



Australian Government
Attorney-General's Department

Civil Justice Division

Submission No. <u>46</u>
Date Received

13 July 2005

RECEIVED
15 JUL 2005
BY: IAEA NT

Committee Secretary
House of Representatives Standing Committee on
Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

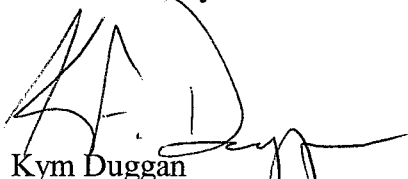
Family Law (Shared Parental Responsibility) Bill 2005 - Response to Questions from the Hon Peter Slipper and summary of response to recommendations

Please find attached answers to questions presented to us by the Chairman of the Committee at the hearing last week. I have also enclosed a document that we agreed to provide to the Committee that outlines the government's response to the recommendations in the Every Picture Tells a Story Report and indicates where that response can be found in the Bill.

We are working through the other questions that we have received and will provide you with responses to those shortly.

I am the action officer for this matter and would be happy to discuss these documents with you if there is anything that needs further clarification.

Yours sincerely


Kym Duggan
A/First Assistant Secretary
Civil Justice Division

Telephone: (02) 6250 6856
Facsimile: (02) 6250 5902
E-mail: kym.duggan@ag.gov.au

**Response to questions provided by the Hon Peter Slipper MP,
Chairman of the House of Representatives Standing Committee on
Legal and Constitutional Affairs (the Committee) provided to the
Attorney-General's Department on 4 July 2005**

Question 1 – We understand that the Attorney-General's department undertook extensive consultation in preparing the legislation. Based on that consultation, what do you expect the major criticisms to the exposure draft to be?

1. That the Bill will lead to increased litigation

Concern has been expressed by a number of groups (including the legal profession and the courts) that the Bill may lead to increased litigation about:

- the application of the provision requiring attendance at dispute resolution and in particular the exceptions (Schedule 1, item 9, Subdivision E of Part VII of the Bill);
- whether the presumption of joint parental responsibility applies or should be rebutted (Schedule 1, item 11, section 61DA of the Bill); and
- the effect of the requirement, where there is joint parental responsibility, that parents make joint decisions about major long-term issues (Schedule 1, item 23, section 65DAC of the Bill).

The government has attempted to address these concerns. Part of that response has been the nearly \$400 million, announced as part of the 2005-06 Budget, to increase services to assist people to resolve disputes outside of the court system. The application of the legislative reforms in relation to pre filing family dispute resolution is being phased in to ensure that services are available to assist parties reach agreement. The exceptions from the need to attend family dispute resolution prior to filing an application have also been more narrowly targeted. Further, the introduction of a presumption should reduce litigation given that this will be the expected normal position in most cases. Encouraging joint parental responsibility, and communication between parents about their children, should reduce litigation. The changes in relation to parenting plans and giving parents the ability to reach agreement and vary orders without going back to Court also has the potential to reduce litigation. The government's commitment to expanded services for family dispute resolution should assist in changing the culture of the family law system towards parents reaching agreement on their future parenting arrangements which should lead to reduced litigation.

The less adversarial proposals will also lead to a greater emphasis on creating cooperative parenting even with those parents who have had to come to court to resolve their differences. One of the key principles of this process requires the court to concentrate on encouraging cooperative parenting and concentrating on the impact of the proceedings upon the children. .

2. That the Bill will lead to increased risk of family violence and child abuse to woman and children

A number of women's groups (such as the National Council of Single Mothers and their Children) have raised concerns that the proposed reforms will place women and children at greater risk of violence. In particular, the groups are concerned that it will be much easier for abusive parents to have contact with their children, that there are risks in the requirement for compulsory dispute resolution prior to application to court and that the requirement to agree on long-term issues will lead to the escalation of conflicts. They are also concerned about the effect of the strengthening of the enforcement provisions on the risks to women and children.

