



Family Law Amendment (Shared Parental Responsibility) Bill 2005

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Law and Bills Digest Section

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Family Law Amendment (Shared Parental Responsibility) Bill 2005

Date Introduced: 8 December 2005

House: House of Representatives

Portfolio: Attorney-General

Commencement: The formal provisions commence on Royal Assent. The substantive provisions commence on various dates. Details are provided in the 'Main Provisions' section of this Digest.

Purpose

The Family Law Amendment (Shared Parental Responsibility) Bill 2005 (the Bill) makes a wide range of amendments to the *Family Law Act 1975* implementing a number of recommendations of the 2003 report, [*Every picture tells a story*](#). The changes aim to bring about a cultural shift in how family separation is managed: away from litigation and towards co-operative parenting.

Background

The FCAC Report—Every picture tells a story

The report of the House of Representatives Standing Committee on Family and Community Affairs (the FCAC) inquiry into child custody arrangements in the event of family separation, entitled *Every picture tells a story* was released on 29 December 2003 (the FCAC Report). The impetus for that inquiry is evident from the Prime Minister's statement on 23 June 2003:

The member for Macquarie [Kerry Bartlett MP], in common with many members on this side of the House and, I am sure, many members on the other side of the House is aware that within the Australian community there is a level of concern about and unhappiness with the operation of matters relating to the custody of children following marriage breakdown and a measure of unhappiness with the operation of the Child Support Agency.

[...]

I have expressed before, and I will say it again, that one of the regrettable features of society at the present time is that far too many young boys are growing up without proper male role models. They are not infrequently in the overwhelming care and custody of their mothers, which is understandable. If they do not have older brothers or uncles they closely relate to and with an overwhelming number of teachers being

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female, in primary schools in particular many young Australian boys are at the age of 15 or 16 before they have a male role model with whom they can identify.

I do not imagine that any one legislative change or pronouncement can alter that, but I think as a national parliament because this is a national responsibility there are things that we can do about it. Having regard to that, and particularly to the recent response to the report of the Family Law Pathways Advisory Group, I will be sending a reference to the House of Representatives Standing Committee on Family and Community Affairs. That reference will, amongst other things, while noting that the best interest of the child is the paramount consideration, be asking the committee to investigate what other factors should be taken into account in deciding the respective time each parent should spend with their children post separation, in particular whether there should be a presumption that children will spend equal time with each parent and, if so, in what circumstances such a presumption could be rebutted.

The committee will also be asked to investigate in what circumstances a court should order that children of separated parents have contact with other persons, including their grandparents. This is an issue that I think is quite properly in the same genre as the other matters I have discussed. We will also be asking the committee to examine whether the existing child support formula works fairly for both parents in relation to their care of, and contact with, their children, because as members on this side of the House and particularly the member for Macquarie will know there are many non-custodial parents in Australia who are profoundly unhappy with the existing formula used by the Child Support Agency and wish that matter to be examined.

We are asking the committee to report to the parliament by 31 December. There is no point giving it two or three years. I think that six months, given the intensity and amount of public interest in this matter, is an appropriate period of time.¹

Rebuttable presumption of joint custody in family law

As indicated by the Prime Minister's statement, one focus of the FCAC inquiry was whether there should be a rebuttable presumption of joint custody in family law. There are various meanings of 'joint custody', one of which is that a child would spend equal amounts of time with both parents.

Most family law matters are resolved without court orders (about 95%). Statistics from the Child Support Agency indicate that where parents agree by themselves on issues of residence and contact, in 90% of such cases a decision is made that the child will be in the sole principal care of one person (usually the mother).²

Of matters that do proceed to a residence order:

- the percentage of residence orders made in favour of the mother was 74.6% in 2000-2001 (down from 77.8% in 1994-95)

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- the percentage of residence orders made in favour of fathers was 19.6% in 2000-2001 (up from 15.3% in 1994-95).³

Advantages and disadvantages of a rebuttable presumption of equal time custody

Advantages are said to include:

- ideally each parent should be equally involved in caring for their children
- it would be in the child's best interests (the foundational principle on which family law in Australia operates)
- it would underline the fact that both parents should have a continuing role in their children's lives
- it may increase the amount of contact children have with both parents even if equal time is not agreed or ordered. A 'spin off' of this may be that fathers may be more willing to pay child support
- it may promote greater parental co-operation.⁴

Among the disadvantages identified are:

- it derogates from the principle of the child's best interests
- it does not adequately recognise problems associated with family violence
- it may increase parental conflict with a consequent negative impact on the child
- the need to rebut/argue the presumption would impose burdens on court resources and parents' finances
- there are practical difficulties with the concept – for instance, it could mean that separated parents would probably have to live close to each other.⁵

The FCAC Report recommendations

The FCAC did not endorse a rebuttable presumption of joint custody. It made 29 recommendations, some of them multi-part recommendations. They included the following:

- amendment of the Family Law Act to create a clear (rebuttable) presumption in favour of equal shared parental responsibility (except where there is 'entrenched' conflict, family violence, substance abuse or established child abuse). It was recommended that 'shared parental responsibility' be defined in the Act as involving a requirement that parents consult with each other about major issues relevant to care, welfare and development of their children (including education, religion, culture, health, surname and usual place of residence) and that these matters should be contained in a parenting plan.

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- require mediators, counsellors, and legal advisers to assist parents for whom the presumption of shared parenting responsibility is applicable, develop a parenting plan
- require courts/tribunals to consider the terms of any parenting plan in making decisions about the implementation of parental responsibility in disputed cases
- require mediators, counsellors, and legal advisers to assist parents for whom the presumption of shared parenting responsibility is applicable, to first consider a starting point of equal time where practicable; and require courts/tribunals to first consider substantially shared parenting time when making orders in cases where each parent wishes to be the primary carer.
- replacement of the language of ‘residence’ and ‘contact’ in the Family Law Act with family friendly terms such as ‘parenting time’
- amendment of the Family Law Act to require separating parents to undertake mediation or other forms of dispute resolution before they make an application for a parenting order (except where there is ‘entrenched’ conflict etc.)
- establishment of a Families Tribunal with power to decide disputes about shared parental responsibility. The Committee recommended that the role of the courts in deciding parenting matters should be limited to occasions where there is ‘entrenched’ conflict; to the enforcement of Families Tribunal orders and to review of Families Tribunal orders (but only on limited grounds, like denial of natural justice). The Families Tribunal would consist of a mediator, child psychologist and a lawyer.
- the streamlining of courts with family law jurisdiction so there is one federal court dealing with family law (rather than, as at present, two federal courts, the Family Court and the Federal Magistrates Court)
- amendment of the Family Law Act so that section 68F explicitly refers to grandparents.⁶

The report also made a number of recommendations about child support. For instance:

- an increase in the minimum child support liability payable under section 66 of the *Child Support (Assessment) Act 1989* from \$260 per year to \$520 per year
- a reduction in the cap on the income of the paying parent on which child support is calculated, so that high income earners are not contributing ‘at a rate in excess of cost of children’
- elimination of any direct link between the time that each parent spends with the child and the amount of child support
- an increase in the enforcement powers of the Child Support Agency
- the establishment of a Ministerial taskforce to re-evaluate the Child Support Scheme.⁷

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Government response

The Government released its [response](#) to the FCAC recommendations on 23 June 2005. In releasing the response, the Attorney-General described the proposed changes as ‘the most significant changes to the family law system in 30 years’.

The Government’s response to the FCAC’s recommendations has a number of components. The most significant are:

- a commitment of \$397 million over four years in the 2005-06 Budget, including for 65 Family Relationship Centres (FRCs) to be rolled out over the next four years
- establishment of the Child Support Taskforce, which has now reported to the Government,⁸ and
- major changes to the Family Law Act, as set out in the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005, also released on 23 June 2005, and referred to the House of Representatives Standing Committee on Legal and Constitutional Affairs (LACA Committee) for inquiry.

The LACA inquiry

The LACA Committee was asked to inquire into the provisions of the Exposure Draft Bill and consider whether they implemented the measures set out in the Government’s response to the *Every picture tells a story* report, namely to:

- encourage and assist parents to reach agreement on parenting arrangements after separation outside of the court system where appropriate
- promote the benefit to the child of both parents having a meaningful role in their lives
- recognise the need to protect children from family violence and abuse, and
- ensure that the court process is easier to navigate and less traumatic for the parties and children.

The Committee was specifically directed not to re-open discussions on policy issues such as the rejection of the proposal of 50/50 custody in favour of the approach of sharing of parental responsibility.

The Bill implements many of the recommendations made by the LACA inquiry in its report on the Exposure Draft Bill ([the LACA report](#)). Analysis of the LACA report and the [Government’s response](#) to it is provided under the Main Provisions section of the Digest.

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Main provisions

Schedule 1 – Shared parental responsibility

The amendments in **Schedule 1** commence six months after Royal Assent unless commenced earlier by proclamation (**clause 2**).

Schedule 1, Part 1 makes amendments to the provisions of Part VII of the Family Law Act, the Part that deals with children. In particular it makes amendments to the provisions dealing with parental responsibility, the best interests of the child principle, parenting plans, and parenting orders. The Explanatory Memorandum states the amendments in this schedule:

[...] recognise the need for a cooperative approach to parenting. The amendments promote the object of ensuring that children have a right to have a meaningful relationship with both their parents and that parents continue to share responsibility for their children after they separate. The amendments also reinforce the primary importance of the object of ensuring that children live in an environment where they are safe from violence or abuse.

The amendments in Schedule 1 also advance the Government's long standing policy of encouraging people to take responsibility for resolving disputes themselves, in a non adversarial manner.⁹

Items 1-7 insert new definitions relevant to Schedule 1 into section 4, the interpretation section of the Family Law Act.¹⁰

Objects and principles of Part VII

Item 8 repeals and replaces the objects and principles of Part VII as set out in section 60B.

New subsection 60B(1) states that the objects of Part VII are to ensure that the best interests of children are met by:

- a) ensuring that children have the benefit of both parents having a meaningful involvement in their lives to the maximum extent consistent with the best interests of the child
- b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence
- c) ensuring children receive adequate and proper parenting to achieve their full potential, and

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- d) ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

Objects a) and b) are new whereas objects c) and d) replicate the current objects.

The principles underlying the objects are set out in **new subsection 60B(2)**. They replicate the principles in the existing provision with some modification in terminology. For example, children have a right to *spend time on a regular basis with*, and *communicate on a regular basis* with both their parents' and other people significant to their care, welfare and development (such as *grandparents and other relatives*). In contrast, the existing section refers to the right to have 'contact on a regular basis with both their parents and with other people significant to their care'. The specific reference to grandparents was a recommendation of the LACA report.¹¹

The principles underlying the objects are also expanded to include the right of all children to enjoy their culture (**new paragraph 60B(2)(e)**) and more specifically the right of Aboriginal or Torres Strait Islander children to enjoy their culture (**new subsection 60B(3)**).¹²

The principle of the 'best interests of child'

The 'best interests of the child' have been the paramount consideration in making of parenting orders since the Family Law Act came into force.

Division 10 of Part VII of the Family Law Act deals, in part, with how a court determines what is in the child's best interests. The Division applies in any proceedings under Part VII (Children) where the best interests of the child are the paramount consideration. **Item 9** relocates these provisions to Division 1, **new Subdivision BA** replicating some and modifying others. The LACA report recommended that these provisions be moved to the beginning of Part VII to give them greater emphasis and visibility. Evidence to the inquiry suggested that the key provision, namely the best interests of the child principle is currently difficult to locate in the Family Law Act.¹³

New section 60CA replicates existing section 65E and moves it into **new Subdivision BA**. It states that the paramount consideration for a court when making a parenting order is the child's best interests.

The key provision, **new section 60CC** replaces section 68F which sets out how a court is to determine the best interests of a child. The current provision provides that in making a determination a court must consider such things as any wishes expressed by the child, the nature of the relationship between the child and his or her parents, the child's needs and characteristics, and the need to protect the child from harm.

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In contrast **new section 60CC** establishes a two tiered approach – *primary* and *additional* considerations that a court must consider to determine the best interests of children. The *primary* considerations a court must have regard to are:

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

These primary considerations intentionally mirror the wording of the new objects provision thus providing a direct link between the objects of Part VII and the list of factors the court must consider in determining the best interests of the child.¹⁴ The Explanatory Memorandum states that the purpose of the two tiered approach is to elevate the importance of the primary factors and to better direct the court’s attention to the revised objects of Part VII.¹⁵

The *additional* considerations a court must consider include those currently set out in existing subsection 68F but with some modification in terminology. For example **new section 60CC** states that the court could consider:

- ‘... any views expressed by the child’ (**new paragraph 60CC(3)(a)**) (in contrast to ‘any wishes expressed by the child’),
- the nature of the relationship of the child with other persons including grandparents or other relatives (**new subparagraph 60CC(3)(b)(ii)**).

