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SOME PRACTICAL IMPLICATIONS OF THE FAMILY LAW AMENDMENT (SHARED PARENTAL RESPONSIBILITY) BILL 2005

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Introduction:

On present indications the Family Law Amendment (Shared Parental Responsibility) Bill 2005 (called "the Bill") which was introduced in the last sitting of Parliament in 2005, will be passed in the May 2006 sitting of Parliament and will come into effect on 1 July 2006. The Bill will bring about substantial changes to law and practice relating to the parental responsibility of children.It is probably the most significant reform to Australian Family Law in a decade. This paper sets out the writer's thoughts on some of the practical implications of the Bill and is based on the final draft of the Bill that takes into account the House of Representatives' Report on the exposure draft of the Bill (August 2005) as well as the Government amendments to the Bill of 27 February 2006.This article is structured in five stages, each broadly corresponding to the "life" of a family law matter, viewed from the perspective of a family lawyer.These five stages are:

- Before clients come to see a family lawyer
- Pre-action stage:before proceedings are commenced
- Resolution stage;after proceedings are commenced
- Determination stage;decision-making under the Bill
- Post-determination:supervision and enforcement

Using this structure, the practical impacts of the Bill will be explored and discussed.

Background:

There is much history that precedes this Bill and more of this history is grounded in social and political issues than legal ones.When one attempts to distil its essence, however, it seems to be a response to deep concerns about parenting after separation and how these disputes are resolved.In this regard shared parenting is often measured by how much time children spend with each parent. The perception is that, in the past, there has been inadequate opportunity for *both* parents to have meaningful involvement in the lives of their children after separation.

But is this perception an accurate one?What do we, in fact, know about patterns of parenting after separation in Australia?In fact, know quite a lot about this as a result of research undertaken by Bruce Smyth and others at the Australian Institute of Family Studies in Melbourne.We know that, in Australia, at least six broad patterns of father-child contact after separation can be identified.[1] Those patterns can be summarised as follows:

Standard contact	Each weekend or each alternate weekend	34%

Little or no contact	Less than once a year	26%
Daytime only contact	Contact only during the day	16%
Holidayonly contact	Only during school holidays	10%
Occasional contact	Once every 3-6 months	7%
Equal (or near) shared care	At least 30% of nights of the year	6%

These patterns of contact indicate high levels of fractured co-parenting after separation.Just over 1/3 of children have either weekend or alternating weekend contact with their father after separation.Almost half of all children with a parent living elsewhere see their father less frequently than each weekend or each alternate weekend.One quarter of children have contact less than once a year.

These statistics may not reflect the cases that family lawyers encounter in daily practice.Indeed, when the Family Court's own statistics[2] are examined, quite differentpatterns of contact emerge:

	Form 12A Consent Orders	Form 3F Consent Orders	Judicial Orders
Standard contact (51-108 nights)	42.4%	50.0%	65.9%
Little or no contact (<50 nights p.a.)	11.15	16.4%	31.8%
Shared care	12.5%	18.2%	29.5%

(>109 nights p.a.)			

A comparison of these two sets of data needs to be undertaken very carefully.It is not comparing apples to apples. And yet, some very interesting trends seem to emerge.Those fathers who accessed the legal system seem to do far better in terms of the frequency of contact with their children.Indeed, on one view, the deeper the access into the legal system (through to adjudication) the better the results in terms of frequency of contact.These are tentative conclusions, and yet they do need to be kept in mind when considering the potential impacts of some of the changes about to be discussed.Involvement in the legal process may well result in *higher* levels of shared parenting than is generally the case without involvement in the legal process.And yet the Bill actively seeks to discourage access into legal process, particularly by emphasising parenting plans.

STAGE 1:Before clients come to see a Family Lawyer

Family Relationships Centres

Some clients will separate having heard nothing about the Bill, but most will either have heard about its intentions or will rapidly be exposed to its broader ramifications particularly when the Government's community education programme commences. Indeed, the Bill is merely part of a much broader strategy and investment in improving outcomes and experiences arising out of family breakdown in Australia.The centrepiece is, indeed, not the Bill itself but the 65 Family Relationship Centres (FRCs) to be established as a single entry point to the family law system (15 in 2006, 25 in 2007 and 25 in 2008).Moreover, the government will fund scores of other services to help families e.g. 15 new services under the Contact Orders Programme;30 new children's contact services; early intervention and prevention services covering pre-marriage and family relationships eduction, relationships counselling and skills; and significant increased funding for specialist services for men, and for mediation and other dispute resolution services.In short, the Bill represents only the changes to the law, but the changes to the law are merely part (albeit an important part) of a much broader attempt to change community attitudes and expectations relating to family breakdown.

With this background, it is inevitable that in that period between separation (or contemplated separation) through to actually obtaining legal advice, clients will have experienced a pervasive range of influences and messages all coming from non-legal sources.Some of these messages will be unclear.Some of the messages will be mixed.And some will, no doubt, be selectively interpreted and understood (or misunderstood, as the case may be).

As the FRCs are progressively rolled-out, more and more clients will have had some contact with them before getting legal advice.The Bill itself, however, has nothing to say about FRCs.What we do know about FRCs, however, is that they will be "a first port of call to help families to resolve the problem outside the courts, where possible".They will provide information, advice and dispute resolution services to help parents reach agreement on parenting arrangements.We don't know, as yet, precisely *how* the FRCs will become a first port of call and whether, for example, people will be "encouraged" to go there by incentives, or "compelled" to go there because of disincentives if they do not.We don't know whether *all* people will go there or just *some* people.In the early years, geographical location may have a profound influence on all of this.

We know [3] that FRCs will not provide legal advice to clients and clients will not be legally represented in sessions conducted there.Parents are free to obtain legal advice at any time and the Centres should refer clients to legal advice where appropriate, and parents will be encouraged to return to the Centres to continue to work towards agreement.However, the Centres will also encourage parents who need basic legal advice to access the Family Relationship Advice Line on the spot, so that the dispute resolution process can continue.

If parties are not able to reach agreement as a result of attending at FRC, or referral from the FRC, if they need to enter the Family Law system they will probably do so as they have done in the past.In many respects, these people are not of much interest in the present context.Of much more interest, the writer submits, is to consider what happens to

parents who *do* reach agreement.What happens to *those* agreements?How are they recorded and implemented?What safeguards are there to ensure that they represent a best interests outcome for children?

The Bill contains new provisions that strongly emphasise the role of parenting plans, and one reasonable hypothesis must be that when parents do reach agreement post-separation but before getting legal advice, those agreements will be embodied in parenting plans.

Parenting Plans

The Family Law Act 1975 (called FLA) already contains provisions relating to parenting plans.The admonition to parents in s63B that they should reach agreement concerning their children is immediately followed by s63C(1) that defines a parenting plan as an agreement that is in writing, is made between the parents and deals with the matters set out in s63C(2).The clear implication of s63C is that a parenting plan is the preferred method of documenting the agreements that are encouraged in s63B.Section 63C(1A) provides that an agreement is not a parenting plan for the purposes of this Act unless it is made free from any threat, duress or coercion.

The Bill introduces a new s63C(2) in these terms:

"s63C(2) A parenting plan may deal with one or more of the following:
(a) the person or persons with whom a child is to live;
(b) the time a child is to spend with another person or other persons;
(c) the allocation of parental responsibility for a child;
(d) if 2 or more persons are to share parental responsibility for achild—the form of consultations those persons are to have withone another about decisions to be made in the exercise of thatresponsibility;
(e) the communication a child is to have with another person or otherpersons;
(f) maintenance of a child;
(g) the process to be used for resolving disputes about the terms oroperation of the plan;
(h) the process to be used for changing the plan to take account ofthe changing needs or circumstances of the child or the parties tothe plan;
(i) any aspect of the care, welfare or development of the child or anyother aspect of parental responsibility for a child.

Note: Paragraph (f)—if the Child Support (Assessment) Act1989 applies,provisions in a parenting plan dealing with themaintenance of a child (as distinct from child support under thatAct) are unenforceable and of no effect unless the provisions inthe plan are a child support agreement (see section 63CAA andsubsection 63G(5) of this Act)."

The most recent amendment to the Bill also introduces a new s63C(1A) as follows:

"(1A)An agreement is not a parenting plan for the purposes of this Act unless it is made free from any threat, duress or coercion"

This provision is a very half-hearted and probably quite ineffective attempt to take into account the many concerns expressed during the consultation process about the risks associated with parenting plans.Only a Court can decide whether the plan was entered into "free from any threat, duress or coercion", a fact that will provide little comfort in the meanwhile to the parent whose will has been overborne in entering into it.

There are new, supporting provisions in s63C(2A), (2B) and (2C) as follows:

"s63(2A)The person referred to in subsection (2) may be, or the persons referred to in that subsection may include, either a parent of the child or a person other than the parent of the child (including a grandparent or other relative of the child).

(2B)Without limiting paragraph (2)(c), the plan may deal with the allocation of responsibility for making decisions about major long term issues in relation to the child.

(2C)The other communication referred to in paragraph (2)(e) includes (but is not limited to) communication by:

(a)letter; and

(b)telephone, email or any other electronic means."

Compared to the current s63B(2), the Bill proposes a much broader role as regards what parenting plans can achieve, a role which is consistent with the other objectives of the Bill.The theme of the parenting plan as the vehicle to implement a major policy objective of greater shared parenting must surely be apparent.This is confirmed in the proposed s63DA that creates obligations on advisers in these terms:

"63DA Obligations of advisers

(1) If an adviser gives advice or assistance to people in relation to parentalresponsibility for a child following the breakdown of the relationshipbetween those people, the adviser must:

(a)inform them that they could consider entering into a parentingplan in relation to the child; and
(b) inform them about where they can get further assistance todevelop a parenting plan and the content of the plan.

(2) If an adviser gives advice to people in connection with the making by thosepeople of a parenting plan in relation to a child, the adviser must:

(a) inform them that, if the child spending equal time with each ofthem is:
(i) reasonably practicable; and
(ii) in the best interests of the child;

they could consider the option of an arrangement of that kind; and
(b) inform them that, if the child spending equal time with each ofthem is not reasonably practicable or is not in the best interests ofthe child but the child spending substantial and significant timewith each of them is:
(i)reasonably practicable; and
(ii)in the best interests of the child;

they could consider the option of an arrangement of that kind; and
(c)inform them that decisions made in developing parenting plansshould be made in the best interests of the child; and
(d) inform them of the matters that may be dealt with in a parentingplan in accordance with subsection 63C(2); and
(e) inform them that, if there is a parenting order in force in relation tothe child, the order may (because of section 64D) include aprovision that the order is subject to a parenting plan they enterinto; and
(f) inform them about the desirability of including in the plan:
(i) if they are to share parental responsibility for the child under theplan—provisions of the kind referred to in paragraph 63C(2)(d)(which deals with the form of consultations between the parties tothe plan) as a way of avoiding future conflicts over, ormisunderstandings about, the matters covered by that paragraph;and
(ii) provisions of the kind referred to in paragraph 63C(2)(g) (whichdeals with the process for resolving disputes between the partiesto the plan); and
(iii) provisions of the kind referred to in paragraph 63C(2)(h) (whichdeals with the process for changing the plan to take account of thechanging needs or circumstances of the child or the parties to theplan); and
(g) explain to them, in language they are likely to readily understand,the availability of programs to help people who experiencedifficulties in complying with a parenting plan; and
(h)inform them that section 65DAB requires the court to have regardto the terms of the most recent parenting plan in relation to thechild when making a parenting order in relation to the child if it is inthe best interests of the child to do so.
Note: Paragraphs (a) and (b) only require the adviser to inform the people that they could consider the option of the child spending equal time, or substantial and significant time, with each of them. The adviser may, but is not obliged to, advise them as to whether that option would be appropriate in their particular circumstances.

(3) For the purposes of paragraph (2)(b), a child will be taken to spendsubstantial and significant time with a parent only if:

(a) the time the child spends with the parent includes both:
(i) days that fall on weekends and holidays; and
(ii) days that do not fall on weekends or holidays; and
(b)the time the child spends with the parent allows the parent to beinvolved in:
(i) the child's daily routine; and
(ii) occasions and events that are of particular significance to thechild; and
(c) the time the child spends with the parent allows the child to beinvolved in occasions and events that are of special significance tothe parent.

(4) Subsection (3) does not limit the other matters to which regard may be had in determining whether the time a child spends with a parent would be substantial and significant.

(5) In this section:

adviser means a person who is:

(a) a legal practitioner; or
(b) a family counsellor; or
(c) a family dispute resolution practitioner; or
(d) a family consultant."

It should be remembered that whilst family lawyers are clearly advisers for the purposes of s63DA,it is to be expected that most other professionals with whom the clients comes into contact will *also* be an adviser.There is no doubt that parents will be encouraged to use parenting plans at the FRC. The message will be clear;*"consider entering into a parenting plan."*Of course s63DA goes much further than this.It goes beyond the procedural (*how* to implement the agreement) into the substantive (the *content* of the agreement) as s63DA(2) again strongly emphasises shared parenting.

It is quite possible, therefore, that many agreements reached before getting legal advice will be embodied in parenting plans.This may well be the case *even though* parties were encouraged to get legal advice. Had they received legal advice they may well have been told that a parenting plan does not create a legal obligation unless registered.No doubt, if they had received legal advice, they would have been told that registration of parenting plans was abolished by the *Family Law Amendment Act 2003* (see s63C(6)) Curiously perhaps, s63DA does not oblige advisers to mention what is surely an important fact.Section 63DA(2)(h) does create an obligation to inform the parties that the terms of the most recent parenting plan must be taken into account when making a parenting order.

The importance of parenting plans, indeed perhaps even the *primacy* of these plans, is apparent from a consideration of s63DA(2)(e) and the proposed s64D which is in these terms:

"*64D Parenting orders subject to later parenting plans*

(1) Subject to subsection (2), a parenting order in relation to a child is taken to inlude a provision that the order is subject to a parenting plan that is:

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

(2) The court may, in exceptional circumstances, include in a parenting order a provision that the parenting order, or a specified provision of the parenting order, may only be varied by a subsequent order of the court (and not by a parenting plan).

(3)Without limiting subsection (2), exceptional circumstances for the purposes of that subsection include the following:

(a)circumstances that give rise to a need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence;

(b)the existence of substantial evidence that on of the child's parents is likely to seek to use coercion or duress to gain the agreement of the other parent to a parenting plan."

In other words, a later parenting plan "trumps" an earlier parenting order, irrespective of the circumstances leading to the making of both the plan and the order unless threat, duress or coercion can be established.Thus, in theory, a parenting order made after a full hearing with the benefits of child representation and expert reports may be rendered quite nugatory by a later informal parenting plan entered into by the parents without the benefit of any assistance at all.The only statutory protection against forms of inequality in bargaining power is

(1A) which is of dubious assistance.The Report seemed to address the strong expressions of concern raised about parenting plans by recommending that, unless the parenting plan was developed as part of a formal dispute resolution process (whatever that means) there is a cooling-off period of seven clear days to enable parents to get legal advice.But no such provision is contained in the Bill.

Section 64D is well-intended.Its rationale is to recognise changing circumstances that often make parenting orders unworkable.However it fails to recognise that parents often exert pressure on each other to make arrangements that are not necessarily in the best interests of their children.Section 64D(2) creates a formidable obstacle for the Court to take control of difficult cases i.e. only "*in exceptional circumstances"* will a parenting order be able to stipulate that it cannot be varied by a later parenting plan.Even s64D(3) goes only so far in dealing with these concerns.

Indeed, as will be seen below, the existence of a parenting plan must be taken into account in contravention proceedings:ss70NEC, NGB and NJA.

In short, therefore, it is possible, indeed quite likely, that those parents who do reach agreement either independently or as a result of attending their local FRC, or a referral from their FRC, will embody their agreements in a parenting plan.These plans will create no legal obligation but will be taken into account in later parenting proceedings.This trend towards the informalisation of agreements relating to the parenting of children reflects a "no-intervention" principle i.e. that courts and law should not intrude into the agreements made by the parents of children who are, after all, perhaps best placed to work out what is best for their children.Regrettably, in many cases, parents will reach agreements as a result of factors that are quite extraneous and far-removed from considerations of the best interests of their children.Family Law can sometimes be very "paternal" or "maternal" in that it insists on there being a checking mechanism to ensure that the legal arrangements that parties enter into are in accordance with social norms.Thus, e.g. all consent orders are at least notionally "checked" by the Court to ensure that they are in the child's best interests, or just and equitable, depending on the context.Child Support Agreements need to be registered and accepted by the Child Support Agency.Binding Financial Agreements have stringent certification requirements.Of course, the difference between all of the aforementioned and parenting plans is that one creates legal obligations and the other does not.And yet this is a strange dichotomy, and a curious distinction to make, when one considers the importance to society of the decisions parents make about their children, particularly after separation.Parents will inevitably get it wrong sometimes.

These cases will only come to the attention of society when a problem or dispute arises, at which time formal legal intervention is necessary.It is likely, therefore, that even after the Bill becomes law, and parents enter into parenting agreements about their children, they will come to see family lawyers when disputes arise about the interpretation, implementation or enforcement of those agreements.

It may well be then many practitioners will be reluctant to advise clients to use parenting plans and thus, whilst the advice for s63DA may well be to "consider entering into a parenting plan", nonetheless where certainty, predictability and enforceability are important interests for the client, the advice may be to use a parenting order instead.Of course, a parenting order and a parenting plan may not always be mutually inconsistent i.e. it may not always be a case of "either/or" – sometimes it could be a parenting order and a parenting plan.Thus, for example, the parenting order may be a preferred method of documenting where a child lives, how much time the child spends with another person, and how parental responsibility is allocated.But a parenting plan might be appropriate for many of the other matters referred to in s63C(2) e.g. the manner of communication between the child and another person (s63C(2)(e)); dispute resolution arising out of the plan (s63C(2)(g)); the process for changing the plan itself (s63C(2)(h)).

Shared Parenting Messages

The Bill attempts to send out strong messages.The strongest message is about shared parenting after sepa*ration*.The Bill will introduce a new s60B in these terms*:*

"60B Objects of Part and principles underlying it

(1) The objects of this Part are to ensure that the best interests of children are met by:

(a) ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and

(b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and

(c)ensuring that children receive adequate and proper parenting to help them achieve their full potential; and

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

(2) The principles underlying these objects are that (except when it is or would be contrary to a child's best interests):

(a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and

(b)children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives); and

(c)parents jointly share duties and responsibilities concerning the care, welfare and development of their children; and

(d) parents should agree about the future parenting of their children; and

(e)children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).

(3)For the purposes of subparagraph (2)(e), an Aboriginal child's or Torres Strait Islander child's right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right:

(a) to maintain a connection with that culture; and

(b) to have the support, oppurtunity and encouragement necessary:

(i) to explore the full extent of that culture, consistent with the child's age and development level and the child's view; and
(ii) to develop a positive appreciation of that culture."

The changes in s60B, paragraphs (1) and (2) clearly reflect an attempt to strengthen the shared parenting theme in s60B.The statutory message purports to be very clear.This is remedial legislation, it could be argued.A fresh approach to the interpretation of s60B is clearly called for, an approach that embraces and implements the principle of shared parenting after separation.Surely, this is an attempt to distance the new jurisprudence from the old B and B:Family Law Reform Act (1995) FLC 92-755 jurisprudence?

However, the child's best interests are still considered to be the paramount consideration in making a parenting order, but this principle is now expressed in s60CA, rather than s65E.

The shared-parenting message of the Bill is also evident in the proposed s60CC which is in the following terms:

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

Determining child's best interests

(1)Subject to subsection (5), in determining what is in the child's best interests, the court must consider the matters set out in subsections (2) and (3).

Primary considerations

(2) The primary considerations are:

(a)the benefit to the child of having a meaningful relationship with both of the child's parents; and

(b)the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.
Note: Making these considerations the primary ones is consistent with the objects of this Part set out in paragraphs 60B(1)(a) and (b).

Additional considerations

(3) Additional considerations are:

(a) any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views;

(b)the nature of the relationship of the child with:
(i) each of the child's parents; and
(ii) other persons (including any grandparent or other relative of the child);

(c)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;

(d) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:
(i)either of his or her parents; or
(ii)any other child, or other person (including anygrandparent or other relative of the child), with whom heor she has been living;

(e)the practical difficulty and expense of a child spending time with and communicatingwith a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;

(f)the capacity of:
(i) each of the child's parents; and
(ii) any other person (including any grandparent or otherrelative of the child);
to provide for the needs of the child, including emotional and intellectual needs;

(g)the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child's parents, and any other characteristics of the child that the court thinks are relevant;

(h) if the child is an Aboriginal child or a Torres Strait Islander child:
(i) the child's right to enjoy his or her Aboriginal or TorresStrait Islander culture (including the right to enjoy thatculture with other people who share that culture); and
(ii) the likely impact any proposed parenting order under thisPart will have on that right;

(i)the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;

(j)any family violence involving the child or a member of the child's family;

(k)any family violence order that applies to the child or a member of the child's family, if:
(i) the order is a final order; or
(ii) the making of the order was contested by a person;

(l)whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;

(m)any other fact or circumstance that the court thinks is relevant.