The Government has attempted to address these concerns, The government considers that family violence and child abuse cannot be tolerated. New principles in item 2 of Schedule 1 make it clear that children need to be protected from the risk of violence or psychological harm. The presumption of joint parental responsibility and the requirement to attend family dispute resolution prior to going to court, will not apply in cases involving family violence or child abuse. In those cases, the court will also not be obliged to consider the child spending substantial 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 only two primary factors that the court must consider is the need to protect the child from violence or harm.

The less adversarial processes are likely to lead to family violence and child abuse issues being properly dealt with earlier in the proceedings. Screening for family violence and child abuse will also be a very important role of the Family Relationship Centres. The Centres will also be able to provide information and advice to victims of family violence about their options and about support services available to them.

3. That there will be increased opportunity to make false allegations about violence and abuse

This criticism is dealt with in the answer to question 6 below.

4. Changes to enforcement provisions

Some women's groups have expressed some concern that the new enforcement regime may go too far while some men's groups have indicated that they do not consider the enforcement provisions go far enough.

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 response to question 3 addresses this issue more fully.

The amendments 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 court will retain discretion to determine the most appropriate orders and will consider the circumstances in each case in light of the best interests of

the child, but the provisions do place greater obligations on the court to make orders compensating the party who has not had contact as a result of the breach.

Question 2 – The Terms of Reference for the inquiry ask the Committee to examine the provisions of the exposure draft to determine whether they implement a number of measures, including ensuring that the court process is easier to navigate and less traumatic for children.

What specific measures have been included in the exposure draft to make the court processes less adversarial?

Schedule 3 of the exposure draft is specifically designed to ensure that the court process is less adversarial. This approach relies on active management by judicial officers and ensures that proceedings are managed in a way that considers the impact of the proceedings (not just the outcome of the proceedings) on the child. The intention is to ensure that the case management practices adopted by courts will promote the best interests of the child by encouraging parents to focus on their parenting responsibilities.

This approach largely reflects the approach taken by the Family Court in its pilot of the Children's Cases Program (CCP), although it is not intended to restrict courts exercising family law jurisdiction to the implementation of the CCP program.

Initial data from this project is very encouraging. There have now been some 126 cases finalised out of the 220 that have been accepted into the project. There has been only one appeal from a decision that has been made in these cases.

Can you specify the provisions of the Bill which assist in making the court process less traumatic and easier to navigate

The less adversarial approach set out in Schedule 3 of the exposure draft is generally intended to make the court process less traumatic by promoting a cooperative approach between parents, with a focus on children.

In particular, the provisions set out in proposed sections 60KE, 60KF, 60KG and 60KI will ensure a significantly less adversarial approach to decision making. Section 60KE sets out the obligations imposed on a judicial officer dealing with children's matters to be more much more involved in the way that a case is dealt with at the trial phase. Section 60KG provides that many of the rules of evidence that would normally apply in such matters will not apply unless the court decides otherwise. Section 60KI gives the court greater power to direct how evidence will be produced and how the examination of witnesses will take place at trial.

In addition to the legislative changes, the implementation of a combined registry for the Family Court and the Federal Magistrates Court for family law matters is a key component of the package of reforms announced by the government. The aim of the combined registry is to channel cases to the appropriate court and address concerns that the family court system can be confusing for many people. These concerns were expressed in the *Every Picture Tells a Story* report and the Australian National Audit Office's 2004 report into client service in the courts. Both these reports emphasised

the need for 'one way into the family courts' to reduce confusion for separating families, for court procedures to be easily understood and manageable, and for better coordination of services and information to the public by the two courts.

The Attorney-General's Department has undertaken discussions with the courts on options to implement a combined registry for family law matters. As a result a result of cooperation between the courts and the Department, a new combined registry is being established. The combined registry will undertake a number of initiatives to reduce confusion for separating families that access the courts. For example, the registry will provide one comprehensive set of information about the family law courts to parents. Most matters will be initially channelled to the Federal Magistrates Court. Forms and websites will be reviewed and simplified to ensure that they are comprehensive and can be easily understood.

