

# **FAMILY LAW AMENDMENT (SHARED PARENTAL RESPONSIBILITY) BILL 2005**

## **Explanatory Statement**

(Circulated by authority of the Attorney-General,  
the Honourable Philip Ruddock MP)

### **INTRODUCTION**

This Bill amends the *Family Law Act 1975* (the Act) to implement a number of the recommendations of the report of the House of Representatives Standing Committee on Family and Community Affairs (the Committee) inquiry into child custody arrangements in the event of family separation. The report, titled *Every Picture Tells a Story*, was released on 29 December 2003 (the Committee's Report). The amendments are part of the Government's bold new reform agenda in family law.

This legislation is a key component of the package of family law reforms that was announced by the Prime Minister in July 2004. The legislation will underpin the package of measures announced in the 2005 Budget. The cost of the package is estimated at \$397 million over four years. These initiatives represent a generational change in family law and aim to bring about a cultural shift in how family separation is managed: away from litigation and towards cooperative parenting.

This explanatory statement generally follows the order that the provisions appear in the Bill.

### **SCHEDULE 1 – Shared parental responsibility**

The amendments in Schedule 1 of the Bill support and promote shared parenting and encourage people to reach agreement about parenting of children after separation. The amendments advance the Government's long standing policy of encouraging people to take responsibility for resolving disputes themselves, in a non adversarial manner.

#### *Objects of Part VII*

Item 2 of this Schedule amends the objects provision of Part VII of the Act. This part deals with children's matters and the changes will better focus on the benefit to children of having a meaningful relationship with both parents and being protected from harm.

The Committee particularly emphasised that, subject to the best interests of the child, both parents should remain involved in caring for their children after separation.

The new objects provision recognises the benefit to children of having both parents meaningfully involved in their lives. Subject to safety issues, children have the right to know and be cared for by both parents. This is consistent with recommendation 3 of the Committee's Report.

These amendments recognise that children need to be protected from physical and psychological harm, that is or may be, caused by being subjected or exposed to abuse or family violence or other such behaviour. Furthermore, children need to be protected from being directly or indirectly exposed to abuse or family violence that is directed towards, or affects, another person. This will include, for example, the possible psychological harm to a child caused by the child witnessing abuse against another child, or family violence against a member of the child's family.

### *Compulsory attendance at Family Dispute Resolution*

Item 9 of this Schedule ensures that people, who apply to the court for a parenting order, will be required to first attempt to resolve their dispute using family dispute resolution services, such as mediation. This change will assist people to resolve family relationship issues outside the court system, which will have the benefits of providing flexible solutions, minimising conflict and avoiding costly court procedures.

A court cannot hear an application for an order under Part VII unless the applicant files a certificate by a family dispute resolution practitioner to the effect that the applicant has attended family dispute resolution, or that the failure to do so has been caused by the refusal of the other party or parties to the proceedings to attend.

There are a limited number of exceptions to this requirement, to ensure that people will not be required to attend family dispute resolution in circumstances that are inappropriate. These are described below. However, there is a clear principle that parties should attend family dispute resolution to resolve disputes.

The introduction of this family dispute resolution requirement will increase the demand for dispute resolution services. The Government is rolling out Family Relationship Centres and other services to meet this demand. The dispute resolution provisions are being phased in to match this rollout.

Phase 1 applies to proceedings filed from commencement to 30 June 2007. In phase 1 attendance at dispute resolution is encouraged by application of the *Family Court Rules 2004* to all courts exercising Family Law jurisdiction. The Rules will therefore apply to the Federal Magistrates Court and the State and Territory courts when they exercise their family law jurisdiction. There will be a requirement that before commencing proceedings, parties make a genuine effort to resolve the dispute by attending a dispute resolution service as provided in the Family Court Rules.

Phase 2 applies from 1 July 2007 to 30 June 2008. By this time a majority of the Family Relationship Centres will have been established. The provisions requiring compulsory attendance will apply to all new clients of the court (i.e. in respect of matters where the parties have not previously filed an application for parenting orders). Attendance for existing clients will still be encouraged.

Phase 3 applies to all applications for a Part VII order that are made on or after 1 July 2008. It is anticipated that all Family Relationship Centres will have been established and that improved access to family dispute resolution services will be available as a

result of the rollout of the funding announced in the 2005 budget. Therefore from 1 July 2008, compulsory dispute resolution (subject to the exceptions set out below) will apply to all applications for parenting orders.

### *Exceptions to attendance at Family Dispute Resolution*

Where parties have agreed to consent orders, they will not be required to attend family dispute resolution. Only parties in dispute about parenting matters will need to attend. People who are able to reach agreement without assistance will not be required to use the dispute resolution services if they do not need them.

Parties are not required to attend family dispute resolution again where orders are sought in response to a Part VII application and where an application is made for procedural or interim orders after the substantive proceedings have commenced. These parties would generally have already attended family dispute resolution.

