

After a long and arduous process of inquiry and debate, far-reaching reforms to the *Family Law Act 1975* have been passed into law. Complemented by developments in family services provision, the Australian Government's reform package aims to effect a cultural shift in the way disputes over children following separation are resolved.

## “Shared parental responsibility” and the reshaping of family law.



Catherine Caruana

### *Amendments to the Family Law Act 1975 made law*

The penultimate step in the legislative passage of the *Family Law Amendment (Shared Parental Responsibility) Bill 2005* occurred on the 10 May when the House of Representatives approved the far-reaching amendments to the *Family Law Act 1975*. The majority of the provisions took effect when proclaimed on 1 July 2006, coinciding with the opening of the first 15 Family Relationship Centres.

The most significant changes to the substantive law are amendments to Part VII of the FLA, contained in Schedule 1 of the Act, dealing with parental responsibility, time spent with children, the “best interests” provisions, and the making of parenting plans and parenting orders. Amendments to procedural provisions seek to deflect disputing parents away from the courts, to minimise the adversarial nature of proceedings involving issues related to children and to encourage a culture of co-operative parenting after separation.

A summary of the key amendments are outlined below<sup>1</sup>. References to “the Act” throughout are to the amending legislation, i.e., the *Family Law Amendment (Shared Parental Responsibility) Act 2006*.

#### *Change in terminology*

Schedule 8 of the Act replaces the current terms of “residence”, “contact” and “specific issues” throughout the Act with “live with”, “spend time with”, “communicate with” etc. Similarly, contact, residence and specific issues orders are now to be known simply as “parenting orders”.

#### *New objects and principles section*

The objects and principles section has been amended to add two new objects of “ensuring that children have the benefit of both parents having a meaningful involvement in their lives” and “protecting children from physical or psychological harm and from being subjected to, or exposed to, abuse, neglect or family violence”. The wording of the principles section has been broadened to include a child’s right to “communicate on a regular basis”, as well as spend time with, parents and others significant to them, with a specific reference to grandparents. The right of all children, but more particularly Aboriginal and Torres Strait Islander children to “enjoy” their culture has also been added.

#### *Rebuttable presumption for “equal shared parental responsibility”*

A new section 61DA establishes a presumption that in the making of parenting orders<sup>2</sup>, parental responsibility – that is, the making of decisions involving a “major, long-term issue” concerning a child’s care, welfare and development (see section 65DAC) – will be shared jointly by parents. The note to this amendment states specifically that this does not equate with equal parenting *time*. “Equal shared parental responsibility”, as defined, requires that parents consult each other in the making of any long-term decisions and attempt to reach agreement on the issue. As such, parental responsibility is no longer exercisable by one parent independently of the other.

A definition of “major long-term issue” has been inserted into the interpretation section and is stated to include issues relating to the child’s education, religion, culture, health, name and usual place of residence. A note to the amended section specifically states that the decision by a parent to form a relationship with a new partner is *not* considered a ‘major long-term issue’ requiring agreement from the other parent.

The presumption that parents share responsibility can be rebutted (or refuted) by evidence that such an arrangement would not be in the best interests of the child. The presumption does not apply where there are reasonable grounds to believe a parent of the child or a person living with the parent has been violent or abusive to the child (to

the parent or to another child who is a member of the parent's family).

The concept of "entrenched conflict" between parents included in previous draft provisions as a factor that may rebut the presumption for shared parental responsibility, has been deleted from the section in its final form.

### **Promotion of "joint custody"**

Consistent with the recommendation of the "Every picture tells a story" report (Australia. Parliament. House of Representatives Standing Committee on Family and Community Affairs, 2004), amendments relating to the amount of *time* separated parents spend with their children are designed to encourage a shift in the family law system towards a shared care model (or what is known in popular parlance as "joint custody") rather than impose a presumption. A new, detailed section 65DAA states that where parents have an order for equal shared parental responsibility, the court must consider making an order for the child spending either equal time, or where that is not appropriate, "substantial and significant" time with each parent. The court must first be satisfied that to do so would be both in the child's best interests and that such an arrangement would be "reasonably practicable". The notes to the section reiterate that the child's best interests are the paramount consideration.