The courts held a series of consultative workshops in February 2005 in Melbourne, Sydney and Brisbane on what a combined registry should cover and how it could operate. As a result of those workshops, in May 2005 the courts released an information kit as the basis for further consultation with stakeholders about the proposed combined registry. The information kit explains the key components of the proposal and seeks comments. The courts, in close consultation with the Attorney-General's Department, are working to implement the different aspects of the combined registry.

The response to Recommendation 13 states that "the less adversarial court processes... will also include opportunities for the appropriate inclusion of children". Can you specify these?

The first principle of the less adversarial approach at subsection 60KB(3) at item 4 of Schedule 3 is that the court considers the needs and concerns of the child or children in determining the conduct of the proceedings. The third principle of this approach is that proceedings should be conducted to promote cooperative and child focussed parenting by the parties. 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. For example, a judicial officer may in an appropriate case more directly involve children in the court process itself, so that the children could feel that their views were in fact before the court.

Under the current system, children's views are generally put before the court by a child representative who is a professional and who has had many years training. It is expected that this will continue to be the primary manner in which the views of children are put to the court. In addition, the Family Court is currently working on implementing a child inclusive model for non-judicial dispute resolution through court mediators. This dispute resolution process occurs as part of the overall court process. This model provides for the direct involvement of children at an earlier stage of that process.

Question 3 - Compliance is always going to be a difficult area – how to improve compliance with court orders while also protecting the best interests of the child. The range of measures proposed in the response to Recommendation 21 differ somewhat from those in the Recommendation itself. Can you outline the reasons for the differences? Do you think that the new compliance measures will improve compliance?

The government recognises that there is considerable dissatisfaction with how contraventions of parenting orders are dealt with. The government has considered the Committee's recommendations in relation to enforcement at Recommendation 21 and proposes to adopt a series of measures that clarify what the court is required to consider and adds to the options available to the court, while still protecting the best interests of the child. During consultations on the Committee's recommendations, there was considerable concern raised with the government about the potential problems that might arise from the proposals to reverse residence of children and the imposition of minimum financial penalties. The government was concerned that people would use contact disputes to re-run residence arguments and that there was a risk that children would be used as pawns in such disputes and end up going from one residence to another.

Enforcement cases are often cases that involve the most entrenched and bitter conflict between couples. The courts are not necessarily the best venue to address such conflict. The government believes 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 alternatives to court based options.

The government has accepted the spirit of the Committee's recommendation to strengthen the consequences of a breach of orders by including a greater emphasis on make up time, compensation for losses associated with missed contact and the possible awarding of costs in appropriate cases.

A large number of breaches of parenting orders are due to the inappropriateness of existing orders, many of which are made by consent. The new regime of assistance that will be available to separating families and the greater flexibility given to the courts should reduce the numbers of such unworkable orders.

The current 3 stage parenting compliance regime already contains a cumulative list of consequences for breaches of orders. This includes imprisonment as an ultimate sanction.

One concern about the current provisions is that courts often require a very high standard of proof of a breach because of the possibility of criminal sanctions. The standard of proof required is clarified in the Bill. Item 2 of Schedule 2 makes clear the standard of proof that will apply and ensures that expectations about the standard of proof are clear and realistic. For the vast majority of cases, this should result in the bare civil standard of balance of probabilities applying.

Secondly, the menu of orders from which the court can consider the most appropriate option is significantly expanded which will address concerns expressed by the court about the current limited options that they have. There will be a discretionary power

to award compensation for reasonable expenses incurred by a party (such as airfares wasted or other tickets purchased but not used). There is a specific provision, where a breach is not a serious one, that the court must consider awarding costs against the party that has breached the order. There is also a discretion to impose a civil bond for such breaches 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 the final stage of the parenting order compliance regime where there are clear criminal consequences.

Thirdly, at this final stage there will be a rebuttable presumption requiring the court to make an order for costs for legal expenses against a party who has breached the order and to consider making other appropriate orders. Where it is not in the best interests of the child to award costs, the court must make one of the other orders available to it at section 70NJ(3) of the Family Law Act.

