

Appendix D Legislation

Key provisions of the *Family Law Act 1975 (Cth)* as amended by the *Family Law Amendment (Shared Parental Responsibility) Act 2006*

Definitions:

Section 4:

abuse, in relation to a child, means:

- (a) an assault, including a sexual assault, of the child which is an offence under a law, written or unwritten, in force in the State or Territory in which the act constituting the assault occurs; or
- (b) a person involving the child in a sexual activity with that person or another person in which the child is used, directly or indirectly, as a sexual object by the first-mentioned person or the other person, and where there is unequal power in the relationship between the child and the first-mentioned person.

Section 63DA(5):

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.

Section 4:

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.

Part VII—Children

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, opportunity and encouragement necessary:
 - (i) to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and

(ii) to develop a positive appreciation of that culture.

60CA Child's best interests paramount consideration in making a parenting order

In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.

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 any grandparent or other relative of the child), with whom he or she has been living;
 - (e) the practical difficulty and expense of a child spending time with and communicating with 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 other relative 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 Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture); and
 - (ii) the likely impact any proposed parenting order under this Part 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-term issues in relation to the child; and

- (ii) to spend time with the child; and
 - (iii) to communicate with the child; and
 - (b) has facilitated, or failed to facilitate, the other parent:
 - (i) participating in making decisions about major long-term issues in relation to the child; and
 - (ii) spending time with the child; and
 - (iii) communicating with the child; and
 - (c) has fulfilled, or failed to fulfil, the parent's 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 the support, opportunity and encouragement necessary:
 - (i) to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and
 - (ii) to develop a positive appreciation of that culture.

60CF Informing court of relevant family violence orders

- (1) If a party to the proceedings is aware that a family violence order applies to the child, or a member of the child's family, that party must inform the court of the family violence order.
- (2) If a person who is not a party to the proceedings is aware that a family violence order applies to the child, or a member of the child's family, that person may inform the court of the family violence order.
- (3) Failure to inform the court of the family violence order does not affect the validity of any order made by the court.

60CG Court to consider risk of family violence

- (1) In considering what order to make, the court must, to the extent that it is possible to do so consistently with the child's best interests being the paramount consideration, ensure that the order:
- (a) is consistent with any family violence order; and
 - (b) does not expose a person to an unacceptable risk of family violence.

- (2) For the purposes of paragraph (1)(b), the court may include in the order any safeguards that it considers necessary for the safety of those affected by the order.

60I Attending 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 effort to resolve that dispute by family dispute resolution before the Part VII order is applied for.

Phase 1 (from commencement to 30 June 2007)

- (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.

Phase 2 (from 1 July 2007 to first proclaimed date)

- (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 proceedings has 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 the proceedings; or
 - (ii) there would be a risk of abuse of the child if there were to be a delay in applying for the order; or
 - (iii) there has been family violence by one of the parties to the proceedings; or
 - (iv) there is a risk of family violence by one of the parties to the proceedings; 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 the period of 12 months before the application is made;
 - (iii) the application is made in relation to a contravention of the order by a person;
 - (iv) the court is satisfied that there are reasonable grounds to believe that the person has behaved in a way that shows a serious disregard for 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.

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 the proceedings; or
 - (ii) there has been family violence by one of the parties to the proceedings;
- 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.

60K 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 a child; 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 the application, that:
 - (i) there has been abuse of the child by one of the parties to the proceedings; or
 - (ii) there would be a risk of abuse of the child if there were to be a delay in applying for the order; or
 - (iii) there has been family violence by one of the parties to the proceedings; or
 - (iv) there is a risk of family violence by one of the parties to the proceedings; 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.

61B Meaning of *parental responsibility*

In this Part, *parental responsibility*, in relation to a child, means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.

61C Each parent has parental responsibility (subject to court orders)

- (1) Each of the parents of a child who is not 18 has parental responsibility for the child.

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.

- (2) Subsection (1) has effect despite any changes in the nature of the relationships of the child's parents. It is not affected, for example, by the parents becoming separated or by either or both of them marrying or re-marrying.
- (3) Subsection (1) has effect subject to any order of a court for the time being in force (whether or not made under this Act and whether made before or after the commencement of this section).

Note: Section 111CS may affect the attribution of parental responsibility for a child.

61D Parenting orders and parental responsibility

- (1) A parenting order confers parental responsibility for a child on a person, but only to the extent to which the order confers on the person duties, powers, responsibilities or authority in relation to the child.
- (2) A parenting order in relation to a child does not take away or diminish any aspect of the parental responsibility of any person for the child except to the extent (if any):
- (a) expressly provided for in the order; or
 - (b) necessary to give effect to the order.

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.

61DB Application of presumption of equal shared 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.