(4) Without limiting paragraphs (3)(c) and (i), the court must consider the extent to which each of the child's parents has fulfilled, or failed to fulfil, his or her responsibilities as a parent and, in particular, the extent to which each of the child's parents:

(a)has taken, or failed to take, the opportunity:
(i)to participate in making decisions about major long-termissues in relation to the child; and
(ii) to spend time with the child; and
(iii)to communicate with the child; and

(b)has facilitated, or failed to facilitate, the other parent:
(i) participating in making decisions about major long-termissues in relation to the child; and
(ii) spending time with the child; and
(iii)communicating with the child; and

(c)has fulfilled, or failed to fulfil, the parent's obligation to maintain the child.

(4A)If the child's parents have separated, the Court must, in applying subsection (4), have regard, in particular, to events that have happened, and circumstances that

have existed, since the separation occurred.

Consent orders

(5)If the court is considering whether to make an order with the consent of all the parties to the proceedings, the court may, but is not required to, have regard to all or any of the matters set out in subsection (2) or (3).

Right to enjoy Aboriginal or Torres Strait Islander culture

(6)For the purposes of paragraph (3)(h), an Aboriginal child's or a Torres Strait Islander child's right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right:

(a) to maintain a connection with that culture; and

(b) to have support, oppurtunity and encouragement necessary:

(i)to explore the full extent of that culture, consistent withthe child's age and developmental level and the child'sviews; and
(ii) to develop a positive appreciation of that culture."

The creation of the two-tiered structure, with its priority of considerations, is one of the most significant features of the Bill.The first, and the newest, of the primary considerations sends out a strong message about shared parenting, subject only to the message that it must be safe for the child.Not only is there the potential for greater complexity about the interpretation of s60CC, but there is the possibility that the voice of the child becomes subsumed to the over-arching principle of shared parenting.It is only abuse, neglect or violence that can counter the primacy of shared parenting.Professor Richard Chisholm refers to the *"undignified scramble for legislative pegs on which to hang arguments, with parties eager to find factors that will gain some enhancement."*[4]This is a particularly apt and potentially prescient description of the impact of s60CC.

If these messages are indeed clear enough so as to be embraced by the separating public, and by those professionals who advise them *before* they seek legal advice, then parenting plans will embody agreements that reflect shared parenting values.The types of disputes that may, therefore, and in the fullness of time, present to family lawyers, are disputes around the interpretation, implementation and enforcement of these shared-parenting agreements.

Of course, shared parenting does not mean equal shared parenting.On one view, the aim does not seem to be to create equality of time, but to facilitate a result whereby children spend *more time* with *each* parent.

STAGE 2: Pre-action stage:before proceedings are commenced

Post-amendments advice in parenting matters

We have seen that in stage 1, before clients seek advice from a family lawyer, it is likely that most clients will have had some contact with a FRC.Those who have reached agreement through the FRC may have used a parenting plan, and this constituency may not need legal advice until a problem arises with interpreting, implementing or enforcing their parenting plan.But even this constituency may *go back* to the FRC and its broader support network, either as a precursor to or as an alternative to legal advice.Those who reach

agreement through the FRC but need consent orders will come to family lawyers in the usual way.The task of drawing orders to reflect the agreement reached by the parties should not be too different from the present scheme of things, but the terminology will change to reflect some of the different core concepts introduced by the Bill.In the early stages, no doubt, there will be differences of opinion as to what the new provisions actually mean and whether, in particular, they mean substantive changes, or peripheral ones.It will remain the responsibility of the family lawyer to diligently implement the agreements reached by clients at or through the FRCs, within the parameters of the Act.

Of course, some clients will still consult lawyers first.Indeed, this is highly likely during the period that the FRCs are being rolled-out, but one issue that remains important but, as yet, unascertained, is the impact on client behaviour (in terms of first seeking legal advice) of incentives/disincentives as regards the FRCs.

In this section, therefore, the focus of the exploration is whether (and to what extent) what family lawyers would normally do in the pre-action stages of a parenting matter is changed by the Bill.

For some clients it could be as simple as family lawyers providing general advice about the new Part VII of the Act, and then referring them to a FRC.For these clients, the incentives to go to an FRC, or the disincentives for not going, are so great that the FRC must be the preferred or only gateway to the family law system.The contact with lawyers will be purely for initial advice. At this stage, not enough is known about these incentives and disincentives.They may, perhaps, be based on low-cost or no-cost assistance, both of which have been heralded in the publicity for the FRCs.But low-cost/no-cost services will, even in the short-term, be judged by most consumers based on their perceived quality and effectiveness, and not just on cost.In the short to medium-term, other incentives/disincentives will probably be created e.g. no Centrelink or child support benefits, or no grant of legal aid, or no reduced filing fee etc. if a party has not attempted resolution through a FRCTime will tell what these incentives/disincentives will be, and how effective they will be at minimising the role of lawyers.

In the pre-action stage, the role of family lawyers can be summarised as advice, negotiation and drafting.The Bill has the potential to bring about considerable change in each of these core activities for family lawyers.

In the previous section of this paper, the shared parenting messages contained in the Bill were referred to, especially those contained in the new ss60B and 60CC.Perhaps the greatest impact on both advice and negotiation will be the Bill's strong emphasis on shared parenting.This emphasis is also evident in several other important sections, as will be seen below.

Shared Parental Responsibility

Section 61DA creates a presumption of equal shared parental responsibility when making parenting orders.

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

(1)When making a parenting order in relation to a child, the court must apply a presumption that it is in the best interests of the child for the child's parents to have equal shared parental responsibility for the child.

Note: The presumption provided for in this subsection is a presumption that relates solely to the allocation of parental responsibility for a child as defined in section 61B. It does not provide for a presumption about the amount of time the child spends with each of the parents (this issue is dealt with in section 65DAA).

(2) The presumption does not apply if there are reasonable grounds to believe that a parent of the child (or a person who lives with a parent of the child) has engaged

in:

(a) abuse of the child or another child who, at the time, was a member of the parent's family (or that other person's family); or
(b) family violence.

(3)When the court is making an interim order, the presumption applies unless the court considers that it would not be appropriate in the circumstances for the presumption to be applied when making that order.

(4)The presumption may be rebutted by evidence that satisfies the court that it would not be in the best interests of the child for the child's parents to have equal shared parental responsibility for the child."

In practice, there will probably not be too many cases where parental responsibility is not equal shared, anyway.The focus of most contested parenting cases seems to be on how *time* is shared, rather than *responsibility*.But where equal shared parental responsibility is sought to be avoided, the section emphasises the need to obtain evidence in relation to abuse of the child, and family violence: s61DA(2).Curiously, there is no explicit reference to neglect, as there is in s60CC(2)(a).

Whilst issues of shared parental responsibility rarely arise in interim proceedings, sub-sections (3) and (4) favours the application of the presumption unless clearly inappropriate.

It should be noted that the definition of parental responsibility in s61B is unchanged.So too, the statutory allocation of parental responsibility to each parent is unchanged: s61C.However, three Notes are proposed to be inserted immediately after s61C(1) in these terms:

"Note 1:This section states the legal position that prevails in relation to parental responsibility to the extent to which it is not displaced by a parenting order made by the court. See subsection (3) of this section and subsection 61D(2) for the effect of a parenting order.

Note 2:This section does not establish a presumption to be applied by the court when making a parenting order. See section 61DA for the presumption that the court does apply when making a parenting order.

Note 3:Under section 63C, the parents of a child may make a parenting plan that deals with the allocation of parental responsibility for the child. "

What s61DA does aim to achieve, therefore, is to build on ss61B and 61C by creating a presumption of *equal shared* parental responsibility not, it should be noted, joint and several parental responsibility.This is a clear message sent by the Bill.

There is some inconsistency, or at least potential confusion, introduced into the FLA as a result of this provision.Section 61C states that "each of the parents…. has parental responsibility".The conferral of parental responsibility survives separation.When parents separate, *each* retains full parental responsibility which can be exercised *independently* of the other until such time as that unfettered, independent, parental responsibility becomes fettered by a parenting order.By contrast, s61DA in effect directs the Court to *convert* that independent, several parental responsibility into *equal shared* parental responsibility.Parents who have experienced a relationship breakdown, with all the communications problems consequential upon that breakdown, are now made dependent on each other in relation to parental responsibility.They were severally yoked before separation, but equally yoked if they come to Court.Won't this cause more problems, rather than less?And what is the rationale for the fundamental shift between s61C and s61DA?

When the profession had problems with issues of parental responsibility under the current Act, one would get a parenting order made including specific issues orders, where

appropriate, but the independent grant of parental responsibility was not tampered with unnecessarily – only when there was a problem. The new provision seems to work in the opposite manner – if a parenting order is sought then parental responsibility becomes equal shared and thus each parent is dependent on each other, whether they like it or not, and whether the parents' problem relates to parental responsibility or no*t*.

Section 61DB focuses on decisions made by way of interim order.

"61DB*Application of presumption of joint parental responsibility after interim parenting order made*

If there is an interim parenting order in relation to a child, the court must, in making a final parenting order in relation to the child, disregard the allocation of parental responsibility made in the interim order."

This is a curious provision, indeed perhaps even a pessimistic one.If the "prime" message about equal shared parental responsibility in ss61C and 61DA were in fact implemented, s61DB would surely not be needed as it pre-supposes that the allocation of equal shared parental responsibility was altered at an interim hearing.In some respects, therefore, s61DB is a fail-safe mechanism preventing the *status quo* factor from having an effect that defeats the equal shared parental responsibility message of the Act.

Another important section that will influence advice and negotiation of parenting orders is s65D.

"65DCourt's power to make parenting order

(1)In proceedings for a parenting order, the court may, subject to sections 61DA (presumption of equal shared parental responsibility when making parenting orders) and 65DAB (parenting plans) and this Division, make such parenting order as it thinks proper.

(2)Without limiting the generality of subsection (1) and subject to section 61DA (presumption of equal shared parental responsibility when making parenting orders) and 65DAB (parenting plans) and this Division, a court may make a parenting order that discharges, varies, suspends or revives some or all of an earlier parenting order.

Thus the Court's power to make parenting orders is made *expressly subject* to the presumption of joint parental responsibility in s61DA.Thus another strong message about shared parenting.

Parenting time

An even stronger message is found in s65DAA, but this times the focus shifts from parental responsibility to *parenting time*.Section 65DAA urges the Court to consider the child spending *equal* or *substantial and significant time* with each parent in certain circumstances.

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

Equal time

(1) If a parenting order provides (or is to provide) that a child's parents are to have equal shared parental responsibility for the child, the court must:

(a) consider whether the child spending equal time with each of the parents would be in the best interests of the child; and

(b) consider whether the child spending equal time with each of the parents is reasonably practicable; and

(c) if it is, consider making an order to provide (or including a provision in the order) for the child to spend equal time with each of the parents.

Note 1: The effect of section 60CA is that in deciding whether to go on to make a parenting order for the child to spend equal time with each of the parents, the court will regard the best interests of the child as the paramount consideration.
Note 2: See subsection (5) for the factors the court takes into account in determining what is reasonably practicable.
Substantial and significant time

(2) If:

(a) a parenting order provides (or is to provide) that a child's parents are to have equal shared parental responsibility for the child; and

(b) the court does not make an order (or include a provision in the order) for the child to spend equal time with each of the parents; and the court must:

(c) consider whether the child spending substantial and significant time with each of the parents would be in the best interests of the child; and

(d) consider whether the child spending substantial and significant time with each of the parents is reasonably practicable; and

(e) if it is, consider making an order to provide (or including a provision in the order) for the child to spend substantial and significant time with each of the parents.

Note 1: The effect of section 60CA is that in deciding whether to go on to make a parenting order for the child to spend substantial time with each of the parents, the court will regard the best interests of the child as the paramount consideration.
Note 2: See subsection (5) for the factors the court takes into account in determining what is reasonably practicable.

(3) For the purposes of subsection (2), a child will be taken to spend substantial and significant time with a parent only if:

(a) the time the child spends with the parent includes both:

(i) days that fall on weekends and holidays; and
(ii) days that do not fall on weekends or holidays; and

(b) the time the child spends with the parent allows the parent to be involved in:

(i) the child's daily routine; and

(ii) occasions and events that are of particular significance tothe child; and

(c) the time the child spends with the parent allows the child to be involved in occasions and events that are of special significance to the parent.

(4) Subsection (3) does not limit the other matters to which a court can have regard in determining whether the time a child spends with a parent would be substantial and significant.

Reasonable practicality

(5) In determining for the purposes of subsections (1) and (2) whether it is reasonably practicable for a child to spend equal time, or substantial and significant time, with each of the child's parents, the court must have regard to:

(a) how far apart the parents live from each other; and

(b) the parents' current and future capacity to implement an arrangement for the child spending equal time, or substantial and significant time, with each of the parents; and

(c) the parents' current and future capacity to communicate with each other and resolve difficulties that might arise in implementing an arrangement of that kind; and

(d) the impact that an arrangement of that kind would have on the child; and

The threshold set in s65DAA is actually quite low – that a parenting order provides or is to provide for parents to have equal shared parental responsibility.Having regard to the presumption created in s61DA, that is, more likely than not, a common situation.What the court has to do under s65DAA is to:

i.Consider whether

ii.equal time; or

iii.substantial and significant time;

iv.is in the best interests of the child; and

v.is reasonably practicable.

There is already case-law in administrative law that discusses what it means to "consider".The concept of what it means 'to consider' has received detailed consideration inFederal Court of Australia. In *Tickner v Chapman, (Novill v Chapman; Tickner (Minister for Aboriginal & Torres Strait Islander Affairs) v Chapman 1995* 57 FCR 451) the full Federal Court consisting of Black CJ, Burchett and Kiefel JJ the meaning of 'consider'. Black CJ said at 462:

"The minister must personally consider the report and any representation attached to it. The meaning of 'consider' used as a transitive verb referring to the consideration of some things given in the Oxford English Dictionary, 2nd ed. as "to contemplate mentally, fix the mind upon; to think over, mediate or reflect on, bestow attentive thought upon, give heed to, take note of. 'Consideration of a document suck as a representation or a submission (there is little, if any, difference between the two for these purposes) involves an active intellectual process directed at that representation or submission. "[emphasis added]

Burchett J said at 476:

"What is it to 'consider' material such as a report or representations? In my opinion, the minister is required to apply his own mind *to the issues raised by these documents. To do that, he must obtain an* understanding of the facts *and* circumstances *set out in them, and of the contentions they urge based on those facts and circumstances." [emphasis added].*

Kieffel J said at 495:

"To 'consider' is a word having a definite meaning in the judicial context... It requires that the minister have regard to what is said in the representations, to bring his mind to bear upon the facts stated in them and the arguments or opinions put forward and to appreciate who is making them."

If that case-law is adopted in family law, judges will need to do far more than just state:"I have considered…".

The definition of "substantial and significant time" in s65DAA(3) is an attempt to impose a greater variety of shared time arrangements between parents and children after separation, including arrangements that involve both parent and children in a more diverse range of activities in the child's life.It will probably lead to quantitatively more shared time.

Reasonable practicality is defined in subsection (5).It is, of course, a very important factor in determining whether "equal time" or "substantial and significant time" should be ordered.A number of issues arise:

(1)In subsection (5)(b) the "*parents' current and future capacity to implement*" an arrangement surely invites a consideration of financial issues, child support, property and maintenance?None of the s60CC considerations invite a direct consideration of a parent's financial circumstances other than s60CC(3)(e) referring to expense of contact.In making decisions about parenting matters, financial considerations have not been important, for good policy reasons.Is it possible that subsection 5(b) changes that because it focuses on "*capacity to implement an arrangement*"?Surely a parent's employment, assets, liabilities, accommodation etc. are relevant to their capacity to implement a shared-care arrangement?One can readily imagine some litigants tailoring their property applications to dovetail with the parenting orders they seek, having regard to this section.It was probably always possible to do this under the current Act, but this new provision may well invite litigants to draw a closer link between parenting and financial matters.

(2)Subsection 5(b) determines "*reasonable practicability*" by reference to "*current and future capacity*" but not by reference to past capacity.Ironically, therefore, the court is obliged to consider shared care arrangements for children *after* separation that may, in fact, be totally devoid of the reality of the shared care arrangements that existed *before* separation.The parent who has not been as involved with the child before separation receives, in effect, a windfall after separation.Of course, this may be in the best interests of a child, and the court is well-placed to determine this, but what about the thousands of parents who don't go near a court, or near lawyers, and use parenting plans to implement what they perceive to be the new law?One wonders whether it would be better to expressly refer to "*past, current and future*" capacity, as past capacity is a better indicator of the future.A parent's "*current*" capacity is influenced by the fact of the litigation – most parents are on their best behaviour, and the friendly parent doctrine discussed below will ensure that, anyway.

The practical impacts of s65DAA are enormous.It sends out another very strong statutory message about shared parenting.For self-represented litigants in particular, the section may represent the "positions" they will adopt in negotiation and in litigation about parenting orders.The definition of "*substantial and significant time"* in subsection (3) will render obsolete the former standard contact arrangement of every second weekend and half the school holidays.Much more creative orders are now called for.

The definition of substantial and significant time has both qualitative and quantitative elements to it, and there are matters to be taken into account when drafting these types of orders.

The *qualitative* element of substantial and significant time includes:

1.Time that allows the parent to be involved in the child's daily routine and occassions and events that are of particular significance to the child; and

2.Time that allows the child to be involved in occassions and events that are of special significance to the parent.

The focus of the qualitative element is on what both the parent and child would be doing ie their *activity* during a period.Whilst it still measured in time, the focus is on what the parent and child *are doing*.Thus, for example, such an order needs to allow a parent to be involved in aspects of the child's routine such as waking up in the morning, getting ready for school, breakfast, getting to school, coming back from school, recreation, homework, evening meal, bathing and bedtime etc. For some children sports, hobbies and other extra-curricular activities are part of that routine, and this needs to be taken into account.

Such an order also might incorporate opportunities to spend time together at events of "*particular*" significance to the child and "*special*" significance to the parent – note the different words used here.This might include special events at school, excursions, birthday parties, sports presentation nights, graduations etc for the child and similar events for the parent.But will one parents wedding, or spouses birthday or step-siblings birthday be specially significant? The capacity of parents, especially self-represented ones, to engage in futile but robust arguments about those issues never ceases to amaze professionals working in the field!

So far the discussion has related to the qualitative element of substantial and significant time.It is interesting to observe, however the legislation says nothing directly about the *frequency* of these qualitative interactions – it simply says it must be incorporated into the order.

The *quantitative* element of substantial and significant time includes:

1.Days that fall on weekends and holidays; and

2.Days that do not fall on weekends and holidays.

Here the focus is on *time*, not on the activities that are undertaken during that time.The quantitative element can be satisfied irrespective of whether the parent actually exercises the care of the child, or delegates such care.Whether the care is delegated or not (a frequent source of conflict between parents, in practice) is probably a matter to be determined under the 'best interests' and 'reasonably practicable' banner, and not as a quantitative consideration.

Thus, such an order must include:

1.Days that fall on weekends (ie note the plural in both words) but- some will no doubt argue-not necessarily *both*days of the weekend Ie Saturday *or*Sunday, or Saturday *and*Sunday; and

2.Public holidays and school holidays and, probably, religious holidays; and

3.Other days including weekdays.

Thus, an order that provides for a child to spend time with his or her parent on a Friday during school term, on a Saturday and for one week during school holidays, is , conceivably, an order for substantial and significant time.However, an order that states *each* weekend and *all* of the school holidays is not substantial and significant time.

It is also interesting to observe that the legislation says nothing directly about the *frequency* of these quantitative interactions – it simply says it must be incorporated into the order.

The cruel irony is that legislation which is so clearly intended to produce greater shared parenting after separation may in fact fail to do so because of the complexity of the devices it uses to achieve that result.It does not take too much imagination to already hear in one's mind the sorts of submissions that self-represented litigants will articulate about how one weekend a term, one week day a term and one week of the school holidays is substantial and significant time!

Of course to have addressed the issue of the frequency of both qualitative and quantitive interactions in the legislation would have been equally problematic.

One must never lose sight of the objects of this legislation ie meaningful involvement of both parents, when implementing these key concepts.

Still, there must remain serious concerns about what people will do who do not have legal advice and who do not enter into any legal process or even approach a Family Relationships Centre, but whose interpretation of substantial and significant care is such a narrow one.They may well enter into parenting plans that have little, in reality, to do with the best interests of their children.

Joint decision making

The strong joint parenting messages continue in ss65DAC and s65DAE but not in s65 DAD which, being so politically incorrect, does not exist at all.Section 65DAC unbundles what shared parental responsibility means about major long-term issues in relation to a child.

"65DACEffect of parenting order that provides for shared parental responsibility

(1) This section applies if, under a parenting order:

(a) 2 or more persons are to share parental responsibility for achild; and

(b)the exercise of that parental responsibility involves making a decision about a major long-term issue in relation to the child.

(2) The order is taken to require the decision to be made jointly by those persons.
Note: Subject to any court orders, decisions about issues that are not major long-term issues are made by the person with whom the child is spending time without a need to consult the other person (see section 65DAE).

(3) The order is taken to require each of those persons:

(a) to consult the other person in relation to the decision to bemade about that issue; and

(b) to make a genuine effort to come to a joint decision about that issue.

