

## **Review of Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005**

### Author

Banks, Cate, Rhoades, Helen, Sheehan, Grania, Young, Lisa, Carson, Rachel, Batagol, Becky, Fehlberg, Belinda, Harrison, Margaret, Hunter, Rosemary, Kaspiew, Rae, Mclean, Mavis, Rathus, Zoe

### Published

2005

### Journal Title

Australian Journal of Family Law

### Version

Version of Record (VoR)

### Rights statement

© 2005 Lexis Nexis Australia. The attached file is reproduced here in accordance with the copyright policy of the publisher. Please refer to the journal website for access to the definitive, published version.

### Downloaded from

<http://hdl.handle.net/10072/7803>

### Link to published version

<https://www.lexisnexis.com.au/en/products-and-services/lexisnexis-journals/australian-journal-of-family-law>

### Griffith Research Online

<https://research-repository.griffith.edu.au>



## Review of Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005

*An Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth)<sup>1</sup> (the Bill) was released by the Federal Attorney-General on 28 June 2005. The Attorney-General asked the House of Representatives Standing Committee on Legal and Constitutional Affairs (the Committee) to review the draft Bill and report by 11 August 2005. The Committee in turn invited community submissions by 15 July 2005. The Bill amends the Family Law Act 1975 (Cth) (FLA) by implementing a number of recommendations of the 2003 'Every Picture Tells a Story' report of the House of Representatives Standing Committee on Family and Community Affairs<sup>2</sup> and subsequent government proposals put forward in the 2004 'New Approach to the Family Law System' discussion paper,<sup>3</sup> with funding being announced in the 2005–2006 Federal Budget.<sup>4</sup> In essence, the changes 'aim to bring about a cultural shift in how family separation is managed: away from litigation and towards co-operative parenting'.<sup>5</sup> The following comprises a submission made to the Committee responding to the proposed changes, slightly expanded where necessary to provide background information on the proposals.*

We write in response to your invitation for submissions on the above exposure draft.

We have limited ourselves to specific comments on key issues of concern that we have identified in the three weeks available for preparation of submissions. Given the short (and we would argue, inadequate) time available for consideration of the significant and complex range of changes contained in the Bill, the fact that we have not mentioned a particular provision should not necessarily be viewed as an indication of our support of it.

Most of the points made in our submission relate to our concern that the Bill's incorporation of improved provisions related to 'safety' will be overwhelmed by the 'equal parenting' message in the overall scheme. A number of the changes we suggest are aimed at ensuring that this does not occur.

---

1 Available at: <[aph.gov.au/house/Committee/laca/familylaw/index.htm](http://aph.gov.au/house/Committee/laca/familylaw/index.htm)>.

2 Inquiry of the House of Representatives Standing Committee on Family and Community Affairs, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation*, December 2003, Canberra, <<http://www.aph.gov.au/house/committee/fca/childcustody/report.htm>>.

3 *A New Approach to the Family Law System*, Implementation of Reforms, Discussion Paper, Australian Government, November 2004, Canberra, <<http://www.ag.gov.au/>>.

4 <<http://www.budget.gov.au/2005-06/>>.

5 Explanatory Statement to the Bill, available at: <[aph.gov.au/house/Committee/laca/familylaw/index.htm](http://aph.gov.au/house/Committee/laca/familylaw/index.htm)>.

## **Schedule 1: Shared Parental Responsibility**

### **Section 60B: Objects of Part and principles underlying it**

The proposed changes to s 60B elevate the safety for children from one of the factors contained in s 68F(2) to s 60B, the objects and principles section. Section 60B has clearly set the tone for the interpretation of s 68F(2) and the rest of Pt VII of the FLA since its introduction in 1996 (via the Family Law Reform Act 1995 (Cth)) (the Reform Act) and the absence of any reference to safety in this important context has arguably diminished consideration of family violence and abuse in parenting cases. However, we have a number of concerns about the sequencing, wording and ambit of the proposed changes to s 60B.

#### **Section 60B(1)**

The proposed changes to s 60B(1) do not include the object of 'ensuring that children are protected from physical or psychological harm'. As a result, the emphasis is entirely on the importance of parental involvement in their children's lives. This is inconsistent with the proposal to attach dual primacy to parental involvement AND protecting children from harm, set out in both s 60B(2) and s 68F(1A).

We consider that it is critical that the reforms do not operate to compromise children's safety or continue their abuse, and to this end suggest that the legislation should clearly convey (including in its ordering of potentially competing principles) the priority to be given to ensuring children's safety.

#### **We recommend:**

- Section 60B(1) be amended to provide, as the first object, '(a) to ensure that children are protected from physical or psychological harm'.

#### **Section 60B(2)**

We strongly support the inclusion of protection from harm caused by family violence or child abuse in the principles in s 60B(2) although, as just discussed, we consider that a more appropriate ordering would be to list the matters in s 60B(2)(b) first, and the matters set out in s 60B(2)(a) second.

