CHAPTER 3

KEY ISSUES

Introduction

3.1 This chapter discusses the key issues and concerns raised in submissions on the Family Law Amendment (Shared Parental Responsibility) Bill 2005 (the bill). Most submissions received by the Committee were focussed on the amendments to Part VII (Children) of the Family Law Act 1975 (the Act) contained in Schedule 1 of the bill, which contains the key amendments relating to the presumption of equal shared parental responsibility and consideration of equal time, or substantial and significant time arrangements.

3.2 The majority of submissions received by the Committee favoured the policy initiatives underlying the bill – namely, the sharing of parental responsibility following separation and the opportunity for children to develop meaningful relationships with both parents – where those initiatives could be achieved without harm to the child or their parents. For example, the joint submission of Domestic Violence and Incest Resource Centre and *No to Violence*, *Male Family Violence Prevention Association*, (referred to hereafter as DVIRC) said:

> We endorse reforms to the Family Law Act which promote children's opportunities to have meaningful relationships with both parents, where there is no risk of harm. We support responses that facilitate co-operative parenting where it reflects the best interests of children.[1]

3.3 Many submissions raised issues concerning the practicality of some provisions of the bill, particularly those provisions which were not included in, or have been substantially amended from, the exposure draft of the bill considered by the House of Representatives Legal and Constitutional Affairs Committee (LCAC). It is these issues which are the focus of this chapter, in particular:

- the presumption of 'equal shared parental responsibility';
- the considerations to be taken into account by the court in determining what is in a child's best interests;
- the consideration of equal time, or substantial and significant time, arrangements for parenting orders or parenting plans;
- the definition of 'family violence';
- cost orders for false allegations;
- the certification by family dispute resolution practitioners that parties have made a 'genuine effort' to resolve a dispute; and

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1 *Submission* 92, p. 1

- access to, and costs of, dispute resolution.

Parenting time v parental responsibility

3.4 Proposed section 61DA states that when making a parenting order in relation to a child, the court must apply a presumption that it is in the best interests of the child for the child's parents to have equal shared parental responsibility for the child. The presumption does not apply if there are reasonable grounds to believe that a child's parent has engaged in abuse of the child (or another child in their family) or family violence. The presumption in 61DA is not a presumption about the amount of time that a child spends with each of the parents.

3.5 Proposed section 65DAA requires that in making a parenting order, the court must consider whether an equal time, or substantial and significant time, arrangement is in the best interests of the child and reasonably practicable. If such arrangements are in the best interests or the child and reasonably practicable, then the court must make an order for those arrangements.

3.6 Many submissions received by the Committee suggested that the bill should go further than the presumption of equal 'shared parental responsibility' and include a presumption of equal 'parenting time'.[2] Mr Williams from the Lone Fathers Association (Australia) argued:

> We believe the whole bill must be entitled 'Equal parenting time'. It is of the utmost importance that in this bill the words must be entrenched that the children in separated and divorced families have a natural paramount right to equal parenting time with both their parents and that both parents have a natural paramount right to equal parenting time with their children.[3]

3.7 The Committee understands that there are many terms used to describe arrangements where separated parents share both the responsibility for their children and the time the child spends with each parent. The Committee notes the distinction between 'parenting time', and 'shared parental responsibility'. 'Parenting time' refers to the time a child spends with a parent, either living with the parent or otherwise in contact with the parent. 'Shared parental responsibility' encompasses shared guardianship and decision-making responsibility for a child in relation to important matters in the child's life,[4] but does not refer to the living arrangements for the child.

3.8 The Committee acknowledges the many submissions it received, including from the Nuance Exchange Network,[5] Fathers4Equality[6] and Festival of Light

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2 For example Dads in Distress Inc, *Submission* 95, p. 2; Joint Parenting Association, *Submission* 94, p. 2; Festival of Light Australia, *Submission* 6, p.3.

3 *Committee Hansard*, 3 March 2006, p. 1.

4 See Lone Fathers Association (Australia), *Submission* 88, p. 11.

5 *Submission* 71.

6 *Submission* 109.

Australia[7] which addressed the benefits to the children of shared parenting time. The Committee also received an extensive bibliography compiled by Fathers4Equality on research showing the benefits of shared residence over sole residence.[8]

3.9 The Committee also received submissions from people describing their own experiences with shared parenting time arrangements.[9] Mr James from Fathers4Equality gave the Committee an insight into the benefits of the shared parenting arrangements for his daughter:

> I work a four-day work. My daughter's mother works a four-day week. I have my daughter two and a bit days each week and two and a bit nights each week. I have had her shared in this arrangement since she was about nine months old. I love it. It is very rare for a father to have a work-life balance …
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> My daughter seems to be very happy, and I love spending time with her.[10]

3.10 Advocates of equal parenting time stressed that there should be a rebuttable presumption in favour of such an arrangement, with the presumption rebutted in cases of abuse or neglect.[11] Other submissions also acknowledged that while an equal parenting time arrangement may not always be practical, it should at least be the starting point when determining post separation parenting arrangements.[12]

Committee view

3.11 The Committee acknowledges the support in the community, which is reflected in submissions to the inquiry, for a presumption of equal parenting time to be included in the Act. The Committee is also grateful to those who shared their stories and experiences in submissions and at the public hearing.

3.12 The Committee notes that the presumption in proposed section 61DA and the direction to the court in its considerations set out in proposed section 65DAA apply in situations where a court is considering making a parenting order. Where parents who are able to come to an agreement outside of the court system, for example using a parenting plan, each parent has parental responsibility for the child[13] and it is open to parents to agree to the parenting time arrangements that are in the best interests of the child.

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7 *Submission* 6.

8 Fathers4Equality, answers to questions on notice, *Submission* 109N.

9 For example, Mr Gerry Zettler, *Submission* 21; Mr Tim Berthet, *Submission* 56; Mr Jamie Witt, *Submission* 52.

10 *Committee Hansard*, 3 March 2006, p. 3.

11 See for example, Mr James, *Committee Hansard*, 3 March 2006, p. 4.

12 See for example Kathryn Barrett, *Submission* 120, p. 4.

13 Current section 61C of the Act and Explanatory Memorandum, p. 25.

3.13 The Committee also heard the concern expressed in a number of submissions that the reforms in the bill will 'suffer the same fate as the unfulfilled 1995 reforms that were also intended to usher in an era of shared care arrangements'.[14] In this respect, the Committee notes that the Government is also introducing the Family Relationships Centres (FRCs) in order to assist with the implementation of the reforms in the bill.[15] This issue is discussed further below.

3.14 The Committee is mindful that these issues were covered at length by the inquiry which resulted in the Family and Community Affairs Committee's *Every Picture Tells a Story* report (FCAC Report). The FCAC Report concluded that while 50/50 shared residence should be considered as a starting point for discussion and negotiation of post separation parenting plans, in the end, the time spent by a child with each parent should be a decision made in the best interests of the child concerned and on the basis of the arrangement that works best for that family. Ultimately, the FCAC Report did not recommend the inclusion of a presumption of equal parenting time in the Act and the Committee does not intend to revisit this particular issue.

A presumption of parental responsibility

3.15 The introduction of a presumption of equal shared parental responsibility in making parenting orders is one of the key provisions in the bill.[16]

3.16 The provision arises from a recommendation of the FCAC Report:

> The committee recommends that Part VII of the *Family Law Act 1975* be amended to create a clear presumption, that can be rebutted, in favour of equal shared parental responsibility, as the first tier in post separation decision making.[17]

3.17 The Government agreed with this recommendation, stating:

The government … will introduce amendments to Part VII of the Act to require the court to apply a presumption (or starting point) of joint parental responsibility. Joint parental responsibility will mean that parents will continue to share the key decisions in a child's life after separation, regardless of how much time the child spends with each parent.18

3.18 A number of submissions argued that there should not be a presumption of equal shared parental responsibility. Peninsula Women's Information and Support

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14 Fathers4Equality, *Submission* 109, p. 2.

15 See Mr Duggan, *Committee Hansard*, 3 March 2006, p. 50.

16 Section 61DA.

17 House of Representatives Family and Community Affairs Committee, *Every Picture Tells a Story: Report on the inquiry into child custody arrangements in the event of family separation*, December 2003, Recommendation 1, p. xxi.

18 Government Response to *Every Picture Tells a Story*, p. 5.

Services Inc, was one of a number of submissions which raised the following concern about a presumption:

> We do not agree that it should be presumed that shared parental responsibility is the starting point for the process. Ascertaining the facts of the situation and all the variables involved should determine responsibilities, for the benefit of the children.[19]

3.19 Women's Legal Services Australia (WLSA) noted that the current principles underlying the objects of Part VII of the Act require, except where it is contrary to the best interests of the child, that 'parents share duties and responsibilities concerning the care, welfare and development of their children' and that each parent has parental responsibility, subject to court orders.[20] Accordingly, the submission continues:

> [t]he current provisions are clear enough to require and make specific orders in relation to sharing of parental responsibility or to make any other order that meets the best interests of the child.
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> A 'rebuttable presumption' might create greater pressure than already exists to share responsibility for children in inappropriate cases …[21]

Committee view

3.20 The Committee agrees with the FCAC Report that there is a need for a clear presumption in the Act relating to the sharing of parental responsibility.

3.21 As noted above, section 61C of the current Act, deals with parental responsibility in the context of arrangements made in the absence of parenting orders. The Committee therefore believes that the presumption inserted by proposed section 61DA does add to the current legislative framework. The Committee believes that, given the Government's intention to promote meaningful relationships between children and both their parents, it is appropriate that there be some form of presumption in the Act in relation to parental responsibility for parents who require parenting orders.

3.22 However the Committee is concerned at the form of words used in the presumption. This is addressed in the next section.

Equal parental responsibility v joint parental responsibility

3.23 The exposure draft of the bill provided for a presumption of 'joint parental responsibility'.[22] The LCAC recommended that the term 'joint parental responsibility'

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19 *Submission* 58, p. 2. See also NSW Women's Refuge Resource Centre, *Submission* 111, p. 7-8; Domestic Violence and Incest Resource Centre (DVIRC), *Submission* 92, p. 2; WLSA, *Submission* , p. 20-21; National Council for Single Mothers and their Children, *Submission* 26, p. 5.

20 *Submission* 98, p. 20- 21, referring to current sections 60B and 61C of the Act.

21 *Submission* 98, p. 21.

be replaced with the term 'equal shared parental responsibility', in order to be consistent with recommendation of the FCAC Report.[23] A presumption of 'equal shared' parental responsibility was raised in many submissions as a matter of concern.