There is also a new consideration that a court is to take account of: ‘the willingness and ability of each of the child’s parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent’ (**new paragraph 60CC(3)(c)**).

The LACA report noted that a number of groups expressed concern about the impact of this so called ‘friendly parent’ provision. The submission of the National Council of Single Mothers and their Children stated:

The ‘friendly parent’ provision has been a manifest boon, wherever it has been implemented, to parents who use violence or abuse. Parents who use violence and abuse welcome the opportunity to threaten and harm their targets whilst protective parents seeking to avoid threats and injury have every reason to avoid the violent parent.¹⁶

The Committee concluded, however that it is appropriate for the court to have to consider the willingness to maintain a relationship with the other parent:

This is only one factor of the numerous secondary factors that the court is considering. Concerns about the impact on violence are unwarranted given that the court must consider the safety of the child as a primary consideration in determining the best interests.¹⁷

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The Bill includes an additional consideration that was not in the Exposure Draft Bill, which arguably would also help balance the effect of this ‘friendly parent’ provision. **New subsection 60CC(4)** requires the court when making parenting orders must also consider the extent to which each of the parents has fulfilled or failed to fulfil their parental obligations. The Shadow Attorney-General, Nicola Roxon, MP has welcomed this provision arguing that this would alleviate some of the concerns she expressed in her dissenting LACA report.¹⁸

The additional considerations for a court to consider also include a child’s right (including an Aboriginal or Torres Strait Island child) to enjoy his or her culture and the likely impact of a parenting order on that culture (**new paragraph 60CC(3)(h)**). These changes are consistent with similar amendments made to the objects provision.¹⁹

New sections 60CD and 60CE deal with how a court may inform itself of a child’s views when making parenting orders. They replace the current sections 68G and 68H which use the term ‘wishes’ of a child. The Explanatory Memorandum explains that this change of terminology recognises that a child may not necessarily want to express a ‘wish’ about which of his or her parents the child will live with or spend time with. It is intended that ‘views’ will also capture a child’s perceptions and feelings, and will allow for any decision to be made in consultation with the child without the **child** having to make a decision or express a ‘wish’ as to which parent he or she is to live with or spend time with. It is intended that references to a child’s ‘views’ will not exclude a child expressing his or her ‘wishes’.²⁰

New paragraph 60CD(2)(b) makes explicit reference to the court informing itself of the child’s views by appointing an independent children’s lawyer.

New sections 60CF and 60CG replicate sections 68J and 68K respectively. They deal with the obligation on parties to inform the court of any relevant family violence orders and the obligation on the court to ensure that the parenting order is consistent with any family violence orders.

Item 10 is a consequential amendment resulting from the transfer of provisions regarding the best interests of the children to the beginning of Part VII.

Obligation to attend family dispute resolution

As stated above, the FCAC report recommended changes to the family law system in order to encourage separating couples, wherever possible, to resolve disputes without recourse to the court system. The FCAC report recommended:

... that the *Family Law Act 1975* be amended to require separating parents to undertake mediation or other forms of dispute resolution before they are able to make an application to a court/tribunal for a parenting order, except when issues of

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entrenched conflict, family violence, substance abuse or serious child abuse, including sexual abuse, require direct access to courts/tribunal.²¹

The Government agreed to this recommendation, although it altered some of the exceptions to the requirement, particularly the recommended exemption in cases involving entrenched conflict or substance abuse.

Item 11 adds to Division 1 a **new Subdivision E**—Family Dispute resolution. Its effect is to place an obligation on a court to ensure that parties to a court order, subject to certain exceptions, must have attended family dispute resolution. The objective is expressly stated:

To ensure that all persons who have a dispute about matters that may be dealt with by [...] a Part VII order make a genuine effort to resolve that dispute by family dispute resolution before the Part VII order is applied for (**new subsection 60I(1)**)

New subsection 60I(7) is the key provision. Its effect is that a court, subject to certain exceptions, must not hear an application for a Part VII order unless the applicant also files a certificate stating that the applicant had attended or attempted to attend family dispute resolution. Details of the certificate requirements are set out in **new subsection 60I(8)**.

Exceptions to attending family dispute resolution

New subsection 60I(9) sets out the exceptions to attending family dispute resolution. Family dispute resolution is not required where:

- the applicant is seeking a consent order
- the application has been made by another party
- there are reasonable grounds to believe that there has been (or there is a risk of) abuse of the child or family violence
- there is contravention of an existing Part VII order that is less than 12 months old and about which the court is satisfied that there are reasonable grounds to believe the contravener shows a ‘serious disregard’ for obligations under the order
- the application is made in circumstances of urgency
- one or more of the parties is unable to participate effectively due to reasons such as incapacity or physical remoteness, or
- other circumstances specified in the regulations.

Even where a person satisfies the court on reasonable grounds that their case is one in which one of the exceptions can be claimed, the court is directed to consider making an order that the parties attend dispute resolution nonetheless (**new subsection 60I(10)**).

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Exception in cases of child abuse or family violence

As stated above, family dispute resolution is not required where there are *reasonable grounds* to believe that there has been (or there is a risk of) abuse of the child or family violence.

The requirement to show reasonable grounds in relation to child abuse or family violence was a matter of concern in some of the submissions to the LACA inquiry. It was noted that the ‘reasonable grounds’ test was seen as too great an onus to place on persons wishing to seek an exemption, particularly in light of the evidentiary problems associated with family violence and child abuse, which ‘generally occurs behind closed doors and without independent witnesses’.²²

However the Attorney-General’s Department stated that it is necessary to establish a significant threshold for satisfying the court that there is family violence or abuse in order to deter parties from making false allegations for the purpose of avoiding attendance at dispute resolution.²³

The LACA report noted with some concern:

that the provision would create a new species of litigation, with the associated imposition on judicial time and resources. The creation of new hearings would, far from simplifying the process, more likely create delays, and provide a disincentive for people without funding to claim the exemption. The disincentive may then result in compelling some parties to attend dispute resolution, where they have a genuine need to avoid such a process with a violent or abusive ex partner

[...]

The Committee is mindful of the balance being sought by the government, but is concerned that the application of the provision will create an unnecessarily high burden on applicants in violent or abuse domestic situations, particularly as the provision is procedural in nature.²⁴

The Committee proposed an alternative model — that an exception to attendance at compulsory dispute resolution on the basis of family violence or abuse be available where an applicant provides a sworn statement that the dispute is not suitable for family dispute resolution on the basis of family violence or abuse. In addition the Act would expressly impose penalties where the court is satisfied that there are reasonable grounds that the applicant has knowingly made a false allegation. The exception would therefore be dealt with on the papers, without the need for a hearing. The Government did not accept this recommendation.

There are other provisions also dealing with this exception. **New section 60J** provides that where an exemption from attending dispute resolution is successfully claimed on the basis of family violence or abuse, the court must not hear the application unless the applicant has indicated in writing that he/she has received advice on the relevant services and options available in circumstances of abuse and violence. Again, an exception to this

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requirement is available where the court has reasonable grounds to believe that there would be a risk of family violence or abuse in delaying the application for the order. **New section 60K** requires a court to take prompt action in relation to allegations of child abuse or family violence.

Phasing in of family dispute resolution

New subsections 60I(2)–(6) provide that the requirement to attend dispute resolution be phased in over a three year period.

Phase 1 will apply to proceedings filed from commencement of the provisions until 30 June 2007. During this phase the dispute resolution provisions of the Family Law Rules 2004, which currently operate in the Family Court, will be extended to applications made in the Federal Magistrates Court and other courts exercising jurisdiction in family law for that period. These rules impose requirements for dispute resolution to be complied with before an application is made for a parenting order.

Phase 2 will apply the new dispute resolution requirement provisions contained in **new section 60I** to applications made from 1 July 2007 to a day fixed by proclamation.

Phase 3 will commence after a second proclamation date and the compulsory dispute resolution provisions will apply to all applications made to the court.

The rationale for this phased implementation is to provide appropriate time to establish the services necessary (i.e. to establish the Family Relationship Centres) to match the dispute resolution provisions. The LACA report noted with some concern that the Department of Family and Community Services, one of the two implementing agencies, is already sounding warnings about the timeframe for establishing these services.²⁵ The LACA recommendation was that Phases 2 and 3 should be implemented by replacing references to time with references to outcomes, in particular that:

Phase 2 is to commence once 40 Family Relationship Centres are operational, and

Phase 3 is to commence after all 65 Family Relationship Centres are operational.²⁶

The Government did not accept this recommendation.

Parental responsibility

The concept of ‘parental responsibility’ was introduced in the Family Law Act in 1995 and is dealt with in Division 2 of Part VII. It is defined in section 61B to mean all the duties, powers, responsibilities and authority which, by law, parents have in relation to children. Section 61C states that each parent has parental responsibility (subject to court orders) for a child under 18 and that marital status, divorce or separation in the parental relationship has no impact on this responsibility. The Bill does not change these

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definitions, however **item 12** inserts notes into section 61C clarifying the legal effect and directing readers to other provisions that affect parental responsibility. **Item 7** also inserts two new definitions into section 4, the interpretation section, clarifying the meaning of ‘parental responsibility’ and ‘shared parental responsibility’ within the Act. Where a person has shared parental responsibility with another person it means a person shares some or all of the parental responsibility for the child with that other person.

Presumption of equal shared responsibility when making parenting orders

Item 13 inserts **new section 61DA** and creates a presumption of equal shared parental responsibility in relation to making parenting orders. It provides that a court, when making a parenting order in relation to a child 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 a parent of the child or a person who lives with a parent of the child, has engaged in family violence or abuse of the child (or another child who is a member of the parent’s family) (**new subsection 61DA(2)**). The presumption may be rebutted by evidence that satisfies the court that it is not in the best interests of the child for the parents to have equal shared parental responsibility (**new subsection 61DA(4)**). The note to section 61DA attempts to clarify that the presumption relates solely to the allocation of parental responsibility and does not deal with the amount of time spent with the child.

The presumption also applies in relation to interim orders unless the court considers it inappropriate (**new subsection 61DA(3)**). However in making final parenting order the court must disregard the allocation of parental responsibility made in the interim order (**new section 61DB**).

What does equal shared parental responsibility mean?

Where there is equal shared parental responsibility then **new section 65DAC (item 31)** provides that both parents jointly make decisions about major long-term issues in relation to the child. This requires that the parties must consult one another and make a genuine effort to come to a joint decision about the issue. Major long term issues are defined as including decisions relating to the child’s education, religious and cultural upbringing, health, name and changes to the child’s living arrangements that make it significantly more difficult for the child to spend time with a parent (**item 4, new subsection 4(1)**). The note to this definition clarifies that a decision by a parent of the child to form a relationship with a new partner will not, of itself, involve a major long-term issue in relation to the child. However the decision will involve a major long-term issue, if, for example, the relationship with the new partner involves the parent moving to another area and the move will make it significantly more difficult for the child to spend time with the other parent.²⁷ **New section 65DAE** clarifies that there is no requirement to make decisions jointly about issues that are not major-long term issues. The note to this section states that this will mean that the person with whom the child is spending time will usually

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not need to consult on decisions about such things as what the child eats or wears because these are usually not major long-term issues—this exception would however be subject to anything set down in a parenting order.

The LACA report noted that a number of submissions raised concerns that the requirement to consult on major long-term issues may increase the level of litigation. The Law Society of NSW in its submission stated:

...to impose joint parental responsibility on parents who did not parent in this fashion before separation is a recipe for conflict. It is also potentially de-stabilising for a child. Moreover, there is no guarantee that an uninvolved parent will become involved just because of the presumptions. The presumption places the committed parent in a position where he or she is subject to the power of the uncommitted parent. The presumption will, however, work best for committed parents who can communicate with each other and who are able to satisfactorily manage their conflict.²⁸

Shared time — equal time, substantial and significant time

The Bill and the Explanatory Memorandum state that a presumption of *equal shared parental responsibility* does not provide for a presumption about the amount of *time* the child spends with each parent. Shared time is dealt with in **new section 65DAA**. It provides that where a parenting order is to provide for equal shared parental responsibility for the child, the court must consider whether spending *equal time* with each of the parents would be both in the best interests of the child and reasonably practical and if so, then it is to consider making an order for equal time. Where equal time is not appropriate, the court is to consider making an order for *substantial and significant time* with parents providing it would be in the best interests of the child and reasonably practicable to do so. Substantial and significant time requires the child to spend both some time on weekends and holidays and some time on other days. It must also include time in daily routine and allow for participation in events that are significant to the child and events that are significant to the parent. The court may also consider other factors in determining the meaning of significant and substantial time (**new subsections 65DAA(3) and (4)**).

