FAMILY LEGISLATION AMENDMENT BILL 2006 (WA)

EXPLANATORY MEMORANDUM

Overview of Bill

The Bill brings the *Family Court Act 1997* of Western Australia up-to-date with the *Family Law Act 1975* of the Commonwealth. It incorporates those amendments made to the *Family Law Act 1975* (Cth) by the Commonwealth Parliament in the last few years and those that will be made by the Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth). As a result of this legislation those Western Australians in a de facto relationship, and their ex nuptial children, will be in the same position as their married counterparts and the children of those marriages.

CLAUSE NOTES

Part 1 - Preliminary

Clause 1 – Short title

This clause provides that when enacted the Bill is to be know as the *Family Legislation Amendment Act 2006* (WA).

Clause 2 – Commencement

This clause provides that the proposed Act is to come into operation on the day or days set by proclamation.

Clause 3 – The Act amended

This clause provides that the amendments made by the proposed Act are all made to the *Family Court Act 1997* (WA).

Part 2 – Miscellaneous Amendments

Division 1 – Removal of requirement to register parenting plans

Clause 4 – Section 5 amended

This clause inserts in the appropriate place in section 5 (Definitions) of the *Family Court Act 1997* (WA) a meaning of "registered parenting plan". The meaning given is the meaning given in section 76(6) of the Act.

Clause 5 – Section 74 amended

This clause deletes words relating to the registration of parenting plans in the courts from the end of section 74 of the *Family Court Act 1997*.

Clause 6 – Section 75 replaced

This clause repeals the existing section 75 and inserts a new clause 75 (Parents encouraged to reach agreement – FLA section 63B) consistent with the removal of the requirement to register a parenting plan. The proposed new section encourages parents to agree about matters concerning a child and to use the legal system as a last resort rather than a first resort. In reaching agreement parents are encouraged to regard the best interests of the child as the paramount consideration.

Clause 7 – Section 76 amended

The clause inserts anew section 76(6) after section 76(5) of the *Family Court Act 1997*. The proposed new section defines what a "registered parenting plan" is.

Clause 8 – Section 78 replaced

This clause repeals the existing section 78 and inserts a new clause 78 (Parenting plan may be varied or revoked by further written agreement - FLA section 63D). The proposed new section will provide that a parenting plan other than one registered with the Court may be amended or revoked by a subsequent written agreement between the parties.

Clause 9 – Section 78A replaced

This clause repeals the existing section 78A and inserts two new clauses 78A (Explanation by person advising or assisting in the making of a parenting plan – FLA section 63DA) requires that a counsellor, mediator or legal practitioner giving advice or assistance in connection with a parenting plan must advise the parties of the availability of programs to help people experiencing difficulties in complying with the plan.

Clause 10 – Section 78B (Registered parenting plans – FLA S63DB)

This clause inserts a new clause 78B (Registered parenting plans - FLA section 63DB) after section 78A of the Act. The proposed new section provides that a registered parenting plan cannot be varied though it can be revoked, varied or discharged by the Court.

This section deals with the saving and variation of registered parenting plans. These plans cannot be varied but can be revoked.

Clause 10 – Section 79 replaced

This clause repeals the existing section 79 and inserts a new section that sets out the mechanism by which to register the revocation of a registered parenting plan by agreement. The court in deciding whether to register a revocation will consider information accompanying the application and what is in the best interests of the child. The application must be accompanied by a number of documents including a certificate from a legal practitioner that each party has been given independent legal advice about the effect of the revocation of the agreement.

Clause 11 – Section 80(1) replaced

This clause repeals subsection 80(1) and inserts a new provision that ensures that the section relating to child welfare provisions of registered parenting plans only applies to those registered parenting plans already existing. That is those defined by section 76 (clause 7).

Clause 12 – Section 81(1) replaced

This clause repeals subsection 81(1) that relates to where child maintenance provisions of registered parenting plans are not enforceable maintenance agreements. A new provision is inserted to ensure that this only applies to "a registered parenting plan" as defined by section 76.

Clause 13 –subsection 82(1)

This clause inserts subsection 82(1a) provides that section 82 about the courts powers to set aside, discharge, suspend or revive registered parenting plans also applies to a registered parenting plan (as defined by section 76 that contains child welfare provisions.

This clause also amends section 82(1) and ensures that section 82 about the courts' powers to set aside, discharge, suspend or revive registered parenting plans applies only to a registered parenting plan (as defined by section 76).

Clause 14 – Section 174 amended

This clause amends the definition of "Division 10 contact order" to include a registered parenting plan.

Clause 15 – Section 205A amended

This clause amends the definition of order under this Act affecting children to include a registered parenting plan.

Clause 16 – Section 221 amended

This clause amends section 221(1)(b) to include a registered parenting plan.

Division 2 – Use of audio links, video links, etc.

This Division facilitates the use of video and audio technology for the taking of submissions and evidence. It is expected that it will be common for parties to live, or have their place of business, in different towns or even different States. Use of audio and video links will reduce the need for parties to travel long distances to attend directions hearings or final hearings of their cases.

This Division applies to the giving of testimony, appearances and making submissions by video or audio link or other appropriate means. The technical requirements for the use of video or audio links are set out in section 219AE.

Clause 17 – Section 5 amended

This clause defines *audio link* to mean facilities like telephones that enable audio communications between persons in different places and defines *video link* to mean facilities like closed circuit television that enable audio and visual communications between persons in different places.

Clause 18 –Heading to Part 8 Division 1 inserted

This clause inserts the heading "Division 1 – General matters concerning procedures and evidence". This is necessary because of the creation of the new Division 2 of Part 8.

Clause 19 – Part 8 Division 2 inserted

This clause inserts new Division 2 in relation to the use of video link, audio link or other appropriate means to give testimony, make appearances and give submissions etc.

Division 2 – Use of video link, audio link or other appropriate means to give testimony, make appearances and give submissions etc.

Section 219AA — provides that this Division is in addition to and does not limit the operation of the *Evidence Act 1906*.

Section 219AB – Testimony (FLA S102C)

Section 219AB allows the court or a Judge to direct that testimony may be given by video link, audio link or other appropriate means. Testimony must be given on oath or affirmation unless the court considers other forms to be appropriate. The exception is because in some countries it is not permissible for an oath or affirmation to be administered to a witness taking part in a foreign proceeding.

Subsection 219AB(3) — provides that where the testimony is not given by oath or affirmation the court may give the testimony such weight as it thinks fit.

Subsection 219AB(4) — provides that the court or a Judge may direct testimony be given by video or audio link, or other appropriate means, on its own initiative or on the application of a party to the proceedings.

Subsection 219AB(5) — provides an exception for people providing testimony in New Zealand because the *Evidence and Procedures (New Zealand) Act 1994* (the New Zealand Evidence Act) provides arrangements for obtaining evidence for proceedings in each country from witnesses in the other country, including arrangements for the use of video and audio link.

Section 219AC (FLA S102D) – Appearance of persons

Subsection 219AC allows the court or a Judge to direct that a person may appear before the court by video or audio link or other appropriate means on its own initiative or on the application of a party to a proceeding. Subsection 219AC(3) provides that this does not apply if the person appearing is in New Zealand as the New Zealand Evidence Act applies.

Section 219AD – (FLA S102E)

Subsection 219AD allows the Court or a Judge to direct that a person make submission by video link, audio link, or other appropriate means on its own initiative or on the application of a party to a proceeding. Subsection 219AD(3) provides that this does not apply if the person making a submission is in New Zealand as the New Zealand Evidence Act applies.

Section 219AE (FLA S102F) – Conditions for use of links

Section 219AE sets out the requirements for video link, audio link, and other appropriate means of communication.

In the case of audio link the requirement is that the courtroom and the remote location are equipped with facilities that enable all eligible persons to hear the person appearing, giving testimony or making the submissions.

In the case of video link the requirement is that all eligible persons are able to see and hear, the person appearing, giving testimony or making the submissions.

In the case of other appropriate means of communication the Judge must be satisfied that the conditions prescribed by the applicable Rules of Court are met and the Judges may impose any other conditions deemed appropriate.

Subsections 219AE(2) and (4) also provide the conditions that may be prescribed by the applicable Rules of Court for video and audio links. These include the form of the links, the equipment required and the standard, speed and quality of the transmission.

Subsection 219AE(6)defines eligible person to be those the court or Judge considers should be treated as such. These would be expected to include those who are giving evidence when they are giving that evidence.

Subsection 219AE(7) defines courtroom to mean the place where the judge or court is sitting.

Section 219AF (FLA S102g) – Putting documents to a person

In general, a person cannot be questioned about a document unless the person is given a copy of the document. The process of giving a copy of the document to a person to be questioned is called putting a document to the person. Section 219AF provides a mechanism for putting documents to persons attending the hearing by video link, audio link or other appropriate means including where there is a split court. It provides that a document may be put to the person by causing a copy of the document to be transmitted to the court and to the remote point where the person is located as necessary.

Section 219AG (FLA S102J) – Administration of oaths and affirmations

Section 219AG provides that oaths or affirmations required when evidence is to be given by video or audio link or other appropriate means may be administered by video or audio link or if the court or Judge directs by another person at the remote location. The provision states that the administration of the oath or affirmation is to be done as far as practicable the same way that it would have been if the testimony was given in a courtroom.

Section 219AH (FLA S102) – Expenses

Section 219AH provides for the payment of expenses incurred in the use of video or audio link or other appropriate means of communication including a split court. Generally, the person who wishes to give evidence, appear or make submission by video or audio link or other appropriate means would be responsible for having all the necessary arrangements made and for meeting the costs. Subsection 219AH(1) enables the court or a judge to order another person to pay those costs, including the courts expenses.

Section 219AI (FLA S102L) – New Zealand proceedings

Section 219AI provides that this division does not affect the New Zealand Evidence Act. That Act provides arrangements for obtaining evidence for proceedings in Australia or New Zealand from witnesses in the other country.

Clause 20 – Section 244 amended

This clause inserts a rule-making power into paragraph S244(3), that enables the court to make Rules of Court for the purposes of the audio link, video link etc provisions. Any Rules of Court may provide for the conditions relating to the use of video links, audio links and other appropriate means of communication.

Clause 21 – Transitional provisions

This clause provides that the Family Court Act as amended by this Division applies in relation to proceedings instituted in a court before, on or after the commencement of this Division.

Division 3 – Parenting Compliance Regime

Clause 22 – Section 95A inserted

This clause inserts section 95A (Court may order attendance at a post-separation parenting program (FLA S65LA)) that gives the court the power to order a person to attend a post-separation parenting program at any stage during proceedings for a parenting order.

The provisions require that in deciding to make an order the court must regard the best interests of the child as being paramount. Section 95A contains definitions of "*post-separation parenting program*" and "*post-separation parenting program provider or provider*" and "*proceedings for a parenting order*" for the purposes of this section.

Clause 23 – Section 102 amended

This clause removes the reference to "section 226" in subparagraph 102(1)(b) and replaces it with the reference to "Division 13".

Clause 24 – 205A amended

This clause removes the definition of *appropriate post-separation parenting program* or *appropriate program*. This definition is no longer necessary because of the amendments made by clause 22 and other related amendments.

This clause also amends paragraph (c) of the definition of *order under this Act affecting children* in relation to an undertaking. The new definition relates to undertakings given to, and accepted by the court that relate to, or to the making of, a parenting order or certain types of injunctions, community service orders and bonds. The new definition ensures that only contraventions of these listed types of undertakings can be captured under Division 13. The intention is that breaches of undertakings that relate solely to financial matters but that are made in proceedings that deal with both parenting matters and financial matters are not dealt with under the parenting compliance regime.

Clause 24 also amends the definition of *order under this Act affecting children* in relation to a subpoena. The new definition relates to subpoenas issued under the applicable Rules of Court that relate to, or to the making of, a parenting order or certain types of injunctions, community service orders and bonds. The new definition ensures that only contraventions of these listed types of subpoenas can be captured under Division 13. The intention is that breaches of subpoenas that relate solely to financial matters but that occur in proceedings that deal with both parenting matters and financial matters are not dealt with under the parenting compliance regime.

Clause 24 also inserts a new paragraph in the definition of *order under this Act affecting children* in relation to community service orders. This allows the court to apply the provisions of Division 13 to a contravention of a community service order made in relation to the breach of a parenting order.

Clause 24 also amends section 205A by inserting a definition of *post-separation parenting program provider* or *provider* to mean a provider of a program this is included in a list of providers compiled under the *Family Law Act*.

Clause 24 also replaces the existing definition of *primary order* in section 205A. It inserts a new definition, which provides that *primary order* means an order under this Act affecting children and includes such order as varied. This ensures that contraventions of orders that are slight variations of the original orders are still regarded as breaches of the original order. This was the original intention of the provision.

Clause 25 – Section 205G amended

This clause amends section 205G(1) as a consequence of the clause 24 amendment to the definition of primary order.

This clause replaces one of the existing grounds on which a court can use its powers under Division 13 with a reference to the situation where either subsection (1a) or (1b) of section 205G applies.

Clause 25 also inserts new subsections (1a) and (1b) into section 205G.

This amendment ensures that all findings or contraventions, whether made before or after the amendments came into force, can be counted as previous contraventions for the purpose of the regime.

The new provisions simply refer to the imposing of a sanction or the taking of any action in relation to the primary order, without reference to whether or not the person was able to show they had a reasonable excuse for the breach. The provision also covers an adjournment. These amendments ensure that the original intention of the provisions is implemented.

Clause 26 – Section 205H amended

This clause removes the power of the court to order parties to attend, after assessment as to suitability of a program provider, a particular post-separation parenting program. These provisions proved to be unnecessarily restricting the flexibility of post-separation parenting program providers to tailor programs to suit individual clients.

Clause 26 also amends subparagraphs 205H(1)(a)(i) and (ii) so that, if making an order under paragraph 205H(1)(a) the court may order a person to attend before a post-separation parenting program provider for an initial assessment as to the person's suitability to attend a program. If so, that provider can then decide the most appropriate program, or a part of a program, for that person to attend. This decision takes effect as an order of the court directing the person to attend that program, or that part of that program.

Clause 26 also amends section 205(1)(b) to ensure that the court, in addition to having the power to make a further parenting order that compensates for contact foregone, also has the power to make an order that compensates for residence foregone.

Clause 26 also amends section 295H(1)(b) to extend the powers of the court to include that the court may make any other order varying the contravened order. This provides the court with a wider discretion in dealing with the range of possibilities that may come before it.

Clause 26 also amends section 205H(4) and provides that if the court makes an order under section 205H(1)(a) that a person is to attend before a provider for assessment, the court must cause the provider to be notified of the making of the order.

Clause 27 – Section 205K replaced

This clause inserts a new section 205K (Court may make further orders in relation to attendance at program – FLA section 70N1A) and gives the court the additional power to make further orders to deal with the contravention. Under the current provisions it is not clear that the court has power to deal further with a person where, for example, they have been found unsuitable to attend a program.

Clause 28 – Section 205L amended

This clause makes consequential amendments to the powers of the court.

Division 4 – Setting aside financial agreements

Clause 29 – Section 205ZV

This clause deals with the setting aside of financial agreements on an application by a person who was a party to the financial agreement, or by any other interested person, if the purpose of the financial is to defraud or defeat a creditor or there is a reckless disregard of the interests of a creditor.

Clause 30 – Transitional provisions

This clause deals with transitional provisions.

Division 5 – Other amendments relating to financial agreements

Clause 31 – Section 205ZR

This clause allows a court to take into account the terms and effect of a financial agreement, if the party was unable to support himself or herself with an income tested pension, allowance or benefit.

Clause 32 – Section 205ZS amended

This clause inserts the advantages and disadvantages, at the time that the advice was provided, to the party of making the agreement when considering whether financial agreements are binding.

Clause 33 – Section 205ZU amended

This clause repeats clause 33.

Division 6 – Orders and injunctions binding third parties

Clause 34 – Division 2A inserted in Part 5A

This clause inserts Division 2A which deals with orders and injunctions binding on third parties and follows the *Family Law Act 1975* (Cth) except in so far as it relates to de facto partners – refer to Commonwealth explanatory memorandum, *Family Law Amendment Act 2003* (Cth).

Clause 35 – Transitional provisions

This clause deals with transitional provisions.

Division 7 – Amendments about Magistrates Courts

Clauses 36,37,38,39,40,41 – Section 43 amended, Section 209A inserted, Sections 210A, 210AA and 210AB inserted.

These clauses amend the Magistrates Courts and ensures that Family Law Magistrates exercising State jurisdiction have the same powers as when exercising Federal jurisdiction.

Clause 42 - Transitional provision

This clause deals with transitional matters.

Division 8 – Amendments relating to the *Criminal Property Confiscation Act 2000*

Clauses 43,44,45,46 – Section 5 amended and consequential amendment, Section 205ZH amended, Sections 205ZHA, 205ZHB, 205ZHC and 205ZHD inserted, Sections 205ZX, 205ZY 205ZZ and 205ZZA inserted in Part 5A Division 3.

These clauses follow amendments to the *Family Law Act 1975* (Cth) to ensure that proceeds of crime orders must be notified, and appropriate action taken when an application is made for a property order by a married person - refer to Commonwealth explanatory memorandum, proceeds of *Crime Consequential Amendments and Transitional Provisions) Act 2002* (Cth).

Division 9 – Other amendments

Subdivision 1 – Parenting compliance regime

Clause 47 - Section 91 amended

This clause provides that proceedings for a parenting order includes proceedings for the enforcement of a parenting order and any other proceedings in which a contravention of a parenting order is alleged.

Clause 48 – Part 5 Division 13 Subdivision 1A inserted.

This clause inserts a subdivision on the court's powers to vary an order where contravention of a parenting order without reasonable excuse is not established.

Clause 49 – Transitional provisions

This clause deals with transitional provisions.

Clause 50 – Section 237 amended

This clause is a consequential amendment.

Clause 51 – Section 240 replaced

This clause allows for offers of settlement requiring that any offer must not be disclosed to a court except for the purposes of the consideration by the court on whether it should make an order as to costs.

Clause 52 – Savings provision

This clause is a savings provision in relation to offers to settle proceedings before the commencement of the relevant provision.

Sub Division 3 – Suspension of Sentences of Imprisonment

Clause 33 – Section 205Q amended

This clause allows for the suspension of sentences imposed by the Court.

Clause 54 – Section 226 amended

This clause is a consequential amendment.

Clause 55 – Section 227 amended

This clause allows for suspension of sentences of imprisonment as in clause 53.

Sub Division 4 – Enforcement (Removal of Information Procedure)

Clause 56, 57 – Section 205P amended, Section 230 amended

These clauses are necessary due to the removal of information procedure by the Bill.

Clause 58 – Savings Provision

This clause relevantly deals with procedures in force prior to amendments made before the commencement of the sub division.

Sub Division 5 – Private Arbitration

Clause 59 – Section 60B amended

This clause allows for private arbitration in relation to Part 5A proceedings or proceedings under section 221 of the *Family Court Act 1997*.

Sub division 6 – Change of Venue

Clause 60 – Section 46A inserted

This clause allows for a change of venue as directed by the court.

Sub division 7 – Definition of disposition

Clause 61 – Section 222 amended

This clause defines "disposition" and "interest".

Clause 62 – Savings provision

This clause relevantly deals with matters prior to the commencement of the relevant section.

Sub division 8 – Recovery of amounts paid under maintenance orders

Clause 63 – Part V – Provision 7 – Sub Division 7 inserted

This clause deals with the recovery of amounts paid under maintenance orders.

Sub division 9 – Miscellaneous amendments

Clause 64 – Section 5 amended

This clause includes a definition in the appropriate place of a "child representative".

Clause 65 – Section 55 amended

This clause deletes "prepared in accordance with the rules".

Section 57 amended.

This clause allows for the Principal Registrar to make arrangements for the dispute to be mediated.

Clause 67 – Section 59

This clause is a consequential amendment.

Clause 68 – Section 61 amended

This clause is a consequential amendment.

Clause 69 – Section 64 amended and transitional provision

This clause provides that there is an exception in relation to any admission by an adult that indicates that a child has been abused or is at risk of abuse and the disclosure by a child 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. The clause then defines "abuse" and "child".

Clause 70 – Section 169 amended

This clause is a consequential amendment.

Clause 71 – Section 605J amended and transitional provision

This clause mirrors clause 69 in relation to the evidence provisions of the *Family Court Act 1997*.

Clause 72 – Section 205H amended

This clause is a consequential amendment.

Clause 73 – Section 2057B amended

This clause provides that under breakdown of a de facto relationship, an application for a property settlement maintenance must be made within 2 years after the relationship ends and not 1 year.

The equivalent section in section 44 (3) of the *Family Law Act 1975* (Cth) provides that a former partner to a marriage is to take action for a property settlement and spousal maintenance within 1 year after divorce. As divorce proceedings cannot be instituted until there has been a 1 year separation there is effectively a 2 year period for married persons to make application. De facto partners ought to be treated equally before the law.

Clause 74 – Section 212 amended

This clause includes Principal Registrar and Registrar.

Clause 75 – Section 222 amended

This clause states that in addition to setting aside instruments the court may do all or any of the things specified in 205ZI.

Clause 76 – Section 222A amended

This clause specifies which sections do not affect the operation of section 222A(1) whereby a person must not be imprisoned or otherwise placed in custody because of a contravention of an order made under the *Family Court Act 1997* for the payment of money.

Clause 77 – Section 226 amended

This clause inserts "by order".

Clause 78 – Section 237 amended and transitional provision

This clause operates to avoid doubt in proceedings involving a Child Representative.

Clause 79 – Section 238

This clause is a consequential amendment.

Clause 80 – Section 243

This clause deals with the publication of court list and publication of accounts of proceedings.

Clause 81 Section 5 amended

This clause inserts definitions common with the Commonwealth Act as follows:

A definition of '**Aboriginal child'** into facilitates other clauses which relate to the right of an Aboriginal or Torres Strait Islander child to enjoy his or her own culture. The amendment implements recommendation 45 of the Legal and Constitutional Affairs Report (LACA Report) that 'Aboriginal child' means 'a child who is a descendent of the Aboriginal people of Australia'. While this definition replaces the previous definition of 'Aboriginal peoples' it is not envisaged that this will significantly change the group of people who may be covered by the definition. It will make the definition of Aboriginal child consistent with the previous definition of Torres Strait Islander child. The Legal and Constitutional Affairs Committee (LACA Committee) considered it appropriate for the definitions of Aboriginal and Torres Strait Islander children to be standardised and to focus on the fact of indigenous descent rather than race.

A definition of '**Aboriginal or Torres Strait Islander culture**' is inserted. This definition facilitates other clauses which relate to the right of an Aboriginal or Torres Strait Islander child to enjoy his or her own culture. The term 'Aboriginal or Torres Strait Islander culture' means the culture of the Aboriginal and Torres Strait Islander community or communities to which the child belongs, which includes, but is not limited to, the lifestyle and traditions of that community or communities. This implements recommendation 46 of the LACA Report that the definition be redrafted to include the words 'of the relevant community/communities'. The LACA Committee adopted this recommendation from a submission by the Aboriginal Legal Service of Western Australia.

A definition of **'family violence'** is inserted. The definition has been amended to implement recommendation 9 of the LACA Report that the definition of family violence should include an objective element. A requirement of 'reasonableness' is added to the existing definition. While there is no requirement for reasonableness for violence that has actually occurred, fear or apprehension of violence must be reasonable. This will help to address concerns that have been expressed that allegations of family violence can be made in family law proceedings even where a fear of violence is far fetched or fanciful.

This approach is not new. In South Australia, the Domestic Violence Act 1994 has for some time provided a concept of 'reasonable' fear or apprehension in relation to the definition of family violence. In addition, several State criminal codes have elements of reasonableness in relation to specific offences, in particular stalking type offences which also require a reasonable apprehension or fear to be established.

