28 February 2006

Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Committee Secretary

Family Law Amendment (Shared Parental Responsibility) Bill 2005

The attached submission prepared by the Family Law Section of the Law Council of Australia (FLS) makes the following recommendations to the Committee:

1. That the opportunity be taken to rearrange the provisions of Part VII [Children] of the *Family Law Act 1975* in a more logical and accessible sequence.
(paragraph 1.7-1.8)

2. That the two-tiered approach to determining what is in a child's best interests be removed from section 60CC so that all considerations are brought together in the one subsection, without differentiation between them, with the court to apply discretion and to give such weight to each of the relevant factors as it considers appropriate.
(paragraphs 2.1 - 2.5).

3. That subsection 60CC(4) regarding the extent to which a parent has fulfilled their parental obligations in the past be deleted.
(paragraphs 2.6 - 2.10).

4. That further consideration be given to the practical implications which flow from the issue of a certificate under subsection 60I(8) regarding attendance at family dispute resolution.
(paragraphs 2.11 – 2.16)

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5. Alternatively, that subsection 60I(8) be amended so that the certificate issued by a family dispute resolution practitioner only certifies as to attendance and not as to whether or not a genuine effort was made by either party to resolve the issues.
   (paragraph 2.17)

6. That the provisions in section 60K [which provides that the court must take prompt action in relation to allegations of child abuse or family violence] only apply if there is a clear relationship between the allegations of violence or abuse and the orders that the court is asked to make.
   (paragraph 2.18 – 2.20)

7. That the Government ensure the provision of sufficient additional resources to the Court and Legal Aid to meet the additional demands that will result from the enactment of section 60K.
   (paragraphs 2.21 - 2.24)

8. That further consideration be given to the rationale for the fundamental shift between section 61C and section 61DA regarding the allocation of parental responsibility.
   (paragraphs 2.25 – 2.28)

9. That section 64D be amended so that a parenting plan which overrides a court order is subject to a cooling-off period. A consequential amendment to subsection 63C of the FLA [Meaning of “parenting plan” and related terms] may be necessary.
   (paragraph 2.29 – 2.30)

10. That the legislation make it clear that parenting plans are subject to the ultimate supervision of the court, and that the court has the power to consider the terms and effect of the plan and the circumstances in which it was entered into.
    (paragraph 2.31 – 2.32)

11. That, to avoid unnecessary confusion, the purpose of section 65AA be reconsidered as it merely restates that section 60CA provides that the best interests of the child is the paramount consideration.
    (paragraph 2.33 – 2.35)

12. That paragraph 65DAA(5)(b) be amended to make it clear that the capacity of a parent to implement an arrangement for children does not refer to financial capacity.
    (paragraph 2.38 - 2.39)

13. That paragraph 65G(2)(a) be amended so that the court does not lose its supervisory jurisdiction when consent orders are made in favour of non-parents
    (paragraph 2.40 – 2.41)

14. That section 117AB regarding the imposition of mandatory costs orders where a party has knowingly made a false allegation or statement be deleted.
    (paragraph 2.42 – 2.45)

15. That the provisions in Schedule 1 of the Bill apply to all proceedings relating to children and not just those initiated after commencement.
    (paragraphs 2.46 – 2.52)

16. That a provision be inserted in the Bill to make it clear (particularly to litigants in person) that the commencement of the Bill does not, of itself, constitute a change in circumstances justifying an application for a change to existing parenting orders.
    (paragraphs 2.53 – 2.56)

17. That Schedule 3 [Amendments relating to the conduct of child-related proceedings] be reconsidered with reference to the specific issues raised by FLS.
    (paragraphs 3.1 – 3.8)

18. That subsection 13E(1) be amended so that the issues which can be dealt with in private arbitration can also be dealt with in Court-referred arbitration. A consequential amendment to paragraph 10L(2)(a) in the Bill will also be required.
    (paragraph 4.1 – 4.4)

19. That the erroneous reference in paragraph 19E(3)(a) of the current FLA to section 106A [Execution of instruments by court order] be corrected to refer to section 106B [Transactions to defeat claims]. A consequential amendment to paragraph 10L(2)(b)(i) in the Bill will also be required.
    (paragraphs 4.5 – 4.6)

20. That paragraph 68LA(5)(b) regarding the duty of an independent children's lawyer (ICL) to inform the court of the child's views be amended:

