



UNIVERSITAS INDONESIA

**Hak Asuh Anak Dibawah Umur Akibat Perceraian Menurut
Undang-Undang No. 1 Tahun 1974 tentang Perkawinan dan
Australia Family Law Act 1975 (Suatu Perbandingan)**

SKRIPSI

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0505001348**

**FAKULTAS HUKUM
PROGRAM STUDI ILMU HUKUM
PROGRAM KEKHUSUSAN HUKUM PERDATA
DEPOK
JULI 2009**



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Undang-Undang No. 1 Tahun 1974 tentang Perkawinan dan
Australia Family Law Act 1975 (Suatu Perbandingan)**

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Diajukan sebagai salah satu syarat untuk memperoleh gelar Sarjana Hukum

**JILLY ARIANY SIAHAAN
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PROGRAM STUDI ILMU HUKUM
PROGRAM KEKHUSUSAN HUKUM PERDATA
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LEMBAR PERNYATAAN ORISINALITAS

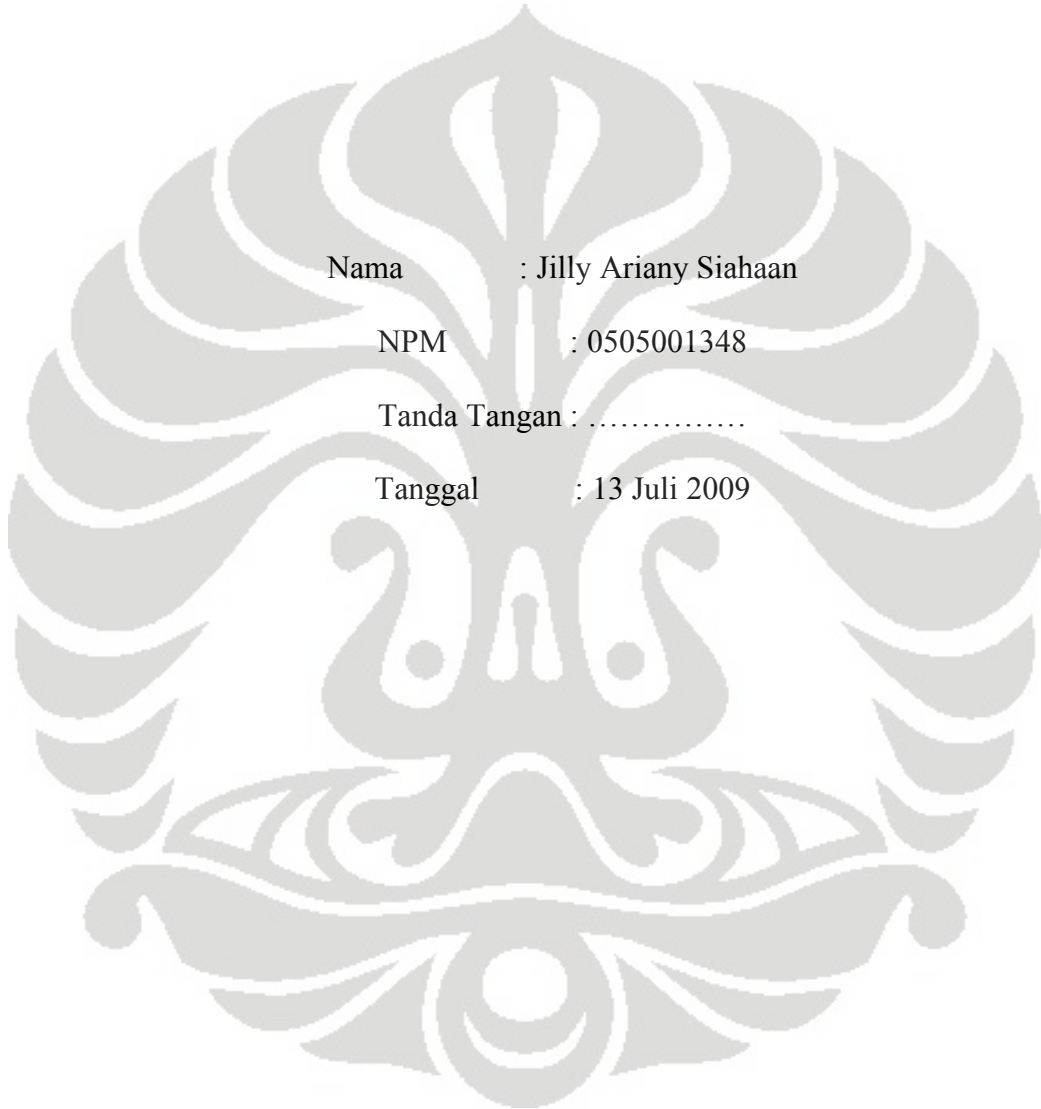
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Tanda Tangan :

Tanggal : 13 Juli 2009



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Telah berhasil dipertahankan di hadapan Dewan Penguji dan diterima sebagai bagian persyaratan yang diperlukan untuk memperoleh gelar Sarjana Hukum pada Program Studi Ilmu Hukum, Fakultas Hukum, Universitas Indonesia

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Tanggal : 13 Juli 2009

KATA PENGANTAR

Puji syukur saya panjatkan kepada Tuhan Yang Maha Esa, karena atas berkat dan rahmat-Nya, saya dapat menyelesaikan skripsi ini. Penulisan skripsi ini dilakukan dalam rangka memenuhi salah satu syarat untuk mencapai gelar Sarjana Hukum pada Fakultas Hukum Universitas Indonesia. Saya menyadari bahwa, tanpa bantuan dan bimbingan dari berbagai pihak, dari masa perkuliahan sampai penyusunan skripsi, sangatlah sulit bagi saya untuk menyelesaikan skripsi ini. Oleh karena itu, saya mengucapkan terima kasih kepada:

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Depok, 13 Juli 2009

Penulis

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ABSTRAK

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Judul : Hak Asuh Anak Dibawah Umur Akibat Perceraian Menurut Undang-Undang No. 1 Tahun 1974 tentang Perkawinan dan Australia Family Law Act 1975 (Suatu Perbandingan)

Skripsi ini membahas mengenai ketentuan pengaturan hak asuh anak dibawah umur akibat perceraian di Indonesia dan Australia. Salah satu akibat hukum dari perceraian adalah bagi anak dibawah umur. Oleh karena itu perlu diberlakukan pengaturan yang jelas mengenai ketentuan hak asuh anak dibawah umur akibat perceraian. Penelitian ini mendasarkan pada metode perbandingan hukum terhadap dua negara yang berbeda yaitu Indonesia dan Australia. Selain itu penelitian ini adalah penelitian kualitatif dengan desain deskriptif. Hasil penelitian menyarankan kepada Pemerintah selaku pembuat undang-undang bahwa ketentuan mengenai hak asuh anak dibawah umur akibat perceraian di Indonesia masih perlu dilakukan perubahan-perubahan sehingga dalam penerapannya nanti ketentuan tersebut dapat berlaku lebih jelas dan tegas.