3.24 In the course of the public hearing the Committee heard evidence on the interpretations and expectations arising from the use of 'equal shared parental responsibility'. Mr Butler from the Shared Parenting Council of Australia (SPCA) said:

> So my understanding would be that I would be required to consult with the other parent. I would be required under law to make sure that the parent's views are considered when a decision is made as to, for example, which school we might send our child to. The big decisions would be made through discussion and not arbitrarily made by one party.[24]

3.25 Ms Holmes, from Relationships Australia Tasmania, stated her concerns in relation to the focus of the presumption:

> I think the removal of the word 'equal' would help to shift the focus back to responsibility, because talking about shares in terms of proportions, such as equal or whatever, gets into the issue of entitlement, in my experience. So, if you are talking about 'equal', the focus - as my colleagues from both [peak bodies] have said here - is on the parents' entitlement rather than the child's best interest, whereas 'responsibility' has a clear focus on the child's best interest rather than on the parents' entitlement.[25]

3.26 Ms Jennifer Hannan of Family Services Australia highlighted the potential difficulty for those working with separating couples where there is a presumption of equality, regardless of whether it is equality of time or responsibility:

> It needs to be about parents taking responsibility and the needs of the child weighed up with what was the situation prior to separation - what are the needs of the children now, how can you guys sit down [and] work out a way that is going to be the best possible way for this child? – rather than looking at parents. The minute you bring in the situation where you are talking about 'equal', it is almost like talking about property. It becomes exceptionally problematic when, on the ground as a worker, you are trying to get them to focus on the needs of a child rather than 'my' rights to have equal anything. It is truly difficult.[26]

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22 Proposed section 61DA of the exposure draft of the bill.

23 House of Representatives Legal and Constitutional Affairs Committee, *Report on the exposure draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005*, August 2005, Recommendation 1, p. 8.

24 *Committee Hansard* , 3 March 2006, p. 32

25 *Committee Hansard*, 3 March 2006, p. 11.

26 *Committee Hansard*, 3 March 2006, p. 16.

3.27 Ms Fletcher of WLSA raised the concern that the use of the term 'equal' in this context 'tends to encourage people to focus on how they are going to precisely equally divide their responsibilities for their children'.[27] Ms Fletcher accepted that in most cases parents should be sharing responsibility for children, it would not be constructive to force people to see that they are sharing exactly equally because this, in turn, would lead to a focus on equal time, despite that not being the intention of the provisions.[28]

3.28 Mr Kennedy from the Family Law Section of the Law Council of Australia stated that in his view the presumption was not a practical one, making the following observations:

> [t]he mere inclusion of the word 'equal' seems to have led, in the media at least, to the generation of a false expectation as to what is going to flow from that.
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> … it does change the broader, more flexible situation that parents had beforehand and almost locks them together to require them to exercise equal decision-making power at a time of their lives when they have a very limited ability to communicate. That is, by and large, not good for children or for the relationship between the parents, particularly where you have a power imbalance or a history within the relationship where one person can use being empowered in that way to influence and control the other person.[29]

3.29 The Family Issues Committee of the Law Society of NSW highlighted a further three issues with respect to the presumption of equal shared parental responsibility, namely:

> [First] that the presumption of equal shared parental responsibility is imposed irrespective of whether it is what the parents themselves want. In this regard it is legislative paternalism at its worst.
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> Second, the presumption applies when making a parenting order, even though the parenting order may only relate to a very discrete aspect of parental responsibility such as how much time the child spends with each parent. In other words the presumption applies even to cases where there is no dispute between the parents about broader issues of decision-making.
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> Third, it is somewhat incongruent that if there is a dispute about broad issues of parental responsibility, the imposition of equal shared parental responsibility potentially creates more problems, not less. The experience of members of the Law Society's Family Issues Committee indicates that parents who experience relationship breakdown, and who are not able to resolve their differences without litigation, often experience high levels of communication difficulties. For these parents, whilst they were *severally*

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27 *Committee Hansard*, 3 March 2006, p. 28.

28 *Committee Hansard*, 3 March 2006, p. 28- 29.

29 *Committee Hansard*, 3 March 2006, p. 41.

> yoked about parental responsibility before coming to Court, they are now *equally* yoked by virtue of this presumption in section 61DA. And yet these parents are the least capable of sharing responsibility and making decisions as equals.[30]

3.30 The Lone Fathers Association (Australia) objected to changing the presumption from equal shared parental responsibility to joint parental responsibility, describing such a move as a 'fundamental attack on the legislation' which would be 'unacceptable to the great majority of separated fathers, and damaging to their children'.[31]

3.31 The Attorney-General's Department state that:

> [t]he Government is aware of concerns that the term 'equal shared parental responsibility' may be thought by some to imply 50/50 time sharing and that use of the term 'equal' may focus people on issues of time rather than sharing parenting in decision making. The note related to section 61DA …makes clear that 'equal shared parental responsibility' is about the sharing of major long-term decisions and not time. Further, the Explanatory Memorandum …makes clear that equal shared parental responsibility is not a presumption of equal shared parenting time.[32]

Committee view

3.32 The Committee recognises that the terms 'joint' parental responsibility versus 'shared' parental responsibility have received ongoing discussion over the history of this bill. The FCAC originally recommended the use of the term 'equal shared'; the government response to the report referred to 'joint shared' and that term appeared in the exposure draft of the bill; and the LCAC report then recommended the change back to 'equal shared' so as to better implement the recommendation of the FCAC Report.

3.33 The Committee recognises that the FCAC Report's recommendation for a presumption of 'equal shared parental responsibility' has been accepted by the Government. The Committee also notes the conclusion of the LCAC that the term 'joint' parental responsibility does not properly implement Recommendation 1 of the FCAC Report.

3.34 The Committee is also mindful of the view of the Attorney-General's Department that the words 'equal shared parental responsibility' have been endorsed by two Parliamentary Committees having received submissions and oral evidence from hundreds of people and organisations.[33]

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30 *Submission* 23, 3 March 2006, p. 4-5.

31 *Submission* 88, p. 4.

32 Attorney-General's Department, answers to questions on notice, *Submission* 137, p. 1.

33 Attorney-General's Department, answers to questions on notice, *Submission* 137, p. 1.

3.35 The criticism of the term 'equal shared parental responsibility' received during this inquiry, and particularly the view of the Family Law Section of the Law Council of Australia that the presumption is impractical, indicates that the meaning of the term needs to be clarified.

Recommendation 1

3.36 The Committee recommends that there be a definition of 'equal shared parental responsibility' inserted in the bill.

Determining the best interests of the child

Primary and Additional Considerations

3.37 When a court is making a parenting order in relation to a child, the child's best interests are the paramount consideration.[34] The bill provides that in determining a child's (or children's) best interests the court must consider the 'primary' and 'additional' considerations listed in proposed subsections 60CC(2) and (3).

3.38 The primary considerations in determining a child's best interests are:

- the benefit to the child of having a meaningful relationship with both of their parents; and
- the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

3.39 There are 13 additional considerations listed in proposed subsection 60CC(3).

3.40 This two-tier approach for determining the best interests of the child was included in the exposure draft of the bill which was considered by the LCAC. As was the case with the exposure draft, concerns were raised in submissions to the current inquiry over framing the considerations as 'primary' and 'additional', particularly the relationship between the two sets of considerations.

3.41 The Family Law Section of the Law Council of Australia reiterated its opposition to the two-tier approach:

> splitting the considerations into primary and additional is likely to create unnecessary debate and tension about the relationship between each set of considerations – with the potential to give rise to sterile, costly and unnecessary disputes which take the focus off the fundamental issue before the Court (i.e. the determination of the children's best interests).
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> … [we recommend] that all considerations should be brought together in the one subsection, without differentiation between them, with the court to

34 See section 65E of the Act and proposed section 60CA of the bill.

> apply discretion and to give such weight to each of the relevant factors as it considers appropriate in the particular circumstances of each case.[35]

3.42 WSLA raised the concern that the two primary considerations listed in proposed subsection 60CC(2) would be in direct conflict with each other whenever violence or abuse is alleged. In cases where both primary considerations apply it is anticipated that the court will give consideration to the additional factors.[36] In WLSA's view this approach further increases the risk of safety being de-prioritised in decision making.[37]

3.43 The Human Rights and Equal Opportunity Commission (HREOC), amongst others, expressed disappointment that the views of the child were categorised as an additional consideration, which, in HREOC's view, meant that the child's views may be of lesser weight than the primary considerations.[38] However, HREOC noted that the Explanatory Memorandum provided that the additional considerations listed in proposed subsection 60CC(3) may outweigh primary considerations. HREOC suggested that this be explicitly provided for in the legislation.[39]

3.44 The Attorney-General's Department outlined the Government's reasons for distinguishing between primary and additional considerations:

> [t]he government takes the view that it is appropriate to link the objects of part VII, for example, the provisions at the beginning of the part which talk about what it is intended to do, to those which are the critical elements of part VII. Clearly the best interests of the child is a critical element of part VII. The government takes the view that it is appropriate to link those provisions together and make it clear what the object's provision is.
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> … the government believes that they are the most important considerations; they are more important than other considerations. That is the view the government has taken. The government has considered the views of a range of stakeholders, including the family law section, and throughout a number of iterations of this legislation these issues were dealt with directly by the legal and constitutional affairs committee in the other place. The government strongly takes the view that these are the critical elements that it sees as determining the decision about what is in the best interests of the child. In particular, the government is keen to raise the issue about ongoing relationships, particularly with non-resident parents. That is one of the reasons why that provision is there. At the same time, of course, the

35 *Submission* 99, p. 2-3.

36 Attorney-General's Department in its submission to the LCAC, see p. 51, paragraph 2.190 of the LCAC Report.

37 *Submission* 98, p. 5.

38 *Submission* 13, p.5. See also the Law Society of South Australia, *Submission* 30, and Women's Legal Services Australia, *Submission* 98.

39 *Submission* 13, p. 5, referring to the Explanatory Memorandum, p. 13.

> government is acutely aware of the need to protect children and give them a safe environment.[40]

The extent to which a parent has fulfilled their responsibilities as a parent

3.45 Two additional subsections of proposed section 60CC, which were not in the exposure draft considered by the LCAC, were also the subject of comment in submissions. Proposed subsections 60CC(4) and (4A) provide direction to the court in its consideration of the extent to which each of the child's parents has fulfilled, or failed to fulfil, their responsibilities as a parent.[41]

3.46 On a positive note, the Family Issues Committee noted:

> section 60CC(4) has the potential to introduce into Australian family law a new "friendly parent doctrine" ie the friendly parent - the one who has always participated in the life of the child and facilitated the other parent's participation – gets the advantage under section 60CC(4) of the bill. This hopefully changes the culture of disputation between parents and brings about better outcomes for their children too. As parents start to realise that their conduct will potentially be the subject of such scrutiny, they may think twice about actions such as abuse, violence, or restricting the time spent between children and their parent.[42]

3.47 Although the Committee is encouraged by this view, there were three problems identified with the provisions which the Committee found concerning. These are outlined below.