    20.1 so that it does not conflict with section 68LA(6) which provides that the ICL is not under obligation to disclose to the court any information that the child communicates to the ICL
    (paragraphs 5.1 – 5.3)
    20.2 so that it does not conflict with section 60CE which provides that nothing in Part VII permits the court or any person to require the child to express his or her views in relation to any manner
    (paragraphs 5.4 – 5.5)
    20.3 to protect the independent position of the ICL. FLS refers the Committee to the wording of the Guidelines for Children's Representation issued by the Family Court of Australia.
    (paragraphs 5.6 – 5.7)

21. That subsection 68LA(2) and (3) be amended to ensure that the ICL is not compelled to express a premature view. FLS refers the Committee to the wording of the Guidelines for Children's Representation issued by the Family Court of Australia.
(paragraph 5.5.2).

I would be happy to appear before the Committee to discuss these recommendations.

Yours faithfully

Ian Kennedy AM
Chair

Representing Family Lawyers Throughout Australia

Family Law Section

Law Council of Australia

Submission to the Senate Legal and Constitutional Committee

Family Law Amendment (Shared Parental Responsibility) Bill 2005

1. Introduction

1.1 The Family Law Section of the Law Council of Australia (FLS) is a professional association representing over 2,000 family law practitioners, from all Australian States and Territories.

1.2 Members of FLS represent parents and children from the very beginning of their process of separation through to finalisation of their family arrangements. Throughout this process, family law practitioners facilitate an infinite variety of solutions because each family is unique and the needs of each family are different.

1.3 The *Family Law Amendment (Shared Parental Responsibility) Bill 2005* (the Bill) was tabled in the Parliament on 8 December 2005. On 7 February 2006 the Senate referred the Bill to the Senate Legal and Constitutional Committee (Senate Committee) for inquiry and report by 27 March 2006.

1.4 An exposure draft of the *Family Law Amendment (Shared Parental Responsibility) Bill 2005* (Exposure Draft) was released for public consultation on 23 June 2005. At the same time, the Government referred the Exposure Draft to the House of Representatives Standing Committee on Legal and Constitutional Affairs (House Committee) for report in August 2005. FLS made two submissions to this inquiry, on 18 July and 4 August 2005, and appeared at the public hearing on 20 July 2005. The Bill currently before the Senate Committee incorporates the majority of the recommendations made by the House Committee report in August 2005.

1.5 Despite the reservations concerning the necessity for, and likely efficacy of, the proposed reforms, FLS does not address in this submission the policy decisions and initiatives which underly the proposed amendments contained in the Bill.

1.6 This submission is directed:

1.6.1 Firstly, at some of the technical aspects of the draft Bill with recommendations to improve its workability; and

1.6.2 Secondly, to provide comment on some of the new or significantly changed provisions that were not in the Exposure Draft of the Bill.

1.7 In addition, FLS notes that Part VII [Children] of the *Family Law Act* is drafted in a complicated and confusing way. Its structure is difficult to navigate (particularly for non-lawyers) and provisions which ought to go together are often many pages of legislation apart. This will be significantly exacerbated by the proposed amendments.

1.8 **FLS strongly recommends that the opportunity be taken to rearrange the provisions of Part VII in a more logical and accessible sequence**.

2. Schedule 1: Shared Parental Responsibility

How a court determines what is in a child's best interests – Section 60CC

2.1 Item 9 of the Bill inserts a new *Subdivision BA - Best interests of the child* into Part VII [Children] of the *Family Law Act 1975* (FLA). Section 60CC of this subdivision sets out a new two-tiered approach, differentiating between *primary* and *additional* considerations, for determining the best interests of the child. FLS maintains its strong opposition to this two-tiered approach.

2.2 The Explanatory Statement for the Bill, at paragraph 48, states that:

> *The intention of separating these factors into two tiers is to elevate the importance of the primary factors and to better direct the court's attention to the revised objects of Part VII of the Act which are set out in the new section 60B*.

