



## 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
<i>A rebuttable presumption</i>	
<p><b><u>Recommendation 1</u></b></p> <p>The committee recommends that Part VII of the <i>Family Law Act 1975</i> 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.</p> <p>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.</p>	<p>Schedule 1, item 11, subsection 61DA(1)</p>

<p>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.</p> <p>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.</p> <p>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.</p>	<p>Schedule 1, item 23, section 65DAC</p>
<p><b><u>Recommendation 2</u></b></p> <p><b>The committee recommends that Part VII of the <i>Family Law Act 1975</i> 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.</b></p>	

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.

**Recommendation 3**

**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.

Schedule 1, item 2,  
paragraph 60B(1)(c)

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.

- **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;**

Schedule 1, item 2,  
paragraph 60B(2)(b)

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

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)



	<p>Schedule 1, item 16, subsections 64B(2)(c) and (d)</p> <p>Schedule 1, item 11, section 61DA</p>
<p><b><u>Recommendation 4</u></b></p> <p><b>The committee recommends that Part VII of the <i>Family Law Act 1975</i> 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’.</b></p> <p>The government agrees with this recommendation.</p> <p>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</p>	<p>Schedule 5</p> <p>Schedule 1, item 13,</p>

<p>ensure that the Act focuses on the relationship that parents have with their children rather than the time a child spends with each parent.</p> <p>These amendments require consequential amendments to the terminology that is used in the <i>Australian Citizenship Act 1948</i>, the <i>Australian Passports Act 2005</i> and the <i>Child Support (Assessment) Act 1989</i>.</p>	<p>paragraphs 63C(2)(a) and (b)</p> <p>Schedule 1, item 16, paragraphs 64B(2)(a) and (b)</p>
<p><b><u>Recommendation 5</u></b></p> <p><b>The committee recommends that Part VII of the <i>Family Law Act 1975</i> be further amended to:</b></p> <ul style="list-style-type: none"> <li><b>require mediators, counsellors, and legal advisers to assist parents for whom the presumption of shared parenting responsibility is applicable, develop a parenting plan;</b></li> </ul> <p>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</p>	<p>Schedule 1, item 13,</p>

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.

- **require courts/tribunal to consider the terms of any parenting plan in making decisions about the implementation of parental responsibility in disputed cases;**

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.

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.

subsection 63C(2)

Schedule 1, item 14,  
section 63DA

Schedule 1, item 23,  
section 65DAB

Schedule 1, items 21  
and 22 (court's  
power to make a  
parenting order)

Schedule 2, item 4,  
section 70NEC

<ul style="list-style-type: none"> <li>• <b>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</b></li> </ul> <p>The government agrees with this recommendation in principle.</p> <p>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.</p> <ul style="list-style-type: none"> <li>• <b>require courts/tribunal to first consider substantially shared parenting time when making orders in cases where each parent wishes to be the primary carer.</b></li> </ul> <p>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.</p> <p>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.</p>	<p>Schedule 2, item 8, section 70NGB</p> <p>Schedule 2, item 12, section 70NJA</p> <p>Schedule 1, item 14, subsection 63DA(2)(a)</p> <p>Schedule 1, item 11, section 61DA</p>
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	Schedule 1, item 23, section 65DAA
<i>Facilitating shared parenting</i>	
<b><u>Recommendation 9</u></b>  The committee recommends that the <i>Family Law Act 1975</i> 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.	

<p>The government agrees with this recommendation (with some changes to the exceptions).</p> <p>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:</p> <ul style="list-style-type: none"><li>• they have attended a dispute resolution process with the other parent aimed at completing a parenting plan, or</li><li>• they attempted to do so but the other parent refused or failed to attend.</li></ul> <p>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.</p> <p>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.</p>	<p>Schedule 1, item 9, subsection 60I(8)</p> <p>Section 1, item 9, section 60J</p>
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<p>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.</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>As the new Family Relationship Centres and other services will be rolled out over three years, the</p>	<p>Schedule 1, item 9, subsection 60I(9)</p>
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<p>compulsory dispute resolution provision will be phased in over the same period.</p>	
<p><i>A new family law process</i></p>	
<p><b><u>Recommendation 12</u></b></p> <p><b>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:</b></p> <ul style="list-style-type: none"> <li><b>• It should be child inclusive, non adversarial, with simple procedures that respect the rules of natural justice.</b></li> </ul> <p>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.</p> <p>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.</p>	<p>Schedule 3</p>



<p>The approach also contains provisions about procedure already in the <i>Federal Magistrates Act 1999</i>. It also reflects provisions related to management of cases that are found in the United Kingdom Civil Procedure Rules and the NSW <i>Children and Young Persons (Care and Protection) Act 1998</i>.</p>	Schedule 4
<p><b><u>Recommendation 21</u></b></p> <p><b>The committee recommends the immediate implementation of the following additions to contact enforcement options:</b></p> <ul style="list-style-type: none"><li>• <b>a cumulative list of consequences for breaches;</b></li><li>• <b>reasonable but minimum financial penalties for first and subsequent breaches;</b></li><li>• <b>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</b></li><li>• <b>retaining the ultimate sanction of imprisonment.</b></li></ul> <p>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</p>	

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.

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;
- in cases where there is not a serious breach of an order, the court will need to consider making an order for costs;

Schedule 2

Schedule 2, item 2,  
section 70NEA

- 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 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).

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 3,  
sections 70NEAA  
and 70NEAB

Schedule 2, item 6,  
paragraph  
70NG(1)(e)

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,

	<p>paragraphs 70NJ(3)(g) and (h)</p> <p>Schedule 2, item 8, section 70NGA</p> <p>Schedule 2, item 4 section 70NEC</p> <p>Schedule 2, item 8, section 70NGB</p> <p>Schedule 2, item 12, section 70NJA</p>
<i>A child's contact with other persons</i>	
<b><u>Recommendation 23</u></b>	

**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.

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 29,  
paragraph 68F(2)(a)

Schedule 1, item 31,  
subparagraph  
68F(2)(c)(ii)

Schedule 1, item 32,  
paragraph 68F(2)(e)

Schedule 1, item 16,  
subsection 64B(2)

<p>(or other relative) of the child.</p>	
<p><b><u>Recommendation 24</u></b></p> <p><b>The committee recommends that the Commonwealth government:</b></p> <ul style="list-style-type: none"> <li>• <b>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</b></li> </ul> <p>The government agrees with this recommendation. Amendments have been included which extend provisions to include grandparents and other relatives.</p> <p>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.</p>	<p>Schedule 1, item 7 (definition of relative)</p> <p>Schedule 1, item 13, subsection 63C(2A)</p>

- **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