There will also be exceptions in the following circumstances:

- Where there is or has been family violence or abuse. This exception recognises the impact that family violence can have on the capacity of parties to participate effectively in a dispute resolution process. The party seeking to invoke this exception must satisfy the court that there are reasonable grounds to believe that the abuse or violence has occurred or may occur.
- Where a Part VII order relating to an issue in the current contravention application was made within the 6 months before the application and the person has behaved in a way that shows serious disregard for his or her obligations under that order. This formulation of ‘serious disregard’ is the same as that already in subsection 70NF(2) of the Act, which means those persons would go directly into stage 3 of the parenting compliance regime. It would be unreasonable to delay the consideration of a contravention order by a court where the contravention shows a serious disregard for court orders a short period after the orders were made.
- In circumstances of urgency. For example, this may cover an application for an urgent order in relation to location and recovery of a child, including cases of child abduction.
- Where a party is unable to participate effectively in family dispute resolution. ‘Unable’ includes circumstances of incapacity or physical remoteness and other similarly exceptional circumstances. For example situations such as a person being significantly intellectually impaired, a person addicted to drugs in such a manner that makes them unable to effectively participate in family dispute resolution, or circumstances of geographical distance where attendance by telephone is not feasible.

If a person has not attended family dispute resolution, including persons who meet one of the exceptions, there is a mechanism for the court to consider making an order that the person attend such a process. This will discourage people from trying to avoid the provisions and will ensure that the court considers reasons for exemption. It

will also ensure that even the cases meeting the exceptions are referred outside of the court system for resolution where the court considers that appropriate. This is consistent with the government's policy that whenever possible family separation should be dealt with outside the court system.

These provisions substantially implement recommendation 9 of the Committee's Report.

*Special requirement in cases of child abuse or family violence*

Item 9 also includes, in proposed section 60J, a special requirement in circumstances where family dispute resolution is not attended by parties due to the existence or risk of family violence or child abuse. Parties must obtain information about the issue or issues in dispute from a family counsellor or family dispute resolution practitioner, prior to the application being considered by the court. The family counsellor or family dispute resolution practitioner must provide to the applicant a certificate stating that the applicant has attended to obtain such information. It will be possible to obtain the information by telephone as long as it is provided by a family counsellor or family dispute resolution practitioner.

The intention of this item is to ensure that people in cases where there is violence or abuse issues, have information on the services and options available to them. An exception to this requirement is included where there is a risk of child abuse or family violence if there is a delay in the court hearing the matter. This exception ensures that those matters involving high risk or immediate violence are heard by the court as soon as possible, minimising the risk of violence to the parties or the children.

*Presumption of joint parental responsibility*

In accordance with recommendations 1 and 2 of the Committee's Report, item 11 provides a new presumption, or a starting point, that the court must take into account when making a parenting order. The presumption is that the parents have joint parental responsibility for the child. Joint parental responsibility means that decisions about major long-term issues will be made by both parents, for the benefit of the child.

The presumption will not apply if there are reasonable grounds for the court to believe that a parent of a child, or a person who lives with a parent of the child, has engaged in child abuse or family violence.

This exception recognises the impact that violence and abuse in the home of either parent can have on the ability to exercise the joint decision making requirement of joint parental responsibility.

The presumption will also be rebutted where the court considers that joint parental responsibility would not be in the best interests of the child.

The court will have discretion not to apply the presumption in interim proceedings. This provision covers the situation where a court will have limited evidence relating to the application of the presumption. At the final hearing the court will be required

to disregard the finding about joint parental responsibility established at an interim hearing. This addresses concerns that a person may obtain an unwarranted advantage in a final hearing by a finding made on limited evidence in interim proceedings.

### *The operation of joint parental responsibility*

The amendments also provide greater guidance to parents and to the court about when joint parental responsibility is appropriate and the circumstances in which parents should consult about decisions relating to the care, welfare and development of their children.

Where parents exercise joint parental responsibility this involve them making joint decisions about major long-term issues about their children. Parents will be required to consult and to make a genuine effort to come to a joint decision. Where there has been no genuine attempt to consult about a major long-term decision, a party will be able to make an application to the court to deal with the dispute, subject to the dispute resolution process requirements.

However, where a child is spending time with a person pursuant to the terms of a parenting order, that person will not need to consult on decisions about issues that arise during that time that are not major long-term issues.

In item 6, a definition of ‘major long-term issues’ gives a non-exclusive list of the types of long-term care, welfare and development issues that are components of parental responsibility.

The definition specifically refers to: (a) the child’s education (both current and future). This will include issues such as which school a child attends; (b) the child’s religious and cultural upbringing. This will include decisions about which religious or cultural practices a child might observe; (c) the child’s health. This will include longer term issues such as immunisation and other matters affecting the child’s long-term health; (d) the child’s name. This will include a child’s first name, middle name and surname; and (e) significant changes in the child’s living arrangements. This will include any substantial changes to the type and location of the residence in which the child usually lives. This last factor is not intended to cover situations where the child relocates to another residence within the same locality unless this produces a significant change. ‘Major long-term issues’ is also not intended to cover trivial matters.