2.3 FLS remains firmly of the view that 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).

2.4 There is no argument from FLS about the content of each consideration but rather that it is unnecessary and undesirable to differentiate between *primary* and *additional* considerations, in the way proposed. It is interesting (and concerning given that the focus of the legislation should be on the best interests of the child rather than on the rights of parents) to note that the views of the child, *inter alia*, become an *additional (or secondary)* consideration in this process

2.5 **FLS recommends that all considerations should be brought together in the one subsection, without differentiation between them, with the court to apply discretion and to give such weight to each of the relevant factors as it considers appropriate in the particular circumstances of each case**.

2.6 Subsection 60CC(4), which was not in the Exposure Draft of the Bill, provides:

> (4) Without limiting paragraphs 3(c) and (i), the court must consider the extent to which each of the child's parents has fulfilled, or failed to fulfil, his or her responsibilities as a parent and, in particular, the extent to which each of the child's parents:
> (a) has taken, or failed to take, the opportunity:
> (i) to participate in making decisions about major long-term issues in relation to the child; and
> (ii) to spend time with the child; and
> (iii) to communicate with the child; and
> (b) has facilitated, or failed to facilitate, the other parent:
> (i) participating in making decisions about major long-term issues in relation to the child; and
> (ii) spending time with the child; and
> (iii) communicating with the child; and
> (c) has fulfilled, or failed to fulfil, the parent's obligations to maintain the child.

2.7 Under subsection 60CC(4) the court is required to consider the extent to which parents have fulfilled their responsibilities as parents. The indicators of fulfilling this responsibility are articulated and include both historical and current participation in decision-making about long-term issues, spending time and communicating with the child. The indicators go further, however, and include the extent to which one parent has either facilitated, or failed to facilitate, the other parent's involvement in these indicators.

2.8 It does not require great imagination to see the potential for conflict between parties and argument over issues which are in many respects, not ultimately fundamental to the best interests of the child, such as:

- Should parental responsibility be shared equally?
- If so, does this mean equal time?
- If not, what is substantial and significant time?
- When is/is not a proposed arrangement:
  - practical?
  - in the interests of the child?

- In what circumstances should a parent be disqualified from:
  - equal shared responsibility?
  - equal time?
  - substantial and significant time?
- Has a parent fulfilled his her responsibilities (and if so which):
  - adequately?
  - at all?
- Has a parent facilitated adequately (or failed to facilitate) the other parent's participation in the child's life?

2.9 Arguably, from a legal perspective, there is nothing new in subsection 60CC(4) as all of these matters could have been relevant under the existing subsection 68F(2) (and can still be considered under paragraphs 60CC(3)(c), (f) and (i)). Nonetheless, the clear statutory drafting cannot be ignored. FLS is concerned that subsection 60CC(4) is, potentially, litigation-generating. Cases will inevitably become more acrimonious than they need be because evidence under this provision will be led, relating to matters which are ultimately about a parent's conduct (either act or omission). For self-represented litigants especially, this provision will be read as granting a clear statutory licence to criticise their former partners and attack their parenting skills. More importantly, this provision invites parents to rake over the past – and flies in the face of the current policy of the Court to encourage parents to focus on the future and the arrangements which will best promote the long-term welfare of their children.

2.10 **FLS recommends that section 60CC(4) be deleted**.

Attending family dispute resolution before applying for Part VII order – Section 60I

2.11 Item 9 inserts a new *Subdivision E – Family dispute resolution* into Part VII [Children] of the FLA. Section 60I of this subdivision sets out the requirements for attending family dispute resolution before applying for Part VII orders. This provision has undergone some change since the Exposure Draft of the Bill. Under the new provision parties now not only have to attend family dispute resolution (FDR), they have to make a "*genuine effort*" to resolve their dispute.

2.12 Subsection 60I(8) specifies that there are, in effect, three different types of certificates granted by FDR practitioners including one to the effect that a party "did not make a genuine effort to resolve the issue or issues". There is a note after subsection 60I(8) that refers to section 117 and implies that the certificate may be taken into account for the purposes of costs orders. Indeed, subsection 117(2) does seem broad enough to enable this to happen.

2.13 FLS is concerned that *labelling* a party with not having made a *genuine effort* at such an early stage in the process will unfairly impact on future resolution of the dispute, not only from the perspective of the party and their confidence in the dispute resolution process but also as a consequence of the negative perception that is portrayed to the court.