The factors the court is to take into account in determining what is reasonably practicable in terms of equal time or substantial and significant time include:

- how far apart the parents live from each other
- the parents' current and future capacity to implement such an arrangement
- the parents' current and future capacity to communicate with each other and resolve difficulties that might arise in implementing an arrangement of that kind
- the impact that an arrangement of that kind would have on the child, and
- such other matters as the court considers relevant (**new subsection 65DAA(5)**).

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Obligations on advisers to give advice about equal time or substantial and significant time

Item 18 repeals and replaces section 63DA. **New section 63DA** significantly expands the obligations on advisors (defined as legal practitioners, family counsellors, family dispute resolution practitioners and family consultants) when advising separating couples about options for developing a parenting plan. An advisor must inform separating couples about:

- the possibility of the child spending ‘equal time’ or spending ‘substantial and significant time’ with each of the parents where it is practicable and in the best interests of the child
- the need to consider the best interests of the child when developing parenting plans
- the matters that may be dealt with in a parenting plan
- the operation of any pre-existing parenting order
- the desirability of including provisions concerning the form of consultations, the process for resolving disputes and the process for changing the plans in the terms of the plan
- the availability of programs to help people who have difficulty complying with a parenting plan, and
- that pursuant to new section 56DAB the court must have regard to the terms of the most recent parenting plan (**new subsection 63DA(2)**).

The note to this section clarifies that when advising about the option of a child spending equal time, or substantial and significant time with each parent, the advisor may, but is not obliged, to advise whether such an option is appropriate in the circumstances.

Substantial versus equal time

The court’s obligation to consider that the child spend *equal time* with both parents was not part of the Exposure Draft Bill. The Draft Bill required only that the court consider the child spending ‘*substantial time*’. The LACA Committee did not consider that the use of the term ‘substantial’ adequately implements the recommendations of the FCAC report as accepted by the Government. On this matter, the LACA Committee saw particular merit in the submission of the Shared Parenting Council of Australia (supported by a number of other submissions) that:

Recommendation 5 of the Report,²⁹ was a fundamental and key recommendation arrived at after extensive community and departmental consultation, which has been accepted by the Government. The [FCAC] Committee did not reject the ‘notion’ of 50/50 shared time in certain circumstances. It rejected the idea of a presumption of equal shared custody...

The Shared Parenting Council argued that the Exposure Draft Bill did not directly provide for a court to make equal or substantially equal parenting time orders in appropriate circumstances.³⁰

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The LACA Committee had sympathy with submissions and witnesses who expressed concerns that substantial time may not operate to facilitate shared parenting. It therefore recommended that proposed section 65DAA be amended to provide that the court shall, in making parenting orders in situations where there is equally shared parental responsibility, consider whether equal time with both parents is in the best interests of the child and reasonably practicable.³¹ The Government accepted this recommendation.

Parenting plans and parenting orders

A parenting plan as defined in section 63C of the Family Law Act is an agreement, made in writing between parents that deals with arrangements about their children. Parenting plans are simply an agreement between parents and are currently not legally enforceable.

Parenting orders, defined in section 64B are court orders that may cover such matters as who a child will live with (residence order), who a child will have contact with (contact order), and matters concerning the care, welfare and development of a child (specific issues order). In contrast to parenting plans, parenting orders are legally enforceable. A parenting order may be applied for by either or both of the child's parents, the child, a grandparent of the child, or any other person concerned with the care, welfare or development of the child (section 65C).

New subsection 63C(2) expands the list of matters that can be included in a parenting plan to include one or more of the following:

- the person with whom the child is to live
- the time a child is to spend with a person
- the allocation of parental responsibility
- the form of consultation to be had on the exercise of shared parental responsibility
- communications that a child is to have with another person (i.e. including parents, grandparents or relatives)
- maintenance
- the process of resolving disputes about the terms of the parenting plan
- the process for changing the plan where circumstances require it, and
- any aspect of the care, welfare or development of the child.

Items 22 – 24 amend section 64B to provide a similar expanded list of matters that can be included in parenting orders and to reflect the new terminology. Parenting orders are no longer described as 'residence orders', 'contact orders' or 'specific issues orders' but rather parenting orders that provide with whom a child is to live, spend time, communicate or that allocate parental responsibility or a component of parental responsibility.

The relationship between parenting plans and parenting orders

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In contrast to court orders, parenting plans can be varied or revoked by agreement in writing between the parties to the plan (except where they have been registered under the Act).³² Advantages of parenting plans are their flexibility and affordability. They are a cost effective way of handling changing circumstances. Against that, it can also be argued that the lack of court supervision or scrutiny of a parenting plan can mean that any power imbalance in the relationship would be manifested in any agreement.

The Bill contains a number of amendments to the parenting plan provisions which give parenting plans a new legal effect. **New section 65DAB** provides that where a court is making a parenting order it must have regard to the terms of the most recent parenting plan, if doing so would be in the best interests of the child. More significantly **new section 64D** is a default provision which would have the effect of making parenting orders subject to any subsequent parenting plan. It provides that unless a court determines otherwise, a parenting order in relation to a child is taken to include a provision that the order is subject to a parenting plan that is:

- entered into subsequently by the child's parents, and
- agreed to, in writing by any other person (other than the child) to whom the parenting order applies.

New subsection 64D(2) provides that the court may in exceptional circumstances provide that a parenting order may only be varied by a subsequent order of the court (and not by a parenting plan).

The Attorney-General's Department in its submission to the LACA Committee in explaining this provision stated:

The intention of section 64D is that, to the extent of any inconsistency, a parenting order should cease to have effect in circumstances where parents subsequently make a parenting plan that deals with a matter in a court order. This does not mean that the parenting plan itself is enforceable (parenting plans have no legal enforceability), but does mean that where this default provision is included in the parenting order, there will no longer be a right to enforce the previous court order (to the extent of inconsistency with the new parenting plan).³³

Costs for false allegations

Item 41 inserts **new section 117AB**. It provides that a court must order a party to pay some or all of the costs of another party, where the court is satisfied that that party has knowingly made a false allegation in the proceedings. This provision implements recommendation 10 of the LACA report. It attempts to address concerns that have been expressed, in particular that allegations of family violence and abuse can be easily made and may be taken into account in family law proceedings.³⁴ It is of note that the Government's reason for not proceeding with a costs measure in the Exposure Draft Bill was that it might discourage people raising genuine instances of violence and abuse.³⁵

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The Explanatory Memorandum notes that the provision is broader than family violence or abuse allegations and would apply to any false statement knowingly made. **Item 40** is consequential to this amendment.

Consequential amendments

Items 19–21 and 34–39 are consequential amendments resulting from the transfer of the provisions dealing with the best interests of the child into **new Subdivision BA** of Division 1.

Item 28 repeals and replaces section 65AA. The current section 65AA contains an explanation of the three tiered compliance regime for parenting orders and is no longer required because of changes to that regime (made by **Schedule 2** of the Bill). **New section 65AA** is a sign post back to **new section 60CA** – when making parenting orders the best interests of the child are paramount.

Item 32 repeals existing section 65E–Child’s best interests paramount. This section has been transferred to **new Subdivision BA** and is now **new section 60CA (item 9)**.

Section 65G deals with the special requirements for making consent orders in favour of non parents (such as grandparents or relatives). Before making such orders parties must have attended counselling and the court must receive a report on that counselling. **Item 33** amends section 65G to remove the requirement to present the counselling report.

Schedule 2—Compliance regime

The amendments in **Schedule 2** commence six months after Royal Assent unless commenced earlier by proclamation (**clause 2**).

Schedule 2 repeals and replaces the existing Division 13A of Part VII of the Family Law Act that deals with the consequences of the failure to comply with orders that affect children. The **new Division 13A** includes amendments that:

- aim to expand the powers of the court in order to strengthen the existing enforcement regime
- remove the terminology referring to a three stage compliance regime, and
- restructure and reorder the provisions in order to improve clarity.³⁶

The parenting compliance regime

The court can make a range of orders affecting children including parenting orders,³⁷ certain injunctions, and certain bonds.

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There are various ways in which compliance with these orders can be secured including consensus following counselling or mediation, use of location and recovery orders, contempt proceedings, proceedings to vary a substantive order and use of the parenting compliance regime found in Part VII, Division 13A of the Family Law Act. The parenting compliance regime is a three-tiered approach to compliance with orders affecting children.³⁸ These measures were inserted by the *Family Law Amendment Act 2000* and were designed to be a more sophisticated response to non-compliance than the traditional approaches of fines, community service orders, custodial sentences or bonds.

- Stage 1 contains preventative measures. It aims to improve communication between separated parents and educate them about their parental responsibilities.
- Stage 2 is a remedial regime designed to enable parents to resolve issues of conflict about parenting and to help in the negotiation of improved parenting.
- Stage 3 enables sanctions to be imposed. It covers situations of serious or repeated breaches of orders. The person who is caught by the stage 3 regime can be ordered to do community service or enter a bond.

The FCAC report expressed concern that this enforcement regime needed to be strengthened and recommended the implementation of a number of additional contact enforcement options including reasonable but minimum financial penalties for first and subsequent breaches and consideration of a parenting order in favour of the other parent in cases of repeated and deliberate defiance of court orders. The Government in its response agreed on the need to strengthen the scheme but proposed a different range of options. In addition to the financial penalties and cumulative list of consequences already in the Act, the Government proposed the introduction of the following new measures:

- a requirement that the courts consider ‘make-up’ contact if contact has been missed through a breach of an order. Unlike most enforcement provisions, it will not be necessary to prove that the breach was intentional
- a power to award compensation for reasonable expenses incurred by a person but which were wasted due to a breach of an order
- that legal costs will be awarded against the party that has breached the order, unless it is not in the best interests of the child, and
- a discretion to impose a bond for all breaches of orders.³⁹

The Bill generally implements these measures and proposes a compliance regime based on the following categories:

- where a contravention is alleged to have occurred but is not established, then **new Subdivision C** applies
- where the court makes a finding that a contravention has occurred but there is a reasonable excuse, then **new Subdivision D** applies

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- where the court finds that the contravention has occurred and there is no reasonable excuse, the **new Subdivisions E and F** apply. Whether Subdivision E or F applies is a matter for the court to determine and will depend on the seriousness of the contravention.

Items 1 – 5 are consequential amendments resulting from the restructure of Division 13A and the removal of references to the ‘three stage compliance regime’. The Explanatory Memorandum states that this terminology is not well understood as there is confusion about the fact that stage 1 (remedial) is located in Division 6 of Part VII, while stages 2 and 3 are in Division 13A.

New Subdivision A within Division 13A deals with preliminary matters and includes definitions of terms used in the Division. Several provisions replicate existing provisions in Division 13A with minor drafting changes. For example **new sections 70NAB – Application of the Division and 70NAC – Meaning of contravened an order**, replicate sections 70NBA and 70NC respectively.

New section 70NAD refers to the general obligations that are created by parenting orders. It replicates existing section 70ND but replaces the terms ‘residence order’, ‘contact order’ and ‘specific issues order’ with references to orders relating to with whom a child is to live, spend time and communicate.

New section 70NAF replaces section 70NEA. It provides clarification of the standard of proof to be applied by the court in considering enforcement applications. The general standard to be applied is the civil standard of proof – on the balance of probabilities. This is subject to **new subsection 70NAF(3)** which requires the court to apply the stricter standard – proof beyond reasonable doubt, in matters when a court is considering a criminal consequence for the contravention under new Subdivision F (for example when imposing a community service order, a fine, or a sentence of imprisonment).