We are also concerned that s 60B(2)(b) uses the concept of 'abuse', which is now defined in s 4(1) of the FLA rather than s 60D (which contains the definition of 'family violence') (see Sch 4). The definition of 'abuse' has not changed, but the word 'abuse' now carries much more weight than it did previously. In our view, the existing definition of 'abuse' is too narrow for its new role, and therefore has the effect of narrowing the scope of the principle in s 60B(2)(b) (as well as the operation of other important provisions in which it appears, including s 60I(8), s 61DA(2)(a), and s 68F(1A)). Most notably, the definition does not extend to neglect, or ill-treatment (which, in contrast, does appear in s 68F(1A)). The limited FLA definition of 'abuse' is in contrast to the harms from which children are to be protected under the various State

child protection regimes, which typically include abuse and neglect.<sup>6</sup> Reference in s 60B(2)(b)(i) to ‘other behaviour’ is not sufficiently clear to cover these harms.

**We recommend:**

- The ordering of s 60B(2) be changed, so that matters currently in s 60B(2)(b) appear first, and the matters currently set out in s 60B(2)(a) appear second.
- That, along with family violence and abuse, neglect and other ill-treatment of children be included in s s 60B(2)(b).

**Section 60I(8)(b) and s 60J(1): Family dispute resolution in cases of child abuse and family violence**

The effect of s 60I and s 60J is that, with limited exceptions, parties will have to attend Family Dispute Resolution (FDR), or attend a family counsellor or FDR practitioner, before the court will hear their application for a Pt VII order in relation to a child.

We have a number of broader concerns about the introduction of compulsory FDR. Where there is a significant power imbalance between the parties, compulsory FDR may result in unjust processes and outcomes, as parties of unequal bargaining power are forced to negotiate, giving stronger parties ample opportunity to pressure weaker parties into capitulation. The proposed process for obtaining an exemption to the requirement to attend FDR under s 60I(8) (see later) is not adequate to eliminate many cases in which there will exist a significant power imbalance between former partners, which may result in unfair agreements. This situation may be exacerbated by the lack of encouragement for parties using FDR under the Bill to seek legal advice, as legal support may enable a weaker party to insist on a better deal.<sup>7</sup>

Voluntariness is also important to the success of FDR processes such as mediation because willingness to participate is equated with good faith, and a party compelled to attend mediation may fail to negotiate or even sabotage the process, resulting in fewer agreements and possibly an abuse of process.<sup>8</sup>

Experiences in England and Wales suggest that compulsory FDR is unlikely to be of use to most couples and that it may simply add to the cost of the

<sup>6</sup> L Broomfield and D Higgins, ‘National Comparisons of Child Protection Systems’ (2005) *Child Abuse Prevention Issues* (No 22), Australian Institute of Family Studies, Melbourne, pp 4–5.

<sup>7</sup> The Bill is silent on the issue of whether parties should seek legal advice in conjunction with private dispute resolution (there is no section in the current or proposed legislative scheme that requires or encourages mediating parties to seek the advice of lawyers). The government’s *New Approach*, Discussion Paper, above n 3, p 6 states:

To help prevent joint sessions with a parenting adviser becoming adversarial, it is proposed that a lawyer not be present during those sessions. Parents would still be able to consult a lawyer if they wished, but the lawyer would not be part of the process at Family Relationship Centres.

<sup>8</sup> L Katz, ‘Compulsory Alternative Dispute Resolution: Two-Headed Monster or Two Sides of the Coin?’ (1993) *Jnl of Dispute Resolution* 1 at 53; G Smith, ‘Unwilling Actors: Why Voluntary Mediation Works, Why Mandatory Mediation Might Not’ (1998) 36 *Osgoode Hall Law Jnl* 847 at 875–9.

family law system. Under s 29 of the UK Family Law Act 1996 parties were not granted legal aid unless they attended a meeting with a mediator to determine whether family mediation was suitable. In practice, this provision meant that family mediation was compulsory in many cases.

After a government-commissioned evaluation of the pilot mediation scheme, the provisions relating to family mediation were not brought into force by the UK government. The evaluation found that the compulsory nature of the referral to mediation at the early stages of litigation was not an effective means of securing legal settlement. Mediation providers found that parties compulsorily referred to mediation under s 29 were less committed to the process and likely to break appointments, and were less likely to reach agreement.<sup>9</sup>

The evaluation concluded that mediation was a useful process for some cases but that where parties are forced into it and did not commit themselves to the process, it was unlikely to be successful and proved an additional cost to the system without achieving the goals of securing more agreements, minimising conflict, and avoiding costly court procedures.<sup>10</sup>

It is disappointing that the Bill has been drafted without apparently paying regard to the UK situation. It is hoped that a major, independent evaluation of the reforms will be commissioned by the Attorney-General's Department so that the impact of the compulsory dispute resolution requirements can be assessed.

Assuming that the government does not propose to reopen this issue, the following suggestions relate to improving the procedure for assessing whether FDR should take place.