2.14 It is important to remember that – as a result of disparities in their emotional state following the breakdown of their relationship, power imbalances in the relationship, background issues of violence or abuse etc – not all parties will be able to work constructively toward resolving their problems at the same time, and many could feel inappropriately coerced into participating in family dispute resolution at a time when they simply do not have the capacity to do that in any meaningful way. This does not mean that that party will not be ready or willing to resolve a dispute at some later time.

2.15 FLS is also concerned that subsection 60I(8) does not address a number of important practical issues in relation to the certificates. For example:

2.15.1 If a parent agrees to attend family dispute resolution but not at the time nominated (perhaps because it was inconvenient) or not within a time period which the other parent regarded as reasonable, is this a refusal or failure to attend? On what basis is the family dispute resolution practitioner to assess the merits of the explanation which the non-participating parent gives?

2.15.2 Is a family dispute resolution practitioner entitled to certify that all attendees made a genuine effort to resolve the issues when one parent refuses to consider reasonable proposals or puts forward responses which the practitioner considers to have little or no merit? What is the test for determining the genuineness of a parent's efforts to resolve issues?

2.15.3 What is the mechanism by which a family dispute resolution practitioner is to be accountable for a refusal to issue a certificate, for issuing a certificate that a person failed or refused to attend, or for refusing to issue a certificate that all attendees made a genuine effort to resolve the issues?

2.15.4 Are family dispute resolution practitioner's certificates admissible in evidence? If they are not, then how are they to be used in relation to costs disputes? If they are, then what right do the parties have to challenge a certificate and the judgment made by the person who issued it in the event that it is inaccurate or misleading.

2.16 **FLS recommends that these issues be addressed before commencement of the legislation**.

2.17 **Alternatively, FLS recommends that the FDR practitioner certify only as to attendance and not as to whether or not a genuine effort was made by either party to resolve the issues.**

Court to take prompt action in relation to allegations of child abuse or family violence – Section 60K

2.18 Section 60K of *Subdivision E* is entitled "*Court to take prompt action in relation to allegations of child abuse or family violence"*. The provision says, in effect, that if a Part VII [Children] order is sought and any document is filed that alleges abuse, family violence, or the risk of abuse or family violence, the Court must [within 8 weeks] consider what orders should be made to enable appropriate evidence to be obtained and for the child or the parties to be protected.

2.19 The first issue that concerns FLS about this provision is that there is no nexus between the violence alleged and the orders sought. Section 60K should only apply if the orders sought require an investigation by the Court of abuse or violence.

2.20 **FLS recommends that the provisions in section 60K only apply if there is a clear relationship between the allegations of violence or abuse and the orders that the court is asked to make**.

2.21 The second issue which is of significant concern relates to the frequency of these types of allegations, the duties which will now be imposed on the court and the serious impact that this will have on court resources.

2.22 While it is a matter for Government to introduce this type of provision, and FLS supports the policy behind the provision, it is essential that sufficient additional resources are provided to the court so that it can meet its obligations.

2.23 As subsection 60K(2) provides that the court must consider what orders should be made to enable appropriate evidence to be obtained and to protect the child or parties, an increase in interim hearings and orders for family reports, as well as a substantial increase in orders for children's representatives, can reasonably be expected. Each of these issues will have a significant impact on the court and legal aid funding. The court already has significant difficulty in meeting its current obligations to fund family reports. Legal Aid funding is also stretched to meet the existing demand for children's representatives.

2.24 **FLS recommends that the Government provide sufficient additional resources to the Court and sufficient Legal Aid funding to meet the additional demands which will result from the enactment of this provision**.

Presumption of equal shared parental responsibility when making parenting orders – Section 61DA

2.25 Section 61DA (*Presumption of equal shared parental responsibility when making parenting orders*) has had small but significant changes made to it as compared to the Exposure Draft. The Exposure Draft referred to "joint parental responsibility", but the current section refers to "*equal* shared parental responsibility". FLS believes that there is some inconsistency, or at least potential confusion, introduced into the FLA as a result of this provision.

2.26 Section 61C states that *"each of the parents…. has parental responsibility*". The conferral of parental responsibility survives separation. When parents separate, *each* retains *full* parental responsibility - which can be exercised independently of the other parent until such time as that unfettered, independent parental responsibility becomes fettered by a parenting order. When there are problems with issues of parental responsibility a party can seek a parenting order to include specific issues orders, where appropriate - but the independent grant of parental responsibility is not tampered with unnecessarily.