The Explanatory Memorandum states that the current test provided by section 140 of the *Evidence Act 1995* is the civil standard of proof, the balance of probabilities, with the court to take account of the gravity of matters. The purpose of this amendment is to assist practitioners and self-represented litigants by clarifying the circumstances in which the court will apply a different standard of proof.⁴⁰

Court’s power to vary parenting orders in all contravention proceedings – Subdivision B

The effect of **new section 70NBA** is that in all contravention proceedings under Division 13A the court has the power under Subdivision B to vary the parenting order. **New subsection 70NBA(2)** provides that in cases involving more serious breaches, that would otherwise be dealt with under Subdivision F, the court must take account of certain considerations if it decides to vary the order under section 70NBA. The Explanatory Memorandum states that the intention of this provision is to ensure that, when varying an order involving serious or repeated contraventions, the court considers whether there are

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other viable options (such as a post separation parenting program) or whether they have been tried before without success.⁴¹

When considering whether to vary a parenting order, **new section 70NBB** requires the court to consider the terms of any subsequent parenting plan the parents have made and consider varying the order to include some or all of the provisions of that parenting plan (**new paragraph 70NBB(2)(d)**).

Breach alleged but is not established by the court – Subdivision C

New Subdivision C deals with situations where a contravention of a primary order is alleged to have occurred but is not established by the court (**new section 70NCA**). In such cases the court may vary the primary order (**new section 70NBA**) and it may order that the person who brought the contravention proceedings pay some or all of the costs of the other parties (**new section 70NCB**) — the intention here is to deter people from making nuisance claims of breaches. A primary order is defined as an order under the Family Law Act affecting children, or a variation of such an order.⁴²

Breach established but with reasonable excuse – Subdivision D

New subdivision D deals with situations where a court finds that a person has committed a contravention of a primary order,⁴³ but that the person had a reasonable excuse for the contravention (**new section 70NDA**). The meaning of reasonable excuse is defined in **new section 70NAE** and includes a belief on the part of the respondent that it was necessary to contravene the order to protect the health or safety of either the respondent or the child.⁴⁴

In such cases the court may make any or all of the following orders:

- vary the primary order (note to **new section 70NDA**)
- compensate for time with the child forgone as a result of the contravention, (except where it would not be in the best interests of the child for the court to do so) (**new section 70NDB**),
- make an order that the person who brought the contravention proceedings pay some or all of the costs of the other parties (**new section 70NDC**) — the intention here is to deter people from making nuisance claims of breaches.

Less serious breaches without reasonable excuse – Subdivision E

New Subdivision E equates to stage 2 of the existing compliance regime with an expanded list of discretionary orders available to the court. It deals with situations where a court finds that a person has contravened a primary order with no reasonable excuse, and the contravention is of a less serious nature (**new subsection 70NEA(1)**). Less serious is where there have been no previous breaches or where there have been previous breaches

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and the court considers it appropriate to apply this Subdivision (**new subsections 70NEA(2) and (3)**).

In these cases the court is able to make any or all of the following orders (**new section 70NEB**):

- direct the person/s to participate in a post-separation parenting program (**new paragraph 70NEB(1)(b)**). Before making such an order the court must consider seeking the advice of a family and child specialist about the services appropriate to the person's needs.
- compensate for the lost time with the child as a result of the contravention concerned (**new paragraph 70NEB(1)(a)**) (except where it would not be in the best interests of the child for the court to do so (**new subsection 70NEB(5)**))
- require the person to enter into a bond (**new paragraph 70NEB(1)(d)**). The bond may be for up to 2 years and may include conditions requiring the person to attend family counselling or to be of good behaviour (**new section 70NEC**).
- enable an application to be made to revise, discharge or vary the earlier parenting order (**new paragraph 70NEB(1)(c)**)
- require that the person who committed the contravention pay some or all of the legal costs of the other parties (**new paragraph 70NEB(1)(f)**)
- award compensation for reasonable expenses that resulted from the contravention (**new paragraph 70NEB(1)(e)**) – for example lost air fares etc.
- require the person who brought the proceedings to pay some or all of the costs of the person who committed the contravention (only in cases where the court makes no other orders) (**new paragraph 70NEB(1)(g)**).

The discretion to impose a bond or award compensation for expenses wasted due to a breach of an order are new discretionary powers.

Should a court order attendance at a post separation parenting program then the program provider must report any failure to attend the program or situations where it considers the person ordered to attend is unsuitable (**new section 70NED**). Where a person does not attend or is considered unsuitable for such a program then the Court may make further appropriate orders (**new section 70NEG**).

Evidence of anything said by a person attending a parenting program is not admissible in a court, except where there has been admission or disclosure of abuse or risk of abuse of a child under 18 (**new section 70NEF**).

More serious or repeated breaches without reasonable excuse – Subdivision F

New subdivision F equates to stage 3 of the existing compliance regime but expands the list of options available to the court. It deals with situations where a court finds that a

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person has contravened a primary order with no reasonable excuse, and the contravention is of a ‘more serious’ nature (**new subsection 70NEA(1)**). More serious is where there has been a serious disregard for the primary order, or where there have been repeated breaches of orders (**new subsections 70NFA(2) and (3)**). The Explanatory Memorandum states that, by way of example, a serious disregard could include the removal of a child to another place despite orders of the court, or harassment despite repeated warnings and the terms of the parenting order. In these cases the court’s powers and obligations are set out in **new section 70NFB**.

Where there is a serious contravention, the court *must* make an order for costs against the person who breached the order unless it is not in the best interest of the child to do so (**new paragraph 70NFB(1)(a)**). Where the court does not make an order for costs, then the court *must* make at least one other order from the following:

- impose a community service order (**new paragraph 70NFB(2)(a)**)
- require the person to enter into a bond in accordance with new section 70NFE (**new paragraph 70NFB(2)(b)**). The bond may be for up to 2 years and may include conditions requiring the person to attend family counselling or to be of good behaviour
- compensate for the lost time with the child resulting from the contravention concerned (**new paragraph 70NFB(2)(c)**) (except where it would not be in the best interests of the child for the court to do so)
- impose a fine of up to 60 penalty units (**new paragraph 70NFB(2)(d)**)
- impose a sentence of imprisonment (**new paragraph 70NFB(2)(e)** – although only as a penalty of last resort (see **new section 70NFG(2)**)
- award compensation for reasonable expenses that resulted from the contravention (**new paragraph 70NFB(1)(f)**) – for example lost air fares etc.)
- require that the person who committed the contravention pay some or all of the legal costs of the other parties (**new paragraphs 70NFB(2)(g) and 70NFB(2)(h)**).

Sanctions involving fines, bonds, community service orders or imprisonment are currently available to the court under existing subsection 70NJ(3). Options of compensatory orders for time lost and expenses incurred are new sanctions.

The mandatory imposition of costs sanctions for serious and continual breaches was a matter of concern raised in some submissions to the LACA inquiry. The Family Law Section of the Law Council of Australia argued:

it is highly inappropriate to impose automatic costs sanction in children’s cases, even on a *prima facie* basis. The court already has sufficient discretion to order costs in appropriate circumstances.¹⁴⁵

The Committee however, with the support of the Family Court thought it not inappropriate, given that the court still has the discretion not to make an order for costs if this would not be in the best interests of the child. Further, the Committee felt it a suitable

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provision to include in the final stage of the Act's compliance regime where cases involving repeated breaches of orders or serious disregard for orders will come before the Court.⁴⁶

New sections 70NFC–NFG establish the mechanisms for imposing the sanctions of community service orders, bonds and imprisonment under **new Subdivision F**. They replicate existing sections 70NK – 70NO with minor drafting changes.

New sections 70NFH, 70NFI and 70NFJ replicate sections 70NP, 70NQ and 70NR respectively.

Item 7 is a consequential amendment resulting from the new presumption to order costs in cases of serious breaches under **new subsection 70NFB(1)**.

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

General

Schedule 3 amendments commence on 1 July 2006 (**clause 2**).

As stated earlier in this Digest, FCAC recommended the establishment of a statutory Families Tribunal.⁴⁷ The Government rejected this suggestion but said it would introduce a less adversarial approach to family law proceedings and establish a network of Family Relationship Centres.

The amendments in **Schedule 3** are intended to promote a less adversarial, more flexible and more child focused approach to 'child-related proceedings.' They largely reflect the approach taken by the Family Court of Australia in its pilot of Children's Cases Program.⁴⁸ They include provisions already contained in *Federal Magistrates Act 1999* and they reflect case management provisions in the United Kingdom Civil Procedure Rules and the *Children and Young Persons (Care and Protection) Act 1998* (NSW). **Schedule 3** gives a court a more active, case management role in proceedings. It also sets out principles, duties and powers that a court must be guided by and exercise in 'child-related proceedings.'

What are 'child-related proceedings'?

The LACA Committee made a number of recommendations for the amendment of **Schedule 3** when it considered the Exposure Draft Bill and came to the following conclusion:

The Committee believes that Schedule 3 of the draft Bill has much to commend it. The new provisions will help to ensure that child-related proceedings under the Family Law Act 1975 will be child-focused, less adversarial, less traumatic and easier to navigate. The principle of active judicial management combined with the other operative provisions ... will mean that the court will be able to conduct proceedings

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in a manner that is appropriate and comprehensible for the parties and children in each case. *The Committee's recommendations are, however, necessary to ensure that Schedule 3 is properly equipped to fulfil its purpose.*⁴⁹

LACA Committee recommendations and Government responses are described below.

Item 4 of Schedule 3 inserts **new Division 12A** into Part VII of the Family Law Act. The new Division deals with and applies to 'child-related proceedings'. The expression 'child-related proceedings' means:

- proceedings *wholly* under Part VII (children's matters)
- proceedings *partly* under Part VII—the parties' non-coerced consent is required for those parts of the proceedings that are non-Part VII proceedings
- proceedings arising from the breakdown of the parties' marital relationship—if the parties consent and the consent is free from coercion (**new section 69ZM**).

The consent of a party can be withdrawn with the leave of the court.

The Exposure Draft Bill did not specify that consent must be free from coercion. As a result of evidence it received, the LACA Committee inquiry into the Exposure Draft Bill recommended amendments so that weaker parties in non-children's matters (eg proceedings for property alteration, spousal maintenance etc) are not coerced into consenting—with the consequence that certain rules of evidence do not apply to their proceedings.⁵⁰ The Government accepted this recommendation and the Bill has been amended accordingly.⁵¹

Principles for conducting child-related proceedings

The Exposure Draft Bill examined by the LACA Committee contained four principles for conducting child-related proceedings. The Committee's report recommended the insertion of an additional principle stating that proceedings be conducted in a way that safeguards the child and the parties against family violence, child abuse and child neglect.⁵² The Government responded as follows:

The Government agrees with the Committee in considering that this change 'will not only assist the court in dealing with allegations of violence, abuse and neglect, but with actual incidences of these things also.' This is consistent with the greater emphasis on the safety of children in the objects provision of Part VII.⁵³

The Committee's recommendation has been adopted by the Government and a fifth principle added to the Bill.

The five principles for conducting child-related proceedings itemised in **new section 69ZN** are:

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- in determining how to conduct proceedings, the court must consider the child's needs and the impact that the conduct of proceedings may have on the child
- the court is to actively direct and manage the proceedings
- the proceedings are to be conducted in a way that safeguards the child and the parties against family violence,⁵⁴ child abuse⁵⁵ and child neglect
- proceedings are to be conducted in a way that promotes cooperative and child-focused parenting by the parties, and
- the proceedings are to be conducted without undue delay and with as little formality and legal technicality as possible.

Failure to give effect to these principles does not invalidate proceedings or court orders. The active involvement of judicial officers in child-related proceedings is further emphasised by **new section 69ZP**, which provides that a court can exercise its powers at the request of a party or *on its own initiative*.

New section 69ZQ sets out the general duties a court has in child-related proceedings. For instance, a court must decide which issues need full investigation and which can be summarily disposed of, make appropriate use of technology and, where appropriate, deal with a matter without requiring the parties to be physically present.

Evidence in child-related proceedings

The LACA Committee made a number of recommendations about what is now **new section 69ZT**. This section provides that certain rules of evidence *do not* apply to child-related proceedings unless a court sees fit. The provision is designed to ensure that child-related proceedings are conducted with as little formality as possible.

In brief, rules that are ousted include general rules about giving evidence and examining witnesses, rules about documents, and rules about hearsay, opinion evidence, admissions, and evidence of convictions, credibility and character. The Committee recommended that:

- the Bill be amended so that a court can only apply those rules of evidence in child-related proceedings in exceptional circumstances
- in making a decision to use those rules of evidence, a court should take four factors into account—the importance of the evidence, the nature and subject matter of the proceedings, the probative value of the evidence and the powers of the court to adjourn the hearing or make another order.⁵⁶ The court may also take other matters into account.

The Government accepted these recommendations⁵⁷ and the Bill has been amended accordingly.