The Bill provides that if under s 60I(8)(b) the court is satisfied that there are 'reasonable grounds to believe' that a party has committed child abuse or family violence, it still must not hear the application unless the applicant files a certificate that they have obtained information about the issues in dispute from a family counsellor or family dispute resolution practitioner (s 60J(1)) unless (once again) the court is satisfied that there are 'reasonable grounds' (etc) for not requiring this. We are particularly concerned that these provisions: create significant obstacles for victims of violence (including delay); increase the risk (especially in cases involving allegations of child sexual abuse) for systems abuse (meaning 'the preventable harm [that] is done to children in the context of policies and programmes which are designed to provide adequate care and protection');<sup>11</sup> and will further discourage victims of violence from raising these issues at all, and thus to inappropriately enter the FDR process. The reluctance of victims of violence to disclose their

---

<sup>9</sup> G Davis et al, *Monitoring Publicly Funded Family Mediation: Report to the Legal Services Commission*, 2000, at 257.

<sup>10</sup> *Ibid*, at 273.

<sup>11</sup> J Cashmore, J Dolby and D Brennan, 'Systems Abuse: Problems and Solutions', NSW Child Protection Council, Sydney, 1994, p 11, cited in Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, AGPS, Canberra, 1997.

experiences<sup>12</sup> was previously discussed in the submission made by a number of us on the *New Approach* Discussion Paper.

Also, it is not at all clear how these sections would work in practice. For example, how can the court be satisfied that there are 'reasonable grounds to believe' (etc) unless it actually hears the application? It seems that the burden of proof to establish 'reasonable grounds' will be on the party alleging harm, but what will suffice to discharge it? What is the basis for the distinction drawn between commission of abuse or family violence (s 60I(8)(b)(i)) and risk thereof (s 60I(8)(b)(ii))?

We are also concerned that the proposed system set out in s 60I(7) and (8) for determining whether FDR should take place centres around the judge (or registrar or magistrate — our subsequent references are just to judges), and does not impose any obligation on FDR practitioners to consider the appropriateness for FDR of clients presenting to them for this purpose. Under the provisions, the judge determines suitability for FDR, and whether an exception to the requirement to attend FDR has been made out. Parties must make a case and provide evidence to the judge to be exempted from the FDR attendance requirement. All FDR practitioners need do is provide certificates for those who have attended. There appears to be no requirement in the Bill for FDR practitioners to make an assessment of suitability for mediation nor the ability for FDR practitioners to reject a case for dispute resolution if they feel it is inappropriate.

These proposed changes are in marked contrast to the present primary dispute resolution system, which centres on the mediator. Presently, the mediator (the forerunner of the FDR practitioner) is required under Reg 62 of the Family Law Regulations 1984 to make an assessment of the suitability of each case for mediation before dispute resolution can take place. The matters taken into account by the mediator in making this assessment are broader than the exceptions listed in proposed s 60I(8) and include the safety of the parties, the risk of abuse to a child, the equality of bargaining power between the parties and the psychological and physical health of the parties. Assessment sessions are conducted separately with each party and usually take around an hour each. The mediator, who must have a background in social work, psychology, counselling or law, makes his or her assessment of the case for mediation after spending time with each party and by drawing upon his or her experience and training. If the mediator decides that mediation is inappropriate, he or she must not conduct the mediation.

Finally, s 60I(8), unlike the present Reg 62, does not ask judges to consider whether an inequality of bargaining power would make FDR inappropriate. Section 60I(8)(e) requires a judge to consider whether parties are able to participate effectively in FDR, but this provision is narrower than the terms of the present Reg 62(2) and the other examples given in the subsection focus on more superficial issues than bargaining power, such as the inability to attend dispute resolution because of physical remoteness and disability. The narrow wording of s 60I(8)(e) and the limited examples provided militate against any

---

<sup>12</sup> For example, M Kaye, J Stubbs and J Tolmie, 'Negotiating Child Residence and Contact Arrangements Against a Background of Domestic Violence', Griffith University Research Report 1, Brisbane, 2003.

consideration of the important issue of power imbalance between the parties when determining whether FDR is appropriate. This means that FDR may take place when it is inappropriate and is unlikely to be fair.

**We recommend:**

- Section 60I(7) be amended to include an additional provision that allows for FDR practitioners to certify that the dispute was not suitable for FDR.
- Section 60I(8) be amended to include the requirement for judges to consider inequality of bargaining power (as is required of mediators under Reg 62).
- Section 60I(9) not be introduced.
- Amendment of the Family Law Regulations (or the FLA see next point) so that FDR practitioners are required to conduct information and assessment sessions for clients in parenting cases, to determine whether FDR would be appropriate.
- Reg 62 of the Family Law Regulations should remain in place as the basis on which suitability to attend FDR is assessed by FDR practitioners. However, the wording of the Regulation should be adjusted to reflect the change in terminology (eg, community and private mediators to FDR practitioners) brought about by the Bill. It is arguable that this critical provision dealing with exclusions from mediation processes should not be placed in the rarely accessed Regulations, but rather should be positioned in Subdivision E of the FLA where its relevance and importance is then given greater visibility.
- Section 60J not be introduced.