These changes are consistent with recommendation 3 of the Committee’s Report.

When a decision about a major long-term issue is communicated to another person (who does not have joint parental responsibility) by a party with joint parental responsibility, that third party is entitled to assume that a decision has been made jointly and they are not required to establish that the decision has been made jointly. It is the responsibility of parents to ensure that appropriate consultation occurs. For example, schools should be able to rely on information from a one parent.

### *Obligation on advisers*

Item 14 repeals the existing section relating to an explanation about the making of a parenting plan by a person advising or assisting a party. A more detailed provision is inserted which sets out the obligations on advisers to provide information on parenting plans. ‘Adviser’, in this context, includes a person who is a legal practitioner, a family counsellor, a family dispute resolution practitioner or a family and child specialist.

The intention of this provision is to ensure that parties are aware that they are able to make a parenting plan and, if they wish to do so, that they fully understand the effect of entering into that plan.

Initially, in advising or assisting a person in relation to parental responsibility for a child, an adviser must inform the person that they may consider entering into a parenting plan. These include where further information and assistance can be obtained in order to develop a parenting plan.

If an adviser is assisting a person or persons with the making of a parenting plan, the adviser is obliged to inform them of the possibility of the child spending substantial time with each of the parties, if it is practicable and in the best interests of the child. The adviser must also inform them of the matters that can be included in a parenting plan including the form of consultations, the process for resolving disputes and the process for changing the plan. This is to help parents avoid future conflicts over changes or misunderstandings in the form of the plan.

Importantly, in setting out the obligations of an adviser, the amendments give particular emphasis to explaining the effect of making a parenting plan, when a parenting order is already in existence. The adviser must inform the parties that, if an order is in force, the order may include a provision that the order is subject to a parenting plan that they enter into. Therefore, the adviser must be careful to inform parties that the effect of this is that the parenting order will terminate to the extent of inconsistency with the parenting plan. In addition, the adviser must inform the parties that the court is required to have regard to the terms of the most recent parenting plan, when making a parenting order. It is not intended that the adviser would be providing legal advice. The adviser may provide this information by way of written documents, such as information sheets or brochures.

These changes are consistent with recommendation 5 of the Committee’s report.

### *Substantial time*

Item 23 provides that the court must consider making an order that a child spend substantial time with each parent, if a parenting order provides or is to provide the parents with joint parental responsibility for the child. The court must consider whether both parents wish to spend substantial time with the child and whether it is reasonably practicable for the child to spend this time with their parents and whether it is in the child’s best interests.

This provision does not mean that there will be a presumption that the child will spend equal time with each parent. The Committee rejected the notion of 50/50 shared custody. This amendment implements part of recommendation 5 of the Committee's report.

Other provisions will encourage parents to consider substantial sharing of parenting time when reaching agreement on parenting arrangements.

### *Parenting plans and parenting orders*

The amendments in this schedule also clarify what joint parental responsibility means for parents when they are making agreements about parenting arrangements (parenting plans), and for the court when making orders about parenting arrangements (parenting orders). Items 13 and 15 revise and expand the list of things that a parenting plan or parenting order may deal with. Both items provide for the time a child is to spend with another person or persons, the allocation of parental responsibility (including decisions about major long-term issues in relation to a child), 'other communications' a child is to have with another person or persons, child maintenance, and the form of consultations about parental decisions.

The amendments also clarify what 'other communication' means in the context of items 13 and 15. Letters, telephone calls and e-mail or any other electronic communication are examples only and do not limit the scope of 'other communication'. 'Other communications' is drafted broadly and is intended to cover new technologies brought about by, for example, the internet and mobile phones. The intention is for parents to consider a variety of ways by which they can have a meaningful involvement in their children's lives, which is not just physical time spent with a child.

Parenting plans and parenting orders may deal with the process for resolving disputes about the terms or operation of the parenting plan or orders and the process to be used for changing the plan or orders. The intention of these provisions is to ensure that parents consider the changing needs of their children as they get older; to provide for an element of flexibility in the plan; and to consider alternatives to court for negotiating the operation of plans and orders.

### *Effect of parenting plans*

A primary aim of these amendments is to encourage and assist parents to reach agreement on parenting arrangements after separation and to document that agreement through workable parenting plans. This is consistent with the Government's commitment to assisting parents to resolve parenting disputes in a non-adversarial manner and help parents reach agreements without the need for legal proceedings.

Item 23 provides that when making parenting orders the court should have regard to what the parents have agreed to in the most recent parenting plan entered into by the parents of the child. This will give the court the benefit of information about the types of arrangements that the parents have previously considered when the court is making parenting orders.