(4) To avoid doubt, this section does not require any other person to establish, before acting on a decision about the child communicated by one of those persons, that the decision has been made jointly."

The obligation is to make joint decisions after consultation and genuine effort in this regard.The definition of *"major long-term issues"* is found in s4(1) and states:

"4(1) major long-term issues, in relation to a child, means issues about the care, welfare and development of the child of a long-term nature and includes (but is not limited to) issues of that nature about:

(a) the child's education (both current and future); and

(b) the child's religious and cultural upbringing; and

(c) the child's health; and

(d) the child's name; and

(e) changes to the child's living arrangements that make it significantly more difficult for the child to spend time with a parent.

Note: To avoid doubt, a decision by a parent of a child to form a relationship with a new partner is not, of itself, a major long-term issue in relation to the child. However, the decision will involve a major long-term issue if, for example, the relationship with the new partner involves the parent moving to another area and the move will make it significantly more difficult for the child to spend time with the other parent."

There is no obligation to consult on issues that are not major long-term issues, as s65DAE states.

"65DAE No need to consult on issues that are not major long-term issues

(1) If a child is spending time with a person at a particular time under a parenting order, the order is taken not to require the person to consult a person who:

(a) has parental responsibility for the child; or

(b) shares parental responsibility for the child with another person; about decisions that are made in relation to the child during that time on issues that are not major-long term issues.

Note: This will mean that the person with whom the child is spending time will usually not need to consult on decisions about such things as what the child eats or wears because these are usually not major long-term issues.

(2)Subsection (1) applies subject to any provision to the contrary made by a parenting order."

Meaning of s60CC

As strong as all these messages about shared parenting and equal shared parental responsibility are, it is interesting to note that there are no changes to s65E (the best interests of the child remain the paramount consideration) except to relocate it to s60CA right at the beginning of Part VII.Thus, joint and shared parenting are outcomes that are desirable, indeed preferable, but only where this is consistent with the best interests of the child.One would imagine that there are only relatively few cases where an inconsistency might arise.

Section 60CC will, of course, be the most influential provision when it comes to giving advice, and the negotiation that often follows that.It is the successor to s68F.Like many other provisions, it sends out strong messages about shared parenting.The two-tiered structure of s60CC is clearly deliberate, but whilst the primary considerations in (2) are to, in effect, prevail over (3), none of the primary considerations or additional considerations per se are to have more weight than its counterpart primary or additional considerations as the case may be.In other words, it is highly unlikely that the order in which either the primary or additional considerations appear is at all significant.

Section 60CC(2)(a) is a clear shared parenting message which can only be countered by the need to protect the child from abuse, neglect or family violence:sub-section (2)(b).If there is no evidence of abuse, neglect or violence, then the importance of the meaningful relationship with both parents seems, prima facie, to prevail as a primary consideration.But what does this mean in practice when the *primary* consideration is countered by *several additional* considerations?How many additional considerations are necessary to balance and/or counter the primary consideration?One would think that it would have to be more than one additional consideration, otherwise the distinction between primary and additional is redundant.The Explanatory Memorandum at para 50 does seem to contemplate that there "m*ay be some instances where these secondary considerations may outweigh the primary considerations"*.Interestingly, the example provided there seems to indicate that at least *three* additional considerations could outweigh a primary consideration, in a case where abuse, neglect and violence issues do not feature as having particular relevance.

Parents wishing to resist shared parenting after separation really only have limited scope to do so with any degree of certainty, and that involves evidence of abuse, neglect or family violence.Cases involving these allegations are already very common, and where the allegations are substantiated, the Bill probably effects no change to the law.What is uncertain, however, is whether the elevation of the significance of abuse, neglect or family violence to that of primary consideration will somehow exacerbate or increase such allegations?And yet there is a dilemma here for those who make such allegations unsuccessfully – as will be seen below.

As for the additional considerations, subsection (3)(a) refers to any "views" expressed by a child, which is probably no different in substance to its predecessor:"wishes".Paragraph (b) is similar to its predecessor but there is explicit reference to grandparents, as there is in several other sections of the Bill e.g. paragraph (d) of s60CC(3).Paragraph (c) is new, and will be discussed below.Paragraphs (e) (f) (g) (h) (i) and (j) basically reflect existing considerations in s68F(2) as does (l) and (m), with no substantive changes.

The paragraph (k) family violence order consideration is a modification of its predecessor.Now a family violence order is only relevant if it is a final order or it was contested.Thus uncontested or interim family violence orders are irrelevant.The basis of this was, according to para 67 of the Explanatory Memorandum, to address *"a perception that violence allegations are taken into account without proven foundation in some family law proceedings."*It is noted, however, that even if the family violence *order* is not relevant, the underlying family violence is relevant subject to matters of proof.Arguably, the forensic benefit to a case of a family violence order made on a final or contested basis is overstated anyway.Nonetheless, where a forensic advantage is perceived, the complainant will have to see the family violence proceedings through to its conclusions, as the interim order is of no benefit in the parenting proceedings.One could reasonably expect that the defendant, however, will not be at all keen to allow the complainant to obtain this perceived forensic advantage.Whilst the defendant suffers no disadvantage by consenting to a family violence order on either an interim or final basis, it is in fact the complainant who needs a final order, presumably after evidence has been heard.There is potential for this paragraph (k) consideration to actually exacerbate family violence litigation in the State courts.

Subsection (4) builds on paragraphs (3) (c) and (i) and, in effect, introduces several new factors.

The proposed s60CC(4) is new.The court is required to consider the extent to which parents have fulfilled their responsibilities as parents i.e. the extent to which they have been "good".The "goodness" indicators are articulated and include both historical and current participation in decision-making about long-term issues, spending time and communicating

with the child. The "goodness" factors go further, however, and include the extent to which one parent has either facilitated, or failed to facilitate, the other parent's involvement in these indicators.The final indicator looks at the obligation to maintain the child.Arguably, from a legal perspective, there is nothing new in s60CC(4) as all of these matters could have been relevant under existing s68F(2).Nonetheless, the clear statutory drafting cannot be ignored.The articulated factors are significant ones, though no more significant than any other secondary consideration.Section 60CC(4) is, potentially, quite litigation-generating.Cases might become even more acrimonious than they need be because evidence under this paragraph will be led, at length, relating to matters which are ultimately about a parent's conduct (either act or omission).For self-represented litigants especially, s60CC(4) will be read as granting a clear statutory licence to "have a go at their ex".

The combination of s60CC(3)(c) (willingness to facilitate and encourage close relationship between child and other parent), 3(i) (attitudes to child and to responsibilities of parenthood), and s60CC(4)(b) (facilitating the other parent's participation etc.), all cumulatively amount to a new "friendly parent doctrine" in Australian Family Law.The parent who fosters the child's relationship with the other parent i.e. the friendly parent, is more likely to get what they want in a contested application.It is eminently reasonable and sensible at first blush, but on closer examination, presents quite a paradox.If the parent or parents were truly friendly, why would they be litigating over their children?By definition, litigation about where a child will live, and how much time they will spend with the other parent, means that one parent's relationship with the child will not be fostered.A child's time is zero-sum i.e. the more time the child spends with one parent, the less it will spend with the other.The "friendly parent doctrine" focuses the litigation on the other parent's conduct (e.g. one parent trying to show that the other is unfriendly) and distracts attention from the child.As parents start to realise that their friendliness to the other parent will be a matter of potential great judicial scrutiny, they will soon start to think twice about restricting the time spent between the child and the other parent.The risk, of course, is that *justifiable unfriendly behaviour*is potentially high-risk.A parent who has genuine concerns about contact, and therefore wishes to place restrictions on the same, runs the risk of being found an unfriendly parent.A mother who has concerns about violence, abuse, neglect, lack of parenting skills, attachment, appropriateness of physical care arrangements, drugs and alcohol, new partners etc. must think twice.By "hanging their hat on" or "bidding" on other s60CC factors, such a parent runs a risk of losing out on the s60CC(4) factors.Women who have experienced violence in relationships not only face the evidentiary challenge of establishing family violence as defined, but will also face the tactical dilemma of dealing with s60CC(4).If violence is raised but not proved, there is an automatic penalty under s60CC(4), but if violence is not raised, then the grounds for denying the demand cannot be made out, again risking a s60CC(4) "black mark".

One can only trust that s60CC(4) is interpreted by the Court's sensitively and in the broader context of all the s60CC factors.

Section 60CC(4)(a) is somewhat curious in that it is a retrospective on parenting during pre-separation and potentially works against the parent who was primarily involved in non-parenting roles e.g. financial provision for the family.It is curious because it is found in a Bill that is otherwise so full of strong messages about shared parenting after separation.That is probably why subsection (4A) was introduced.It is hoped that the Court will interpret all of the evidence advanced pursuant to the paragraphs in this subsection in the context of how the particular family operated when it was intact, particularly the roles adopted by each parent.Thus, e.g. the parent who was primarily the breadwinner *before* separation isn't punished for desiring to take on a greater shared parenting responsibility *after* separation.Separation is a traumatic time for most parents, and unsurprisingly, often leads to a reconsideration of priorities, especially in relation to children.This reconsideration of priorities is not always attributable to a desire to reduce child support payments or enhance a claim to property settlement.

It is regrettable that s60CC(4) has such potential to focus litigation on the conduct of parents when the real issue relates to the best interests of the child.

The totality of these provisions is a strong policy push towards greater shared parenting, equal shared parental responsibility and, preferably, as a necessary consequence of this, greater shared time with each parent.This must, of necessity, be reflected in the advice that is given the clients about their parenting arrangements.It is probably the advice (or is it

information?) that will be given to clients at FRCs.

Of course, family lawyers give advice, and clients decide what to do with that advice.Some will embrace this advice whole-heartedly, some reluctantly and some not at all. Clients' responses to advice depends as much on how they parented when their marriage was intact, as it does on their future plans and aspirations, and myriad other factors personal to them.It is at this point that law's zone of influence starts to diminish rapidly.It would be far too simplistic to say that those parents who successfully shared parental responsibility, and even time, *during* their relationship will want to do so afterwards.Separation brings about a dramatic re-structuring of the family in all its dynamics.The former triad consisting of mother, father and child/children becomes a dyad of single mother and child, and single father and child. The incentive and motivation that existed before separation may not exist afterwards.Law has little influence in this sphere of restructured family dynamics.

But conversely, parents who *did not* successfully co-parent during their relationship may be forced by law to do so afterwards.Perhaps it was even divergent parenting roles that contributed to or even precipitated the separation?In these cases, the amendments will hopefully assist parents to find a way to co-parent even if it is in a parallel domain.What is reasonably certain, however, is that one parent who was not involved in, or substantially involved, in parenting before separation, now has the opportunity to do so after separation if it is considered to be in the child's best interests.The parent, therefore, whose major role in the intact family was that of "breadwinner" and "support" or "reserve" parent, seems entitled after separation to assume a far greater role in terms of parenting if he or she so desires.The other parent, therefore, who assumed the role of parent, homemaker and supporter of the breadwinner, and who has developed all those skills that are essential ingredients to successful parenting during the intact marriage, is given the opportunity after separation to relinquish this role, at least in part, and to develop those breadwinning skills that might have been lost or diminished whilst parenting.All subject, of course, to the best interests of the child.And hopefully, for both parents, there will be opportunities in the workplace: for one to reduce their breadwinning and for the other to increase theirs.Hopefully, a "safety-net" of social security and other related benefits will be there to support a new regime of shared parenting.

It is not possible to generalise too much as to how clients will respond.The statutory messages are clear, however.What is unclear is how they will be received.

Post-amendments negotiation in parenting matters

Negotiation of orders by way of settlement of parenting matters is by far the most prevalent outcome under the current regime, and it is still likely to be the case after the amendments come into effect.Negotiation , of course, reflects the advice given to clients and how that advice is received i.e. the instructions given.In most cases, the negotiation will be around issues of time, and possibly also around issues that are "major long-term issues" as defined in s4(1).These issues are not dissimilar to the most prevalent current ones.While the issues may be the same, will these issues be more frequent, or more contentious, than they are currently?In the short-to-medium term, it is quite likely that these issues *will* arise more frequently and *will* be more contentious than is the case at the moment.

This is to be expected with new, overtly remedial legislation.As there was a "spike" (i.e. a significant short-term increase) in the number of parenting applications filed after the Family Law Reform Act 1995, this may well be replicated with the current Bill.The "statutory messages" will be "received" by a disparate audience in different ways.The level of understanding of the legislation within the legal profession may also be varied.As family law is the largest area of law in which Australian lawyers "dabble", it is highly likely that the specialist family lawyers will interpret and applythe new law in different ways to the general practitioner.Cultural differences may well emerge, an unsurprising thing, having regard to the vast geographical area that Australian family law seeks to influence.The emergence of case law will assist to "settle down" and give coherence to the implementation of these statutory messages.As a result of all these influences, and may more, negotiation of issues of time and aspects of parental responsibility may be rendered more difficult in the short-to-medium term.

Negotiations about time will be particularly difficult in those cases where one parent wishes to adopt a parenting role after separation quite different from their role before

separation.Thus, one parent wishing to become a partner in shared parenting after separation, perhaps for the first time in their children's lives, will be met by the cries of resistance from the other parent, including sceptical expressions of concern about ulterior motives e.g. reduced child support, greater claims to property settlement etc.And yet time is a concept that is very amenable to negotiation which can result in very flexible, child-focussed outcomes.[5]

New terminology

Negotiation may also become more difficult, at least in the short term, because of changes to terminology.The existing concepts of orders in relation to residence, contact and specific issues is abandoned.Parenting order is now defined in s64B as follows:

*"**64B**Meaning of parenting order and related terms*

(1)A parenting order is:

(a)an order under this Part (including an order until furtherorder) dealing with a matter mentioned in subsection (2); or

(b)an order under this Part discharging, varying, suspending or reviving an order, or part of an order, described in paragraph (a).

(2) A parenting order may deal with one or more of the following:

(a) the person or persons with whom a child is to live;

(b) the time a child is to spend with another person or other persons:

(c) the allocation of parental responsibility for a child;

(d) if 2 or more persons are to share parental responsibility for a child - the form of consultations those persons are to have with one another about decisions to be made in the exercise of that responsibility;

(e) the communication a child is to have with another person or other persons;

(f)maintenance of a child;

(g)the steps to be taken before an application is made to a court for a variation of the order to take account of the changing needs or circumstances of:

(i)a child to whom the order relates; or
(ii) the parties to the proceedings in which the order ismade;
(h) the process to be used for resolving disputes about theterms or operation of the order;
(i) any aspect of the care, welfare or development of thechild or any other aspect of parental responsibility for achild.

The person referred to in this subsection may be, or the persons referred to in this subsection may include, either a parent of the child or a person other than the parent of the child (including a grandparent or other relative of the child).

Note: Paragraph (f)—a parenting order cannot deal with the maintenance of a child if the Child Support (Assessment) Act 1989 applies.

(3)Without limiting paragraph (2)(c), the order may deal with the allocation of responsibility for making decisions about major long-term issues in relation to the child.

(4) The communication referred to in paragraph (2)(e) includes (but is not limited to) communication by:

(a)letter; and
(b)telephone, email or any other electronic means.

(4A) Without limiting paragraphs (2)(g) and (h), the parenting order may provide that the parties to the proceedings must consult with a family dispute resolution practitioner to assist with:

(a)resolving any dispute about the terms or operation of theorder; or
(b) reaching agreement about changes to be made to the order.

(6)For the purposes of this Act:

(a)a parenting order that provides that a child is to live with aperson is made in favour of that person; and

(b)a parenting order that provides that a child is to spend time with a person is made in favour of that person; and

(c)a parenting order that provides that a child is to have communication with a person is made in favour of that person; and

(d)a parenting order that:

(i)allocates parental responsibility,for a child to aperson; or

(ii)provides that a person is to share parental responsibility, is made in favour of that person."

The new concepts are now "living with", "spending time with", "have communication with" and parental responsibility orders dealing with major long-term issues, and issues that are not major long-term issues.No doubt negotiations will include trying to establish when a child spending substantial time with each parent under s65DAA ceases to be a child "spending time with" one parent but becomes a child "living with" that same parent.Will the difference between these two types of parenting orders be measured quantitatively or qualitatively?It may well simply depend on the individual circumstances of each case.And perhaps it simply does not matter in most cases, at the end of the day.

Drafting parenting orders after the amendments

The Bill even presents new drafting challenges for family lawyers.In some respects drafting parenting orders in hard children's cases has always been problematic.The collective

wisdom, experience and creativity of teams of family lawyers, including counsel, can often be defeated by parents in entrenched conflict over their children whose ingenuity in finding tiny gaps in the orders is matched only by their lack of insight into how their behaviour adversely impacts their children.But putting aside these difficult cases, s64B(2) raises some interesting issues that might be new for some family lawyers. In particular, s64B(2)(g) and (h) and s64B(4A) is worth considering.

Paragraph (d) refers to the "form of consultation" persons who have joint parental responsibility should have when making decisions about children.At one tangible level, the drafting here might specify whether the consultation is verbal, by telephone, or in person, by mail, fax or email, through an intermediary etc.At another level, it might specify that consultations must be in good faith, child-focussed, non-derogatory etc.

Paragraphs (g) and (h) expressly contemplate that orders can specify what could amount to be pre-conditions to the further exercise of the court's jurisdiction to vary the parenting order being made.Paragraph (g) recognises that, whilst an order may be made at a quite specific, finite point in time of the life of a child, it is nonetheless highly likely that a child's circumstances will change. Indeed, it goes further to recognise that the circumstances of parents might also change.Drafting to take into account this paragraph might provide, for example, that the parents and/or the child attend family therapy, or counselling, or psychology or some other form of expert assistance to help the family deal with their changed circumstances.All of this might be expressly stated to be a pre-condition to making an application to a Court.Whilst paragraph (g) seems to focus on assistance to take into account changing needs or circumstances, paragraph (h) seems to focus on dispute resolution i.e. it almost assumes that the assistance referred to in (g) has not resolved the conflict arising in the circumstances.A paragraph (h) provision in an order might specify, for example, that the parties should attempt counselling, mediation or conciliation if a dispute arises about the interpretation, implementation or enforcement of their orders.Such orders must be very clear and precise, leaving no doubt as to what the parties' obligations are in the circumstances.Whilst it is probably not possible to formally create a precondition to the exercise of the jurisdiction of the Courts under paragraph (h), it might become one of the first issues raised if and when the matter comes before the Court.Sub-section (4A) confirms the intent of these paragraphs, and specifically refers to family dispute resolution, which will be discussed below.

One wonders also whether, for some parents, the definition of "major long-term issues" in s60D(1)might potentially create new problems that need to be anticipated through careful drafting.When the Family Law Reform Act 1995 came into effect in 1996 one concern that was later found to be unwarranted was that orders would become more complex because of specific issues orders i.e. attempts to regulate the minutiae of parenting not covered through broader orders governing long-term and day-to-day care, welfare and responsibility for children.History seems to indicate that the vast majority of separated parents simply sorted these issues out in consultation with each other and without recourse to the legal system.For example, there were and are relatively few disputes that present primarily as being about education, religious and cultural upbringing or health.Perhaps slightly more disputes presented around the issue of the child's name, and more prevalent were disputes about living arrangements e.g. relocation.Often, some of the issues arose incidentally in the context of disputes that were really about something else e.g. parenting arrangements immediately or shortly after separation.

On one view, the statutory definition of major long-term issues in the context of the new regime will have no real impact as regards the issues covered by the definition – the vast majority of parents will simply sort it out through consultation.Of course, another hypothesis is that relatively few disputes presented over these issues in the past because one parent felt quite disempowered.On this hypothesis, the parent with residence had sway over these decisions under the current regime.Residence invariably carried with it responsibility for day-to-day decision-making about a child's care.The "other" parent may well have felt powerless to influence decisions made about education, health, religious and cultural upbringing, name and living arrangements. It is possible to argue, however, that the powerful messages sent out by the Bill in relation to shared parenting and equal shared parental responsibility, have the potential to empower *all* parents in relation to these issues and not just those with whom the child lives.If this is the case, the strong message of the new law, when coupled with the statutory definition of major long-term issues, may actually serve to *increase* disputes about these issues. This is where drafting of orders can play a preventative role.Family lawyers may well adopt the view that the best way to prevent conflict about these issues is to address them explicitly in orders.

How will Part VII of the Act be interpreted after 1 July 2006?

The answer to this question determines whether the changes wrought by the amendments are substantive or superficial.From a purely legal perspective, the answer will depend on how certain key sections inter-relate to each other.

The key sections are:

- Section 60B – the objects and principles underlying Part VII
- Section 60CA – the re-expression of s65E:that a child's best interests are paramount
- Section 60CC – how a child's best interests are determined
- Section 61DA – presumption for equal shared parental responsibility
- Section 65DAA – equal, or substantial and significant time

The first thing to note is that the legislature has not purported to change the paramountcy principle i.e. that a child's best interests are the paramount consideration in making a parenting order.Indeed, by bringing it forward from s65E to s60CA, immediately following the objects provisions, but otherwise at the commencement of Part VII, it has reasserted the paramountcy principle.However, what the legislature has done is to explain, in more detail, how a child's best interests are to be determined.The embodiment of this is found in s60CC, a far more prescriptive version of its predecessor, s68F.However, ultimately, the Court's expression of what is, on the facts of a particular case, the best interests of a child, is found in a parenting order under s64B.Because of s61DA, there will often be a presumption of equal shared parental responsibility in parenting orders that leads the Court to consider at least two statutory expressions of what the legislature considers to be in the best interests of children so far as the time they spend with their parents after separation.Those statutory expressions are found in s65DAA:equal time or substantial and significant time.It is a complex and convoluted pathway that starts off with a very broad direction and unfettered discretion (child's best interests paramount) but which is gradually fettered and narrowed as the decision-making process moves from generalised concept to concrete order.