This change will not make it harder for people to disclose family violence. It does not change the definition where there has been actual violence. The courts already impute an element of reasonableness when applying the existing definition of family violence. However, this change will clarify, particularly for self-represented litigants, that the court will only take into account issues of violence where the fear of harm is 'reasonable'. This change is not intended to suggest that violence is acceptable. Given the serious consideration that courts give to family violence in making parenting orders these matters should be objectively tested. Family violence crime and should not be tolerated.

A new definition of '**major long-term issues'** is inserted which provides a non-exclusive list of the types of long-term care, welfare and development issues which are components of parental responsibility. These long-term issues may include the child's education (both current and future), the child's religious and cultural upbringing, the child's health, the child's name, and changes to the child's living arrangements that make it significantly more difficult for a child to spend time with a parent. This last provision is consistent with recommendation 3 of the FCAC Report and has been amended in light of recommendation 2 of the LACA Report.

It is intended that 'the child's education' in paragraph (a) will capture issues such as which school a child attends. 'The child's religious and cultural upbringing' in paragraph (b) is intended to include decisions relating to which religion a child is, or which cultural practices a child might observe. It is intended that 'the child's health' in paragraph (c) will not capture a child's short-term illness, such as a cold, but may capture issues such as immunisation, which may affect the child's long-term health or when the child has ongoing medical needs. It is intended that 'the child's name' in paragraph (d) of the definition will capture a child's first name, middle name and surname.

'Changes to the child's living arrangements that make it significantly more difficult for the child to spend time with a parent' in paragraph (e) is intended to cover any substantial changes to the type and location of the residence in which the child usually lives. Paragraph (e) is not intended to cover situations where the child relocates to another residence within the same locality unless it is a significant change that impacts on the child's ability to spend time with the parent.

The words following paragraph (e) clarify that 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. This implements recommendation 2 of the LACA Committee which noted that the key issue about decisions related to where a child lives is the capacity for the other parent to maintain and develop a relationship by spending time with that child. Paragraph (e) does not prevent a new partner moving into a residence where the child lives without a joint decision with the former spouse. The factor is intended to cover situations such as significant relocation where joint decisions are appropriate given the significant impact on the capacity for both parents to exercise parental responsibility.

The concept of 'major long-term issues' is relevant to other sections provide that, where parents are exercising shared parental responsibility in accordance with the terms of a parenting order that involves making a decision about a major long-term issue in relation to a child, both parents are required to discuss any proposed decision with each other and reach agreement about the decision. However, where a child is spending time with a person pursuant to the terms of a parenting order, that person is not required to consult on decisions about issues that arise during that time that are not major long-term issues. Of course, parents may choose to consult on these issues. The clarification of what issues are major long-term issues is intended to reduce disputes about what falls into this category and to make it clear that day to day decisions can be made by the parent who has care of the child, thus reducing litigation about those issues.

A new definition of '**relative**' is inserted which is a broad definition of 'relative', which includes step-parents, siblings, half-siblings, grandparents, uncles, aunts, nephews, nieces and cousins. This implements recommendation 44 of the LACA Committee which recommended using the term 'step-parent' rather than 'step-father or step-mother' in the definition of relative. This broad definition is intended to ensure the court takes account of other significant relationships that may be of benefit to a child in making children's orders.

A definition of '**Torres Strait Islander child'** is inserted, which provides that 'Torres Strait Islander child' means a child who is a descendent of the indigenous inhabitants of the Torres Strait Islands. This is a relatively common definition, which has been used in legislation such as the Native Title Act 1993, the Racial Discrimination Act 1975 and the new Corporations (Aboriginal and Torres Strait Islander) Bill 2005. This definition facilitates other sections which relate to the right of an Aboriginal or Torres Strait Islander child to enjoy his or her own culture.

Clause 82 Heading inserted in Part 5 Division 1

Objects and principles are now included.

Clause 83 Section 66 replaced

New section 66 is common with FLA s 60B.

This new provision better focuses the objects and principles of the Part on the best interests of the child and shared parental responsibility between parents. It implements recommendation 3 of the FCAC Report and recommendation 17 of the LACA Report.

New subsection 66(1) states that the objects of the Part are to ensure that the best interests of children are met by the items set out in paragraphs (a), (b), (c) and (d). The inclusion of the reference to 'the best interests of children' is to give greater emphasis to those interests when interpreting other provisions.

The objects that were already provided for in section 66 of the Act are now set out in subparagraphs 66(1)(c) and (d). These include ensuring that children receive adequate and proper parenting to help them achieve their full potential and ensuring that parents meet their responsibilities concerning the care, welfare and development of their children.

Section 66 also includes two new objects. These objects mirror the primary considerations another section that must be considered by a court in making decisions about the best interests of the child. These two new objects are placed at the start of the objects provision to draw attention to them. There is no particular priority to the objects – each is important. The first is set out in paragraph 66(1)(a). It recognises the importance of ensuring that children are given the opportunity for their parents to have a meaningful involvement in their lives to the maximum extent possible, consistent with their best interests. The intention is to better recognise that children have a right to know their parents and the benefit to children of having a good relationship with both of their parents. However, it is also recognised that this may not be appropriate in situations such as where the safety of the child would be at risk.

The second new object is inserted in new paragraph 66(1)(b). It recognises that there is a need for children to be protected from physical and psychological harm from being subjected to, or exposed to, abuse, neglect or family violence. The provision recognises that children need to be protected not only from direct harm but also harm caused by being exposed to abuse or family violence that is directed towards, or affects, another person. This would cover, for example, the possible psychological harm to a child caused by the child witnessing abuse against another child, or family violence against a member of the child's family. This new object implements recommendation 2 and conclusion 2.29 of the FCAC Report and recommendations 17 and 18 of the LACA Report. The term 'subjected to' has been retained as well as 'exposed to' in the drafting to make clear that it covers protection both from direct harm and from witnessing violence towards another person.

Subsection 66(2) sets out the principles that underlie the objects of the Act. It states that children have the right to know and be cared for by both their parents, regardless of whether their parents have married, separated or have never married or lived together.

Paragraph 66(2)(b) is amended to specifically refer to children having a right to spend time on a regular basis with grandparents and other relatives who are significant to their care, welfare and development. This amendment recognises the important role that grandparents and other relatives play in a child's life. It implements recommendation 43 of the LACA Report and is consistent with the other amendments in the Bill to facilitate greater involvement of extended family members in the lives of children.

Paragraphs 66(2)(c) and (d) provide that parents should jointly share duties and responsibilities concerning the care, welfare and development of their children and should agree about the future parenting of their children. These principles remain essentially the same as in the existing Act.

New subparagraph 66(2)(e) expands the existing principles that underlie the objects of the Part, by including a reference to children having a right to enjoy their culture. The provision is intended to ensure that children are able to share their culture with others in their cultural community or communities (in situations where a child might belong to more than one community). The inclusion of this principle is consistent with the provisions relating specifically to Aboriginal and Torres Strait Islander children resulting from recommendation 3 of the Family Law Council's December 2004 Report, Recognition of Traditional Aboriginal and Torres Strait Islander Child-Rearing Practices: Response to Recommendation 22: Pathways Report, Out of the Maze. It is not intended to be limited only to Aboriginal and Torres Strait Islander children.

As detailed above, new subparagraph 66(2)(e) inserts a new principle that every child has a right to enjoy his or her culture. New subsection 60B(3) expands this principle, which underlies the objects of this Part, in relation to Aboriginal and Torres Strait Islander children by identifying matters included in the right of an Aboriginal or Torres Strait Islander child to enjoy his or her culture.

New subsection 66(3) clarifies that the right includes the right of an Aboriginal or Torres Strait Islander child to maintain a connection with his or her culture and to have the support, opportunity and encouragement necessary to develop a positive appreciation of that culture and to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views.

These changes implement recommendation 3 of the Family Law Council's December 2004 Report, Recognition of Traditional Aboriginal and Torres Strait Islander Child-Rearing Practices: Response to Recommendation 22: Pathways Report, Out of the Maze. These changes are also consistent with other changes in the Act to ensure the role of relatives and extended family is better recognised.

Clause 84 Section 66 replaced

New subdivisions relating to the best interests of the child and family dispute resolutions are added.

New Subdivision 2 dealing with the best interests of the child into will give greater prominence to these issues which are relevant to a large range of issues. This is aimed to assist people making agreements to make all their post separation decisions with a child focus. The consolidation of the provisions close to the start of Part VII is useful given the greater prominence to the best interests now in the objects and principles in section 66.

Section 66A – Child's best interests paramount consideration in making a parenting order – FLA s 60CA

Section 66A provides that the court must regard the best interests of the child as the paramount consideration in deciding whether to make a particular parenting order to section 66A The intention is to increase the visibility and emphasis of this important provision. This is consistent with recommendation 16 of the LACA Committee.

Section 66B – Proceedings to which this Subdivision applies – FLA s 60CB

Section 66B describes the proceedings to which the new subdivision will apply. These include:
• any proceedings under Part VII of the Act dealing with children in which the best interests of a child are the paramount consideration; and

• proceedings in relation to a child to which subsection 80(2), or 80(6) or section 176 apply as in these provisions the best interest of the child must be considered.

Section 66C – How a court determines what is in a child's best interests – FLA s 60CC

This section sets out the primary and additional considerations for the court to consider in determining a child's best interests.

Section 66C(2) - Primary considerations

The amendment creates two tiers of considerations that the court must take account of in determining what is in the best interests of a child. The primary considerations are contained in the new subsection 66(2). They include the benefit to the child of having a meaningful relationship with both parents and the protection of the child from physical and psychological harm. The safety of the child is not intended to be subordinate to the child's meaningful relationship with both parents. The intention of separating these factors into two tiers is to elevate the importance of the primary factors and to better direct the court's attention to the revised objects which are set out in the new section 66.

For example in a case where there is family violence or sexual abuse then keeping the child safe will have particular relevance. In other cases not involving any issues of safety that will be less relevant and the issue of the benefit of a meaningful relationship with both parents will be the primary factor although other factors in the secondary list, such as the child's views, or failure to previously fulfil parental responsibilities without any reason may also be considered as relevant.

There may be some instances where these secondary considerations may outweigh the primary considerations. For example the court may have a case of a teenage indigenous child who wants to keep living with a parent to maintain their connection to traditional culture. The other parent who lives far away and is unable to travel regularly also seeks residence. They also have demonstrated that they will not facilitate connection with culture. In such a circumstance the court may well decide that for that particular child the secondary factors may effectively outweigh that consideration and that it would not be in the best interests of that child to change residence, the court may consider other ways the child and parent can maintain a meaningful relationship.

The primary factors mirror the first two objects set out in new section 66. These objects are elevated to primary considerations as they deal with important rights of children and encourage a child-focused approach. The elevation of the object relating to the benefit to the child of having a meaningful relationship with both parents is consistent with the introduction of a presumption in favour of equal shared parental responsibility.

The wording of the new primary factor concerning the need to protect children from harm is consistent with the approach recommended by the LACA Committee in recommendation 18. The Committee recommended simplifying the provision so that the phrase is simple and forceful and focuses on the key issue of ensuring safety of the child.

Additional considerations – Section 66C(3)

The second tier of additional considerations in the new subsection 66C(3) consists of the existing considerations in the Act. These have been modified as outlined below.

Paragraph 66C(3)(a). The references to a child's 'wishes' have been changed to references to a child's 'views'.

Paragraph 66C(3)(a) now provides that in determining what is in a child's best interests the court must consider, amongst other factors, any 'views' expressed by the child and any other factors that the court thinks are relevant to the weight it should give to the child's 'views'.

The amendment recognises that a child may not necessarily want to express a 'wish' about which of his or her parents the child will live with or spend time with. It is intended that 'views' will also capture a child's perceptions and feelings, and will allow for any decision to be made in consultation with the child without the child having to make a decision or express a 'wish' as to which parent he or she is to live with or spend time with. It is intended that references to a child's 'views' will not exclude a child expressing his or her 'wishes'.

Replacing references to a child's 'wishes' to a child's 'views' is also consistent with the wording in Article 12 of the United Nations Convention on the Rights of the Child.

Paragraph 66C(3)(b)

This new paragraph provides that where the court is determining the best interests of the child, it must consider the nature of the relationship with each of the child's parents and with other persons. This provision has been modified to include an explicit reference to grandparents or other relatives of the child. This change further ensures that the court recognises the importance of the relationships that the child has with their wider family, in particular grandparents.

Paragraph 66C(3)(c)

A new consideration in determining what is in the best interests of a child has been added in paragraph 66C(3)(c). The additional consideration is the willingness and ability of each of the child's parents to facilitate and encourage a close and continuing relationship between the child and the other parent. This criterion will need to be considered by the court along with the other criteria set out in subsection 66C(2) and (3) when making a parenting order. New subsection 66C(4) also provides that when considering this factor, the court must consider the extent to which each of the parents has fulfilled or failed to fulfil their parental obligations.

Paragraph 66C(3)(d)

Paragraph 66C(3)(d) has been modified to make an explicit reference to grandparents or other relatives. The existing provision provides that, in determining what is in the best interests of a child, the court should consider the likely effect of any change of the child's circumstances particularly in relation to separation from his or her parents and other persons with whom the child has a relationship. New subparagraph 66C(3)(d)(ii) makes an explicit reference to grandparents or other relatives. This change ensures that the court recognises the importance of the relationships that the child has with wider family in particular grandparents.

Paragraph 66C(3)(e)

Paragraph 66C(3)(e) mirrors an existing paragraph which requires the court, when determining a child's best interests, to consider the practical difficulty and expense of a child spending time with and communicating with a parent and whether this will affect the child's right to maintain personal relations and direct contact with both parents on a regular basis.

Paragraph 66C(3)(f)

Paragraph 60CC(3)(f) has been modified to make an explicit reference to grandparents or other relatives. This provision provides that in determining the best interests of the child, the court should consider the capacity of the parent or of any other person to provide for the needs of the child, including emotional and intellectual needs. The amended paragraph 66C(3)(f) recognises the importance of the relationships that the child has with wider family, in particular grandparents.

Paragraphs 66C(3)(g) and (h)

Paragraphs 66C(3)(g) and (h) provide that the court must consider the maturity, sex, lifestyle and background of the child, and either of the child's parents, as well as any other characteristics of the child that the court thinks are relevant. The lifestyle, culture and traditions of a parent or child are relevant to a consideration of their background.

Aboriginal peoples and Torres Strait Islanders are now referred to specifically in the new subparagraph 66C(2)(h). The subparagraph provides that the court must take into account the right of an Aboriginal or Torres Strait Islander child to enjoy his or her culture, and the likely impact that any proposed parenting order will have on that right. This paragraph supports recommendation 4 in the Family Law Council's December 2004 Report, Recognition of Traditional Aboriginal and Torres Strait Islander Child-Rearing Practices: Response to Recommendation 22: Pathways Report, Out of the Maze.

The need to protect the child from physical or psychological harm has been elevated to a primary consideration in the new subsection 66C(2). The wording of this factor has also been simplified in accordance with recommendation 18 of the LACA Report.

Paragraph 66C(3)(i)

Paragraph 66C(3)(i) mirrors an existing paragraph which requires the court, when determining a child's best interests, to consider the attitude of a parent to the child and the responsibilities of parenthood.

New subsection 66C(4) provides that in considering this factor, the court must consider to extent to which each of the child's parents has fulfilled, or failed to fulfil, his/her responsibilities as a parent. This includes the extent to which each parent has taken, or failed to take, the opportunity to spend time with the child, communicate with the child, and participate in decision-making about major long-term issues in relation to the child. It also includes the extent to which each parent has facilitated, or failed to facilitate, the other parent doing these things and the extent to which each parent has fulfilled, or failed to fulfil, his/her obligation to maintain the child.

Paragraph 66C(3)(j)

Paragraph 66C(3)(j) mirrors an existing paragraph which directs the court to consider any family violence involving the child or a member of the child's family. The court will take this into account giving such weight as is appropriate to the evidence before it.

Paragraph 66C(3)(k)

Paragraph 66C(3)(k) directs a court to consider any family violence order that applies to the child or a member of the child's family. New paragraph 66C(3)(k) provides that this only includes a final or contested family violence order. The intention of this subsection is to ensure that the court does not take account of uncontested or interim family violence orders. This should address a perception that violence allegations are taken into account without proven foundation in some family law proceedings.

The Government does not consider that that this amendment has the potential to place children at risk. In determining the best interests of the child, the court will consider, as a primary consideration, the need to protect children from harm under subsection 66C(2). The court may also have regard to any family violence involving the child or a member of the child's family under paragraph 66C(3)(j). The LACA Committee considered this amendment appropriate.

Paragraphs 66C(3)(l) and (m)

Paragraphs 66C(3)(l) and (m) direct the court to consider 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 and any other fact or circumstances that the court thinks is relevant.

Subsection 66C(4)

Subsection 66C(4) provides that in considering the factors set out at paragraphs 66C(3)(c) and (i), the court must consider to extent to which each of the child's parents has fulfilled, or failed to fulfil, his/her responsibilities as a parent. This includes the extent to which each parent has taken, or failed to take, the opportunity to spend time with the child, communicate with the child, and participate in decision-making about major long-term issues in relation to the child. It also includes the extent to which each parent has facilitated, or failed to facilitate, the other parent doing these things and the extent to which each parent has fulfilled, or failed to fulfil, his/her obligation to maintain the child. It would not cover a situation where a parent
is willing to fulfil their obligations but prevented due to the other parents unwillingness to facilitate this. The court would in such a case be taking account of the unwillingness.

New subsection 66C(4) seeks to ensure that when determining the best interests of the child the court is able to take into account whether a person has failed to fulfil their parental responsibility obligations in the past. Thus the court will take into account the fact a person has failed to pay child support or has consistently broken contact arrangements in the past without regard to the best interests of their child. This is appropriate as the failure of a parent to fulfil their parental responsibility obligations can have a significant impact on the child and is relevant to any determination of the child's best interests.

New subsection 66C(5) addresses concerns about the operation of subsection 66C(4). The amendment makes clear that the court is to particularly focus on post-separation parenting when considering the fulfilment of parental responsibility as a factor relevant to the best interests of the child.

It is not intended that subsection 66C(4) provide an opportunity for parents to litigate on whether they were fulfilling their responsibilities while together or raise trivial or immaterial matters about their conduct before separation. The intention is for the court to consider the extent a parent has failed to meet their material parental responsibilities that are relevant to the best interests of the child such as paying child support or complying with contact orders. The Government recognises that the main period of interest for the court is the post-separation period, as parental attitudes and behaviour in relation to responsibilities may change on separation. However, subsection 66C(4) may also apply to some cases where it is meaningless to talk about 'post-separation', such as where parents have never lived together.

Like other provisions setting out factors the court must take into account in determining a child's best interests, it is not expected that the court would take into account trivial or inconsequential matters in determining whether this factor is relevant to the decision of what is in the best interests of the child. Subsection

66C(6) – Consent orders

New subsection 66C(6) provides that if the court is considering whether to make an order with the consent of all the parties to the proceedings, the court may have regard to all or any of the matters set out in subsections (2) and (3). These subsections contain the primary and additional considerations that a court considers in

determining a child's best interests. This allows the court to take these considerations into account and is consistent with the Government's policy of encouraging people to
take responsibility for resolving disputes themselves, in a non-adversarial manner.

For the purpose of new paragraph 66C(3)(h), new subsection 66C(7) clarifies the meaning of an Aboriginal or a Torres Strait Islander child's right to enjoy his or her culture. The provision reflects the importance of Aboriginal and Torres Strait Islander children being able to maintain a connection with their culture and to have the support, opportunity and encouragement necessary to develop a positive appreciation of that culture and to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views. These changes are made as a result of recommendation 4 in the Family Law Council's December 2004 Report, Recognition of Traditional Aboriginal and Torres Strait Islander Child-Rearing Practices: Response to Recommendation 22: Pathways Report, Out of the Maze.

Section 66D – How the views of a child are expressed –FLA s 60CD

Section 66D deals with how the court may inform itself of views expressed by a child. Section 66D changes the references to a child's 'wishes' to a child's 'views.' Subsection 66D(1) now provides that the section deals with how a court is to consider a child's 'views', rather than a child's 'wishes', under paragraph 60CC(2)(a) of the Act when making a determination about what is in a child's best interests. Subsection 66D(2) provides that a court may inform itself of the 'views', rather than the 'wishes', expressed by a child by having regard to a report prepared by the relevant person or, subject to any applicable Rules of Court, by such other means as the court thinks appropriate.

The reasons for this change are outlined in relation to Paragraph 66C(3)(a), above.

Section 66E – Children not required to express views – FLA s 60CE

Section 66E changes the references to a child's 'wishes' to a child's 'views'. Section 66E now provides that nobody can require a child to express his or her 'views' in relation to the any issue. The reasons for this change are outlined in relation to Paragraph 66C(3)(a), above.

Section 66F – Informing court of relevant family violence orders – FLA s 60CF

Section 66F sets out the responsibility of the parties to the proceedings to inform the court of any relevant family violence order.

Section 66G – Court to consider risk of family violence – FLA s 60CG

Section 66G requires the court to ensure, when it makes an order, that the order is consistent with any family violence order that may be in place; and does not expose a person to an unacceptable risk of family violence. The court must do so to the extent that it is possible consistent with the child's best interests remaining the paramount consideration. Subsection 66G(2) provides that the court may include in the order any safeguards that it considers necessary for the safety of those affected by the order.

Subdivision 3 – Family dispute resolution

This inserts a new Subdivision 3 deals with children. New Subdivision 3 deals with family dispute resolution and family counselling.

Section 66H – Attending family dispute resolution before applying for Part 5 Order – FLA s 60I

It inserts new section 66H into the Act which provides for compulsory attendance at family dispute resolution in a range of circumstances, prior to lodging an application with the court. This is a key change to encourage a

culture of agreement making and avoidance of an adversarial court system. The object of new section 66H, which is set out in subsection 66H(1), is to ensure that parties attempt to resolve their disputes about children's matters that can be dealt with under Part 5 of the Act, before commencing a court process. This will assist people in resolving family relationship issues outside of the court system, which is costly and can lead to entrenched conflict. This item substantially implements recommendation 9 of the FCAC Report.

Phases of Commencement

There is a staged commencement of the requirement for people to attend a dispute resolution process before applying for a Part 5 order. The three phases are set out in subsections 66H(2) to (6). The reason for the staged commencement is to allow for the rollout of the Family Relationship Centres and the increased funding for dispute resolution services announced in the 2005-06 Federal Budget. This will ensure there are sufficient dispute resolution services to assist in meeting the demand. This will also allow time for development of a process for accreditation of dispute resolution practitioners.

In order to ensure the quality of services delivered by family counsellors, family dispute resolution practitioners and workers in Government funded children's contact services, competency-based accreditation standards are currently being developed by
the Community Services and Health Industry Skills Council (CSHISC). These standards will form the minimum requirements for family counsellors, family dispute
resolution practitioners and workers in funded children's contact services.

Phase 1 is for proceedings filed from the commencement of this Bill to 30 June 2007. It provides that during this time, people who have a dispute about matters that may be dealt with by a parenting order must comply with the dispute resolution procedures relevant to a parenting order that are set out in the Family Law Rules 2004 (the Rules). Currently, Rule 1.05 provides that before starting a case, each prospective party to the case must comply with the pre-action procedures, set out in Part 2 of Schedule 1 of the Rules, which include attempting to resolve the dispute using dispute resolution methods.