### Section 63DA: Obligations of advisers

Section 63DA provides that if an adviser (defined in s 63DA(3) to cover legal practitioners, family counsellors, FDR practitioners, and family and child specialists) gives advice or assistance to people regarding parental responsibility of a child after relationship breakdown, the adviser must inform the people that they may enter into a parenting plan. If an adviser provides advice on parenting plans, the adviser must inform the people s/he advises that they could consider the option of the child spending substantial time with each parent.

This provision omits any necessity on the part of advisers to inquire about a history of family violence, and child abuse, neglect, and ill-treatment, in the relationship. If advisers are to do their jobs in a manner consistent with the increasing emphasis being given in the FLA to protecting children from harm (including the introduction of a two-track system in which matters involving the risk of harm to a child should be referred straight to court), the obligation on advisers to inquire about a history of family violence and child abuse, neglect and ill-treatment should be part of the screening process. This is particularly important given that, as noted earlier, victims are reluctant to spontaneously reveal such issues.

Further, the Bill does not appear to contain any provision to ensure that FDR practitioners (s 10J) or advisers providing information about making parenting plans (s 63DA(3)), have the requisite training and expertise that

would enable the ready appreciation and recognition of the existence and impact of past or potential family violence and child abuse, neglect or ill-treatment. The appropriate recognition of past or potential harm of this nature is particularly important in light of empirical research indicating that family violence is not a rare phenomenon,<sup>13</sup> that there is evidence of the coexistence of family violence and child abuse,<sup>14</sup> and that victims of family violence are reluctant to notify practitioners or courts of the existence or severity of family violence.<sup>15</sup>

More generally, we would question the fragmented approach apparently being taken in relation to the introduction of the changes related to FDR — for example, obligations of advisers are set out in s 63DA, but the requirements to be complied with by FDR practitioners are being left to the Regulations (s 10R). We would support requirements regarding the training, qualifications and obligations of the key decision makers in all non-court services being set out in one place, either in the Regulations (as is currently the case) or preferably, in the FLA (see earlier).

**We recommend:**

- The FLA (or the Family Law Regulations), be amended to cover requirements regarding the training, qualification, and obligations of key decision makers in non-court services as a result of the FDR changes.
- At a minimum, amendment of s 63DA(1) and (2) to include, as a first requirement, that advisers must consider the risk of family violence, as well as child abuse, neglect, or ill-treatment, and where this risk exists, refer directly to the court.

**Section 64B(2): Matters with which a parenting order may deal**

Section 64B(2) lists the matters with which a parenting order may deal. Consistent with the Bill's emphasis on shared parenting and non-legal dispute resolution, and the proposed abandonment of the terms 'residence' and 'contact' (Sch 5) (see later), this list has been extended considerably .

Regarding the ordering of s 64B(2), given that 'time' and 'communication' comprise the central aspects of 'contact', it would be preferable for s 64B(2)(b) ('time') to be followed by what is currently s 64B(2)(e) ('communication'). It is important that all potential decision-makers are clear about the full range of options available. One of those options is that what is

---

<sup>13</sup> For example, R Alexander, *Domestic Violence in Australia*, Federation Press, Annandale, 2002; M Eriksson and M Hester, 'Violent Men as Good-Enough Fathers?' (2001) *Violence Against Women* 779.

<sup>14</sup> For example, Kaye, Stubbs and Tolmie, above n 12; A Shea Hart, 'Children Exposed to Domestic Violence: Undifferentiated Needs in Australian Family Law' (2004) 18 *AJFL* 170; K Rendell, Z Rathus and A Lynch, *An Unacceptable Risk: A Report on Child Contact Arrangements Where There is Violence in the Family*, Women's Legal Service Inc, Brisbane, 2000; T Brown, M Frederico, L Hewitt and R Sheehan, *Violence in Families. The Management of Child Abuse Allegations in Custody and Access Disputes before the Family Court of Australia*, Monash University, Melbourne, 1998.

<sup>15</sup> Kaye, Stubbs and Tolmie, above n 12.



currently understood as a child's 'contact' with one parent be limited to arrangements which do not include physical proximity.

**We recommend:**

- The ordering of s 64B(2) be changed, so that the current s 60B(2)(b) is followed by what is currently s 64B(2)(e).

**Section 65DAA: Court to consider child spending substantial time with each parent in certain circumstances**

Section 65DAA provides that the court must consider making an order that the child spend substantial time with each parent, if: a parenting order says (or will say) that parents have joint parental responsibility for the child (s 65DAA(1)(a)); both parents wish to spend substantial time with the child; and it is reasonably practicable for this to occur. The note to s 65DAA says that the child's best interests will still be the paramount consideration when the court decides whether to go on to make a 'substantial shared time' order.