Kata Kunci: Perkawinan, Perceraian, Hak asuh anak dibawah umur

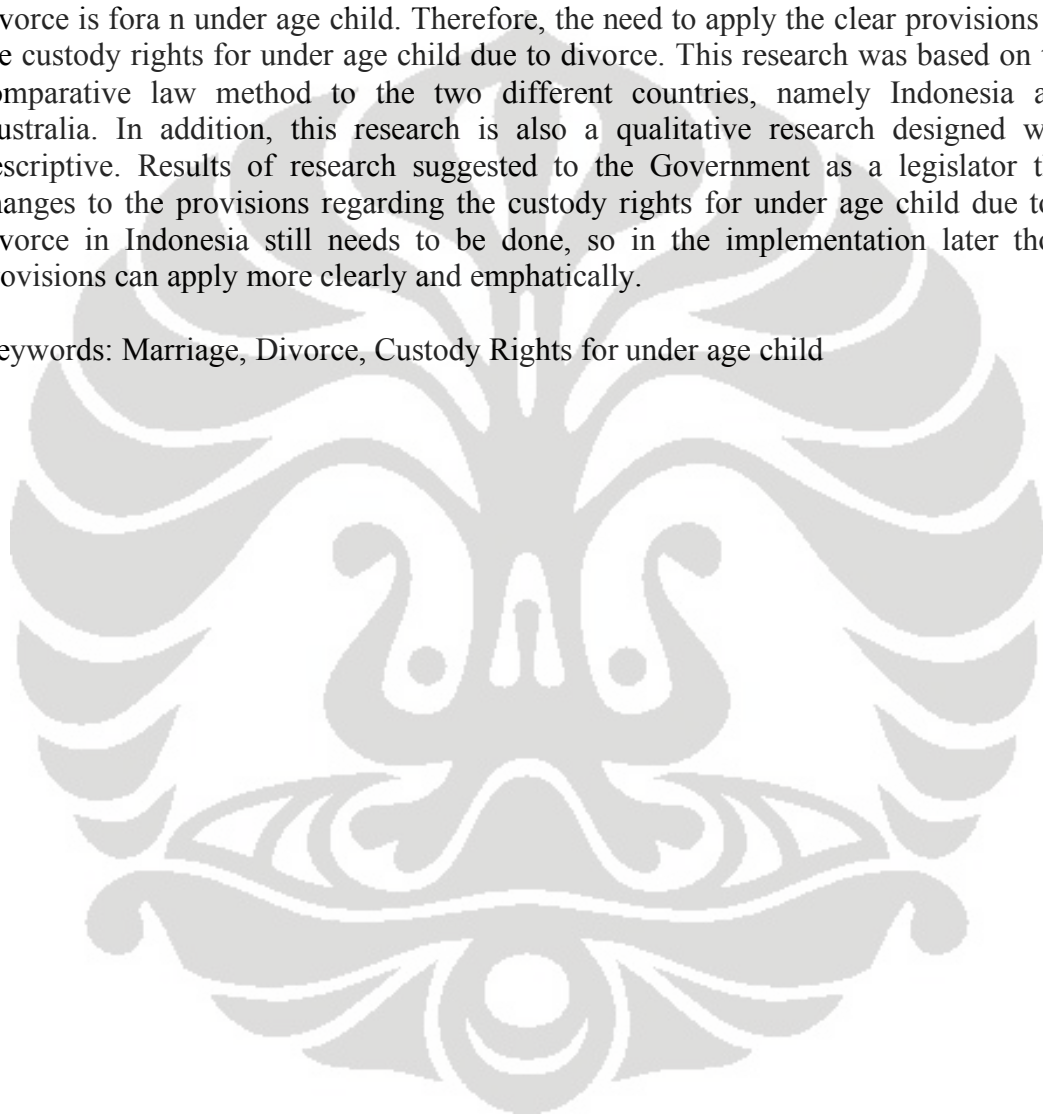


ABSTRACT

Name : Jilly Ariany Siahaan
Study Program: Civil Law
Title : Custody Rights for Under Age Child Due to A Divorce According to the Law No. 1 Year 1974 on Marriage and the Australian Family Law Act 1975 (A Comparison)

This essay discusses about setting the right conditions of custody rights for under age child due to a divorce in Indonesia and Australia. One of the legal consequences of divorce is for a n under age child. Therefore, the need to apply the clear provisions on the custody rights for under age child due to divorce. This research was based on the comparative law method to the two different countries, namely Indonesia and Australia. In addition, this research is also a qualitative research designed with descriptive. Results of research suggested to the Government as a legislator that changes to the provisions regarding the custody rights for under age child due to a divorce in Indonesia still needs to be done, so in the implementation later those provisions can apply more clearly and emphatically.

Keywords: Marriage, Divorce, Custody Rights for under age child



DAFTAR ISI

HALAMAN JUDUL	i
LEMBAR PERNYATAAN ORISINALITAS.....	ii
LEMBAR PENGESAHAN	iii
KATA PENGANTAR	vi
LEMBAR PERSETUJUAN PUBLIKASI KARYA ILMIAH	vi
ABSTRAK	vii
DAFTAR ISI	ix
DAFTAR LAMPIRAN	x
BAB 1 PENDAHULUAN	1
1.1 Latar Belakang	1
1.2 Perumusan Masalah	10
1.3 Tujuan Penelitian	11
1.4 Manfaat Penelitian	12
1.5 Metodologi Penelitian	12
1.6 Definisi Operasional	13
1.7 Sistematika Penulisan	15
BAB 2 HAK ASUH ANAK DIBAWAH UMUR AKIBAT PERCERAIAN MENURUT UNDANG-UNDANG NO. 1 TAHUN 1974 TENTANG PERKAWINAN	17
2.1 Pengertian Perkawinan	17
2.2 Akibat Perkawinan	22
2.2.1 Hubungan Hukum Antara Suami Istri Itu Sendiri	22
2.2.2 Hubungan Hukum Antara Suami Istri Terhadap Anak	24
2.2.3 Hubungan Hukum Suami Istri Terhadap Harta Benda Dalam Perkawinan	28
2.3 Putusnya Hubungan Perkawinan karena Perceraian	29
2.4 Akibat Perceraian Terhadap Anak Dibawah Umur	33
BAB 3 HAK ASUH ANAK DIBAWAH UMUR AKIBAT PERCERAIAN MENURUT AUSTRALIA FAMILY ACT 1975	40
3.1 Pengertian Perkawinan	40
3.2 Akibat Perkawinan	45
3.3 Putusnya Hubungan Perkawinan karena Perceraian	47
3.4 Akibat Perceraian Terhadap Anak Dibawah Umur	54
BAB 4 ANALISA PERBANDINGAN ANTARA KETENTUAN MENGENAI HAK ASUH ANAK DIBAWAH UMUR AKIBAT PERCERAIAN MENURUT UNDANG-UNDANG NO.1 TAHUN 1974 TENTANG PERKAWINAN DAN AUSTRALIA FAMILY LAW ACT 1975	69
4.1 Analisa Putusan Perkara No. 309/PDT/G/2008/PN.Jkt.Ut (Indonesia)	69
4.2 Analisa Putusan Perkara Lachlan & Lachlan [2008]FamCA 455 file number SYF 3137 of 2006 (Australia)	74