Item 19 specifies that unless the court orders otherwise, it is a term of all parenting orders that they are subject to later parenting plans. The effect of this is that a parenting order will terminate to the extent of inconsistency with a later parenting plan. The court can modify or exclude this provision if it does not consider that it is in the best interests of the child. This provision recognises that the party's circumstances may change and encourages parents to agree on new arrangements in a parenting plan, rather than return to court. Where the subsequent parenting plan affects third parties other than the parents, the agreement in writing of those parties will be required.

In addition, in Schedule 2 where the court does not include this provision in a parenting order and there is a contravention, the court will be required to consider the subsequent parenting plan when considering whether to vary the parenting order.

These provisions will allow maximum flexibility for parties to come to an agreement, even where there is a parenting order in force and will give parenting plans increased legal status.

#### *Best interests of the child*

Items 26 to 36 introduce amendments to the provisions relating to the best interests of the child. There will be two tiers of factors that the court must consider in determining the best interests of the child. The first tier consists of two primary considerations, which are:

- the benefit to the child from having a meaningful relationship with both of the child's parents, and
- the need to protect the child from violence or psychological harm caused, or that may be caused, by being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person.

The intention of separating these factors into two tiers is to elevate the importance of the primary factors and to direct the court's attention to the objects of Part VII of the Act.

The second tier includes the other best interest factors that already exist in subsection 68F(2) of the Act. In addition, these amendments introduce a new factor that the court must consider which is 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. This provision is influenced by legislation in the State of Florida in the United States of America.

There is also an amendment to the current paragraph 68F(2)(j) which directs the court to consider a final or contested family violence order. The intention of this subsection is to ensure that uncontested or interim family violence orders are not an independent factor in determining the best interests of the child. The court will still consider, as a



primary factor, the need to protect children from harm and will have regard to final or contested family violence orders and actual violence under paragraph 68F(2)(i). This should address a concern that allegations of violence can be taken into account that were later found to be without substance.

### *Role of grandparents and other relatives*

There are a number of amendments in this schedule which provide for a greater role for grandparents and other relatives of a child. This is consistent with recommendations 23 and 24 of the Committee's Report. This change recognises the importance of the relationships that the child has with their wider family, in particular their grandparents.

For example, this schedule makes a number of amendments to the best interest factors that the court must consider in determining the best interests of the child. These amendments now include an explicit reference to the relationship between the children and their grandparents and other relatives.

'Relatives' is defined as:

- a step-father or step-mother of the child
- a brother, sister, half-brother, half-sister, step-brother of the child
- a grandparent of the child
- an uncle or aunt of the child
- a nephew or niece of the child; and
- a cousin of the child.

Items 13 and 16, which set out the details of what issues a parenting plan and parenting order may deal with, also gives greater recognition of the important role that grandparents and other relatives play in a child's life by specifying that a 'person' includes a grandparent or other relative of a child. This change is consistent with the amendments to facilitate greater involvement of extended family members in the lives of children.

### *Children's wishes and views*

There are a number of amendments to this Schedule which replace references to children's 'wishes' in the Act with references to children's 'views'. Research has found that the use of the word 'wishes' means that children may feel that they need to make decisions about their future and that they do not necessarily want to do this, even though they want to be heard. By referring to 'views' in the Act, children may still be heard and their views taken into account, but they should not feel that they need to make a decision. This approach is consistent with the wording in the United Nations Convention on the Rights of the Child at Article 12.

An example is at item 28. In determining what is in a child's best interests, the court must consider any 'views' expressed by the child and any other factors that the court thinks are relevant to the weight it should give to the child's 'views'. This amendment 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 include a child's perceptions and feelings, and will allow for any decision to be made in consultation with the child without the child being required to make a decision or express a 'wish' as to which parent he or she is to live with or spend time with. References to a child's 'views' will not exclude a child expressing his or her 'wishes' if they want to do this.

*Aboriginal and Torres Strait Islander children*

As a result 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*, there are a number of amendments in this Schedule which provide for a greater emphasis on the specific needs of Aboriginal and Torres Strait Islander children. In accordance with the recommendations of this report, the amendments emphasise the consideration of the kinship obligations and child-rearing practices of Aboriginal and Torres Strait Islander culture in applying Part VII: this includes that children of indigenous origins have a right to enjoy their own culture as an object in the Bill: greater recognition in the Bill that they have a right to maintain a connection with the lifestyle, culture and traditions of their peoples and an amendment introducing an evidence provision to assist the court in being informed about culture and kinship systems. These changes are consistent with the proposed reforms relating to better recognition of extended family members, in particular when considering the best interests of the child.

## **SCHEDULE 2 – Compliance regime**

Schedule 2 implements a range of amendments to strengthen the existing enforcement regime relating to Part VII orders in the Act. The amendments ensure that enforcement applications can be dealt with appropriately by the court, particularly given the object that children have a meaningful relationship with both parents.