3.48 Firstly, the Family Issues Committee of the Law Society of NSW commented that section 60CC(4) may have an unintended consequence of generating more acrimonious disputes and litigation between parents:

> section 60CC(4) has the potential to unsettle that balance by explicitly directing attention to adult centric considerations, particularly in self-represented litigation.
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> … Section 60CC(4) is a statutory invitation to all litigants, represented or unrepresented, to produce evidence about matters relating, ultimately, to a

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40 Mr Duggan, *Committee Hansard*, 3 March 2006, p. 54.

41 Proposed by subsection 60CC(4A) is part of the Government amendments to the bill introduced into the House of Representatives on 27 February 2006. Although these amendments were introduced after the closing date for submissions, meaning they may not have been covered in written submissions, the Committee was able to seek feedback on the amendments at the public hearing. Subsection 60CC(4), along with subsections 60CC(3)(c) and (i) were referred to in some submissions as the 'friendly parent' provisions, see for example the NSW Women's Refuge Resource Centre, *Submission* 111, and the Family Issues Committee of the Law Society of NSW, *Submission* 23.

42 *Submission* 23, p. 3.

> parent's conduct. For some self-represented litigants, section 60CC(4) will be read as a statutory licence to 'have a go at the ex'.[43]

3.49 The Family Law Section of the Law Council of Australia also noted that subsection 60CC(4) had the potential to become litigation-generating, because it invited a 'trawl' through the history of the couple with evidence being led as to the conduct of each parent, rather than focussing on the present and the future.[44]

3.50 Secondly, the Family Issues Committee, along with a number of submissions, went on to highlight the potential adverse application of section 60CC(4). The NSW Women's Refuge Resource Centre makes the following observation:

> [t]he 'friendly parent' provision also militates against women disclosing abuse and domestic violence, as they would risk being seen as "non-cooperative" and not prepared to facilitate contact with the other party.
>
> An abusive partner on the other hand, would be more than happy to 'facilitate' contact with their ex-partner in order to use it as an opportunity to continue to abuse.[45]

3.51 Finally, it was also drawn to the Committee's attention, that despite the amendments made by subsection 60CC(4A) it was still not clear that in applying subsection 60CC(4) the court was to consider a parent's fulfilment of their parental responsibilities in both a pre- and post-separation context.

3.52 Ms Fletcher of WLSA pointed out that subsection 60CC(4) is couched in post-separation terminology. The specific direction in subsection 60CC(4A) for the court to consider events and circumstances since the separation served only to focus attention on a parent's conduct and circumstances in the post-separation environment.[46] In contrast, Mr Kennedy of the Family Law Section of the Law Council of Australia thought that the provisions were overly focussed on a parent's pre-separation fulfilment of their parental responsibility.[47]

Consent orders

3.53 Subsection 60CC(5) provides that the court is not required to give consideration to the primary and additional considerations in subsections 60CC(2) and (3), where the parties are seeking parenting orders by consent. This provision already exists in the Act as subsection 68F(3).

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43 *Submission* 23, p. 2-3.

44 See Mr Kennedy, *Committee Hansard*, 3 March 2006, p.37-38; and *Submission* 99, p. 3-4

45 *Submission* 111, p. 4-5.

46 *Committee Hansard*, 3 March 2006, p. 28.

47 *Committee Hansard*, 3 March 2006, p. 37.

3.54 Ms Holmes of Relationships Australia spoke to the Committee of her concerns that consent orders were a potential 'blind spot' in the Act:

> … because a lot of abuse is quite well hidden and it is a matter of reading the clues. I am very concerned about consent orders. A couple, where there is a lot of intimidation, can present consent orders. I have done a little bit of scoping around one of the registries … and I understand some judges and registrars who approve consent orders read them and some do not. I think there is a whole area that this act is failing to address … with domestic violence, there is a real risk that consent orders might slip through without anyone identifying that this seems a peculiar arrangement.[48]

Committee view

3.55 The Committee notes the concerns raised in relation to the two-tier approach to determining the child's best interests set out in proposed section 60CC. The Committee has also considered the Explanatory Memorandum, which provides that:

- [t]he safety of the child is not intended to be subordinate to the child's meaningful relationship with both parents; and
- there may be some instances where [the] secondary considerations may outweigh the primary considerations.[49]

3.56 The Committee appreciates the explanation by the Attorney-General's Department as to why this particular approach has been adopted in the bill, namely:

- the need to link the objects of Part VII (as set out in proposed subsection 60B(1)) with the critical elements of the Part VII; and
- the primary considerations are the most important considerations, more important than the additional considerations.

3.57 However, the Committee does not believe that the relationship between the primary and additional considerations in proposed subsection 60CC(2) and (3) is sufficiently clear. The Committee understands that while each consideration is, in and of itself, a discrete element of determining the best interests of the child, a better explanation should be provided as to the interaction of these considerations, particularly how each consideration is weighted against, limited by, or negatived by any other consideration. The Committee is concerned that without any clarification to these issues, the bill will become litigation generating. The Committee has taken into consideration that, in relation to other sections of the bill, readers (particularly self-represented litigants) are guided by signposting in Notes. The Committee believes that this would be one way in which the relationship between the considerations in proposed subsection 60CC(2) and (3) could be clarified.

Recommendation 2

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48 *Committee Hansard*, 3 March 2006, p. 15.

49 Explanatory Memorandum, p. 13.

3.58 The relationship between the considerations in proposed subsections 60CC(2) and (3) be clarified in the bill.

3.59 The Committee notes the concerns raised in submissions and in evidence that subsections 60CC(4) and (4A) have the potential to provide additional acrimony to contested proceedings, and to adversely impact on parents who seek to protect their child(ren) from an abusive parent. However, the Committee is encouraged by the view that subsection 60CC(4) may also result in a change of the culture of dispute in child-related proceedings.

3.60 The Committee is concerned about the potential impacts of subsections 60CC(4) and (4A), particularly the apparent lack of clarity as to how the provisions apply to a parent's pre- and post- separation conduct and circumstances.

3.61 The Committee believes that pre- and post-separation conduct and circumstances may be relevant to the best interests of the child(ren).

Recommendation 3

3.62 Subsections 60CC(4) and (4A) should be amended to make it clear that a court should consider a parent's pre- and post-separation conduct and circumstances. The revised provisions should use appropriate terminology for the pre-separation conduct and considerations, and avoid using post-separation terminology such as 'the parent's obligation to maintain the child'. The revised provisions should also direct the court that while pre-separation considerations are important, the focus should be on determining the child's best interests in relation to a parent's present and future conduct and circumstances.

3.63 The Committee appreciates Relationships Australia's views on how provisions excluding the operation of court consideration where consent orders are lodged are open to abuse by parties, particularly in cases of domestic violence. The Committee believes that the operation of these exclusionary provisions should be further investigated by Government.

Recommendation 4

3.64 That the Government undertake a review of the application of provisions which may operate to exclude the Court's consideration in situations where consent orders are lodged by the parties.

Equal time or substantial and significant time parenting arrangements

3.65 The amendments in the bill are aimed at having separated parents, and courts, consider equal time, or substantial and significant time parenting arrangements. This section discusses two provisions which implement that aim.

Obligation on Advisors

3.66 Proposed section 63DA creates an obligation on advisers (legal practitioners, family counsellors, family dispute resolution practitioners and family consultants) to inform people considering entering a parenting plan that they could consider equal time, or substantial and significant time parenting arrangements, for those parenting plans, where such arrangements are in the best interests of the child and reasonably practicable.

3.67 Family Services Australia raised three specific issues in its submission with respect to this provision:[50]

- such information may maintain a focus on the parents rather than the child, whose experiences, developmental stage, emotional and physical bonds and relationship with friends and pets may be compromised by an arrangement that does not take these considerations into account;
- the place of assessment in the process is not clear. While implied through the use of terms such as 'reasonably practicable', a comprehensive assessment of a family is a pre-requisite of any family work and is the basis on which any information of the type required by section 63DA would be given; and
- the specific nature of the requirement for family advisers to inform parents of the possibility of equal time, or substantial and significant time jeopardises the adviser's neutrality and impartiality. Advisors hold a position of power, and parents may understand the advice to be an endorsement of a specific arrangement. The preference would be for parents to be presented with a range of options, and allow the parents to consider their own needs.

Requirement for court to consider equal time, or substantial and significant time

3.68 Proposed section 65DAA requires the court to consider, in situations where parents have equal shared parental responsibility for a child, an equal time or substantial and significant time parenting arrangement. Such arrangements must only be ordered where it would be in the best interests of the child and reasonably practicable.

3.69 Mr Butler of the SPCA described proposed section 65DAA as 'an opportunity – or a door that opens' for parents wanting to spend equal or substantially equal time with their children. The Family Issues Committee of the Law Society of NSW described the amendments in proposed section 65DAA as:

> a significant development in Australian Family Law and will, in all likelihood, set new benchmarks in terms of shared parenting arrangements after separation.

3.70 A number of other submissions found these provisions problematic.

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50 *Submission* 1, p. 9.

3.71 The Non Custodial Parents Party argued that the term 'substantial and significant' should be defined as 'around 120 days a year'. The Non Custodial Parents Party considered the changes were too vague and provided too much of an opportunity not to change current decision making processes.[51]

Reasonable practicality

3.72 One particular aspect of subsection 65DAA(5), which outlines how the court determines whether an arrangement is reasonably practical, was brought to the Committee's attention. Proposed paragraph 65DAA(5)(b) requires the court to have regard to the parents' current and future capacity to implement an arrangement for the child spending equal time, or substantial and significant time, with each of the parents.

3.73 The Family Issues Committee of the Law Society of NSW made the following comment on the use of the word 'capacity' in this context:

> [t]here is some risk that this may be interpreted, particularly by self-represented litigants, as also referring to financial capacity, as well as emotional and physical capacity. The reality is that greater levels of shared parenting after separation will inevitably lead to financial implications not only in relation to maintenance, child support and property settlement, but as regards to social security as well. The potential changes in the workplace are also enormous. Specifically in the context of this sub-section, however, the Committee queries whether the intention was to potentially invite a closer connection between financial matters and parenting matters, especially for self-represented litigants.[52]

3.74 The Family Issues Committee of the Law Society of NSW was also of the view that parents' past capacity, more so than their future capacity, was a better indicator of reasonable practicality.[53]

3.75 The Committee put the concerns in relation to proposed paragraph 65DAA(5)(b) to the Attorney-General's Department and received the following response:

> These provisions … are a potted summary of factors that have been listed in an existing case before Magistrate Ryan. So they actually come from under the existing law. And the government, to make it clear to the court the sorts of things it needs to take into account, put them in the legislation.[54]

3.76 The Attorney-General's Department was not concerned that 'capacity' might be interpreted as financial arrangements and stated that the situation would be monitored to ensure that such an interpretation was not adopted. Further, the Attorney-

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51 *Submission* 101.

52 *Submission* 23, p.7.

53 *Submission* 23, p. 7.