The challenge facing the Full Court as regards these amendments is similar to that confronted by the Full Court as *B and B: Family Law Reform Act 1995 (1997) FLC 92-755*.There the Court decided that s65E prevailed:

"The best interests of the particular children in the particular circumstances of that case remain the paramount consideration.A court… starts from that essential premise and it remains the final determinant." (para 9.51).

That proposition should not, it is submitted, change, save that s60CA replaces s65E.

The Full Court then considered which of ss60B or 68F(2) was the next most influential provision in the decision-making process.The Court found, in effect, that s68F(2) was the implementation of s65E, and that s60B was to be read subject to both ss65E and s68F(2). The objects provisions in s60B:

"provide guidance to the Court's consideration of the matters in s68F(2) and to the overall requirement of s65E." (para 9.54).

Of course, the versions of ss60B and s68F(2) in the current amendments are significantly different. The shared-parenting "message" in s60B was not matched in s68F(2). Indeed the dissonance between these two sections when it comes to shared parenting is readily apparent when they are read alongside the "new" s60B as compared to s60CC.The objects of the legislation are far more closely aligned to how they are manifested and are to be implemented under s60CC.

The Full Court's admonition in *B and B* was that the wording of s68F(2) made it clear that the court *"must consider*" the various matters set out therein and that the

"weight which is attached to any one consideration will depend upon the circumstances of the individual case" (para 9.53).

The Full Court also noted that he list was not intended to be exhaustive and that :

"the inquiry is a positive one tailored to the best interests of the particular children and not children in general..." (para 9.53).

Of course the successor to s68F(2) does not so easily lend itself to such an interpretation about weighting.The legislature has spoken – there are *primary* considerations, and there are *additional* considerations.The former is a closed class, the latter is not, as s60CC(3)(m) confirms.This "closed class" of primary considerations is actually a closed but broad class.For example, the s60CC(2)(a) consideration about *"benefit to the child of having a meaningful relationship"* necessarily incorporates, it could be argued, a number of factors that the section treats as additional considerations in s60CC(3).Hence, on this argument, "benefit" cannot be ascertained except by reference to what are the child's views [(3)(a)] relationships with parents [(3)(b)] capacity of parents etc.The difficulty with this interpretation is that it is reading down "primary consideration" – primary loses its distinctiveness and becomes meaningless.

The problem with using *B and B* as a point of reference in interpreting the new Act is that it emphasised the importance of the exercise of discretion in each case, in a context where the Act permitted discretion to prevail.Arguably, under the new Act, discretion is fettered or circumscribed.Whereas in *B and B* the Full Court could confidently say:

".....the legislature and the courts.... have eschewed the application of fixed or general rules as the solution."(para 9.57)

that is no longer the case under the new Act because discretion is exercised within more narrow confines.Moreover, whereas the Full Court could confidently assert that the:

"Act contemplates individual justice.Any question of presumption or onus has the potential to impair the enquiry as to what is in the best interests of the particular children" (para 9.59), now it could be asserted that the Act rather precisely and prescriptively creates a far more structured enquiry about what is best for particular children. On this view, sections 60CC(2) and 65DAA are the statutory manifestations of a new structured enquiry.

It may seem strange, perhaps discomforting, that the statement of the paramountcy principle in s60CA, which is so full of the promise of unfettered discretion and individualised justice, is so quickly reined in at s60CC.But that is the power of the legislature.Section 60CA cannot be understood and applied without reference to ss 60CC and 65DAA.

But how then is s60CC to be interpreted and applied?After all, s60CC(1) requires the court to consider the matters set out in subsections (2) and (3).As indicated above, primary and additional considerations cannot have equal weighting because then they are no longer primary or additional.But if that is the case, then in theory no number of additional considerations could ever cumulatively outweigh any one of the primary considerations.Surely there must be middle ground, particularly when an outcome based on the paramountcy principle points to additional considerations having greater weight than primary ones?

Another approach might be to look at these provisions from the perspective of the *end result* of the s65E deliberation i.e. the parenting order made. This is legitimate because the express words of s60CA state *"In deciding whether to make a particular parenting order.."* i.e. the context of the best interests principle is necessarily established in this regard).As we have seen, s65D confers on courts the power to make a parenting order, subject to s61DA, the presumption of equal shared parental responsibility.

As we have also seen, s65DAA requires the court to consider equal time or substantial and significant time.Thus, on this approach to the new provisions, because the Act is so prescriptive about *how* the paramountcy principle is to be implemented in the making of a *particular* parenting order, the key to understanding how the relevant provisions operate is to understand that, so far as the legislature is concerned, equal time or substantial and significant time are the desired manifestations of the paramountcy principle, subject to

s65DAA itself.But this begs the question because s65DAA(1)(a) and (2)(c) again require the court to consider the best interests of the child, as well as reasonable practicability.The best interests principle, or paramountcy principle, prevails yet again.

Does this suggest that, in reality, it is s65DAA that is the lynch-pin to understanding all of Part VII?What does s65DAA actually mean?

Section 65DAA seems to expressly contemplate two scenarios – equal time, or substantial and significant time.This does not necessarily exhaust the court's powers about what orders it can make, however, and it is possible that neither equal time nor substantial and significant time would be in the best interests of the child and reasonably practicable.The Court's obligation is, in each case, to consider.It must, in order words, seriously think about making these types of orders, but it can still do something else.The discretion is still there, albeit it is a guided and therefore fettered one, but not entirely fettered.The intention seems to be that *if* it is in the best interests of the child, *and* it is reasonably practicable, then equal time or substantial and significant time are the preferred statutory outcomes.But it is not a statutory formula e.g.it is not:

best interests + reasonably practicable = equal time;

or

best interests + reasonably practicable = substantial and significant time

The equals symbol in this equation is a discretion:"to consider".This, no doubt, enables the Court to take into account the myriad circumstances and factual situations that present in children's cases.No doubt many litigants, both represented and self-represented, will regard s65DAA as presenting a formula which produces formulaic outcomes.Indeed, one can foresee many cases where best interests and reasonable practicability does, in fact, point towards either equal time or substantial and significant time.The latter is probably more likely than the former, having regard to the current low rate of shared parenting in the Australian community today.But it's still not a formula, and it's certainly not a presumption, though one may well expect that in most cases it is the likely outcome.

In this regard, the situation may well be little different to the parallel situation in assessment of contribution in long marriages.There is no presumption or formula that states that contribution in long marriages is equal, but somehow that seems to represent the outcome in the vast majority of cases. Likewise, it may well be that the outcome in the vast majority of parenting cases will be either equal care or substantial and significant care, even though there is no formula or presumption to that effect.

These are discretionary powers and while s60CA is extremely wide, it is not uncontrolled and the Act thus contains a number of other provisions that guide the Court in exercising its discretion.In this respect it is very similar to the broad discretion granted under S79, and the comments of the High Court in Norbis v Norbis (1986) 161 CLR 513 are useful in this regard.For examples consider the comments of Mason and Deane JJ at pp 518-519

"Section 79(1) of the Act provides that the Court may make such order as it thinks fit altering the interests of the parties to a marriage in the property of the parties or either of them. In so providing, the Act confers a very wide discretion on the Court.But that discretion is not unlimited.Its exercise is conditioned by the requirement that it is just and equitable to make the order (s. 79(2)), and that the Court take into account the matters specified in s. 79(4) and the general principles embodied in ss. 43 and 81, so far as they are applicable."

"The sense in which the terms "discretion" and "principle" are used in these remarks needs some explanation."Discretion" signifies a number of different legal concepts…..Here the order is discretionary because it depends on the application of a very general standard — what is "just and equitable" — which calls for an overall assessment in the light of the factors mentioned in s. 79(4), each of which in turn calls for an assessment of circumstances.Because these assessments call for value judgments in respect of which there is room for reasonable differences of opinion, no particular opinion being uniquely right, the making of the order involves the exercise of a judicial discretion.The contrast is with an order the

making of which is dictated by the application of a fixed rule to the facts on which its operation depends.

Consider also the comments of Brennan J at p 536

"The orderly administration of justice requires that decisions should be consistent one with another and decision-making should not be open to the reproach that it is adventitious.These considerations are of special importance in the administration of the law relating to custody of children, maintenance and property arrangements on the dissolution of marriage.The anguish and emotion generated by litigation of this kind are exacerbated by orders which are made without the sanction of known principles and which are seen to be framed according to the idiosyncratic notions of an individual judge. An unfettered discretion is a versatile means of doing justice in particular cases, but unevenness in its exercise diminishes confidence in the legal process."

In the first extract, Mason and Deane JJ contrast the broad discretion granted under s79 to the application of a fixed rule.In the second extract, Brennan J reminds us about the importance of consistency, particularly when there is a large discretion.

On one view we don't have the "fixed rule" referred to by Mason and Deane JJ because even s65DAA is subject to best interests and reasonable practicability.But we probably *do* have a discretion that is more fettered than it once was because of the combined effect of ss60B, 60CA, 60CC, 61DA and 65DAA.This is consistent with the need that Brennan J identifies for some measure of consistency.

Instead of viewing the effect of these legislative changes as resulting in a more fettered discretion, another way of looking at them is as statutory guidelines particularly ss60C and 65DAA.Whilst the conceptual differences are perhaps semantic, viewing these provisions as statutory guidelines at least means the discretion remains quite broad and unfiltered – its just that the legislative 'hopes' or "expects" that the exercise of a discretion will follow certain relatively predictable paths ie equal time, or substantial or significant time.

When in doubt about how new legislation works, and what specific provisions actually mean, the Acts Interpretation Act 1901 can be called in to assist. Thus, for example, s15AA(1) of that Act suggests that in interpreting a provision , a construction that promotes the purpose or object underlying the Act is preferred to a construction that would not promote that purpose of object. This takes us back to s60B with its clearly articulated objects and principles all of which, it is substituted, contain strong shared parenting messages. But shared parenting doesn't necessarily always mean either equal share of substantial and significant time, though it might mean either of these most of the time, where there are no contra-indications such as violence, abuse or neglect.

Section 15AB(1) of the Acts Interpretation Act also enables one to have regard to extrinsic materials if this assists in ascertaining the meaning of a provision , but only if the meaning of the provision is ambiguous, obscure or its ordinary meaning is manifestly absurd or is unreasonable.These extrinsic materials are substantial, and their common theme is the desirability of shared parenting after separation, subject only to violence, abuse or neglect.Searching these extrinsic materials in support of an interpretation of these new provisions that is not consistent with the shared parenting is a futile exercise.

In what situations, however, might the s65DAA preferred outcome not, in fact, apply?It will obviously not apply where primary consideration (b) is found to be an issue i.e. abuse, neglect or family violence.Where such findings are made, s61DA(1) will probably not apply and thus s65DAA will not apply.In passing, it is interesting to note that, whereas primary consideration (b) in s60CC(2) refers to abuse, neglect or family violence, s61DA(2) only refers to abuse or family violence i.e.it does not refer to neglect.This could be dealt with under s61DA(4) however.

However, there are also other less dramatic situations where it is strongly arguable that either equal time or substantial and significant time are not appropriate, even though it might otherwise be in the best interests of the child, and be reasonably practicable.On one view, the "one size fits all" approach in s65DAA does not take into account very young children

(e.g. infants and toddlers) and older children (teenagers).With very young children there are practical issues of breast-feeding and sleeping routines, as well as the more difficult issues of attachment generally. [6] .With older children there are those special challenges associated with a developmental stage when children are asserting themselves, sometimes with much gusto.Whilst their views are merely additional considerations under s60CC(3), any order made under s65DAA that ignores these views are fraught with difficulty .It may well be that both of these situations could be adequately dealt with by the "best interests" and "reasonable practicability" thresholds in s65DAA anyway.In this regard the description of reasonable practicability in s65DAA(5) is clearly open to broader interpretation – see paragraph (e).

Will Relocation cases change after 1 July 2006

One of the most interesting and important issues arising out of the Bill is whether the law relating to relocation has changed.There is little doubt that making relocation more difficult was one of the aims of these amendments, but will this succeed?

There is no doubt that Australians are a very mobile population.Research that was released in April 2006[7] indicates that approximately 17% of the population moves each year and that families with children under the age of 15 move most often.The most common reason for moving reported in the data collected in this research was "personal or family reasons" which includes, amongst other things, moving out because of relationship breakdown.Of significance in the present context is that within the group that stated they moved for family reasons, 31.7% moved more than 20 km., including 17.9% who moved more than 100 km.One would have reasonably thought that shared parenting becomes difficult the greater the distance between parents.Experience suggests that above 20 km. there are significant logistical challenges to shared parenting.Thus, a Bill that encourages greater shared parenting after separation is set in a statistical context indicating high levels ofmobility and often distances that make shared parenting quite difficult.The "messages" about shared parenting in the Bill, and the statistical reality about population mobility, point to future difficult decisions about relocation.

The closely related issues of relocation and mobility of children have been the subject of extensive litigation over recent years.The issue in the present context is whether the new legislation makes a difference, and clarifies the law.One of the first things to note in this regard is that all of the relocation cases emphasise the importance of the governing legislation.Take, for example, the decision of Kirby J in *AMS –v- AIF (1991) FLC 92-852* commencing at para.111.His Honour reviewed the prior case-law, not just from Australia, but other common law jurisdictions and derived a number of general propositions.Kirby J's first proposition is that:

"*…each case depends on the application of the governing legislation which, in turn, is in a constant state of amendment and re-expression."*

His Honour's next proposition is that:

"…. unless legislation provides otherwise, no single factor is dispositive of decisions governing the residence of a child in the context of the proposed relocation."

The issue then is, in this context: do the amendments to the FLA provide a clear re-expression of the legislature's desire for shared parenting after separation? If so, is this to have primacy over the desire of one parent to relocate in such a way that gives expression to their individual freedom of movement, but at the expense of a meaningful relationship between the child and the non-relocating parent?

As noted in an earlier section, the answer may depend on how, precisely, the Full Court of the Family Court determines that the new provisions of the Act inter-relate with s60CA (formerly s65E).On the face of the Act as amended, however, one would argue that if a relocation would result in one parent *not* having a meaningful involvement in the life of the relocating child and in the *absence* of evidence of violence, abuse or neglect, the weight of the statutory provisions indicating *against* relocation exceeds that indicating *for* relocation.

This might be illustrated as follows. In a situation where there are no issues about abuse, neglect or violence, and one parent seeks to relocate to a place where it becomes difficult for the other parent to have a meaningful involvement in the life of the child , what are the operative provisions in the legislation? The following tableeliminates sections that might apply equivocally, but assumes there is a child who expresses views in favour of relocation, and a parent who can make a convincing case that their own capacity to provide for the child is enhanced by the relocation.

FLA provisions indicating against relocation	**FLA provisions indicating for relocation**
s60B(1)(a)	
s60B(2)(a)	
s60B(2)(b)	
s60CC(2)(a)	s60CC(2)(a)
s60CC(3)(c)	s60CC(2)(f)
s60CC(3)(d)	
s60CC(3)(e)	
s61DA, S61DAC and definition of *"major long-term issue"* in s4(1)	
s65DAA(1) or (2)	

The above is, of course, an over-simplification of the typical situation.Real relocation cases *do* often involve allegations of violence, abuse or neglect.Nonetheless, at least on a

superficial basis, the weight of the anti-relocation factors remains evident.

And yet, one is left with a measure of disquiet about this result.It seems difficult indeed to establish that a relocation can be in the best interests of a child, in the absence of violence, neglect or abuse.Family Law has long since renounced "compelling reasons" as an obstacle to be crossed by the relocating parent.And yet that obstacle seems minor compared to the statutory provisions arrayed above.The legislature has spoken.The statute is clear.Even in a highly mobile society that values the freedom of its people to move as they please, the implementation of the best interests principle seems to preclude relocation of the child and, ipso facto, the child's parent in most cases.

Perhaps one answer, in some cases, is to actually reframe the application so that it is not a relocation of the child, but of the family consisting of the child and his or her parents, as well.This rethinking about relocation could result in a far more even distribution of the relevant statutory provisions when determining how, precisely, the best interests principle is implemented.Section 68B of the Act could be called into assistance in this regard by ordering a parent to relocate as a necessary concommitment to shared parenting.And, perhaps, in this manner Family Law, as it relates to relocation, will be found to have less unequal impacts.In this regard, it could address the concerns of Kirby and Gaudron JJ in *U –v- U (2002) FLC 93-112* who observed that the current law operates to the detriment of the primary carer who is, far more often than not, the mother.Some might argue that the proposed law operates even more to the detriment of mothers.

Compulsory family dispute resolution before filing

Another made change to practice and procedure in the pre-filing stage is compulsory pre-filing dispute resolution.

"60IAttending family dispute resolution before applying for Part VII order

Object of this section

(1)The object of this section is to ensure that all persons who have a dispute about matters that may be dealt with by an order under this Part (a Part VII order) make a genuine effortto resolve that dispute by family dispute resolution before the Part VII order is applied for."

At this particular point, the definitions of family dispute resolution and family dispute resolution practitioner should be noted.Section 10F states in this regard:

"10FDefinition of family dispute resolution

Family dispute resolution is a process (other than a judicial process):

(a) in which a family dispute resolution practitioner helps people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other; and

(b) in which the practitioner is independent of all of the parties involved in the process.

"10GDefinition of family dispute resolution practitioner

A family dispute resolution practitioner is:

(a) a person who is accredited as a family dispute resolution practitioner under the Accreditation Rules; or

(b) a person who is authorised to act on behalf of an organisation designated by the Minister for the purposes of this paragraph; or

(c) a person who is authorised to act under section 38BD, or engaged under subsection 38R(1A), as a family dispute resolution practitioner; or

(d) a person who is authorised to act under section 93D of the Federal Magistrates Act 1999, or engaged under subsection 115(1A) of that Act, as a family dispute resolution practitioner; or

(e) a person who is authorised by a Family Court of a State to act as a family dispute resolution practitioner.

(2) The Minister must publish, at least annually, a list of organisations designated for the purposes of paragraph (b) of the definition of family dispute resolution practitioner.

(3) An instrument under this section is not a legislative instrument."

The definition does not automatically include family lawyers even though the vast majority of family law disputes handled by lawyers are successfully resolved amicably, inexpensively and in a child-focussed manner.It will be interesting to see whether the paragraph (a) person who is accredited under the Accreditation Rules(yet to be made) could include family lawyers with counselling, mediation or conciliation training and experience.

Compulsory family dispute resolution is to be rolled-out in three phases.In Phase 1, from the commencement of the Bill to 30 June 2007, the existing dispute resolution provisions contained in the Family Law Rules 2004 are extended to all courts applying the Family law Act.The relevant provisions are s60 1 (2)-(4).

Phase 1 (from commencement to 30 June 2007)

"s60 I (2)The dispute resolution provisions of the Family Law Rules 2004 impose the requirements for dispute resolution that must be complied with before an application is made to the Family Court of Australia for a parenting order.

(3) By force of this subsection, the dispute resolution provisions of the Family Law Rules 2004 also apply to an application to a court (other than the Family Court of Australia) for a parenting order. Those provisions apply to the application with such modifications as are necessary.

(4) Subsection (3) applies to an application for a parenting order if the application is made:

(a) on or after the commencement of this section; and

(b) before 1 July 2007."

The dispute resolution provisions in the Rules are well known to practitioners by now.Extending them to the Federal Magistrates Courts, and courts exercising a summary jurisdiction, will lead to a more uniform approach to dispute resolution in family law matters.Whilst the pre-action procedures in the 2004 Family Law Rules are a good framework

for dispute resolution before the commencement of proceedings, the inconsistency with which they have been implemented within the profession, and are enforced both within individual Registries of the Court, and between Registries, has perhaps retarded their effectiveness.