### *Clarification of the standard of proof to be applied*

Item 2 provides clarification of the standard of proof to be applied by the court in considering enforcement applications. The current test provided by section 140 of the *Evidence Act 1995* (the Evidence Act) is the civil standard of proof, the balance of probabilities, but for the court to take account of the gravity of matters. In practice, the court applies a stricter standard of proof, much closer to the standard of beyond reasonable doubt because of the possibility of criminal sanctions being applied.

To ensure that expectations about the standard of proof are clear and realistic, the Bill specifies that a civil standard of proof applies to all matters where there are no criminal consequences and that a stricter standard of proof beyond reasonable doubt should apply to those matters in stage 3 of the parenting compliance regime in circumstances where the court is considering applying a criminal penalty.

### *Strengthening of the parenting compliance regime*

Currently stage 2 of the enforcement regime provides that for first breaches, or other breaches where the court thinks that it is still appropriate to do so, the court may order a contravening parent to attend a provider of a post-separation parenting program to assess whether the person is suitable for such a program and direct the person to attend, if found suitable. Stage 3 applies if a party has contravened a current parenting order, and either the court has previously determined that the party has contravened a primary order without reasonable excuse, or the court is satisfied that the party has behaved in a way that showed a serious disregard for their obligations under the order. The court can impose various sanctions including a community service order, a bond, a variation of the original order, a fine of up to 60 penalty units, or sentences of imprisonment for a period of 12 months or less.

To strengthen the existing enforcement regime, the court will be given a wider menu of options that it must consider at both stages 2 and 3 of the parenting compliance regime. These are:

- at both stage 2 and stage 3 the court must consider awarding compensation for reasonable expenses incurred by a party (such as airfares wasted, other tickets or accommodation purchased but not used).
- power to impose a bond at stage 2 where the consequences of failure to comply with the bond would be limited to civil penalties. This would distinguish it from the current bond provisions at stage 3 where there are clear criminal consequences.

- at stage 2 a provision that the court must consider awarding costs against the party that has breached the order; and
- at stage 3 a presumption that the court will order costs for legal expenses against the party who has breached the order, unless it is not in the best interests of the child. Where it is not in the best interests of the child to order costs at stage 3, the court must make one of the other orders available to it.

### *Parenting plans*

In circumstances where a parenting plan has been made prior to a contravention application, the court will specifically need to consider varying the parenting order to the extent of any inconsistency to reflect the terms of the subsequent parenting plan. The intention of this is to encourage greater reliance on parenting plans to resolve parenting issues on an ongoing basis.

This provision will only operate in circumstances where a parenting order does not include a provision that the order is subject to a parenting plan subsequently entered into by the child's parents (see item 19 of Schedule 1). Where a parenting order is subject to a parenting plan, item 19 provides that the effect is that the parenting order will terminate to the extent of inconsistency with the parenting plan.

### **SCHEDULE 3 – Amendments relating to the conduct of child-related proceedings**

Schedule 3 implements a range of amendments to provide legislative support for a less adversarial approach to be adopted in all child-related proceedings under the Act. This approach relies on active management of proceedings by judicial officers in a way that considers the impact of the proceedings on the child and not just the outcome of the proceedings. The intention is to ensure that the case management practices adopted by courts will promote the best interests of the child by encouraging parents to focus on their children and on their parenting responsibilities.

This approach largely reflects that taken by the Family Court of Australia in its pilot of the Children's Cases Program. The approach contains provisions about procedure already located in the *Federal Magistrates Act 1999*. It also reflects provisions related to the management of cases that are found in the *United Kingdom Civil Procedure Rules* and the *NSW Children and Young Persons (Care and Protection) Act 1998*.

Item 4 inserts a new Division 1A into Part VII of the Act. The Division will apply to proceedings under Part VII. The Division will also apply to related proceedings that involve the court exercising jurisdiction under the Act, or that arise from the breakdown of the parties' marital relationship, where all the parties have consented to the process. Consent will need to be given on a prescribed form and can be revoked only with leave of the court.

The intention of extending the application of the new Division to other matters consented to by the parties is to ensure that people are able to resolve all elements of their dispute using the one process, should they choose to do so.

#### *Principles guiding the court*

Item 4 contains the principles that will guide the court in implementing the less adversarial approach. The court must have regard to these principles in performing its duties, exercising its powers, and in making decisions about the conduct of child-related proceedings.

The first principle ensures that the proceedings are focussed on the child. The court must consider the impact that the conduct of the proceedings may have on the children involved. In particular, the court must consider the likely stress on the children of the conflict between the parents that is created by the proceedings and seek to minimise this. The court may, for example, consider making orders that children attend family counselling to assist them to understand the courts' orders or the trial process. When setting hearing dates, the court may also consider the stress caused to children by lengthy times between hearing dates and seek to minimise this impact where appropriate.