63DA Obligations of advisers

- (1) If an adviser gives advice or assistance to people in relation to parental responsibility for a child following the breakdown of the relationship between those people, the adviser must:
- (a) inform them that they could consider entering into a parenting plan in relation to the child; and
 - (b) inform them about where they can get further assistance to develop a parenting plan and the content of the plan.
- (2) If an adviser gives advice to people in connection with the making by those people of a parenting plan in relation to a child, the adviser must:
- (a) inform them that, if the child spending equal time with 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
 - (b) inform them that, if the child spending equal time with each of them is not reasonably practicable or is not in the best interests of the child but the child spending substantial and significant time with 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 plans should be made in the best interests of the child; and
 - (d) inform them of the matters that may be dealt with in a parenting plan in accordance with subsection 63C(2); and
 - (e) inform them that, if there is a parenting order in force in relation to the child, the order may (because of section 64D) include a provision that the order is subject to a parenting plan they enter into; and
 - (f) inform them about the desirability of including in the plan:

- (i) if they are to share parental responsibility for the child under the plan—provisions of the kind referred to in paragraph 63C(2)(d) (which deals with the form of consultations between the parties to the plan) as a way of avoiding future conflicts over, or misunderstandings about, the matters covered by that paragraph; and
- (ii) provisions of the kind referred to in paragraph 63C(2)(g) (which deals with the process for resolving disputes between the parties to the plan); and
- (iii) provisions of the kind referred to in paragraph 63C(2)(h) (which deals with the process for changing the plan to take account of the changing needs or circumstances of the child or the parties to the plan); and
- (g) explain to them, in language they are likely to readily understand, the availability of programs to help people who experience difficulties in complying with a parenting plan; and
- (h) inform them that section 65DAB requires the court to have regard to the terms of the most recent parenting plan in relation to the child when making a parenting order in relation to the child if it is in the 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 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 to the 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 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.

64B Meaning of *parenting order* and related terms

- (1) A *parenting order* is:
 - (a) an order under this Part (including an order until further order) 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 is made;
 - (h) the process to be used for resolving disputes about the terms or operation of the order;
 - (i) any aspect of the care, welfare or development of the child or any other aspect of parental responsibility for a child.

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 the order; or
 - (b) reaching agreement about changes to be made to the order.
- (5) To the extent (if at all) that a parenting order deals with the matter mentioned in paragraph (2)(f), the order is a ***child maintenance order***.
- (6) For the purposes of this Act:
- (a) a parenting order that provides that a child is to live with a person 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 a person; or

(ii) provides that a person is to share parental responsibility for a child with another person;
is *made in favour* of that person.

(9) In this section:

this Act includes:

- (a) the standard Rules of Court; and
- (b) the related Federal Magistrates Rules.

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 to the 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
 - (e) such other matters as the court considers relevant.

Note 1: Behaviour of a parent that is relevant for paragraph (c) may also be taken into account in determining what parenting order the court should make in the best interests of the child. Subsection 60CC(3) provides for considerations that are taken into account in determining what is in the best interests of the child. These include:

- (a) 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 (paragraph 60CC(3)(c));
- (b) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents (paragraph 60CC(3)(i)).

Note 2: Paragraph (c) reference to future capacity—the court has power under section 13C to make orders for parties to attend family counselling or family dispute resolution or participate in courses, programs or services.

65DAC Effect 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 a child; 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 be made 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.

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.

65L Family consultants may be required to supervise or assist compliance with parenting orders

- (1) If a court makes a parenting order in relation to a child, the court may also, subject to subsection (2), make either or both of the following orders:
 - (a) an order requiring compliance with the parenting order, as far as practicable, to be supervised by a family consultant;
 - (b) an order requiring a family consultant to give any party to the parenting order such assistance as is reasonably requested by that party in relation to compliance with, and the carrying out of, the parenting order.
- (2) In deciding whether to make a particular order under subsection (1) in relation to a child, a court must regard the best interests of the child as the paramount consideration.

Note: Sections 60CB to 60CG deal with how a court determines a child's best interests.

Division 10—Independent representation of child's interests

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 that independent 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.

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
 - (b) act in relation to the proceedings in what the independent children's lawyer believes to be the best interests of the child.
- (3) 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) ensure that any views expressed by the child in relation to the matters to which the proceedings relate are fully put before the court; 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.

Division 11—Family violence**68N Purposes of this Division**

The purposes of this Division are:

- (a) to resolve inconsistencies between:
 - (i) family violence orders; and
 - (ii) certain orders, injunctions and arrangements made under this Act that provide for a child to spend time with a person or require or authorise a person to spend time with a child; and
- (aa) to ensure that orders, injunctions and arrangements of the kind referred to in subparagraph (a)(ii) do not expose people to family violence; and
- (b) to achieve the objects and principles in section 60B.

Note: Other provisions dealing with family violence and family violence orders are section 4 (definitions), paragraphs 60B(1)(b) and 60CC(2)(i) and (j), sections 60CF and 60CG, subsection 60I(9), section 60K, subsection 61DA(2), paragraph 65F(2)(b) and section 65P.