4.3 Perbandingan Ketentuan Mengenai Hak Asuh Anak Dibawah Umur Akibat Perceraian Menurut Undang-Undang No. 1 Tahun 1974 tentang Perkawinan dan Australia <i>Family Law Act 1975</i>	87
BAB 5 PENUTUP	90
5.1 Kesimpulan	90
5.2 Saran	92
DAFTAR REFERENSI	94



DAFTAR LAMPIRAN

LAMPIRAN 1. PUTUSAN PERKARA NO. 309/PDT/G/2008/PN.Jkt.Ut
(INDONESIA)

LAMPIRAN 2. PUTUSAN LACHLAN & LACHLAN [2008]FamCA 455 FILE
NUMBER SYF 3137 of 2006 (ASUTRALIA)

LAMPIRAN 3. FAMILY LAW ACT 1975

LAMPIRAN 4. FAMILY LAW AMENDMENT (Shared Parental Responsibility)
ACT 2006

LAMPIRAN 5. MARRIAGE ACT 1961

LAMPIRAN 6. MARRIAGE REGULATIONS 1963

BAB 1

PENDAHULUAN

1.1 Latar Belakang

Setiap manusia memiliki kepentingan. Kepentingan adalah suatu tuntutan perorangan atau kelompok yang diharapkan untuk dipenuhi. Setiap manusia adalah pendukung atau penyandang kepentingan.¹ Dalam melindungi kepentingannya manusia memerlukan bantuan manusia lain. Manusia akan lebih kuat dalam menghadapi berbagai ancaman terhadap kepentingannya bila manusia hidup dalam masyarakat, yaitu salah satu kehidupan bersama yang anggota-anggotanya mengadakan pola tingkah laku yang maknanya dimengerti oleh sesama anggota.

Masyarakat merupakan suatu kehidupan bersama yang terorganisir untuk mencapai dan merealisasikan tujuan bersama. Hanya dalam kehidupan bersama manusia dimungkinkan memenuhi panggilan hidupnya, memenuhi kebutuhan atau kepentingannya. Kehidupan bersama tersebut menyebabkan timbulnya interaksi atau hubungan satu sama lain dan terkadang interaksi tersebut dapat menimbulkan pertentangan atau konflik. Adanya konflik tersebut menimbulkan keperluan setiap manusia akan adanya suatu norma atau kaedah sosial yang akan menjadi pedoman, patokan atau ukuran untuk berperilaku dalam kehidupan bersama.²

Norma atau kaedah sosial tersebut terdiri dari kaedah kepercayaan, kaedah kesusilaan dan kaedah sopan santun. Ketiga kaedah tersebut memberikan kewajiban bagi setiap manusia untuk mencapai suatu penyempurnaan sehingga setiap umat manusia dapat berkelakuan baik. Namun dari ketiga kaedah tersebut sanksi yang diberlakukan bukan merupakan sanksi hukuman. Sehingga diperlukanlah satu kaedah yang dapat memberikan perlindungan dengan tegas dan memberikan sanksi berupa hukuman apabila kaedah tersebut tidak dijalankan

¹Sudikno Mertokusumo, *Mengenal Hukum*, cet.I, (Yogyakarta: Liberty, 2003), hal.1.

²*Ibid.*, hal.2.

dengan semestinya. Kaedah yang dapat melindungi kepentingan manusia yang sudah mendapat perlindungan dari ketiga kaedah lainnya dan melindungi kepentingan-kepentingan manusia yang belum mendapat perlindungan dari ketiga kaedah lainnya adalah kaedah hukum.³

Kaedah hukum ditujukan terutama kepada pelakunya yang konkrit, dimana isinya ditujukan kepada sikap lahir manusia. Selain itu kaedah hukum selain membebani manusia dengan kewajiban juga memberi hak sehingga kaedah hukum itu bersifat normatif dan atributif.⁴ Dalam kaedah hukum diperlukan suatu peristiwa konkrit dan yang penting bukanlah apa yang terjadi melainkan apa yang seharusnya terjadi.

Untuk itu dalam menjalankan kehidupan masyarakat dan bernegara diperlukan suatu sistem hukum yang berlaku dalam masyarakat tersebut sehingga kehidupan masyarakat dapat berlangsung dengan damai dan sejahtera. Dengan berlakunya suatu sistem hukum dalam negara tersebut maka kepentingan setiap manusia pun terlindungi sehingga manusia dapat hidup dengan aman dan sejahtera. Setiap negara memiliki sistem hukum yang berbeda-beda, hal ini disebabkan karena kebutuhan setiap masyarakatnya pun berbeda-beda. Terdapat berbagai macam sistem hukum yang kita kenal seperti sistem hukum Eropa Kontinental, sistem hukum Anglo-Saxon, sistem hukum adat, dan sebagainya.⁵

Sistem hukum Indonesia tersusun atas sejumlah bagian yang masing-masing juga merupakan sistem yang dinamakan subsistem yang semuanya merupakan satu kesatuan yang utuh. Dalam sistem hukum positif Indonesia terdapat subsistem hukum perdata, subsistem hukum pidana, subsistem hukum tata negara, dan lain-lain yang dimana satu dengan yang lainnya saling berbeda.⁶

³*Ibid.*, hal.12.

⁴*Ibid.*

⁵J.B. Daliyo, *Pengantar Hukum Indonesia* (Jakarta: Prenhallindo, 2001), hal.35.

⁶*Ibid.*, hal.36.

Salah satu aturan hukum yang mengatur tingkah laku setiap orang terhadap orang lain yang berkaitan dengan hak dan kewajiban yang timbul dalam pergaulan masyarakat maupun pergaulan keluarga adalah hukum perdata. Hukum perdata dibedakan menjadi dua, yaitu hukum perdata material dan hukum perdata formal. Hukum perdata material mengatur kepentingan-kepentingan perdata setiap subjek hukum. Hukum perdata formal mempertahankan hukum perdata material, karena hukum perdata formal berfungsi menerapkan hukum perdata material apabila ada yang melanggarnya.⁷ Dalam sistem hukum positif Indonesia berlaku asas konkordansi yang membuat *Burgelijk Wetboek* (BW/KUHPerdata Belanda) menjadi contoh KUHPerdata di Indonesia. Kitab Undang-Undang Hukum Perdata (KUHPerdata) Indonesia terdiri dari empat buku, yaitu:

1. Buku I, yang berjudul “perihal orang”, memuat hukum perorangan dan hukum kekeluargaan.
2. Buku II, yang berjudul “perihal benda”, memuat hukum benda dan hukum waris.
3. Buku III, yang berjudul “perihal perikatan”, memuat hukum harta kekayaan yang berhubungan dengan hak dan kewajiban yang berlaku bagi orang-orang atau pihak-pihak tertentu.
4. Buku IV, yang berjudul “perihal pembuktian dan kadaluwarsa”, memuat perihal alat-alat pembuktian dan akibat-akibat lewat waktu terhadap hubungan-hubungan hukum.