Question 4 – Does the Bill contain anything to address false accusations of child abuse/family violence

Family violence orders can, in some cases, be obtained from State and Territory Magistrates Courts without evidence having been properly tested as to whether the allegations are well founded. Item 35 of Schedule 1 contains an amendment to the factors that the court must consider in determining a child's best interests, to make it clear that the court must only rely on final or contested family violence orders.

As discussed in question 1 the tests that have been set for reliance on family violence or child abuse, both as an exception to attendance at family dispute resolution and for the 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 issues in the proceedings.

The investigation of allegations of child abuse and family violence is primarily a matter for the States and Territories. 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 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.

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.

Question 5 - Do you believe that the new considerations for the court to take into account when determining the best interests of the child significantly improve on the current considerations? Do you think that they will lead to better determinations about this crucial question?

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.

Question 6 – The exposure draft has already been criticised by the Shared Parenting Council as doing nothing to “guarantee shared parenting outcomes as the norm for separating couples”. Would you like to respond?

The Committee did not accept that shared parenting should be a presumption in the legislation. The Committee was concerned that the focus must be turned back to the primary issue of how to ensure both parents can, and will, remain involved in caring for their children after separation.

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 children 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 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 compliance regime and improve compliance with court orders providing for shared parenting.

Question 7 – The current Family Law Act already provides for mediation, counselling and primary dispute resolution. Apart from introducing new terminology and family relationships centres, how does the Amendment Act differ in substance from current provisions that allow for the resolution of disputes outside of the courtroom?

How exactly will the new Act encourage more out of court settlement than the existing Act?

The major reform that will assist out of court settlements is the major expansion of family dispute resolution services as announced in the 2005-06 Budget. However, the legislation will also play a significant part. 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 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.

The proposed amendments focus much more on parents reaching agreements to settle their parenting disputes. The amendments at item 14 and item 16 to provisions related to parenting plans and parenting orders, are focussed on considering opportunities for parents to reach agreements. The amendments to allow parties to resolve future

problems by entering into parenting plans post orders, will also assist in encouraging even those who have had to resort to court orders to deal with these matters outside the court system in the future.

TABLE 1:

FAMILY LAW AMENDMENT (SHARED PARENTAL RESPONSIBILITY) BILL 2005

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
<p><i>A rebuttable presumption</i></p>	
<p><u>Recommendation 1</u></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>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>Schedule 1, item 11, subsection 61DA(1)</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><u>Recommendation 2</u></p> <p>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.</p> <p>The government agrees that the presumption of joint parental responsibility should not apply to cases involving family violence or child abuse.</p> <p>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.</p> <p>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.</p> <p>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 ability to exercise the joint decision making requirement of</p>	<p>Schedule 1, item 11, subsection 61DA(2)</p>

<p>joint parental responsibility.</p> <p>The government has also decided not to create a presumption against joint parental responsibility in cases involving substance abuse or entrenched conflict.</p> <p>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.</p> <p>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.</p>	
<p><u>Recommendation 3</u></p> <p>The committee recommends that Part VII of the <i>Family Law Act 1975</i> be amended to:</p> <ul style="list-style-type: none"> • 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; <p>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.</p>	<p>Schedule 1, item 2, paragraph 60B(1)(c)</p>

Table 1 – Comparison of recommendations, government response and exposure draft

<ul style="list-style-type: none"> • 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 <p>The government agrees with this recommendation and has provided the court with the power to make such orders in this Bill.</p> <ul style="list-style-type: none"> • 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. <p>The government agrees with this recommendation in principle and has provided the court with the power to make such 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.</p>	<p>Schedule 1, item 16, subsections 64B(2)(c) and (d)</p> <p>Schedule 1, item 16, subsections 64B(2)(c) and (d)</p> <p>Schedule 1, item 11, section 61DA</p>
<p><u>Recommendation 4</u></p> <p>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’.</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 ensure that the Act</p>	<p>Schedule 5</p> <p>Schedule 1, item 13, paragraphs 63C(2)(a)</p>