Section 65DAA(1)(a) is intended to ensure that cases involving family violence or abuse are excluded. However, the simple exclusion of cases where joint parental responsibility has not been granted does not provide an adequate legislative framework for what is likely to be one of the most contentious provisions of the Bill. The factors which militate against joint parental responsibility are not identical to the factors which militate against the very different notion of shared time.

The current position is that the court must already consider not only the parties' proposals but also any other appropriate arrangements.<sup>16</sup> The practicalities of shared parenting must also already be considered. Section 65E is the touchstone for decisions. Section 65DAA(1), which is parent rather than child focused, is therefore unnecessary and we would argue inappropriate. Preferably, s 65DAA should not be introduced.

However, if the decision is made to implement s 65DAA it is relevant to consider that many jurisdictions which promote shared parenting time set out clear contra-indicators and strong positive features which must be present before an order can be made which entails a child moving regularly between two households for substantial periods of time. For example, the Revised Code of Washington sets out three major pre-requisites to such an order being made:<sup>17</sup>

- That there are no contra-indicators, such as abuse and violence;<sup>18</sup>
- That the order is in the best interests of the child;<sup>19</sup> and
- A set of logical positive features;<sup>20</sup>
  - That the parties have a satisfactory history of cooperation

---

<sup>16</sup> *U v U* (2002) 211 CLR 238; 191 ALR 289.

<sup>17</sup> Revised Code of Washington (RCW) can be found at <<http://www.leg.wa.gov/RCW>> — particularly Title 26 RCW Domestic Relations.

<sup>18</sup> This refers to restrictions relevant to residential order listed in RCW 26.09.191 factors, an extensive list which tends to relate to abuse and violence.

<sup>19</sup> RCW 26.09.002.

<sup>20</sup> RCW 26.09.187 3(a)(i)–(vii).

- A history of shared performance of parenting functions [This can include an examination of the pre-separation roles played by each of the parents]
- Geographic proximity

These criteria are consistent with the findings of recent research conducted by the Australian Institute of Family Studies regarding the features of successful shared time arrangements.<sup>21</sup>

**We recommend:**

- Section 65DAA not be introduced, or at a minimum be amended to provide similar guidance to the Revised Code of Washington as to when substantially shared time is appropriate.

**Section 65DAC and s 60D(1)(e): Requirement that parents decide jointly about ‘significant changes to the child’s living arrangements’**

Read together, s 60D(1)(e) and s 65DAC require parents to take jointly decisions about ‘significant changes to the child’s living arrangements’.

The child’s living arrangements are the same as the living arrangements of the parent with whom that child lives. The Explanatory Statement accurately predicts that parents will try to use this section to control relocations by the other parent and says s 60D(1)(e) is not intended to cover situations where the child relocates to another residence within the ‘same locality’ unless this produces ‘significant change’ (p 5). However, it is unclear what the words *significant change* and *same locality* might mean and thus the extent to which the ability of mothers to relocate with the children, or to re-establish themselves in other ways post-separation, might become more limited. For example, the words *significant change* might mean: a new person living in the same house as the child; the style of the child’s accommodation changing dramatically; and so on. Is this section to mean that a parent remarrying and moving into new (perhaps substantially better) accommodation with a new spouse (and perhaps step siblings) is required to make this decision jointly with the child’s other parent? That scenario would be squarely covered by this subsection (and indeed is envisaged in part in the Explanatory Statement which refers to substantial changes to the type of the child’s accommodation). Indeed, a carer parent not receiving child support from a payer parent, and thus suffering financial hardship, could in effect be required to negotiate with the parent as to whether they could move to cheaper accommodation — and vice versa, a payer of child support struggling to meet payments and maintain their accommodation would face the same requirement. And what is the *same*

---

<sup>21</sup> B Smyth (ed), *Parent-Child Contact and Post-Separation Parenting Arrangements*, Australian Institute of Family Studies, Melbourne, 2004. Available at Child Contact – Research Report No 9 2004 – Publications – Australian Institute of Family Studies, <aifs.gov.au/institute/pubs/resreport9/main.html>. These factors are found also in the case law: see *Foster and Foster* [1997] FLC 90-281 and *Forck & Thomas* (1993) 16 Fam LR 516.

*locality?* — we are aware of parents seeking orders to restrain moves of other parents between suburbs.<sup>22</sup>

Currently, if parents have a parenting order, and the move of one parent would impinge on the other parent's right to care for the child under the order, then the order already provides sufficient protection. If there is no order in force, then a parent is perfectly entitled to seek an order to restrain a move. A section requiring a parent to negotiate with the child's other parent as to where and under what conditions they will live is highly intrusive and will provide an opportunity for parents to try to exercise control unreasonably over the other parent of their child. This is particularly so in the case of a broadly worded section such as this, which just refers to significant changes to living arrangements. Section 60D(1)(e) is unworkable and unnecessary and should not be introduced.