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New section 69ZV also deals with evidence. It provides that a child's hearsay evidence is not inadmissible in child-related proceedings merely because it is hearsay. A court can give a child's hearsay evidence such weight as it thinks fit.

New section 69ZW enables a court in child-related proceedings to make an order requiring a prescribed State or Territory agency to provide it with specified documents or information relating to suspected child abuse or family violence affecting the child. It may also order assessments, findings or reports to be provided.

Item 8 applies the **Schedule 3** amendments to proceedings commenced on or after 1 July 2006.

Schedule 4—Changes to dispute resolution

General

Most of **Schedule 4** commences on proclamation or six months after Royal Assent, whichever is earlier (**clause 2**).

The FCAC envisaged a new family law system with single entry points attached to an existing Commonwealth body.⁵⁸ The Government decided instead that it would establish 65 Family Relationship Centres. While these Centres are not statute-based, persons operating within them and certain other professionals will have certain statutory obligations. These are set out in **Schedule 4**. **Schedule 4** also aims to distinguish services provided in the community from services provided by the courts and to clarify the different roles played by each.⁵⁹ Further, it contains many changes to terminology.

Approval of organisations and accreditation

Items 1-3 and 5-6 of **Schedule 4** amend the Family Law Act so that Ministerial approval and funding can be given to counselling and mediation organisations irrespective of whether they are voluntary (ie not for profit) or 'for profit'. Currently, only voluntary organisations can be approved.

The LACA Committee considered that accreditation and quality standards were a critical issue for counsellors and dispute resolution practitioners and recommended that:

... the government introduce a system of accreditation and evaluation for all Family Relationship Centres and all family dispute resolution practitioners as a matter of urgency.⁶⁰

The Government responded as follows:

The Government agrees with this recommendation. The Government has already commissioned the Community Services and Health Industry Skills Council (CSHISC)

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to develop competency-based standards and a suite of qualifications for family counsellors and family dispute resolution practitioners across the family law system, including in the Family Relationship Centres. The CSHISC project is due to be completed before the introduction of compulsory dispute resolution. In the meantime, the current provisions in the Act with respect to qualifications will continue to apply.⁶¹

New section 10A enables Accreditation Rules to be made for ‘family counsellors, family dispute resolution practitioners and workers in Government funded children’s contact services.’⁶² Accreditation Rules may deal with matters such as standards, who is responsible for monitoring compliance with ongoing requirements, how accreditation can be suspended or cancelled, processes for handling complaints against accredited persons, who can deliver recognised training to accredited persons and how to deal with persons who falsely represent that they are accredited. The Rules will be prescribed by regulation.

The Explanatory Memorandum states that accreditation standards are expected to be in place by mid-2006 and that, in the transition period, ‘courts, approved organisations and organisations designated by the Attorney-General will be able to authorise family counsellors and family dispute resolution practitioners. Professionals so authorised will be taken to be accredited during the transition period.’⁶³

Protection of names

Item 8 inserts **new Part IA** into the Family Law Act. This new Part makes it an offence for a person, without Ministerial consent, to use a protected name or symbol or a name or symbol that could be mistaken for a protected name or symbol. The maximum penalty is 30 penalty units (ie \$3300).⁶⁴ Protected names and symbols will be prescribed by regulation.

The rationale for these provisions is set out in the Explanatory Memorandum:

The Part will ensure that the names of services funded by the Government to provide assistance and support to people in the family law system (such as Family Relationship Centres), and the symbols (or logos) used to identify these services are not used in an unauthorised manner that might mislead or deceive the public.

As the field of family law is a highly emotional area in which people may not always be in a position to objectively or thoroughly assess the credentials of service providers, consumer protection is of critical importance.⁶⁵

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Changes to dispute resolution—amendments to the Family Law Act

Definitions

Items 11-12, 15-22, 28, 30-31 and 34 repeal existing terms and definitions in the Family Law Act relating to what is currently called ‘primary dispute resolution’. So, for example, the terms ‘primary dispute resolution’, ‘family and child counsellor’ and ‘family and child mediator’ will be removed. New terminology will be used instead—for instance, ‘family counsellor’ and ‘family dispute resolution practitioner (see, for instance, **items 25 and 27**).

The Explanatory Memorandum describes the reasons for the changes:

At present the Act uses the umbrella term ‘primary dispute resolution’ to cover almost every form of non-judicial intervention in family conflicts, including counselling, mediation and arbitration. The term is poorly understood in the community and its use in legislation makes it difficult to differentiate specific types of intervention.

To assist understanding, the Bill removes the term ‘primary dispute resolution’ and clearly identifies more specific forms of intervention. As part of this change, the terms in these items will be removed from the Act and new terms ‘family counselling’ .. and ‘family dispute resolution’ ... will be introduced.⁶⁶

The new terms are designed to clearly distinguish those who provide services dealing with *personal and interpersonal relationships* and those who provide *dispute resolution* services.

Non-court based family services

Item 36 repeals Parts II and III of the Family Law Act and inserts **new Parts II, III, IIIA and IIIB**. Parts II and III currently deal with counselling and mediation organisations and primary dispute resolution.

New Part II deals with non-court based family services—that is, family counselling services, family dispute resolution services and arbitration. *Note*, however, that court staff may also be appointed as family counsellors or family dispute resolution practitioners (**new section 38BD**).

Family counselling and family counsellors

‘Family counselling’ is defined as a process in which a family counsellor helps:

- a person deal with personal and interpersonal issues relating to marriage, or
- adults and children affected by separation or divorce to deal with personal, interpersonal or child care issues (**new section 10B**).

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Family counsellors must be accredited under the proposed Accreditation Rules or authorised (for example, authorised under the Family Law Act, by the Family Court of Western Australia or under the Federal Magistrates Act)—**new section 10C**.

The issue of *confidentiality of communications* in family counselling was the subject of a number of recommendations by the LACA Committee. In brief, the Committee recommended that:

- the circumstances in which family counsellors can disclose in the discharge of their functions be limited to circumstances relating to a serious threat to the welfare of the child (recommendation 26)⁶⁷
- disclosure provisions distinguish between mandatory and discretionary disclosures (recommendation 27). The Committee concluded that disclosure should be mandatory where it could prevent or lessen a serious risk to life or health or where the disclosure related to the commission of an offence involving serious harm to a child
- disclosure provisions be amended so that disclosure can occur with the consent of participants to the process (recommendation 28).

The Government responded:

- agreeing in principle with recommendation 26. The Government proposed two changes which it said would amend the legislation in a manner consistent with the Committee's recommendation. One of those amendments enables a disclosure to occur where a family counsellor believes that it is necessary to protect a child from harm or *risk of harm*.⁶⁸ The Government response is reflected in the Bill.
- agreeing that mandatory and discretionary disclosures be distinguished in the legislation (recommendation 27). However, the Government took the view that disclosure should only be mandatory when required to comply with a Commonwealth, State or Territory law.⁶⁹ The Government's response is reflected in the Bill.
- agreeing to amend the Bill to provide for consensual disclosures (recommendation 28). The Government noted that, in relation to disclosure of communications made by children, the Bill would be amended so that such disclosures could only be made with the consent of each person who has parental responsibility for the child or with the consent of a court.⁷⁰ The Government's response is reflected in the Bill.

New section 10D contains a general prohibition on family counsellors disclosing information they obtain when counselling.⁷¹ Exceptions are provided to this general rule. For instance:

- disclosure is *mandatory* if the counsellor reasonably believes that the disclosure is required by law
- disclosure is *discretionary* with consent *or* if the counsellor reasonably believes the disclosure is necessary to protect a child from harm or the risk of harm or is necessary to prevent a serious and imminent threat to a person's life or health, or

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- the disclosure is of *non-identifying information* for *research* relevant to *families*.

New section 10E generally prevents admissions made to family counsellors during counselling being admitted as evidence in any court.⁷² This rule also applies to professionals to whom a family counsellor refers a person. There are some exceptions to this general rule—for instance, in the case of an admission by an adult that a child has been abused or a disclosure by a child that indicates they have been abused. Additionally, disclosures made in a professional consultation pursuant to a referral from a family counsellor are inadmissible.

Importantly, the fact that information must or can be disclosed under **new section 10D** does not necessarily make it admissible in court under **new section 10E**.

In September 2005, the Attorney-General asked the National Dispute Resolution Advisory Council (NADRAC) and the Family Law Council (FLC) to provide joint advice on whether family counsellors should be granted immunity when conducting family counselling under the Family Law Act. NADRAC and the FLC advised the Attorney in November 2005 that the grant of such immunity was not appropriate.⁷³

Family dispute resolution and family dispute resolution practitioners

The Bill defines ‘family dispute resolution’ as a non-judicial process in which an independent family dispute resolution practitioner helps people affected by separation or divorce to resolve some or all of their disputes with each other (**new section 10F**).

‘Family dispute resolution practitioners’ will be accredited under the proposed Accreditation Rules or authorised in prescribed ways—for example, under the Family Law Act, by the Family Court of Western Australia or under the Federal Magistrates Act (**new section 10G**). The same rules about confidentiality of communications and admissibility of evidence that apply to family counsellors also apply to family dispute resolution practitioners (**new sections 10H and 10J**).

LACA Committee recommendations about confidentiality and admissibility encompassed family dispute resolution practitioners as well as family counsellors as did the Government’s responses. For a brief description of the recommendations and the Government’s responses see above.

The Exposure Draft Bill conferred judicial immunity on family dispute resolution practitioners in the circumstances set out in proposed section 10M of the draft.⁷⁴ The LACA Committee recommended that the question of immunity for such practitioners should be referred to ‘an appropriate Government advisory body for research and consideration.’⁷⁵ As a result of advice from NADRAC and the FLC (referred to above), the Government has removed the immunity provision.⁷⁶

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New section 10K provides that regulations may be made prescribing requirements to be complied with by family dispute resolution practitioners. **New section 10K** generally reflects existing section 19P of the Family Law Act. Among other things, existing regulations provide that family and child mediators must have suitable qualifications, training and experience; undertake continuing training; make an assessment about whether mediation is appropriate before commencing mediation and ensure that the mediation process is suited to the parties' needs.⁷⁷ The Government proposes to amend the relevant regulations to reflect the new terminology introduced by the Bill.⁷⁸

Arbitrators

The Bill repeals the term 'private arbitration' and substitutes the expression 'relevant property or financial arbitration' (see **items 30, 32 and new subsection 10L(2)**). The content of the definition remains the same.

The Bill also inserts a definition of 'arbitration'—a process, other than a judicial process, in which parties to a dispute present evidence to an arbitrator who makes a determination to resolve the dispute (**new subsection 10L(1)**).

While new sections dealing with arbitration replace existing sections, no substantive changes are made to the existing arbitration provisions of the Family Law Act. Thus:

- an arbitrator will continue to be a person who meets requirements prescribed by regulation (**new section 10M**)
- arbitration remains a process in which an arbitrator determines a dispute between the parties (**new section 10L**)
- arbitrators will continue to be able to charge for their services (**new section 10N**)
- arbitrators will continue to have the same immunity as Family Court judges (**new section 10P**), and
- communications with arbitrators are not confidential and may be admissible in court.

Family consultants

New section 69ZS (see **Schedule 3**) enables the court to appoint a family consultant in child-related proceedings. In brief, these consultants assist and advise people involved in family law proceedings.

New Part III, inserted by **Schedule 4**, deals in detail with family consultants. Family consultants can be appointed by the Family Court of Australia, the Federal Magistrates Court and the Family Court of Western Australia. It is anticipated that they will be assigned by the court in each case involving children and will manage the case.⁷⁹

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Unlike family counsellors and family dispute resolution practitioners, communications with family consultants are not confidential and may be admitted into evidence. The Explanatory Memorandum explains the rationale for differences in title and the status of communications involving these three groups:

Under the Act in its present form court staff or persons engaged by a court may provide confidential or non-confidential services but do so under the title mediators, counsellors or welfare officers. Under the Bill the title of the person who provides court services will differ depending upon whether the process is confidential or not.⁸⁰

Among other things, these consultants assist and advise people involved in family law proceedings and help those involved in such proceedings to resolve disputes (**new section 11A**). Family consultants may be appointed under the Family Law Act, the Federal Magistrates Act, under the regulations or under State law (**new section 11B**). In general, anything said to a family consultant is admissible in proceedings under the Family Law Act (**new section 11C**). Like arbitrators, family consultants have the same immunity as a Family Court judge (**new section 11D**).