This requirement will apply to all courts exercising jurisdiction under the Act, including the Federal Magistrates Court and State and Territory Courts, with such modifications as may be necessary, as provided for in subsection 66H(3). For example there may be different forms used for different steps of the process depending on which court the matter is being heard in. It is intended that the penalties set out in the Family Law Rules for non-compliance or unreasonable non-compliance (such as case management consequences or cost orders) in clause 2 of Part 2 of the Rules will apply during Phase 1.

Phase 2 provides that subsections 66H(7) to (10) will apply to a Part 5 order in relation to a child if the application is made on or after 1 July 2007 and before the date fixed by Proclamation and none of the parties have applied for a Part 5 order in relation to the child before 1 July 2007. New applicants to the courts are most likely to benefit from the use of the dispute resolution services, as their disputes may not be as entrenched as those parties already in the litigation process.

Phase 2 increases the number of people the provisions will apply to, but allows for the continued rollout of Family Relationship Centres. Using a date fixed by Proclamation to set the limits of Phase 2 allows for necessary flexibility in relation to the full rollout of the Family Relationship Centres. This responds to recommendation 25 of the LACA Report which reflected concerns that there might be a legislative obligation imposed on people prior to services being available.

Phase 3, in subsection 66H(6), applies subsections 66H(7) to (10) to all applications for a Part 5 order that are made on or after a further Proclamation. At this stage, all Family Relationship Centres and funding will be rolled out.

Requirement to attempt to resolve dispute by family dispute resolution before applying for a parenting order

Subsection 66H(7) is the key operational provision. It provides that a court cannot hear an application for an order under Part 5 unless the applicant has also filed, with the application, a certificate by a family dispute resolution practitioner. This certificate must state that either: (a), the applicant did not attend family dispute resolution due to the refusal or failure of the other party or parties to attend the process; or (b) the family dispute resolution practitioner considers, having regard to the matters prescribed by the Regulations, that it would not be appropriate to conduct the proposed family dispute resolution; or (c) the applicant attended family dispute resolution, conducted by the practitioner, with the other party or parties to the proceedings, at which they discussed and made a genuine effort to resolve the issue or issues to which the court application relates; or (d), the applicant attended family dispute resolution, conducted by the practitioner, with the other party or parties to the proceedings, but that the applicant, the other party or another of the parties did not make a genuine effort to resolve the issue or issues. For example, a party who sits through a mediation without making an effort to engage with the mediator or other party.

The certificate is needed to accommodate the existing requirement, imposed on mediators under regulation 62 of the Family Law Regulations 1984 (the Regulations), to determine whether mediation is appropriate in the circumstances of the individual case. In determining this matter, the mediator must consider whether the ability of any party to negotiate freely is affected by issues such as a history of family violence, the likely safety of the parties, or the risk that a child may suffer abuse. It is envisaged that the regulation to be made for the purposes of the section will largely reproduce the factors currently set out in regulation 62.

Without the ability to issue a certificate the dispute resolution practitioner would be prevented, both legally and ethically, from conducting the dispute resolution, but would be unable to issue a certificate to allow the parties to proceed to court.

Attendance at family dispute resolution is not required in a number of instances, which are set out in subsection 66H(9). These exceptions are intended to ensure that people will not be required to attend family dispute resolution in circumstances that are inappropriate.

Section 66I –Family dispute resolution not attended because of child abuse or family violence - FLA s 60J

The purpose of subsection 66I(1) is to ensure that people who are not required to attend family dispute resolution where there has been child abuse or family violence by one of the parties to the proceedings, obtain information about the services and options that are available to them. This will ensure that people are made aware of services and options (including alternatives to court action) that are available in circumstances of abuse or violence.

To avoid undue delay to people seeking to rely on the family violence or child abuse exceptions to family dispute resolution and make the process less bureaucratic, the information will be made available by family counsellors and family dispute resolution practitioners. An applicant for a Part 5 order will be required to indicate in writing whether they have or have not received the information.

New subsection 66I(2) provides an exception to the requirement in section 66I(1) where there is a risk of child abuse or family violence if the matter is delayed getting to court. While the intention of section 66I(1) is to ensure that victims of violence have information on the services available to them, the exception is to ensure that those matters involving high risk of immediate violence or abuse are heard by the court as soon as possible.

New subsection 66I(3) provides that the validity of proceedings for a Part 5 order and any order made pursuant to those proceedings is not affected by a failure to comply with the requirement to file a certificate in accordance with subsection 66I(1).

New subsection 66I(4) provides if a person indicates that they have not received the information about the other services and options available in circumstance of abuse or violence and the subsection 66I(2) does not apply, the

principal executive officer of the relevant court must ensure that the person is referred to a family counsellor or family dispute resolution practitioner to obtain the information.

Section 66J - Court to take prompt action in relation to allegations of child abuse or family violence- FLA s 60K

Section 66J requires the court to take prompt action in relation to allegations of child abuse or family violence (particularly as this forms an exception to attendance at dispute resolution). This is an important provision as where issues of violence and abuse are raised there is a process in place to ensure that there will be adequate information provided to the court so that it can make appropriate orders and so that necessary steps can be taken to ensure appropriate protections are in place.

Subsection 66J(1) sets out when the section applies. It applies where an application is made to a court for a Part 5 order in relation to a child and a document prescribed by the applicable Rules of Court is filed alleging that there has been abuse of a child or family violence by one of the parties or would be a risk of abuse of a child or family violence by one of the parties if there were a delay in applying for the order. This provision recognises the need for any necessary protection issues to be addressed in a timely matter. It also allows the court to ensure it will have appropriate information about the allegations. The provision will not apply where the allegation of violence or abuse is not relevant to whether the court should grant or refuse the application. That is, there must be a nexus between the allegation that is made and the orders that are sought. This requirement for a nexus is based on provisions in the UK 'Guidelines for Good Practice on Parental Contact in Cases where there is Domestic Violence'.

Use of a prescribed form to identify the allegation will make identification of relevant cases to which timeframes may apply by counter staff within the courts straightforward. This addresses concerns that were raised about the difficulties for counter staff in courts to identify which proceedings timeframes would apply to. The form will make clear the allegation made and the relationship to the orders sought.

In these circumstances, subsection 66J(2) provides that the court must consider what interim or procedural orders (if any) should be made to enable appropriate evidence about the allegation to be obtained as expeditiously as possible and to protect the child or any of the parties to the proceedings. The court must make the orders it considers appropriate and deal with the issues raised by the allegation as expeditiously as possible. Subsections 66J(2) and (3) require the court to make any appropriate orders as soon as practicable and, where appropriate having regard to the case, within 8 weeks.

The type of order that is envisaged includes interim or procedural orders to ensure that appropriate information is before the court. This may include orders for a matter to be referred to a State and Territory agency or that a State or Territory agency provide information or reports. It may also include orders that a Family Report be prepared or an independent children's lawyer for the child be appointed.

Subsection 66J(4) provides that when considering what order (if any) should be made under section 202K to enable appropriate evidence about the allegation to be obtained as expeditiously as possible, one of the matters the court must consider is whether it should make orders under section 235 to obtain reports from State and Territory agencies in relation to the allegations.

Subsection 66J(5)) provides that when considering what order (if any) should be made under subparagraph 66J(2)(a)(ii) to protect the child or any of the parties to the proceedings, the court must consider whether orders should be made or an injunction granted under section 235. Section 235 sets out the types of orders and injunctions the court may make for the welfare of a child. Subsection 66J(5) does not limit subparagraph 66J(2) and the court may make other orders it considers appropriate.

New subsection 66J(6) puts beyond doubt that any orders made by the court in relation to allegations of family violence and child abuse will be valid even if, for example, they are outside of the 8 week timeframe.

Clause 85 Sections 70A and 70B inserted

Section 70A – Presumption of equal shared parental responsibility when making parenting orders- FLA s 61DA

New section 70A, applies to a court making a parenting order. The presumption provides that it is in the best interests of the child that the parents share equally the parental responsibility for the child. The provision is intended to promote decision making about major long-term issues by both parents, for the benefit of the child.

New subsection 70A(2) states that the presumption will not apply if the court reasonably believes that a parent of a child, or a person who lives with a parent of the child, has engaged in family violence or abuse of the child (or another child who is a member of the parent's family). The extension of this provision to a person who lives with a parent is intended to address concerns about the impact that violence and abuse in the home of either parent can have on the child and on the ability to exercise the joint decision making requirement of equal shared parental responsibility.

The provision is limited to a parent who has committed abuse of the child (or a child who is a member of the parent's family) so as not to exclude a parent who had committed sexual assault against some other person at an earlier stage from participating in decision making. Where there may be risks to the child, the presumption can be rebutted under new subsection 70A(4).

New subsection 70A(3) provides that the presumption of equal shared parental responsibility will apply at an interim hearing, unless the court considers that it is inappropriate for the presumption to apply. This implements recommendation 15 of the LACA Report. This discretion is appropriate given the limited evidence that may be available for interim hearings.

New subsection 70A(4) provides that the presumption will be able to be rebutted where its application would not be in the best interests of the child. For example, where there are no issues of violence or abuse but a parent is addicted to drugs in such a manner that he or she is unable to make decisions for the benefit of the child or has a mental illness that similarly affects the capacity to share decision making. This is appropriate as under section 66A the court must regard the best interests of the child as the paramount consideration in deciding whether to make a particular parenting order in relation to a child.

Section 70B – Application of presumption of equal shared parental responsibility after interim parenting order made- FLA s 61DB

New section 70B provides that, when making a final parenting order, the court must disregard the allocation of parental responsibility established after an interim hearing. The purpose of this provision is to address concerns about the potential difficulty of displacing a status quo related to parental responsibility that may be established at an interim hearing. This implements recommendation 15 of the LACA Report.

The provision is not intended to prevent the court from taking into consideration any of the evidence on which the interim parenting orders were based. Under section 66A the court must regard the best interests of the child as the paramount consideration in deciding whether to make a particular parenting order in relation to a child.

Clause 86 Section 71A inserted

Section 71A – Application to Aborigine or Torres Strait Islander children - FLA s 61F

This section provides that, in applying Part 5 to the circumstances of an Aboriginal or Torres Strait Islander child or identifying a person/s that has or may exercise parental responsibility for such a child, the court must have regard to any kinship obligations and child-rearing practices of Aboriginal and Torres Strait Islander culture that

are relevant to the child. The definitions of the terms 'Aboriginal child', 'Torres Strait Islander child' and 'Aboriginal or Torres Strait Islander culture', are inserted into the general dictionary in section 5 of the Act.

New section 71A implements recommendation 1 of the Family Law Council's December 2004 Report, Recognition of Traditional Aboriginal and Torres Strait Islander Child-Rearing Practices: Response to Recommendation 22: Pathways Report, Out of the Maze. The purpose of this provision is to ensure that the unique kinship obligations and child-rearing practices (such as the involvement of extended family) of Aboriginal and Torres Strait Islander culture are recognised by the court when making decisions about the parenting of an Aboriginal or Torres Strait Islander child. This provision is consistent with other amendments to facilitate greater involvement of extended family members in the lives of children.

Clause 87 Section 73 amended

This clause inserts two new subsections into section 73. This provides for the court to direct a family consultant or welfare officer to give the court a report on matters relevant to the proceedings.

New subsection 73(3a) provides that a family consultant or welfare officer who is directed to give the court a report on a matter must ascertain the views of the child in relation to the matter and include the views of the child in the report. New subsection 73(3b) provides that subsection 73(3aA) does not apply if it would be inappropriate to do so because of the child's age or maturity or some other special circumstance. For example, if the child has a disability which makes them unable to express a view, or is a baby.

The intention is to ensure that, where possible, the court is informed about the views of the child on matters to which a parenting order relates. The child's views are a factor a court is to consider when determining what is in the child's best interests under section 66C. This implements recommendation 42 of the LACA Committee. The note following this provision makes clear that the requirement to seek the views of a child is subject to another section which makes clear that a child cannot be forced to give a view.

Clause 88 Section 76 amended

Clause 88 amends subsection 76(1) which defines what a parenting plan is. Under the existing Act, a parenting plan is a written agreement made between the parents of a child dealing with the issues set out in section 76. The amendment adds two additional requirements to what will constitute a parenting plan.

Paragraph 76(1)(ba) requires the parenting plan to be signed by the parents the child. Paragraph 76(1)(bb) requires the parenting plan to be dated. This is appropriate given that a parenting plan entered into after a parenting order is made may render the parenting order unenforceable. The requirement to sign and date a parenting plan will emphasise the significance of the document. This partially implements recommendation 33 of the LACA Committee.

Subclause 2 inserts new subsections into section 76. This section sets out what constitutes a parenting plan for the purposes of the Act. New subsection 76(1a) provides that to be a parenting plan for the purposes of the Act, the plan must be made free from any threat, duress or coercion. Arguably, it is implicit that the court would read this into the existing provisions as a condition of agreement. However, it is useful for readers, particularly for self represented litigants, to make this explicit.

Subsection 76(2)

This section facilitates the removal of the terms 'residence' and 'contact' from the Act by replacing the current subsection 76(2), which specifies that residence and contact between the child and the parent is one of the matters that a parenting plan may deal with.

It inserts a new subsection 76(2), which sets out the details of what issues a parenting plan may deal with. This includes with whom a child is to live, the time a child is to spend with a nominated person or persons, the allocation of parental responsibility (including decisions about major long-term issues in relation to a child – see subsection (2b)), the communications a child is to have with a nominated person or persons (see subsection (2C)), child maintenance, the form of consultations about parental decisions and any other aspect of the care, welfare or development of the child.

In particular, new paragraphs 76(2)(g) and (h) provide that a parenting plan may deal with the process for resolving disputes about the terms or operation of the plan and the process to be used for changing the plan. The intention of these paragraphs is to ensure that parents consider the changing needs of their child or children as they get older and to work an element of flexibility into the plan. The aim of these paragraphs is to attain a greater level of compliance with parenting plans.

The clause also gives greater recognition to the important role that grandparents and other relatives play in a child's life. In particular, subsection 76(2a) specifically provides that a parenting plan may provide for a child spending time with or communicating with the grandparent or other relative of a child. This change is consistent with the amendments to recognise the need to consider the benefit to the child of greater involvement of extended family members.

Subsection 76(2b) clarifies that a parenting plan may deal with the allocation of parental responsibility for making decisions about major long-term issues in relation to a child. The definition of 'major-long term issues' has been inserted into the Act.

The addition of subsection 76(2c) provides greater clarity about what 'other communication' means in paragraph 76 (2)(e). The two examples it gives, which are examples only and do not limit the scope of 'other communication', are letters and telephone, email or any other electronic means. The intention is for parents to consider a variety of ways by which they can have a meaningful involvement in their children's lives, not just physical time with a child. This might include SMS, video hook-ups or attending sporting or social events their child is involved in.

Clause 89 Section 78A replaced

Section 78A – Obligations of advisers- FLA s 63DA

This section t sets out the obligations of advisors (ie. legal practitioners, family counsellors, family dispute resolution practitioners and family consultants) when giving advice to people in relation to parenting plans. It aims to assist people making parenting plans to understand what the plan may include, the effect of the plan and the availability of programs to assist people who experience difficulties with their agreements or who need to negotiate a change in an agreement. This is a key provision and ensures that people are well informed and supported towards making an agreement about post-separation parenting. It is intended that as part of the package of reforms to the family law system that brochures and information materials will be developed. These will present the information required to be provided in a simple and easily understood form. This will assist advisers in fulfilling their obligations under this provision.

Ensuring that people are appropriately informed about parenting plans is part of the cultural shift to have cooperative, child-focussed parenting take place outside of the adversarial court system. It will be important to ensure that parents understand that the parenting plan is not enforceable but that if the agreement later breaks down it might be relevant to court orders. It will also be important that parents understand that the effect of a parenting plan made after court orders may be that formal court orders will be subject to the later parenting plan.

New subsection 78A(1) places an obligation on advisors assisting or advising people about parental responsibility following the breakdown of a relationship to inform them that they could consider entering into a

parenting plan and the services available where they can get further assistance to develop a plan. This will make people aware of the option and the advantages to each party of a cooperative approach.

New subsection 78A(2) sets out the obligations that advisers must meet when advising people about the making of a parenting plan.

Paragraph 78A(2)(a) places an obligation on advisors to inform people that, where it is in the best interests of the child and reasonably practicable, they could consider as an option an arrangement where they equally share the time spent with the child. Equal time arrangements are most likely to work in situations where there is a high degree of cooperation between the parents.

Paragraph 78A(2)(b) places an obligation on advisers to inform the people that if an equal time arrangement is not appropriate, they could consider whether an arrangement where the child spends substantial and significant time with each person would be in the best interests of the child and reasonably practicable. Subsection 78A(4) makes it clear what substantial and significant time means and that it includes a variety of days including days that fall on weekends and holidays and other days. It ensures that both parents can participate in a child's routine and in events of significance to the child such as sporting events, birthdays, or concerts. It would also ensure that the child is able to participate in events significant to the parents such as
birthdays or father's or mother's day.

Paragraph 78A(2)(c) emphasises that decisions made by parties in developing parenting plans should be made in the best interests of the child. In this context the term should not be read in a technical way. The mediator doesn't have to consider every aspect of the legal considerations that the court must consider. This is consistent with recommendation 6 of the LACA Report.

Paragraph 78A(2)(d) ensures that when giving advice to people about a parenting plan, advisors inform them of the matters that may be dealt with in a parenting plan in accordance with subsection 78(2). As noted above section 78(2) sets out the issues a parenting plan may deal with. For example, with whom a child is to live, the time a child is to spend with a nominated person or persons, the allocation of parental responsibility and the process for resolving disputes about the plan.

New paragraphs 78A(2)(e) and 78A(2)(h) ensure that advisors explain the interaction between parenting plans and parenting orders. Subparagraph 78A(2)(e) requires advisors to inform their clients that an existing parenting order may be subject to a parenting plan that they subsequently enter into. Advisors must also inform their clients that the court is required to consider the terms of the most recent parenting plan about a child when making a parenting order about that child, if it is in the best interests of the child to do so.

New paragraph 78A(2)(f) requires advisors to inform their clients that it is desirable to include in a parenting plan provisions of the kind referred to in section 76. These paragraphs deal, respectively, with the form of consultations between the parties to the plan, the process for resolving disputes about the terms or operation of the plan and the process to be used for changing the plan. The intention of these paragraphs is to help people avoid having to take parenting matters to court by ensuring that when making a plan, they consider how they will consult with one another, resolve disputes and make changes to the plan as their child grows older and their needs change.

New paragraph 78A(2)(g) requires advisors to explain to their clients what programs are available to help people who experience difficulties in complying with parenting plans.

New subsections 78A(3) and (4) explain what is meant by substantial and significant time. It ensures that the focus is not just on the amount of time that each parent spends with the child but also on the type of time that is spent. The definition is to encourage people to ensure that there is a mix of holidays, weekends and other days and that both parents are able to participate in the child's daily routine and in events that are significant to the child (like sporting events, birthdays and concerts). It also ensures that the child is able to participate in events

significant to the parent such as mother's or father's day, extended family weddings or christenings and birthdays.

New subsection 78A(5) provides that for the purposes of this particular section, 'adviser' means a person who is a legal practitioner, a family counsellor, a family dispute resolution practitioner, or a family consultant.
It is envisaged that the information relating to parenting plans that advisers are required to provide under this section could be provided in written form such as brochures.

Clause 90 Section 79 amended

This merely corrects section numbers.

Clause 91 Section 84 amended

New subsection 84(2) provides greater detail and clarity about the matters that a parenting order can deal with. These matters include who a child is to live with, the time and other communications the child is to have with another person or persons, the allocation of parental responsibility and the form of consultations persons with parental responsibility are to have with one another. In particular, paragraph 84(2)(g) provides that a parenting order may deal with the steps that should be taken before an application is made to a court for a variation of the order. Paragraph 84(2)(h) provides that a parenting order may deal with the process to be used for resolving disputes about the terms or operation of the order. The aim is to ensure orders are appropriately framed and flexible to reduce the need for people to go to court about the operation or variation of parenting orders.

New subsection 84B(3) clarifies that a parenting order dealing with the allocation of parental responsibility may deal with the allocation of responsibility for making decisions about major long-term issues in relation to the child.. This provision is not intended to limit other matters that paragraph 84(2)(c) may cover.

New subsection 84(4) sets out what the reference to other communications in paragraph 84(2)(e) includes. This is drafted broadly and is intended to cover new technologies brought about by, for example, the internet, mobile phones and other electronic devices.

New subsection 84(4a) provides that an option under paragraphs 84(2)(g) and (h), is for a parenting order to require people to consult with a family dispute resolution practitioner to assist with resolving any dispute about the terms or operation of the order or about coming to agreement about changing the order. This subsection is not intended to limit other matters that paragraphs 84(2)(g) and (h) may cover.

This section gives greater recognition to the important role that grandparents and other relatives play in a child's life and to the benefits to a child of continued contact with these significant people. In particular, subsection 84(2) specifically provides that a parenting order may provide for a child spending time with or communicating with the grandparent or other relative of a child. This change is consistent with the amendments to facilitate greater involvement of extended family members in the lives of children.

Subsection 84(6) in the Act, provides for what are called 'specific issues orders'. This is a subsequent amendment to the removal of the terminology of residence and contact. As references to residence and contact orders are repealed, so too are references to specific issues orders. Instead, there is a more generic approach to parenting orders. Specific issues orders are replaced with parenting orders dealing with allocation of parental responsibility and components of parental responsibility. The new subsection 84(6) describes the types of parenting orders that can be made in favour of a person.

Clause 92 Section 85A inserted

Section 85A – Parenting orders subject to later parenting plans- FLA s 64D

New section 85A inserts a default provision into parenting orders that are made after the commencement of this Bill. The default provision has the effect that those parenting orders will be subject to any subsequent parenting plan. This will only be the case where the parenting plan is agreed to in writing by any other person to whom the parenting order applies.

There is discretion for the court not to include the default provision in the parenting order in 'exceptional circumstances'. Subsection 85A(3) clarifies what exceptional circumstances means. This is to address concerns that the term could be interpreted too narrowly so that it only applies very rarely and that this could undermine the principle of the best interests of the child being the paramount consideration.

The Government intends 'exceptional' to include circumstances where the court considers that there is:

- a need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect, or family violence, or

- substantial evidence that one parent is likely to seek to coerce or use duress to gain the agreement of the other parent.

This ensures that it is clear that 'exceptional' covers circumstances where there is concern about risks to the child or where there is a risk that a parent could seek to avoid parenting orders being enforceable by pressuring the other party to agree to a parenting plan. For example, a court may consider it is in the best interests of a child to reside with his or her grandparents, as both parents have substance abuse issues. The court may exercise its discretion to make an order that can only be changed by the subsequent order of the court and not by a subsequent parenting plan. The court may do so due to concerns that the parents may attempt to use a parenting plan to override the court order and provide for the child to live with them, rather than the grandparents and that this would place the child at risk of harm. It is appropriate for the court to have this discretion in order to ensure that the best interests of the child remain paramount.

The requirement that this be limited to exceptional cases implements the LACA Committee recommendation 34. This reflects a desire that generally people should be encouraged to vary existing parenting orders by agreement using the new services that will be available.

Section 85A does not mean that the parenting plan itself is enforceable (parenting plans have no legal enforceability), but it does mean that after the commencement of this Bill, where this default provision is included in the parenting order, there will no longer be a right to enforce the previous court order to the extent that it is inconsistent with the new parenting plan. People can only lose the capacity to enforce their existing parenting order within the court system if they agree to this in writing in a parenting plan.

Clause 93 Section 86 amended

This is a consequential amendment.