We would also question the utility of creating legal obligations that are in reality fictional, such as s 65DAC(3)(b). It is one thing to oblige parents to consult each other, it is another to oblige them in the way set out in s 65DAC(3)(b). In our view, exhortations regarding desired parental behaviour should be characterised that way in the FLA, not as fictional legal obligations. If this subsection is intended to create a legal obligation, then in our view it would be inappropriate and too vague.

### Section 68F: Changes to the 'best interests' checklist

The Exposure Draft introduces a two-tiered approach for determining the best interests of children. The first tier (s 68F(1A)) comprises two primary considerations: the benefit to the child of having a meaningful relationship with both parents, and the need to protect the child from physical and psychological harm. The second tier (s 68F(2)) comprises the original s 68F(2) 'best interests' checklist, with some important changes.

#### Section 68F(1A): Primary 'best interests' considerations

Section 68F(1A) mirrors the new s 60B(2) in making ongoing contact with both parents and protection from violence and abuse equally important (so, once again, we consider that protection from harm should be listed first). However, the wording of s 68F(1A)(b) is different from that of s 60B(2)(b). Section 60B(2)(b) refers to protection from harm caused by being subjected or exposed to 'abuse or family violence or other behaviour', while s 68F(1A)(b) refers to protection from harm caused by being subjected or exposed to 'abuse, *ill-treatment*, *violence* or other behaviour'. The wording of s 68F(1A)(b) is the same as the old s 68F(2)(g), but this does not explain why the wording of s 60B(2)(b) is different.

We would prefer to see a consistent approach being taken in the FLA when describing the types of harm from which there is a need to protect children. As

---

<sup>22</sup> The most relevant reported case is *D v SV* (2003) 30 Fam LR 91, in which the Full Court allowed the mother to relocate with the three children of the marriage (boys aged 13, 11, and 9) from the Melbourne suburb of Vermont South to Drysdale, 115 km away, where her new partner had some significant connections. The court, at 97, expressed the view that: 'Where the move is over a relatively short distance such as this one, we would caution against the making of orders that restrict the residence parent's freedom of movement. The inquiry should be directed more at alternative contact or shared residence arrangements.'

discussed earlier, we consider that ‘ill-treatment’ should also be included in s 60B(2)(b). Second, the fact that s 68F(1A)(b) uses the term ‘violence’ rather than ‘family violence’ is problematic, since the term ‘family violence’ is defined in the FLA (s 60D), but ‘violence’ is not. Consequently, s 68F(1A)(b) needs to be amended to use the term ‘family violence’ rather than just ‘violence’.

### Section 68F(2)(ba): The ‘friendly parent’ criteria

The Bill introduces s 68F(2)(ba) — the ‘friendly parent’ criterion — to the effect that the court must consider ‘[t]he 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’.

We commend the recognition in the ‘best interests’ checklist of the importance of safeguarding children from abuse by designating the need for protection from violence as a ‘primary’ consideration in s 68F(1A). However, we are concerned that this protection will be undermined by the inclusion of s 68F(2)(ba) as an ‘additional consideration’. This provision contradicts the concern about exposure to family violence in s 60B(2)(b) and is in direct conflict with the ‘primary’ consideration in s 68F(1A)(b), since a parent who is properly and appropriately seeking to protect a child from the effects of family violence will by definition not be willing to facilitate and encourage a close and continuing relationship between the child and the other parent. It is critical that the reforms do not operate to compromise children’s safety or continue their abuse in the aftermath of separation by generating an expectation that parents should attempt to cooperate with a violent spouse or partner.

As discussed in our submission in response to the *New Approach* Discussion Paper (see earlier) Dr Rae Kaspiew’s recent research<sup>23</sup> shows that attitudes to the other parent are already examined by the court in the context of assessing ‘parental attitudes’ more widely under FLA s 68F(2)(h). This provision requires the court to consider ‘the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child’s parents’. The research suggests that it has become a highly influential consideration under the Reform Act with adverse consequences for the positioning of mothers and the safety of children in circumstances where the court has been faced with increased applications for contact in cases involving domestic violence.<sup>24</sup> The informal presumption in favour of contact in FLA s 60B(2)(b), together with the changed bargaining dynamics under the Reform Act,<sup>25</sup> mean that it has become tactically dangerous for women to object to contact on the

---

23 R Kaspiew, ‘Mothers, Fathers and Parents: The Construction of Parenthood in Contemporary Australian Family Court Decision Making’, PhD Thesis, University of Melbourne, 2005. For further information on this study, see ‘Violence in Contested Children’s Cases: An Empirical Exploration’, (2005) 19 *AJFL* 110.

24 A Shea Hart, above n 14; H Rhoades, R Graycar and M Harrison, *The Family Law Reform Act 1995: The First Three Years*, University of Sydney and Family Court of Australia, Sydney, 2000, at 5.24–5.35.

