

Mr Barry Hain

GRANS

Ms Karen Carr

Mr Craig Hickman

Mrs Lea McKenzie

Mr James Balmer

Mr Jai Cooper

Mrs Pearl Doyle

Ms Joanne Fletcher

Ms Debra Hayden

Mr Chris Smith

Mr Terry Clayton (Fathers for Justice Australia and New Zealand)

Mr Roger Truscott

David and Sylvia Mosey

Mr Ross Mitchell

E

Appendix E: Government response to FCAC report and provisions of the Bill

The following table, provided as part of the Attorney-General's submission to the inquiry, sets out the recommendations of the *Every Picture Tells a Story* report, the government response, and the legislative implementation of that response where appropriate.

FAMILY LAW AMENDMENT (SHARED PARENTAL RESPONSIBILITY) BILL 2005

Source *Submission, Attorney-General's Department.*

Comparison of the Government Response to the House of Representatives Standing Committee on Family and Community Affairs (the committee) report, *Every picture tells a story* (the report) and the provisions of the exposure draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005 (the Bill)

Recommendation & Government Response	Exposure Draft Provision
A rebuttable presumption	
Recommendation 1 **The committee recommends that Part VII of the *Family Law Act 1975* be amended to create a clear presumption, that can be rebutted, in favour of equal shared parental responsibility, as the first tier in post separation decision making.** The government agrees with this recommendation and has introduced a requirement for the court to apply a presumption (or starting point) of joint parental responsibility.	Schedule 1, item 11, subsection 61DA(1)

While the changes to the law will mean that the courts will generally start with the presumption that the parents will have joint parental responsibility, one or both parents can submit that this is not appropriate in a particular case. The best interests of the child will remain paramount. The primary factors in determining the best interests of the child will be the benefit to the child of having a meaningful relationship with both parents and the need to protect the child from physical or psychological harm. The government considers that it is more appropriate to refer to a presumption of 'joint' parental responsibility, rather than a presumption of 'shared', as this better focuses on the decision making responsibilities of both parents and reduces confusion that the presumption is about sharing of a child's time. Joint parental responsibility will mean that parents will continue to share the key decisions in a child's life after separation, regardless of how much time the child spends with each parent.	Schedule 1, item 23, section 65DAC
<u>Recommendation 2</u> **The committee recommends that Part VII of the *Family Law Act 1975* be amended to create a clear presumption against shared parental responsibility with respect to cases where there is entrenched conflict, family violence, substance abuse or established child abuse, including sexual abuse.**	

The government agrees that the presumption of joint parental responsibility should not apply to cases involving family violence or child abuse. However, rather than introducing a separate presumption against joint parental responsibility (a negative presumption), the government has decided that the courts should not apply the presumption of joint parental responsibility in circumstances of family violence or child abuse. The government considers that the intention of the committee in recommendations 1 and 2 can be achieved by having only one presumption and providing for an exception to the application of that presumption in the case of family violence and child abuse. Having two presumptions would have the effect that where the exceptions relating to family violence and child abuse apply there is no starting point of joint parental responsibility and the court must consider the best interests of the child. In such cases, the negative presumption against joint parental responsibility would also apply with the same result (ie. that the court must consider the best interests of the child without any particular starting point). The single presumption will be easier to understand, particularly for self-represented litigants. In addition, the government has decided that the grounds on which the presumption of joint parental responsibility should not apply should be extended to cover situations where there are reasonable grounds to believe that one of the parents, or a person who that parent lives with, has engaged in family violence or abuse of the child or another child of the family. The government considers that this will address concerns about the impact that violence and abuse in the home of either parent will have on the child and on the	Schedule 1, item 11, subsection 61DA(2)

ability to exercise the joint decision making requirement of joint parental responsibility. The government has also decided not to create a presumption against joint parental responsibility in cases involving substance abuse or entrenched conflict. The government considers that, in relation to substance abuse, a better approach would be for the courts to take into account the effect of substance abuse on parental behaviour in deciding whether joint parental responsibility is in the best interests of the child. In relation to entrenched conflict, it could be argued that any case that reaches a final court hearing involves entrenched conflict. Making entrenched conflict a ground for applying a presumption against joint parental responsibility could mean the courts would rarely be able to apply the proposed new presumption in favour of joint parental responsibility. The government considers that the presumption of joint parental responsibility should apply, noting that the impact of conflict and the ability of parents to communicate over parenting arrangements are matters for the courts to consider when deciding any particular case.	
<u>Recommendation 3</u> **The committee recommends that Part VII of the *Family Law Act 1975* be amended to:**	