Clause 94 Section 86A replaced

Section 86A – Child's best interests paramount consideration in making a parenting order- FLA s 65AA

This item repeals the existing subsection that provides information about the three stage parenting compliance regime. That information is no longer required due to the changes to compliance. A new provision is included

which is a signpost back to section 66A. This signpost makes it clear that when making parenting orders the best interests of the child are paramount.

Clause 95 Section 89 amended

This is a consequential amendment to section numbers.

Clause 96 Sections 89AA, 89AB, 89AC and 89AD inserted

Section 89AA – Court to consider child spending equal time or substantial and significant time with each parent in certain circumstances FLA s 65DA

Section 89AA is a new provision about circumstances where the court is to consider children spending either equal and if not equal then substantial and significant time with both a child's parents.

Subsection 89AA(1) implements recommendations 4 and 5 of the LACA Committee. It provides a new requirement that the court must consider making an order that a child spend equal time with each parent, if a parenting order provides or is to provide the parents with equal shared parental responsibility for the child. This provision is not a presumption 50:50 of joint custody. That approach was rejected by the FCAC. The court must consider whether it is in the best interests of the child and reasonably practicable for the child to spend equal time with the parents.

Subsection 89AA(2) recognises that an equal time arrangement will not be appropriate in some cases but that the court must consider other arrangements that promote a meaningful relationship. This provision places an obligation on the court in situations where there is equal shared parental responsibility and equal time is not appropriate, to consider whether it would be in the best interests of the child and reasonably practicable for the child to spend substantial and significant time with both parents. This is intended to ensure that in making parenting orders related to time that the court focuses not just on the substantial quantity of time that is spent with each parent, but also on the significant type of time. The note in this section emphasises that the best interests of the child remain the paramount consideration for parenting orders.

Subsection 89AA(3) makes it clear that substantial and significant time requires that the child spend both some time on weekends and holidays and some time on other days. It must also include time in daily routine and allow for participation in events that are significant to the child. This might include sporting events, birthdays or concerts. It would also include the child being able to be involved in events of significance to the parent such as family weddings or christenings, mother's or father's day, birthdays.

Subsection 89AA(4) makes it clear that the court can have regard to other things when deciding what is substantial and significant time. This will allow the court flexibility in determining for each unique case in the best interests of the child to determine what the significant events are for that child and parent and what would constitute substantial time. For some children it may include things related to religious or cultural events.

Section 89AA(2)-(4) is intended to ensure that the courts consider arrangements that are much more than 'one weekend a fortnight and half of the holidays' or an 80:20 arrangement. It is intended to ensure a focus both on the amount of time and the type of time. It would include both day time contact and night time contact. It recognises that what is important is that the focus be on ways that both parents are able to develop a meaningful relationship with their children and share important events including everyday time with the child. It recognises that in order to have a meaningful relationship and to share equal shared parental responsibility that this will generally involve 'both' parents spending both substantial and significant time with their children.

Subsection 89AA(5) sets out factors that the court should consider in determining whether both equal or substantial and significant time are reasonably practicable. These factors originate from case law, including the case of T and N (2001) FMCAfam 222. The inclusion of the factors was recommended by the Family Law

Council which considered 2004 research by the Australian Institute of Family Studies entitled, Research Report No 9: Parent-Child Contact and Post Separation Parenting Arrangements.

Paragraph 89AA(5)(a) provides that the court consider the proximity of the residence of the parents. It will obviously be less practical to share care in situations where the parents live in different countries or large distances away from each other.

Paragraph 89AA(5)(b) is the parent's ability, including an assessment of their future ability, to implement the logistical issues associated with shared care. For example, what would the parents do if the child leaves homework at one house? Will the parents readily rectify this problem? The court may decide to make some related orders to send the parties to a program to assist them develop or improve these skills.

89AA(5)(c) refers to the parents current and future capacity to communicate and resolve difficulties. This may include a variety of issues including religious adherence, cultural identity, extra curricula activities of the child, methods of discipline, attitude to homework, health and dental care, diet and sleeping patterns.

Paragraph 89AA(5)(d) ensures that there is a child focus to the decision and ensures that account is taken of the child's age, views (including factors that may have influenced those views) and the general benefit to the child of this type of arrangement.

Section 89AB – Court to have regard to parenting plans – FLA s 65DAB

New section 89AB is inserted to provide that when making parenting orders the court should consider the terms of the most recent parenting plan that may have been entered into by the parents about the child. The intention is that this provision will mostly be used in situations where, prior to entering the court system, parents have agreed on a parenting plan that breaks down and parenting orders are required (because the plan itself is unenforceable). It may also be relevant, where due to the effect of section 85A, a previous parenting order has become unenforceable and the
parents now come before the court to seek new parenting orders.

The provision will give the court the benefit of information about the types of arrangements that the parents have previously considered when the court is making parenting orders. The court is still required to make a decision in the best interests of the child but information about the agreement may assist the court in considering the appropriate parenting orders to make. The court is not bound by any previous agreement.

Section 89AC – Effect of parenting order that provides for shared parental responsibility – FLA s 65DAC

New section 89AC provides a rule that where parental responsibility is to be shared in relation to a major long-term issue under a parenting order, this means that decisions should be made jointly. This clarifies for parents or others who may have parental responsibility, what exercising shared parental responsibility actually involves. This will ensure that both parents have a meaningful involvement in the child's life. This does not only apply in situations where parents are sharing exactly equal responsibility. In all cases where there is some sharing of responsibility then consultation, then discussion about major long-term issues is required for those parts of responsibility that are shared.

New subsection 89AC(2) contains a note which explains that there is no need to consult about decisions unrelated to the major long-term care welfare and development issues, while the child is spending time with a particular person. This is further explained by section 89AD. The intention is to make clear that while a child is with a parent, that parent takes responsibility for the child. This is intended to reduce litigation about minor details.

New subsection 89AC(3) specifies that in the context of making decisions jointly, consultation between those persons and making a genuine effort to come to a decision is required. This will allow a party to seek to enforce a parenting order in circumstances where there has been no genuine attempt to consult.
When a decision about a major long-term issue is communicated to another person (who does not share parental responsibility) by a party with a share in parental responsibility, new subsection 89AC(4) clarifies that section 89AC does not require that person to establish that the decision has been made jointly. The purpose of this section is to ensure that third parties, for example schools, do not have to establish whether a decision has been made jointly between parties.

New section 89AC outlines the decision making responsibility when a major long-term issue needs to be decided. These provisions are important to give meaning to the sharing of decisions about long term issues. They recognise the benefit to the child generally where both parents play a role in their life. The provisions also encourage a cooperative approach to parenting and, it is hoped, less adversarial court proceedings.

Section 89AD – No need to consult on issues that are not major long-term issues – FLA s 65DAE

New section 89AD provides a new rule that where a child is spending time with a person under a parenting order, there is no need to consult about decisions that are unrelated to the major long-term care, welfare and development issues. The note to the section highlights the fact that this would include issues such as what the child eats or wears on a particular day. This is intended to emphasise the types of decisions covered by the section and reduce levels of conflict and litigation about minor issues.

Section 89AD will be contestable in court. A person may disagree with a decision that has been made by the person that the child is spending time with. For example, a parent who is spending time with the child feeds the child in a manner that is inconsistent with the child's religious upbringing. Although what a child eats is not usually a major long-term issue, a child's religious upbringing is defined as a major long-term issue in section 5.

In the event that parties are unable to resolve this issue themselves, the parties will be required to attend family dispute resolution to discuss the issue before an application can be made to a court. The Government does not expect this provision to lead to an increase in litigation. The establishment of Family Relationship Centres and expansion of other counselling, mediation and similar services will assist parties to resolve such issues themselves and to reach agreement in a non-adversarial and cost-effective manner.

Clause 97 Section 90 repealed

The section is repealed.

Clause 98 Section 92 amended

This amendment merely recognises the office of "family consultant'.

Clause 99 Section 237A inserted

Section 237A Costs where false allegation or statement made– FLA s 117AB

This section provides for costs to be awarded against a party who made a false allegation.

Clause 100 Transitional provisions

Inserts necessary transitional provisions.

Clause 101 Section 89 amended

This is a consequential amendment to a section number.

Clause 102 Part 5 Division 13 replaced

Division 13 is inserted.

Section 205A - Simplified outline of the Division – FLA s 70NAA

Deals with preliminary matters that facilitate the operation of Division 13, including definitions of terms used in the Division and the standard of proof to be applied in determining matters under the Division. Section 205A provides a simplified outline of the Division, designed to make the Division easier for readers, particularly self-represented litigants, to understand and use.

Subsection 205A(1) explains that the Division deals with the powers that a court, exercising jurisdiction under the Act, has to make orders to enforce compliance under this Act affecting children. For example, parenting orders which deal with the time a child is to spend with a person.

Subsection 205A(2) clarifies that, in all contravention proceedings under this Division, the court has the power under Subdivision 2 to vary the parenting order. In doing so, the court will have regard to any parenting plan that has been entered into since the order was made. Section 205H is relevant in relation to the effect of a parenting plan in the contravention proceedings.

Subsection 205A(3) outlines the different provisions that will be applied by the court in assessing contravention applications. In particular it summarises the key differences in the application of Subdivisions 3, 4 and 5. Subdivision 3 applies where a contravention is alleged to have occurred, but is not established. This may include situations where there is an application but the court decides it can deal with the matter without making a finding about the contravention. Subdivision 4 applies where the court makes a finding that a contravention has occurred, but there is a reasonable excuse for a contravention. It sets out the powers of the court to make orders in that situation.

Subdivisions 5 and 6 apply where the court finds that a contravention has occurred and there is no reasonable excuse. Whether Subdivision 5 or 6 applies is a matter for the court to determine and will depend on the seriousness of the contravention. Subdivision 5 covers the cases where there is a less serious contravention application and Subdivision 6 covers cases where there is a more serious contravention application, including where there are repeated breaches of orders. The Subdivisions set out the powers of the court to address contraventions in each category. The range of options for the court in each situation have been significantly increased.

Section 205B – Application of Division – FLA s 70NAB

Section 205B clarifies the application of Division 13A. The reason that it is in this Bill is because the whole of Division 13A has been repealed. It makes it clear that this Division only applies to contraventions committed after the Division commences.

Section 205C – Meaning of contravened an order – FLA s 70NAC

Section 205C sets out what it means for a party to have contravened an order under the Act affecting children. To assist all users of the Act, particularly self-represented litigants, a note is inserted after section 205C to highlight that an action that would otherwise contravene a parenting order may not be a contravention if it is consistent with a subsequent parenting plan. This is because under new section 85A, parenting orders may be subject to a subsequent parenting plan. Where a parenting order includes a section 85A order, then a

contravention application cannot be brought to enforce the original order if there is a subsequent parenting plan that has changed that aspect of the original parenting order.

For example, there may be a parenting order that provides that the child is to live with each parent for a week about. As the child gets older and the child's needs change the parents may agree, using a parenting plan, that it would be in the best interests of the child that the child change residence each fortnight. The new provision section 85A would prevent either of the parents bringing a contravention application against the other person to seek to enforce the original orders. The parent no longer happy with the arrangement agreed in the parenting plan will need to either seek to negotiate a new agreement or seek to get new parenting orders.

Section 205D - Requirements taken to be included in certain orders – FLA s 70NAD

Section 205D refers to the general obligations created by parenting orders - for example, that a person cannot remove a child from the care of a person where there is a parenting order that the child be in that person's care. Only the terminology has been changed. The terms 'residence order', 'contact order' and 'specific issues order' are replaced with references to orders relating to whom a child is to live, spend time and communicate. This is consistent with recommendation 4 of the FCAC's report.

Section 205E – Meaning of "reasonable excuse for contravening an order" – FLA s 70NAE

Section 205E sets out what constitutes a reasonable excuse for contravening a parenting order. Where there is a reasonable excuse the court is required to ensure the person understands their obligations under the order and consequences if the order is again breached. An example of a reasonable excuse is action necessary to protect the health or safety of a person, including the respondent or the child.

The terminology has changed. 'Residence order' is replaced by a 'parenting order which deals with who a child is to live with. 'Contact order' is replaced by a parenting order which deals with whom a child is to spend time or to communicate.

Section 205F – Standard of proof – FLA s 70NAF

Section 205F provides clarification of the standard of proof to be applied by the court in considering enforcement applications. The current test provided by section 140 of the *Evidence Act 1995* is the civil standard of proof, the balance of probabilities, with the court to take account of the gravity of matters. Section 205F aims to assist practitioners and self-represented litigants by clarifying the circumstances in which the court will apply a different standard of proof.

New subsection 205F(1) specifies that the court should generally apply the civil standard of proof, the balance of probabilities, in considering matters in proceedings under this Division. This is subject to subsection 205F(3), which provides that a stricter standard applies to orders being considered under the more serious contravention applications that may incur a criminal penalty under provisions in Subdivision 6.

New subsection 205F(2) clarifies that the court should also apply the civil standard when determining whether a person had a reasonable excuse for having contravened an order affecting a child under this Act. This approach should mean that it is easier for many less serious contraventions to be dealt with by the court as they will not need to be treated as a quasi-criminal proceeding.

New subsection 205F(3) provides that a stricter standard of proof, requiring the court to be satisfied beyond reasonable doubt, applies to matters to which Subdivision 6 applies when a court is considering a criminal consequence for the contravention of an order (for example, imposing a bond, a fine, or a sentence of imprisonment). This is appropriate given the consequences for the individual of orders that impose criminal sanctions.

Subdivision 2 – Court's power to vary parenting order

Section 205G – Variation of parenting order – FLA s 70NBA

Section 205G is inserted as the first section of Subdivision 2. It sets out the court's power to vary a parenting order where a contravention of an order under the Act affecting children has been alleged. The court may vary a parenting order under Subdivision 2 regardless of whether the contravention is also dealt with under Subdivisions 4, 5 or 6

.

Experience suggests that many contravention applications come to the court because circumstances have changed and the existing orders are no longer appropriate. This provision makes it clear that the court always has the power to vary the order whether it is a matter where a contravention is not established or where there is a serious contravention and the court is making orders imposing criminal type penalties. This flexibility should assist in resolving many applications that come to the courts through contravention applications without the need for separate variation applications to be lodged. Having this provision at the start of the Subdivision is intended to simplify its application and to reduce the need for the duplication of a similar provision in each of the subsequent Subdivisions.

Subsection 205G(1) sets out when a court may make an order varying a 'primary order'. 'Primary order' is defined in the dictionary in section 5 of the Act to mean an order under the Act affecting children or a variation of such an order. A court may vary a primary order where contravention proceedings are brought in relation to that order and it is alleged that a person has contravened the order. The court may do so whether or not it finds that a contravention has been committed. This flexibility is appropriate as the dispute about the contravention may highlight the fact that the primary order is no longer suitable due to a change in the child's circumstances. In such a case, it is important that the court have the power to vary the order regardless of whether or not a contravention has been committed.

Subsection 205G(2) provides that if there is a more serious contravention, that would otherwise be dealt with under Subdivision 6, then the court must take account of certain considerations if it decides to vary the order under subsection 205G(1). These additional considerations are set out in paragraphs 205G(2)(a) to (d). They include that the person who contravened the order did so after having attended, refused or failed to attend, or been found unsuitable to take any further part in, a post-separation parenting program, or that there was no such program that the person could attend. The court must also consider whether it would not be appropriate for a person to attend such a program or part of a program because of the behaviour of the person
who contravened the order. An additional consideration is whether the primary order
was a compensatory parenting order made under paragraph 205O(1)(b) or subsection 205SB(2) after the person had contravened a previous order under the Act affecting children. The intention of this provision is to ensure that, when varying an order involving serious or repeated contraventions, the court considers whether there are other viable options such as ordering the person to attend a post-separation parenting program or making a compensatory order are viable, or whether they have been tried before without success. The best interests of the child remain the paramount consideration in varying any order.

Section 205H – Effect of parenting plan- FLA s 70NBB

New section 205H requires the court to have regard to the terms of a parenting plan that parents have made subsequent to a parenting order, when it is considering whether to vary a parenting order under section 205G. This section is relevant to those parenting orders which do not have an order made by section 85A (which provides that subsequent parenting plans make the orders unenforceable). These provisions will be particularly relevant once the family law reforms are in place. People who had made parenting orders some time ago will be encouraged, and in some cases will be required, to attend a dispute resolution process before making an application to a court. Agreements will be encouraged rather than going back to court.

Subsection 205H(1) sets out that the section applies to situations where a parenting order is made about a child, and after that order was made, the parents made a parenting plan that dealt with a matter that was covered by the parenting order.

Subsection 205H(2) requires the court, when exercising its powers to vary an order under section 205G, to consider the terms of the parenting plan and whether to make an order varying the parenting order to include some or all of the provisions of the parenting plan, with or without modification. Section 205H gives greater importance to parenting plans made after parenting orders, in order to provide maximum flexibility for parents to come to agreement even if there is a parenting order in effect. Section 205H implements recommendation 39 of the LACA Report.

The provision allows the court to consider the type of arrangements that the parties may have considered and which have not worked for them. The parenting plan may be very relevant if the reason that one party has technically contravened an order was because they thought they had a formal agreement with the other party. The court is not bound by the subsequent parenting plan - it is simply to be taken into consideration.

The provision will also be very relevant in the new family law system which aims to keep people out of court. People with existing orders will be encouraged to use parenting plans rather than parenting orders to address changing circumstances. They will be supported in making parenting plans by the services of the Family Relationship Centres. It is therefore appropriate that these be taken into account if the matter does need to return to court at a later date.

As discussed previously, section 205H will only be relevant for the enforcement of parenting orders that do not have a section 85A default clause. This is providing that the parenting order is subject to a subsequent parenting plan (for example, parenting orders made prior to the commencement of the provision or where the court has exercised its discretion not to include the provision). The effect of section 85A is that a parenting order will be unenforceable to the extent it is inconsistent with a subsequent parenting plan. This is appropriate in the new system which will encourage people to resolve issues by agreement rather than through the courts. People will know upfront, when they get their initial parenting order, of the potential effect of subsequent parenting plans.

Subdivision 3 – Contravention alleged but not established

Section 205I– Application of Subdivision – FLA s 70NCA

Section 205I is the first section of Subdivision 3. It provides that Subdivision 3 applies where a contravention is alleged to have occurred but is not established. This is the first of the potential options available for the court in dealing with a contravention application. For example, this provision will apply where the person fails to satisfy the standard of proof on the balance of probabilities that there has been a contravention.

The court can still look at the existing orders and determine if circumstances have changed, and if a variation of the original parenting order is warranted. The note to section 205I is an important signpost for readers, particularly self-represented litigants. It clarifies that, in addition to the court's powers in Subdivision 3 to order costs against the person who brought the proceeding, the court may also vary the order that has been contravened under Subdivision 2. Subdivision 2 sets out the court's power to vary a parenting order and the effect of a subsequent parenting plan where a contravention has been alleged.

Section 205J– Costs - FLA s 70NCB

Section 205J provides that the court may order that the person who brought the contravention proceedings pay some or all of the costs of the other party or parties to the proceedings. The court must consider, in making such an order, if the applicant has previously brought contravention proceedings in relation to the primary order (or another primary order) and if, on the most recent occasion on which the person brought the proceedings, the court was not satisfied that a contravention had been committed or was satisfied that a contravention had been

committed but did not make an order under section 205G, 205L, 205M, 205O or 205SB (these are the sections under which the court has the power to make orders dealing with contraventions that it finds). The intention is to deter people from making repeated contravention applications which aim to harass or inconvenience the other party. This implements recommendation 40 of the LACA Report.

Subdivision 4 – Contravention established but reasonable excuse for contravention

Section 205K – Application of Subdivision – FLA s 70NDA

Section 205K is the first section of Subdivision 4. It provides that Subdivision 4 applies if the court is satisfied that a person has committed a contravention of a primary order, but that the person had a reasonable excuse for the contravention. This applies to a contravention committed before or after the commencement of this Subdivision of a primary order made before or after the commencement of the Subdivision. 'Primary order' is defined in the dictionary in section 5 of the Act to mean an order under the Act affecting children, or a variation of such an order. Section 205E in Subdivision 1 explains what constitutes a reasonable excuse for contravening an order.

The note to section 205K provides an important signpost for readers, particularly self-represented litigants. It clarifies that, in addition to the court's powers in Subdivision 4 to order make up contact time or to order costs against the person who brought the application, the court may vary the order that has been contravened under Subdivision 2. Subdivision 2 sets out the court's power to vary a parenting order and to take account of a parenting plan where a contravention of an order under the Act affecting children has been alleged. This ensures flexibility to address changing circumstances which warrant a variation of the parenting order without the need for a separate application to be made.

Section 205L – Order compensating person for time lost – FLA s 70NDB

The first option for the court to consider when Subdivision 4 applies is set out in section 205L. This section provides that if a person has contravened a parenting order and the result of the contravention is that another person did not spend time with the child or that the child did not live with another person for a particular period, the court must consider making an order which compensates the person for the time they did not spend with the child or did not have the child living with them.

This allows for the court to order make-up time even where the person who committed the contravention had a reasonable excuse. This is appropriate given that the original parenting order for contact was made in the best interests of the child, that contact with both parents is an important aspect of ensuring that a child maintains a meaningful relationship with both parents and that parents are able to fulfil their parental responsibilities in relation to their child.

The note to subsection 205L(1) is a signpost for readers directing them to the sections of Subdivisions 5 and 6 under which the court has the power to make an order compensating a person for time lost. Unlike Subdivision 4, these Subdivisions apply where a person does not have a reasonable excuse for a contravention. In those cases, the court has a number of other options, as well as ordering make-up time.

Subsection 205L(2) provides that the court must not make a compensatory order under section 205L where it would not be in the best interests of the child to do so. It is intended that the exception relating to the best interests of the child will cover, for example, where one party refuses the other party time with the child because of a fear of violence or abuse. However, it is not intended that the exception would capture the whole range of reasons for contravention that could amount to 'reasonable excuse' in section 205E in Subdivision 1. In all cases, other than where it is not in the child's best interests to do so, it is intended that the court must consider whether compensatory time with the child should be ordered to make up for the missed time.

Section 205M – Costs – FLA s 70NDC

The second option for the court to consider when Subdivision 4applies is set out in section 205M. This section provides that if the court does not make an order under section 205L compensating a person for lost time, the court may order that the person who brought the contravention proceedings pay some or all of the costs of the other party or parties to the proceedings. The court must consider making such an order if the applicant has previously brought contravention proceedings about the primary order (or another primary order) and, on the most recent previous occasion on which the person brought the contravention proceedings, the court was not satisfied that a contravention had been committed, or was satisfied that a contravention had been committed but did not make an order under section 205G, 205L or 205O dealing with the contravention. The intention of this provision is to deter people from making repeated contravention applications which aim to harass or inconvenience the other party. This implements recommendation 40 of the LACA Report.

Subdivision 5 – Contravention without reasonable excuse (less serious contravention)

Section 205N - Application of Subdivision- FLA s 70NEA

Subsection 205N(1) sets out when Subdivision 5 applies. It applies if a person has committed a contravention of a primary order (defined in the dictionary in section 5 of the Act) with no reasonable excuse, and the contravention is of a less serious nature. Section 205N in Subdivision 1 explains what constitutes a reasonable excuse for contravening an order.

Subsections 205N(2) and (3) clarify when a contravention is of a less serious nature such that Subdivision E applies. Under subsection 205N(2), the Subdivision will apply if no court has previously imposed a sanction, taken action, or adjourned proceedings under section 205O(1)(c) in respect of a contravention by the person. Thus persons who repeatedly breach parenting orders will generally not be dealt with under this Subdivision, but under the Subdivision that deals with more serious contraventions. However, under subsection 205N(3), in some cases where there has been more than one contravention and where a court has previously imposed a sanction, or taken action, or adjourned proceedings under paragraph 205O(1)(c) in respect of a contravention by the person, but the court is satisfied that the circumstances of the current contravention make it more appropriate for it to be dealt with under Subdivision 5, it can deal with the matter as a less serious contravention. This provides the court flexibility to decide it is appropriate to deal with a matter as a minor contravention even where there has been a previous breach. The substance of these provisions has not changed from the existing provisions.