54 Mr Duggan, *Committee Hansard*, 3 March 2006, p. 53.

General's Department did not consider that inserting an express provision in the bill, excluding consideration of financial capacity was warranted:

> We do not necessarily put it in other provisions either. That is the difficulty sometimes. When you amend one provision which … is quite similar to another provision, you start tinkering … Once we make a change to the law then we potentially have flow-on effects that may, for example, impact on other parts of the legislation … I would have thought that the provision is clear enough in itself. It flows from case law, so it is dealt with under the existing law. We do not think there is a need.[55]

Committee view

3.77 The Committee appreciates the concerns raised by Family Services Australia in relation to proposed section 63DA. The Committee notes that although the wording section 63DA states that an advisor 'must' advise parents they can consider equal time and substantial and significant time arrangements where those arrangements are reasonably practicable and in the best interests of the child the provision does not preclude advisors from informing separating parents of other parenting arrangements.

3.78 Further, the Committee understands the provisions of the section to mean that advisors are obligated to inform parents they *could* consider equal time, or substantial and significant time, arrangements *where those arrangements are reasonably practicable and in the best interests of the child*. The Committee understands that advisors may, but are not obligated, give an opinion as to whether the option is appropriate in the particular circumstances of the parents.

3.79 The Committee believes that proposed section 63DA is sufficiently broad to address the concerns raised by Family Services Australia.

3.80 The Committee notes the position put forward by the Non Custodial Parents Party in relation to the definition of substantial and significant time. 'Substantial and significant time' is defined in proposed section 63DA and 65DAA by reference to the time:

- including both weekends and weekdays;
- allowing a parent to be involved in the child's daily routine and occasions or events which are of significance to the child;
- allowing the child to be involved in occasions or events which are significant to the parent.

3.81 The Committee has considered the explanation that the definition in the bill is intended to focus on both the quantity of time and the quality of time that a parent

55 Mr Duggan, *Committee Hansard*, 3 March 2006, p. 53.

spends with the child, and feels that this is a better definition than may cause the parties to focus solely on the quantity of time that a child spends with a parent.[56]

3.82 The Committee is grateful to the Family Issues Committee of the Law Society of NSW, Mr Kennedy from the Family Law Section of the Law Council of Australia and the Attorney-General's Department for their contributions on the interpretation of 'capacity' in proposed subsection 65DAA(5)(b). The Committee is mindful of the caution expressed by the Attorney-General's Department regarding potential flow on effects from so-called 'tinkering'. The Committee accepts the explanation given by the Attorney-General's Department that 'capacity' in this context is a term derived from case law and is understood to not mean 'financial' capacity.

Parenting Plans

3.83 Proposed section 63C(2) sets out the issues which may be dealt with in a parenting plan. The key differences between section 63C(2) and the equivalent provision in the Act, is that the new provision:[57]

- sets out in greater detail the matters which may be covered in a parenting plan;
- facilitates the removal of the terms 'residence and contact' from the Act;
- provides that a parenting plan may deal with the process for resolving disputes about the terms and operation of the plan;
- clarifies that a parenting plan may allocate parental responsibility for making decisions about major long term issues in a child's life; and
- gives a greater recognition to the role of grandparents in the life of a child.

3.84 A number of submissions raised the interaction of proposed section 64D and the operation of parenting plans. Under section 64D, in all but exceptional circumstances, a parenting order could be subject to a later parenting plan. The particular concern was that one party may enter into a parenting plan under duress or coercion. The effect of that 'coerced' parenting plan could be to overturn a judicially considered and determined parenting order.[58]

56 Explanatory Memorandum, p. 36.

57 Explanatory Memorandum, p. 28-9.

58 See the Family Law Section of the Law Council of Australia, *Submission* 99. p. 8, and the Family Law Committee of the Law Society of NSW, *Submission* 23, p. 7.

Committee view

3.85 The Committee notes that a number of solutions to this issue have been raised, including certifying that the parties have received independent legal advice on the plan or a 7-day cooling off period following parties entering into a parenting plan.[59]

3.86 The Committee concurs with the view of the Attorney-General that the application of contract law principles, such as a cooling off period, to parenting plans may potentially stifle what is intended to be a flexible document which can be amended by the parties to suit their changing circumstances.[60]

3.87 The Committee is satisfied that Government amendments introduced into the House of Representatives on 27 February 2006, which provide that an agreement is not a parenting plan unless it is made free from threat, duress or coercion, should be sufficient to address this concern. The Committee also believes the Government amendments to proposed section 64D, clarifying what is meant by 'exceptional circumstances' for the purposes of that section, addresses these concerns. Specifically, the amendments provide that exceptional circumstances include:[61]

- circumstances giving rise to a need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and
- the existence of substantial evidence that one of the child's parents is likely to seek to use coercion or duress to gain the agreement of the other parent to a parenting plan.

Definition of 'family violence'

3.88 The bill inserts a new definition of 'family violence' into the Act:

> ***family violence*** means conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person's family that causes that or any other member of the person's family reasonably to fear for, or reasonably to be apprehensive about, his or her personal wellbeing or safety.[62]

3.89 The term 'family violence' is an important defined term in the bill because it is relevant to a number of key sections throughout the bill, including:

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59 See for example the Family Law Committee of the Law Society of NSW, *Submission* 23; Family Law Practitioners Association Queensland, *Submission* 34; NSW Women's Refuge Resource Centre, *Submission* 111.

60 Mr Duggan, *Committee Hansard*, 3 March 2006, p. 47-48.

61 See Attorney-General's Department, answers to questions on notice, *Submission*

62 Item 3 of Schedule 1.

- one of the primary considerations for the court in determining what is in the child's best interests is the need to protect the child from physical or psychological harm from being subject to family violence;[63]
- two exceptions to the requirement to attend dispute resolution are that there has been family violence or there is a risk of family violence;[64] and
- the presumption of equal shared parental responsibility when making parenting orders does not apply if there are reasonable grounds to believe that a parent of the child has engaged in family violence.[65]

3.90 The definition of 'family violence' was not raised as an issue by either the FCAC Report, or the Government response to that report. The revised definition comes as a result of a recommendation by the LCAC, on the basis of the Committee's concerns that false allegations could be made and that the definition of family violence would be better qualified by inserting an objective element.[66]

3.91 The Committee received many submissions addressing the impact that this amendment to the definition of family violence may have.

3.92 Some submissions argued that violence was not a matter for family law at all. Mr Adams stated:

> Violence is not a matter of Family Law. Domestic violence and common assault are matters for the local court and should remain in the local court.[67]

3.93 The SPCA stated:

> that left unqualified the notion of family violence is too wide and vague and fabrication and allegations of violent behaviors are often made by one party during a case to leverage parenting outcomes that would disadvantage the other.
>
> We have proposed the addition of the word 'serious' to be added to 'violence'. Leaving the word violence unqualified is capable of a wide definition and interpretation, whereas the reality is that it varies from raised voices to serious injury. Violence without any definition might lead to an enormous amount of litigation, and would prevent many fruitful mediation sessions from taking place.[68]

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63 Proposed paragraph 60CC(2)(b).

64 Proposed subparagraphs 60I(9)(b)(iii) and (iv).

65 Proposed paragraph 61DA(2)(b).

66 House of Representatives Legal and Constitutional Affairs Committee, *Report on the exposure draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005*, August 2005, p. 35.

67 *Submission* 110, p. 3.

68 *Submission* 100, p. 15.

3.94 The Lone Fathers Association (Australia) argued that an objective test was necessary:

> [l]aws affecting the rights of a person cannot in justice be based on a subjective state of mind of another person. The description of domestic violence needs, in fact, to be tightened up, as it is at present too all-embracing.[69]

3.95 However, a number of submissions expressed concern at the objective requirement being imported into the definition of family violence. For example, the NSW Women's Refuge Resource Centre argued that an objective requirement could potentially exclude consideration of a perpetrator's pattern of previous violent behaviour.

> [a] woman who has experienced domestic violence, possibly over a number of years, may experience fear over an incident or event that would not "reasonably cause" fear in an outsider. This is because the incident may be part of a pattern of abuse and control that outsiders have no insight into. This approach does not take into consideration that the effect of domestic violence is accumulative.[70]

3.96 WLSA stated that an objective test sends an unfortunate message to the community, that the use of violence and the experience of violence is only a problem if it causes someone 'reasonably' to be in fear.[71]

3.97 Dr Elspeth McInnes of the National Council of Single Mothers and their Children (NCSMC) gave the following example of how an objective test might operate against a victim of family violence:

> We had a case where a mother detailed how her ex partner had brutally murdered the family pet, a cat, in front of the child and the mother. It was in an episode of high agitation and aggression and he had threatened that this would happen to other family members who defied him. He used to like to send kitten cards to the child and the mother when she was attending court. Everybody would look at that on the outside and say, 'Isn't that nice, he's sending a lovely card with a kitten.' But the message was 'remember the cat'. How do you deal with those situations in the court? The reality is that would be disregarded under the current regime, let alone what is ahead.[72]

3.98 Other submissions linked the operation of this amended definition of family violence to the new provision for costs orders against a person who knowingly makes a false allegation of violence (discussed below). It was stated that the overall effect of

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69 *Submission* 88, p. 5.

70 *Submission* 101, p. 4.

71 *Submission* 98, p. 11-12.

72 *Committee Hansard*, 3 March 2006, p. 19.

the two provisions would be to 'silence' victims of family violence who were unable to substantiate their allegations.[73]

3.99 The Attorney-General's Department had the following to say on the amendment:

> The only change to the current definition that has been made is the addition of that word – 'reasonable' – and that only relates to an apprehension or fear of violence, not to where there has been actual violence. The Attorney has not undertaken a major rewrite of the definition of violence.[74]

3.100 The Attorney-General's Department was of the view that the amendment was not a major change, and that a fundamental change to the definition was not thought to be appropriate. The Department indicated further consideration may be given to this issue once the research from the Australian Institute of Family Studies is available.[75]

3.101 The Attorney-General's Department noted that that there is a 'very extensive jurisprudence' about the current definition, and stated that the test is a 'reasonable' person in the shoes of the individual:

> [i]t is not some person on the Clapham omnibus – the average man in the street – that we are dealing with; it is the reasonable person in the shoes of the individual and whether they would fear or have an apprehension of violence.[76]

Committee view

3.102 The Committee understands that the issue of family violence is one of the most difficult in family law, and therefore any proposed amendment to the definition of the term family violence is not a matter to be undertaken lightly.