Table 1 – Comparison of recommendations, government response and exposure draft

<p>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>and (b)</p> <p>Schedule 1, item 16, paragraphs 64B(2)(a) and (b)</p>
<p><u>Recommendation 5</u></p> <p>The committee recommends that Part VII of the <i>Family Law Act 1975</i> be further amended to:</p> <ul style="list-style-type: none"> • require mediators, counsellors, and legal advisers to assist parents for whom the presumption of shared parenting responsibility is applicable, develop a parenting plan; <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 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.</p> <ul style="list-style-type: none"> • require courts/tribunal to consider the terms of any parenting plan in making decisions about the implementation of parental responsibility in disputed cases; <p>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.</p>	<p>Schedule 1, item 13, subsection 63C(2)</p> <p>Schedule 1, item 14, section 63DA</p> <p>Schedule 1, item 23, section 65DAB</p> <p>Schedule 1, items 21</p>

<p>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.</p> <ul style="list-style-type: none"> • 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 <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"> • require courts/tribunal to first consider substantially shared parenting time when making orders in cases where each parent wishes to be the primary carer. 	<p>and 22 (court’s power to make a parenting order)</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> <p>Schedule 1, item 14, subsection 63DA(2)(a)</p> <p>Schedule 1, item 11, section 61DA</p> <p>Schedule 1, item 23,</p>
---	--

Table 1 – Comparison of recommendations, government response and exposure draft

<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>section 65DAA</p>
<p><i>Facilitating shared parenting</i></p> <p><u>Recommendation 9</u></p> <p>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> <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"> • 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. <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>Schedule 1, item 9, subsection 60I(8)</p>

<i>A new family law process</i>	
<p><u>Recommendation 12</u></p> <p>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:</p> <ul style="list-style-type: none"> • It should be child inclusive, non adversarial, with simple procedures that respect the rules of natural justice. <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>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>	<p>Schedule 3</p> <p>Schedule 4</p>
<p><u>Recommendation 21</u></p> <p>The committee recommends the immediate implementation of the following additions to contact enforcement options:</p> <ul style="list-style-type: none"> • a cumulative list of consequences for breaches; 	

Table 1 – Comparison of recommendations, government response and exposure draft

<ul style="list-style-type: none"> • 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. <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 adds to the options available to the court.</p> <p>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.</p> <p>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.</p> <p>In addition to the financial penalties and cumulative list of consequences already in the Act, the government will introduce the following new measures:</p> <ul style="list-style-type: none"> • 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 	<p>Schedule 2</p> <p>Schedule 2, item 2, section 70NEA</p> <p>Schedule 2, item 3, sections 70NEAA and 70NEAB</p> <p>Schedule 2, item 6, paragraph 70NG(1)(e)</p>
---	--

Table 1 – Comparison of recommendations, government response and exposure draft

<p>by the person to collect a child but the child was not handed over;</p> <ul style="list-style-type: none"> • 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 • 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). <p>As recommended by the committee, imprisonment will be retained as an ultimate sanction.</p> <p>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.</p>	<p>Schedule 2, item 11, paragraph 70NJ(3)(f)</p> <p>Schedule 2, item 6, paragraph 70NG(1)(f)</p> <p>Schedule 2, item 9, subsection 70NG(2A)</p> <p>Schedule 2, item 11, 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>
<p><i>A child's contact with other persons</i></p>	

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.

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 (or other relative) of the child.

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)

Recommendation 24

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**

<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> <ul style="list-style-type: none"> • 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. <p>The government agrees with this recommendation.</p> <p>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.</p> <p>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</p>	<p>Schedule 1, item 7 (definition of relative)</p> <p>Schedule 1, item 13, subsection 63C(2A)</p> <p>Schedule 1, item 14, section 63DA</p>
--	--

<p>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.</p>	
---	--