Subsection 205N(4) provides that Subdivision 5 will not apply even if the circumstances set out in subsection 205N(2) are met, if the court is satisfied that the person who contravened the primary order has behaved in a way that showed a serious disregard for his or her obligations under the primary order. This allows the court the flexibility to decide that the contravention should be dealt with as a contravention of a more serious nature under Subdivision 6, where there are more serious penalties available including criminal sanctions.

Section 205O - Powers of Court – FLA s 70NEB

Where there is a less serious contravention and Subdivision 5 applies, the court has the powers set out in section 205O. These powers expand on the existing enforcement regime.

Under paragraph 205O(1)(a), the court may direct the person who contravened the order, or that person and another specified person, to attend a post-separation parenting program. The intention is that this will help parents resolve problems that affect the carrying out of their parenting responsibilities. This option is already available. Under paragraph 205O(1)(b), the court may now also make an order which compensates a party for the time they did not spend time with the child or did not have the child living with them as a result of the contravention. Under paragraph 205O(1)(c), the court may adjourn the proceedings to allow the parties to apply for a further parenting order. The reference to ‘contact’ is replaced with ‘time the person did not spend with the

child' and the reference to 'residence' is replaced with 'time the child did not live with the person'. This is consistent with recommendation 4 of the FCAC's report.

New paragraphs 205O(1)(d), (e) and (f) add to the existing powers of the court and will significantly strengthen the power of the court to address less serious contraventions in a way that deters further contraventions. New paragraph 205O(1)(d) introduces a discretion for the court to impose a bond in accordance with new section 205P

290. New paragraph 205O(1)(e) enables the court to order the person who contravened an order to compensate another person who incurred expenses as a result of the contravention. The expenses incurred must be reasonable expenses. This provision is intended to cover situations where airfares or other tickets purchased are wasted as a result of a person, for example, not making the child available for time with the other parent under a parenting order.

New paragraph 205O(1)(f) enables the court to make an order that the person who committed the contravention pay some or all of the costs for legal expenses of the other party or parties to the proceedings.

Where the court makes no other orders in relation to the contravention, new paragraph 205O(1)(g) enables the court to order that the person who brought the proceedings pay some or all of the costs of the person who committed the contravention. The court must consider making such an order in the circumstances set out in subsection 205O(7), below. The intention is to deter people from making repeated contravention applications which aim to harass or inconvenience the other party. This implements recommendation 40 of the LACA Report.

An important signpost for readers, particularly self-represented litigants. It clarifies that, in addition to the court's powers in Subdivision 5, the court may, under Subdivision B, vary the order that has been contravened. Subdivision 2 sets out the court's power to vary a parenting order and consider the effect of parenting plan where a contravention of an order under the Act affecting children has been alleged.

Subsection 205O(1) clarifies that before the court makes an order for a person to attend a post-separation parenting program, it consider seeking the advice of a family consultant. This is appropriate as they are likely to have more experience in dealing with local services and a better understanding of what might be available and suitable for the individual.

Subsections 205O(2) and (3)) deals with when a court can make an order under paragraph 205O(1)(a) that a person, other than the person who committed the contravention, attend a post-separation parenting program. Subsection 2052O(3) requires the principal executive officer of the court to notify the provider of the program that the order has been made. This is to ensure that they are aware of the orders.

Subsection 205O(4) provides further details about the application of paragraph 205O(1)(b) which allows the court to make an order compensating a person for time the person did not spend or live with the child due to a contravention. This is appropriate as it may ensure the child benefits from time with the other person that they have missed out on.

New subsection 205O(4) provides that the court must consider making a compensatory order under paragraph 205O(1)(b) where a contravention of a parenting order has occurred which has resulted in a person not spending time with, or living with, a child. However, subsection 205O(5) provides that the court must not make a compensatory time order under paragraph 205O(1)(b) where it would not be in the best interests of the child to do so.

Subsection 205O(6) provides further details about the application of paragraph 205O(1)(c) which provides that the court may adjourn the proceedings to allow the parties to apply for a further parenting order.

Subsection 205O(7) provides further details about the application of paragraph 205O(1)(g) which enables the court to order that the person who brought the proceedings pay some or all of the costs of the person who committed the contravention. The court must consider making such an order if the applicant has previously brought contravention proceedings in relation to the order and, on the most recent occasion on which the person brought the proceedings, the court was not satisfied that a contravention had been committed or was satisfied that a contravention had been committed but did not make an order under section 205G, 205L, 205M or 205SB (these are the sections under which the court has the power to make orders dealing with contraventions). The intention is to deter people from making repeated contravention applications for minor breaches which aim to harass or inconvenience the other party. It is only applicable where the court has considered the issue and decided that no orders are appropriate. This is one of a number of amendments that implement recommendation 40 of the LAC

Section 205P - Bonds – FLA s 70NEC

Section 205P provides for the type of bonds the court may require a person to enter into as a sanction for committing a less serious contravention under the new paragraph 205O(1)(d). The court must specify the period of the bond (limited to 2 years) (subsection 205P(2)) and determine if the bond is to be with or without surety and security (subsection 205P(3)).

The conditions that may be imposed on a person by a bond are detailed in subsection 205P(4) but are not limited to those listed in that subsection. The court may require good behaviour by a person or for that person to attend an appointment with a family consultant, or attend family counselling or family dispute resolution.

Subsection 205P(5) requires the court, if it proposes to require a person to enter into a bond, to clearly explain to a person in language likely to be understood by the person, the purpose and effect of the requirement and the consequences of not entering into the bond or failing to act in accordance with the bond. This requirement on the court is consistent with other provisions in the Act that oblige the court, lawyers and others, to provide clear information about the nature and effect of any orders made in proceedings under this Act so that there can be no misunderstanding about what is intended.

Section 205Q – Duties of provider of post-separation parenting program FLA s 70NED

Section 205Q provides that a provider of a post-separation parenting program, which a person has been ordered to attend under section 205O (1)(a), must inform the court if the provider considers the person to be unsuitable to attend the program, or if the person fails to attend the whole or part of the program

Section 205R – Evidence – FLA s 70NEF

Section 205R provides that evidence of anything said, or any admission made, by a person attending a post-separation parenting program is not admissible in any court, or any proceedings. However, subsection (2) provides that evidence in the form of an adult's admission of abuse or risk of abuse to a child under 18 years, or a disclosure by a child that he or she has been abused or is at risk of abuse, is not excluded by operation of subsection (1).

Section 205S – Court may make further orders in relation to attendance at program – FLA s 70NEG

Section 205S allows the court to make appropriate orders if a person who has been ordered to attend post-separation parenting program does not attend, or was assessed as unsuitable to attend.

Subdivision 6 – Contravention without reasonable excuse (more serious contravention)

Section 205SA – Application of Subdivision – FLA s 70NFA

Subsection 205SA(1) sets out that Subdivision 6 applies if a person has committed a contravention of a primary order (defined in the dictionary in section 5 of the Act) with no reasonable excuse and the contravention is of a more serious nature. Section 205SA explains what constitutes a reasonable excuse for contravening an order.

. Subsections (2) and (3) clarify when a contravention is of a more serious nature such that Subdivision 6 applies. Under subsection (2), this will be the case even if no court has previously imposed a sanction, taken action, or adjourned proceedings under section 205O(1)(c) in respect of a contravention by the person, yet the court is satisfied that the person has behaved in a way that showed a serious disregard of his or her obligations under the primary order. Thus a person who only commits one contravention can be immediately dealt with under this Subdivision if they show serious disregard for their obligations. What amounts to a serious disregard will depend on the circumstances of the case but, by way of example, could include the removal of a child to another place despite orders of the court or harassment despite repeated warnings and the terms of the parenting order. In such cases, the court will deal with the matter under Subdivision 6, which requires the court to consider imposing more serious penalties ranging from community service orders to fines and imprisonment.

Subsection (3) clarifies that a contravention is of a more serious nature, such that Subdivision 6 applies, if a court has previously imposed a sanction, taken action, or adjourned proceedings under section 205O(1)(c) in respect of a contravention by the person. Thus where there have been repeated breaches the matter would ordinarily be dealt with as a more serious contravention under Subdivision 6.

Subsection (4) provides that Subdivision 6 does not apply if the court is satisfied that it is more appropriate for the contravention to be dealt with under Subdivision 2. Under Subdivision 2 the court can vary a parenting order and must take account of a subsequent parenting plan. This allows the court the flexibility to decide that the contravention is best dealt with by varying the parenting order. This is appropriate as in some cases a variation of the parenting order may be the most appropriate option even where the conditions for the application of Subdivision 6 are met. For example, there may be a serious contravention and the court may simply decide it is in the best interests of the child to vary the parenting order to reverse the order about who the child will live with but not to impose any other penalty under Subdivision 6.

Subsection 205SA(5) clarifies that the Subdivision applies whether the parenting order to which the contravention relates was made prior to the commencement of the new division; or whether the contravention occurred prior to the commencement of the new division.

Section 205SB– Powers of Court – FLA s 70NFB

Where Subdivision 6 applies and there is a more serious contravention, the court has the powers set out in section 205SB. These powers expand on those in the existing Act in order to strengthen the existing enforcement regime.

New paragraph 205SB(1)(a) provides that where there is a serious contravention there is a presumption that the court will order costs against the person who has contravened the order (using the courts power to award costs under paragraph (2)(g)) unless it is not in the best interests of the child.

Paragraph (1)(b) provides that where the court makes an order for costs under paragraph (2)(g), the court must also consider making another order under subsection 205SB(2). For example, a compensatory order, a community service order or an order imposing a fine.

Where the court does not make an order for costs under paragraph 205SB(2)(g), the court must make at least one other order under subsection (2) that the court considers to be the most appropriate. This ensures that the court must impose some kind of sanction to more serious contraventions.

Subsection 205SB(2) lists the powers that are available to the court under Subdivision 6 for serious contraventions. These powers strengthen the existing enforcement regime. These sanctions are retained in paragraphs 205SB(2)(a), (b), (d) and (e) respectively.

New paragraph 205SB(2)(c) expands the possible sanctions to include a power for the court to make a compensatory order for the time a person did not spend with the child as a result of the contravention.

New subparagraph 205SB(2)(f) enables the court to order the person who contravened an order to compensate another person who incurred expenses as a result of the contravention. The expenses incurred must be reasonable expenses. This provision is intended to cover situations where airfares or other tickets purchased are wasted as a result of a person, for example, not making the child available for time with the other parent under a parenting order.

New subparagraph 205SB(2)(g) enables the court to make an order that the person who contravened an order pay all of the costs for legal expenses of the other party or parties to the proceedings. New subsection (1) inserts a presumption that where Subdivision 6 applies the court will make a costs order under paragraph 205SB(2)(g) unless it is not in the best interests of the child.
New paragraph 205SB(2)(h) enables the court to make an order that the person who contravened an order pay some of the costs for legal expenses of the other party
or parties to the proceedings.

Subsection 205SB(3) provides that where a court varies or discharges a community service order under section 205SD it may give any direction as to the effect of the variation or discharge as it thinks appropriate.

Subsection 205SB(4) provides that a sanction of imprisonment may be imposed for the non-payment of maintenance where the contravention was intentional or fraudulent.

Subsection 205SB(5) provides that the court must not impose a sanction of imprisonment in respect of a breach of certain provisions of the Child Support (Assessment) Act 1989 - in particular, a contravention of a child support assessment or a breach of a child support agreement made under that Act, or a contravention of a departure order made under Division 4 of Part 7 of that Act. 60

Subsection 205SB(6) provides the court with flexibility to express an order made under section 205SB to take effect immediately, at the end of a specified period or on the occurrence of a specified event.

Subsection 205SB(7) clarifies that at the time of imposing a sanction the court may also make other orders it considers necessary to ensure future compliance.

Section 205SC – When court is empowered to make a community service order – FLA s 70NFC

Section 205SC sets out the details of a community service order the court is empowered to make under paragraph 205SB(2)(a).

Section 205SD – Variation and discharge of community service orders – FLA s 70NFD

Section 205SD provides for the variation and discharge of community service orders.

Section 205SE – Bonds – FLA s 70NFE

Section 205SE provides for bonds that the court may impose under paragraph 205SB(2)(b).

Section 205SF – Procedure for enforcing community service orders or bonds – FLA s 70NFF

Section 70NFF provides for the procedure for enforcing community service orders or bonds.

Section 205SG – Sentences of imprisonment – FLA s 70FNG

Section 205SG provides for sentences of imprisonment that may be imposed by the court under paragraph 205SB(2)(e).

Section 205SH – Relationship between Subdivision and other laws – FLA s 70NFH

Section 205SH explains the relationship between Subdivision 6 and other laws.

Clause 103 Section 237 amended

This merely corrects section numbers.

Clause 104 Transitional provisions

Inserts necessary transitional provisions.

Clause 105 – Section 5 amended

Inserts a definition of 'child-related proceedings' into Section 5 of the Act, containing the definitions that are used throughout the Act**.**

Part 5 Division 11A Inserted

Clause 106 Section 202A – Proceedings to which this Division applies

New section 202A defines what is meant by 'child-related proceedings', and how Division 11A applies. Division 11A only applies to 'child-related proceedings'. Firstly, subsection 202A(1) provides that 'child-related proceedings' are all proceedings under Part 5 of the Act. Part 5 relates to children and deals with proceedings for orders such as parenting orders, child maintenance orders, location and recovery orders, orders for the enforcement of orders affecting children, and proceedings for injunctions relating to children.

Secondly, paragraph 202A(2)(a) provides that 'child-related proceedings' include proceedings that are partly under Part 5 of the Act to the extent that they are proceedings under that Part. Paragraph 202A(2)(b) then provides that 'child-related proceedings' can also include proceedings that are partly under Part 5 of the Act to the extent that they are not proceedings under that Part, if the parties consent.

Subsection 202A(5) ensures that any such consent must be free from coercion and in a form to be prescribed by the Rules of Court.

Subsection 202A(3) provides that 'child-related proceedings' also include any other proceedings between the parties that involve the court exercising jurisdiction under the Act and that arise from the breakdown of the parties' marital relationship, if

the parties consent. This may include, for example, property settlement proceedings or spousal maintenance proceedings. However, Division 11A will only apply to such proceedings where the parties have each consented and where the parties are also parties to proceedings under Part 5 of the Act or have been parties to such proceedings. Subsection 202A(5) ensures that any such consent must be free from coercion.

New paragraph 202A(5)(a) provides that the consent to a matter becoming a child-related proceeding must be free from coercion. This implements recommendation 35 of the LACA Report and addresses concerns that weaker parties may be forced into giving their consent by stronger parties. New paragraph 202A(5)(b) allows the Rules of Court to prescribe the form by which consent must be given. This will ensure a standard procedure for signifying consent that will allow the court to be satisfied that the consent of the parties is deliberate and informed.

Subsection 202A(6) provides that consent given by persons for the purposes of subsection 202A(5) is irrevocable except with leave of the court. This means that if a party has given his or her consent to a proceeding which is covered by paragraph 202A(2)(b) or subsection 202A(3) being dealt with by a court in accordance with the provisions in new Division 11A, that party cannot later revoke that consent without the leave of the court and have the dispute dealt with otherwise than in accordance with Division 11A. The intention is to minimise the costs involved in courts having to adopt a different case management approach once a matter has begun on the basis that parties have changed their minds about consent. The fact that consent must be demonstrated by a form prescribed by the court will ensure that there is evidence about what the parties have agreed.

Subdivision B – Principles for conducting child-related proceedings

New section 202B sets out the principles for conducting child-related proceedings. Subsection 202B(1) provides that the court must give effect to these principles in performing its duties and exercising its powers (whether under this Division or otherwise) in child-related proceedings, and in making other decisions about the conduct of child-related proceedings. These principles will apply in the exercise of the court's duties and powers in other proceedings that the parties have consented to join to child-related proceedings, and therefore to which Division 11A applies, by virtue of paragraph 202A(2)(b) and subsection 202A(3). However, the proceedings, or any order made in them, will not be invalid should the court fail to apply a principle.

Subsection 202B(2) removes any doubt that regard is to be had to the principles in interpreting Division 11A.

The first principle, in subsection 202B(3), is intended to ensure that the proceedings are focussed on the child. This means that the court must consider the child's needs and the impact that the conduct of the proceedings may have on him/her. In particular the court must consider the likely stress on the child of the conflict between the parents that is created by the proceedings and seek to minimise this. The court may, for example, consider making orders that the child attend family counselling to assist the child to understand the court's orders or the trial process. The court may also, when setting hearing dates, consider the stress caused to the child by lengthy times between hearing dates and seek to minimise this impact where appropriate.

The second principle, in subsection 202B(4), is that the court must actively direct, control and manage the conduct of child-related proceedings. This will enhance the role of the judicial officer, requiring them to have more control over the conduct of the hearing, rather than the parties and their representatives controlling the conduct of the hearing.

The third principle, in subsection 202B(5), is that the proceedings must be conducted in a way that will safeguard the child or children concerned against family violence, child abuse and child neglect; and safeguard

the parties against family violence. This implements recommendation 36 of the LACA Report and gives emphasis to the protection of the child in less adversarial proceedings. The more active case management approach in Division 11A should ensure that allegations of violence and abuse are dealt with at an earlier stage in the court process. It will also ensure that judicial officers are better able to ensure that appropriate evidence is before them. This will assist courts to better address issues of child abuse and family violence in proceedings.

The fourth principle, in subsection 202B(6), is intended to ensure that the proceedings, as far as possible, are conducted in a way that encourages the parents to
focus on their child or children and on their ongoing relationship as parents. The aim
is to promote both a focus on the child and cooperation between the parties to allow at
least a positive working relationship between them, both during and after the proceedings so that they can communicate in order to fulfil their responsibilities as parents. This means that the court, when it considers how to conduct the proceedings,
must consider ways that it might minimise the level of conflict between the parents
and ensure that the focus of both parents is on the child.

This principle comes from concerns that a traditional adversarial approach to litigation is harmful to children as it can entrench conflict between parents. It can also lead to a focus on the parents and their perceptions of their rights rather than a
focus on the child.

The fifth principle, in subsection 202B(7), is intended to provide that the proceedings be conducted without undue delay and with as little formality and legal technicality as possible. This does not mean that the proceedings will be conducted in a casual way that detracts from the seriousness of the orders being made. It is intended that the proceedings be conducted in a way that makes the parties feel comfortable and that ensures that the matter can be finalised in a timely way. It is intended that new subsection 202B(7) go further than the current subsection 97(3) of the Act, which provides that in proceedings under the Act the court shall proceed without undue formality and shall endeavour to ensure that the proceedings are not protracted. This subsection replicates subsection 93(2) of the Children and Young Persons (Care and Protection) Act 1998 (NSW).

This Division also applies to proceedings in Chambers

New section 202C provides that all of the duties and powers conferred on a 'court' throughout Division 12A are also conferred on a Judge, Judicial Registrar, Registrar, Federal Magistrate or magistrate who is hearing a child-related proceeding in Chambers. This is to ensure that the provisions of Division 12A apply to any proceedings or parts of proceedings that are heard in Chambers. Similar provisions exist in other federal court legislation.

The Act already makes provision for proceedings to be heard by a judge, Judicial Registrar, Registrar, Federal Magistrate or magistrate sitting in Chambers where there is authorisation to do so in the regulations or the applicable Rules. The note to section 202C clarifies that an order made in Chambers has the same effect as an order made in open court.

Section 202D – Powers under this Division may be exercised on court's own initiative

New section 202D provides that the court may exercise a power under Division 11A either on the court's own initiative or at the request of a party to the proceedings.

This gives the court flexibility in discharging its obligation to actively manage cases
in a way that encourages parents to focus on their child and on their ongoing relationship as parents and without undue delay or formality. It ensures a more inquisitorial approach by courts to resolving children's issues. This is appropriate given that decisions must be made in the best interests of the child not just on the position put to the court by the parties.

Subdivision 3 – Duties and powers related to giving effect to the principles

Section 202E – General duties

New subsection 202E(1) lists a number of general duties that the court must carry out in giving effect to the principles in new section 202B. These will ensure that cases are actively managed in a way that encourages parents to focus on their child and on their ongoing relationship as parents and without undue delay or formality. They will also ensure the proceedings are not protracted, and should help to reduce the overall costs.

Paragraph 202E(1)(a) provides that the court will need to decide which of the issues identified in the application and in the proceedings actually require full investigation and hearing, and which of these issues may be disposed of summarily.

As set out in paragraphs 202E(1)(b) and (c), the court will also have to decide the order in which issues are to be decided and give directions about the timing of steps that are to be taken in the proceedings. This will lead to better management of proceedings.

There is a specific duty in paragraph 202E(1)(d) to consider whether the likely benefits of taking a step in the proceedings justify the costs of taking it. This could be relevant in a situation where parties are proposing to use multiple experts or have particular evidence given by a variety of witnesses. In such a situation, the court may decide that only one of the witnesses proposed will be sufficient to establish a particular fact in the case.

Paragraph 202E(1)(e) requires the court to make appropriate use of technology, such as video-link, audio-link, or other electronic technology. This provision supplements the existing discretion to use such technology at Division 2 of Part XI of the Act. This provision is intentionally wide, as it is difficult to predict the future development of technology which may assist in family law proceedings. 366. Paragraph 202E(1)(f) provides that the court will again need to consider encouraging the parties to use a family dispute resolution or family counselling process if the court considers that is appropriate. This reinforces the Government's intention to ensure that family separations are dealt with outside the legal system wherever that is possible. It is not intended that the court's role should be to mediate or to take part in negotiations. However, it is intended that the court carry out a more active role in creating opportunities for successful negotiations to take place between the parties, which may
lead to consent orders being made during the proceedings on some or all of the issues
in dispute.

Paragraph 202E(1)(g) provides that the court must deal with as many aspects of the matter as the court can on a single occasion, in order to prevent parties having to attend at more court events than is necessary. This will minimise the impact of the proceedings on the child, and help to reduce costs for the parties.

Paragraph 202E(1)(h) provides that the court must also consider dealing with the matter without requiring the parties' physical attendance at court, where this is appropriate. It is envisaged that parties may not need to attend court in two different
types of instances – (1) where the use of appropriate technology (eg video link) removes the need for a party's physical attendance in the court, and (2) where the court can make decisions on the papers (where this is appropriate) without it being necessary for the court to hear more about the matter before making its decision. Any decision made by the court to deal with a case without the parties would need to be made in accordance with the principles of natural justice and procedural fairness. It is expected that these duties will be fulfilled by the court at an early stage of proceedings in order to give effect to the principles behind this active case management approach. For example, it is intended that as early as possible in the proceedings the court will identify the issues in dispute and make directions to ensure that the case proceeds as expeditiously as possible. However, it is recognised that the exact time at which these duties are fulfilled will differ between courts exercising jurisdiction under the Act and between cases.

A number of these general duties are modelled on the duties set out in Rule 1.4 of Part 1 of the United Kingdom Civil Procedure Rules (40th Update). Subsection 202E(2) provides that in giving effect to the five principles set out in section 202B, the court is not limited to undertaking only what is required by subsection 202E(1). The court may give effect to the principles in other ways. Subsection 202E(3) provides that the court's failure to comply with subsection 202E(1) will not invalidate an order.