• **provide that the object of Part VII is to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents are given the opportunity for meaningful involvement in their children's lives to the maximum extent consistent with the best interests of the child;** The government agrees with this recommendation. However, the government considers that it is preferable to focus on the child rather than the parent in this principle and refer to the need to ensure that children are given the opportunity for their parents to have a meaningful involvement in their lives to the maximum extent possible, consistent with their best interests. The government will also make an additional change to the objects of the *Family Law Act 1975* (the Act) to include the preservation of a child's right to safety, in keeping with the committee's conclusion at paragraph 2.29 of the Committee's Report.	Schedule 1, item 2, paragraph 60B(1)(c)
• **define 'shared parental responsibility' as involving a requirement that parents consult with one another before making decisions about major issues relevant to the care, welfare and development of children, including but not confined to education – present and future, religious and cultural upbringing, health, change of surname and usual place of residence. This should be in the form of a parenting plan;** The government agrees with this recommendation. A person with joint parental responsibility, or a component of joint parental responsibility, will be required to consult and make a genuine effort to come to a decision about that particular issue. In the definition of 'major long-term issues' the reference to the 'usual place of residence' has been changed to the	Schedule 1, item 2, paragraph 60B(2)(b)

more limited 'significant changes to a child's living arrangements'. This addresses concerns that requiring parties to consult and reach agreement is too onerous an expectation in relation to decisions about the 'usual place where a child lives'. The issue of the usual place where the child lives involves the consideration of a broad range of issues such as the legitimate short distance relocation decisions of one parent; the financial pressure on a parent to move (eg to lower rent accommodation); the distance between the homes of the parents and the need to ensure that the parents do not control each other's lives and financial arrangements. This change will also address concerns that orders may become more complex and difficult to understand, which will lead to an increase in non-compliance and a proliferation in litigation. • **clarify that each parent may exercise parental responsibility in relation to the day-to-day care of the child when the child is actually in his or her care subject to any orders of the court/tribunal necessary to protect the child and without the duty to consult with the other parent;** The government agrees with this recommendation. If a child is spending time with a person at a particular time under a parenting order, there is no need to consult on issues that are not major long-term issues. • **in the event of matters proceeding to court/tribunal then specific orders should be made to each parent about the way in which parental responsibility is to be shared where it is in the best interests of the child to do so; and** The government agrees with this recommendation and has provided the court with the power to make such orders in this Bill. • **in the event of matters proceeding require the court/tribunal, to make orders concerning the allocation of parental responsibility between the parents or others who have parental responsibility when requested to do so by one or both parents.** The government agrees with this recommendation in principle and has provided the court with the power to make such	Schedule 1, item 23, section 65DAC Schedule 1, item 6, subsection 60D(1)

orders in the Bill. The government believes that such orders should be made on a case by case basis at the discretion of the court.	Schedule 1, item 23, section 65DAE Schedule 1, item 16, subsections 64B(2)(c) and (d)

	Schedule 1, item 16, subsections 64B(2)(c) and (d) Schedule 1, item 11, section 61DA
<u>Recommendation 4</u> **The committee recommends that Part VII of the *Family Law Act 1975* be further amended to remove the language of 'residence' and 'contact' in making orders between the parents and replace it with family friendly terms such as 'parenting time'.** The government agrees with this recommendation. The terms 'residence' and 'contact' will be removed from the Family Law Act. The concept of 'parenting orders' rather than 'parenting time' will be used. The government considers that this is a simpler way to	Schedule 5 Schedule 1, item 13,