2.27 By contrast, the new section 61DA seems to work in the opposite manner. It in effect directs the Court to *convert* that independent, separate parental responsibility into equal shared parental responsibility. If a parenting order is sought then parental responsibility becomes equally shared; and thus *each* parent is dependent on each other - whether they like it or not, and whether the parents' problem relates to parental responsibility or not – in relation to all decisions concerning the welfare of their children. Parents who have experienced a relationship breakdown, with all the communication problems consequential upon that breakdown, are now made dependent on each other in relation to parental responsibility. FLS believes that this will cause more, rather than fewer, problems.

2.28 **FLS recommends that further consideration be given to the rationale for the fundamental shift between section 61C and section 61DA**.

Parenting orders subject to later parenting plans – Section 64D

2.29 Section 64D provides that a parenting order is subject to any subsequent parenting plan unless the court has, in exceptional circumstances, ordered otherwise. FLS has no objection to this provision to the extent that it elevates the legal significance of parenting plans. However FLS has significant concerns that parties, and in particular women, may be overborne into entering a parenting plan which over-rides parenting orders made after a Court hearing and careful consideration by the Court of the arrangements which best promote the welfare of the children, by a stronger party who refuses to accept the decision.

2.30 **FLS strongly recommends that parenting plans be subject to a cooling off period. A consequential amendment to subsection 63C of the FLA [Meaning of "parenting plan" and related terms] may be necessary**.

2.31 As a further safeguard the legislation should make it clear that parenting plans are subject to the ultimate supervision of the court, and that the court has the power to consider the terms and effect of the plan and the circumstances in which it was entered into. The issue of whether or not a plan is legitimately or appropriately entered into will only arise if one of the parties subsequently takes the matter to the court. In these circumstances the court should have the capacity to consider:

- The content of the plan
- The circumstances in which the plan was made
- Whether or not the plan was obtained by fraud, duress, undue influence or unconscionable conduct
- Whether or not it is in the best interests of the child to disregard or vary the plan.

2.32 **FLS recommends that the legislation make it clear that parenting plans are subject to the ultimate supervision of the court, and that the court has the power to consider the terms and effect of the plan and the circumstances in which it was entered into.**

Child's best interests paramount consideration in making a parenting order – Section 65AA

2.33 Item 28 inserts a new section 65AA into the FLA to provide as follows:

> **65AA Child's best interests paramount consideration in making a parenting order**
>
> Section 60CA provides that in deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.

2.34 FLS notes that this is a curious provision which merely restates that section 60CA provides that the best interests of the child is the paramount consideration.

2.35 **FLS recommends that, to avoid confusion, the purpose of this provision be reconsidered**.

Court to consider child spending equal time or substantial and significant time with each parent in certain circumstances – Section 65DAA

2.36 Section 65DAA is significantly different to its equivalent in the Exposure Draft and introduces obligations on the Court to consider equal time, or substantial and significant time, wherever the parents retain equal shared parental responsibility for the child. The Court's obligation is to:

(i) consider whether
(ii) equal time; or
(iii) substantial and significant time
(iv) is in the best interests of the child; and
(v) is reasonably practical.

2.37 FLS notes that there is already case law in the administrative law jurisdiction that discusses what it means to "consider". If that case law is adopted in family law, judges will need to do far more than just state: *"I have considered…"*. The definition of "*substantial and significant time"* in subsection 65DAA(3) is an attempt to impose greater variety of shared time arrangements between parents and children after separation, including arrangements that involve both parents and children in a more diverse range of activities in the child's life. It will probably lead to quantitatively more shared time.

2.38 *Reasonable practicality* is defined in subsection 65DAA(5). It is, of course, a very important factor in determining whether "*equal time"* or *"substantial and significant time"* should be ordered. In paragraph 65DAA(5)(b) the "*parents' current and future capacity to implement*" an arrangement surely invites a consideration of financial issues, child support, property and maintenance? None of the section 60CC considerations invite a direct consideration of a parent's financial circumstances other than paragraph 60CC(3)(e) referring to expense of contact. In making decisions about parenting matters, financial considerations have, for good policy reasons, long been rejected as important. Is it possible that paragraph 65DAA(5)(b) changes that because it focuses on *"capacity to implement an arrangement"*? Surely a parent's employment, assets, liabilities, accommodation etc. are relevant to their capacity to implement a shared-care arrangement? One can readily imagine some litigants tailoring their property applications to dovetail with the parenting orders they seek, having regard to this provision. It was probably always possible to do this under the current Act, but this new provision may well invite litigants to draw a closer link between parenting and financial matters.