Perkawinan merupakan hal yang sangat penting dalam kehidupan setiap manusia. Ikatan perkawinan menimbulkan hubungan hukum keluarga yang akan berkaitan dengan orang tua, anak, perwalian warisan, pengampunan, dan sebagainya. Oleh karena itu diperlukan suatu ketentuan yang mengatur mengenai perkawinan atau dapat kita sebut sebagai hukum perkawinan karena hukum perkawinan merupakan bagian yang sangat penting dalam hukum keluarga. KUHPerdata mengatur mengenai perkawinan dalam Buku I, karena Buku I

⁷*Ibid.*, hal.103.

memuat mengenai hukum kekeluargaan yang merupakan rangkaian peraturan-peraturan hukum yang timbul untuk mengatur pergaulan hidup kekeluargaan. Namun setelah berlakunya Undang-Undang No. 1 Tahun 1974 tentang Perkawinan, sebagian besar ketentuan yang mengatur mengenai perkawinan dalam Buku I KUHPerdata kini tidak berlaku lagi.

Seperti yang telah diuraikan diatas sebelum lahirnya Undang-Undang No. 1 Tahun 1974 tentang Perkawinan, perkawinan diatur melalui Buku I KUHPerdata sehingga KUHPerdata memiliki pengaruh besar terhadap Undang-Undang No. 1 Tahun 1974 tentang Perkawinan dan merupakan salah satu sumber dari Undang-Undang No. 1 Tahun 1974 tentang Perkawinan.

Definisi perkawinan menurut Undang-undang No. 1 Tahun 1974 tentang Perkawinan adalah ikatan lahir bathin antara seorang pria dengan seorang wanita sebagai suami istri dengan tujuan membentuk keluarga (rumah tangga) yang bahagia dan kekal berdasarkan Ketuhanan Yang Maha Esa.⁸ Penulis berpendapat dari unsur-unsur definisi perkawinan tersebut maka Undang-Undang No. 1 Tahun 1974 tentang Perkawinan mengartikan bahwa perkawinan selain merupakan hubungan yang menyangkut hak dan kewajiban masing-masing pihak dalam perkawinan juga merupakan sebuah hubungan yang berlandaskan keagamaan. Hal-hal lain menyangkut tentang perkawinanyang diatur dalam Undang-Undang No. 1 Tahun 1974 tentang Perkawinan adalah mengenai syarat-syarat perkawinan, pencegahan dan pembatalan perkawinan, akibat perkawinan, harta benda perkawinan, perjanjian perkawinan, putusnya perkawinan dan akibat dari putusnya perkawinan, kedudukan anak, hak dan kewajiban antara orang tua dan anak, perwalian, dan perihal perkawinan campuran.

Hukum perkawinan dapat dibagi menjadi dua bagian yaitu:

1. Hukum perkawinan yang bertalian dengan hubungan antara pria dan wanita untuk menciptakan keluarga.

⁸Indonesia, *Undang-Undang Tentang Perkawinan*, UU No. 1 Tahun 1974, LN No. 1 Tahun 1974, Ps. 1.

2. Hukum kekayaan dalam perkawinan adalah keseluruhan peraturan yang mengatur tentang harta suami istri yang timbul dalam suatu hubungan perkawinan.⁹

Tujuan dilakukannya perkawinan adalah membentuk suatu keluarga yang kekal dan bahagia yang akan berlangsung selama-lamanya. Keinginan untuk membentuk keluarga yang kekal tersebut adalah idealisme setiap keluarga, namun terkadang hal tersebut tidak berjalan sesuai dengan yang kita inginkan. Terkadang hubungan suami istri merenggang dengan tidak terdapat lagi kesepakatan atau kerukunan sehingga menimbulkan terjadinya suatu perselisihan yang berkepanjangan. Perkawinan dengan keadaan buruk seperti itu sangat tidak sehat apabila tetap dilanjutkan oleh kedua pihak sehingga perkawinan tersebut lebih baik diakhiri dengan jalan perceraian.

Perceraian merupakan salah satu peristiwa yang dapat terjadi dalam suatu perkawinan. Perceraian adalah penghapusan perkawinan dengan putusan hakim atau tuntutan salah satu pihak dalam perkawinan¹⁰. Perceraian harus dijalankan dengan menaati syarat-syarat dan ketentuan yang telah diatur dalam Undang-Undang, karena perceraian menimbulkan akibat-akibat yang tidak hanya melibatkan suami dan istri saja, namun pihak-pihak dan segala sesuatu yang berkaitan dengan kedua pihak tersebut.

Salah satu akibat hukum dari perceraian adalah bagi anak dibawah umur. Oleh karena itu jika perkawinan dipecahkan oleh hakim harus pula diatur tentang perwalian itu terhadap anak-anak yang masih dibawah umur. Penetapan wali oleh Hakim dilakukan setelah mendengar keluarga dari pihak ayah maupun dari pihak ibu yang rapat hubungannya dengan anak-anak tersebut. Hakim merdeka untuk menetapkan ayah atau ibu menjadi wali. Tergantung dari siapa yang dipandang

⁹Wienarsih Imam Subekti dan Sri Soesilowati Mahdi, *Hukum Perorangan dan Kekeluargaan Perdata Barat*, cet.I, (Jakarta: Gitama Jaya, 2005), hal..26.

¹⁰Subekti, *Pokok-Pokok Hukum Perdata*, cet. XXVI, (Jakarta: Internusa, 1994), hal.42.

paling cakap atau baik mengingat kepentingan anak-anak. Penetapan wali ini juga dapat berdasarkan perubahan keadaan.¹¹

Perceraian terhadap anak dibawah umur mengakibatkan perwalian. Dalam Kitab Undang-Undang No. 1 Tahun 1974 tentang Perkawinan ada 2 (dua) macam perwalian, yaitu:

1. Perwalian yang diangkat oleh Hakim (Pasal 49)
2. Perwalian yang ditunjuk oleh bapak atau ibu dengan surat wasiat atau akta tersendiri (Pasal 51 ayat (1) dan (2)).

Berbeda dengan Indonesia, Australia menganut sistem hukum *common law* Inggris atau dapat disebut juga dengan sistem hukum anglo-saxon. Sistem hukum ini bersumber pada putusan-putusan hakim atau yurisprudensi. Putusan-putusan hakim mewujudkan kepastian hukum, maka melalui putusan-putusan hakim itu prinsip-prinsip dan kaidah-kaidah hukum dibentuk dan mengikat umum.¹²

Kebiasaan-kebiasaan dan peraturan hukum tertulis yang berupa undang-undang dan peraturan administrasi negara diakui juga, karena pada dasarnya terbentuknya kebiasaan dan peraturan tertulis tersebut bersumber dari putusan pengadilan. Putusan pengadilan, kebiasaan dan peraturan hukum tertulis tersebut tidak tersusun secara sistematis dalam kodifikasi sebagaimana pada sistem hukum Eropa Kontinental.¹³

Dalam sistem hukum anglo-saxon, hakim berperan besar dalam menciptakan kaidah-kaidah hukum yang mengatur tata kehidupan masyarakat, oleh karena itu hakim terikat pada putusan pengadilan yang sebelumnya sudah terdapat dari perkara-perkara sejenis (asas *doctrine of precedent*). Namun bila dalam putusan pengadilan terdahulu tidak dapat ditemukan prinsip hukum yang hakim butuhkan

¹¹H. Hilman Hadi Kusuma, *Hukum Perkawinan Indonesia*, cet. I, (Bandung: Mandar Maju, 1990), hal.160.

¹²J.B Daliyo, *op.cit.*, hal.37.