ensure that the Act focuses on the relationship that parents have with their children rather than the time a child spends with each parent. These amendments require consequential amendments to the terminology that is used in the *Australian Citizenship Act 1948*, the *Australian Passports Act 2005* and the *Child Support (Assessment) Act 1989*.	paragraphs 63C(2)(a) and (b) Schedule 1, item 16, paragraphs 64B(2)(a) and (b)
<u>Recommendation 5</u> **The committee recommends that Part VII of the *Family Law Act 1975* be further amended to:** • **require mediators, counsellors, and legal advisers to assist parents for whom the presumption of shared parenting responsibility is applicable, develop a parenting plan;** The government agrees with this recommendation in principle. Changes to the Act will require mediators, counsellors, and legal advisers to provide information about what a parenting plan is, the possible content of such a plan and appropriate organisations or individuals who can assist in the development and effect of	Schedule 1, item 13,

parenting plans. Where they are providing advice to parents about parenting plans, they would also be required to inform parents that they could consider substantially sharing parenting time as an option where it is in the best interests of the child and practicable.	subsection 63C(2)
• **require courts/tribunal to consider the terms of any parenting plan in making decisions about the implementation of parental responsibility in disputed cases;**	Schedule 1, item 14, section 63DA
The government agrees with this recommendation. A court will be required to take into account the terms of the most recent parenting plan if the parents subsequently appear before the court over a parenting issue.	Schedule 1, item 23, section 65DAB
When considering an enforcement application of a parenting order, the court will need to consider the terms of a subsequent parenting plan. In circumstances where a parenting plan has been made prior to a contravention application, the court will specifically need to consider varying the parenting order to the extent of any inconsistency to reflect the terms of the subsequent parenting plan.	Schedule 1, items 21 and 22 (court's power to make a parenting order) Schedule 2, item 4, section 70NEC

• **require mediators, counsellors, and legal advisers to assist parents for whom the presumption of shared parenting responsibility is applicable, to first consider a starting point of equal time where practicable; and** The government agrees with this recommendation in principle. The government has decided that it is more appropriate to refer to 'substantial' time rather than 'equal' time, given the need to be consistent with the new obligation on the court to consider 'substantial time' in certain circumstances (section 65DAA which implements point 4 of recommendation 5). This ensures that there is no confusion that this is about 50:50 custody arrangements, which was specifically rejected by the committee. Substantial sharing would include sharing a child's time equally, but better focuses on the fact that what is important is that both parents are able to develop a meaningful relationship with their children. It recognises that in order to have a meaningful relationship generally this will require 'substantial time' to be spent with the child. • **require courts/tribunal to first consider substantially shared parenting time when making orders in cases where each parent wishes to be the primary carer.** The government agrees with this recommendation in principle. Courts will be required to first consider substantially shared parenting time when making orders in cases where there is joint parental responsibility and each parent wishes to spend substantial time with the child. Whether substantially shared parenting time is ordered will depend on the best interests of the child. Substantially shared parenting time does not preclude the equal sharing of the child's time. The government did not consider it useful to limit this provision to those cases where both parents want to be the primary carer. It is more appropriate that the court consider such an option in all cases where both parents want substantial time with the child.	Schedule 2, item 8, section 70NGB Schedule 2, item 12, section 70NJA Schedule 1, item 14, subsection 63DA(2)(a) Schedule 1, item 11, section 61DA

	Schedule 1, item 23, section 65DAA
Facilitating shared parenting	
Recommendation 9 **The committee recommends that the *Family Law Act 1975* be amended to require separating parents to undertake mediation or other forms of dispute resolution before they are able to make an application to a court/tribunal for a parenting order, except when issues of entrenched conflict, family violence, substance abuse or serious child abuse, including sexual abuse, require direct access to courts/tribunal.**	

The government agrees with this recommendation (with some changes to the exceptions). The government will introduce amendments to the Act to provide that a parent who wishes to take a parenting dispute to court will be required to file a certificate by an accredited dispute resolution practitioner (such as a mediator) to show that: • they have attended a dispute resolution process with the other parent aimed at completing a parenting plan, or • they attempted to do so but the other parent refused or failed to attend. Exceptions to this requirement will be cases involving family violence or child abuse, urgent matters, situations where the parents lack the capacity to participate in dispute resolution, and cases involving flagrant breaches of existing court orders. Where a case is exempt from this requirement because it involves family violence or child abuse, there will still be a requirement for the person wanting to take the matter to court to obtain information from a family counsellor or dispute resolution practitioner about options and support services available. The test for family violence or abuse is an objective one and will require some prima facie evidence. The government has included an exception to this requirement where there is a risk of child abuse or family violence if there is a delay in the court hearing the matter. This is to minimise the risk of violence to the parties or the child in those matters involving high risk or immediate violence.	Schedule 1, item 9, subsection 60I(8) Section 1, item 9, section 60J