The amendments also enable courts to seek advice from family consultants and to order parties to see a family consultant (**new sections 11E and 11F**). **New section 11E** has been amended in accordance with recommendation 31 made by the House of Representatives Committee. It requires a court seeking advice from a family consultant to inform the person in relation to whom the advice is sought whom the court is seeking advice from and the nature of the advice. The basis of the recommendation was the need for transparency and so that parties can be heard.⁸¹

Obligations to inform people about non-court based family services and about court processes and services

The Family Law Act currently imposes certain information and advice giving obligations on courts and lawyers. However, no obligations are imposed on counsellors, mediators or arbitrators. Existing provisions are repealed (see **item 36**), more detailed provisions are inserted in their place and obligations are imposed on family counsellors, family dispute resolution practitioners and arbitrators.

New Part IIIA deals with obligations to inform people about non-court based family services and about court processes and services. Its objects are to ensure that people are aware of:

- services that may assist them to reconcile or adjust to separation or divorce, and
- non-litigious ways of resolving disputes (**new section 12A**).

It consolidates and expands existing requirements relating to the provision of information.

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Prescribed information

Regulations made under the Family Law Act may prescribe information to be provided to parties about non-court based family services, court processes and services; reconciliation and Part VII proceedings (**new sections 12B-12D**).

In relation to *court* and *non-court based services*, any regulations must include, but are not limited to, information about:

- the legal and possible social effects of the proposed proceedings (including consequences for children). This provision partially replicates paragraph 17(a) of the Family Law Act, which requires a court to give a document containing this information to the parties
- services provided by family counsellors and family dispute resolution practitioners. This provision substantially replicates paragraph 17(b) of the Family Law Act.
- the steps involved in the proposed proceedings
- the role of family consultants, and
- arbitration facilities (**new section 12B**).

In relation to:

- *reconciliation*, regulations may prescribe information about relevant services (**new section 12C**)
- *Part VII proceedings* (children's matters), any regulations must include information about family counselling services (**new section 12D**).

Lawyers' obligations

Under the Family Law Act, lawyers must consider the possibility that their clients will reconcile (section 14D). Additionally, lawyers must consider whether to advise parties about the existence of non-litigious means of dispute resolution (section 14G) and about marital breakdown counselling (subsection 16C(3)).

Under **new section 12E**, lawyers are, in general, obliged to provide prescribed information to their clients about non-court based family services, court processes and services, reconciliation, and Part VII proceedings. There are exceptions to this general rule. For instance, prescribed information need not be provided if a lawyer reasonably believes that his or her client has already been given the information. Nor is a lawyer required to provide prescribed information about reconciliation services if he or she considers there is no real possibility of the parties reconciling.

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Obligations on principal executive officers of courts

The Family Law Act currently imposes information giving obligations on court staff.⁸² These provisions are repealed and, instead, **new section 12F** requires principal executive officers of courts to provide any information prescribed under:

- **new section 12B** (about non-court based services and court processes and services), and
- **new section 12C** (about reconciliation)

to any person considering instituting Family Law Act proceedings ‘on the first occasion the person deals with a registry of the court’.

These officers are also obliged to provide information about family counselling or family dispute resolution services to any person ‘involved in proceedings’ who asks for it. The expression ‘people involved in proceedings’ means any of the parties, any child affected by the proceedings and any person whose conduct is having an effect on the proceedings (**item 35 of Schedule 4**).

Obligations on family counsellors, family dispute resolution practitioners and arbitrators

Family counsellors, family dispute resolution practitioners and arbitrators are also obliged to provide prescribed information about reconciliation to married clients considering divorce, financial or Part VII proceedings. This obligation is waived if the counsellor etc has reason to believe that the person already has the information or that there is no reasonable possibility of the parties reconciling (**new section 12G**).

Court’s powers in relation to court and non-court based family services

The Family Law Act contains general provisions to the effect that courts must consider the possibility of reconciliation between the parties, may adjourn proceedings if reconciliation appears possible and refer parties to counselling that may assist with reconciliation (section 14C). A court also has a duty to consider whether the parties should be advised about non-litigious dispute resolution processes (currently called primary dispute resolution) (section 14F).⁸³ Further, under a raft of provisions the court can order parties to attend counselling, mediation or other programs.⁸⁴ These existing provisions are repealed (**item 36**) and new provisions, including an objects clause, are inserted.

New Part IIIB deals with the court’s powers in relation to court and non-court based family services. The objects of the Part are to:

- facilitate access to family counselling
- encourage people to use non-litigious dispute resolution mechanisms
- encourage the use of arbitration if appropriate, and

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- empower the court to require parties to use family services appropriate to their needs (**new section 13A**).

New section 13B generally reflects existing section 14C of the Family Law Act.

New section 13C reflects and consolidates existing provisions of the Family Law Act in relation to referrals and court orders. It also:

- contains a note referring to **new section 11E** (obliging the court to consider seeking the advice of a family consultant about services appropriate to the parties' needs before making an order)
- enables the court to suggest a particular purpose for attendance at counselling or dispute resolution services, and
- enables orders requiring the parties to encourage the participation of other persons likely to be affected by the proceedings (the example of grandparents or other relatives is provided).

If a party fails to comply with a **new section 13C** order, the failure must be reported to the court and the court may make whatever orders it considers appropriate (**new section 13D**).

Court's role in relation to the arbitration of disputes

New sections 13E-13K deal with arbitration. They substantially reproduce and consolidate the existing arbitration provisions in the Family Law Act enabling:

- a court to refer property or maintenance proceedings to an arbitrator with the consent of the parties
- a court to make orders facilitating arbitration
- the Family Court, the Family Court of Western Australia or the Federal Magistrates Court to determine a question of law referred by an arbitrator
- arbitrated awards to be registered as court orders
- the Family Court, the Family Court of Western Australia or the Federal Magistrates Court to review and set aside a registered arbitral award.

As stated earlier in this Digest, there has been a change in terminology. The Family Law Act currently refers to 'private arbitration'. This term is replaced by the expression 'relevant property or financial arbitration' (see **items 30, 32 and new paragraph 10L(2)(b)**).

Administration of Court's family services

New section 38BA gives the Chief Executive Officer of the Family Court the functions of a family consultant under **new section 11A**. These functions can be delegated (**new**

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section 38BB). **New section 38BD** enables the CEO to authorise a staff member to act as a family counsellor or family dispute resolution practitioner.

Item 52 repeals sections 62B, 62C, 62CA, 62D, 62E and 62F of the Family Law Act and replaces them with **new section 62B**. Some of these sections have been replaced. Other sections (sections 62C, 62CA, 62D and 62E) relate to counselling services provided by courts exercising Family Law Act jurisdiction. The Explanatory Memorandum explains:

As set out in relation to sections 10C and 10G, the Family Court, the Family Court of Western Australia and the Federal Magistrates Court will still be able to provide these services where necessary, but it is intended that most counselling and dispute resolution services will be provided outside the court.⁸⁵

Items 61-64 amend section 65LA of the Family Law Act, which deals with post-separation parenting programs. The effect of these amendments is that providers of post-separation parenting programs will need to meet conditions set out in the Act and accountability requirements set out in funding agreements. At present, the Attorney-General's Department maintains a list of post-separation parenting program providers, which according to the Explanatory Memorandum 'has no relation to the quality of services provided.'⁸⁶

Amendments to other legislation

Consequential amendments are made to the Federal Magistrates Act to remove current terminology (such as 'primary dispute resolution' and 'welfare officer') and replace it with new terminology ('dispute resolution') (see, for example, **items 87-91, 94-105, 107-110**). The new terms reflect the amendments proposed for the Family Law Act.

Similarly, amendments are made to the *Marriage Act 1961* (for example, to change the expression 'family and child counsellor' to 'family counsellor' in accordance with amendments proposed to the Family Law Act (**items 116-117**)).

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

Schedule 5 commences on proclamation or six months after Royal Assent, whichever is earlier (**clause 2**).

The issue of child representatives in family law matters has been considered in a number of reports, including:

- Family Law Council—*Representation of Children in Family Law Proceedings* (1989)
- Family Law Council—*Involving and Representing Children in Family Law* (1996)

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- Australian Law Reform Commission and Human Rights and Equal Opportunity Commission—*Seen and Heard: Priority for Children in the Legal Process* (1997), and
- Family Pathways Advisory Group—*Out of the Maze: Pathways to the Future for Families Experiencing Separation* (2001), and
- Family Law Council—*Pathways for Children: A review of children’s representation in family law* (2004).

It has also been the subject of judicial rulings and guidelines issued by the Family Court.⁸⁷ There has been considerable confusion the role and functions of the child’s representative not the least, perhaps, because the Family Law Act itself is silent on these matters. The general view is that the child representative is a best interests advocate rather than a representative of the child. However, some of the reports mentioned above have considered and in some cases recommended other models for child representation—including the direct representative model⁸⁸ and a team approach whereby an appropriately trained lawyer is assisted by a social worker or counsellor.⁸⁹

In 2004, the Family Pathways Advisory Group recommended that:

... the development of clearly defined roles for, and responsibilities of, child representatives be given urgent priority, with adequate funding allocated to support implementation.⁹⁰

As a result of this recommendation, the Attorney-General asked the Family Law Council to review, as a matter of urgency, the role and the basis of appointment of child representatives. The Council reported in August 2004. Most of its recommendations for statutory reform are included in the Bill and are briefly described below. For convenience, the 2004 report is referred to as the ‘Council’s report.’

Item 1 of Schedule 5 repeals the definition of ‘child representative’ in the Family Law Act. The expression ‘independent children’s lawyer’ is used instead. The Council’s report recommended that the expression ‘independent lawyer’ be used to clarify that the lawyer does not represent the child.⁹¹ However, the Government considers that the term ‘independent children’s lawyer’ is more descriptive and shows that the lawyer is associated with the child, not the other parties in the proceedings.⁹²

Item 2 defines the independent children’s lawyer as a lawyer appointed by a court who represents the child’s interests. The definition of ‘child representative’ currently in the Family Law Act is a person who represents a child in proceedings. The difference in language is significant. The new definition makes it clear that the function of the lawyer is to represent the child’s interests and not represent the child. It also accords with the Family Law Council’s recommendation for an amendment specifying that the lawyer is a best interests advocate.⁹³

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Item 5 repeals Division 10 of Part VII, the part currently dealing with the best interests of children and the representation of children and replaces it with a new Division entitled ‘Independent representation of child’s interests.’

New subsection 68L(2) provides that a court can order the appointment of an independent children’s lawyer if it appears that such representation is necessary. This new subsection is along the lines of existing subsection 68L(2). The Council’s report endorsed the Family Court’s decision in *Re K* which contains a detailed list of circumstances in which a child representative should be appointed.⁹⁴ However, it concluded that such detail should be left to the common law rather than enshrined in statute so that a flexible approach can be taken by the courts.

There is little detail in the existing Division about how the child’s representative is to operate. Considerable detail is provided by the amendments. It is also intended that the Family Court’s guidelines will continue to be used to further flesh out roles and responsibilities. **New section 68LA** sets out the *general* nature of the lawyer’s role and *specific* duties that attach to it.

The *general* nature of the lawyer’s role is to:

- form an independent view of what is in the child’s best interests and inform the court, and
- act in the proceedings in what the lawyer believes is in the child’s best interests (**new subsection 68LA(2)**).

New subsection 68LA(4) states that the lawyer is not the child’s representative and is not obliged to act on the child’s instructions.

Specific duties are to:

- act impartially in dealing with the parties
- inform the court of any views expressed by the child
- analyse any reports relating to the child in terms of the child’s best interests and draw those matters to the court’s attention
- minimise the trauma to the child associated with the proceedings, and
- facilitate an agreed resolution of matters to the extent that doing so is in the child’s best interests (**new subsection 68LA(5)**).

For the most part, **new subsections 68LA(2)-(5)** reflect principles enunciated by the Family Court in *P and P*⁹⁵ in accordance with recommendation 1 of the Council’s report.⁹⁶

The Council’s report also commented on continuing confusion about the confidentiality of communications between a child representative and the child. It recommended that the child representative should not be compellable to disclose such communications to a court

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exercising Family Law Act jurisdiction but should be able to disclose in the child's best interests, even if this goes against the child's wishes. **New subsections 68LA(6)-(8)** encapsulate the Council's recommendations.

Items 6-13 are consequential amendments reflecting the change in terminology from 'child representative' to 'independent children's lawyer'.

Parliament may be interested in other recommendations and suggestions in the Council's report. For instance, the Council recommended that statutory indemnity be given to the child representative along the lines of the indemnity enjoyed by mediators and counsellors. In the Council's view these lawyers face a significant risk of being sued and if indemnified would still be subject to professional disciplinary bodies.⁹⁷ This recommendation has not been adopted.