¹³*Ibid.*

maka hakim berdasarkan prinsip keadilan, kebenaran dan akal sehat akan memutuskan perkara dengan menggunakan metode penafsiran hukum.¹⁴

Dalam pembagian hukumnya, sistem hukum ini juga membagi hukum menjadi dua golongan, yaitu hukum publik dan hukum privat. Hukum privat menurut sistem hukum ini lebih ditujukan kepada kaidah hukum tentang hak milik, hukum tentang orang, hukum perjanjian dan hukum tentang perbuatan melawan hukum.¹⁵ Hukum keluarga dalam sistem hukum ini termasuk kedalam golongan hukum privat.

Layaknya sebuah negara dengan sistem hukum anglo-saxon, ketentuan mengenai jalannya pemerintahan di Australia diatur melalui undang-undang yang dikeluarkan oleh sebuah parlemen yang disebut sebagai *the Australian Parliament*. *Parliament of Australia* terdiri dari *Senate* dan *House of Representative*, dimana pihak yang bertugas membuat dan mengamandemen peraturan-peraturan adalah *House of Representative*. *House of Representative* inilah yang mengeluarkan segala ketentuan di Australia termasuk segala ketentuan mengenai hukum keluarga¹⁶.

Pada umumnya ketentuan tentang hukum keluarga di Australia yang meliputi perceraian, harta benda, status anak dibawah umur, serta kewajiban suami dan istri diatur dalam Undang-Undang Keluarga tahun 1975 (*Family Law Act 1975*). Perkawinan di Australia diatur secara spesifik di dalam Undang-Undang Perkawinan tahun 1961 (*Marriage Act 1961*) dan Peraturan Perkawinan tahun 1963 (*Marriage Regulations 1963*). Undang-Undang Keluarga tahun 1975 dan Undang-Undang Perkawinan tahun 1961 berada di bawah yurisdiksi *The Family Court of Australia* bersama-sama dengan *Federal Magistrates Court* kecuali untuk wilayah Australia Barat yang memiliki *Family Court* tersendiri. Adapun yang dimaksud dengan perkawinan di Australia berdasarkan Undang-Undang

¹⁴*Ibid.*, hal.38.

¹⁵*Ibid.*

¹⁶“*Australia’s House of Representatives: Introduction*,” <<http://www.aph.gov.au/house/info/general/index.htm>>. diakses pada hari Jumat, 15 Mei 2009.

Perkawinan tahun 1961 Bab I Pasal 5 ayat (1) adalah *marriage means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life*. Sebuah perkawinan dianggap sah di Australia apabila memenuhi ketentuan sebagai berikut¹⁷:

1. Para pihak terdiri dari seorang pria dan seorang wanita.
2. Perkawinan dapat dilaksanakan melalui 2 (dua) cara, yaitu perkawinan berdasarkan agama/kepercayaan; atau perkawinan sekuler yang tidak berdasarkan agama.
3. Pihak yang akan melaksanakan perkawinan memiliki umur yang cukup, yaitu 18 (delapan belas) tahun keatas.
4. Pihak yang akan melaksanakan perkawinan tidak memiliki hubungan darah; termasuk saudara kandung atau saudara tiri maupun saudara dengan hubungan adopsi termasuk yang telah dibatalkan, diputuskan atau tidak berlaku lagi dengan alasan apapun. Ini berarti, sebagai contoh, seseorang tidak dapat menikah dengan orang tuanya, nenek/kakeknya, anak, cucu, kakak atau adik. Namun seseorang dapat melakukan perkawinan dengan bibi atau paman, sepupu dekat maupun sepupu jauh mereka.

Setelah pasangan melakukan perkawinan dan telah melengkapi Akte Perkawinan mereka, perkawinan tersebut kemudian akan dicatat ke sebuah lembaga bernama *The Births, Deaths and Marriages Registration Office* yang pencatatannya dilakukan sesuai dengan negara bagian tempat tinggal mereka¹⁸.

Dari penjelasan tersebut dapat kita lihat bahwa perkawinan di Australia harus dilakukan berdasarkan Undang-undang yang telah diberlakukan oleh Parlemen Australia. Berbeda dengan Indonesia, perkawinan Australia memiliki ketentuan

¹⁷“*Australian Marriage License Laws -- Getting Married in Australia*,” <http://marriage.about.com/od/australia/Getting_Married_in_Australia_Australian_Marriage_License_Laws.htm>, diakses pada hari Jumat, 15 Mei 2009.

¹⁸“Form 15 marriage certificate,” <http://www.ag.gov.au/www/agd/agd.nsf/Page/Marriage_Formmarriagecelebrants_Form15marriagecertificate>, 18 July 2006, diakses pada hari Jumat, 15 Mei 2009.

yang lebih umum dan luas karena perkawinan hanya dilihat dari segi hukumnya saja. Namun sama halnya dengan Indonesia, suatu perkawinan yang tidak berjalan sesuai dengan kehendak suami dan istri tersebut baik dapat diakhiri dengan jalan perceraian.

Berbeda dengan ketentuan perkawinan yang diatur dalam Undang-Undang Perkawinan tahun 1961 dan Peraturan Perkawinan tahun 1963, di Australia perceraian bagi suatu perkawinan diatur dalam Undang-Undang Keluarga tahun 1975. Selain itu perceraian di Australia tidak dilakukan pada Pengadilan Negara Bagian masing-masing namun Pengadilan Federal. Menurut Undang-Undang Keluarga tahun 1975, perceraian dianggap sebagai saat berakhirnya suatu perkawinan antara dua orang yang sebelumnya telah melaksanakan suatu perkawinan. Dengan dilakukannya perceraian, maka seseorang dapat melaksanakan perkawinan dengan orang lain. Adapun syarat untuk melakukan suatu perceraian adalah apabila suatu hubungan perkawinan sudah tidak baik dan tidak dapat diperbaiki lagi oleh kedua pasangan dalam perkawinan tersebut. Hal ini dapat dibuktikan dengan telah terpisahnya suami dan istri tersebut selama 12 (dua belas) bulan dan tidak adanya kemungkinan untuk rekonsiliasi. Pengadilan tidak akan melihat siapakah pihak yang bersalah atas terjadinya hal tersebut¹⁹.

Perceraian tidak menyelesaikan masalah mengenai anak dibawah umur dan harta benda dalam perkawinan. Ketentuan mengenai hal tersebut harus dibuat terpisah, namun dalam formulir aplikasi perceraian harus terdapat pernyataan mengenai ketentuan yang layak untuk hak asuh dan penghidupan anak dibawah umur yang telah dibuat, bila hal tersebut tidak dilaksanakan maka Pengadilan akan menolak perceraian tersebut. Selain itu pengadilan juga harus mengetahui tentang ketentuan biaya penghidupan bagi sang anak dan segala pengaturan yang berhubungan dengan anak tersebut.