2.39 **FLS recommends that paragraph 65DAA(5)(b) be amended to make it clear that the capacity of a parent to implement an arrangement for children does not refer to financial capacity**.

Special conditions for making residence order or specific issues order by consent in favour of non-parent – Section 65G

2.40 Under the proposed change to paragraph 65G(2)(a) the Court loses its supervisory jurisdiction when consent orders are made in favour of non-parents. The obligation on parties is to attend a conference with a family consultant to discuss the matter. Previously the Court had to consider a report prepared by the counsellor or be satisfied that it was unnecessary. Interestingly, this provision does not explicitly grant to the Court the power not to make the consent order sought.

2.41 **FLS recommends that paragraph 65G(2(a) be amended so that the Court does not lose its supervisory jurisdiction when consent orders are made in favour of non-parents**.

Costs where false allegations or statement made

2.42 Item 41 inserts a new section 117AB [Costs where false allegation or statement made]. Paragraph 117AB(1)(b) provides, *inter alia*, that if a Court is satisfied that a party has *"knowingly made a false allegation or statement"* in the proceedings, then under subsection 117AB(2) the Court *"<u>must</u> order that party to pay some or all of the costs of another party…."*.

2.43 FLS is opposed to any provision which makes costs orders mandatory in any circumstance. The FLA already provides sufficient flexibility for costs orders to be made in the appropriate circumstances. This is the only provision in the Act which mandates the imposition of costs penalties. The new section 117AB is unnecessary and inappropriate (and particularly so in relation to proceedings between parents concerning the welfare of their children).

2.44 Section 117AB is more likely to ferment dispute between the parties, distract from the real issue of the children's welfare by focusing on arguments about whether statements are, or are not, false and encourage parties to litigate rather than focus on resolving the dispute.

2.45 **FLS recommends that this provision be deleted**.

Application of amendments

2.46 Item 43 sets out the various dates of effect for the amendments in Schedule 1. It is currently proposed that only some of the amendments will apply to all proceedings (i.e. whether initiated before or after the commencement of the Bill), whereas others apply only to proceedings initiated after the commencement of the Bill.

2.47 FLS is very concerned that this will lead to considerable confusion and potential injustice. Of particular concern is that the following key provisions will apply only in proceedings commenced on or after the commencement of the Bill:

- 2.47.1 The way in which the Court is to determine the best of interest of children (section 60CC).
- 2.47.2 The presumption of shared parental responsibility (section 61DA).
- 2.47.3 What issues a parenting order may deal with (subsection 64B)(2) to 64B(4A).
- 2.47.4 The requirement to consider equal or substantial and significant time (section 65DAA).
- 2.47.5 The effect of a parenting order providing for shared parental responsibility (section 65DAC).

2.48 FLS considers that it is fundamental that all Australian children come under the one regime. It is inappropriate to apply different rules and standards to the determination of existing applications under the old law to those applicable to new proceedings under the amended law.

2.49 As a result of chronic inadequate funding of the family law courts and consequent lack of resources, delays of up to 18 months or more before cases can be finalised are endemic in many registries of the Family Court. As a result cases commenced just prior to the new legislation may not be completed to well into 2008 (or even into 2009). This raises the real prospect of the futures of different children being dealt with in adjoining courts on quite different principles and with different outcomes over the next two to three years – or even children in the one family, as a result of different issues arising at different times, being dealt with under different regimes.

2.50 Similar considerations apply to other provisions with different commencement dates. The dates of commencement are illustrated in the table below.