Phase 2 applies between 1 July 2007 and 30 June 2008 and then Phase 3 covers all applications made on or after 1 July 2008.The only difference between the phases, in terms of the relevant obligations, is that Phase 2 only applies to fresh proceedings i.e. none of the parties had applied for Part VII orders before 1 July 2007.The obligations created are set out in s60 1 (7)-(11) but for the sake of completeness sections (5) – (11) are extracted below:

Phase 2 (from 1 July 2007 to 30 June 2008)

"(5) Subsections (7) to (12) apply to an application for a Part VII order in relation to a child if:

(a) the application is made on or after 1 July 2007 and before the date fixed by Proclamation for the purposes of this paragraph; and

(b) none of the parties to the proceedings on the application has applied, before 1 July 2007, for a Part VII order in relation to the child. Phase 3 (from second proclaimed date)

(6) Subsections (7) to (12) apply to all applications for a Part VII order in relation to a child that are made on or after the date fixed by Proclamation for the purposes of this subsection.
Requirement to attempt to resolve dispute by family dispute resolution before applying for a parenting order

(7) Subject to subsection (9), a court exercising jurisdiction under this Act must not hear an application for a Part VII order in relation to a child unless the applicant files in the court a certificate given to the applicant by a family dispute resolution practitioner under subsection (8). The certificate must be filed with the application for the Part VII order.
Certificate by family dispute resolution practitioner

(8) A family dispute resolution practitioner may give one of these kinds of certificates to a person:

(a) a certificate to the effect that the person did not attend family dispute resolution with the practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with, but the person's failure to do so was due to the refusal, or the failure, of the other party or parties to the proceedings to attend;

(aa) a certificate to the effect that the person did not attend family dispute resolution with the practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with, because the practitioner considers, having regard to the matters prescribed by the regulations for the purposes of this paragraph, that it would not be appropriate to conduct the proposed family dispute resolution;

(b) a certificate to the effect that the person attended family dispute resolution with the practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with, and that all attendees made a genuine effort to resolve the issue or issues;

(c) a certificate to the effect that the person attended family dispute resolution with the practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with, but that the person, the other party or another of the parties did not make a genuine effort to resolve the issue or issues.

Note: When an applicant files one of these certificates under subsection

(7),the court may take the kind of certificate into account in considering whether to make an order referring to parties to family dispute resolution (see section 13C) and in determining whether to award costs against a party (see section 117).
Exception

(9) Subsection (7) does not apply to an application for a Part VII order in relation to a child if:

(a) the applicant is applying for the order:
(i) to be made with the consent of all the parties to the proceedings; or
(ii) in response to an application that another party to the proceedingshas made for a Part VII order; or

(b) the court is satisfied that there are reasonable grounds to believe that:
(i) there has been abuse of the child by one of the parties to theproceedings; or
(ii) there would be a risk of abuse of the child if there were to be a delayin applying for the order; or
(iii) there has been family violence by one of the parties to theproceedings; or
(iv) there is a risk of family violence by one of the parties to theproceedings; or

(c) all the following conditions are satisfied:
(i) the application is made in relation to a particular issue;
(ii) a Part VII order has been made in relation to that issue within theperiod of 12 months before the application is made;
(iii) the application is made in relation to a contravention of the order bya person;
(iv) the court is satisfied that there are reasonable grounds to believethat the person has behaved in a way that shows a serious disregardfor his or her obligations under the order; or

(d) the application is made in circumstances of urgency; or

(e) one or more of the parties to the proceedings is unable to participate effectively in family dispute resolution (whether because of an incapacity of some kind, physical remoteness from dispute resolution services or for some other reason); or

(f) other circumstances specified in the regulations are satisfied.
Referral to family dispute resolution when exception applies

(10) If:

(a) a person applies for a Part VII order; and

(b) the person does not, before applying for the order, attend family dispute resolution with a family dispute resolution practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with; and

(c) subsection (7) does not apply to the application because of subsection (9);
the court must consider making an order that the person attend family dispute resolution with a family dispute resolution practitioner and the other party or parties to the proceedings in relation to that issue or those issues.

(11) The validity of:

(a) proceedings on an application for a Part VII order; or

(b) any order made in those proceedings;
is not affected by a failure to comply with subsection (7) in relation to those proceedings.

(12) In this section:

dispute resolution provisions of the Family Law Rules 2004 means:

(a) Rule 1.05 of those Rules; and

(b) Part 2 of Schedule 1 to those Rules; to the extent to which they deal with dispute resolution."

Thus s60 I(7) will stipulate that a court exercising jurisdiction under the Family Law Act "must not hear an application for a Part VII order" unless the applicant files the certificate from the family dispute resolution practitioner.It is quite clear from the terms of subsection (7) that the certificate must be filed with the application, but it is still unclear as to what are the ramifications of failing to do so.For example, does it mean that without the certificate, the application will not be accepted across the counter for filing, or does it mean that the Court "must not hear the application"?When subsections (7) and (9) are read together, one interpretation is that it is open to the court hearing the matter to decide whether the certificate was necessaryhaving regard to the matters raised in subsection (9) .

Subsection (8) specifies that there are four different types of certificates that can be issued by family dispute resolution practitioners including one to the effect that a party "*did not make a genuine effort to resolve the issue"*.The note after this subsection refers to the costs provision, s117, and implies that the certificate may be taken into account for costs purposes.Indeed, s117(2) seems broad enough to enable this to happen.

Subsection (9) sets out the exemptions to filing a certificate. Most are quite self-explanatory, but paragraph (b) does create the impression that the court needs to make findings about certain matters in the context of some sort of hearing based on evidence.It is unlikely that a separate, preliminary hearing was contemplated by this paragraph, and this leads to the inference that a court decides at the hearing itself whether family dispute resolution should have been attempted.

What needs to be certified is attendance at family dispute resolution, in relation to the relevant "issues".Whilst these provisions provide for compulsory dispute resolution, and participation in good faith (a "genuine effort"), there is no obligation to settle.

The section requires the making of a genuine effort, and how this is interpreted and implemented will be crucial to the success of these procedures.

Genuine effort will probably be defined by reference to existing jurisprudence that explores what actions or conduct is constituted by it.For example, the term 'genuine effort' is used in s134 of the *Migration Act*, and the cases that have considered the meaning of the term seem to adopt a factual approach i.e. what is a genuine effort depends on the factual

context of the case[8].This makes sense of course, but merely acknowledging that 'genuine effort' as a matter of fact does not assist in identifying what behaviour constitutes it.However, the scope for understanding what is 'genuine effort' is considerably expanded if the term is equated with 'good faith'.It is a logical link to make.Indeed a review of the jurisprudence of 'good faith' reveals many useful, and relevant indicia.The National Native Title Tribunal has had to consider on several occasions what is 'good faith' negotiation.It is far more than just acting honestly.Perhaps the most expansive statement is contained in the Tribunal's decision in *Western Australia v Taylor*[9] otherwise known as the Njamal decision.The indicia include:

(i)unreasonable delay in initiating communications in the first instance;

(ii)failure to make proposals in the first place;

(iii)the unexplained failure to communicate with the other parties within a reasonable time;

(iv)failure to contact one or more of the other parties;

(v)failure to follow up a lack of response from the other parties;

(vi)failure to attempt to organise a meeting between the native title and grantee parties;

(vii)failure to take reasonable steps to facilitate and engage in discussions between the parties;

(viii)failing to respond to reasonable requests for relevant information within a reasonable time;

(ix)stalling negotiations by unexplained delays in responding to correspondence or telephone calls;

(x)unnecessary postponement of meetings;

(xi)sending negotiators without authority to do more than argue or listen;

(xii)refusing to agree on trivial matters eg a refusal to incorporate statutory provisions into an agreement;

(xiii)shifting position just as agreement seems in sight;

(xiv)adopting a rigid non-negotiable position;

(xv)failure to make counter proposals;

(xvi)unilateral conduct which harms the negotiating process eg issuing inappropriate press releases;

(xvii)refusal to sign a written agreement in respect of the negotiation process or otherwise;

(xviii)failure to do what a reasonable person would do in the circumstances.

This is a very useful list of factors in the present context, and the Njamal indicia appear to be widely adopted by the Native Title Tribunal and accepted by the Federal Court[10].

Section 60J deals with family dispute resolution where there are allegations of child abuse or family violence

"60J Family dispute resolution not attended because of child abuse or family violence.

(1) If:

(a) subsections 60I(7) to (12) apply to an application for a Part VII order (see subsections 60I(5) and (6)); and

(b) subsection 60I(7) does not apply to the application because the court is satisfied that there are reasonable grounds to believe that:

(i) there has been abuse of the child by one of the parties to theproceedings; or
(ii) there has been family violence by one of the parties to theproceedings;
a court must not hear the application unless the applicant has indicated in writing that the applicant has received information from a family counsellor or family dispute resolution practitioner about the services and options (including alternatives to court action) available in circumstances of abuse or violence.

(2) Subsection (1) does not apply if the court is satisfied that there are reasonable grounds to believe that:

(a) there would be a risk of abuse of the child if there were to be a delay in applying for the order; or

(b) there is a risk of family violence by one of the parties to the proceedings.

(3) The validity of:

(a) proceedings on an application for a Part VII order; or

(b) any order made in those proceedings;
is not affected by a failure to comply with subsection (1) in relation to those proceedings.

(4) If:

(a) the applicant indicates in writing that the applicant has not received information about the services and options (including alternatives to court action) available in circumstances of abuse or violence; and

(b) subsection (2) does not apply;
the principal executive officer of the court concerned must ensure that the applicant is referred to a family counsellor or family dispute resolution practitioner in order to obtain information about those matters."

Section 60J aims to ensure that even people who could not attend family dispute resolution for good reasons, still get information about the services and options available to them.

It is clear that this regime of compulsory pre-filing family dispute resolution is one way of ensuring that litigants attend FRCs, though family dispute resolution may be provided outside of FRCs.There is little new in the concept of compulsory dispute resolution.Counselling has, historically, always been compulsory in children's matters.Conciliation has likewise been compulsory in property and financial matters.The Bill abandons the historical and often highly problematic definitions and/or description of counselling, conciliation, mediation etc.The difference under the Bill is that these processes are made compulsory before filing, rather than afterwards.The intent is to resolve cases in a timely fashion before the commencement of litigation, which is perceived to deepen the conflict between the parties before their case is later resolved.Whilst it is a complete truism that family lawyers have always resolved the vast majority of cases in which they are involved, both at a pre-filing, and then prior-to-hearing stage, it is not necessarily true that these disputes have been resolved in a timely manner.The challenge to the legal profession presented by the Bill is to resolve family disputes early, and without filing, if at all possible.If we don't, others (the FRCs) will.The other great opportunity that is presented to family lawyers by these provisions is to become active providers of family dispute resolution services.

Other Changes To Dispute Resolution

In terms of the sheer volume of change, one of the biggest changes to the FLA relates to dispute resolution, in this sense meaning non-adjudicative dispute resolution.Existing Parts II, III, IIIA and IIIB of the Act are repealed and substituted with new provisions.This commentary will be confined to those aspects of these provisions that are most relevant to practitioners.As was noted in a previous section, pre-filing family dispute resolution is now mandatory, save in the circumstances specifically excluded.The new definitions of family dispute resolution, and family dispute resolution practitioner have also been noted.

In terms of non-court based dispute resolution services, the major players will be family dispute resolution practitioners and family counsellors.The accreditation standards for these people are being developed at the moment.What is known about these new standards so far is that they will be competency-based, rather than based on educational qualifications.The proposed s10A provides that regulations may prescribe the accreditation rules for both family counsellors and family dispute resolution practitioners.

Counselling, as it was known in the past, is now "family counselling" and is non-court based.Family Counselling is defined in s10B as follows:

s10B Definition of family counselling

Family counselling is a process in which a family counsellor helps:

(a)one or more persons to deal with personal and interpersonal issues in relation to marriage; or

(b) one or more persons (including children) who are affected, or likely to be affected, by separation or divorce to deal with either or both of the following:
(i) personal and interpersonal issues;
(ii) issues relating to the care of children."

Family counselling is not, therefore, primarily about dispute resolution, though obviously that might occur as a consequence of dealing with personal and interpersonal issues, and issues relating to children:"Family counsellor" is defined in s10C but is not relevant in the present context.Communications made in family counselling are confidential.The new s10D provides in this regard:

s10D Confidentiality of communications in family counselling

(1) A family counsellor must not disclose a communication made to thecounsellor while the counsellor is conducting family counselling, unless thedisclosure is required or authorised by this section.
(2) A family counsellor must disclose a communication if the counsellorreasonably believes the disclosure is necessary for the purpose of complyingwith a law of the Commonwealth, a State or a Territory.
(3) A family counsellor may disclose a communication if consent to thedisclosure is given by:

(a) if the person who made the communication is 18 or over - that person; or
(b) if the person who made the communication is a child under 18:

(i) each person who has parental responsibility (within the meaningof Part VII) for the child; or
(ii)a court.

(4) A family counsellor may disclose a communication if the counsellor reasonably believes that the disclosure is necessary for the purpose of:

(a) protecting a child from the risk of harm (whether physical or psychological); or

(b)preventing or lessening a serious and imminent threat to the life orhealth of a person; or

(c) reporting the commission, or preventing the likely commission, of anoffence involving violence or a threat of violence to a person; or

(d) preventing or lessoning a serious and imminent threat to the property of a person; or

(e) reporting the commission, or preventing the likely commission, of anoffence involving intentional damage to property of a person or a threatof damage to property; or

(f) if a lawyer independently represents a child's interests under an order under section 68L - assisting the lawyer to do so properly.

(5) A family counsellor may disclose a communication in order to provide information (other than personal information within the meaning of section 6 of the Privacy Act 1988) for research relevant to families.

(6) Evidence that would be inadmissible because of section 10E is not admissible merely because this section requires or authorises its disclosure.
Note: This means that the counsellor's evidence is inadmissible in court, even if subsection (2), (3), (4) or (5) allows the counsellor to disclose it in other circumstances.

(7) Nothing in this section prevents a family counsellor from disclosing information necessary for the counsellor to give a certificate of the kind mentioned in paragraph 16(2A)(a) of the Marriage Act 1961.

(8)In this section: communication includes admission."

There are some changes from its predecessor.There is mandatory disclosure under s10D(2) and discretionary disclosure under s10D(3), (4) and (5).In particular, practitioners should note that disclosure may occur under s10D(4)(f) in order to assist an independent child lawyer to represent the child.

Of course, disclosure does not necessarily mean admissibility.Section 10E states in this regard:

s10E Admissibility of communications in family counselling and in referrals from family counselling

(1) Evidence of anything said, or any admission made, by or in the company of:

(a)a family counsellor conducting family counselling; or

(b)a person (the professional) to whom a family counsellor refers aperson for medical or other professional consultation, while theprofessional is carrying out professional services for the person;
is not admissible:

(c) in any court (whether or not exercising federal jurisdiction); or

(d) in any proceedings before a person authorised to hear evidence (whether the person id authorised by the law of the Commonwealth, a State or a Territory, or by the consent of the parties).

(2)Subsection (1) does not apply to:

(a)an admission by an adult that indicates that a child under 18 has beenabused or is at risk of abuse; or

(b) a disclosure by a child under 18 that indicates that the child has been abused or is at risk of abuse; unless, in the opinion of the court, there is sufficient evidence of the admission or disclosure available to the court from other sources.

(3)Nothing in this section prevents a family counsellor from disclosing information necessary for the counsellor to give a certificate of the kind mentioned in paragraph 16(2A)(a) of the Marriage Act 1961.

(4)A family counsellor who refers a person to a professional (within the meaning of paragraph (1)(b)) must inform the professional of the effect of this section."

Moving away from family counselling, to family dispute resolution, the definition in s10F referred to above makes plain that this process is about resolution.The definition makes no distinction between the various processes that might be used to bring about resolution.Indeed, the only indicators in this regard are that the process must "help people resolve" and must be provided by a person who "is independent of all the parties involved."Family dispute resolution could thus involve processes such as mediation, conciliation, neutral

evaluation, non-binding arbitration, and any hybrid of these or other resolution –type processes.As all of these processes will be treated as "family dispute resolutions", practitioners will need to be very clear as to both the services they provide, and the services that are being requested.

Communications made in family dispute resolution are confidential.Section 10H provides in this regard:

s10H Confidentiality of communications in family dispute resolution

(1) A family dispute resolution practitioner must not disclose a communication made to the practitioner while the practitioner is conducting family dispute resolution, unless the disclosure is required or authorised by this section.

(2) A family dispute resolution practitioner must disclose a communication if the practitioner reasonably believes the disclosure is necessary for the purpose of complying with a law of the Commonwealth, a State or a Territory.

(3) A family dispute resolution practitioner may disclose a communication if consent to the disclosure is given by:

(a) if the person who made the communication is 18 or over—that person; or

(b) if the person who made the communication is a child under 18:
(i) each person who has parental responsibility (within the meaning ofPart VII) for the child; or
(ii)a court.

(4) A family dispute resolution practitioner may disclose a communication if the practitioner reasonably believes that the disclosure is necessary for the purpose of:
(a) protecting a child from the risk of harm (whether physical orpsychological); or

(b) preventing or lessening a serious and imminent threat to the life or health of a person; or

(c)reporting the commission, or preventing the likely commission, of an offence involving violence or a threat of violence to a person; or

(d) preventing or lessening a serious and imminent threat to the property of a person; or

(e) reporting the commission, or preventing the likely commission, of an offence involving intentional damage to property of a person or a threat of damage to property; or

(f) if a lawyer independently represents a child's interests under an order under section 68L—assisting the lawyer to do so properly.

(5) A family dispute resolution practitioner may disclose a communication in order to provide information (other than personal information within the meaning of section 6 of the Privacy Act 1988) for research relevant to families.

(6) A family dispute resolution practitioner may disclose information necessary for the practitioner to give a certificate under subsection 60I(8).

(7) Evidence that would be inadmissible because of section 10J is not admissible merely because this section requires or authorises its disclosure.
Note: This means that the practitioner's evidence is inadmissible in court, even if subsection (2), (3), (4), (5) or (6) allows the practitioner to disclose it in other circumstances.

(8)In this section:
communication includes admission"

Whilst these sections preclude, for example, the dispute resolution practitioner making disclosures, other than as permitted, ss10E (re family counselling) and 10J (re family dispute resolution) deal with admissibility of communications made in these contexts.For example, s10J provides:

s10J Admissibility of communications in family dispute resolution and in referrals from family dispute resolution

(1) Evidence of anything said, or any admission made, by or in the companyof:

(a) a family dispute resolution practitioner conducting family dispute resolution; or

(b) a person (the professional) to whom a family dispute resolution practitioner refers a person for medical or other professional consultation, while the professional is carrying out professional services for the person;

is not admissible:

(c) in any court (whether or not exercising federal jurisdiction); or

(d) in any proceedings before a person authorised to hear evidence (whether the person is authorised by a law of the Commonwealth, a State or a Territory, or by the consent of the parties).

(2)Subsection (1) does not apply to:

(a) an admission by an adult that indicates that a child under 18 has been abused or is at risk of abuse; or

(b)a disclosure by a child under 18 that indicates that the child has been abused or is at risk of abuse; unless, in the opinion of the court, there is sufficient evidence of the admission or disclosure available to the court from other sources.

(3)Subsection (1) does not apply to information necessary for the practitioner

to give a certificate under subsection 60I(8).

(4) A family dispute resolution practitioner who refers a person to a professional (within the meaning of paragraph (1)(b)) must inform the professional of the effect of this section."

Subsection (3) should be noted.In particular inadmissibility does not apply as regards the s60I(8) certificate provided by a family dispute resolution practitioner.Thus, for example, a certificate under s60I(8)(c) to the effect that one of the parties "did not make a genuine effort to resolve the issue" may be admissible.Curiously though, there is nothing in s60I(8) to suggest that such a certificate need contain or refer to any "evidence of anything said, or any admission made" during family dispute resolution.As these are the words used in s10J(1), it may well be that s10J(3) really has no practical effect.The other possibility is that the s60I(8) certificate is actually meant to do more than just certify an assertion about conduct during family dispute resolution and actually provide brief particulars or reasons.The interaction between s60I(8) and s10J(3) is unclear, but potentially important in practice.

Section 10K is an interesting provision in that it is quite unclear whether it is meant to cover substantive or rather procedural aspects of family dispute resolution.It states:

s10K Family dispute resolution practitioners must comply with regulations
(1) The regulations may prescribe requirements to be complied with by familydispute resolution practitioners in relation to the family dispute resolutionservices they provide.
(2) The regulations may prescribe penalties not exceeding 10 penalty units inrespect of offences against regulations made for the purposes of subsection(1)."

Once these regulations are promulgated, it will become more apparent what was intended.

The arbitration provisions of the Act have been revamped, but with no substantive changes.There have been consistent signals emerging from the Courts exercising jurisdiction under the FLA that they will contemplate more external referrals to arbitration.Indeed, even the Government seems not opposed in principle to greater use of private arbitration.AIFLAM will provide more information to practitioners about developments as regards arbitration under the FLA.

The new provisions in Part IIIA deal with the information that is to be provided to people about non-court based, as well as court based, services and processes.The obligations as legal practitioners are set out in s12E which states:

s12E Obligations on legal practitioners

(1) A legal pratitioner who is consulted by a person considering instituting proceedings under this Act must give the person documents containing the information prescribed under section 12B (about non-court based family services and court's processes and services).

(2) A legal practitioner who is consulted by, or who is representing, a marriedperson who is a party to:

(a) proceedings for a divorce order in relation to the marriage; or

(b) financial or Part VII proceedings in relation to the marriage;

must give the person documents containing the information prescribed under section 12C (about reconciliation).

(3) A legal practitioner representing a party in proceedings under Part VII must give the party documents containing the information prescribed under section 12D (about Part VII proceedings).
Note: Section 63DA also imposes information-giving obligations on legal practitioners dealing with people involved in Part VII proceedings.

(4) A legal practitioner does not have to comply with subsection (1), (2) or (3) if the practitioner has reasonable grounds to believe that the person has already been given documents containing the prescribed information mentioned in that subsection.

(5) A legal practitioner does not have to comply with subsection (2) if the practitioner considers that there is no reasonable possibility of a reconciliation between the parties to the marriage."