Section 202F – Power to make determinations, findings and orders at any stage of proceedings

Section 202F makes clear that the court can make findings of fact, determine a matter arising in the proceeding, or make an order at any stage after the commencement of proceedings. This is intended to encourage the court to consider making findings throughout the hearing rather than leaving all findings to a judgement at the end. This should assist in narrowing the issues between the parties and better focus the proceedings on the key issues.
Subsection 202F(2) clarifies that this does not prevent the court making a finding of fact, determining a matter arising in the proceeding, or making an order in relation to a particular issue at the same time as making final orders.
To avoid any doubt, subsection 202F(3) clarifies that the making of a finding of fact, determination or order under subsection 202F(1) is not a reason for a judge, Judicial Registrar, Registrar, Federal Magistrate or magistrate to disqualify himself or herself from a further hearing of the proceedings.
The aim of this section is to provide the court maximum flexibility in how it determines the best management of a particular case.

Section 202G – Use of family consultants

Section 202G provides that at any time during child related proceedings, the court may designate a family consultant as the family consultant in relation to the proceedings. A family consultant so designated will have the functions as described

These sections relate to the role of family consultants in proceedings. This provision has been inserted to clarify that it is envisaged that family consultants will play a much more active role in child-related proceedings than they traditionally have in other more adversarial proceedings.

Section 202H – Rules of evidence not to apply unless court decides

New section 202H is one of the key provisions in achieving less adversarial court processes in child-related proceedings.

The general rules of evidence that apply to court proceedings. These are:

(a) Division 3 (General Rules about Giving Evidence), Division 4 (Examination-in-Chief and Re-examination), and Division 5 (Cross-Examination) of Part 2.1,

(b) Parts 2.2 (Documents) and 2.3 (Other Evidence), and

(c) Parts 3.2 to 3.8 (including Hearsay, Opinion Evidence, Admissions, Evidence of Judgements, Credibility and Character).

Generally, these rules of the Evidence Act relate to the manner of giving evidence, the method of proof of documents (or other evidence) and the exclusionary rules. Specifically, these rules deal with the ways of giving evidence, examination-in-chief and re-examination, cross-examination, proof of documents, other evidence,

hearsay evidence, opinion evidence, admissions, evidence of judgments and convictions, tendency and coincidence, credibility and character.

It is intended that in each child-related proceeding, the court may, if it considers that the circumstances are exceptional, apply these rules of evidence on an issue by issue basis in the proceedings. This means that, in some proceedings, some of these rules of evidence may be applied in relation to some parts of the proceeding but not others. It may also mean that in some proceedings, no rules of evidence are applied.

Subsection 202H(2) clarifies that a court may give such weight, if any, as it thinks fit to evidence admitted as a consequence of the Evidence Act not applying due to the operation of subsection 202H(1). It is appropriate that the court has this discretion where evidence is admitted that would be inadmissible if not for the waiver of the rules of evidence. This makes it clear that the court has flexibility to determine the probative value of material that it relies upon even where the rules of evidence would not otherwise apply.

Paragraph 202H(3)(b) provides that, when deciding whether to apply one or more of the specified provisions of the Evidence Act to an issue in child-related proceedings, the court must take into account a number of factors. These include the importance of the evidence in the proceedings, the nature of the subject matter of the proceedings, the probative value of the evidence and the powers of the court to adjourn the hearing, to make another order or to give a direction in relation to the evidence. These factors are found in subsection 190(4) of the Evidence Act. Their inclusion also implements recommendation 37 of the LACA report. The Committee was of the view that requiring the court to take these factors into account when deciding whether it should apply the rules of evidence in child-related proceedings would provide greater surety of justice for the parties to the proceedings.

Section 202I – Evidence of family consultants

Subsection 202I provides that, without the agreement of the parties, the court must not take any opinions expressed by a family consultant into account in determining the issues in a case, unless such opinions are given as part of sworn evidence in a case. This clarifies the status of what is said by a family consultant on the occasions when a Judge chooses to include them in the proceedings.

The court may appoint a family consultant prior to or during the proceedings with a view to assisting the parties to have a better understanding of the effect that particular issues or behaviours may have on a child from a social science perspective. The family consultant should also be able to provide parents with information on programs or services that may assist them The high threshold for applying the rules of evidence is appropriate as the waiving of the specified provisions of the Evidence Act is an integral element of the active judicial management necessary to achieve less adversarial court processes in child-related proceedings. It also implements recommendation 37 of the LACA report.

However, the court is left with the discretion to apply the rules of evidence in the appropriate case where the threshold is reached. For example the test of 'exceptional' may be met in a serious contravention case where the court is considering a criminal penalty such as imprisonment. It may be appropriate to apply the rules of evidence to such a proceeding due to the gravity of the potential outcome. Even where rules of evidence are applied, other factors related to child-related proceedings can continue to operate, in particular the case management approach.

Section 202J provides that, despite any other Act or rule of law, 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 solely because of the law against hearsay in any child-related proceedings. A 'representation' includes an express or implied representation which can be either oral or in writing, and a representation inferred from conduct - see subsection 202J(5).

While the effect of 202J is that, in many cases, rules of evidence including the hearsay rule would not apply in child-related proceedings, section 202J is necessary in those exceptional cases where a court considers that it is necessary to apply rules of
evidence. In those cases, the rules related to hearsay will still not be relevant in relation to evidence of representations made by a child. This provision is particularly
relevant for the role of independent children's lawyers.

The effect of subsection 202J(5) is to confine the application of this provision to children under 18. This is appropriate as after attaining the age of 18 the child in question would be able to provide evidence to the court directly.

Section 202K – Evidence relating to child abuse or family violence

Section 202K gives the court the power to make an order in child-related proceedings requiring a prescribed State or Territory agency to provide the court with documents which contain information about one or more of the following: any notifications to the agency of suspected abuse of the child or family violence affecting the child any assessments by the agency of investigations into a notification of that kind, any reports commissioned by the agency in the course of investigating a notification.

The prescribed agencies will include the child welfare agencies of the States and Territories and police departments as they are likely to be the agencies which would conduct investigations and hold reports related to issues of child protection and family violence.

Section 202K implements recommendation 11 of the LACA Committee. The intention is to ensure that where allegations of violence or abuse are made, the court has as much information as possible relevant to those allegations when making a determination about what is in the best interests of the child.

Subsection 202K(3) clarifies that nothing in the order is to be taken to require the agency to provide the court with documents or information not in the possession or control of the agency; or documents or information that include the identity of the person who made the notification. If the agency does provide documents or information that include the identity of the person who made the notification, disclosure of these documents or information can only be made in the circumstances
set out in subsection 202K(6).

Subsection 202K(4) ensures that a law of a State or Territory has no effect to the extent that it would hinder or prevent an agency from complying with the order. The intention is that subsection 202K(4) will prevail to the extent of any inconsistency between it and the law of a State or Territory. This will ensure that courts exercising family law jurisdiction are able to compel the same information from all States and Territories in spite of the differences in their child welfare legislation.

This is intended to assist the court to overcome issues that arose in the case of Northern Territory v GPAO and others (1998) 196 CLR 553. In this case the High Court found that the existing provisions of the Act did not override provisions in the Northern Territory child welfare legislation such that the Family Court of Australia could not compel the Northern Territory welfare authority to produce any documents it held concerning the protection of a child who was the subject of a parenting case.

This decision has limited the evidence available to the court to determine what is in a
child's best interests in some cases. Section 202K will address this and extend to information about family violence.

Subsection 202K(5) provides that the court must admit into evidence any documents or information provided in response to the order on which the court intends to rely. This ensures that where the court intends to rely on information it has received relating to an allegation of abuse or violence, the parties are aware of the information or allegation and have an opportunity to respond. This is in accordance with principles of natural justice.

Subsection 202K(6) provides that where an agency has provided documents or information that include the identity of the person who made the notification of suspected abuse or family violence, the court must not disclose the identity of the person unless he or she consents to the disclosure or 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.
This provision is found in section 29 of the Children and Young Persons (Care and Protection) Act 1998 (NSW). It recognises that it is a matter of public policy that the identity of a notifier should be protected in most circumstances to ensure that there is no disincentive to notification of child protection issues.

Subsection 202K(7) ensures that before any disclosure is made under subsection 202K(6), the agency that provided the identity of the person who made the notification is notified and given an opportunity to respond. This provision addresses the concerns expressed by some State agencies about the sensitivities in release of the identity of the notifier. In most cases the identity of the notifier will not be relevant - what is relevant is what the findings were about the child protection issue. Protection of the identity of the notifier ensures that there is no disincentive to report suspected child protection issues. This will ensure that there is an appropriate process to assess that the information is critically important and that failure to make the disclosure would prejudice the proper administration of justice.

Section 202L – Court's general duties and powers relating to evidence

Section 202L sets out the court's general duties and powers relating to evidence. Subsection 202L(1) sets out a list of actions that the court may carry out in giving effect to the five principles for conducting child-related proceedings in section 202B. This provision supplements the duties in section 69ZQ which must be followed in giving effect to the principles and to ensure active management of children's matters to minimise the effect of the proceedings on children and to promote a cooperative parenting relationship between parents.

The list of actions in subsection 202L(1) includes the court giving directions or
making orders about:

• the matters in relation to which the parties are to present evidence
• who is to give evidence in relation to each remaining issue
• how particular evidence is to be given, and
• if the court considers that expert evidence is required:
- the matters in relation to which an expert is to provide evidence
- the number of experts who may provide evidence in relation to a matter,
and -
how an expert is to provide the expert's evidence.

Paragraph 202L(1)(e) also gives the court the power to question and seek evidence or the production of documents or things from parties, witnesses and experts on matters relevant to the proceedings.

Subsection 202L(2) provides a non-exhaustive list of further types of directions and orders that the court may make in child-related proceedings. This list is not intended to limit the actions that the court may make under subsection 202L(1) in giving effect to the principles for conducting child-related proceedings set out in section 202B. The list is also not intended to limit section 202F, which is the section that clarifies that the court may make determinations, findings and orders at any stage of the proceedings.

Under subsection 202L(2) the court may make directions or orders:

- about the use of written submissions
- about the length of written submissions
- limiting the time for oral argument
- limiting the time for the giving of evidence
- that particular testimony is to be given orally
- that particular evidence is to be given by affidavit
- that evidence in relation to a particular matter not be presented by a party
- that evidence of a particular kind not be presented by a party
- limiting, or not allowing, cross-examination of a particular witness, or
- limiting the number of witnesses who are to give evidence in the proceedings.

A number of these provisions come from the United Kingdom Civil Procedure Rules (40th Update). They are intended to allow the court to play a much greater role in managing the conduct of the proceedings.

Subsection 202L(3) inserts a modified version of section 86 of the Native Title Act 1993. It provides that the court may, in child-related proceedings, receive into evidence the transcript of evidence in any other proceedings before a court or tribunal and draw any conclusions of fact from the transcript that it thinks proper. The court may also adopt any recommendation, finding, decision or judgment of any court or tribunal.

This amendment implements recommendation 5 of the Family Law Council's December 2004 Report, Recognition of Traditional Aboriginal and Torres Strait Islander Child-Rearing Practices: Response to Recommendation 22: Pathways Report, Out of the Maze. The Report found that such a provision could provide a court with the flexibility to draw on relevant evidence adduced in other proceedings in other courts to inform decision-making in the best interests of the child pursuant to subsection 68F(2). It suggested that, in the case of an Aboriginal or Torres Strait Island child, such an approach would assist a court in informing itself of the content of the relevant kinship obligations and child-rearing practices wherever such reliable information exists. In this regard, the provision is relevant to new section 61F (inserted by item 14 in Schedule 1) which requires the court to have regard to the kinship obligations and child-rearing practices that are relevant to an Aboriginal or Torres Strait Islander child.

This provision does not apply only to proceedings concerning an Aboriginal or Torres Strait Islander child. It applies to all child-related proceedings. In this respect, the provision implements recommendation 48 of the LACA Report. The Committee was of the view that extending the provision to all children would be helpful and may assist in addressing issues surrounding claims of family violence and abuse.

Clause 107 - Section 214 repealed

Section 214 is Repealed.

Clause 108 Transitional provision

A provision giving application on or after 1 July 2006 is inserted.

Clause 109 Section 5 amended

To maintain consistency with the Commonwealth legislation section 5 of the Family Court Act 1997 is amended by deleting superseded definitions and inserting new definitions of:

- arbitration
- Director of Court Counselling
- family consultant

- family counselling
- family counsellor
- family dispute resolution
- family dispute resolution practitioner
- post-separation parenting program
- relevant property or financial arbitration
- section 65M arbitration.

New subsection 5(4) defines who constitutes "a person or people involved in proceedings".

Clause 110 Section 25 amended

These amendments that deal with officers of the Court recognise a change in title from "Executive Officer" to "executive manager".

The amendments also provide for the Court to appoint family consultants, family counsellors and family dispute resolution practitioners.

Clause 111 Section 33 amended

This is a consequential amendment to section numbers.

Clause 112 Section 3A inserted

Section 33A Engagement of consultants – FLA s 38R

Section 33A of the Act allows the executive manager of the Family Court to engage consultants. This item explicitly provides that the executive manager may engage people to perform family counselling and family dispute resolution.

Clause 113 Part 2 Division 4 replaced

Division 4– Administration of Court's family services

Section 34 Director of Court Counselling has functions of family consultants- FLA s 38BA

Section 34 confers the functions to be performed by family consultants under section 60 on the Director of Court Counselling of the Family Court. These functions can be delegated (see section 34A below). As the Director of Court Counselling can only delegate functions that he or she possesses the functions to be performed by family consultants under the Act must be conferred on the Director of Court Counselling.

Section 34A Director of Court Counselling may delegate powers and functions that relate to family consultants – FLA s 38BB

Section 34A permits the Director of Court Counselling to delegate the functions conferred upon him or her under section 34A. This allows the Director of Court Counselling to control the work flow to individual family consultants, to ensure that they are able to provide services to the court and people involved in proceedings in the most efficient and effective way.

The manner in which the Director of Court Counselling chooses to delegate such functions will be a decision for him or her. For example, the Director of Court Counselling may choose to delegate the functions of family consultants to a 'Principal family consultant'. The Bill has been designed to allow maximum flexibility for the Director in this regard.

Section 34B Director of Court Counselling may give directions that relate to family services functions – FLA s 38BC

To put the matter beyond doubt, section 34B clarifies that the Director of Court Counselling may give directions to family consultants, and court officers or staff member performing the functions of a family counsellor or family dispute resolution practitioner.

Section 34C Director of Court Counselling may authorise officer or staff member to act as family counsellor or family dispute resolution practitioner – FLA s 38BD

Section 5 explains who is a 'family counsellor' or a 'family dispute resolution practitioner'. One category of family counsellor and family dispute resolution practitioner is a person who is authorised by the Director of Court Counselling of the Family Court, to act as a family counsellor under this section.

Subsection (3) ensures that family consultants who are authorised by the Director of Court Counselling, under this section, to provide family counselling or family dispute resolution for the Family Court do not combine the two roles, by, for example, attempting to provide services as both a family consultant and a family dispute resolution practitioner in the one case. It is imperative that the work of family consultants is kept separate from the work of family counsellors and family dispute resolution practitioners as the confidentiality and admissibility applying to the processes are completely different and it would be impossible for a practitioner to offer both types of services without compromising each one.

Section 34D Director of Court Counselling may engage persons to perform family counselling services – FLA s 38R(1A)

Section 34D of the Act allows the Director of Court Counselling of the Family Court to engage consultants. This item explicitly provides that the Director of Court Counselling may engage people to perform family counselling and family dispute resolution.

Clause 114 Section 40 amended

These are consequential amendments to section 40 which deals with the functions of the officers of the court.

Clause 115 Section 46 amended

These are consequential amendments that reflect the new terms "counsellor or family dispute resolution practitioner".

Clause 116 – Part 4 Non-Court based family services

Definition of family counselling

The Family Court of Australia, the Federal Magistrates Court and the Family Court of Western Australia will be able to authorise people to act as family counsellors, as will organisations designated by the Attorney-General.

To ensure that professionals who are currently delivering family and child counselling and family and child mediation are able to continue to offer these services without interruption there is provision for transitional arrangements.

Section 49 Confidentiality of communications in family counselling

New section 49 aims to clarify when communications made in family counselling must or may be disclosed.

Recognising the importance of confidentiality to the success of family counselling, subsection 49(1) provides that a family counsellor must not disclose a communication made in family counselling unless the disclosure is required or authorised under the section.

In order to provide guidance to family counsellors the section delineates the circumstances in which disclosure is mandatory from those circumstances in which disclosure may occur, at the discretion of the family counsellor. The Government considers that it is only appropriate to mandate disclosure of communications where the body or individual to whom communications are to be disclosed is able to be prescribed in the legislation. As a result, disclosure of communications made in family counselling is mandatory where the family counsellor reasonably believes that the disclosure is necessary for the purpose of complying with a law of the Commonwealth, a State or a Territory.

The situations in which a family counsellor may disclose a communication made in family counselling are set out at subsection 49(4). These situations include the situation where the family counsellor reasonably believes that the disclosure is necessary for the purpose of protecting a child from the risk of physical or psychological harm (paragraph 49(4)(a)). As is the case in relation to the concept of harm employed in section 68F of the Act, the physical or psychological harm referred
to here encompasses sexual harm.

Subsection 49(3) enables a family counsellor to disclose a communication, with the consent of the party who made the disclosure, where that person is an adult, or, where the disclosure was made by a child who is under 18, both parents must consent to the disclosure. If agreement cannot be reached the matter may be referred to the court for decision. This situation is similar to that which operates in relation to parentage testing, under section 69W of the Act.

The ability to disclose communications, with consent, will assist the people participating in family counselling in a number of ways. For example, if a person consents to the disclosure of information when the family counsellor is making a referral to another professional, this will ensure that clients will not need to relate the details of their circumstances each time they see a different professional.

Subsection 49(5) allows a family counsellor to make disclosures in order to provide information for research relevant to families, as long as the information provided does not constitute 'personal information' as defined in section 6 of the Privacy Act 1988. 'Personal information' is information or an opinion from which an individual's identity is apparent, or can reasonably be ascertained.

Subsection 49(6) clarifies that information that is inadmissible as evidence due to the effect of section 50, does not become admissible merely because a family counsellor is required or authorised to disclose that information under subsections 49(2) to (5). The Note to this subsection clarifies 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.

Subsection 49(7)

Section 50 Admissibility of communications in family counselling and in referrals from family counselling

Currently, the admissibility into evidence of communications and admissions made in family and child counselling and family and child mediation, or in a professional consultation pursuant to a referral by a family and child counsellor or family and child mediator, is addressed by section 64 of the Act.

Subsection 50(1) provides that a communication made in family counselling is not admissible in any court or proceedings, in any jurisdiction. Subsection 50(1) also provides that a communication made when a professional consultation is being carried out on referral from a family counsellor is also inadmissible in any court or proceedings, in any jurisdiction. In order to ensure that professionals to whom family counsellors make referrals

are aware of the inadmissible status of communications made to them, subsection 50(4) requires the family counsellor to inform them of this fact when making a referral.

Subsection 50(3) provides what information must be provided to a professional.

Division 2 – Family Dispute Resolution

Section 51 Definition of family dispute resolution

The introduction of compulsory attendance at a dispute resolution process, prior to applying to the court for an order under Part 5 of the Act (subject to some exceptions), under new section 60I (see Item 9 of Schedule 1) necessitates the differentiation of processes that aim to resolve disputes from those that are focused on psychological health and relationship issues. In order to achieve its objectives (as set out at x), it is critical that section 60I can only be satisfied by attendance at a process that is genuinely concerned with resolving disputes. Thus it is imperative that such processes are distinguished from processes concerned with personal/ relationship healing.

The definition of 'family dispute resolution' is based on NADRAC's 'Glossary of Terms'.

Section 52 Definition of family dispute resolution practitioner

Section 52 provides a definition of persons who may be regarded as family dispute resolution practitioners. The first instance is where a person is accredited as a family dispute resolution practitioner under the Accreditation Rules.

The Family Court of Australia, the Federal Magistrates Court and the Family Court of Western Australia will be able to authorise people to act as family dispute resolution practitioners, as will organisations designated by the Attorney-General.

Section 53 Confidentiality of communications in family dispute resolution

Recognising the importance of confidentiality to the success of family dispute resolution, subsection 53(1) provides that a family dispute resolution must not disclose a communication made in family dispute resolution unless the disclosure is required or authorised under this section.

In order to provide guidance to family dispute resolution practitioners this section delineates the circumstances in which disclosure is mandatory from those circumstances in which disclosure may occur, at the discretion of the family dispute resolution practitioner. The Government considers that it is only appropriate to mandate disclosure of communications where the body or individual to whom communications are to be disclosed is able to be prescribed in the legislation. As a result, disclosure of communications made in family dispute resolution is mandatory where the family dispute resolution practitioner reasonably believes that the disclosure is necessary for the purpose of complying with a law of the Commonwealth, a State or a Territory.

The situations in which a family dispute resolution practitioner may disclose a communication made in family dispute resolution are set out at subsection 53(4). These situations include the situation where the family dispute resolution practitioner
reasonably believes that the disclosure is necessary for the purpose of protecting a child from the risk of physical or psychological harm (paragraph 53(4)(a)). As is the case in relation to the concept of harm employed in section 68F of the Act, the physical or psychological harm referred to here encompasses sexual harm.

Subsection 53(3) enables a family dispute resolution practitioner to disclose a communication, with the consent of the party who made the disclosure, where that person is an adult, or, where the disclosure was made by a child

who is under 18, both parents must consent to the disclosure. If agreement cannot be reached the matter may be referred to the court for decision. This situation is similar to that which operates in relation to parentage testing, under section 69W of the Act. 144. The ability to disclose communications, with consent, will assist the people participating in family dispute resolution in a number of ways. For example, if a person consents to the disclosure of information when the family dispute resolution practitioner is making a referral to another professional, this will ensure that clients will not need to relate the details of their story each time they see a different professional.

Subsection 53(5) allows a family dispute resolution practitioner to make disclosures in order to provide information for research relevant to families, as long as the information provided does not constitute 'personal information' as defined in section 6 of the Privacy Act 1988. 'Personal information' is information or an opinion from which an individual's identity is apparent, or can reasonably be ascertained.

Subsection 53(6) clarifies that the provision of a certificate by a family dispute resolution practitioner under subsection 60I(8) is not prevented by the confidentiality
requirement.

Subsection 60I(8) (see Schedule 1) provides that a court must not hear an application for a parenting order unless (subject to some exceptions) the applicant files a certificate from a family dispute resolution practitioner that states either: that the applicant has attended family dispute resolution and that all attendees made a genuine effort to resolve the dispute; that the applicant has attended family dispute resolution but that one or more of the attendees did not make a genuine effort to resolve the dispute; or that the applicant did not attend, but this failure was due to the failure of the other party to attend.

Subsection 53(7) clarifies that information that is inadmissible as evidence due to the effect of section 54, does not become admissible merely because a family dispute resolution practitioner is required or authorised to disclose that information under subsections 53(2) to (5).

Subsection 53(8) clarifies that, in section 53, communication includes admission.

Section 54 Admissibility of communications in family dispute resolution and in referrals from family dispute resolution

Currently, the admissibility into evidence of communications and admissions made in family and child counselling and family and child mediation, or in a professional consultation pursuant to a referral by a family and child counsellor or family and child mediator, is addressed by section 64 of the Act.

Section 54 largely recreates section 64, to the extent that that section relates to family dispute resolution practitioners. Subsection 56(1) provides that a communication made in family dispute resolution is not admissible in any court or proceedings, in any jurisdiction.