For a care arrangement to involve "substantial and significant" time with a parent, the Act stipulates it must include weekdays, weekends and holidays, allow the parent to be involved in the child's daily routine and enable the parent and the child to be involved in occasions and events that are significant to both. The section then goes on to specify that in determining whether such an arrangement is "reasonably practicable", the court must consider how far apart the parents live from each other, their current and future capacity to put the arrangement into effect, to communicate with each other and to resolve difficulties that may arise, the impact of such an arrangement on the child and any other factors it considers relevant. Notes to the section state that behaviour by parents that indicate their capacity to share parenting, may also be taken into account in determining what arrangement is in the child's best interests.

The Act also imposes new obligations on advisers working with separating parents to encourage them to consider more equal time spent caring for children (see S.63DA). "Advisers" are defined as legal practitioners, family counsellors, family dispute resolution practitioners and family consultants working within the court. Under the Act they are required to inform clients that if the child spending equal time or substantial and significant time with each of them is reasonably practicable and in the best interests of the child, the clients "could consider" such an arrangement.

These changes to the substantive law apply to all parenting orders made after 1 July 2006, including those matters in the system before the amendments were made law. In an attempt to prevent a flood of applications to vary orders in light of the amendments, the Act specifically states that the passage of the legislation does not in itself constitute "changed circumstances" providing grounds for the variation of existing parenting orders.

### **"Best interests" factors**

The "best interests of the child" principle retains its paramountcy in the Act (section 60CA). In fact the provisions

have been given more prominence with their relocation closer to the front of Part VII.

Section 60CC replaces the old section 68F and regroups the factors that the court must consider in determining what is in a child's "best interest" into *primary* and *additional* considerations. The two factors elevated to *primary* considerations are "the benefit to the child of having a meaningful relationship with both of the child's parents" and "the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence."

The *additional* considerations incorporate the remaining factors listed under the old section 68F, with some minor changes to wording. The court must consider children's "views" rather than their "wishes" and the child's relationships with his or her grandparents are specifically highlighted.

Three new provisions have been added. First, the court is directed to consider "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" – the so called "friendly parent" provision. Second, the rights of all children, but more specifically Aboriginal or Torres Strait Islander children, to enjoy their cultural heritage must also be taken into account in determining what is in the child's best interests. Finally, the court must consider the extent to which each of the parents have fulfilled their parental responsibilities since separation, in particular the time spent with the child or maintaining contact with the child, their participation in decision making, the facilitation (or otherwise) of the other parent's involvement in the child's life as well as the provision of financial support for the child.

### **Independent children's lawyer**

These provisions deal with changes to the role formerly known as the child representative, (i.e., the lawyer appointed by the court in certain cases to represent the child's interests) and, to a large extent, implement the recommendations of the Family Law Council in its 2004 report "Pathways for children: A review of children's representation in family law". The terminology has been changed in an attempt to avoid the common misunderstanding under the old provisions that the lawyer appeared as the representative of the child.

### **Family violence**

As indicated by changes to the objects and principles sections and the "best interests" provisions outlined above, the issue of family violence has been given greater prominence in the amended act, but there has otherwise been no significant change to the way family violence is treated under the *Family Law Act 1975*. An issue of some controversy throughout the parliamentary debate was the introduction of a definition of family violence in the interpretation section, and in particular, the inclusion of a requirement that the apprehension or fear for personal wellbeing or safety be "reasonably" held, taking into account the individual circumstances of the person said to hold that fear.

Schedule 6 of the Act simply clarifies existing provisions that deal with the jurisdictional overlap between state and territory family violence protection orders and orders made in the Family Court concerning how children spend time with each parent. This is an issue that will be revisited as part of the Federal Attorney-General's Family Violence Strategy (see below).

### ***Parenting plans and parenting orders***

Parenting plans are written agreements between parents concerning the care of their children. Unlike parenting orders there is no mechanism to make them enforceable<sup>3</sup>. As part of the push for negotiated rather than adjudicated settlement of disputes, the amendments promote the wider use of parenting plans, and while they remain unenforceable, have lent them greater legal significance. Parenting orders are now said to be subject to any subsequent parenting plan entered into by the parties. This means that the orders cease to be enforceable to the extent of any inconsistency with a subsequent written agreement by the parties.