Whilst the content of the information to be provided might have changed, the obligation on legal practitioners has not.Similar obligations extend to family counsellors, family dispute resolution practitioners and arbitrators:s12G

The new provisions in Part IIIB deal with the Court's powers in relation to court and non-court based family services.Section 13B restates the existing obligation on the court to accommodate possible reconciliations.

The court's powers to refer parties to external services has been enhanced considerably as is evident from s13C.It states:

s13C Court may refer parties to family counselling, family dispute resolution and other family services

(1) A court exercising jurisdiction in proceedings under this Act may, at anystage in the proceedings, make one or more of the following orders:

(a) that one or more of the parties to the proceedings attend family counselling;

(b) that the parties to the proceedings attend family dispute resolution;

(c) that one or more of the parties to the proceedings participate in anappropriate course, program or other service.

Note 1: Before making an order under this section, the court must consider seeking the advice of a family consultant about the services appropriate to the parties' needs (see section 11E).
Note 2: The court can also order parties to attend appointments with a family consultant (see section 11F).

(2) *The court may suggest a particular purpose for the attendance or participation.*

(3) The order may require the party or parties to encourage the participation of specified other persons who are likely to be affected by the proceedings.

Note: For example, the participation of children, grandparents or other relatives may be encouraged.

(4) The court may make any other orders it considers reasonably necessary or appropriate in relation to the order.

(5) The court may make orders under this section:

(a) on its own initiative; or

(b) on the application of:

(i) a party to the proceedings; or
(ii) a lawyer independently representing a child's interests under anorder made under section 68L."

Compulsory counselling has been the norm hitherto, but henceforth compulsory family dispute resolution will also become the norm, as will attendance at appropriate courses or programmes.The consequences of failure to comply are set out in s13D which states:

s13D Consequences of failure to comply with order under section 13C
(1) If a party fails to comply with an order of a court under section 13C, thefamily counsellor, family dispute resolution practitioner or provider of thecourse, program or other service must report the failure to the court.

(2) On receiving the report, the court may make any further orders it considersappropriate.

(3) The court may make orders under subsection (2):
(a)on its own initiative; or
(b)on the application of:
(i) a party to the proceedings; or
(ii) a lawyer independently representing a child's interests under anorder made under section 68L."

These new dispute resolution provisions demonstrate the capacity of courts exercising powers under the FLA to be far more managerial and interventionist as regards how disputes are managed to resolution.

Family Violence, Child Abuse and Neglect

The importance of family violence, neglect and abuse issues is reflected by the number of provisions within the amendments dealing with these difficult issues.

There is a new s60K in these terms:

s60K Court to take prompt action in relation to allegations of child abuse or family violence

(1) This section applies if:
(a) an application is made to a court for a Part VII order in relation to achild; and

(b)a document is filed in the court, on or after the commencement of this section, in relation to the proceedings for the order; and

(c)the document alleges as a consideration that is relevant to whether the court should grant or refuse this application that:

(i)there has been abuse of the child by one of the parties to theproceedings; or
(ii) there would be a risk of abuse of the child if there were to be adelay in applying for the order; or
(iii) there has been family violence by one of the parties to theproceedings; or
(iv) there is a risk of family violence by one of the parties to theproceedings; and

(d)the document is a document of the kind prescribed by the applicable Rules of Court for the purposes of this paragraph.

(2) The court must:

(a)consider what interim or procedural orders (if any) should be made:

(i) to enable appropriate evidence about the allegation to be obtained as expeditiously as possible; and

(ii)to protect the child or any of the parties to the proceedings; and

(b)make such orders of that kind as the court considers appropriate; and

(c)deal with the issues raised by the allegation as expeditiously as possible.

(2A)The court must take the action required by paragraphs (2)(a) and (b):

(a)as soon as practicable after the document is filed; and

(b)if it is appropriate having regard to the circumstances of the case – within 8 weeks after the document is filed.

(3) Without limiting subparagraph (2)(a)(i), the court must consider whether orders should be made under section 69ZW to obtain reports from State and Territory agencies in relation to the allegations.

(4)Without limiting paragraph (2)(a)(ii), the court must consider whether orders should be made, or an injunction granted, under section 68B.

(5)A failure to comply with a provision of this section in relation to an application does not affect the validity of any order made in the proceedings in relation to the application."

This new section obliges the Court to take prompt action in relation to allegations of child abuse or family violence, particularly to ensure that it receives adequate information so that appropriate orders can be made and protection extended.The difficulty is that s60K is, potentially, so broad.The form of this document is to be prescribed, but the content only needs to establish a relevant nexus between the orders sought and the violence or abuse or risk thereof.Given the relative frequency of these types of allegations, a logistical nightmare for the Court may have been created.

Family lawyers should also note at this juncture, that there is a new definition of family violence in s4(1) as follows:

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

NOTE: A person reasonably fears for, or reasonably is apprehensive about, his or her personal wellbeing or safety in particular circumstances if a reasonable person in those circumstances would fear for, or be apprehensive about, his or her personal wellbeing or safety."

The definition is relocated from s60D and the requirement of "reasonableness " imports an objective element.This is not unlike many State law domestic violence provisions.There are a number of concerns about this definition.The requirement for an objective element i.e. reasonable fear or apprehension, is not limited by the definition just to threatened conduct, but could apply to actual conduct as well.Moreover, the definition is simplistic and fails to take into account the complexity of family violence.

For example, it fails to take into account time.A menacing stare at a particular point in time is clearly "conduct" of one person, but if it generates fear or apprehension in that person's spouse, will the reasonableness of the fear and apprehension be judged by reference to that *particular* point in time, or to a period of time preceding it?Women who have lived in long-term relationships of fear and apprehension often have lived in the shadow of threatened violence due to actual violence perpetrated well in the past.If, for example, actual violence was perpetrated 5 years ago, will the menacing stare 5 days ago justify a reasonable fear today?From a forensic perspective, the actual violence 5 years ago may have far lesser persuasive weight in a parenting dispute than the menacing stare perpetrated 5 days ago.And yet the latter may not amount to family violence.

It must be recognised, however, that there are occasional cases where the introduction of an objective basis for the fear is a positive thing.It's just that the "occasional case" is being elevated to the norm.The term 'family violence's is an important one – indeed quite central to the operations of provisions such as S60K (above) S60CC (as a primary consideration), S60I (an exception to attendance at dispute resolution) and S65DA (the presumption of equal shared parental responsibility).The amendment came quite late in the overall consultation process ie during the House of Representatives inquiry, and is based on that committee's concerns that false allegations could be made, hence the need to insert an objective element.The report of the Senate Legal and Constitutional Legislation Committee certainly acknowledged concerns that an objective test could have the effect of silencing victims of family violence who were unable to substantiate their allegations.Curiously, the Attorney General's Department took the view that inserting the objective element would not bring about a major change because the 'reasonable person' would be a reasonable person *in the shoes of the complainant*, with the complainants knowledge.The committee thus concluded at para 3.106:

"*The Committee understands from this that the Government intends that a history or pattern of behaviour, to some extent, may be taken into account in the application of the test*".

The Committee recommended a redraft to clarify this, but the result was only to addthe Note that follows the definition.Nonetheless, and perhaps curiously, the Committee noted at para3.108:

"*Therefore, the purpose of the amendment is to raise the burden of proof on allegation of family violence – a purpose which is reliant on a view about the frequency of vexatious complaints of violence*".

Whether this "view" about false allegations is itself objectively based is a matter in respect of which future research would be most welcomed.

Practitioners should also note in relation to the definition of family violence there is a specific definition in s4(1AB) of who is a member of a family.This is an expansive definition that captures not just persons who are married, de facto or relatives but people who ordinarily reside with a person.Moreover, s4(1AC) also defines who is a relative:

s4(1AB) For the purposes of:
(a) the definitions of family violence and step-parent in subsection (1); and
(b) paragraphs 60CC(2)(i) and (j); and
(c) section 60CF;
a person (the first person) is a member of the family of another person (the second person) if:
(d)the first person is or has been married to, or in a de facto relationshipwith, the second person; or
(e) the first person is or has been a relative of the second person (as defined insubsection (1AC)); or
(f) an order under this Act described in subparagraph (i) or (ii) is or was (at anytime) in force:

(i) a parenting order (other than a child maintenance order) that relates to a child who is either the first person or the second person and that is in favour of the other of those persons;
(ii) an order providing for the first person or the second person to have custody or guardianship of, or a right of access to, the other of those persons; or

(g) an order under a law of a State or Territory described in subparagraph(i) or (ii) is or was (at any time) in force:

(i) an order determining that the first person or the second person is or was tolive with the other of those persons, or is or was to have custody orguardianship of the other of those persons;
(ii) an order providing for contact between the first person and the second person, or for the first person or the second person to have a right of access to the other of those persons; or

(h) the first person ordinarily or regularly resides or resided with thesecondperson, or with another member of the family of the secondperson; or

(i) the first person is or has been a member of the family of a child of thesecond person.

s4(1AC) For the purposes of subsection (1AB), a relative of a person is:
(a) a father, mother, grandfather, grandmother, step-father or step-mother of theperson; or
(b) a son, daughter, grandson, grand-daughter, step-son or step-daughter of theperson; or
(c) a brother, sister, half-brother, half-sister, step-brother or step-sister of theperson; or
(d) an uncle or aunt of the person; or
(e) a nephew or niece of the person; or
(f) a cousin of the person; or
(g) if the person is or was married—in addition to paragraphs (a) to (f), aperson who is or was a relative, of the kind described in any of thoseparagraphs, of the person's spouse; or
(h) if the person is or was in a de facto relationship with another personinaddition to paragraphs (a) to (f), a person who would be a relative of akind described in any of those paragraphs if the persons in that defactorelationship were or had been married to each other."

Parenting orders and family violence orders

The next issue is the vexed issue about the relationship between parenting orders and family violence orders.Some of the changes are quite significant.Division II of Part VII is replaced.The new s68N sets out the purpose of the Division, particularly to resolve inconsistencies between family violence orders and other parenting orders and to ensure that orders do not expose people to family violence.The new s68P sets out the obligations on a Court exercising family law jurisdiction when there is an existing state family violence order in place, and the Court makes an order that is inconsistent with it.These obligations are self- explanatory.

s68P Obligations of court making an order or granting an injunction under this Act that is inconsistent with an existing family violence order

(1) This section applies if:

(a) A court:

(i) makes a parenting order that provides for a child to spend time with a person, or expressly or impliedly requires or authorises a person to spend time with a child; or

(ii) makes a recovery order (as defined in section 67Q) or any other order under this Act that expressly or impliedly requires or authorises a person to spend time with a child; or

(iii) grants an injunction under section 68B or 114 that expressly or impliedly requires or authorises a person to spend time with a child; and

(iv) the order made or injunction granted is inconsistent with an existing family violence order.

(2) The court must, to the extent to which the order or injunction provides for the child to spend time with a person, or expressly or impliedly requires or authorises a person to spend time with the child

(a) specify in the order or injunction that it is inconsistent with an existing family violence order; and

(b) give a detailed explanation in the order or injunction of how the contact that it provides for is to take place; and

(c) explain (or arrange for someone else to explain) the order or injunction to:

(i) the applicant and respondent in the proceedings for the order or injunction; and

(ii) the person against whom the family violence order is directed (if that person is not the applicant or respondent); and

(iii) the person protected by the family violence order (if that person is not the applicant or respondent); and

(d) include (or arrange to be included) in the explanation, in language those persons are likely to readily understand:

(i) the purpose of the order or injunction; and

(ii) the obligations created by the order or injunction, including how the contact that it provides for is to take place; and

(iii) the consequences that may follow if a person fails to comply with the order or injunction; and

(iv) the court's reasons for making an order or granting an injunction that is inconsistent with a family violence order; and

(v) the circumstances in which a person may apply for variation or revocation of the order or injunction.

(3) As soon as practicable after making the order or granting the injunction (and no later than 14 days after making or granting it), the court must give a copy to:

(a) the applicant and respondent in the proceedings for the order or injunction; and

(b) the person against whom the family violence order is directed (if that person is not the applicant or respondent); and

(c) the person protected by the family violence order (if that person is not the applicant or respondent); and

(d) the Registrar, Principal Officer or other appropriate officer of the court that last made or varied the family violence order; and

(e) the Commissioner or head (however described) of the police force of the State or Territory in which the person protected by the family violence order resides; and

(f) a child welfare officer in relation to the State or Territory in which the person protected by the family violence order resides.

(4) Failure to comply with this section does not affect the validity of the order or injunction."

Section 68Q confirms that to the extent that a family violence order is inconsistent with the subsequent order or injunctions made under the Family Law Act, the family violence order is invalid.

s68Q Relationship of order or injunction made under this Act with existing inconsistent family violence order

(1) To the extent to which:

(a) an order or injunction mentioned in paragraph 68P(1)(a) is made or granted that provides for a child to spend time with a person, or expressly or impliedly requires or authorises a person to spend time with a child; and

(b) the order or injunction is inconsistent with an existing family violence order; the family violence order is invalid

(2) An application for a declaration that the order or injunction is inconsistent with the family violence order may be made, to a court that has jurisdiction under this Part, by:

(a) the applicant or respondent in the proceedings for the order or injunction mentioned in paragraph 68P(1)(a); or

(b) the person against whom the family violence order is directed (if that person is not the applicant or respondent); or

(c) the person protected by the family violence order (if that person is not the applicant or respondent).

(3) The court must hear and determine the application and make such declarations as it

considers appropriate."

The important change becomes apparent from a close inspection of s68R which deals with the *reverse* situation i.e the power of a Court making a family violence order to revive, vary, discharge or suspend an existing order under the Family Law Act.

s68R Power of court making a family violence order to revive, vary, discharge or suspend an existing order, injunction or arrangement under this Act Power

(1) In proceedings to make or vary a family violence order, a court of a State or Territory that has jurisdiction in relation to this Part may revive, vary, discharge or suspend:

(a) a parenting order, to the extent to which it provides for a child to spend time with a person, or expressly or impliedly requires or authorises a person to spend time with the child; or

(b) a recovery order (as defined in section 67Q) or any other order under this Act, to the extent to which it expressly or impliedly requires or authorises a person to spend time with a child; or

(c) an injunction granted under section 68B or 114, to the extent to which it expressly or impliedly requires or authorises a person to spend time with a child; or
(d) to the extent to which it expressly or impliedly requires or authorises a person to spend time with a child:

(i) an undertaking given to, and accepted by, a court exercising jurisdiction under this Act; or

(ii) a registered parenting plan within the meaning of subsection 63C(6); or

(iii) a recognisance entered into under an order under this Act.

(2) The court may do so:

(a) on its own initiative; or

(b) on application by any person.
Limits on power

(3) The court must not do so unless:

(a) it also makes or varies a family violence order in the proceedings (whether or not by interim order); and

(b) if the court proposes to revive, vary, discharge or suspend an order or injunction mentioned in paragraph (1)(a), (b) or (c)—the court has before it material that was not before the court that made that order or injunction.

(4) The court must not exercise its power under subsection (1) to discharge an order, injunction or arrangement in proceedings to make an interim family violence order or an interim variation of a family violence order.
Relevant considerations

(5) In exercising its power under subsection (1), the court must:

(a) have regard to the purposes of this Division (stated in section 68N); and

(b) have regard to whether contact with both parents is in the best interests of the child concerned; and

(c) if varying, discharging or suspending an order or injunction mentioned in paragraph (1)(a), (b) or (c) that, when made or granted, was inconsistent with an existing family violence order—be satisfied that it is appropriate to do so because a person has been exposed, or is likely to be exposed, to family violence as a result of the operation of that order or injunction.

Note: Sections 60CB to 60CG deal with how a court determines a child's best interests.
Registration of revival, variation, discharge or suspension of orders and other arrangements

(6) The regulations may require a copy of the court's decision to revive, vary, discharge or suspend an order, injunction or arrangement to be registered in accordance with the regulations. Failure to comply with the requirement does not affect the validity of the court's decision."

The limits on the Courts power set out in s68R(3) and (4) are significant.Any variation of the family law order can only be made if a family violence order is made or varied.The family law order can only be revived, varied, discharged or suspended if the Court has before it material that was not before the Court that made the order.No discharge of a family law order can occur in interim family violence proceedings, and any revival, variation or suspension of such orders is for a temporary period only – s68T

s68T Special provisions relating to proceedings to make an interim (or interim variation of) family violence order

(1) If, in proceedings to make an interim family violence order or an interim variation of a family violence order, the court revives, varies or suspends an order, injunction or arrangement under section 68R, that revival, variation or suspension ceases to have effect at the earlier of:

(a) the time the interim order stops being in force; and

(b) the end of the period of 21 days starting when the interim order was made.

(2) No appeal lies in relation to the revival, variation or suspension"

Section 68S deals with aspects of jurisdiction of a court exercising the s68R power i.e. the Court making the family violence order subsequent to a FLA order.It states:

s68S Application of Act and Rules when exercising section 68R power

(1) The following provisions do not apply to a court exercising the power under section 68R:
(a) section 65C (who may apply for a parenting order);
(b)subsection 65F(2) (parenting order not to be made unless parties attendfamily counselling);
(c) section 60CG (court to consider risk of family violence);
(d) section 69N (requirement to transfer certain proceedings);
(e) any provisions (for example, section 60CA) that would otherwise make thebest interests of the child the paramount consideration;
Note: Even though the best interests of the child are not paramount, they must still be taken into account under paragraph 68R(5)(b).
(f) any provisions of this Act or the applicable Rules of Court specified in theregulations.

(2) If a court is exercising the power under section 68R in proceedings to make an interim family violence order or an interim variation of a family violence order:
(a) the court has a discretion about whether to apply paragraph 60CC(3)(a)(about taking into account a child's views etc.); and
(b) any provisions of this Act or the applicable Rules of Court specified in theregulations do not apply.

(3) A court exercising the power under section 68R may, as it thinksappropriate, dispense with any otherwise applicable Rules of Court."

It will be interesting to see how the relevant courts exercise the broad powers given to them under this section.In many respects, in this context, they are freed of the fetters that otherwise circumscribe the Part VII jurisdiction given to other courts.The best interests of the child, and the wishes of children are, for example, relevant considerations but not determinative of their own.The applicable Rules of Court can be dispensed with.All of this is in the relatively narrow parameters of s68R which, as noted above, enables a court dealing with a family violence order to revive, vary, discharge or suspend an existing order, injunction or arrangement under the FLAin the circumstances set out in that section.

STAGE3: The resolution stage:the pre-trial period

Family Consultants

Probably the most important changes to practice at this stage of proceedings relates to the use of family consultants particularly in advising and assisting courts in decision making.A family consultant is defined in s11B:

"s11B: A family consultant is a person who is:

(a)appointed as a family consultant under section 38N; or

(b)appointed as a family consultant in relation to the Federal Magistrates Court under the Federal Magistrates Act 1999; or

(c)appointed as a family consultant under the regulations; or

(d)appointed under a law of a State as a family consultant in relation to a Family Court of that State."

The functions of these consultants are described in s11A:

"*s11A:The functions of family consultant are to provide services in relation to proceedings under this Act, including:*

(a)assisting and advising people involved in the proceedings; and

(b)assisting and advising courts, and giving evidence, in relation to the proceedings; and

(c)helping people involved in the proceedings to resolve disputes that are the subject of the proceedings; and

(d)reporting to the court under sections 55A and 62G; and

(e)advising the court about appropriate family counsellors, family dispute resolution practitioners and courses, programs and services to which the court can refer the parties to the proceedings".

Of relevance and interest is the definition of "people involved in the proceedings", found in s4(1AA)

"4. (1AA)A reference in this Act to a person or people involved in proceedings is a reference to:

(a)any of the parties to the proceedings; and

(b)any child whose interests are considered in, or affected by, the proceedings; and

(c)any person whose conduct is having an effect on the proceedings".

One wonders whether lawyers for the parties might, one day, receive advice from a family consultant in relation to the impact on the child of how litigation is being conducted!

So far, of course, all that the Bill does in a practical sense is substitute the office of family consultant for the existing Court mediator, or counsellor, as they are referred to in the

Act.The real change, however, is apparent from s11C – all communications with a family and child specialist are admissible.

"s11C

(1)Evidence of anything said, or any admission made, by or in the company of:

(a)a family consultant performing the functions of a family consultant; or

(b)a person (the professional) to whom a family consultant refers a person for medical or other professional consultation, while the professional is carrying out professional services for the person;

is admissible in proceedings under this Act.

Note 1:Communications with family consultants are not confidential (except in the special circumstances set out in subsection 38BD(3) in relation to consultant having several roles).

Note 2:Subsection (1) does not prevent things said or admissions made by or in the company of family consultant from being admissible in proceedings other than proceedings under this Act.

(2)Subsection (1) does not apply to a thing said or an admission made by a person who, at the time of saying the thing or making the admission, had not been informed of the effect of subsection (1).

(3)Despite subsection (2), a thing said or admission made is admissible even if the person who said the thing or made the admission had not been informed of the effect of subsection (1), if:

(a)it is an admission by an adult that indicates that a child under 18 has been abused or is at risk of abuse; or

(b)it is a disclosure by a child under 18 that indicates that the child has been abused or is at risk of abuse;

unless, in the opinion of the court, there is sufficient evidence of the admission or disclosure available to the court from other sources."