Statutory Provision	**Proposed Commencement**
Section 60CC – How a Court determines what is in the child's best interests (successor to s68F)	Applies to proceedings initiated on or after commencement only and the current section 68F (although repealed by the Bill) applies to proceedings initiated before commencement.
Section 61DA – Presumption of equal shared parental responsibility when making parenting orders	Applies to parenting orders made in proceedings initiated on or after commencement only.
Amendment to subsection 65D(1) (dealing with Court's power to make parenting orders) so that it is subject to section 61DA	Applies to parenting orders made in proceedings initiated on or after commencement only.
Amendments to subsection 65D(2) (dealing with Court's power to make parenting orders) so that it is subject to section 61DA and 65DAB (parenting plans)	Applies to parenting orders made in proceedings initiated on or after commencement only.
Section 61F – the Aboriginal and Torres Strait Islander children provisions	Applies to all Part VII proceedings whether initiated before or after commencement
New subsection 62G(3A) – directing a family consultant who is preparing a report to ascertain views of the child and include those views	Applies to directions given under s62G(2) of the new Act after commencement
New paragraphs 63C(1)(ba) and (bb) requiring parenting plans to be signed by the parents and dated	Applies to parenting plans made on or after commencement
New subsections 64B(2) to (4A) setting out what a parenting order may deal with including the "new" matters such as form of consultations, communications etc.	Applies to parenting orders made in proceedings initiated on or after commencement
New section 64D stating that parenting orders are subject to later parenting plans	Applies to parenting orders made on or after commencement including applications to vary existing parenting orders

Statutory Provision	Proposed Commencement
New sections 65DAA (Court to consider child spending equal time or substantial and significant time with each parent); 65DAB (Court to have regard to parenting plans); 65DAC (effect of parenting order that provides for shared parental responsibility); and 65DAE (no need to consult on issues that are not major long-term issues)	Applies to parenting orders made in proceedings initiated on or after commencement
New paragraph 65G(2)(a) – requirement for conference with a family consultant when a parenting order is proposed to be made in favour of a non-parent	Applies to a court proposing to make an order whether or not the proceedings were initiated before commencement

2.51 FLS considers that there is no justification for children being treated in different ways simply because applications concerning their future welfare have been filed at different times.

2.52 **FLS recommends that the provisions apply to all proceedings relating to children and not just those initiated after commencement**.

2.53 The Bill – and particularly the presumption of shared parental responsibility – has been the subject of considerable media attention, much of which has been misleading and has created false and unrealistic expectations in the community.

2.54 There is a real concern that the commencement of the Bill will give rise to a rush of applications by non-residence parents attempting to vary existing orders so as to obtain equal time with their children.

2.55 An existing parenting order can only be varied if there has been a change in circumstances since it was made of such a nature as to render the original order no longer appropriate.

2.56 **FLS recommends that a provision be inserted in the Bill to make it clear (particularly to litigants in person) that the commencement of the Bill does not, of itself, constitute a change in circumstances justifying an application for a change to existing parenting orders**.

3. Schedule 3: Amendments relating to the conduct of child-related proceedings

3.1 Item 4 inserts a new *Division 12A – Principles for conducting child-related proceedings* into the FLA. Section 69ZM (which appeared as section 60KA in the Exposure Draft) has undergone some modification. The section now provides that these principles apply to:

3.1.1 Child-related proceedings;

3.1.2 Any other proceedings between the parties arising the breakdown of their marital relationship (eg property division) – but only if the parties to the proceedings consent.

3.2 Section 69ZT provides that the Rules of evidence do not apply to child-related proceedings unless the Court chooses to apply them in whole or in part.

3.3 The combined effect of sections 69ZM and 69ZT is that:

3.3.1 Child-related proceedings **must** be conducted in accordance with Division 12A.

3.3.2 Proceedings concerning other aspects of a marital relationship **may** be dealt with – with the consent of the parties – under Division 12A at the same time.

3.4 The result is that either:

3.4.1 The child-related aspects may be heard at the same time as other aspects of the issues between the parties requiring determination but under different (or at least uncertain) evidentiary regime.

3.4.2 If the parties do not agree to those aspects of their dispute which are not child-related being dealt with under Division 12A then separate proceedings will be required to determine those other issues.

3.5 FLS maintains its strong opposition to the exclusion of the provisions of the *Evidence Act 1995* in relation to child-related proceedings. The facility to dispense with the rules of evidence, by consent, is already available to the parties under Section 190 of the Evidence Act.

3.6 FLS also strongly opposes the broad power given to the Court under Section 69ZT(3) to apply the excluded provisions of the Evidence Act at its discretion. This creates uncertainty, inconsistency, and the risk of the development of a Judge-made evidentiary regime in child-related proceedings which has not been exposed to the scrutiny of, or received the imprimatur of, Parliament.

