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.