Section 11C(2) clearly contemplates that a statutory warning needs to be given about the admissibility of these statements, subject only to subsection (3).

Section 11F of the Bill empowers a court exercising jurisdiction under the Act to order parties to attend appointments with a family and child specialist, and s11G sets out the consequences of failure to do so.These specialists also have an advisory role under s11E.

The reporting process in relation to children does not change, but these reports are, of course, provided by family consultants.

Independent Children's Lawyers

There are significant changes to child representation.The Bill enacts changes that, in effect, codify the role of child representatives.Child representatives will be called 'independent children's lawyers' defined in s4(1) as follows.

independent children's lawyer for a child means a lawyer who represents the child's interests in proceedings under an appointment made under a court order under subsection 68L(2).

The new s68L empowers the Court to order independent representation for children.

"68L Court order for independent representation of child's interests

(1) This section applies to proceedings under this Act in which a child's best interests are, or a child's welfare is, the paramount, or a relevant, consideration.

(2) If it appears to the court that the child's interests in the proceedings ought to be independently represented by a lawyer, the court:

(a) may order that the child's interests in the proceedings are to be independently represented by a lawyer; and

(b) may make such other orders as it considers necessary to secure thatindependent representation of the child's interests.

(3) However, if the proceedings arise under regulations made for the purposes of section 111B, the court

(a) may order that the child's interests in the proceedings be independently represented by a lawyer only if the court considers there are exceptional circumstances that justify doing so; and (b) must specify those circumstances in making the order. Note: Section 111B is about the Convention on the Civil Aspects of International Child Abduction.

(4) A court may make an order for the independent representation of the child's interests in the proceedings by a lawyer:

(a) on its own initiative; or

(b) on the application of:

(i) the child; or

(ii) an organisation concerned with the welfare of children; or

(iii) any other person.

(5) Without limiting paragraph (2)(b), the court may make an order under that paragraph for the purpose of allowing the lawyer who is to represent the child's interests to find out what the child's views are on the matters to which the proceedings relate.
Note: A person cannot require a child to express his or her views in relation to any matter, see section 60CE.

(6) Subsection (5) does not apply if complying with that subsection would be inappropriate because of:

(a) the child's age or maturity; or

(b) some other special circumstance."

The role of the independent children's lawyer is, in effect, codified in s68LA.

"68LA Role of independent children's lawyer When section applies

(1)This section applies if an independent children's lawyer is appointed for a child in relation to proceedings under this Act. General nature of role of independent children's lawyer

(2)The independent children's lawyer must:

(a)form an independent view, based on the evidence available to the independent children's lawyer, of what is in the best interests of the child and inform the court of that view; and

(b)act in relation to the proceedings in what the independent children's lawyer believes to be the best interests of the child.

(3)Without limiting paragraph (2)(a), the independent children's lawyer must, if satisfied that the adoption of a particular course of action is in the best interests of the child, make a submission to the court suggesting the adoption of that course of action.

(4)The independent children's lawyer:

(a)is not the child's legal representative; and

(b)is not obliged to act on the child's instructions in relation to the proceedings.

Specific duties of independent children's lawyer

(5) The independent children's lawyer must:

(a)act impartially in dealings with the parties to the proceedings; and

(b)inform the court of the views that the child has expressed in relation to the matters to which the proceedings relate; and

(c) if a report or other document that relates to the child is to be used in the proceedings:
(i) analyse the report or other document to identify those matters in the report or other document that the independent children's lawyer considers to be the most significant ones for determining what is in the best interests of the child; and
(ii) ensure that those matters are properly drawn to the court's attention; and

(d)endeavour to minimise the trauma to the child associated with the proceedings; and

(e)facilitate an agreed resolution of matters at issue in the proceedings to the extent to which doing so is in the best interests of the child.

Disclosure of information

(6)Subject to subsection (7), the independent children's lawyer:
(a)is not under an obligation to disclose to the court;
(b)cannot be required to disclose to the court;
any information that the child communicates to the independent children's lawyer.

(7)The independent children's lawyer may disclose to the court any information that the child communicates to the independent children's lawyer if the independent children's lawyer considers the disclosure to be in the best interests of the child.

(8) Subsection (7) applies even if the disclosure is made against the wishes of the child."

These sections basically bring together in statutory form the Guidelines for Child Representatives as well as the Full Court's decision in *P and P (1955) FLC 92-615*.

It is worth noting, however, that one consequence of the proposed two-tier structure to s60CC may be that a child's view (as an additional consideration in s68F(2)(a) 60CC(3) is subsumed in importance to having a meaningful relationship with both parents (a primary consideration under s60CC(2).

STAGE 4: Determination stage; Conducting child-related hearings

Less adversarial procedures

Some of the most significant reforms to be enacted under the Bill are contained in Division 1A entitled "Principles for conducting child-related proceedings".For all lawyers who have not yet experienced the Children's Cases Programme which has been running as apilot in Sydney, this will be quite unfamiliar, and possibly quite uncomfortable territory.

As is evident from s69ZM, all proceedings under Part VII of the Act are governed by Division 1A:

"69ZM Proceedings to which this Division applies

(1)This Division applies to proceedings that are wholly under this Part.

(2)This Division also applies to proceedings that are partly under this Part, but only:

(a)to the extent that they are proceedings under this Part; and

(b)if the parties to the proceedings consent—to the extent that they are not proceedings under this Part.

(3)This Division also applies to any other proceedings between the parties that involve the court exercising jurisdiction under this Act and that arise from the breakdown of the parties' marital relationship, if the parties to the proceedings consent.

(4)Proceedings to which this Division applies are child related proceedings.

(5)Consent given for the purposes of paragraph (2)(b) or subsection (3) must be given in the form prescribed by the applicable Rules of Court.

(6)A party to proceedings may, with the leave of the court, revoke a consent given for the purposes of paragraph (2)(b) or subsection (3)."

Section 69ZM means, in effect, that all Part VII proceedings are to be conducted in the less adversarial manner described in this Division.Whilst the section refers to 'consent', the consent only relates to the part of the case not under Part VII i.e conceivably a property case could also be dealt with in this manner.Thus whilst the heading Division 12A refers to

"Principles for conducting child-related proceedings" it would be quite a mistake to interpret this as meaning just parenting orders.Part VII of course includes provisions dealing with child maintenance, child bearing expenses, injunctions to protect children, as well as all of Division 13A dealing with enforcement and compliance.

69ZN*Principles for conducting child related proceedings*

"69ZN Principles for conducting child-related proceedings
Application of the principles

(1) The court must give effect to the principles in this section:

(a) in performing duties and exercising powers (whether under this Division or otherwise) in relation to child-related proceedings; and

(b) in making other decisions about the conduct of child-related proceedings.
Failure to do so does not invalidate the proceedings or any order made in them.

(2) Regard is to be had to the principles in interpreting this Division.
Principle 1

(3) The first principle is that the court is to consider the needs of the child concerned and the impact that the conduct of the proceedings may have on the child in determining the conduct of the proceedings.
Principle 2

(4) The second principle is that the court is to actively direct, control and manage the conduct of the proceedings.

Principle 3

(5) The third principle is that the proceedings are to be conducted in a way that will safeguard:

(a) the child concerned against family violence, child abuse and child neglect; and

(b) the parties to the proceedings against family violence.
Principle 4

(6) The fourth principle is that the proceedings are, as far as possible, to be conducted in a way that will promote cooperative and child-focused parenting by the parties.
Principle 5

(7) The fifth principle is that the proceedings are to be conducted without undue delay and with as little formality, and legal technicality and form, as possible."

One way of summarising these principles is to say that the proceedings are child-focussed, robustly managed by the Court, less adversarial and informal.It doesn't matter whether the child-related proceedings are dealt with in open Court, or in Chambers:s69Z0.The relevant powers can be exercised as the Court's own initiative, or at the request of one or more of the parties:s69ZP.

Section 60ZQ sets out general duties in the Court in order to give effect to the principles:

"60KEGeneral duties

69ZQ General duties

(1) In giving effect to the principles in section 69ZN, the court must:

(a) decide which of the issues in the proceedings require full investigation and hearing and which may be disposed of summarily; and

(b) decide the order in which the issues are to be decided; and

(c) give directions or make orders about the timing of steps that are to be taken in the proceedings; and

(d) in deciding whether a particular step is to be taken—consider whether the likely benefits of taking the step justify the costs of taking it; and

(e) make appropriate use of technology; and

(f) if the court considers it appropriate—encourage the parties to use family dispute resolution or family counselling; and

(g) deal with as many aspects of the matter as it can on a single occasion; and

(h) deal with the matter, where appropriate, without requiring the parties' physical attendance at court.

(2) Subsection (1) does not limit subsection 69ZN(1).

(3) A failure to comply with subsection (1) does not invalidate an order.

As can be seen from these provisions, the Court is expected to be the interventionist manager of the child-related dispute, and not just a passive adjudicator of it. Of course, the Court retains its fundamental role as adjudicator, but with a significant added dimension of flexibility, as set out in s69ZR:

"69ZR Power to make determinations, findings and orders at any stage of proceedings

(1) If, at any time after the commencement of child-related proceedings and before making final orders, the court considers that it may assist in the determination of the dispute between the parties, the court may do any or all of the following:

(a) make a finding of fact in relation to the proceedings;

(b) determine a matter arising out of the proceedings;

(c) make an order in relation to an issue arising out of the proceedings.
Note: For example, the court may choose to use this power if the court considers that making a finding of fact at a particular point in the proceedings will help to focus the proceedings.

(2) Subsection (1) does not prevent the court doing something mentioned in paragraph (1)(a), (b) or (c) at the same time as making final orders.

(3) To avoid doubt, a judge, Judicial Registrar, Registrar, Federal Magistrate or magistrate who exercises a power under subsection (1) in relation to proceedings is not, merely because of having exercised the power, required to disqualify himself or herself from a further hearing of the proceedings."

Evidence

Major changes are proposed to the rules of evidence – these rules do not apply unless the Court decides that it should because of exceptional circumstances:S60ZT:

"69ZT Rules of evidence not to apply unless court decides

(1) These provisions of the Evidence Act 1995 do not apply to child-related proceedings:

(a) Divisions 3, 4 and 5 of Part 2.1 (which deal with general rules about giving evidence, examination in chief, re-examination and cross-examination), other than sections 26, 30, 36 and 41;
Note: Section 26 is about the court's control over questioning of witnesses. Section 30 is about interpreters. Section 36 relates to examination of a person without subpoena or other process. Section 41 is about improper questions.

(b) Parts 2.2 and 2.3 (which deal with documents and other evidence including demonstrations, experiments and inspections);

(c) Parts 3.2 to 3.8 (which deal with hearsay, opinion, admissions, evidence of judgments and convictions, tendency and coincidence, credibility and character).

(2) The court may give such weight (if any) as it thinks fit to evidence admitted as a consequence of a provision of the Evidence Act 1995 not applying because of subsection (1).

(3) Despite subsection (1), the court may decide to apply one or more of the provisions of a Division or Part mentioned in that subsection to an issue in the proceedings, if:

(a) the court is satisfied that the circumstances are exceptional; and
(b) the court has taken into account (in addition to any other matters the court thinks relevant):

(i) the importance of the evidence in the proceedings; and

(ii) the nature of the subject matter of the proceedings; and

(iii) the probative value of the evidence; and

(iv) the powers of the court (if any) to adjourn the hearing, to make another order or to give a direction in relation to the evidence.

(4) If the court decides to apply a provision of a Division or Part mentioned in subsection (1) to an issue in the proceedings, the court may give such weight (if any) as it thinks fit to evidence admitted as a consequence of the provision applying.

(5) Subsection (1) does not revive the operation of:

(a) a rule of common law; or

(b) a law of a State or a Territory;
that, but for subsection (1), would have been prevented from operating because of a provision of a Division or Part mentioned in that subsection."

Before any of the excluded parts of the Evidence Act are applied under s69ZT(3) the Court must not only find exceptional circumstances but also consider the importance, nature of subject matter and probabtive value of the evidence in question.At all times, of course, the Court allocates such weight (if any) to evidence as it sees fit: s69ZT(4).For many Australian lawyers not already familiar to the Children's Cases Program, this is a significant change.One would reasonably hope, however, that where there are allegations of violence, neglect or abuse, and on the more serious contravention cases, the protections of the Evidence Act will be involved.

Section 100A of the Act is replaced by s69ZV:

***"69ZV** Evidence of children*

(1)This section applies if the court applies the law against hearsay under subsection 69ZT(2) to child related proceedings.

(2)Evidence of a representation made by a child about a matter that is relevant to the welfare of the child or another child, which would not otherwise be admissible as evidence because of the law against hearsay, is not inadmissible in the proceedings solely because of the law against hearsay.

(3)The court may give such weight (if any) as it thinks fit to evidence admitted under subsection (2).

(4)This section applies despite any other Act or rule of law.

(5)In this section:

child means a person under 18.

representation includes an express or implied representation, whether oral or in writing, and a representation inferred from conduct."

Section 69ZW is an important provision dealing with evidence relating to child abuse of family violence.It provides

"69ZW Evidence relating to child abuse or family violence

(1) The court may make an order in child-related proceedings requiring a prescribed State or Territory agency to provide the court with the documents or information specified in the order.

(2) The documents or information specified in the order must be documents recording, or information about, one or more of these:

(a) any notifications to the agency of suspected abuse of a child to whom the proceedings relate or of suspected family violence affecting the child;

(b) any assessments by the agency of investigations into a notification of that kind or the findings or outcomes of those investigations;

(c) any reports commissioned by the agency in the course of investigating a

notification.

(3) Nothing in the order is to be taken to require the agency to provide the court with:

(a) documents or information not in the possession or control of the agency; or

(b) documents or information that include the identity of the person who made a notification.

(4) A law of a State or Territory has no effect to the extent that it would, apart from this subsection, hinder or prevent an agency complying with the order.

(5) The court must admit into evidence any documents or information, provided in response to the order, on which the court intends to rely.

(6) Despite subsection (5), the court must not disclose the identity of the person who made a notification, or information that could identify that person, unless:

(a) the person consents to the disclosure; or

(b) the court is satisfied that the identity or information is critically important to the proceedings and that failure to make the disclosure would prejudice the proper

administration of justice.

(7) Before making a disclosure for the reasons in paragraph (6)(b), the court must ensure that the agency that provided the identity or information:

(a) is notified about the intended disclosure; and

(b) is given an opportunity to respond."

This is a very useful provision that will ensure that the Court has before it as much relevant evidence as is possible.Section 69ZW reverses, in effect, the High Court's decision in Northern Territory v GPAO (1998) 196 CLR553 where the Court said that the Family Law Act did not override inconsistent provisions in Northern Territory child welfare legislation.

Section 69ZX sets out the Court's general duties and powers in relation to evidence.These are very broad as is apparent from a reading of the section:

"69ZXCourt's general duties and powers relating to evidence

(1) In giving effect to the principles in section 69ZN, the court may:

(a) give directions or make orders about the matters in relation to which the parties are to present evidence; and

(b) give directions or make orders about who is to give evidence in relation to each remaining issue; and

(c) give directions or make orders about how particular evidence is to be given; and

(d) if the court considers that expert evidence is required—give directions or make orders about:

(i) the matters in relation to which an expert is to provide evidence; and

(ii) the number of experts who may provide evidence in relation to a matter; and

(iii) how an expert is to provide the expert's evidence; and

(e) ask questions of, and seek information or the production of evidence from, parties, witnesses and experts on matters relevant to the proceedings.

(2) Without limiting subsection (1) or section 60ZR, the court may give directions or make orders:

(a) about the use of written submissions; or

(b) about the length of written submissions; or

(c) about limiting the time for oral argument; or

(d) about limiting the time for the giving of evidence; or

(e) that particular evidence is to be given orally; or

(f) that particular evidence is to be given by affidavit; or

(g) that evidence in relation to a particular matter not be presented by a party; or

(h) that evidence of a particular kind not be presented by a party; or

(i) about limiting cross examination of a particular witness; or

(j) about limiting the number of witnesses who are to give evidence in the proceedings

(3) The Court may, in child related proceedings:

(a) receive into evidence the transcript of evidence in any other proceedings before:

(i) the court; or

(ii) another court; or

(iii) a tribunal;
and draw any conclusions of fact from that transcript that it thinks proper; and

(b) adopt any recommendation, finding, decision or judgment of any court, person or body of a kind mentioned in any of subparagraphs (a)(i) to (iii)."

STAGE 5: Post-determination stage

Enforcement of Obligations

In view of the quite substantial changes to other parts of Part VII of the Act, it was inevitable that Division 13A dealing with the consequences of failure to comply with orders would also be effected. The result, however, is a much better and more user-friendly Division.

Second 70NAA provides an overview to the Division, and emphasises the Court's power to vary parenting orders in the course of applications for compliance. It also refers to the requirement for the Court to have regard to any parenting plan that has been entered into *since* the order was made. Section 70NAA(3) establishes the broad framework of the compliance regime, which is summarised in the table below.

Subdivision C	Contravention alleged, but not established
Subdivision D	Contravention established, but reasonable excuse
Subdivision E	Contravention established, but no reasonable excuse; less serious contravention
Subdivision F	Contravention established, but no reasonable excuse; more serious contravention

The old terminology of the staged parenting compliance regime is abolished.

The definition of contravention Is s70NAC is the same as its predecessor, s70NC, but for the addition of an important note that refers to the fact that a parenting order may be subject to a later parenting plan, thus having as potential impact on whether a contravention has in fact occurred.

Section 70NAD sets out the requirements taken to be included in orders, and is identical to its predecessor, s70ND.Section 70NAE explains the definition of reasonable excuse.It is substantially the same as its predecessor, but the terminology is changed to reflect those changes and this section, overall, reads better.

"70NAE Meaning of reasonable excuse for contravening an order

(1) The circumstances in which a person may be taken to have had, for the purposes of this Division, a reasonable excuse for contravening an order under this Act affecting children include, but are not limited to, the circumstances set out in subsections (2), (4), (5), (6) and (7).

(2) A person (the respondent) is taken to have had a reasonable excuse for contravening an order under this Act affecting children if:

(a) the respondent contravened the order because, or substantially because, he or she did not, at the time of the contravention, understand the obligations imposed by the order on the person who was bound by it; and

(b) the court is satisfied that the respondent ought to be excused in respect of the contravention.

(3) If a court decides that a person had a reasonable excuse for contravening an order under this Act for the reason referred to in paragraph (2)(a), it is the duty of the court to explain to the person, in language likely to be readily understood by the person, the obligations imposed on him or her by the order and the consequences that may follow if he or she again contravenes the order.

(4) A person (the respondent) is taken to have had a reasonable excuse for contravening a parenting order to the extent to which it deals with whom a child is to live with in a way that resulted in the child not living with a person in whose favour the order was made if:

(a) the respondent believed on reasonable grounds that the actions constituting the contravention were necessary to protect the health or safety of a person (including the respondent or the child); and

(b) the period during which, because of the contravention, the child did not live with the person in whose favour the order was made was not longer than was necessary to protect the health or safety of the person referred to in paragraph (a).

(5) A person (the respondent) is taken to have had a reasonable excuse for contravening a

parenting order to the extent to which it deals with whom a child is to spend time with in a way that resulted in a person and a child not spending time together as provided for in the order if:

(a) the respondent believed on reasonable grounds that not allowing the child and the person to spend time together was necessary to protect the health or safety of a person (including the respondent or the child); and

(b) the period during which, because of the contravention, the child and the person did not spend time together was not longer than was necessary to protect the health or safety of the person referred to in paragraph (a).

(6) A person (the respondent) is taken to have had a reasonable excuse for contravening a parenting order to the extent to which it deals with whom a child is to communicate with in a way that resulted in a person and a child not having the communication provided for under the order if:

(a) the respondent believed on reasonable grounds that not allowing the child and the person to communicate together was necessary to protect the health or safety of a person (including the respondent or the child); and

(b) the period during which, because of the contravention, the child and the person did not communicate was not longer than was necessary to protect the health or safety of the person referred to in paragraph (a).

(7) A person (the respondent) is taken to have had a reasonable excuse for contravening a parenting order to which section 65P applies by acting contrary to section 65P if:

(a) the respondent believed on reasonable grounds that the action constituting the contravention was necessary to protect the health or safety of a person (including the respondent or the child); and

(b) the period during which, because of that action, a person in whose favour the order was made was hindered in or prevented from discharging responsibilities under the order was not for longer than was necessary to protect the health or safety of the person referred to in paragraph (a).”

Section 70NAF deals with standard of proof and replaces for its predecessor s70NEA.

“70NAF Standard of proof

(1)	*Subject to subsection (3), the standard of proof to be applied in determining matters in proceedings under this Division is proof on the balance of probabilities*	
(2)	*Without limiting subsection (1), that subsection applies to the determination of whether a person who contravened an order under this Act affecting children had a reasonable excuse for the contravention.*	
(3)	*The court may only make an order under:*	
	(a)	*paragraph 70NFB(2)(a), (d) or (e); or*
	(b)	*paragraph 70NFF(3)(a);*
	if the court is satisfied beyond reasonable doubt that the grounds for making the order exist. ”	

In effect, therefore, the civil standard of proof, the balance of probabilities applies except when a criminal penalty is being contemplated for a subdivision F more serious contravention. The civil standard applies even to the issue of "reasonable excuse".