3.7 The coexistence of two systems of hearing cases based upon different rules of procedure and evidence is both expensive and wasteful. The further concerns of FLS include:

3.7.1 The pressure to adopt the children's cases model in financial proceedings associated with child-related proceedings will be immense because otherwise parties will be forced to litigate twice at double the expense;

3.7.2 A well resourced and/or difficult litigant can refuse consent to all aspects of the dispute with the other party being determined in accordance with Part 12A in order to force a weaker litigant into giving up by virtue of the costs of running two cases;

3.7.3 The answer to the problem does not lie in mandating the CCP procedure for all cases because the Family Court (and Federal Magistrates Court) now deal with third parties, bankruptcy trustees and trustees of superannuation funds, and it would be manifestly unjust to impose different legal requirements upon those parties which depend upon whether or not the husband and wife are involved in a parenting dispute.

3.7.4 There may be unforeseen and unintended consequences about the status of findings made by a court under the CCP regime (without the application of the rules of evidence) being binding by reason of issue estoppel on a court hearing property matters.

3.8 **FLS recommends that Schedule 3 be reconsidered with reference to the specific issues raised by FLS in paragraphs 3.1 – 3.7 above.**

4. Schedule 4: Changes to dispute resolution

4.1 Subsection 13E(1) of the Bill empowers a Court exercising jurisdiction in Part VIII (property and/or maintenance proceedings) to refer the parties, with their consent, to arbitration.

4.2 However section 19E of the current FLA enables the parties to submit to private arbitration in relation to any issue arising between them under Part VIII, Part VIIIA, VIIIB and section 106A of the Act.

4.3 The limitation in subsection 13E(1) to "Part VIII proceedings" appears to be a drafting error.

4.4 **FLS recommends that subsection 13E(1) be amended to ensure that the issues which can be dealt with in private arbitration can also be dealt with in Court-referred arbitration. A consequential amendment to paragraph 10L(2)(a) of the Bill will also be required.**

4.5 FLS has also noted a drafting error in paragraph 19E(3)(a) of the current FLA. This paragraph refers to proceedings under section 106A [Execution of instruments by order of court]. The reference should be to proceedings under section 106B [Transactions to defeat claims].

4.6 **FLS recommends that the opportunity be taken to amend paragraph 19E(3)(a) to remedy this error. A consequential amendment to paragraph 10L(2)(b)(i) in the Bill will also be required.**

5. Schedule 5: Representation of child's interests by independent children's lawyer

5.1 Item 5 inserts a new *Division 10 – Independent representation of child's interests*. Section 68LA of this Division sets out the role of the independent children's lawyer (ICL).

5.2 There appears to be a conflict between paragraph 68LA(5)(b), which requires the ICL to inform the court of the views of the child, and subsection 68LA(6), which provides that the ICL is not obliged to disclose to the court any information that the child communicates.

5.3 **FLS recommends that paragraph 68LA(5)(b) be amended so that it does not conflict with subsection 68L(6).**

5.4 A further conflict arises between paragraph 68LA(5)(b) and the proposed section 60CE (which provides that nothing in Part VII permits the court or any person to require the child to express his or her views in relation to any manner). As a matter of policy FLS strongly endorses the position set out in section 60CE. This provision is also consistent with the Guidelines for Child Representatives issued by the Family Court.

5.5 **FLS recommends that paragraph 68LA(5)(b) be amended so that it does not conflict with section 60CE**.

5.6 FLS is also concerned about striking the appropriate balance between informing the court of the child's views and protecting the independent position of the ICL. The Guidelines for Child Representatives issued by the Family Court provide that "The Child's Representative is to ensure that any wishes expressed by the child are fully put before the court and so far as possible are in admissible form." The wording in the Guidelines is preferred because this will avoid the situation where an ICL could effectively become a witness in the case.

5.7 **FLS recommends that paragraph 68LA(5)(b) be amended to protect the independent position of the ICL.**

5.8 Further concerns in relation to these provisions include:

5.8.1 The need to safeguard against children being pressured to express a view or to “take sides” against their parents.

5.8.2 The need to redraft subsections 68LA(2) and (3) to ensure that the ICL is not compelled to express a premature view.

5.9 **FLS recommends that subsection 68LA(2) and (3) be redrafted in keeping with the Guidelines for Children’s Representation issued by the Family Court.**