25 J Dewar and S Parker, *Parenting, Planning and Partnership: The Impact of the New Part VII of the Family Law Act 1975*, Family Law Research Unit Working Paper No 3, Griffith University Brisbane, 1999, p 74.

grounds of domestic violence and abuse except in the most extreme circumstances. Dr Kaspiew's study showed that contact was not opposed even in cases where children had been exposed to violence and abuse and fathers had, for example, untreated mental illnesses, poor parenting skills and/or inadequate parenting capacity.<sup>26</sup> Details of this study were provided at the request of the Family Pathways Branch when our submission regarding the *New Approach* Discussion Paper was being considered.

### Section 68F(2)(j): Relevance of family violence orders

The government proposes to change s 68F(2)(j) so that the court can only have regard to final or contested family violence orders.

Proposed s 68F(2)(j) also directly contradicts the concerns about family violence expressed in s 68B(2) and s 68F(1A). If a primary aim is to ensure the child's safety and protection from harm, then there is no basis on which to direct the court to ignore interim *ex parte* family violence orders. All of the available research (as opposed to anecdotal) evidence establishes that the great majority of women applying for family violence orders have been subjected to repeated incidents of violence before they approach the court for an order.<sup>27</sup> Consequently, an interim *ex parte* order is in fact *good evidence* that violence has occurred in the family over a period of time. Further, the criteria to be satisfied before either a temporary or final protection order can be made vary from State to State. This lack of uniformity makes it dangerous to distinguish between the different categories of order. For these reasons, we consider that it should be left to the discretion of the court to give such weight to any family violence order as it considers appropriate.

### The history of care for the child

At present, no changes are proposed in relation to s 68F(2) to reflect the importance for the child of the 'status quo' — ie, maintaining stability in the patterns of satisfactory past/existing care arrangements of the child.

We consider that the 'best interests' checklist should include as a relevant factor the need to consider 'the history of care for the child'. This factor was recommended for inclusion in Canada's Divorce Act by the Canadian government's *Final Report on Custody and Access* in 2002, which followed several years of consultations and government-commissioned research.<sup>28</sup> This consideration recognises the importance to children in the post-separation period of minimising, as far as practicable, disruption to the routines with which they are familiar.

---

26 Kaspiew, 'Mothers, Fathers, and Parents', above n 23, pp 102–14.

27 Eg, J Stubbs and D Powell, *Domestic Violence: Impact of Legal Reform in NSW*, NSW Bureau of Crime Statistics and Research, Sydney, 1989, p 83; R Wearing, *Monitoring the Impact of the Crimes (Family Violence) Act 1987*, LaTrobe University, Melbourne, 1992; L Trimboli and R Bonney, *An Evaluation of the NSW Apprehended Violence Order Scheme*, NSW Bureau of Crime Statistics and Research, Sydney, 1997, p 31.

28 Canada, *Putting Children First: Final Federal-Provincial-Territorial Report on Custody and Access and Child Support*, Department of Justice, Ottawa, November 2002.

**We recommend:**

- The ordering in s 68F(1A) should be changed, so that the need to protect the child from harm is stated as the first rather than the second principle.
- The relevant forms of harm from which children are acknowledged to be in need of protection should be stated consistently across s 68F(1A) and s 60B(2)(b).
- The relevant forms of harm from which children need to be protected should include family violence, and child abuse, neglect, and ill-treatment.
- Section 68F(2)(ba) not be introduced.
- Section 68F(2)(j) not be amended.
- The s 68F(2) 'best interests' checklist include as a relevant factor the need to consider 'the history of care for the child'.

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

The Exposure Draft introduces a number of changes to encourage less adversarial conduct of child-related matters, which can also be applied to other proceedings with the consent of all the parties.

We are concerned by the decision to mandate less adversarial processes for dealing with child-related proceedings in court. According to the Explanatory Statement, this approach 'largely reflects that taken by the Family Court of Australia in its pilot of the Children's Cases Program' (CCP). This decision is premature, given that evaluations of the CCP are not complete, and that it is as yet unclear whether this model is appropriate for separating families who use the court system.

The CCP evaluations are being conducted by Professor Rosemary Hunter and Dr Jenn McIntosh, and involve wide-ranging consultations with stakeholders including the court, parties to cases, solicitors, barristers and child representatives, the Legal Aid Commission of NSW, and community organisations. The evaluations focus on 100 pilot CCP cases finalised at the Sydney and Parramatta Registries of the Family Court, together with a matched group of 100 control cases from each registry finalised during the same period. Since not all of the pilot and control cases are as yet completed, there is insufficient data available to draw reliable conclusions on questions such as:

- whether the CCP is effective in dealing with cases involving domestic violence and child abuse, which will form the core caseload of the Family Court under the proposed amendments
- what Family Court litigants think of the CCP process
- what impact CCP has on children and parent-child relationships
- the cost-benefit of CCP, and whether it can be sustained within the resources available to the Family Court
- what options and variations in the implementation of the CCP model represent 'best practice'.