Section 70NBA sets out the court's power to vary existing parenting orders, and replaces existing s70NEB:

"*70NBA Subdivision B—Court's power to vary parenting order*
Variation of parenting order

(1)	*A court having jurisdiction under this Act may make an order varying a primary order if:*		
	(a)	*proceedings in relation to the primary order are brought before a court having jurisdiction under this Act; and*	
	(b)	*it is alleged in those proceedings that a person committed a contravention of the primary order and either:*	
		(i.)	*the court does not find that the person committed a contravention of the primary order; or*
		(ii.)	*the court finds that the person committed a contravention of the primary order.*
(2)	*If Subdivision F applies to the contravention, when making an order under subsection (1) varying a primary order, the court, in addition to regarding, under section 60CA, the best interests of the child as the paramount consideration, must, if any of the following considerations is relevant, take that consideration into account:*		

	(a)	*the person who contravened the primary order did so after having attended, after having refused or failed to attend, or after having been found to be unsuitable to take any further part in, a post-separation parenting program or a part of such a program;*
	(b)	*there was no post-separation parenting program that the person who contravened the primary order could attend;*
	(c)	*because of the behaviour of the person who contravened the primary order, it was not appropriate, in the court's opinion, for the person to attend a post-separation parenting program, or a part of such a program;*
	(d)	*the primary order was a compensatory parenting order made under paragraph 70NEB(1)(b) or 70NFB(2)(c) after the person had contravened a previous order under this Act affecting children.*
(3)	*This section does not limit the circumstances in which a court having jurisdiction under this Act may vary a primary order."*	

The power to vary parenting orders therefore applies across the board to all types of contravention applications and regardless of the findings made.It is very flexible in this regard.

The significance of parenting plans becomes obvious from the entirely new s70NBB.

"70NBB Effect of parenting plan

(1) This section applies if:

(a) a parenting order has been made in relation to a child (whetherbefore or after the commencement of this section); and

(b) after the parenting order was made, the parents of the child made a parenting plan that dealt with a matter (the relevant matter) that was dealt with in the parenting order."

Thus the subsequent parenting plan must be taken into account with the contravention application, and the Court is to consider whether to vary the parenting plan by making an order.Interestingly, the Court is not bound by the parenting plan, though surely it will be relevant so far as the contravention application is concerned even though reliance is the *plan* is not specifically a 'reasonable excuse' under s70NAE.The irony, of course, is that even if the Court does vary the plan by making an order under s70NBB, the parties may change that by an even later parenting plan.

Sections 70NCA and NCB form part of Subdivision C ie contravention alleged, but not established.

70NCA Application of Subdivision

This Subdivision applies if:

(a) a primary order has been made, whether before or after the commencement of this Subdivision; and

(b) proceedings in relation to the primary order are brought before a court having jurisdiction under this Act; and

(c) it is alleged in those proceedings that a person (the respondent) committed a contravention of the primary order; and

(d) the court does not find that the respondent committed a contravention of the primary order.

Note: The court may also vary the primary order under Subdivision B.

70NCB Costs

(1) The court may make an order that the person who brought the proceedings (the applicant) pay some or all of the costs of another party, or other parties, to the proceedings.

(2) The court must consider making an order under subsection (1) if:

(a) the applicant has previously brought proceedings in relation to the primary order or another primary order in which the applicant alleged that the respondent committed a contravention of the primary order or that other primary order; and

(b) on the most recent occasion on which the applicant brought proceedings of the kind referred to in paragraph (a), the court before which the proceedings were brought:

(i) was not satisfied that the respondent had committed a contravention of the primary order or that other primary order; or

(ii) was satisfied that the respondent had committed a contravention of the primary order or that other primary order but did not make an order under section 70NBA;

Of course the Court still retains its power to vary orders.The costs sanctions described in s70NCB are obviously designed to deter people from making unwarranted contravention applications.

Sections 70NDA, NDB and NDC form part of subdivision D ie. contravention established, but reasonable excuse for contravention found.Section 70NDB empowers the Court to order compensatory time in appropriate cases

(s70NDB)

"70NDB:Order compensating person for time lost:

(1)	*If:*

	(a)	*the primary order is a parenting order in relation to a child; and*
	(b)	*the current contravention resulted in a person not spending time with the child (or the child not living with a person for a particular period);* *the court:*
	(c)	*may make a further parenting order that compensates the person for time the person did not spend with the child (or the time the child did not live with the person) as a result of the current contravention; and*
	(d)	*must consider making that kind of order.*
Note: If the person does not have a reasonable excuse for a contravention, the court has the power to make an order compensating a person for time lost under paragraph 70NEB(1)(b) or 70NFB(2)(c).		
(2)	*The court must not make an order under paragraph (1)(c) if it would not be in the best interests of the child for the court to do so."*	

The costs sanction described by s70NDC is similar to s70NCB, so that if the Court does not order compensatory time, the Court may order costs against the applicant, particularly if there have been previous contravention applications.

Sections 70NEA, NEB, NEC, NED, NEF and NEG form part of subdivision E i.e contravention without reasonable excuse, but less serious.Subdivision E basically replaces the existing stage 2 of the parenting compliance regime.Serial offenders would not be covered here, but rather in subdivision F re: more serious contraventions.

The powers of the Court in s70NEB, replacing s70NG, are somewhat broader.

"s70NEB Powers of the Court:

(1) If this Subdivision applies, the court may do any or all of the following:

(a) make an order directing:

(i) the person who committed the current contravention; or

(ii) that person and another specified person;
to attend a post-separation parenting program;

(b) if the current contravention is a contravention of a parenting order in relation to a child—make a further parenting order that compensates a person for time the person did not spend with the child (or time the child did not live with the person) as a result of the current contravention;

(c) adjourn the proceedings to allow either or both of the parties to the primary order to apply for a further parenting order under Division 6 of Part VII that discharges, varies or suspends the primary order or revives some or all of an earlier parenting order;

(d) make an order requiring the person who committed the current contravention to enter into a bond in accordance with section 70NEC;

(e) if:

(i) the current contravention is a contravention of a parenting order in relation to a child; and

(ii) the current contravention resulted in a person not spending time with the child (or the child not living with a person for a particular period); and

(iii) the person referred to in subparagraph (ii) reasonably incurs expenses as a result of the contravention;

make an order requiring the person who committed the current contravention to compensate the person referred to in subparagraph (ii) for some or all of the expenses referred to in subparagraph (iii);

(f) make an order that the person who committed the current contravention pay some or all of the costs of another party, or other parties, to the proceedings under this Division; and

(g) if the court makes no other orders in relation to the current contravention—order that the person who brought the proceedings in relation to the current contravention pay some or all of the costs of the person who committed the current contravention.

Note 1: The court may also vary the primary order under Subdivision B.
Note 2: Paragraph (1)(a)—before making an order under this paragraph, the court must consider seeking the advice of a family consultant about the services appropriate to the person's needs (see section 11E).

(2) The court must not make an order under paragraph (1)(a) directed to a person other than the person who committed the current contravention unless:

(a) the person brought the proceedings before the court in relation to the current contravention or is otherwise a party to those proceedings; and

(b) the court is satisfied that it is appropriate to direct the order to the person because of the connection between the current contravention and the carrying out by the person of his or her parental responsibilities in relation to the child or children to whom the primary order relates.

(3) If the court makes an order under paragraph (1)(a), the principal executive officer of the court must ensure that the provider of the program concerned is notified of the making of the order.

(4) If:

(a) the current contravention is a contravention of a parenting order in relation to a child; and

(b) the contravention resulted in a person not spending time with the child (or the child not living with a person for a particular period);

the court must consider making an order under paragraph (1)(b) to compensate the person for the time the person did not spend with the child (or the time the child did not live with the person) as a result of the contravention.

(5) The court must not make an order under paragraph (1)(b) if it would not be in the best interests of the child for the court to do so.

(6) In deciding whether to adjourn the proceedings as mentioned in paragraph (1)(c), the court must have regard to the following:

(a) whether the primary order was made by consent;

(b) whether either or both of the parties to the proceedings in which the primary order was made were represented in those proceedings by a legal practitioner;

(c) the length of the period between the making of the primary order and the occurrence of the current contravention;

(d) any other matters that the court thinks relevant.

(7) The court must consider making an order under paragraph (1)(g) if:

(a) the person (the applicant) who brought the proceedings in relation to the current contravention has previously brought proceedings in relation to the primary order or another primary order in which the applicant alleged that the person (the respondent) who committed the current contravention committed a contravention of the primary order or that other primary order; and

(b) on the most recent occasion on which the applicant brought proceedings of the kind referred to in paragraph (a), the court before which the proceedings were brought:

(i) was not satisfied that the respondent had committed a contravention of the primary order or that other primary order; or

(ii) was satisfied that the respondent had committed a contravention of the primary order or that other primary order but did not make an order under section 70NDB, 70NDC, 70NEB, 70NFB or 70NBA in relation to the contravention

The powers to order a bond, order compensatory expenses and pay costs are new, and will enhance the flexibility of the Courts powers significantly.Again there is a deterrent for unsuccessful contravention applications that are brought to harass.Section 70NEC refer to the bonds that may be required under S70NEB.

"70NEC Bonds

(1) This section provides for bonds that a court may require a person to enter into under paragraph 70NEB(1)(d).

(2) A bond is to be for a specified period of up to 2 years

(3) A bond may be:

(a) with or without surety; and

(b) with or without security.

(4) The conditions that may be imposed on a person by a bond include (without limitation) conditions that require the person:

(a) to attend an appointment (or a series of appointments) with a family consultant; or

(b) to attend family counselling; or

(c) to attend family dispute resolution; or

(d) to be of good behaviour.

(5) If a court proposes to require a person to enter into a bond, it must, before making the requirement, explain to the person, in language likely to be readily understood by the person:

(a) the purpose and effect of the proposed requirement; and

(b) the consequences that may follow if the person

(i) fails to enter into the bond; or

(ii) having entered into the bond—fails to act in accordance with the

bond."

The bond can only be for a period up to 2 years.The remaining sections in this subdivision mirror the existing provisions in the Act.

Subdivision F, of course, deals with contravention established, no reasonable excuses, but a more serious contravention, and effectively replaces the stage 3 parenting compliance regime.The provisions are better drafted however, e.g the existing s70NJ is covered by s70NFA and NFB.

70NFA Application of Subdivision

(1) Subject to subsection (2), this Subdivision applies if:

(a) a primary order has been made, whether before or after the commencement of this Division; and

(b) A court having jurisdiction under this Act is satisfied that a person has, whether before or after that commencement, committed a contravention (the current contravention) of the primary order; and

(c) the person does not prove that he or she had a reasonable excuse for the current contravention; and

(d) either subsection (2) or (3) applies.

Note: For the standard of proof to be applied in determining whether a contravention of the primary order has been committed, see section 70NAF.

(2) For the purposes of paragraph (1)(d), this subsection applies if:

(a) no court has previously:

(i) made an order imposing a sanction or taking an action in respect of a contravention by the person of the primary order; or

(ii) under paragraph 70NEB(1)(c), adjourned proceedings in respect of a contravention by the person of the primary order; and

(b) the court dealing with the current contravention is satisfied that the person has behaved in a way that showed a serious disregard of his or her obligations under the primary order.

(3) For the purposes of paragraph (1)(d), this subsection applies if a court has previously:

(a) made an order imposing a sanction or taking an action in respect of a contravention by the person of the primary order; or

(b) under paragraph 70NEB(1)(c), adjourned proceedings in respect of a contravention by the person of the primary order.

(4) This Subdivision does not apply if the court dealing with the current contravention is satisfied that it is more appropriate for that contravention to be dealt with under Subdivision E.

(5) This Subdivision applies whether the primary order was made, and whether the current contravention occurred, before or after the commencement of this Division.

The Section preserves the existing regime whereby a single contravention that showed 'a serious disregard; can still be covered by this subdivision.

"70NFB Powers of court

(1)	*If this Subdivision applies, the court must, in relation to the person who committed the current contravention*	
	(a)	*make an order under paragraph (2)(g), unless the court is satisfied that it would not be in the best interests of the child concerned to make that order; and*
	(b)	*if the court makes an order under paragraph (2)(g)—consider making another order (or other orders) under subsection (2) that the court considers to be the most appropriate of the orders under subsection (2) in the circumstances; and*
	(c)	*if the court does not make an order under paragraph (2)(g)—make at least one order under subsection (2), being the order (or orders) that the court considers to be the most appropriate of the orders under subsection (2) in the circumstances.*
(2)	*The orders that are available to be made by the court are:*	
	(a)	*if the court is empowered under section 70NFC to make a community service order—to make such an order; or*
	(b)	*to make an order requiring the person to enter into a bond in accordance with section 70NFE; or*
	(c)	*if the current contravention is a contravention of a parenting order in relation to a child—to make a further parenting order that compensates a*

		person for time the person did not spend with the child (or the time the child did not live with the person) as a result of the current contravention, unless it would not be in the best interests of the child concerned to make that order; or	
	(d)	*to fine the person not more than 60 penalty units; or*	
	(e)	*subject to subsection (7), to impose a sentence of imprisonment on the person in accordance with section 70NFG; or*	
	(f)	*If:*	
		(i)	*the current contravention is a contravention of a parenting order in relation to a child; and*
		(ii)	*the current contravention resulted in a person not spending time with the child (or the child not living with a person for a particular period); and*
		(iii)	*the person referred to in subparagraph (ii) reasonably incurs expenses as a result of the contravention;*
		to make an order requiring the person who committed the current contravention to compensate the person referred to in subparagraph (ii) for some or all of the expenses referred to in subparagraph (iii); or	
	(g)	*to make an order that the person who committed the current contravention pay all of the costs of another party, or other parties, to the proceedings*	

		under this Division; or
	(h)	*to make an order that the person who committed the current contravention pay some of the costs of another party, or other parties, to the proceedings under this Division.* *Note: The court may also vary the primary order under Subdivision B.*
(3)	*If a court varies or discharges under section 70NFD a community service order made under paragraph (2)(a), the court may give any directions as to the effect of the variation or discharge that the court considers appropriate.*	
(4)	*The court must not make an order imposing a sentence of imprisonment on a person under this section in respect of a contravention of a child maintenance order made under this Act unless the court is satisfied that the contravention was intentional or fraudulent.*	
(5)	*The court must not make an order imposing a sentence of imprisonment on a person under this section in respect of:*	
	(a)	*a contravention of an administrative assessment of child support made under the Child Support (Assessment) Act 1989; or*
	(b)	*a breach of a child support agreement made under that Act; or*
	(c)	*a contravention of an order made by a court under Division 4 of Part 7 of that Act for a departure from such an assessment (including such an order that contains matters mentioned in section 141 of that Act).*
(6)	*An order under this section may be expressed to take effect immediately, at the end of a specified period or on the occurrence of a specified event.*	

(7)	*When a court makes an order under this section, the court may make any other orders that the court considers necessary to ensure compliance with the order that was contravened."*

The subsection (2) orders that can be made are broader than the existing s70NJ(3) orders.There is a presumption in favour of a costs order unless it is not in the best interests of the child: s70NFB(1)(a).The Court must also consider other orders on top of costs.The new powers include the order compensatory time, compensatory expenses and costs for legal expenses.

The remaining sections in Subdivision F are basically the same as the existing provisions in the Act, with a few drafting charges of no substantive impact.

Application and Transitional Matters:

There is quite a deal of complexity surrounding when exactly, various provisions contained within the Bill come into effect.The Bill contains 9 different schedules, all dealing with specific amendments to the Act, and the schedules do not, at this stage, coincide in terms of when they are stated to commence.There is a fairly confident view however, that all or most of the schedules will come into effect as from 1 July 2006.That is the assumption that will be made for present purposes.One would reasonably expect a high level of publicity and media attention will surround the commencement of these new laws.

Assuming it is 1 July 2006, of deeper interest to the profession will be the transitional provisions ie. precisely what matters are covered by the new laws?A schedule by schedule approach is required in order to deal with this issue comprehensively.Schedule 1 of the Bill deals with shared parental responsibility.The table below summarises what is presently contemplated on the Bill.

	Statutory Provision	***Proposed Commencement***
1.	s60CC – how a Court determines what is in the child's best interests (successor to s68F)	applies to orders made on or after commencement
2.	s61DA – presumption of equal shared parental responsibility when making parenting orders;amendment to s65D(1) (dealing with Court's power to make parenting orders) so that it is subject to s61DA;amendments to s65D(2) so that it is subject to s61DA	applies to parenting orders made on or after commencement

3.	s61F – the Aboriginal and Torres Strait Islander children provisions	applies to all Part VII proceedings whether initiated before or after commencement
4.	new s62G(3A) – directing a family consultant who is preparing a report to ascertain views of the child and include those views	applies to directions given under s62G(2) of the new Act after commencement
5.	new s63C(1)(b) requiring parenting plans to be signed by the parents and dated	applies to parenting plans made on or after commencement
6.	new s64B(2) to (4A) setting out what a parenting order may deal with including the "new" matterssuch as form of consultations, communications etc.	applies to parenting orders made on or after commencement
7.	new s64D stating that parenting orders are subject to later parenting plans	applies to parenting orders made on or after commencement including applications to vary existing parenting orders
8.	new ss65DAA (Court to consider child spending equal time or substantial and significant time with each parent);65DAB (Court to have regard to parenting plans); s65DAC (effect of parenting order that provides for shared parental responsibility)65DAE (no need to consult on issues that are not major long-term issues)	applies to parenting orders made on or after commencement
9.	new s65G(2)(a) – requirement for conference with a family consultant when a	applies to a court proposing to make an order whether or not the proceedings were initiated

	parenting order is proposed to be made in favour of a non-parent	before commencement

It is therefore the case that these new provisions will take effect on 1 July thus having an impact on almost all cases already "in the system", but not heard before that date. Indeed, it would be reasonable to expect that

1.If any judgments are reserved in parenting matters as at 1 July, potentially those parenting case would need to be reopened.

2.If proceedings were part heard as at 1 July, evidence might need yo be updated and submissions made having regard to the new law , and, no doubt, estimated hearing times would increase.

3.If cases had been heard in June and a Judgment not delivered, the cases could be re-opened.

Schedule 2 of the Bill deals with the new compliance regime. These amendments apply to a contravention occuring or alleged to have occured on or after commentcement.

Schedule 3 deals with the changes to how child-related proceedings are conducted. These amendments are stated to apply to proceedings commenced by an application filed on or after 1 July 2006. This is logical.

Schedule 4 deals with the changes to dispute resolution. The transitional provisions here are quite extensive and sensible. If a family report has been ordered and is outstanding as at the time of commencement, the report is to be completed. It doesn't look as if there is much risk of confidential conselling, without parties being made aware of the same.

Schedule 5 deals with child representation and the changes come into operation irrespective of whether the proceedings were commenced before or after commencement, and irrespective of when the appointment was actually made.

Schedule 6 deals with the new family violence inconsistency with parenting orders regime. It applies to orders made after commentcement, irrespective of when the proceedings were actually commenced. This may result in some confusion and unnecessary complexity because State Courts will need to first ask when the Order under the Family Law Act was made before knowing what their powers are in context of a later family violence order.

Schedule 7 repeals s45A, which removes the monetary limit on the Federal Magistrates Court jurisdiction in family law matters. It applies to proceedings instituted before or after commencement i.e. immediate application.

Schedule 8 contains extensive amendments to a range of legislation, removing references to residence and contact and replacing it with the new terminology.No real transitional provisions are needed here, and the changes simply come into effect on commencement.

Schedule 9 of the Bill brings about the relocation of defined terms used in Part VII and take effect on commencement.

Schedule 10 of the Bill deals with orders of non-judicial officers of State Courts of summary jurisdiction.In effect, these provisions retrospectively validate any orders that might have been made under the Family Law Act 1975 in courts of summary jurisdiction, where doubts might arise as to whether those orders were properly made in exercise of Federal Family Law jurisdiction.

Varying existing orders after 1 July 2006

As this is an issue that will, no doubt, arise in the next few months, s44 of the Amendment Act will state:

"The amendments made by this Schedule are taken not to constitute changed circumstances that would justify making an order to discharge or vary, or to suspend or remove the operations of, some or all of a parenting order that was made before commencement."

This is, of course, a restatement of the principle expressed in Rice v Asplund (1979) FLC 90-725.The amendments are not, per se, changed circumstances.That is not to say that the amendments will not be the catalyst of variation applications the grounds of which will be other factors such as the genuine changed circumstances of either the parents or the children.Having regard to the fluidity of modern life, and the often distinct developmental stages that children go through, when coupled with the simple passage of time , the Rice v Asplund threshold may not be a significant barrier to cross.

There will always be some parents who will seek to trigger a change in circumstances in order to bring themselves within these new provisions.For example contravention proceedings under the new Division 13A Compliance Regime applies to contraventions after commencement and not just orders made after the commencement (and quite properly so, it is submitted).Division 13A strongly

emphasises the Courts power to vary the order in question.That variation could only be in accordance with the new law.Thus, by virtue of contravention proceedings, the opportunity arises for an old order to be varied pursuant to new principles.One trusts that each case will be dealt with in its own merits and facts.

May 1, 2006