The amendments also provide that if a person has not attended family dispute resolution, including persons who meet one of the exceptions, there is a mechanism for the court to consider making an order that the person attend such a process. This will discourage people from trying to avoid the provisions and will ensure that the court considers reasons for exemption. It will also ensure that even the cases meeting the exceptions are referred outside of the court system for resolution where the court considers that it is appropriate. This is consistent with the government's policy that whenever possible, family separation should be dealt with outside the court system. The government does not agree that cases involving substance abuse and entrenched conflict should also be exempted from the compulsory dispute resolution requirement. In the government's view, these exceptions could cover too many cases where dispute resolution may in fact be successful. Dispute resolution services meeting the new requirement will be provided by the new Family Relationship Centres and also by accredited practitioners in other services or in private practice. Accreditation standards will be developed under the Act. As well as establishing the new Family Relationship Centres, the government will expand community-based dispute resolution services by 25 per cent to help meet the demand for these services, at an additional cost of $13.4 million over four years. As the new Family Relationship Centres and other services will be rolled out over three years, the	Schedule 1, item 9, subsection 60I(9)

compulsory dispute resolution provision will be phased in over the same period.	
A new family law process	
Recommendation 12 **The committee recommends that the Commonwealth government establish a national, statute based, Families Tribunal with power to decide disputes about shared parenting responsibility (as described in Chapter 2) with respect to future parenting arrangements that are in the best interests of the child/ren, and property matters by agreement of the parents. The Families Tribunal should have the following essential features:** • **It should be child inclusive, non adversarial, with simple procedures that respect the rules of natural justice.** The government does not agree with this recommendation. The government considers the committee's objectives can be better met through the new network of Family Relationship Centres and through changes to court processes. For those families who do need to access the court system, the government will introduce less adversarial court processes for parenting matters. This less-adversarial approach largely reflects the approach taken by the Family Court in its pilot of the Children's Cases Program, although it is not intended to restrict courts exercising family law jurisdiction to that program.	Schedule 3

The approach also contains provisions about procedure already in the *Federal Magistrates Act 1999*. It also reflects provisions related to management of cases that are found in the United Kingdom Civil Procedure Rules and the NSW *Children and Young Persons (Care and Protection) Act 1998*.	Schedule 4
Recommendation 21 **The committee recommends the immediate implementation of the following additions to contact enforcement options:** • **a cumulative list of consequences for breaches;** • **reasonable but minimum financial penalties for first and subsequent breaches;** • **on a third breach within a pattern of deliberate defiance of court orders, consideration to a parenting order in favour of the other parent; and** • **retaining the ultimate sanction of imprisonment.** The government agrees with the committee's concern that the contact enforcement options in the Act need to be strengthened and recognises that there is considerable dissatisfaction about existing mechanisms for dealing with contraventions of parenting orders. The Government has considered this recommendation and proposes instead to adopt a series of measures that clarify what the court is required to consider and	

adds to the options available to the court.	
Many breaches of parenting orders result from the inappropriateness of existing orders, many of which are made by consent. Introducing mandatory penalties without going through the first stage of considering the appropriateness of the original orders is not appropriate when the orders themselves may be the problem.	Schedule 2
The government has clarified the standard of proof to be applied by the court. The amendments ensure that expectations about the standard of proof are clear and realistic.	
In addition to the financial penalties and cumulative list of consequences already in the Act, the government will introduce the following new measures: • a requirement that the courts consider 'make-up' contact if contact has been missed through a breach of an order. This provision is intended to apply where a party is able to show that there was a reasonable excuse for breaching the order. The court will now have power to order make up contact if that is in the best interest of the child;	
• a power to award compensation for reasonable expenses incurred by a person but which were wasted due to a breach of an order. This might include airfares or other tickets purchased but not used or travel expenses incurred by the person to collect a child but the child was not handed over;	Schedule 2, item 2, section 70NEA
• in cases where there is not a serious breach of an order, the court will need to consider making an order for costs;	