3.103 The Committee heard evidence, and received submissions from those who were both for and against the inclusion of an objective test in the Act. On one hand some people have the view that the current definition of family violence is all-embracing. As one witness pointed out to the Committee:

> [s]houting on one occasion and slamming a door on one occasion have been cited as proof of violence.[77]

3.104 On the other hand, the Committee was told of the importance and validity of a subjective view that:

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73 See for example the Domestic Violence and Incest Resource Centre, *Submission* 92, p. 2, and

74 Mr Duggan, *Committee Hansard*, 3 March 2006, p. 48.

75 Mr Duggan, *Committee Hansard*, 3 March 2006, p. 48.

76 Mr Duggan, *Committee Hansard*, 3 March 2006, p. 48.

77 Mr Adams, *Committee Hansard*, 3 March 2006, p. 8.

> police and anybody who is working with family violence victims need to ask the victim, 'How frightened are you of what the perpetrator is doing?' rather than some objective person, who may say: 'So what?…'[78]

3.105 The Committee notes the concerns raised about the potential interpretations that may arise from the inclusion of the word 'reasonably' in the definition. The Committee received a number of submissions and heard evidence that the proposed objective test will potentially exclude a history or pattern of violent behaviour.

3.106 The Committee notes that objective tests are not uncommon in different areas of the law. In this regard, the Committee was particularly interested in the evidence given by the Attorney-General's Department, which indicated the interpretation in this instance would be the reasonable person 'in the shoes of the individual' (presumably with the complainant's knowledge). The Committee understands from this that the Government intends that a history or pattern of behaviour, to some extent, may be taken into account in the application of the test.

3.107 Despite this, the Committee has reservations that this position is not expressed in the definition in the bill, and may therefore not be clear, particularly for self-represented litigants.

3.108 In considering this particular issue the Committee has taken into account the history to this amendment. It is the Committee's understanding that the amendment was recommended by the LCAC to address concerns that false allegations of violence *could* be made and that a better qualified definition of family violence may address this concern. Therefore, the purpose of the amendment is to raise the burden of proof on allegations of family violence – a purpose which is reliant on a view about the frequency of vexatious complaints of violence.

3.109 Further the Committee has also considered the statements by the Attorney-General's Department to the effect that there is extensive jurisprudence about the current definition of family violence and that a fundamental change to the definition was not thought to be appropriate at this time.

3.110 If the Government does feel it is necessary at this point in time to amend the definition, the Committee believes that the definition should be clarified to include the intention that the test applies to a reasonable person in the shoes of the individual, and with the individual's knowledge.

Recommendation 5

3.111 The proposed definition of family violence should be redrafted to clarify that the test is the 'reasonable person in the shoes of the individual and whether they would fear or have an apprehension of violence'.

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78 Ms Budivari, *Committee Hansard*, 3 March 2006, p. 26.

Recommendation 6

3.112 The Government should use the results of the Australian Institute of Family Studies research it has commissioned into family violence and, if necessary, review definitions of family violence across all State and Territory jurisdictions as soon as possible.

Costs orders for false allegations

3.113 Proposed new section 117AB provides that, where the court is satisfied that a party knowingly made a false allegation or statement in the proceedings, the court must order that party to pay some or all of the costs of another party to the proceedings.

3.114 The provision was inserted in the bill as a result of a recommendation by the LCAC in relation to exceptions to the requirement to attend dispute resolution on the basis of family violence and child abuse. The LCAC recommended that:

- there be an exception to attendance at dispute resolution where an affidavit is made asserting the existence of family violence or child abuse; and
- there should be an express statement in the proposed exception provision of penalties to apply if the court is satisfied on reasonable grounds that a false allegation was knowingly made in the affidavit.[79]

3.115 In its response to the LCAC Committee, the Government stated that it did not agree with the recommendation that an exception to dispute resolution should be granted where an affidavit asserting family violence or child abuse is filed. The Government did agree with the second part of the recommendation, noting that it considered a cost provision appropriate in circumstances where it was established that a false allegation was 'knowingly made'.[80] The provision attempts to address concerns that allegations of family violence can be easily made and may be taken into account in family law proceedings. The approach has been adopted as it avoids the need for criminal proceedings for perjury, which are inappropriate where parents need to maintain an ongoing parenting relationship.[81]

3.116 Mr Williams of the Lone Fathers Association (Australia) indicated his concerns about the role that allegations of violence played in dispute resolution. Mr Williams stated that allegations of violence should be 'proven – the accused convicted

79 House of Representatives Legal and Constitutional Affairs Committee, *Report on the exposure draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005*, August 2005, Recommendation 21, p. 72-3.

80 Government Response to the Recommendations of the House of Representatives Standing Committee on Legal and Constitutional Affairs on the Family Law Amendment (Shared Parental Responsibility) Bill 2005, p. 10.

81 Explanatory Memorandum, p. 40-1.

and charged' before the exception to mandatory dispute resolution could be invoked by a party.[82]

3.117 The Attorney-General's Department noted that knowingly making a false allegation would probably constitute the criminal offence of perjury. However, rather than pursue the criminal offence via a costly and long-running prosecution, the Government has proposed section 117AB, obligating courts to make a costs order.[83]

3.118 The Attorney-General's Department also drew the Committee's attention to the other purpose that the provision serves – to give resolution to the party against whom an allegation has been made:

> because our court is not required necessarily to make absolute findings in relation to whether an allegation took place or not – its major task is to look at risk to the child – there are circumstances in a number of cases where the allegation is made and is not substantiated and it just remains there. So someone who vehemently opposes or denies the allegation does not have a finding in his or her favour.[84]

3.119 The principal criticism of the proposal is that it is based on an, as yet unproven, view that there is a problem with false allegations in the family law system. Dr McInnes of the NCSMC raised the concern that 'the mere fact that there are penalties for false allegations of violence writes into the minds of everybody that false allegations are a likely and common outcome of allegations of violence'.[85]

3.120 As noted above in relation to the definition of family violence, there were some submissions concerned that the combination of the two provisions would result in people being reluctant to report domestic violence for fear that if they were unable to substantiate the claim, there would be a costs order made against them. Ms Fletcher of the WLSA said:

> these provisions will pressure women to keep quiet about violence or abuse and lead to the victim's experience not being properly factored into decision making. This would undermine one of the central objects proposed in the bill and one of the primary considerations for making decisions about children – that is, the need to protect children from harm. It would also send a dangerous message to the community about family violence that is inconsistent with one of the key messages of the 'Violence against women: Australia says no' campaign that women should speak up about violence and their fears will be taken seriously and acted upon.[86]

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82 *Committee Hansard*, 3 March 2006, p. 2.

83 Mr Duggan, *Committee Hansard*, 3 March 2006, p. 50-51.

84 *Committee Hansard*, 3 March 2006, p. 51.

85 *Committee Hansard*, 3 March 2006, p. 20.

86 *Committee Hansard*, 3 March 2006, p. 25.

3.121 Ms Fletcher stated that at best the provisions could be described as 'premature' because they were designed at addressing a perceived problem of false allegations and the Government was still awaiting findings on research it had commissioned on this issue.[87]

3.122 Ms Mertin-Ryan of Relationships Australia stated that false denials, as well as false allegations, should be the subject of the study commissioned by the Government.[88]

Committee view

3.123 The Committee understands that the issue of allegations of violence is a difficult area for those involved who have experienced relationship breakdowns and for those assisting families following separation. The Committee appreciates the material provided in submissions on this particular issue which highlights the tensions in this particular area.

3.124 The Committee notes that this particular provision represents the Government's agreement to one part of a two-part recommendation by the LCAC. The Committee is concerned that the LCAC recommendation was made in the more limited context of an affidavit having been filed asserting family violence or child abuse in order to trigger the exception provisions to mandatory dispute resolution. The current provision dispenses with the framework in which the recommendation was made, namely the assertion of family violence in an affidavit filed to exempt a party from mandatory dispute resolution. In addition, the provision applies generally to false allegations in the proceedings, and is not limited to false allegations of family violence or child abuse.

3.125 The Committee is mindful of the delicate balance which must be struck in situations where there are allegations of family violence. On one hand the Committee sees that the provision may, in concert with the proposed definition of family violence, cause some victims of family violence to be reluctant to come forward and speak out against the perpetrator. In this regard, the Committee notes Recommendation 5 of this Report, being that the proposed definition of family violence be amended.

3.126 On the other hand, the Committee sees that the provision may provide resolution for other victims, being those who are falsely accused of perpetrating violence, but who feel that those false allegations are not fully dealt with in the current environment.

3.127 Another factor influencing the Committee is that false allegations made in proceedings are already a criminal offence, and may be prosecuted as perjury. The

87 *Committee Hansard*, 3 March 2006, p. 25.

88 *Committee Hansard*, 3 March 2006, p. 11.

Committee also takes into account the evidence by the Attorney-General's Department that in its view, even under the current Act, it would expect the Court to make costs orders in a situation where there is evidence that someone has knowingly made a false allegation.[89]

3.128 On balance, the Committee believes that until the research commissioned by the Government into this area is complete, it is unclear whether this is a problem that needs solving. Therefore, the proposed obligation on the Court to make cost orders against parties found to have knowingly made false allegations should not be included in the Act.

Recommendation 7

3.129 Proposed subsection 117AB should be removed from the bill pending any relevant results of the Australian Institute of Family Studies research into the prevalence of false allegations of family violence in family law proceedings.

Certify that a 'genuine effort' has been to resolve a dispute

3.130 The Committee received a number of submission raising concerns with the provisions in proposed subsection 60I(8). Subsection 60I(8) deals with the certificates given by family dispute resolution practitioners in relation to the mandatory dispute resolution attendance before applying to the court for orders under Part VII of the Act.

3.131 There are 4 certificates which a family dispute resolution practitioner may give to those attending dispute resolution:

- a certificate that the party did not attend dispute resolution, but that non-attendance was as a result of the refusal or failure of other parties to the proceedings to attend; or
- a certificate that the person did not attend dispute resolution, because the practitioner considers that it would not be appropriate to conduct the proposed dispute resolution;[90] or
- a certificate that the person attended with the other parties to the proceedings, and all attendees made a genuine effort to result the dispute; or
- a certificate that the person attended with the other parties to the proceedings, but that the person, or other parties, did not make a genuine effort to result the dispute.

3.132 The requirement that a family dispute resolution practitioner certify that parties had, or had not, made a genuine effort to resolve their disputes caused concern for a number of reasons. Family Services Australia stated that it was concerned with

89 Mr Duggan, *Committee Hansard*, 3 March 2006, p. 50-51.

90 This type of certificate was added to the bill in the Government amendments introduced into the House of Representatives on 27 February 2006.

the concept of a 'genuine effort' which was reliant on a subjective judgement by the practitioner. Family Services Australia gave examples of how problematic the term is:

> Sometimes a party can feel protective of him- or herself or a child but still have a 'genuine' wish to resolve the issues. Others may not feel ready to work towards resolving the issues at that specific time, feeling coerced into attending dispute resolution. This may not necessarily mean that that person will not be ready for a 'genuine effort' in another month or two. A person might also have a 'genuine' wish to resolve issues but feel unable to resolve them at the time of dispute resolution because of fear or confusion over what is best at the time. Nevertheless, a person's demeanour might be interpreted as not 'genuine'.