Subsection 54(1) also provides that a communication made when a professional consultation is being carried out on referral from a family dispute resolution practitioner is also inadmissible in any court or proceedings, in any jurisdiction. In order to ensure that professionals to whom family dispute resolution practitioners make referrals are aware of the inadmissible status of communications made to them, subsection 54(4) requires the family dispute resolution practitioner to inform them of this fact when making a referral.

As is the case under current section 64, an admission or disclosure that indicates that a child under 18 has been abused or is at risk of abuse may be admitted as evidence, unless there is sufficient evidence of the admission or disclosure available to the court from other sources.

Subsection 54(3) clarifies that the provision of a certificate by a family dispute resolution practitioner under subsection 60I(8) is not prevented by this provision.

55 - Family dispute resolution practitioners must comply with regulations

Section 55 provides that the regulations may prescribe requirements to be complied with by family dispute resolution practitioners in relation to the family dispute resolution services that they provide.
During the transition period the regulations made under this section imposing requirements on family dispute resolution practitioners will continue to apply. These regulations will be amended shortly to reflect the new terminology introduced by the
Bill).

As currently applies under section 19P of the Act, section 55 provides that the regulations may prescribe penalties not exceeding 10 penalty units for offences against the regulations made under this section. (The value of a 'penalty unit' is set out at section 4AA of the Crimes Act 1914. It is currently $110. Thus the maximum penalty that could be prescribed in the regulations pursuant to this provision is a fine of $1,100).

Division 3 – Arbitration

Section 56 Definition of arbitration

Currently the Act does not contain a definition of 'arbitration', which poses problems for users of the Act who are unfamiliar with the term. The definition of arbitration inserted here is taken from NADRAC's 'Glossary of Common Terms'.

Section 10M Definition of arbitrator

The definition of 'arbitrator' is unchanged from the current definition at subsection 4(1) of the Act, except that it specifically refers to the fact that the 'prescribed requirements' for arbitrators will be set out in the Regulations, which should assist users of the Act.

No substantive changes have been made to the arbitration provisions of the Act.

Section 58 Arbitrators may charge fees for their services

This provision reproduces current section 60F of the Act. Section 60F has been removed from the Act as a result of the restructure which deletes current Parts II and III of the Act are deleted and replaces them with a new structure that groups provisions relating to non-judicial interventions logically, by topic.

This section permits arbitrators to charge fees for their services and requires them to provide written information to the parties about those fees before the arbitration commences.

No substantive changes have been made to the arbitration provisions of the Act.

Section 10P Immunity of arbitrators

This provision reproduces current section 63 of the Act.

Clause Heading to Part 5 Division 3 replaced

Division 3 – Reports relating to children under 18

Clause 118 - section 72 amended
Clause 118 repeals and replaces section 72 to provide that if an order is made under Part 3 the court must inform the parties to proceedings about family services available to assist them to adjust to the outcome of that order.

Clause 119 – section 73 amended
Clause 119 amends sub section 73(2), and also repeals and replaces subsections 73(4) and (5), and amends subsection 73(6) to remove the references to "child counsellor" and "welfare officer" and inserts instead "consultant." This is consistent with the amendments to the terminology employed in the Act.

Clause 120 – section 91 amended
Clause 120 repeals subsection 91(1) and amends subsection 91(2) to replace the term "conference" with "counselling" This is consistent with the amendments to the terminology employed in the Act.

Clause 121 – section 95 amended
Clause 121 amends subsection 95(1) by deleting the reference to "family and child Counsellor or a welfare officer" and inserting instead "family consultant. This is consistent with terminology employed in the Act.

Clause 122 – section 95A amended
Clause 122 repeals subsection 95A(1) and inserts new subsection 95A(1) to provide that the court to make an order directing a party to the proceedings to attend a post separation parenting program.
Clause 122 also amends subsection 95A(3) to be consistent with the Commonwealth legislation.

Clause 123 – section 95B inserted
Clause 123 inserts new section 95B to provide for conditions to apply to service providers of post separation parenting programmes consistent with the Commonwealth legislation.

Clause 124 – section 160 amended
Clause 124 repeals existing subsection 160(1) and replaces it with new subsection 160(1) to refer to the new terminology consistent with the Commonwealth legislation.

Clause 125 – section 217 amended
Clause 125 amends subsection 217(4)(b) to refer to the new terminology consistent with that in the Commonwealth legislation.

Clause 126 – section 244 amended

Clause 126 amends section 244 which provides the judges with the power to make rules of court

The clause expands upon the powers with respect to receiving of evidence in investigations and the summonsing of witnesses.

It further expands upon powers by providing for the making of rules with respect to advice, attendance and participation at family counselling and dispute resolution.

The clause also makes some consequential amendments to terms and section numbers.

Clause 128 – Interpretation

This clause provides that the transitional provisions in the subsequent clauses 130 – 135 will come into effect on the day on which this Division comes into effect.

Clause 129 – Arbitration awards registered under section 60A or 60B are taken to be registered under 65P

This clause provides that current arbitration awards registered under section 60A or 60B of the Act will seamlessly maintain their registration as if they were registered under new section 65P of the Act.

Clause 130 – Powers under 4C Division 4 of the *Family Court Act 1997* may be exercised in relation to section 60A arbitration and private arbitration

This clause makes provision that a reference to arbitration under new section 65M includes a reference to arbitration made under existing section 60A, and any reference to relevant property or financial arbitration as being in force immediately before the commencement of this division for the purposes of new sections 65O, 65P, 65Q and 65R.

Clause 131 – Request for counselling under section 52

This clause provides that if a notice filed under section 52 of the Act has not been acted upon, an appropriate office must arrange for the relevant parties (and any other parties he deems appropriate) to be interviewed by a counsellor to discuss the care, welfare and best interests of the child.

Clause 132 – Orders under section 72(2)

This clause provides that if on the day that this Division comes into operation, if an order under section 72(2) of the Act has yet to be complied with, the order is taken to have been complied with if the relevant parties attend a conference with a family counsellor as defined under new section 48 of the *Family Court Act 1997.*

Clause 133 – Reports under section 73

This clause provides that if a family and child counsellor or welfare officer as defined in the *Family Court Act 1997* has been directed to give a report under section 73(2) of that Act and has not yet done so, that person must still provide the report when the legislative changes in this Bill come into effect.

Clause 134 – Pre-parenting order counselling for the purposes of section 72

This clause provides that before the commencement of this Division, if the parties to proceedings attend a conference with a family and child counsellor to discuss the relevant matter, then that attendance is taken to satisfy the requirements of section 72(2) of the *family Court Act 1997.*

Clause 135 – Supervision etc. of parenting orders

This clause provides that, where a person has to supervise compliance with a parenting order or assist any party to the parenting order, then if, after the commencement of this Division, that person can no longer be defined as a "family consultant", then the Court may make another order substituting a family consultant for the person.

Clause 136 – Transitional Regulations

This is a "safety clause", which provides for the Governor to make regulations prescribing all mattes that are necessary to allow for the smooth operation of these transitional provisions.

Division 5 – Amendments about representation of child's interests by independent children's lawyer

Clause 137 – Section 5 amended

This clause repeals the definition of "child representative" because this term is confusing, particularly for children who may expect that the child's representative will act on the child's instructions. The role of the child representative will now be referred to as "independent children's lawyer" to help children and parents understand the neutrality and independence of the role.

Clause 138 – Part 5 Division 9 replaced

This clause repeals Part 5 Division 9 and inserts new Division 9 – independent representation of child's interests. New section 164 provides the court with power to make an order for the appointment of an independent children's lawyer to represent a child's interest in proceedings in which the child's best interests are the paramount consideration.

(Section 164 – Court order for independent representation of child's interest)

New section 164(1) explains that this section applies to proceedings under the Act in which the best interests of the child, are, or the child's welfare is, the paramount or a relevant consideration.

New section 164(2) provides that a court may order that a child's interests be independently represented by an independent children's lawyer if it appears that such representation is necessary in the proceedings. Under this subsection, the court may also make such other orders as it considers necessary to secure the independent representation of the child's interests.

New section 164(3) provides that a court may make an order for the independent representation of the child's interests in the proceedings by a lawyer on its own initiative, or on the application of the child, or an organisation concerned with the welfare of children or any other person.

New section 164(4) provides that the court may make an order under section 164(2)(b) for the purpose of allowing the lawyer who is to represent the child's interests to find out what the child views are on the matters to which the proceedings relate.

New section 164(5) provides that new section 164(4) does not apply if compliance with that subsection would not be appropriate because of the child's age or maturity or some other circumstance.

(Section 165 – Role of independent children's lawyer)

New section 165(1) provides that this section will apply when an independent children's lawyer has been appointed in proceedings under the Act.

New section 165(2) provides that an independent children's lawyer must form an independent view of what is in the best interest of the child and also act in relation to the proceedings in what the independent children's lawyer believes to be in the best interest of the child.

New section 165(3) provides that if an independent children's lawyer is satisfied that a particular course of action is in the best interests of the child, the lawyer must make a submission to the court suggesting the adoption of that course of action. This provision will provide guidance to the independent children's lawyer in situations where what they consider to be in the best interest of the child differs from the views expressed by the child.

New section 165(4) provides further confirmation that an independent children's lawyer si not the legal representative of the child and is not obliged to act on the child's instructions. This provision is necessary to provide absolute clarity on the precise role and obligations of the independent children's lawyer.

New section 165(5) provides guidance to lawyers acting in the role of the independent children's lawyer and clarity to readers about the specific duties of that role.

New section 165(6) provides that the independent children's lawyer is not under an obligation to disclose to the court and, importantly, cannot be required to disclose to the court any information that the child communicated to the independent child's lawyer. The intention of this provision is to clarify the confidential relationship between the independent children's lawyer and the child and to enable a professional relationship to be established between them.

New section 165(7) provides that the independent children's lawyer may disclose to the court any information that the child communicates to them, if the independent children's lawyer considers the disclosure to be in the best interests of the child.

New section 165(8) provides that the independent children's lawyer may disclose information to the court even if this disclosure is made against the wishes of the child. This provision confirms that the independent children's lawyer is acting as a best interests advocate and not on the instructions of the child.

(Section 166 – Order that the child be made available for examination)

New section 166(1) explains that this exaction applies in proceedings under the Act if an independent children's lawyer has been appointed to represent a child's interests.

New section 166(2) provides that the court may, on the application by the independent children's lawyer, order a person to make the child available as specified in the order for an examination to be made for the purposes of preparing a report about the child. The report is for use by the independent children's lawyer in connection with the proceedings.

New section 166(3) provides that the order that a child be made available for examination can be directed to a parent of the child, a person has parental responsibility for the child, or of whom the child may live or communicate with under a parenting order.

Clause 139 – Section 195 amended

This clause deletes the existing section 195(2)(b)(ii) and replaces it with a new section 195(2)(b)(ii) to refer to an independent children's lawyer representing the child under new section 164.

Clause 140 – Section 201 amended

This clause deletes the existing section 201(3)(b)(ii) and replaces it with a new section 201(3)(b)(ii) which refers to an independent children's lawyer representing the child's interest.

Clause 141 – Section 237 amended

This clause amends new sections 237(4)(5)(6) by deleting the reference to a "child representative" and inserting "the independent children's lawyer". This is necessary due to the amendment in section 5 which refers to an independent children's lawyer.

Clause 142 – Transitional provisions

This clause preserves the continuance of a court order for a person to represent a child under the old provision of the *Family Court Act 1997* to be taken as the person appointed as the independent children's lawyer under the new provision of the *Family Court Act 1997.*

Division 6 – Amendments about family violence

Clause 143 – Part 5 Division 10 replaced and consequential amendment

The above is repealed and the following Division (Division 10 – Family Violence) is inserted instead.

New section 173 clarifies the purposes of this Division which are to resolve inconsistencies between family violence orders and certain orders, injunctions and arrangements made under this Act that provide for a child to spend time with a person or require a person to spend time with a child, and to ensure that orders, injunctions and arrangements referred to above do not expose people to family violence.

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

New section 174(1) sets out what a court must do when there is an existing family violence order in place and the court makes an order (or grants an injunction) that is inconsistent with that order.

New section 174(2) sets out what the courts obligations are when it makes an order or injunction which is inconsistent with an existing family violence order. The obligations only apply to the extent to which the order or injunction provides for the child to spend time with the person or authorises the person to spend time with the child. The court must also ensure that all people affected by the order are informed about it and understand its implications.

New section 174(3) provides that where the court makes an order or injunction that is inconsistent with an existing family order it must give a copy of the order to each of the persons listed in paragraphs (a) – (f).

New subsection 174(4) provides that the validity of the order or injunction is not affected by technicalities after the court has already considered the matter. This is appropriate given the high costs of having a matter heard.

(Section 175 – Relationship of order or inunction made under this Act with existing inconsistent family violence order)

New section 175(1) provides that where an order or injunction which provides for a child to spend time with a person is inconsistent with an existing family violence order, the order which provides for the child to spend time with the person prevails and the family violence order is invalid to the extent of the inconsistency.

New section 175(2) provides that an applicant or respondent, the person against whom the family violence order is directed, or the person protected by the family violence order may apply to the court for a declaration that the order or injunction is inconsistent with the family violence order.

New section 175(3) provides that the court must hear and determine the application and make such declarations as it considers appropriate,. The making by the court of a declaration would make it clear the later family court order is meant to be inconsistent with the earlier family violence order.

(Section 176 – Power of court making a family violence order to revive, vary, discharge or suspend an existing order, injunction or arrangement under this Act)

New section 176(1) gives a court dealing with an application for a family violence order, the power to revive, vary, discharge or suspend family law orders, injunctions and arrangements that provide for a child to spend time with a person. These orders, injunctions and arrangements are described in paragraphs (1)(a) – (d).

New section 176(2) provides that the court may revive, vary, discharge or suspend these orders, injunctions and arrangements on its own initiative or on the application by any person.

New sections 176(3)(4) set out the limits on the court 's power. For example, under section 176(3) the court must not revive, vary or discharge or suspend an order unless the court has material before it that was not before the court that made the order or injunction. The intention is to prevent parties circumventing family law orders by applying to a court where there is no new evidence of violence or abuse.

Under new section 176(4), the court must not exercise its power under subsection 176(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. It would be inappropriate for the court to discharge a family law order, injunction or arrangement on the basis of limited evidence available at an interim hearing.

New section 176(5) clarifies what a court making a family violence order should relevantly consider when exercising its power to revive, vary, discharge or suspend a family law order, injunction or arrangement (as set out in subsection 176(1)).

Section 176(5)(a) provides that the court must have regard to the purposes of the Division (as set out in section 173). Section 176(5)(b) provides that the court must also have regard to whether contact with both parents is in the best interests of the child.

Section 176(5)(c) provides that before varying, discharging or suspending an order or injunction (as set out in section 176(1)(a),(b) and (c)) that was inconsistent with an existing family violence order when it was made or granted, the court must 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. This is to prevent orders or injunctions obtained under the Family Law Act from being varied, discharged or suspended, unless there is evidence that the order or injunction has exposed, or is likely to expose, a person to the risk of family violence.

New section 176(6) provides for a regulation making power for the registration of court orders reviving, varying, discharging or suspending a family law order, injunction or arrangement. Failure to comply with a registration requirement under regulations that are made does not affect the validity of the court's decision.

New section 176(7) provides that any failure to comply with the regulations referred to in section 176(6) does not invalidate the courts decision.

(Section 177 – Application of Act and rules when exercising section 176 power)

New section 177(1) clarifies that some provisions of the Act do not apply to the court exercising its power under section 176 to revive, vary, discharge or suspend an order, injunction or arrangement under the Act.

Section 177(1)(a) – (1)(f) sets out a list of provisions that do not apply to a court exercising its power under section 176.

New section 177(2)(a) provides that if a court is exercising its power under section 176 in proceedings to make an interim family violence order (or interim variation of a family violence order), the court has a discretion about whether to apply section 66C(3)(a). Section 66C(3)(a) allows the court to take into consideration any views expressed by the child when determining the child's best interests.

Section 177(2)(b) provides for the court exercising its power under section 176 for a regulation making power for other provisions of the Act or applicable rules to be specified not to apply in court proceedings of this kind.

Section 177(3) provides a power for a court exercising its power under section 176 to dispense with any otherwise applicable rules.

(Section 178 – Special provisions relating to proceedings to make an interim (or interim variation of) family violence order)

New section 178(1) makes special provision for proceedings involving interim family violence orders or interim variations of family violence orders. Section 178(1) provides that in such proceedings, if the court revives, varies or suspends an order, injunction or arrangement under section 176, that revival, variation or suspension ceases to have effect at the time the interim order stops being in force, or 21 days after the interim order was made, whichever is earlier.

Clause 144 – Transitional provisions

This clause defines "commencement" and clarifies the application of orders made after but not before commencement of the Division 6.

Division 7- Amendments about removal of references to "residence" and "contact".

Clauses 145 and 146

Division 7 changes the terminology of the Act to remove references to the terms 'residence', 'contact' and 'specific issues orders'. Changes to the Act in 1995 adopted the terms 'residence' and 'contact' instead of 'custody' and 'access' in order to eliminate any sense of ownership of children.
In the majority of cases the amendments replace references to 'residence' with 'lives with' and references to 'contact' with 'spends time with' and 'communicates with'. The amendments also remove the current categories of residence, contact and specific issues orders from parenting orders and refer simply to parenting orders.
"State child order is re defined to include an order that provides for a person to spend time with a child. This change is consequential to the removal of the references to residence and contact from the Act.
Child maintenance orders are retained as a separate category of parenting orders. This is due to the direct link between child maintenance orders and orders made pursuant to the child support scheme.

The changes will focus the court and the parties on parenting as the central issue. In particular, this will emphasise the need for parents to think more broadly about what parenting means and the impact of the proceedings upon the child.

Clause 147 – Section 76 amended
Section 76 is amended clarify that provisions of a parenting plan that deal with matters other than the maintenance of a child are "child welfare provisions".

Clause 148 - Section 80 amended

Clause 148 repeals and replaces the existing subsection 80(3) which describes the effect of child welfare provisions in registered parenting plans. It does this to remove the current references to 'residence order', 'contact order' and 'specific issues order'.

Clause 149 – Section 92 amended
Clause 149 repeals and replaces subsection 92(1) which sets out when section 92 applies. Section 92 is the section that sets out the special conditions that apply when the court proposes to make a residence or specific issues order by consent, in favour of a non parent. New subsection 92(1) changes the terminology to refer to parenting orders that deal with whom a child should live (rather than residence orders). New subsection 92(1a) changes the terminology to refer to parenting orders that deal with the allocation of parental responsibility or a component of parental responsibility for a child (rather than specific issues orders). New subsections 92(1) and 92(1a) also include a reference to grandparents and other relatives. This change is consistent with the amendments to recognise the need to consider the benefit to the child of greater involvement of extended family members.

Clause 150 – Section 94 amended

Clause 150 repeals and replaces the existing subsection 94(1)(a) which deals with what happens when a parenting order that includes a residence order, does not make provision in relation to the death of a parent with whom the child lives. The new subsection 94(1)(a) replaces the reference to residence orders with a reference to a parenting order that provides that the child is to live with one of the parents. This ensures that the more generic description of parenting orders operates.

Clause 150 also repeals and replaces the existing subsection 94(3) which provides that a surviving parent can apply for a residence order in relation to a child where the existing residence order does not make provision in relation to the death of a parent with whom the child lives. The new subsection 94(3) removes the terminology of residence and replaces it with a reference to a parenting order that deals with whom the child is to live. This ensures that the more generic description of parenting orders operates.

Clause 151 – Heading to Part 5 Division Subdivision 3 replaced
Clause 151 deletes the above named heading and inserts instead
"Subdivision 3- General obligations created by certain parenting orders."

Clause 152 – Section 96 amended

Clause 152 repeals and replaces the existing subsection 96(1) which deals with the general obligations created by a residence order and replaces it with a new subsection that refers to the general obligation created by a parenting order to the extent that it deals with whom the child is to live. This ensures that the more generic description of parenting orders operates.

Clause 153 – Sections 97 and 98 replaced by sections 97, 98 and 98A

Clause 153 repeals and replaces the existing section 97 which sets out the general obligations created by a contact order. New section 97 applies to a parenting order to the extent that the order deals with whom the child is to spend time. This removes the terminology of 'contact' and ensures that the more generic description of parenting orders operates. Under new section 97 a person must not hinder or prevent a person spending time with the child in accordance with the parenting order, or interfere with a person and the child benefiting from spending time with each other under the order.
Clause 153 also inserts a new section 98 which applies to a parenting order to

the extent that the order deals with whom a child communicates. This section provides that a person cannot hinder or prevent a person or child from communicating with each other in accordance with a parenting order or interfere with the communication that a person and the child are supposed to have with each other under the order. This new section is necessary to ensure that the Act sets out general obligations to cover both elements of what were previously contact orders. That is, orders relating to time spent with a child and orders relating to with whom the child communicates.

Clause 153 also inserts section 98A which sets out the general obligations created by specific issues orders that confer responsibility for a child's care, welfare and development. New section 98A applies to parenting orders to the extent to which the order allocates parental responsibility. This removes the terminology of 'specific issues orders' and ensures that the more generic description of parenting orders operates. Under new section 98A, a person must not hinder a person who has been allocated parental responsibility under an order in discharging that responsibility.

Clause 154 – section 99 amended

Clause 154 repeals and replaces subsections 99(1)(a) and (b). This section sets out when the court may issue a warrant for arrest of an alleged offender who has prevented or hindered the carrying out of a parenting order. Existing subsection 99(1)(a) provides that the section applies if a residence order or a contact order is in force in relation to a child. New subsection 99(1)(a) replaces the references to residence and contact orders with references to orders about with whom the child is to live , spend time or communicate. This ensures that the more generic description of parenting orders operates.

Existing paragraph 99(1)(b) provides that the section applies if the court is satisfied that there are reasonable grounds for believing that a person has contravened sections 96, 97 or 98 which set out the general obligations created by parenting orders.

Clause 155 – Section 106 amended

Clause 155 repeals the existing definition of a care order at subsection 106(1) in Sub Division 5 of Division 6 of Part 5 which is the subdivision which relates to the obligations under parenting orders relating to taking or sending children from Western Australia to places outside Australia.

The definition is replaced with a definition of 'a parenting order to which the Subdivision applies'. The definition includes parenting orders about whom a child is to live, spend time or communicate with and parenting orders that provide for a person to have parental responsibility for a child. This amendment ensures that the more generic description of parenting orders operates.

Clause 156 – Section 107 amended

Clause 156 amends subsection 107(1) which imposes an obligation on a party, or a person acting on behalf of a party, not to take a child out of the State to a place outside Australia where a residence, contact or care order is in force in relation to a child. The amendment replaces the reference to residence, contact and care orders with a reference to the new definition of 'a parenting order to which the Subdivision applies'. This amendment ensures that the more generic description of parenting orders operates.

Clause 157 – Section 108 amended

Clause 157 amends the terminology in subsection 108(1). This subsection prohibits the taking or sending of a child from State to a place outside Australia where proceedings for the making of 'a residence order, a contact order or a care order' are pending, unless an exception in subsection 108(2) applies. Subsection 108(1) is

amended to replace the reference to 'a residence order, a contact order or a care order' with the new definition of 'a parenting order to which this Subdivision applies'. This amendment ensures that the more generic description of parenting orders operates.

Clause 158 – Section 109 amended

Clause 158 repeals and replaces the existing subsection 109(1)(a). Section 109A imposes obligations on owners etc, of aircraft and vessels in relation to taking or sending a child from the State in the aircraft or vessel for a destination outside Australia, when a residence, contact or care order is in place. New paragraph 109(1)(a) replaces the reference to 'a residence order, a contact order or a care order' with the new definition of 'a parenting order to which this Subdivision applies'. This amendment ensures that the more generic description of parenting orders operates.