In relation to matters not requiring statutory amendment, the Council took the view that:

- the Commonwealth Attorney General's Department, courts exercising jurisdiction under the Family Law Act, organisations specialising in counselling and mediation in family law matters and Legal Aid Commissions should endorse a team based approach to the representation of children so that the appointed legally trained child representative is supported by a social scientist; develop a protocol for cooperation between such lawyers and family and child counsellors; and provide sufficient funds so that the protocol can be implemented⁹⁸
- because of the dearth of research on children's experience of legal representation, the Australian Institute of Family Studies should 'be commissioned to conduct research into the views of children about their experiences, expectations, and competence in family law proceedings and to evaluate children's experiences of child representatives.'⁹⁹ The Council highlighted the importance of such research in developing best practice for the child representative role.
- practice be developed so that direct representation for competent children can occur in appropriate cases.¹⁰⁰

Schedule 6—Family violence

The amendments in **Schedule 6** commence six months after Royal Assent unless commenced earlier by proclamation (**clause 2**).

Schedule 6 repeals and replaces the existing Division 11. This Division deals with the relationship between orders made under the Family Law Act that provide for a child to spend time with a person, and family violence orders made under a law of a State or Territory to protect a person from family violence.

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The Explanatory Memorandum states that the amendments implement recommendations to simplify and improve the operation of the provisions in Division 11, made by the Family Law Council.

The amendments also remove references to the term ‘contact’ to ensure the Division’s terminology is consistent with the new terminology introduced in **Schedule 8** of this Bill.

While the amendments seek to make Division 11 clearer, *they do not change the substance of the Division.*

Item 1 repeals and replaces the existing Division 11.

New Section 68N states that the purposes of Division 11 are to:

- resolve inconsistencies between State and Territory family violence orders and orders made under the Family Law Act that provide for a child to spend time with a person, and
- achieve the objects and principles set out in **new section 60B**. These objects include ensuring that a child benefits from a meaningful relationship with both parents and ensuring that the child is protected from harm.

New section 68P provides that where a court exercising jurisdiction under the Family Law Act makes an order or injunction which is inconsistent with an existing State or Territory family violence order, the court is obliged to explain to the parties affected (or arrange for someone else to explain to them), the effect and consequences of the order or injunction and how it is to be complied with. The relevant orders and injunctions are a parenting order that provides for a child to spend time with a person, a recovery order (as defined in section 67Q), or an injunction under sections 68B or 114 (**subparagraphs 68P(1)(a)(i), (ii) and (iii)**). The Explanatory Memorandum explains that this could arise, for example, where the court exercising family law jurisdiction makes an order that a child spend time with a person even though an earlier family violence order might prevent this occurring.

New section 68P corresponds to existing section 68R and uses the new terminology ‘spend time with a person’ rather than ‘contact’.

New section 68Q clarifies that where an order which provides for a child to spend time with a person is inconsistent with a State or Territory family violence order, the order which provides for a child to spend time with a person prevails and the family violence order is invalid to the extent of the inconsistency. The court may make declarations that clarify that a family law order is meant to be inconsistent with the earlier family violence order (**new subsection 68Q(3)**).

When an application for a family violence order is made in a State or Territory court, **new section 68R** gives that court the power to revive, vary, discharge or suspend an existing family law order, injunction and arrangements providing for a child to spend time with a

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person, if this is necessary to give effect to the family violence order. The court must not make such an amendment unless:

- it also makes or varies a family violence order in the proceedings (**new paragraph 68R(3)(a)**), and
- has material before it that was not before the court that made the order, injunction or arrangement (**new paragraph 68R(3)(b)**).

New Section 68R corresponds to existing section 68T.

The State or Territory court may not exercise its power to discharge a family law order, injunction or arrangement when making or varying interim family violence orders (**new subsection 68(4)**). **New section 68T** makes other special arrangements to do with interim family violence orders.

New subsection 68R(5) clarifies what a State or Territory court making a family violence order should consider when exercising its power to amend a family law order, injunction or arrangement.

New section 68S states that some provisions of the Family Law Act and Family Law Rules may not apply when a State or Territory court is exercising its power under **new section 68R**.

Schedule 7—Jurisdiction of courts

Schedule 7 commences on proclamation or six months after Royal Assent, whichever is earlier (**clause 2**).

Item 1 of Schedule 7 repeals section 45A of the Family Law Act. The effect of section 45A and regulations¹⁰¹ made under it is that the Federal Magistrates Court must transfer contested property proceedings to the Family Court where the value of the property exceeds \$700,000 (unless the parties otherwise agree). Repealing the section means that there will be no monetary limit on the Federal Magistrates Court's jurisdiction in property matters.

Item 2 applies the amendment to proceedings instituted before or after the commencement of **item 1**.

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Schedule 8—Removal of references to residence and contact

Most of **Schedule 8** commences on proclamation or six months after Royal Assent, whichever is earlier (**clause 2**).

Schedule 8 changes the terminology of the Family Law Act to remove references to the terms ‘residence’, ‘contact’ and ‘specific issues orders’. Changes to the Act in 1995 adopted the terms ‘residence’ and ‘contact’ instead of ‘custody’ and ‘access’ in order to eliminate any sense of ownership of children. However, the intended change of culture has not been achieved and the FCAC Report recommended that more family friendly terms such as ‘parenting time’ be used.

Items 1–39 and 102 are consequential amendments to the *Australian Citizenship Act 1948*, the *Australian Citizenship Act 2005*, the *Australia Passports Act 2005*, the *Child Support (Assessment) Act 1989* and the *Migration Act 1958* to take account of the new terminology that is used in the Family Law Act. **Items 40 – 101** make amendments to the Family Law Act to reflect the new terminology. In the majority of cases the amendments replace references to ‘residence’ with ‘lives with’ and references to ‘contact’ with ‘spends time with’ and ‘communicates with’. The amendments also remove the current categories of residence, contact and specific issues orders from parenting orders and refer simply to parenting orders.

The LACA inquiry reported that the changes were supported by a number of groups and organisations as another attempt to change the attitudes that surround the current terms of residence and contact. However others were critical of the proposed changes, believing that they will lead to confusion, may make parenting orders harder to understand, and will be unlikely to change the perception of parents in conflict who see things in terms of ‘winners’ and ‘losers’.¹⁰²

Schedule 9—Relocation of defined terms used in Part VII

Schedule 9 commences on proclamation or six months after Royal Assent, whichever is earlier (**clause 2**).

The effect of Schedule 9 is to move all the defined terms from Part VII of the Act related to children to subsection 4(1) which is the general definition section for the whole of the Family Law Act. Its purpose is to improve the readability of the Act and is a response to recommendation 50 of the LACA report.

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Concluding Comments

Impact and responses

The Bill has been described by the Attorney-General as representing the most significant changes to the Family Law Act since its inception 30 years ago.¹⁰³ It is designed, along with the Family Relationships Centres, to avoid litigation as the means of arriving at arrangements for the parenting of children after separation. The question of whether it will achieve this is a matter of some debate.

The former Chief Justice of the Family Court has been reported as saying the Bill is pandering ‘to the strong pressure that’s been put on the Government by various militant fathers groups by requiring the court to consider whether children in custody disputes should spend equal time with both parents’.¹⁰⁴

Some fathers groups expressed disappointment in the Exposure Draft Bill, suggesting that it did not recognise that both parents have equal rights to contribute to and share in the lives of their children.¹⁰⁵

The LACA Committee noted that considerable concern was expressed in evidence and submissions that the presumption of equal shared parental responsibility (and the focus on increasing shared parenting more generally) will increase the risk of family violence and abuse occurring.¹⁰⁶

Similar concerns have been expressed about the compulsory attendance at family dispute resolution. Some family law academics have pointed to experiences overseas that suggest compulsory family dispute resolution is unlikely to be of use to most couples and that it may simply add to the cost of the family law system.¹⁰⁷

There was also concern that the emphasis on equal shared parental responsibility and the requirement to make decisions on major long term issues jointly could, and is frequently, used by abusive non-resident parents to continue a pattern of controlling behaviour.

Shadow Attorney-General, Nicola Roxon MP, in her dissenting LACA report called for a system that is fair to both mums and dads. She argued that the Exposure Draft Bill was a reform full of rights for non-residential parents, but short on responsibilities.¹⁰⁸

Some commentators are arguing that in fact very little will change. While the court is required to consider children spending equal time with both parents after separation such arrangements will only be ordered if reasonably practicable and if the court considers it satisfies the paramount consideration: the child’s best interests.¹⁰⁹

The diversity of views about the Bill is indicative of how family law has the capacity to polarise views.

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One commentator, Stephen Bourke has noted that the perceptions of what the law actually does and what community perceives it to do can actually affect how it works. He suggests that while the Bill was designed to minimise litigation it could have the opposite effect. Those who perceive that the Bill provides them with something that they did not previously have will pursue what they believe the Bill now provides. Those that perceive the Bill erodes what they currently have will behave in a way to protect what they currently have. What the Bill actually says becomes irrelevant. It is what people perceive the Bill says that becomes important. Stephen Bourke suggests that this phenomenon occurred in 1996 when parenting orders replaced custody orders. The legal effect in 1996 was to give the court greater flexibility in apportioning the different incidents of parental responsibility to avoid the perception that the parent who obtained custody was the winner. However the perceived effect of the change in 1996 was that there were winners and losers. He believes the same will apply with this Bill.¹¹⁰

Arguably, considerable effort has been made to ensure that the Bill, which is aimed at bringing a cultural shift towards shared parenting after separation, does protect the best interests of the child principle and does protect children and parents from violence and abuse. The Labor Party has announced it is proposing amendments to the Bill that it hopes will be accepted to address concerns relating to family violence. However generally Labour supports the Bill —particularly the aims of encouraging both parents to take more responsibility for their children after relationship breakdown; proposing alternatives to the legal system; prioritising children following family breakdown; and improving the legal process when children are involved.¹¹¹

Constitutional issues?

Some of the amendments proposed by the Bill raise constitutional questions. These questions were the subject of advice from the Australian Government Solicitor (AGS) and were discussed at LACA Committee hearings. The constitutional issues relate to the doctrine of the separation of powers and the exercise of power by Chapter III courts such as the Family Court of Australia.

Under the Commonwealth Constitution, a Chapter III court may only exercise judicial power or non-judicial power that is incidental to its exercise of judicial power. Judicial power must be exercised in accordance with judicial process. In common law jurisdictions, this process is generally adversarial (where defining the issues and controlling the process traditionally rests with the parties and the judge does not play an active role). The rules of natural justice may also form an irreducible part of federal judicial process.

The purpose of **Schedule 3** of the Bill is to promote less adversarial proceedings and a more cooperative approach to matters involving children. To this end, courts are given a more active, case management role and can also make own motion orders. It is not clear whether or to what extent an adversarial approach is a requirement of federal judicial

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process. AGS advice is that active case management is consistent with Chapter III and that provision for own motion orders in Part VII matters 'is likely to be consistent with Chapter III of the Constitution.'¹¹² This conclusion appears to be based on the view that proceedings involving children under the Family Law Act are not, in any event, an adversarial contest between the parties but matters that are decided in the best interests of the child.

Schedule 3 also contains general rules excluding certain rules of evidence from 'child-related proceedings' and directing a court about its duties in such proceedings. Questions may arise here about whether the legislature is impermissibly interfering with judicial power. Questions might also be asked about whether certain provisions—such as those excluding certain rules of evidence and those enabling a court to deal with a matter without the parties being physically present—accord with judicial process. Federal judicial process may require the rules of natural justice—such as the right to be heard—to apply. The Constitution may also prevent the legislature prescribing rigid rules for judicial proceedings that prevent judges deciding each case on its merits. AGS advice is that the amendments are likely to be valid because the Bill leaves the court with discretion in such matters.¹¹³

The expression, 'child-related proceedings' also includes proceedings that are partly about children's matters and partly non-Part VII proceedings. While it is possible to characterise proceedings that are solely about children's matters as fundamentally non-adversarial, this cannot be said of non-Part VII proceedings. AGS advice is that the extension of a less adversarial approach to proceedings, such as property proceedings which '... involve the more usual judicial role of adjudicating on existing rights and altering those rights, is more open to doubt and this is why the less adversarial approach will only apply to such proceedings by consent.'¹¹⁴ However, it is not clear whether the consent of the parties will cure any constitutional defect that exists.