3.133 It was Family Services Australia's view that certificates judging a party's efforts at dispute resolution jeopardised that party's wish to enter into family dispute resolution at some later stage. Further Family Services Australia felt that requiring a practitioner to give a 'genuine effort' certificate undermined the role of the practitioner as a neutral and impartial facilitator of the dispute resolution process.[91]

3.134 Mr Butler from the SPCA stated that although he did not have an opinion one way or the other on requiring that the court be provided with a report on how a mediation or counselling progressed:

> perhaps some heads-up view to the judge, arbitrator or judicial officer that one parent is certainly not as cooperative in respect of promoting a shared parenting or a relationship for the other parent with the child or children is certainly something that I would be particularly keen to see go forward.[92]

3.135 The Attorney-General's Department explained that these provisions are:

> really aimed at the situation where perhaps one party or both parties are intent on going through the court process and are basically seeing the dispute resolution process as a speed bump on the way to court. What we are trying to do here is really focus the parties on trying to give this a real go – to make sure they can resolve their issues and have a genuine attempt at it.[93]

Committee view

3.136 The Committee is aware that, following the initial introduction of the bill into the House of Representatives, some groups supported the introduction of a mechanism that enabled family dispute resolution practitioners to indicate to the Court that particular cases were inappropriate for dispute resolution, for example when domestic violence is a significant issue.[94] The Committee understands that these concerns have

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91 See Family Services Australia, *Submission* 1, p. 7-8.

92 *Committee Hansard*, 3 March 2006, p. 31-2.

93 Mr Arnaudo, *Committee Hansard*, 3 March 2006, p. 49.

94 See for example, Ms Hannan, *Committee Hansard*, 3 March 2006, p. 9-10.

been addressed by the amendments introduced by the Government which provide for a certificate to the effect that the parties did not attend dispute resolution because, in the view of the practitioner, dispute resolution would not be appropriate.[95]

3.137 The Committee notes concerns that the certificates envisioned in proposed subsections 60I(8), which require a subjective judgement of a party's efforts in mediation, may potentially undermine future attempts at dispute resolution and the neutrality and impartiality of family dispute resolution practitioners.

3.138 However, ultimately, the Committee accepts the position put forward by the Attorney-General's Department that the requirement to make a genuine effort is designed to stop people from circumventing the compulsory dispute resolution processes by either attending and making no effort or approaching the dispute resolution as a means of obtaining a court order, rather than as an opportunity to resolve the dispute.[96]

3.139 While the Committee does not believe that judges or magistrates should be relying solely on the contents of the certificate, Committee also understands that early advice to a judge or magistrate may also be beneficial in some circumstances. It is the Committee's understanding that these certificates form only one element of a number of factors the court may consider.

3.140 The Committee notes that these certificates may form the basis of a costs order against a party. However, the Committee is also conscious that the court has the discretion to refer parties to family dispute resolution under proposed section 13C, which provides an alternative to a cost order to encourage parties to resolve their disputes. While the certificates may have cost implications for parties, the Committee believes that the court will exercise this discretion with sufficient caution so as not to unreasonably burden any party.

Access to, and costs of, dispute resolution services

3.141 Proposed subsection 60I(7) requires that parties attend dispute resolution prior to a court hearing any application under Part VII of the Act.

3.142 Notwithstanding paragraph 60I(9)(e), which indicates that the physical remoteness of the parties from dispute resolution services may mean they are exempt from the requirement in subsection 60I(7), the Committee was interested to hear from a number of witnesses about the delivery of dispute resolution services to regional, rural, remote and very remote areas of Australia.

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95 Ms Hannan, *Committee Hansard*, 3 March 2006, p. 11, and Mr Kennedy, *Committee Hansard*, 3 March 2006, p. 37.

96 Attorney-General's Department, answers to questions on notice, *Submission* 137, p. 1.

3.143 The SPCA welcomed the initiatives of the relationship centres, particularly in remote communities where it would offer the opportunity for parties to consult with experienced mediators and bypass the formal court process.[97]

3.144 In evidence to the Committee, Family Services Australia, noted that models used in remote areas are quite different to those used in rural towns:

> [t]he service needs to go to the communities, not the other way around, and the communities need to accept and invite that service in and see a benefit from that service. They need to be a part of the solution in terms of how the service is actually set up.[98]

3.145 Ms Hannan provided the Committee with an example of a service delivery model used by Anglicare WA for the provision of a comprehensive sexual abuse counselling and education service to towns and communities in the Kimberley region of WA. [99] Ms Hannan believes that in order for the FRCs to work well a similar model of both town and community service provision would be necessary.

3.146 The basic tenets of Anglicare WA's counselling and education service to the Kimberley region are :

- to be respectful of Aboriginal culture and ways of working;
- to be seen as part of the community;
- to work alongside communities in identifying their own needs;
- to have service providers in key towns;
- to provide clinical input and information as required and requested; and
- to visit communities and outlying towns regularly.[100]

3.147 The Committee was also grateful for Ms Hannan's frank assessment as to whether the new Family Relationships Centres (FRC) were adequately funded to provide these types of services:

> As for what we are really talking about, I know, for example, that in WA there is a family relationship centre for Broome but, looking at where other rural FRCs are being set up, the amount of funding around that for outreach has been quite minimal even for those areas – and when you get to the north-west of Western Australia you can multiply that three or four times. So there are real concerns about people understanding that the models in rural and remote areas in particular need to be very different and that there

97 Mr Butler, *Committee Hansard*, 3 March 2006, p. 33.

98 *Committee Hansard*, 3 March 2006, p. 13.

99 Ms Hannan is also the General Manager Services for Anglicare WA.

100 Family Services Australia, answers to questions on notice, *Submission* 1A, p. 2.

> needs to be sufficient funding to do it properly otherwise it will be worse than not doing it at all.[101]

3.148 The Attorney-General's Department stressed that face-to-face outreach would be available for parties in rural and regional centres, and the size and geographical area of a catchment area for an FRC would be taken into account in allocating funding:

> Those centres with a rural catchment or an Indigenous population in their catchment have been given additional funding, which is specifically worked out on the basis of how big that catchment is and how far people in those catchments are going to have to travel … The centre for that region of Western Australia – the Pilbara and the Kimberley – whether it is Broome or Port Hedland, will certainly be given more funds than you would give, say, Joondalup, which is a city; it is essentially a metropolitan based centre. It needs to be kept in mind that more resources will be put into centres where people have to travel further to get the face-to-face services. This is to get those services to as many people as possible in the more rural parts of the community.[102]

3.149 The Attorney-General's Department also noted, that while it would not be appropriate in all cases, access to dispute resolution via video link or telephone would also be available.[103]

Committee view

3.150 The Committee appreciates the Government's efforts in providing dispute resolution services to regional, rural, remote and very remote communities.

3.151 The Committee was also pleased to hear that in situations where services are provided by telephone or videolink there may be the flexibility to increase the number of free hours of dispute resolution services to which people are entitled. However, the Committee is concerned about the potential issues surrounding the provision of dispute resolution via telecommunications services, without an initial face-to-face outreach, which Ms Budivari of the WLSA referred to:

> [i]t is certainly the experience of workers in our centres, particularly in very remote areas, that that is not an effective means of delivering a service. There needs to be some resources put into face-to-face delivery before telecommunications can be effective.[104]

3.152 The Committee is unable to comment on the adequacy of resources allocated by the Government to the FRCs that will service the remotest areas of Australia. The

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101 *Committee Hansard*, 3 March 2006, p. 13.

102 Ms Pidgeon, *Committee Hansard*, 3 March 2006, p. 53.

103 Ms Pidgeon, *Committee Hansard*, 3 March 2006, p. 52.

104 *Committee Hansard*, 3 March 2006, p. 27.

Committee can only urge the Government to consult widely with other service providers in those areas, on the types of services and costs of providing those services, to ensure that the reforms to be put in place by the bill are able to be accessed by those in all areas of Australia.

3.153 The Committee is acutely aware that people without ready access to an FRC may be financially disadvantaged by the requirement to attend dispute resolution prior to a court hearing any Part VII application. While the Committee appreciates that it is not necessary for this dispute resolution to take place at an FRC, the Committee has been informed that the 3 hours of free dispute resolution is only available from FRCs.[105] The Committee sees no reason why people should be financially penalised on the basis of their location. The Committee believes that where people's location prevents them from attending an FRC, the first 3 hours of dispute resolution should be provided free of charge, regardless of who provides the service.

Recommendation 8

3.154 That the Government undertake the necessary consultation with service providers in rural, regional, remote and very remote areas to ensure that adequate funds are allocated for the provision of dispute resolution services in those areas. Further, where videolink or telecommunications are to be used to provide dispute resolution services, the Government is to ensure that adequate funds are provided so that parties are given the opportunity to have an initial face-to-face outreach service.

Recommendation 9

3.155 Where parties are in a location which prevents them from attending an FRC, the first three hours of dispute resolution is provided to those parties free of charge, regardless of who provides the dispute resolution service.

Development of accreditation regulations

3.156 Both Family Services Australia and Relationships Australia raised issues in submissions about the consultation being undertaken in relation to the development of accreditation rules for family dispute resolution practitioners and family counsellors.[106] Both organisations were particularly concerned that the consultation process should involve experienced service providers, and be conducted in a structured manner.

3.157 The Committee sought a response from the Attorney-General's Department on these concerns. The Committee was informed that the Community Services and Health Industry Skills Council (CSHISC) has been undertaking work on behalf of the

105 Ms Pidgeon, *Committee Hansard*, 3 March 2006, p. 52.

106 Family Services Australia, *Submission* 1, p. 7, and Relationships Australia, *Submission* 14, p. 4-5.

Department in developing competency based accreditation standards to apply to dispute resolution practitioners. CSHISC has undertaken two rounds of consultation, in November 2005, and in early-March 2006. Those consultations were focussed on the actual development of the accreditation standards, with existing practitioners providing expertise on the core competencies required by a mediator. In the future, the Department will undertake further consultation with industry representative bodies, the courts and other stakeholders on the accreditation framework set out in the bill.[107]

Committee view

3.158 The Committee is satisfied that the Department has in place a systematic consultation process for the development of accreditation rules for family dispute resolution practitioners and family counsellors. The Committee encourages the Department to consult as broadly as possible in the development of the accreditation rules.

Amendments only to apply to future applications

3.159 Key amendments in Schedule 1 of the bill, including:

- a presumption of equal shared parental responsibility;
- the considerations to be taken into account in determining the best interests of the child; and
- a requirement that courts consider equal time, or substantial and significant time parenting arrangements, in making a parenting order

only apply to applications under Part VII of the Act lodged after commencement of Schedule 1.

3.160 Two concerns were raised in submissions regarding the application of the amendment only to future applications: that the amendments should apply retrospectively to matters currently before the court; and that there may potentially be an influx of applications to the courts from parties who wish to have existing parenting orders varied.

Retrospective application of amendments

3.161 The Committee has received many submissions which eagerly anticipate the introduction of amendments in the bill.[108] A number of submissions however expressed disappointment that the amendments would not apply to matters that are currently before the court.[109]

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107 Mr Arnaudo, *Committee Hansard*, 3 March 2006, p. 45.