Dari uraian singkat tersebut dapat kita lihat bahwa perceraian yang dilakukan di Australia memiliki ketentuan yang berbeda dengan di Indonesia, dimana sebelum melakukan sebuah perceraian, suami dan istri yang akan melakukan

¹⁹“Australia Grounds for Divorce,” <<http://www.international-divorce.com/d-australia.htm>>, diakses pada hari Rabu, 29 Maret 2009.

perceraian tersebut harus sudah membuat suatu kesepakatan mengenai anak dibawah umur dan harta benda mereka. Ketentuan mengenai hak asuh dan penghidupan anak dibawah umur sangat penting dalam proses perceraian, dikarenakan setelah dibuatnya kesepakatan tersebut, saat mereka mengajukannya ke Pengadilan maka hakimlah yang akan menilai mengenai ketentuan yang telah dibuat oleh mereka dan hakim juga akan memberikan penilaian berdasarkan pemeriksaan yang nantinya akan dilakukan kepada anak-anak dalam pernikahan tersebut. Pengadilan harus benar-benar yakin bahwa kehidupan anak tersebut nantinya akan tetap berjalan dengan baik dan tidak mengalami perbedaan setelah orang tuanya bercerai.

Dari perbedaan-perbedaan mengenai hak asuh anak yang terjadi di Australia dan Indonesia tersebut, penulis tertarik untuk mengangkatnya menjadi sebuah penelitian yang lebih dalam. Penulis tertarik untuk mengangkat ketentuan mengenai hak asuh anak pada negara Australia karena Australia merupakan negara barat yang sistem hukumnya berbeda dengan Indonesia yaitu sistem anglo-saxon sehingga ketentuan mengenai hak asuh anak dibawah umur akibat perceraian sangat berbeda bila dibandingkan dengan Indonesia. Penulis akan mencari informasi lebih lanjut mengenai ketentuan-ketentuan di mengenai hak asuh anak dibawah umur akibat perceraian di Indonesia dan di Australia dan akan menuangkannya dalam skripsi yang berjudul “Hak Asuh Anak di Bawah Umur Akibat Perceraian Menurut Undang-Undang No. 1 Tahun 1974 tentang Perkawinan dan *Australia Family Law Act 1975* (Suatu Perbandingan)”, sebagai salah satu syarat untuk menyelesaikan program pendidikan Sarjana Strata-1 di Fakultas Hukum Universitas Indonesia.

1.2 Perumusan Masalah

Putusnya hubungan perkawinan antara suami istri akan menimbulkan akibat hukum terhadap hak asuh anak di bawah umur. Dalam penulisan ini akan dibahas dengan rumusan masalah antara lain:

1. Bagaimana ketentuan mengenai hak asuh anak dibawah umur akibat perceraian menurut Undang-Undang No. 1 Tahun 1974 tentang Perkawinan?
2. Bagaimana ketentuan mengenai hak asuh anak dibawah umur akibat perceraian menurut *Australia Family Act 1975*?
3. Bagaimana perbandingan antara ketentuan mengenai hak asuh anak dibawah umur akibat perceraian di Indonesia berdasarkan Undang-Undang No. 1 Tahun 1974 tentang Perkawinan dan Australia berdasarkan *Australia Family Act 1975*?

1.3 Tujuan Penelitian

1.3.1 Tujuan Umum

Secara umum penelitian ini bertujuan untuk memberikan penjelasan mengenai ketentuan hak asuh anak dibawah umur akibat perceraian di Indonesia dan di Australia demi kemajuan ilmu pengetahuan di bidang hukum perkawinan.

1.3.2 Tujuan Khusus

Secara khusus penelitian ini bertujuan untuk :

1. Berhubungan dengan pokok permasalahan yang telah disebutkan sebelumnya, penelitian ini bertujuan untuk menjelaskan mengenai ketentuan hak asuh anak dibawah umur akibat perceraian di Indonesia.
2. Penelitian ini juga bertujuan untuk menjelaskan mengenai ketentuan hak asuh anak dibawah umur akibat perceraian di Australia.
3. Berdasarkan kedua tujuan di atas akan dapat diketahui mengenai perbedaan dan persamaan ketentuan hak asuh anak dibawah umur akibat perceraian di Indonesia dan Australia.

1.4 Manfaat Penelitian

Penelitian ini secara teoretis diharapkan dapat bermanfaat bagi para akademisi dalam memahami pengaturan mengenai ketentuan hak asuh anak dibawah umur akibat perceraian di Indonesia dan Australia. Tulisan ini diharapkan dapat mengembangkan pola pikir dalam hukum keluarga dan perkawinan khususnya yang berkaitan dengan hak asuh anak dibawah umur akibat perceraian sebagai salah satu bagian dari ilmu pengetahuan.

Secara praktis, penelitian ini berguna untuk memberikan gambaran yang lebih jelas, memadai, sederhana, dan mudah dimengerti kepada masyarakat mengenai hak asuh anak dibawah umur akibat perceraian yang selama ini masih kurang dipahami oleh beberapa golongan masyarakat.

1.5 Metodologi Penelitian

Menurut kebiasaan metode dirumuskan dengan beberapa kemungkinan, yaitu suatu tipe pemikiran yang dipergunakan dalam penelitian dan penilaian, suatu tehnik yang umum bagi ilmu pengetahuan, atau cara tertentu untuk melaksanakan suatu prosedur. Metode yang akan penulis gunakan dalam melakukan penelitian ini adalah *comparative method* atau metode perbandingan.²⁰ Menurut Hugo F. Reading, yang dimaksud dengan *comparative method* adalah *the comparison of matched societies and institutions for the discovery of associations and correlations*. Jadi yang dimaksud dengan metode perbandingan adalah perbandingan yang cocok dengan masyarakat dan lembaga untuk penemuan sebuah hubungan atau gabungan ketentuan tertentu.

Dalam penulisan ini penulis akan menggunakan metode perbandingan hukum terhadap dua negara yang berbeda yaitu perbandingan terhadap ketentuan hukum di Indonesia dan ketentuan hukum di Australia. Penulis akan merinci ketentuan-

²⁰Soerjono Soekanto, *Pengantar Penelitian Hukum*, (Jakarta: Penerbit Universitas Indonesia, 2006), hal.5.

ketentuan terhadap kedua negara tersebut sesuai dengan ketentuan yang berlaku pada masing-masing negara dan melakukan perbandingan atas unsur-unsur ketentuan yang penulis dapatkan pada ketentuan yang berlaku di kedua negara tersebut sehingga penulis dapat menemukan persamaan dan perbedaan dari ketentuan yang berlaku dalam dua negara tersebut.

Dalam penulisannya, penelitian ini bersifat penelitian deskriptif karena penelitian ini menjelaskan masalah secara umum. Berdasarkan bentuknya penelitian ini bertujuan menjelaskan mengenai akibat perceraian terhadap hak asuh anak dibawah umur dibawah umur sehingga sangat berguna bagi segi kehidupan perkawinan dalam masyarakat. Penelitian ini merupakan gabungan bentuk dari penelitian empiris dan kepustakaan. Peneliti melakukan pengamatan kehidupan masyarakat khususnya kehidupan perkawinan kemudian menyusun penelitian berdasarkan pada hukum tertulis (undang-undang).

Penulis juga mengumpulkan data melalui studi dokumen. Studi dokumen didapat melalui penelusuran data sekunder. Data sekunder tersebut terdiri dari bahan hukum primer yang berupa peraturan perundang-undangan yang terkait dan penelusuran bahan hukum sekunder yang berupa penelusuran terhadap buku-buku yang berkaitan dengan Hukum Perkawinan khususnya yang membahas tentang perceraian dan akibatnya terhadap hak asuh anak dibawah umur serta artikel-artikel dari majalah, koran, dan internet untuk melengkapi data-data yang telah ada. Data-data tersebut kemudian penulis olah secara kualitatif dan penulis juga melakukan analisa data dari data-data yang telah terkumpul tersebut. Dengan dilakukannya pengolahan dan analisa dari data yang telah penulis kumpulkan, maka penulis akan menggunakan unsur-unsur dari data tersebut terhadap objek penelitian yang ada, untuk kemudian ditarik suatu kesimpulan.