We are also mindful of recent English research on parenting disputes in court, which has raised a concern that the emphasis on diverting parents from

court hearings might mean that the service needs of those parents who need the security of a full court process may be compromised.<sup>29</sup> In light of this concern and the lack of knowledge about the impact of the CCP, we recommend that consideration of the implementation of Sch 3 be postponed pending the outcome of the CCP evaluations.

**We recommend:**

- Proposals in the Bill to mandate less adversarial proceedings be deferred until the evaluation of the Children's Cases Program has been completed and the findings carefully considered.

**Section 60KG: Rules of evidence do not apply unless court decides**

Section 60KG changes the rules of evidence so that, in essence, most of the rules of evidence will not apply unless the court decides that to do so would be in the child's best interests.

Professor Hunter's evaluation research on the CCP to date indicates that a relatively low proportion of eligible children's cases entered the CCP pilot in Sydney and Parramatta when the opportunity was offered to take this course, and that many of the strongest supporters of CCP in the legal profession nevertheless consider that CCP is not suitable for all types of children's cases. One of the reasons for parties declining to enter CCP and for legal professionals expressing reservations about CCP is that the suspension of provisions of the Evidence Act is considered problematic when issues arise that require proper testing by means of admissible evidence and cross-examination. This is particularly the case with serious allegations of child abuse or domestic violence. A father accused of abusing his child does not want to have the allegations determined in a context in which hearsay, tendency and character evidence may be admitted. It is also problematic that any criminal charges, such as allegations of child sexual abuse, will be dealt with under relevant State or Territory criminal legislation, and therefore possibly under different evidentiary laws (in States that have not yet adopted the Uniform Evidence Act that applies in the Family Court).

On the other hand, giving the court the discretion to apply the rules of evidence to an issue in the proceedings is also problematic, as it will create scope for greater adversarialism as parties seek to put arguments to the trial judge as to whether or not the rules of evidence should be applied to a particular issue. This same tendency has been observed in other contexts where the rules of evidence *prima facie* do not apply.<sup>30</sup>

The only obvious solution to this dilemma is to make procedural options available rather than mandating a single type of procedure.

**We recommend**

- Section 60KG not be introduced.

---

<sup>29</sup> C Smart, V May, A Wade and C Furniss, *Residence and Contact Disputes in Court, Vol 2*, Department of Constitutional Affairs, London, June 2005, p 89.

<sup>30</sup> See, eg, R Hunter, 'Evidentiary Harassment: The Use of the Rules of Evidence in an Informal Tribunal' in M Childs and L Ellison (Eds), *Feminist Perspectives on Evidence*, Cavendish Press, London, 2000, p 105.

## Schedule 5: Removal of references to residence and contact

Schedule 5 removes references to ‘residence’ and ‘contact’ in legislation including the Child Support (Assessment) Act 1989 and the FLA, replacing these with ‘lives with’ (for residence) and ‘cares for’, ‘spends time with’ or ‘communicates with’ (for ‘contact’).

Underlying the proposal to remove references to ‘residence’ and ‘contact’ is a conflict between the government’s desire to emphasise parental responsibility, and the *practical reality* that children’s arrangements often need to be thought about in terms of *time*, eg, when contact agreements/orders, and child support liabilities (modifications to the formula and departure orders), are being worked out. In the context of child support, the proposal to use the term ‘care’ when it is often ‘time’ that is being described is confusing. Replacing ‘contact’ with ‘care’ also has the potential to further undermine the position of women who have been primary carers of their children, and to give fathers greater acknowledgement than may be warranted, especially in its assumption that ‘contact’ is always the same as ‘care’ — a proposition manifestly unsupported by the empirical evidence.

‘Contact’ and ‘residence’ are neutral terms which describe the matters they refer to in a more accurate and less confusing way than do the proposed changes. The existing terminology should not be changed in the hope that changing language can change the way people think — especially given that, as acknowledged in the Explanatory Statement, this was so clearly not achieved following changes to the Act in 1996.<sup>31</sup>

### We recommend:

- Schedule 5 not be introduced.

Dr Cate Banks, *Griffith University*  
 Ms Becky Batagol, *Monash University*  
 Ms Rachel Carson, *University of Melbourne*  
 Professor Belinda Fehlberg, *University of Melbourne*  
 Ms Margaret Harrison, *University of Melbourne*  
 Professor Rosemary Hunter, *Griffith University*  
 Dr Rae Kaspiew, *University of Melbourne*  
 Ms Mavis Maclean CBE, *University of Oxford*  
 Ms Zoe Rathus, *Griffith University*  
 Ms Helen Rhoades, *University of Melbourne*  
 Dr Grania Sheehan, *Griffith University*  
 Ms Lisa Young, *Murdoch University*

---

<sup>31</sup> S Parker and J Dewar, ‘The Impact of the New Part VII Family Law Act 1975’ (1999) 13 *AJFL* 96; Rhoades, Graycar and Harrison, above n 24.