68P 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
 - (b) 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.

Division 12A—Principles for conducting child-related proceedings

Subdivision B—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.

69ZO This Division also applies to proceedings in Chambers

A judge, Judicial Registrar, Registrar, Federal Magistrate or magistrate, who is hearing child-related proceedings in Chambers, has all of the duties and powers that a court has under this Division.

Note: An order made in Chambers has the same effect as an order made in open court.

69ZP Powers under this Division may be exercised on court's own initiative

The court may exercise a power under this Division:

- (a) on the court's own initiative; or
- (b) at the request of one or more of the parties to the proceedings.

Subdivision C—Duties and powers related to giving effect to the principles

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.

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.

69ZS Use of family consultants

At any time during child-related proceedings, the court may designate a family consultant as the family consultant in relation to the proceedings.

Note 1: Family consultants have the functions described in section 11A. These include assisting and advising people involved in proceedings, and this assistance and advice may involve helping people to better understand the effect of things on the child concerned. Family consultants can also inform people about other services available to help them.

Note 2: The court may also order parties to proceedings to attend appointments with a family consultant. See section 11F.

Subdivision D—Matters relating to evidence

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.

69ZU Evidence of family consultants

The court must not, without the consent of the parties to the proceedings, take into account an opinion expressed by a family consultant, unless the consultant gave the opinion as sworn evidence.

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.

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.

69ZX Court'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 evidence or the production of documents or other things from, parties, witnesses and experts on matters relevant to the proceedings.
- (2) Without limiting subsection (1) or section 69ZR, 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) limiting the time for oral argument; or
 - (d) 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) limiting, or not allowing, cross-examination of a particular witness; or
 - (j) 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).

Note: This subsection may be particularly relevant for Aboriginal or Torres Strait Islander children.

- (4) The court must not, in proceedings under this Part in which the court is required to regard the best interests of the child as the paramount consideration, direct under:
 - (a) subsection 126B(1) of the *Evidence Act 1995*; or
 - (b) a law of a State or Territory relating to professional confidential relationship privilege specified in the regulations;

that evidence not be adduced if the court considers that adducing the evidence would be in the best interests of the child.

117 Costs

- (1) Subject to subsection (2), subsection 70NFB(1) and sections 117AA, 117AB, 117AC and 118, each party to proceedings under this Act shall bear his or her own costs.
- (2) If, in proceedings under this Act, the court is of opinion that there are circumstances that justify it in doing so, the court may, subject to subsections (2A), (4) and (5) and the applicable Rules of Court, make such order as to costs and security for costs, whether by way of interlocutory order or otherwise, as the court considers just.
- (2A) In considering what order (if any) should be made under subsection (2), the court shall have regard to:
 - (a) the financial circumstances of each of the parties to the proceedings;
 - (b) whether any party to the proceedings is in receipt of assistance by way of legal aid and, if so, the terms of the grant of that assistance to that party;
 - (c) the conduct of the parties to the proceedings in relation to the proceedings including, without limiting the generality of the foregoing, the conduct of the parties in relation to pleadings, particulars, discovery, inspection, directions to answer questions, admissions of facts, production of documents and similar matters;
 - (d) whether the proceedings were necessitated by the failure of a party to the proceedings to comply with previous orders of the court;
 - (e) whether any party to the proceedings has been wholly unsuccessful in the proceedings;
 - (f) whether either party to the proceedings has made an offer in writing to the other party to the proceedings to settle the proceedings and the terms of any such offer; and
 - (g) such other matters as the court considers relevant.
- (3) To avoid doubt, in proceedings in which an independent children's lawyer for a child has been appointed, the court may make an order under subsection (2) as to costs or security for costs, whether by way of interlocutory order or otherwise, to the effect that each party to the proceedings bears, in such proportion as the court considers just, the costs of the independent children's lawyer in respect of the proceedings.
- (4) However, in proceedings in which an independent children's lawyer for a child has been appointed, if:
 - (a) a party to the proceedings has received legal aid in respect of the proceedings; or

- (b) the court considers that a party to the proceedings would suffer financial hardship if the party had to bear a proportion of the costs of the independent children's lawyer; the court must not make an order under subsection (2) against that party in relation to the costs of the independent children's lawyer.
- (5) In considering what order (if any) should be made under subsection (2) in proceedings in which an independent children's lawyer has been appointed, the court must disregard the fact that the independent children's lawyer is funded under a legal aid scheme or service established under a Commonwealth, State or Territory law or approved by the Attorney-General.

117AB Costs where false allegation or statement made

- (1) This section applies if:
 - (a) proceedings under this Act are brought before a court; and
 - (b) the court is satisfied that a party to the proceedings knowingly made a false allegation or statement in the proceedings.
- (2) The court must order that party to pay some or all of the costs of another party, or other parties, to the proceedings.