1.6 Definisi Operasional

Metode yang digunakan dalam merumuskan definisi operasional dalam penelitian ini adalah metode definisi analitis yang menjelaskan mengenai istilah

yang mempunyai arti luas dengan memberikan batasan yang tegas dengan memberikan ciri khas dari yang didefinisikan.²¹

Dalam penelitian ini penulis akan memaparkan serangkaian definisi operasional sebagai berikut :

- a. Perkawinan ialah ikatan lahir batin antara seorang pria dengan seorang wanita sebagai suami istri dengan tujuan membentuk keluarga, rumah tangga yang bahagia dan kekal berdasarkan Ketuhanan Yang Maha Esa.²²
- b. *Marriage means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.*²³
- c. Anak yang sah adalah anak yang dilahirkan dalam atau sebagai akibat perkawinan yang sah.²⁴
- d. Anak yang belum mencapai umur 18 tahun atau belum pernah melangsungkan perkawinan yang tidak berada dibawah kekuasaan orang tua, berada dibawah kekuasaan wali.²⁵
- e. Perwalian itu mengenai pribadi anak yang bersangkutan maupun harta bendanya.²⁶
- f. *Child means a person who is under 18.*²⁷
- g. *Child of a marriage includes a child who is, under subsection 60F(1):*

²¹*Ibid.*, hal.135.

²²Indonesia, *op. cit.*

²³Part I subsection 5(1) Marriage Act 1961, <<http://www.comlaw.gov.au/MarriageAct1961>>. diakses pada hari Minggu, 16 Mei 2009.

²⁴Indonesia, , *op. cit.*, Ps.42.

²⁵*Ibid.*, Ps.50 ayat (1).

²⁶*Ibid.*, Ps.50 ayat (2).

²⁷Part I subsection 4(1) Family Law Act 1975, <<http://www.comlaw.gov.au/FamilyLawAct1975>>. diakses pada hari Selasa, 10 Maret 2009.

(a) a child adopted since the marriage by the husband and wife or by either of them with the consent of the other;

(b) a child of the husband and wife born before the marriage;

(c) a child who is, under subsection 60H(1), the child of the husband and wife.

or (2) a child of a marriage includes a reference to a child of:

(a) a marriage that has been dissolved or annulled, in Australia or elsewhere;

(b) a marriage that has been terminated by the death of one party to the marriage.

but does not include a child who is adopted by a person who, before the adoption, is not a prescribed adopting parents ceases to be a child of that marriage for the purposes of this Act²⁸.

1.7 Sistematika Penulisan

Penulisan ini terbagi dalam 5 (lima) bab yang memberikan gambaran mengenai perbandingan hukum terhadap ketentuan hak asuh anak dibawah umur akibat perceraian di Indonesia berdasarkan Undang-Undang No. 1 Tahun 1974 tentang Perkawinan dengan ketentuan di Australia berdasarkan Undang-Undang Keluarga tahun 1975 (*Family Law Act 1975*).

Bab pertama penulisan merupakan pendahuluan yang terbagi ke dalam 7 (tujuh) sub bab, yaitu perumusan latar belakang permasalahan mengenai tulisan; pokok-pokok permasalahan yang akan dijawab melalui penulisan ini berdasarkan pada teori-teori dan fakta-fakta yang akan dipaparkan di bab setelahnya; tujuan penulisan yang membahas mengenai kegunaan umum maupun khusus yang

²⁸*Ibid.*

melalui penulisan ini hendak dicapai oleh penulis; definisi operasional yang akan menjelaskan secara umum mengenai istilah-istilah; dan sistematika penulisan, yang akan memaparkan urutan penulisan.

Bab kedua memuat suatu tinjauan umum mengenai hukum perkawinan di Indonesia berdasarkan Undang-Undang No. 1 Tahun 1974 tentang Perkawinan. Dalam bab ini terdapat 4 (empat) sub bab yang akan dibahas yaitu mengenai tinjauan mengenai pengertian perkawinan, akibat dari perkawinan, putusya hubungan perkawinan karena perceraian, dan sub bab terakhir dari bab kedua ini membahas mengenai akibat perceraian terhadap anak dibawah umur.

Bab ketiga dari penulisan ini memuat suatu tinjauan umum mengenai hukum perkawinan di Indonesia berdasarkan Undang-Undang Keluarga tahun 1975, Undang-Undang Perkawinan tahun 1961 dan Peraturan Perkawinan tahun 1963. Bab ketiga terdiri dari 4 (empat) sub bab yang akan membahas mengenai pengertian perkawinan, akibat perkawinan, putusya hubungan perkawinan karena perceraian, dan akibat perceraian terhadap anak dibawah umur.

Bab keempat memuat sebuah pembahasan mengenai perbandingan antara ketentuan mengenai hak asuh anak dibawah umur akibat perceraian menurut Undang-Undang No.1 Tahun 1974 tentang Perkawinan dan Australia Family Law Act 1975. Dalam bab ini penulis akan menganalisa keputusan mengenai hak asuh anak akibat perceraian dari kedua negara, yaitu Indonesia dan Australia. Dari hasil analisa tersebut penulis akan memaparkan perbandingan ketentuan dari dua negara tersebut, yang dimana perbandingan tersebut akan membahas mengenai persamaan dan perbedaan dari ketentuan–ketentuan mengenai hak asuh anak akibat perceraian di Indonesia dan Australia.

Bab kelima dari penulisan ini berisi rangkuman dari seluruh hasil pembahasan melalui kesimpulan serta saran mengenai ketentuan akibat perceraian terhadap anak dibawah umur yang berlaku di Indonesia dalam perbandingannya dengan ketentuan akibat perceraian terhadap anak dibawah umur yang berlaku di Australia.

BAB 2

HAK ASUH ANAK DIBAWAH UMUR AKIBAT PERCERAIAN MENURUT UNDANG-UNDANG NO. 1 TAHUN 1974 TENTANG PERKAWINAN

2.1 Pengertian Perkawinan

Perkawinan ialah ikatan lahir dan batin antara seorang pria dengan seorang wanita sebagai suami istri dengan tujuan membentuk keluarga (rumah tangga) yang bahagia dan kekal berdasarkan Ketuhanan Yang Maha Esa.¹

Apabila diperhatikan maka dalam definisi tersebut terdapat lima unsur²:

1. Ikatan lahir dan batin

Ikatan lahir merupakan ikatan yang dapat dilihat dan mengungkapkan adanya hubungan hukum antara seorang pria dan seorang wanita untuk hidup bersama sebagai suami istri dengan kata lain hal tersebut disebut hubungan formal. Ikatan batin merupakan hubungan yang tidak formal suatu ikatan yang tidak tampak tidak nyata yang hanya dapat dirasakan oleh pihak-pihak yang bersangkutan ikatan ini merupakan dasar ikatan lahir.