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Endnotes

- 1 House of Representatives, *Hansard*, 24 June 2003, pp. 17277–8.
- 2 Attorney-General's Department. [Submission to the FCAC Inquiry](#).
- 3 *ibid.*
- 4 *ibid.*
- 5 *ibid.*
6. House of Representatives Standing Committee on Family and Community Affairs (FCAC), *Every picture tells a story. Report of the inquiry into child custody arrangements in the event of family separation*, December 2003. See: <http://www.aph.gov.au/house/committee/fca/childcustody/report.htm>,
7. *ibid.* As the Bill does not deal with child support, the Digest does not provide further analysis on these recommendations.
8. At 22 February 2006 the Government response to that report had not been released.
- 9 Explanatory Memorandum, p. 1.
- 10 **Schedule 9** relocates other defined terms used in Part VII to section 4—the aim being to improve the readability of the Act.
11. House of Representatives, Standing Committee on Legal and Constitutional Affairs (LACA Committee), *Report on the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005*, recommendation 43, paragraph 6.35. See: <http://www.aph.gov.au/house/committee/laca/familylaw/report.htm>.
12. The Explanatory Memorandum states that this change implements a recommendation of the Family Law Council's December 2004 Report, *Recognition of Traditional Aboriginal and Torres Strait Islander Child-Rearing Practices: Response to Recommendation 22: Pathways Report, Out of the Maze*.
- 13 LACA Committee, *op. cit.*, paragraph 2.172.
- 14 *ibid.*, paragraph 2.166.
- 15 Explanatory Memorandum, paragraph 48.
- 16 LACA Committee, *op. cit.*, paragraph 2.199.
- 17 *ibid.*, paragraph 2.204.
18. 'He sneers and snarls, but Ruddock is not too proud to steal Labor ideas', Press Release, 9 February 2006.
- 19 See p. 8 of the Digest.
- 20 Explanatory Memorandum, paragraph 55.
21. FCAC, *op. cit.*, paragraph 3.72.

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- 22 National Network of Women's Legal Services, Submission 23, p 7 in LACA Committee, op.cit, paragraph 3.32.
- 23 LACA Committee, op. cit., paragraph 3.22.
- 24 ibid., paragraph 3.46.
- 25 ibid., paragraphs 3.99–3.105.
- 26 ibid., paragraph 3.105.
- 27 This was a recommendation of the LACA report.
28. LACA Committee, op. cit., paragraph 2.21.
29. Recommended in part that the Act be amended to require mediators, counsellors, and legal advisers to assist parents for whom the presumption of shared parenting responsibility is applicable, to first consider a starting point of equal time where practicable.
- 30 LACA Committee, op. cit., paragraph 2.55.
- 31 Recommendation 4, LACA Committee, op.cit., paragraph 2.59.
- 32 Section 63D. Parenting plans were previously registrable under the Principal Act, however registered plans were not often used and the registration provisions of the Act were repealed in 2003.
33. LACA Committee, op. cit., paragraph 3.234.
- 34 Explanatory Memorandum, paragraph 215.
- 35 LACA Committee. op. cit., paragraph 2.128.
- 36 The LACA inquiry noted the complexity of the provisions and therefore recommended a complete redrafting of Division 13A – recommendation 53.
37. Parenting orders are court orders that may cover such matters as who a child will live with, who a child will have contact with, and matters concerning the care, welfare and development of a child.
- 38 This expression is defined in section 70NB of the Family Law Act.
39. See 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. 16. At:
- 40 Explanatory Memorandum, paragraph 248.
- 41 Explanatory Memorandum, paragraph 255.
- 42 That definition, currently in Division 13A will be moved to section 4, the interpretation section (**item 46, Schedule 9**).
43. A primary order is defined as an order under the Family Law Act affecting children, or a variation of such an order.

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44. The provision essentially replicates section 70NE except that the terms ‘residence order’, contact order’ and specific issues order’ are replaced with references to orders relating to with whom a child is to live, spend time and communicate.
45. LACA Committee, op. cit., paragraph 5.67.
46. *ibid.*, paragraph 5.70.
47. FCAC, op. cit., recommendation 12, paragraph 4.157.
48. As at mid-2005, 126 cases had been finalised (out of 200) in this Program and none of the finalised cases had appealed. A full evaluation is expected to be completed in early 2006.
49. LACA Committee, op. cit., paragraph 4.73. Emphases added.
50. *ibid.*, recommendation 35, paragraph 4.42.
51. Government Response, op. cit., p. 26.
52. LACA Committee, op. cit., recommendation 36, paragraph 4.50.
53. Government Response, op. cit., p. 17.
54. A definition of ‘family violence’ is inserted by **item 3 of Schedule 1**.
55. Child ‘abuse’ is defined by **item 9 of Schedule 4**. It means an unlawful assault, including a sexual assault, against a child or a person involving a child in sexual activity where the child is used as a sexual object and there is unequal power in the relationship between the child and the person. This definition reflects the definition currently in the Family Law Act.
56. LACA Committee, op. cit., recommendation 37, paragraph 4.67.
57. Government Response, op. cit., p. 18.
58. FCAC, op. cit., recommendation 11, paragraph 4.156.
59. Attorney-General’s Department, Submission to the House of Representatives Legal and Constitutional Affairs Committee inquiry into the Exposure Draft of the Family Law Amendment (Joint Parental Responsibility) Bill, submission no. 46.1, paragraph 159. At: <http://www.aph.gov.au/house/committee/laca/familylaw/subs/Sub46.1.pdf>
60. LACA Committee, op. cit., recommendation 32, paragraph 3.211.
61. Government Response, op. cit., p. 15.
62. Explanatory Memorandum, paragraph 463.
63. Explanatory Memorandum, paragraph 407. Transitional matters relating to family counselling and family dispute resolution are dealt with in **Part 4 of Schedule 4**.
64. The effect of section 4B of the *Crimes Act 1914* is that in the case of a body corporate the maximum penalty is five times this amount.
65. Explanatory Memorandum, paragraph 422.
66. *ibid.*, paragraphs 441–2.

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67. The relevant paragraph of the Exposure Draft (paragraph 10C(3)(d)) read: ‘(d) enabling the counsellor to properly discharge his or her functions as a counsellor.’
68. Government Response, op. cit., pp. 12–13.
69. *ibid.*, p. 13. Most States and Territories have laws that require certain professionals to report child abuse or mistreatment.
70. *ibid.*, p. 14.
71. Currently, family and child mediators and family and child counsellors take an oath of confidentiality, which is set out in the regulations. The terms of the oath have been moved to the Act and new provisions included—for instance, in relation to certain disclosures and disclosures for non-identifying research purposes.
72. Rules about the admissibility of communications with family and child counsellors and family and child mediators are found in section 19N of the Family Law Act. There are some differences between the current provision and the new provisions. For instance, at present evidence arising from a professional consultation following a referral from a counsellor or mediator is only inadmissible if the person attending the consultation is a party to a marriage. See Attorney-General’s Department, Submission to the House of Representatives Legal and Constitutional Affairs Committee inquiry into the Exposure Draft of the Family Law (Joint Parental Responsibility) Bill, submission no. 46.1.
73. National Dispute Resolution Advisory Council and Family Law Council, *Joint Letter of Advice on the Requirement for Immunity for Family Counsellors and Family Dispute Resolution Practitioners under the Family Law Act 1975* at: http://www.ag.gov.au/agd/WWW/flcHome.nsf/Page/Letters_of_Advice_Letters_Final_Joint_Letter_of_Advice_on_immunity_for_family_counsellors_and_family_dispute_practitioner_s_under_the_family_law_act_1975
74. The Exposure Draft Bill distinguished between facilitative dispute resolution and advisory dispute resolution. This distinction has been removed in the Bill.
75. LACA, op. cit., recommendation 29, paragraph 3.155.
76. Government Response, op. cit., p. 14.
77. See Family Law Regulations 1984.
78. Explanatory Memorandum, paragraph 523.
79. *ibid.*, paragraph 539.
80. *ibid.*, paragraph 541.
81. LACA, op. cit., paragraph 3.188. See also Government Response, op. cit., p. 16.
82. See sections 17, 19J, 62H and 62B(2), Family Law Act.
83. Section 14F, Family Law Act.
84. See sections 16A, 16B, 19B, 19BAA, 19BA, 62F, 65F, 65LA and 70NG, Family Law Act.
85. Explanatory Memorandum, paragraph 653.

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- 86 *ibid.*, paragraph 666.
87. Family Court of Australia, *Guidelines for the Child's Representative* at: http://www.familycourt.gov.au/presence/connect/www/home/directions/guidelines_for_child_representatives/ The Guidelines state: 'The role of the Child's Representative is unique. The lawyer appointed to represent and promote the best interests of a child in family law proceedings has special responsibilities.' p. 1.
88. The Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission recommended in their *Seen and Heard* report that where a child representative is appointed and the child is willing and able to provide instructions, then the representative should act on the child's instructions. See *Seen and Heard: priority for children in the legal process, Report No. 84, 1997, recommendation 70.*
- 89 A team approach was endorsed by the Family Law Council's 1989 and 2004 reports.
90. Family Pathways Advisory Group, *Out of the Maze: Pathways to the Future for Families Experiencing Separation*, 2001, recommendation 21, p. 89. See: <http://www.ag.gov.au/agd/WWW/agdHome.nsf/D2801B61EABE80A2CA256809001328BA/8A2385D2574570FECA25706D0013248A>
91. Family Law Council, *Pathways for Children: A review of children's representation in family law*, 2004, recommendation 7, p. 43. See: http://www.ag.gov.au/agd/WWW/flcHome.nsf/Page/Publications_Reports_to_the_AG_All_Reports_Pathways_for_Children
- 92 Explanatory Memorandum, paragraph 818.
- 93 Family Law Council, *op. cit.*, recommendation 6, p. 43.
94. *Re K* (1994) FLC ¶92-461. In *Re K*, the court enumerated 13 situations in which a child representative should be appointed. These included where allegations of child abuse have been made, where there is intractable conflict between the parents, where it is proposed to separate siblings and where there are real cultural and religious differences affecting the child.
- 95 *P and P* (1995) FLC ¶92-615.
96. Family Law Council, *op. cit.*, recommendation 1: 'The basic elements of the role of the child representative, as set down by the Full Court in *P and P*, should be incorporated into the *Family Law Act*.' Two elements of *P and P* that do not seem to be incorporated are principles 4 and 5:
- '4. Arrange for the collation of expert evidence and otherwise ensure that all evidence relevant to the welfare of the child is before the court. [Although there is general provision for the representative to analyse any reports relating to the child and draw certain matters to the court's attention.]
5. Test by cross-examination where appropriate the evidence of the parties and their witnesses.' *P and P* (1995) FLC ¶92-615, 82,157.
- 97 Family Law Council, *op. cit.*, recommendation 9, p. 60.

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98. *ibid.*, recommendation 8, p. 56.
99. *ibid.*, recommendation 4, p. 37.
100. The Family Law Council's report sets out the circumstances in which it considers direct representation would be appropriate.
101. Regulation 12AC, Family Law Regulations 1984.
102. LACA Committee, *op. cit.*, paragraph 6.6.
103. Philip Ruddock MP, Second reading speech, Family Law Amendment (Shared Parental Responsibility) Bill, House of Representatives, *Hansard*, 8 December 2005, p. 9.
104. 'Child custody bill flawed: Nicholson', *Age*, 9 December 2005, p. 6.
105. Men's Rights Agency, Response to the Exposure Draft Bill, 22 July 2005.
106. LACA Committee, *op. cit.*, paragraph 2.86.
107. Cate Banks et al., 'Review of Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005', *Australian Journal of Family Law*, v. 19, 2005, pp. 81–82.
108. LACA Committee, *op. cit.*, p. 214.
109. Aly Waleed, 'Shared parenting more a mirage than a breakthrough', *Sydney Morning Herald*, 2 January 2006, p. 11.
110. Stephen Bourke, 'When not all things are equal: contentious Bill set to polarise parents', *Canberra Times*, 3 January 2006, p. 11.
111. Nicola Roxon MP, 'Labor's amendments put safety from family violence first', Media release, 14 February 2006.
112. Commonwealth Attorney-General's Department, Submission to the House of Representatives Legal and Constitutional Committee Inquiry into the Exposure Draft Bill (Submission 46.1), Attachment 3, Précis of the Australian Government Solicitors Advice, paragraph 4.
113. *ibid.*, paragraphs 2 and 7.
114. *ibid.*, paragraph 9.

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