When making a parenting order, the court is required to take into account the terms of a pre-existing parenting plan, where it is in the best interests of the child to do so (see new section 65DAB).

By adding to the list of matters that can be included in a parenting plan, the amendments envisage that plans are to be more detailed in nature. Under these provisions, advisers are required to inform parties to a parenting plan of the desirability of including clauses that outline how parties are to consult with each other when parental responsibility is joint and to agree on what dispute resolution processes are to be used in future disputes or if circumstances change. While many mediators already work in this way, it is hoped that a more widespread adoption of the practice may result in better drafted agreements and therefore help to reduce contraventions.

### ***Phase-in of compulsory, pre-filing primary dispute resolution***

The Act establishes a schedule of increasingly directive provisions that require parties seeking a court order in children's matters to first attempt to resolve the dispute between them, before making an application to the court.

*Phase 1:* Until 30 June 2007, the status quo is maintained and parties are merely exhorted to first attempt to resolve their dispute before applying to the court. These provisions have been extended to apply to matters before the Federal Magistrate's Court.

*Phase 2:* From the 1 July 2007 until a date fixed by proclamation, those seeking to make a completely new application to the court will be required to file a certificate stating that they have attempted to resolve the matter using dispute resolution processes. During this time, those filing subsequent applications on the same issue (for example, an interim application in ongoing proceedings) or parties who have previously applied for an order regarding that child, will not be subject to this requirement.

*Phase 3:* At a subsequent date, *all* applications to the court in children's matters, including subsequent interim applications in an ongoing matter, will be subject to the compulsory primary dispute resolution requirement. Exceptions are where the parties are consenting to the orders sought, there is risk of abuse or violence if the application is delayed, in circumstances of urgency, where one or both parties is incapable of participating in primary dispute resolution processes, if the application relates to a contravention or where the application deals with an issue in relation to which an order has been made in the previous 12 months.

The requirements are implemented incrementally to allow for the establishment of Family Relationship Centres and to ensure there are adequate numbers of dispute resolution

practitioners in existing organisations to provide services. In recent budget announcements, an additional \$45.8 million has been dedicated to boost family support services (Federal Attorney-General 2006a, 2006b). Developments in the establishment of the new centres will be discussed below.

### ***Grandparents***

While the amendments do not significantly alter the legal standing of grandparents in family law disputes, their position is highlighted by additional specific references throughout the *Family Law Act 1975*. As indicated above, the child's relationship with grandparents is included in the list of factors considered in any determination as to what is in the best interests of the child.

### ***A new compliance regime***

The powers of the court in ensuring compliance with orders relating to children have been increased. New enforcement provisions grant the court specific powers to make an order "compensating for time lost" with a child as a result of the other parties' contravention of a parenting order, whether or not there was reasonable excuse for the contravention. In fact the court is directed to consider making such an order, except where to do so would not be in child's best interests. Other new powers include the ability to award compensation for reasonable expenses incurred as a result of the breach of the order, an order for costs against the recalcitrant party and discretion to impose a bond for breach of orders.

The three tiered enforcement regime has been replaced with a new grouping of penalties under the following categories: where a contravention is alleged but not established, where a contravention is established but there is a reasonable excuse, where the court finds that a contravention of a less serious nature occurred and there was no reasonable excuse and more serious and/or repeated contraventions. For the final, more serious category of breach, the court must make an order for legal costs unless it is not in the child's best interests.

### ***Procedural changes in children's matters***

In addition to these substantive changes, the Act also contains measures implementing a less adversarial approach in litigation involving children's issues.

The principles that underscore the changes in child-related proceedings are as follows: the court must give significant weight to the impact the proceedings may have on the child or children concerned; the court, rather than lawyers, actively directs, controls and manages the proceedings; proceedings are to be conducted expeditiously, with as little formality as possible and in a way that promotes cooperation and a positive relationship between the parties. To that end, many of the rules of evidence are held not to apply unless the court so orders. The Act outlines new extensive judicial powers in relation to evidentiary and procedural matters and creates a system more akin to European investigatory models of jurisprudence.

While based largely on the Children's Cases Program, a program currently run by the Family Court, these provisions have a wider application, applying as they do to child related proceedings and, where parties consent, to "any other proceedings . . . that arise from the breakdown of the parties' marital relationship". This new judicial approach can therefore apply in property matters where the parties consent.