108 See for example Ms Kali Vida, *Submission* 126.

109 See for example Ms Gail Abrahams, *Submission* 127; and Mr Mark Swartz, *Submission* 131.

3.162 The Family Law Section of the Law Council of Australia is of the opinion that it would be inappropriate to have a situation where different rules and standards applied to the determination of matters currently in the system, and new proceedings lodged under the bill, particularly because applications lodged just prior to the commencement of the bill may not be completed until 2008 or even 2009.[110]

3.163 The Committee heard evidence from the Attorney-General's Department that one reason that the key amendments in the bill will not apply to current applications before the court is because of the cost implications for current litigants.[111]

Potential influx of applications from parties with existing parenting orders

3.164 The Chief Justice of the Family Court raised her concerns with the Committee that following the introduction of the amendments, the Court could experience an influx of applications to change existing parenting orders. Her Honour noted that the Court would have limited scope to change existing parenting orders where the changes introduced by the bill were not accompanied by any change in the parties' relevant circumstances.[112]

3.165 The Attorney-General's Department responded to these concerns explaining that the Government did not believe that there would be an influx of applications to the court seeking to vary existing parenting orders. The Attorney-General's Department stated that it is clear in the legislation that the bill is only intended to apply to applications made in the future. In addition, the Attorney-General's Department noted that it was open to the court to make clear in the first application it heard to vary existing parenting orders that a piece of legislation of general application (such as the bill) should not be regarded as a special circumstance for an individual litigant.[113]

3.166 The Attorney-General's Department also pointed out the reforms the Government was introducing included the Family Relationship Centres, which it believed were a more 'family friendly' alternative to returning to court to vary existing parenting orders.[114]

3.167 The Committee draws the Government's attention to the submission by the Family Issues Committee of the Law Society of NSW which states:

> It is unlikely that mere legislative change amounts to changed circumstances. But there are other ways that unhappy parents can take to bring their parenting order before the court after the Bill has commenced.

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110 *Submission* 99, p. 11.

111 Mr Duggan, *Committee Hansard*, 3 March 2006, p. 46.

112 *Submission* 77.

113 Mr Duggan, *Committee Hansard*, 3 March 2006, p. 46.

114 Mr Duggan, *Committee Hansard*, 3 March 2006, p. 50.

> The simplest might be to initiate contravention proceedings under the new Division 13A Compliance Regime, which applies to contraventions occurring after commencement, not orders made after commencement. Division 13A strongly emphasises the court's power to vary the order in question. That variation could only be in accordance with the law current at that time. Thus, by virtue of contravention proceedings, the opportunity arises for an old order to be varied pursuant to the new principles.[115]

Committee view

3.168 The Committee understands the rationale behind the Government's decision to restrict the application of key amendments in the bill to new applications, particularly in light of the view that at least part of the reason was to limit the cost implications for matters that are already being prepared for hearing under the current provisions of the Act.

3.169 The Committee believes that this is an issue that warrants further investigation, specifically whether the cost implications for litigants who may have already prepared matters for hearing under the current provisions of the Act outweighs:

- the additional costs to litigants in seeking advice on the regime which will apply to their application; and
- the ongoing cost of the courts administering two sets of rules and standards for a period of up to three years.

3.170 The Committee is not convinced that the general public are aware that key amendments in the bill will not apply to current matters before the court.

3.171 The Committee accepts that the establishment of the FRCs may go some way to relieving the burden on the court from this potential influx. However, the Committee does not believe that it is a satisfactory situation for the government to suggest that the court wait for the first application to come before it to clarify that the amendments in the bill are of general application and do not constitute special circumstances for individual litigants. This is an unfortunate suggestion given one of the key objectives of the bill is to reduce litigation in child-related proceedings. Further, such a suggestion places an unwarranted burden on court resources.

3.172 The Committee understands that a change in the rules is unlikely to amount to a relevant change in individual party's circumstances to warrant a court amending a parenting order. However, the Committee accepts the point made by the Family Issues Committee of the Law Society of NSW that where there is a new set of rules, some parties will inevitably try to find ways in which to trigger a change in circumstances in order to bring themselves within the new rules.

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115 *Submission* 23, p. 8.

3.173 The Committee notes that the Attorney-General has taken advice on the potential influx of applications to the court to vary existing parenting orders and is satisfied that there will not be an influx of cases seeking to vary existing parenting orders. However, from the evidence and submissions put to the Committee, the Committee does not share the government's view that the introduction of the amendments in the bill will not result in a significant increase in applications to the courts to vary existing parenting orders.

Recommendation 10

3.174 That the Department immediately undertake a comprehensive analysis of the cost implications on current litigants, future litigants and the courts on maintaining two regimes for a period of three years for the determination of Part VII applications.

Recommendation 11

3.175 That the Attorney-General's Department develop and implement a comprehensive public information campaign to inform people of the impact of the amendments in the bill on existing parenting orders.

Recommendation 12

3.176 In the event of an increase of applications to the court to vary existing parenting orders once the amendments in the bill commence, that the Government provide the court with sufficient resources to adequately address the increase in applications.

Amendments relating to the conduct of child-related proceedings

3.177 Schedule 3 of the bill implements changes which will make child-related proceedings less adversarial, introducing a reliance on active case management by judicial officers.[116] The Family Law Section of the Law Council of Australia's submission included some concerns regarding provisions which exclude the application of the rules of evidence. The Queensland Government raised concerns in relation to proposed section 69ZW, which allows the court to make an order requiring State and Territory agencies to provide documents or information relating to child abuse or family violence.

The rules of evidence in child-related proceedings

3.178 Proposed section 69ZM defines 'child related proceedings' as:

- proceedings that are brought wholly or partly under Part VII of the Act; and

116 Explanatory Memorandum, p. 60.

- to the extent that the parties consent, other proceedings (or parts of proceedings) between the parties that relate to the breakdown of the parties' marital relationship.

3.179 Proposed section 69ZT provides that certain rules of evidence do not apply to child related proceedings, unless the court decides. The discretion of the court to apply the rules of evidence to child related proceedings is set out in section 69ZT(3).

3.180 The Explanatory Memorandum states that proposed section 69ZT is one of the key provisions in achieving a less adversarial process in child related proceedings.[117]

3.181 The Family Law Section of the Law Council of Australia reiterated the concerns it raised before the LCAC in relation to the scope of 'child related proceedings' and its strong objections in relation to a provision which excludes the operation of the rule of evidence unless the court decides.[118] The Family Law Council argued that the coexistence of two systems of hearing cases based on different rules of procedure and evidence is expensive and wasteful.[119]

3.182 Of particular concern to the Family Law Section of the Law Council of Australia was the 'broad power' given to the court under proposed section 69ZT(3), because:

> [t]his creates uncertainty, inconsistency, and the risk of development of a Judge-made evidentiary regime in child related proceedings which has to been exposed to the scrutiny of, or received the imprimatur of, Parliament.[120]

Evidence relating to child abuse or family violence

3.183 Proposed section 69ZW is intended to ensure that the court has as much information as possible when considering what is in the best interests of the child in proceedings where there are allegations of violence and abuse.[121]

3.184 The Queensland Government raised two issues in relation to section 69ZW. Firstly, given that section 60K requires that courts act expeditiously in relation to allegations of child abuse and family violence, section 69ZW should be amended to include a minimum time period in which the State and Territory have to comply with a court order to provide documents or information. This would enable agencies to

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117 Explanatory Memorandum, p. 66.

118 See *Submission* 99, p. 14, and Law Council of Australia, Submission 47 to LCAC inquiry into exposure draft of the bill, p. 34 and 36

119 *Submission* 99, p. 15.

120 *Submission* 99, p. 14.

121 Explanatory Memorandum, p. 69.

'concentrate resources on the collation of material and its appropriate presentation of the Family Court'.[122]

3.185 Secondly, section 91B of the Act provides that a court may request that a State or Territory child welfare officer intervene in proceedings. Where such a request is made the officer is deemed to be a party to the proceedings. The Queensland Government sought further clarification on the interaction of section 91B , which, while not a court order, provides the officer with the rights, duties and responsibilities of a party, and clause 69ZW, which is a court order providing for the gathering of evidence, but does not allow the State officers and agencies the status of being a party to the proceedings.[123]

3.186 In response to the first issue, the Attorney-General's Department stated that it did not believe that provision would have resource implications for State and Territory agencies because the provision does not require agencies to create documents or seek additional information, 'much of the information would currently be obtained through the subpoena process'.[124]

3.187 In response to the second issue, the Attorney-General's Department stated that:

> [t]he Government does not consider that there is any inconsistency between the operation of section 69ZW and section 91B … The Government does not consider that it is necessary, in every case where the court requests an agency to produce documents or information under section 69ZW, for the Chief Executive Officer of that agency to become a party to the proceedings.[125]

3.188 The Western Australian Department for Community Development indicated that proposed section 69ZW may also have a potential impact on the operation of Part 10 of the *Children and Community Services Act 2004* (WA). However the precise nature of the concerns was not provided.[126]

Committee view

3.189 The Committee notes the Family Law Section of the Law Council of Australia's objections to the exclusion of certain rules of evidence in relation to child related proceedings. However, the Committee feels that there has not been a substantive change in the provisions since they were considered by the LCAC. The

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122 *Submission* 71, p. 1-2.

123 *Submission* 71, p. 2.

124 Attorney-General's Department, answers to questions on notice, *Submission* 137, p. 6.

125 Attorney-General's Department, answers to questions on notice, *Submission* 137, p. 6.

126 *Submission*

Committee is therefore satisfied that the concerns raised by the Family Law Section of the Law Council of Australia have been given due consideration.

3.190 The Committee notes that in relation to the issues raised by the Queensland Government the Attorney-General's Department states that the Government is happy to further consider and consult with the States about these issues. The Committee believes that such consultation would be useful.

Recommendation 13

3.191 That the Attorney-General's Department consult with the relevant State and Territory departments and agencies in relation to the operation of section 69ZW.

Independent Children's Lawyer

3.192 Schedule 5 of the bill makes provision for 'independent children's lawyers'. The amendments in Schedule 5 arise from recommendations in the Family Law Council's report *Pathways for Children: A review of children's representation in family law*, and are aimed at providing further guidance to lawyers who act as a child's representative in family law proceedings. In conjunction with the Family Court's *Guidelines for child representatives: Practice directions and guidelines* (the Guidelines), these amendments are to clarify for parties the role of a child's representative in family law proceedings.[127]

3.193 The Committee has received submissions from organisations such as National Legal Aid, the Family Law Section of the Law Council of Australia and the Law Society of South Australia raising specific concerns about the role of the independent children's lawyer. Specifically, those submissions raised the issue of:

- the role of the independent children's lawyer in informing the court of the views of the child; and
- the interaction between proposed section 60K (Court to take prompt action in relation to allegations of child abuse or family violence);

Informing the court of the views of the child

3.194 Submissions raised the conflict between proposed subsection 68LA(6) and proposed paragraph 68LA(5)(b).[128] Subsection 68LA(6) provides that the independent children's lawyer is not under an obligation to, and cannot be required to, disclose to the court any information the child communicates to them. Paragraph 68LA(5)(b) sets out that the independent children's lawyer must inform the court of the views that the child has expressed in relation to the matters to which the proceedings relate.