Clause 159 – Section 110 amended

Clause 159 amends subsection 110(1)(a). Section 110 imposes obligations on owners etc, of aircraft and vessels in relation to taking or sending a child from the State in an aircraft or vessel for a destination outside Australia, when a residence, contact or care order is pending. The amendment substitutes the reference to 'a residence, contact or care order' with the new definition of a 'parenting order to which the Subdivision applies'. This amendment ensures that the more generic description of parenting orders operates.

Clause 160 – Section 144 amended

Clause 160 repeals and replaces subsections 144(1)(a) to (c). Section 144 sets out who may apply for a location order. The amendment replaces the references to residence, contact and specific issues orders in paragraphs (a) to (c) with references to parenting orders about with whom a child is to live, spend time, or communicate, and parenting orders about parental responsibility or a component of parental responsibility. This amendment ensures that the more generic description of parenting orders operates.

Clause 161 – Section 149 amended

Clause 161 repeals and replaces subsections 149(a)(ii) and (iii). Section 149 sets out the meaning of a recovery order which includes orders about to whom the court may order the return of a child. The existing subparagraphs refer to residence, contact and specific issues orders. The amendment replaces these references with references to parenting orders about with whom a child is to live, spend time, or communicate and parenting orders about parental responsibility or components of parental responsibility. This amendment ensures that the more generic description of parenting orders operates.

Clause 161 also repeals subsections 149(d)(ii) to (iv) and replaces them with new subsections 149(d)(ii) and (iii). Section 149 sets out the meaning of a recovery order which includes orders requiring a returned child to be delivered to particular people. The existing subparagraphs refer to residence, contact and specific issues orders. The amendment replaces these references with references to parenting orders about with whom a child is to live, spend time, or communicate and parenting orders about parental responsibility or components of parental responsibility. This amendment ensures that the more generic description of parenting orders operates.

Clause 162 – Section 152 amended

Clause 162 repeals and replaces subsections 152(a) to (c) which set out who may apply for a recovery order. The existing paragraphs refer to residence, contact and specific issues orders. The amendment replaces these references with references to parenting orders about with whom a child is to live, spend time, or communicate with and parenting orders about parental responsibility or components of parental responsibility. This amendment ensures that the more generic description of parenting orders operates.

Clause 163 – Section 198 amended

Item 79 repeals and replaces paragraph 198(2)(c) which provides that a medical procedure in relation to parentage testing may not be carried out on a child under 18 without various consents. The new provision replaces references to a person with a specific issues order about parental responsibility, with a reference to a person with a parenting order under which they have parental responsibility for the child. This amendment ensures that the more generic description of parenting orders operates.

Clause 164 – Section 199 amended

Clause 164 repeals subsection 199(1)(c) which provides that a person is not liable for civil or criminal liability in relation to the proper carrying out of a parentage testing procedure, provided there is appropriate consent. The new provision replaces references to a person with a specific issues order about parental responsibility, with a reference to a person with a parenting order under which they have parental responsibility for the child. This amendment ensures that the more generic description of parenting orders operates.

Clause 165 – Section 205ZH amended

Item 92 amends subsections 205ZH(3)(a)(b) and (c). Subsection 205ZH (3) defines a person who has 'caring responsibility' for a child for the purposes of subsection 205ZH(1)(d). The amendment removes the references to residence and specific issues orders and replaces them with references to parenting orders that provide that a child is to live with a person or that a person has parental responsibility for a child. This amendment ensures the more generic description of parenting orders operates.

Clause 166 – Section 205ZV amended

Clause 166 repeals subsections 205ZV(2)(b) and (c). Subsection 205ZV(2) defines a person who has 'caring responsibility' for a child for the purposes of paragraph 205ZV(1)(d). The amendment removes the references to residence and specific issues orders and replaces them with references to parenting orders that provide that a child is to live with a person or that a person has parental responsibility for a child. This amendment ensures the more generic description of parenting orders operates.

Clause 167 – Section 206 amended

Clause 167 repeals subsection 206(1)(b)(i) to remove the references to residence, contact and specific issues orders in relation to the Attorney-General's power to intervene in any proceedings under this Act. This reference is replaced with a reference to a parenting order, other than a child maintenance order. This amendment ensures the more generic description of parenting orders operates.

Clause 168 – Section 209 amended

Clause 168 repeals subsections 209(2)(c) and (d) which relate to persons who may intervene in proceedings. The amendment replaces the references to a person with a residence order or specific issues order with a reference to a parenting order. This amendment ensures the more generic description of parenting orders operates.

Clause 169 – Section 235 amended

Clause 169 repeals subsections 235(1)(b)(ii) and (iii) which provide that the court can issue an injunction relating to the welfare of a child. The existing provisions refer to people who have residence, contact and specific issues orders. The amendment replaces these with references to parenting orders about with whom a child is to live, spend time, or communicate and parenting orders about parental responsibility or components of parental responsibility. This ensures that the more generic description of parenting orders operates.

Clause 170 – Section 238 amended

Clause 170 repeals paragraph 238(1)(a) which relates to the reparation for certain losses and expenses relating to a child being taken away in contravention of a residence or contact order. This is replaced by a right to the same reparation for certain losses and expenses relating to a person who takes a child away from a person with an order providing for with whom the child lives, spends time or communicates.

Division 8 **(Clauses 171 – 178)**

The effect of Division 8 is to move all of the defined terms from Part V of the Act related to children to subsection 4(1) which is the general definition section for the whole of the Family Court Act.

Part 4 – Amendments about the interaction between family law and bankruptcy law

Clause 179 Section 5 amended
Clause 179 amends section 5 of the *Family Court Act 1997* to insert definitions for terms used throughout the Part.

Clause 180 Section 7B inserted
Clause 180 defines what a debtor subject to a personal insolvency agreement is. The proposed section provides that a person is a debtor subject to a personal insolvency agreement under the *Family Court Act 1997* if a debtor executes a personal insolvency agreement and that agreement has not ended.

Clause 181 Section 45 amended
Clause 181 proposes to amend section 45 of the *Family Court Act 1997* to insert a new subsection (2) which is intended to extend the court's power to stay or dismiss proceedings where a bankruptcy trustee applies for an order under section 139A of the Bankruptcy Act. Proceedings relating to that application are taken to be related proceedings.

Clause 182 Section 205T amended
Clause 182 amends section 205T of the *Family Court Act 1997* to delete the definition of property. The definition of property has been moved to section 5 of the *Family Court Act 1997* and amended slightly to refer to partners and partner instead of parties and party.

Clause 183 Section 205W amended
Clause 183 proposes to add a new subsection (3) to section 205W of the *Family Court Act 1997*. This is to ensure it is not possible for parties to use a binding financial agreement relating to property or financial resources that is the subject of those proceedings to prevent a court dealing with that property or financial resource in accordance with these amendments.

Clause 184 Section 205ZC amended
Clause 184 creates a subsection (1) and makes the drafting clearer by deleting party and inserting instead partner. Clause 184 also adds a new subsection (2) providing that the liability of a bankrupt de facto partner to maintain the other de facto partner may be satisfied, in whole or in part, by way of the transfer of vested bankruptcy property in relation to the bankrupt partner if the court makes an order under this Part for the transfer.

Clause 185 Section 205ZCA inserted

Clause 185 proposes to insert section 205ZCA which provides a court with the power to make de facto partner maintenance orders.

The proposed new subsection (2) provides that the bankruptcy trustee must be joined as a party to the proceeding where the court is satisfied that the interests of the bankrupt's creditors may be affected by an order and the

application for de facto maintenance was made whilst the partner was a bankrupt or the partner became a bankrupt after the application was made but before the proceedings were finally determined. The bankruptcy trustee must apply to become a party before the court can join the trustee as a party.

Proposed new subsection (3) provides that if the bankruptcy trustee is joined as a party under subsection (2) then the bankrupt is not entitled to make submissions to the court in the course of the de facto maintenance proceedings in connection with any of the vested bankruptcy property, except with the leave of the court. The reason for this is that the property that used to belong to the bankrupt has vested in the bankruptcy trustee in accordance with the Bankruptcy Act. It is therefore appropriate that the bankruptcy trustee make submissions to the court rather than the bankrupt.

Proposed subsection (4) provides that the court may only grant leave to the bankrupt under subsection (3) to make submissions where there are exceptional circumstances, which would typically arise when the bankrupt has exclusive knowledge of facts or matters that are relevant to the proceedings.

Proposed new subsection (5) deals with a situation in which one of the de facto partners to maintenance proceedings is a debtor subject to a personal insolvency agreement. This subsection provides that a court must join the trustee of the agreement as a party to the proceedings where the trustee applies to be joined and where the court is satisfied that the interests of the debtor party's creditors may be affected and: (a) when the application was made for an order, the party was a debtor subject to a personal insolvency agreement or (b) the party became a debtor after application was made but before it was finally determined. The new subsections (6) and (7) mirror the effect of subsections (3) and (4) in relation to debtors who are subject to personal insolvency agreements.

Proposed new subsection (8) states that an application for an order for de facto partner maintenance is taken to be finally determined for the purposes of subsections (2) and (5) when: (a) the application is withdrawn or dismissed or (b) an order (other than an interim order) is made as a result of the application.

Clause 186 Section 205ZD amended
Clause 186 makes several minor amendments to delete the word "party" and insert instead "party" or "de facto partner" to make it clear that the section applies to defacto relationships.

Clause 187 Section 205ZG amended
Clause 187(1) proposes to repeal section 205ZG(1) and insert a replacement section. Paragraph (1)(a) replicates the existing law. Paragraph (1)(b) provides that a court can alter the interests of the bankruptcy trustee in the vested bankruptcy property. Paragraphs (c) and (d) largely replicate the existing law, although a new paragraph (d)(ii) provides that a court can make an order against the relevant bankruptcy trustee (if any) to make such settlement or transfer of property as the court determines for the benefit of either de facto partner, or child of the de facto partner.

Clause 187(2)(a) proposes to amend subsection 205ZG(2a) to refer to the new definition of property settlement proceedings which includes proceedings with respect to vested bankruptcy property.

Clause 187(2)(b) proposes to amend subsection 205ZG(2b) to make clear that an order made under subsection (1) may be enforced after the death of a party to the de facto relationship. It is appropriate to omit 'a partner to the proceedings' because, under these amendments, a bankruptcy trustee could be a partner. The Bankruptcy Act deals with the position of a bankruptcy trustee who dies.

Clause 187(3) proposes to amend subsection 205ZG(4) to refer to the expanded definition of property settlement proceedings which includes proceedings with respect to vested bankruptcy property.

Clause 187(4a) proposes to amend subsection 205ZG(5) to refer to the expanded definition of property settlement proceedings which includes proceedings with respect to vested bankruptcy property.

Clause 187(4b) proposes to insert a new paragraph 205ZG(5)(b). The new paragraph is a restructured version of the old paragraph, but contains new references in subparagraphs (ii) and (iv) to the vested bankruptcy property in relation to a bankrupt de facto partner.

Clauses 187(4)(c) to 187(11) further clarify the concepts discussed above.

Clauses 187(12) – 187(18) provide the circumstances for the bankruptcy trustee or the trustee of a personal insolvency agreement to be made a party to proceedings to alter property interests under the *Family Court Act 1997* where a party to the de facto relationship is bankrupt. The effect of this is that the bankruptcy trustee or trustee of a personal insolvency agreement steps into the shoes of the bankrupt de facto partner in making submissions to the court about vested bankruptcy property. Where the bankrupt trustee has become a party the bankrupt de facto partner can only make submissions in relation to this property in exceptional circumstances. This reflects the reality that the bankrupt de facto partner no longer has ownership of property that has vested in the bankruptcy trustee or trustee of a personal insolvency agreement.

The proposed new subsection 205ZG(12) provides that the bankruptcy trustee must be joined as a party to the proceeding upon application by the bankruptcy trustee where the court is satisfied that the interests of the bankrupt's creditors may be affected by an order and the application was made whilst the party was a bankrupt or the party became a bankrupt after the application was made but before the proceedings were finally determined.

The proposed subsection 205ZG(13) provides that if the bankruptcy trustee is joined as a party under subsection (12) then the bankrupt is not entitled to make submissions to the court in the course of the property proceedings in connection with any of the vested bankruptcy property, except with the leave of the court. The reason for this is that the property that used to belong to the bankrupt has vested in the bankruptcy trustee in accordance with the Bankruptcy Act. It is therefore appropriate that the bankruptcy trustee make submissions to the court rather than the bankrupt.

The proposed subsection 205ZG(14) provides that the court may only grant leave under subsection (13) where there are exceptional circumstances, which would typically arise when the bankrupt has exclusive knowledge of facts or matters that are relevant to the proceedings.

The proposed new subsections 205ZG(15) to 205ZG(17) mirror the provisions described above in relation to debtors who are subject to personal insolvency agreements.

The proposed new subsection 205ZG(18) provides a meaning of what is an application which is finally determined for the purposes of the new subsections (12) and (15).

Clause 188 Section 205ZH amended
Clause 188(1) proposes to amend subsection 205ZH(1) so that it refers to the concept of property settlement proceedings.

Clause 188(2) proposes to amend subsection 205ZH(2) so that it also refers to the concept of property settlement proceedings.

Clause 188(3) proposes to amend subsection 205ZH(5) to make clear that the reference to the death of a party to the proceedings is a reference only to the de facto partner and does not include a reference to the bankruptcy trustee.

Clause 188(4) proposes to insert new subsections 205ZH(7) to 205ZH(10) in section 205ZH. Proposed subsection 205ZH(7) provides a creditor of a party to the proceedings is taken to be a person whose interests are affected by the order, if the creditor may not be able to recover their debt because the order has been made.

Proposed subsection 205ZH(8) makes clear that a bankruptcy trustee is a person whose interests are affected by an order where either a party to the de facto relationship was a bankrupt at the time the order was made, or the party became a bankrupt after the order was made. On establishing this, the bankruptcy trustee will have standing to make an application to the court to vary the order, set aside the order or make another order.

Proposed subsection 205ZH(9) makes clear that the bankruptcy trustee is a person whose interests are affected by an order where (a) a party is bankrupt and (b) the order was made with respect to vested bankruptcy property. On establishing this, the bankruptcy trustee will have standing to make an application to the court to vary the order, set aside the order or make another order.

Proposed subsection 205ZH(10) replicates the effect of previous subsections in relation to debtors subject to a personal insolvency agreement. This subsection gives the trustee standing to make an application to the court to vary the order, set aside the order or make another order.

Clause 189 Sections 205ZHE, 205ZHF, 205ZHG and 205ZHH inserted

Clause 189 proposes to insert 4 new notification sections.

Proposed section 205ZHE provides the rules may specify the circumstances in which a person who applies for an order under this Part or is a party to proceedings for an order is to give notice of the application to a person who is not a party to the proceedings.

Proposed section 205ZHF provides that the Rules of Court for courts exercising jurisdiction under these provisions may make provision for a bankrupt who becomes a party to a proceeding for an application to give notice of the application to the bankruptcy trustee. Similarly, proposed subsection (2) provides that the applicable Rules of Court may also make provision for a debtor subject to a personal insolvency agreement who becomes party to a proceeding for an application to give notice of the application to the trustee of the agreement.

Proposed section 205ZHG provides that the applicable Rules of Court may make provision to notify a court exercising jurisdiction under the *Family Court Act 1997* that a person has become a bankrupt or where a person has become a debtor subject to a personal insolvency agreement.

Proposed subsection 205ZHG(2) lists the circumstances in which the bankrupt or debtor subject to the personal insolvency agreement may be required by the applicable Rules of Court to notify the court is where that person:

(a) is a de facto partner, and

(b) is a party to a proceeding for an application under section 205ZA, 205ZCA, 205ZG or 205ZH, and

(c) becomes a debtor subject to a personal insolvency agreement before that application is finally determined.

Proposed subsection 205ZHG(3) provides that the applicable Rules of Court may make provision for notification where a person who is a de facto partner and is a party to proceedings for an application under section 205ZA, 205ZCA, 205ZG or 205ZH and before that application is finally determined, becomes a party to a proceeding before the Federal Court or the Federal Magistrates Court under the *Bankruptcy Act* that relates to the bankruptcy of the person or the person's capacity as a debtor subject to a personal insolvency agreement. The

applicable Rules of Court may provide that person must notify a court exercising jurisdiction under the *Family Court Act 1997* of those proceedings.

Proposed subsection 205ZHG(4) provides that the applicable Rules of Court may make provision for the bankruptcy trustee of a bankrupt de facto partner to notify a court exercising jurisdiction under the *Family Court Act 1997* of the making of an application under the *Bankruptcy Act*.

Proposed subsection 205ZHG (5) defines 'finally determined' for the purposes of this section as being when the application is withdrawn or dismissed, or an order (but not an interim order) is made as a result of the application.

Proposed subsection 205ZHG (6) defines 'finally determined' for the purposes of this section in relation to an application for a declaration under section 205ZA, as when the application for a declaration is withdrawn or dismissed, or a declaration is made as a result of the application.

Proposed section 205ZHH provides that the applicable Rules of Court may provide for a bankruptcy trustee to notify the other de facto partner about an application under section 139A of the *Bankruptcy Act*.

Clause 190 Section 205ZI amended
Proposes to add in new subsections (4) – (6) to section 205ZI. Section 205ZI sets out the general powers of courts exercising jurisdiction under the *Family Court Act 1997*.

Proposed subsection (4) provides that if the bankruptcy trustee is a party to a proceeding before the court, the court may make an order under subsection(1)(e) directed to the bankrupt.

Proposed subsection (5) provides if the trustee of a personal insolvency agreement is a party to a proceeding before the court, the court may make an order under subsection (1)(e) directed to the debtor subject to the agreement.

For the avoidance of doubt, proposed subsections (4) and (5) do not limit subsection(1)(e).

Clause 191 Section 205ZL amended and transitional provision
Clause 191(1) amends section 205ZL(1) that provides for the modification of de facto maintenance orders. The wording is amended to reflect that this Bill provides for the bankruptcy trustee to be a party to de facto maintenance proceedings and that the proceedings may not just be between the parties to the de facto relationship.

Proposed subsection 205ZL(la) sets out the circumstances in which the court's jurisdiction to modify de facto maintenance orders may be exercised, that is:

(a) in any case, in proceedings with respect to the maintenance of a de facto partner, or

(b) on the application of the bankruptcy trustee where there is a bankrupt de facto partner, or

(c) where a de facto partner is a debtor subject to a personal insolvency agreement - on the application of the trustee of the agreement.

Clause 191(3) proposes to make a minor amendment to include the bankruptcy trustee of a de facto partner.

Clause 191(4) provides section 205ZL(1) of the *Family Court Act 1997* applies to an order made before, on or after the commencement of this Part.

Clause 192 Section 205ZP amended
Clause 192 deals with financial agreements after the de facto relationship ends. The proposed amendments to sections 205ZP(1)(a) and 205ZP(1)(b) clarify that the provisions relate to de facto partners.

Clause 193 Section 205ZPA inserted
Clause 193(1) inserts a new section 205ZPA. This proposed amendment provides a financial agreement between 2 people after the de facto relationship ends is of no force or effect until a separation declaration is made.

Clause 193(2) provides a separation declaration is a written declaration. Clause 193(3) provides the declaration must be signed by at least one of the parties to the financial agreement. Clause 193(4) provides the declaration must state that (a) the de facto partners have separated and (b) in the opinion of the de facto partners making the declaration, there is no reasonable likelihood of cohabitation being resumed.

Clause 193(5) provides definitions of "declaration time" and "separated" for the purposes of this section.

Clause 194 Section 222 amended

Clause 194 proposes to insert new subsections 222(1a), 222(1b) and 222(4aa).

Proposed subsection 222(1a) extends the court's power where one party to the de facto relationship is a bankrupt. It provides that where a party to a de facto relationship is a bankrupt and the bankruptcy trustee is a party to proceedings, the court may set aside or restrain the making of an instrument or a disposition designed to defeat an existing or anticipated order (whether intentionally or not) which is made or proposed to be made by or on behalf of, or by direction or in the interest, of the bankrupt.

Proposed subsection 222(1b) extends the court's power where one party to a de facto relationship is a debtor subject to a personal insolvency agreement. It provides that where a party to a de facto relationship is a debtor subject to a personal insolvency agreement and the trustee of the agreement is a party to proceedings, the court may set aside or restrain the making of an instrument or disposition to defeat an existing or anticipated order (whether intentionally or not) which is made by or on behalf of, or by direction or in the interest of, the debtor.

Proposed subsection 222(4aa) provides an application may be made to the court for an order under this section by (a) a party to the proceedings or (b) a creditor to the party to the proceedings if the creditor may not be able to recover his or her debt if the instrument or disposition were made or (c) any other person whose interests would be affected by the making of the instrument or disposition.

Clause 195 Section 235A amended
Section 235A of the *Family Court Act 1997* deals with the circumstances in which the Court may grant an injunction relating to de facto relationships. The section mirrors section 114 of the Family Law Act.

This amendment which adds subsections (4) to (7) expands upon the court's powers where a de facto partner is either a bankrupt or subject to a personal insolvency agreement. The amendments empower the court to grant an injunction restraining the bankruptcy trustee from declaring and distributing dividends or disposing of property.

Clause 196 Transitional provisions
This clause provides that this Part comes into operation on a day fixed by proclamation and applies in relation to bankruptcy and personal insolvency agreements.

Part V – Child Support (Adoption of Laws) Act 1990

Clause 197 – Purpose of Part

The purpose of this Part is to provide that the adoption by the *Child Support (Adoption of Laws) Act 1990* of the *Child Support (Registration of Collection) Act 1988* (Cth) and *Child Support (Assessment) Act 1989* (Cth) adopts amendments to the Commonwealth child support legislation so that those amendments can apply to ex nuptial children in this State. The Acts contained therein are the relevant Commonwealth Acts since 1 July 2002.

Clause 198 – The Act Amended

The amendments in this Part are to the *Child Support (Adoption of Laws) Act 1990*.

Clause 199 – Section 3 amended

The relevant date is 1 July 2006 which is the date when the *Family Law Amendment (Shared Parental Responsibility) Act 2006* comes into effect.

Clause 200 – Section 4 amended

As above.

Part VI – Consequential amendments to other Acts

Division 1 – Children and Community Services Act 2004 amended

Clause 201 – The Act amended

The amendments in this Division are to the *Children and Community Services Act 2004*.

Clause 202 – Section 104 amended

These amendments are required due to the deletion of "residence order" and "specific issues order" and inserting instead "parenting order" plus consequential amendments.

Clause 203 – Section 198 amended

See above.

Clause 204 – Section 238 amended

This clause applies if there are proceedings in the Family Court and it defines a family consultant as defined in the *Family Court Act 1997* or any other person required or directed to prepare a report on matters relevant to the proceedings under the Act or the *Family Law Act 1975* (Cth).

Division 2 – Guardianship and Administration Act 1990 amended

Clause 205 – The Act amended

The amendments in this Division are to the *Guardianship and Administration Act 1990*.

Clause 206 – Section 45 amended

Section 45 is amended to include a parenting order which allocates parental responsibility for a child and a parenting order that provides that a person is to share parental responsibility for a child.

Division 3 – Restraining Orders at 1997 amended

Clause 207 – The Act amended

The amendments in this Division are to the *Restraining Orders Act 1997*.

Clause 207 – Section 5 amended

Section 5 is amended again to allow for a parenting order under the *Family Law Act 1997* (Cth) or the *Family Court Act 1997* and consequential amendments.

Clause 209 – Section 62 amended

This clause is amended due to the deletion of "primary dispute resolution", as defined in section 47 and inserting instead "process of family dispute resolution".

Sub Division 2 – Costs & Offers of Settlement