### Changes to dispute resolution

The Act also amends the dispute resolution provisions of the *Family Law Act 1975*, placing additional advisory obligations on professionals, when dealing with people considering instituting proceedings concerning children. Under the old provisions, only lawyers and court staff were directed that they “must consider whether or not to advise” clients about primary dispute resolution practices. The amendments extend this obligation to family counselors, family dispute resolution practitioners and arbitrators and requires them to inform clients as to: the legal and possible social effects and impact of litigation on children; the steps involved in litigation and the likely timeframe of proceedings; the role of the family and child specialists in the Family Court; the family counselling and dispute resolution services available; the services available to assist with reconciliation (in relation to married clients); and, for court staff only, the arbitration facilities available.

There is a push throughout the Act for professionals dealing with married couples to encourage reconciliation. A judge can adjourn proceedings and speak to the parties in chambers or refer them to counselling if she or he considers there is a “reasonable possibility” of reconciliation. These provisions are restricted to married couples.

### Family Relationship Centres and new family relationship services

With the announcement in April 2006 of the successful tenderers for the establishment of the first 15 Family Relationship Centres around Australia, the Australian Government is moving quickly to implement the services component of its family law reform package (Federal Attorney-General, 2006a). The tenders were awarded to a range of organisations including those already providing government-funded family relationship services, either as stand-alone or joined as a consortium, as well as a number of new private and community-based organisations.

The centres are located mainly in country and outer suburban areas with four each allocated in NSW and Victoria, two in Queensland, and one each in the remaining five jurisdictions. Approximately half the 65 centres are mooted for location in rural, regional and remote locations (Hansard 2006). Some of the bigger players selected to run the prototype centres included Relationships Australia, UnitingCare Unifam, Family Life Movement of Australia, Centacare, and Anglicare. The new centres will be complemented by a telephone advice helpline providing assessment, information, referral and advice to those families unable to access a Family Relationship Centre.

In May, the Federal Attorney-General (2006a, 2006b) announced the establishment of a host of new services, again targeted for rural and regional areas, to assist families experiencing separation. These will replicate existing programs such as Children’s Contact Services (providing a safe, neutral venue for contact to occur, including supervised contact) and the Contact Order’s Programs (a service assisting parents with high levels of conflict to comply with their contact arrangements) as well providing relationship and family counselling via the Early Intervention Services and additional Family Dispute Resolution services. The May 14 announcement also included the proposed location and scheduled establishment of the remaining 50 Family Relationship Centres over a two year period. The first 15 Centres are up and running.

### The Institute undertakes study of allegations of violence and child abuse in the family law system

The Family Law Violence Strategy (Australia. Attorney-General’s Department, 2006), announced by the Federal Attorney General in February this year, seeks to “consider, with a view to improvement, the manner in which family violence and child abuse issues are investigated and dealt within the family law system.” Taking a five-pronged approach, the strategy aims to investigate how allegations arise and are handled by the courts; assess how the recent amendments to the *Family Law Act 1975* and the operation of Family Relationship Centres will impact on issues of violence and abuse; play a coordination role with the states and territories to ensure there is greater consistency in how these issues are handled across the State/Federal divide, particularly where there is overlap with Commonwealth responsibilities; work with the courts to enhance current approaches to family violence; and consult with all relevant stakeholders for further input.

The Institute is to play a pivotal role in the first stated objective by conducting focused research into the management of such issues in the family law jurisdiction. Looking at court records, this short-term project will explore the types of allegations that are made and the circumstances in which they arise, how these are dealt with procedurally and the impact that allegations - both proven and unproven - have on arrangements for the care of children after separation. The results from this study will inform subsequent longitudinal research on the same issues and will provide comparative data for future studies looking at the impact of the legislative reforms outlined above on court users affected by family violence.

### Endnotes

- 1 The Bills Digest produced by Mary Anne Neilsen and Jennifer Norberry, Department of Parliamentary Services, was invaluable in the preparation of this summary.
- 2 Including interim parenting orders.
- 3 Provisions allowing for the registration of parenting plans were removed from the *Family Law Act 1975* in 2003.

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Catherine Caruana is a Senior Researcher at the Australian Institute of Family Studies.