127 Explanatory Memorandum, p. 133.

128 See for example National Legal Aid, *Submission* 27, p. 2-3.

Relationship between proposed section 60K and the independent children's lawyer

3.195 Proposed section 60K[129] provides that where a document is filed alleging:

- abuse, or risk of abuse, of a child; or
- family violence, or the risk of family violence

the court must make appropriate interim or procedure orders to deal with the allegations in the document as soon as practicable after the document is filed.

3.196 National Legal Aid is concerned that section 60K will considerably impact on the demand for independent children's lawyers, which are funded by State and Territory Legal Aid Commissions. In the absence of any direction to the court to effectively involve an investigation of the allegation, the court may feel obligated to make an order for the appointment of an independent children's lawyer in all of these matters. Currently, the appointment of an independent children's lawyer is ordinarily only made in matters where there are allegations of child abuse, not in matters where there are allegations of family violence. Therefore, the inclusion of provisions relating to family violence in section 60K, will potentially have a considerable impact on the resources of Legal Aid Commissions.[130]

Committee view

3.197 The Committee notes the concern raised in submissions about the conflict between the role of the independent children's lawyer as provided for in subsection 68LA(6) and proposed paragraph 68LA(5)(b). The Committee believes that this conflict has been resolved by the Government amendment which removes paragraph 68LA(5)(b) from the bill.

3.198 The Committee is very concerned about the issues raised concerning the potential impact on the resources of Legal Aid Commissions as a result of section 60K. The Committee understands that this issue has been raised with the Attorney-General's Department. The Committee recommends that the Department consider these issues as a matter of urgency, and makes arrangements to ensure that Legal Aid Commissions have sufficient resources to meet any increased demand for independent children's lawyers.

Recommendation 14

3.199 That the Department consult with National Legal Aid to ensure that the necessary resources are made available to meet any increased demand for children's lawyers.

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129 As amended by Government amendments tabled in the House of Representatives on 27 February 2006.

130 *Submission* 27, p. 3.

The relationship between family violence orders and parenting orders

3.200 Schedule 6 of the bill inserts a new Division 11(Family Violence) into the Act, which sets out the relationship between family violence orders (which are made under State and Territory law) and family law orders made under the Act.

3.201 According to the Explanatory Memorandum, the amendments are designed to make Division 11 'clearer, more concise and easier to understand by the people who use and implement it', particularly State and Territory Magistrates making family violence orders.[131] The amendments implement recommendations made by the Family Law Council in a letter of advice to the Attorney-General in November 2004 (FLC Recommendations).

3.202 The WLSA's submission expressed two concerns in relation to the proposed amendment of Division 11.

3.203 Firstly, WLSA is concerned that State or Territory courts who may be considering altering family law orders are required to weigh up a huge number of considerations, and this would be a disincentive for those courts to use their powers in Division 11 where appropriate.[132] WLSA argued that Division 11 of the bill did not give effect to the FLC Recommendation to 'provide a clearer and more succinct statement of the principles to be applied by State and Territory courts when exercising their powers.'[133]

3.204 Under proposed section 68R, when a State or Territory court is making a family violence order, the court also has the power to revive, varying, discharging or suspending a family law order. The relevant considerations for a court considering reviving, varying, discharging or suspending a family law order are set out in subsection 68R(5), and include that the court must have regard to the purposes of the Division (which are set out in proposed subsection 68N). Ms Fletcher explained for the Committee what this process would mean for a court:

> the current structure of the bill will require a state magistrate to consider something like 14 best interests provisions, nine objects and principles and the purposes of the division. It is just not a process that a state magistrate in a busy family violence court list, where they sometimes hear 30 matters in half a day, is going to be willing to do. There is already a problem with that now. The purpose behind the Law Council's recommendations was to promote the use of division 11 so that magistrates could appropriately, for a short period of time, protect people from family violence that might occur because of the family law order.[134]

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131 Explanatory Memorandum, p. 142.

132 *Submission* 98, p. 12-13.

133 Family Law Council, Family Law Council: Review of Division 11 – Family Violence, Letter to the Attorney-General, 16 November 2006, p. 7; see also WLSA, *Submission* 98, p. 13.

134 *Committee Hansard*, 3 March 2006, p. 29.

3.205 In particular, WLSA was concerned that, unlike the current broad focus on protecting people from family violence, the considerations listed in the bill are focused on protecting children from family violence.[135] The Committee notes that Government amendments to the bill have amended the purposes section of Division 11 to include that the purpose of the Division is to ensure that orders, injunctions and arrangements for a child to spend time with a person do not expose people to family violence.[136] Ms Fletcher addressed these amendments in her opening statement, saying:

> We are aware that one change has been made by the government to this division since the bill was introduced into parliament and this is certainly an improvement, but in our view the new division will still make it harder to change family law orders to protect people from violence and it still does not truly give effect to the Family Law Council's recommendations, as it purports to do.[137]

3.206 Secondly, WLSA raised a specific issue in relation to proposed paragraph 68R(3)(b) of the bill. Paragraph 68R(3)(b) provides that a State or Territory court can not revive, vary, discharge or suspend a parenting order, recovery order or an injunction, unless the court has before it new material, which was not before the court which made the order or injunction.

3.207 In WLSA's view the provision was unnecessary because currently courts will not vary an order or injunction where the court believes that all the evidence before it was already before the court that made the order or injunction. Further, WLSA stated that this requirement for new material may 'operate to obscure a history of violence and hence the context of any new incidents'.[138]

3.208 Noting WLSA's criticism of Division 11 of the bill, the Committee sought a response from the Attorney-General's Department, as to why the FLC Recommendations were not incorporated into the bill in their original form.

3.209 The Attorney-General's Department stated that in drafting the amendments to Division 11 to implement the FLC Recommendations to simplify and improve the division, 'it became clear that further simplification was necessary to ensure consistency with other reforms in the bill'.[139] The Department cited 2 specific issues which impacted on the adoption of the FLC Recommendations.

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135 *Submission* 98, p. 13.

136 Added by Government amendment, introduced into the House of Representatives on 27 February 2006. Emphasis added.

137 *Committee Hansard*, 3 March 2006, p. 25.

138 *Submission* 98, p. 13-14.

139 Attorney-General's Department, answers to questions on notice, *Submission* 137, p. 4.

3.210 Firstly, Division 11 as it currently appears in the Act, has a number of complex definitions for various types of contact orders. The Family Law Council recommended that these be replaced with a single definition of 'contact order'. However, as part of the Government reforms to the Act, references to 'contact' are being removed and replaced with 'family friendly' terms such as 'spends time with' and 'communicates with'.[140]

3.211 Secondly, the Department noted that the bill amended the purposes of Division 11, which was one of the issues raised in the FLC Recommendations.[141]

3.212 The initial draft of the bill listed the 2 purposes of Division 11 as:

- resolving inconsistencies between family law orders and family violence orders; and
- achieving the objects and principles in section 60B.

3.213 The Attorney-General's Department noted the Government amendment was introduced to clarify that one of the purposes of Division 11 is also to ensure that family law orders do not expose any person to family violence. It was the view of the Attorney-General's Department that this addressed the major concerns of WLSA in relation to Division 11.[142]

3.214 The Attorney-General's Department stated that an additional purpose for the Division had been added to those in the FLC Recommendations, namely, to achieve the objects and principles of Part VII as listed in section 60B because:

> [t]he Government considers it valuable to link the purposes of Division 11 back to these objects, which also mirror the primary considerations that must be considered by a court in determining the best interests of the child.[143]

3.215 In relation to paragraph 68R(3)(b) the Attorney-General's Department noted that the intention of the amendment is to ensure that family law orders are not circumvented by revisiting the same evidence before a State court – in the absence of new evidence, parties seeking to vary family law orders will generally have to do this via the procedures set out in the Act. The Attorney-General's Department stated:

> [t]he Government does not consider that the provision will restrict the ability of the court to consider evidence of the seriousness or chronic nature of the family violence alleged. The provision does not prevent the court taking pre-existing violence into account so long as the court has before it

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140 Attorney-General's Department, answers to questions on notice, *Submission* 137, p. 4.

141 The FLC Recommendations had suggested that the purpose of Division 11 should be: (a) to resolve inconsistencies between contact orders and family violence orders; and (b) to ensure that contact orders do not expose people to family violence

142 Attorney-General's Department, answers to questions on notice, *Submission* 137, p. 5.

143 Attorney-General's Department, answers to questions on notice, *Submission* 137, p. 4.

> material that was not before the court that made the order or injunction. In this sense the evidence does not have to relate to instances which occurred after the original order was made. It is appropriate to prevent parties circumventing family law orders by applying to a State court where there is no new evidence of violence or abuse.[144]

Committee view

3.1 The Committee concurs with the views of the Attorney-General Department that the Government amendment to the purposes of the Division 11, to include a statement to the ensure that no person is exposed to family violence as a result of a family law order, addresses one of the concerns raised by WLSA.

3.2 The Committee understands the rationale behind the Government's decision to link the purpose Division 11 with the objects and principles underlying Part VII of the Act.

3.3 However, the Committee is concerned with the inclusion of 'to achieve objects and principles of section 60B', as a purpose of Division 11. While the Committee is confident that judicial officers of State and Territory courts will be able to navigate the considerations, it feels that others, particularly self-represented litigants, will find determining the relevant considerations which a State or Territory Court must take into account for the purposes of 68R(5) a convoluted and unwieldy process.

3.4 It was not clear in the response given by the Attorney-General's Department how linking the purposes of Division 11 to the objects and principles in section 60B would provide a clear and more succinct statement of the principles to be applied in exercising their powers under Division 11.

3.5 The Committee believes that finding the relevant considerations should not require the reader to make several cross-references through the legislation. Either all the considerations should be listed in a single location or duplicated as necessary to make navigation easier. Further, it should be clear to the reader the weighting given to each consideration.

3.216 The Committee accepts the explanation of the Attorney-General's Department in respect of the intention of paragraph 68R(3)(b).

Recommendation 15

3.217 The section 68R be reviewed to ensure the considerations to be taken into account are clear to all readers, and similarly the weighting to be given to each consideration, by the Court when exercising its powers under the section must also be clear.

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144 Attorney-General's Department, answers to questions on notice, *Submission* 137, p. 5.

Recommendation 16

3.218 The Committee recommends that subject to the preceding recommendations the bill proceed.

Senator Marise Payne
Committee Chair