• in cases involving a series of breaches or a serious disregard of court orders, a presumption that legal costs will be awarded against the party that has breached the order, unless it is not in the best interests of the child; and	Schedule 2, item 3, sections 70NEAA and 70NEAB
• a new discretion to impose a bond for cases where there is not a serious breach of a court order (the option of a bond already exists for a serious breach of a court order).	Schedule 2, item 6, paragraph 70NG(1)(e)
As recommended by the committee, imprisonment will be retained as an ultimate sanction.	
When considering an enforcement application of a parenting order, the court will need to consider the terms of a subsequent parenting plan. In circumstances where a parenting plan has been made prior to a contravention application, the court will specifically need to consider varying the parenting order to the extent of any inconsistency to reflect the terms of the subsequent parenting plan.	Schedule 2, item 11, paragraph 70NJ(3)(f) Schedule 2, item 6, paragraph 70NG(1)(f) Schedule 2, item 9, subsection 70NG(2A) Schedule 2, item 11,

	paragraphs 70NJ(3)(g) and (h) Schedule 2, item 8, section 70NGA Schedule 2, item 4 section 70NEC Schedule 2, item 8, section 70NGB Schedule 2, item 12, section 70NJA
A child's contact with other persons	
Recommendation 23	

The committee recommends that the Commonwealth government amend subsections 68F(2)(b) and (c) of the *Family Law Act 1975* to explicitly refer to grandparents.	
The government agrees with this recommendation, recognising the important role grandparents play in children's lives. The government will introduce amendments to ensure consideration is given to the role of grandparents and other relatives when considering the best interests of a child and when making orders about parenting arrangements. Parents will also be encouraged to consider substantially sharing parenting time and a child's relationship with grandparents when developing parenting plans outside the court.	Schedule 1, item 29, paragraph 68F(2)(a) Schedule 1, item 31, subparagraph 68F(2)(c)(ii) Schedule 1, item 32, paragraph 68F(2)(e)
In addition, amendments have been included which make clear that the consideration of parenting orders shall include grandparents (and other relatives). For example, subsection 64B(2) provides that a parenting order may deal with a number of issues, such as the time a child is to spend and the communication a child is to have with another person. The amendments give greater recognition of the important role that grandparents (and other relatives) play in a child's life by specifying that a 'person' includes a grandparent	Schedule 1, item 16, subsection 64B(2)

(or other relative) of the child.	
<u>Recommendation 24</u> **The committee recommends that the Commonwealth government:** • **ensure contact with grandparents and extended family members are considered by parents when developing their parenting plan, and if in the best interest of the child, make specific plans for contact with those individuals in the parenting plan; and** The government agrees with this recommendation. Amendments have been included which extend provisions to include grandparents and other relatives. For example, subsection 63C(2) provides that a parenting plan may deal with a number of issues, such as the time a child is to spend and the communication a child is to have with another person. The amendments give greater recognition of the important role that grandparents and other relatives play in a child's life by specifying that a 'person' includes a grandparent or other relative of the child.	Schedule 1, item 7 (definition of relative) Schedule 1, item 13, subsection 63C(2A)

• **develop a range of strategies to ensure that grandparents, and extended family members, are included in mediation and family counselling activities when it is in the best interest of the child, in particular the development of a wider family conferencing model.** The government agrees with this recommendation. Information on the status of grandparents will be included in an education campaign referred to in the government's response. Provisions in the Act relating to parenting plans will explicitly refer to contact with grandparents and extended family members to encourage parents to consider including that contact in their plan. The government also agrees on the need to develop strategies to ensure that grandparents and other extended family members are included in mediation and family counselling activities when it is in the best interest of the child. To this end, the government will ensure that staff of Family Relationship Centres are trained to provide family conferencing, a form of dispute resolution which includes other family members as well as the parents. The government will also provide funding to legal aid commissions to enable them to use dispute resolution processes such as family conferencing where grandparents are involved.	Schedule 1, item 14, section 63DA