The second principle is that the judicial officer should control the conduct of the hearing, rather than relying on the parties and their representatives. The intention is to move towards a more inquisitorial system of litigation away from an adversarial one.

An inquisitorial system operates in a number of countries in Europe and this Bill contains elements of a system that operates in Germany for child related proceedings.

The third principle ensures that proceedings, as far as possible, are conducted in a way that encourages the parents to focus on their children and on their ongoing relationship as parents. This promotes both a focus on the child and cooperation between the parties so as to allow a more positive working relationship between the parties, both during and after the proceedings so that they can communicate in order to fulfil their responsibilities as parents.

This means that the court, when it considers how to conduct the proceedings, must consider ways that it might minimise the level of conflict between the parents and to ensure that the focus of both parents is on the child. This principle comes from concerns that a traditional adversarial approach to litigation is damaging to children as it can entrench conflict and damage further the relationship of the parents. It can also lead to a focus on the parents and their perceptions of their rights rather than a focus on the child.

The fourth principle is that the proceedings should be conducted expeditiously and with as little formality as possible. This does not mean that the proceedings will be conducted in a casual way that detracts from the seriousness of the orders being made. It is intended that the proceedings be conducted in a way that makes the parties feel comfortable and that ensures that the matter can be finalised in a timely way. This new subsection will go further than the current subsection 97(3) of the Act, which provides that in proceedings under the Act the court shall proceed without undue formality and shall endeavour to ensure that the proceedings are not protracted. This principle replicates the drafting of subsection 93(2) of the NSW *Children and Young Persons (Care and Protection) Act 1998*.

#### *General duties and powers of the court*

New section 60KE provides a number of general duties that the court must carry out in giving effect to the principles outlined above. These duties will ensure that cases are actively managed, to avoid undue delay or formality and to focus on the child and on the relationship of the parents. It will also ensure the proceedings do not extend to unnecessary issues to reduce the overall costs.

For example, there is a specific duty for the court to consider whether the likely benefits of taking a step in the proceedings justify the costs of taking it. This could be relevant in a situation where parties are proposing to use multiple experts or have particular facts evidenced by a variety of witnesses. The court may decide in such a case that one of the witnesses proposed will be sufficient to establish a particular fact in the case.

In addition, the court will again need to consider encouraging the parties to use a family dispute resolution or family counselling process, if the court considers that is appropriate. This reinforces the intention that family separations be dealt with outside the court system wherever possible. It is not intended that the court's role should be to mediate or to take part in negotiations. However, it is intended that the court's role be more active in creating opportunities for successful negotiations to take place

between the parties and which may lead to consent orders being made during the proceedings on some or all of the issues in dispute.

A further example is that the court must consider dealing with the matter without requiring the parties' to be present at court, where this is appropriate. It is envisaged that parties may not need to be present at court in two circumstances – (1) where the use of appropriate technology (eg video link) removes the need for a party's physical attendance in the court, and (2) where the court can make decisions on the papers (where this is appropriate) without needing further information from the parties to make its decision. Any decision made by the court to deal with a case without the parties present will need to be made in accordance with the principles of natural justice and procedural fairness.

It is expected that, where possible, these duties will be fulfilled by the court at an early stage of proceedings in order that the principles behind this active case management approach are given effect. However, it is recognised that the exact time at which these duties are fulfilled will differ between courts exercising jurisdiction under the Act and between cases.

#### *Evidence in child-related proceedings*

Item 4 inserts a new Subdivision D which deals with matters relating to evidence. This is a key feature for achieving less adversarial court processes in child-related proceedings.

The Subdivision provides that most of the rules of evidence in subsection 190(1) of the Evidence Act do not apply in child-related proceedings, unless the court considers that it is in the best interests of the child to apply one or more of those provisions to a particular issue or issues in the proceedings. This will allow the court to better control how evidence is received in proceedings.

The rules of evidence that will apply in child-related proceedings are the court's control over questioning, use of interpreters; examination of a person without subpoena or other process and rules about improper questions. These rules are specifically not excluded as they relate to key aspects of the case management approach.

This means that in some proceedings, some of these rules of evidence may be applied in relation to some parts of the proceeding but not others. It may also mean that in some proceedings, no rules of evidence are applied. The key will be that the judicial officer will need to consider in each case exactly what is required.

Generally, the rules of evidence that the court must not apply unless the court orders otherwise are about the method of proof of documents (or other evidence) and the exclusionary rules. Specifically, these rules deal with the ways of giving evidence, examination in chief and re-examination, cross-examination, documents, other evidence, hearsay evidence, opinion evidence, admissions, evidence of judgments and convictions, tendency and coincidence, credibility and character.

In relation to the evidence of children, section 100A from Part XII of the Act has been relocated to the new Division 1A in Part VII. This means that if a court decides to apply the rules of evidence related to hearsay then evidence of a representation made by a child about a matter that is relevant to the welfare of that child or another child, is still admissible.

Item 4 also sets out the court's general duties and powers relating to evidence. In addition to the duties of the court, a list of actions that the court may carry out in giving effect to the principles is included. For example, the court may give directions or make orders about how particular evidence is to be given or whether expert evidence is required. Item 4 also provides another non-exhaustive list about the types of directions and orders that the court may make in child-related proceedings. The court may also give directions or make orders about the use of written submissions or limit the time for oral argument.

A number of these provisions come from the United Kingdom Civil Procedure Rules. They are intended to allow the court to play a much greater role in managing the conduct of the proceedings.

#### *Aboriginal and Torres Strait Islander amendment*

A modified version of section 86 of the *Native Title Act 1993* is also inserted. It applies to proceedings concerning an Aboriginal or Torres Strait Islander child. In such proceedings, for the purposes of having regard to any kinship obligations and child-rearing practices that are relevant to an Aboriginal or Torres Strait Islander child (for the purposes of new section 61F, which is being inserted by this Bill), the court may receive into evidence the transcript of evidence in any other proceedings before a court or tribunal and draw any conclusions of fact from the transcript that it thinks proper. The court may also adopt any recommendation, finding, decision or judgment of any court or tribunal.

This amendment implements recommendation 5 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*. The Report found that such a provision could provide a court with the flexibility to draw on relevant evidence adduced in other proceedings in other courts to inform decision-making in the best interests of the child. It suggested that such an approach would assist a court in informing itself of the content of the relevant kinship obligations and child-rearing practices wherever such reliable information exists.



## **SCHEDULE 4 – Dispute resolution changes**

Schedule 4 of the Bill amends the counselling and dispute resolution provisions in the Act to implement the Government’s policy of encouraging separating and divorcing parents to utilise counselling and dispute resolution services without the need to go to court. In particular, the distinction between family counselling and family dispute resolution, as set out in sections 10A and 10H at Item 32, facilitates the introduction of compulsory dispute resolution for most parents seeking an order under Part VII of the Act (as provided by section 60I, at Item 9 of Schedule 1).

Schedule 4 also distinguishes services available in the community from those provided by the courts, to assist in clarifying the different roles played by each sector in assisting people affected by separation and divorce.

Provisions in the Act that relate to counselling or dispute resolution which are outdated, unnecessary, or which do not reflect current practice or government policy are amended or removed by Schedule 4.

Consistent and consequential changes are made to the *Federal Magistrates Act 1999*, the *Income Tax Assessment Act 1997* and the *Marriage Act 1961*.

The main changes incorporated in Schedule 4 are set out below.

### *Terminology*

The term ‘primary dispute resolution’ has been removed from the Act. This term had caused confusion as it made no distinction between quite different processes. The Bill distinguishes relationship counselling from dispute resolution. New definitions of ‘family counsellor’, ‘family counselling’ and ‘family dispute resolution practitioner’ and ‘family dispute resolution’ have been added (subsection 4(1) and sections 10A, 10B, 10H and 10J at Item 32). Previous definitions of ‘family and child counsellor’, ‘family and child counselling’, ‘family and child mediator’ and ‘family and child mediation’ are removed. These changes will ensure that the new compulsory dispute resolution provision will only apply to processes that are intended to assist people to resolve a dispute and not to processes that are intended to assist people to deal with personal or relationship issues.

The new definition of ‘family dispute resolution’ in section 10H encompasses both ‘advisory dispute resolution’ (where advice is provided as part of the process) and ‘facilitative dispute resolution’ (where no advice is provided, but information can be provided). Part V of the *Family Law Regulations 1984* previously made it clear that the family and child mediator’s role was not to provide advice. Accordingly, processes that were previously referred to as ‘family and child mediation’ will in future fall within the new definition of ‘facilitative dispute resolution’ (subsection 4(1) at Item 13 and paragraph 10H(2)(b) at Item 32).

Practitioners conducting facilitative dispute resolution will retain the immunity that currently applies to mediators under section 19M of the Act. Currently, dispute resolution processes that include the provision of advice are regarded as a form of ‘family and child counselling’. Practitioners conducting family and child counselling

do not currently have immunity under the Act. Under the amendments, dispute resolution processes that include the provision of advice will fall within the definition of 'advisory dispute resolution' (subsection 4(1) at Item 2 and paragraph 10H (2) (a) at Item 32). Practitioners conducting advisory dispute resolution do not have immunity under the amendments, a position which is unchanged from the arrangements currently in the Act.

#### *Approved organisations*

The existing provisions relating to approved counselling organisations and approved mediation organisations have been amended to refer to approved family counselling organisations and approved family dispute resolution organisations as set out in sections 10E and 10N at Item 32.

The prerequisites for organisations seeking approval have been amended. The requirement that the organisations be 'voluntary' or non-profit has been removed. This widens the pool of organisations eligible for approval to include organisations that operate on a for-profit basis. This should assist in ensuring that a range of organisations can tender to provide the increased services announced in the 2005 Budget. The Government will be able to select the tender that will provide the best outcomes.

In order to be eligible for approval, organisations are only required to be in receipt of, or approved to receive, funding to provide services which include family counselling or family dispute resolution, as appropriate, under an Australian Government program designated by the Minister. This new requirement reflects current practice, as all approved organisations are currently funded under the Australian Government Family Relationships Services Program. Accountability requirements under that Program assist in ensuring a level of quality in the services that are provided by approved organisations.

#### *Distinguishing services provided in the community from court based services*

Part II of the Bill deals with non-court based family counselling and family dispute resolution, and arbitration. Although it is envisaged that most family counselling and family dispute resolution services will be provided outside the court, the definitions of 'family counselling' and 'family dispute resolution' allow staff or persons engaged by the Family Court of Australia, the Family Court of Western Australia or the Federal Magistrates Court to provide those services where necessary.

Part III of the Bill deals with the functions of 'family and child specialists', who will be appointed by the Family Court of Australia, the Family Court of Western Australia or the Federal Magistrates Court to provide services to people involved in family law proceedings, and to the courts.

The primary distinction between 'family counsellors' and 'family dispute resolution practitioners' (who mainly provide services in the community) on the one hand, and court-based 'family and child specialists' on the other, is that the former will provide confidential services. Therefore evidence of anything said or any admissions made during those processes will be inadmissible. The services provided by 'family and

child specialists' will not be protected by confidentiality and evidence of things that are said to a family and child specialist will be admissible in court provided the person concerned has been informed that disclosures made to family and child specialists are admissible. Even if a person has not been informed that their statements or disclosures will be admissible, special considerations will apply in cases that involve child abuse.

This approach will help to make it clearer when court staff or persons engaged by the court are providing confidential/inadmissible services and when they are not. 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 and people will need to be informed when statements made in a process will be admissible in court.

#### *Requirements to provide information to people affected by separation and divorce*

To implement the Government's policy of encouraging separating and divorcing parents to utilise non-court counselling and dispute resolution services, Part IIIA of Schedule 4 ensures people receive useful information on these services early in the process of separation or divorce. The provision of such information at an early stage may assist the people involved to address problematic issues before they become entrenched. This will assist many couples to avoid escalating levels of conflict, putting people in a better position to negotiate their own agreements rather than requiring intervention by the courts.

To ensure people considering, or affected by, separation or divorce receive information on family law processes and the services available to assist them, Part IIIA requires relevant information to be provided by family counsellors, family dispute resolution practitioners, arbitrators, legal practitioners and the courts. These professionals and the courts must provide documents to people who are considering instituting proceedings, or are parties to proceedings, which contain information on matters such as the legal and possible social effects of the proposed proceedings, the services provided by family counsellors and family dispute resolution practitioners, the steps involved in the proposed proceedings, the role of family and child specialists in the courts, arbitration facilities and, in certain circumstances, the family counselling facilities available to help with a possible reconciliation between the parties to a marriage. These obligations expand upon existing obligations in sections 14G, 17, 19J and 62H of the current Act.

#### *Court orders to attend family counselling, family dispute resolution or other services*

Part IIIB of Schedule 4 sets out the power of courts exercising jurisdiction under the Act to order, or advise, people to attend family services, either court-based or non-court, that are appropriate to their needs. This will assist people affected by separation or divorce to receive assistance appropriate to their needs from family services within, and outside, the court, including, importantly, assistance to resolve their disputes outside the judicial process.

Section 11E, in Part III of Schedule 4, aims to ensure that the court makes orders that are appropriate to the circumstances and needs of the parties, and which take into account the family services available in different areas. This section provides that where a court has the power to order a person to attend family counselling, family dispute resolution, a course, program or service, or an appointment with a family and child specialist, it may seek the advice of either a family and child specialist (if it is a Court that has family and child specialists) or an appropriately qualified professional, either within the court or outside it (such as a professional employed by a Family Relationship Centre). To emphasise the importance of making orders that are tailored to the individual's requirements, the court must consider seeking such professional advice before making a relevant order.

## **SCHEDULE 5 – Removal of references to residence and contact**

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 Committee has recommended that more family friendly terms such as ‘parenting time’ be used.

Consistent with recommendation 4 of the Committee’s Report, the terms ‘residence’ and ‘contact’ are removed from the Act with the emphasis now on the more family-focussed term of ‘parenting orders’. In the majority of cases, references to ‘residence’ will be replaced with ‘lives with’. References to ‘contact’ will be replaced with ‘spends time with’ and ‘communicates with’ in the majority of cases.

These amendments require consequential amendments to the terminology that is used in the *Australian Citizenship Act 1948*, the *Australian Passports Act 2005* and the *Child Support (Assessment) Act 1989*.