Ikatan batin inilah yang dapat dijadikan dasar fondasi dalam bentuk dan membina keluarga yang bahagia dalam hal ini sangat perlu usaha yang sungguh-sungguh untuk meletakkan perkawinan sebagai ikatan suami istri dalam kedudukan mereka yang semestinya dan suci sebagaimana diajarkan oleh agama yang dianut oleh masing-masing pihak. jadi perkawinan bukan hanya menyangkut unsur lahir tetapi menyangkut unsur batiniah yang dalam dan luhur.

¹Bakrie A. Rahmaan dan Ahmad Sukardja, *Hukum Perkawinan Menurut Islam, Undang-Undang Perkawinan Dan Hukum Perdata* (Jakarta: PT. Hidakarya Agung, 1981), hal.13.

²Wienarsih Imam Subekti dan Sri Soesilowati Mahdi, *op.cit.*, hal. 47.

2. Antara seorang pria dan seorang wanita

Hukum perkawinan hanya boleh terjadi antara seorang pria dan seorang wanita jadi dapat dikatakan bahwa ikatan perkawinan hanya mungkin terjadi antara seorang pria dan seorang wanita jadi perkawinan antara seorang wanita dengan wanita bukan perkawinan. Dan disinipun terkandung asas monogami yaitu pada saat yang bersamaan seorang pria hanya terikat dengan seorang wanita demikian pula sebaliknya seorang wanita hanya terikat dengan seorang pria pada saat yang bersamaan.

3. Sebagai suami istri

Bilakah ikatan seorang pria dengan seorang wanita dapat dipandang sebagai suami istri, yaitu bila ikatan mereka itu didasarkan pada suatu perkawinan yang sah.

4. Tujuan perkawinan adalah membentuk keluarga/rumah tangga yang bahagia dan kekal.

Yang dimaksud dengan keluarga disini adalah kesatuan yang terdiri dari ayah ibu dan anak-anak. Membentuk keluarga yang bahagia erat hubungannya dengan keturunan yang merupakan pula tujuan dari perkawinan sedangkan pemeliharaan dan pendidikan anak-anak menjadi hak dan kewajiban orang tua. Untuk dapat mencapai hal ini maka diharapkan kekekalan dalam perkawinan yaitu bahwa sekali orang melakukan perkawinan tidak akan ada perceraian untuk selama-lamanya kecuali cerai karena kematian.

5. Berdasarkan Ke-Tuhanan Yang Maha Esa.

Undang-undang sebelumnya, memandang perkawinan hanya dari hubungan keperdataan saja sedangkan Undang-Undang No. 1 Tahun 1974 tentang Perkawinan ini memandang perkawinan berdasarkan atas kerohanian.

Penjelasan resmi terhadap ketentuan tersebut menyebutkan bahwa dalam negara yang berdasarkan Pancasila, dimana Sila pertama berbunyi Ketuhanan Yang Maha Esa, maka perkawinan mempunyai hubungan yang sangat erat

dengan agama/rohani seseorang. Oleh karena itu perkawinan tidak hanya memiliki unsur lahir/jasmani namun juga unsur batin/rohani yang memiliki peran sangat penting.

Perkawinan adalah sah, apabila menurut hukum masing-masing agama dan kepercayaan sah. Setiap perkawinan dicatat menurut peraturan perundang-undangan yang lama adalah sah.³ Jadi dapat penulis simpulkan bahwa sebuah perkawinan dianggap sah, jika diselenggarakan:

1. Menurut hukum masing-masing agama dan kepercayaan.
2. Secara tertib dan sah menurut hukum agama dan kepercayaan masing-masing.
3. Dicapat menurut perundang-undangan dengan dihadiri oleh pegawai pencatatan nikah, sesuai dengan ketentuan dalam Pasal 2 Undang-Undang No. 1 Tahun 1974 tentang Perkawinan. Dimana bagi orang-orang yang beragama Islam pencatatan dilakukan oleh pegawai pencatat nikah, talak dan rujuk dari kantor urusan agama, sedangkan bagi orang yang beragama diluar Islam pencatatan dilakukan oleh pegawai pencatat nikah dari kantor catatan sipil setempat.

Pasal 1 Undang-Undang No. 1 Tahun 1974 tentang Perkawinan dan penjelasannya menyebutkan:

1. Bahwa perkawinan menurut Undang-Undang No. 1 Tahun 1974 tentang Perkawinan adalah berdasarkan Ketuhanan Yang Maha Esa.
2. Tujuan perkawinan adalah membentuk dan membina keluarga (rumah tangga) yang kekal dan bahagia serta mendapatkan keturunan yang harus dipelihara dan dididik dengan baik.

Menurut pendapat penulis pengertian perkawinan sebagaimana dinyatakan dalam Pasal 1 Undang-Undang No. 1 Tahun 1974 tentang Perkawinan perlu benar-benar dipahami oleh masyarakat, karena ketentuan tersebut merupakan

³Hazairin, *Tinjauan Undang-Undang Perkawinan No. 1 Tahun 1974*, (Jakarta: Tintamas, 1975), hal.14.

landasan pokok dari kelanjutan ketentuan-ketentuan hukum perkawinan lainnya, baik yang terdapat dalam Undang-Undang No. 1 Tahun 1974 tentang Perkawinan maupun dalam peraturan perundang-undangan lainnya yang juga mengatur tentang perkawinan.

Disamping ketentuan-ketentuan hukum masing-masing agama dan kepercayaan, dalam Pasal 6 dan Pasal 7 Undang-Undang No. 1 Tahun 1974 tentang Perkawinan menentukan syarat-syarat perkawinan sebagai berikut:

1. Perkawinan harus didasarkan atas persetujuan kedua calon mempelai. Jadi dalam perkawinan ada kebebasan kehendak dan dihindari adanya unsur paksaan.
2. Seorang yang belum mencapai umur 21 (dua puluh satu) tahun harus mendapat izin dari orang tuanya. Ketentuan itu menegaskan bahwa bagi mereka yang berumur 21 (dua puluh satu) tahun ke atas tidak memerlukan izin dari orang tuanya. Sedangkan menyimpang dari umur-umur disebutkan diatas, dapat meminta dispensasi dari pengadilan atau pejabat lain yang ditunjuk oleh kedua orang tua pihak perempuan maupun pihak lelaki.

Dalam Undang-Undang No. 1 Tahun 1974 tentang Perkawinan ditentukan bahwa untuk pihak pria sudah mencapai umur 19 (sembilan belas) tahun, dan untuk pihak perempuan sudah mencapai umur 16 (enam belas) tahun.

3. Jika salah satu dari kedua orang tua meninggal dunia atau tidak mampu menyatakan kehendaknya, izin cukup diperoleh dari orang tua yang mampu menyatakan kehendaknya.
4. Jika kedua orang tua meninggal dunia atau tidak mampu menyatakan kehendaknya izin diperoleh dari wali orang yang memelihara atau keluarga yang mempunyai hubungan darah dalam garis keturunan lurus keatas selama mereka masih hidup dan dalam keadaan dapat menyatakan kehendaknya.
5. Dalam hal terjadi perbedaan pendapat diantara mereka atau jika seorang atau lebih diantara mereka tidak menyatakan pendapatnya, maka pengadilan dalam daerah hukum tempat tinggal orang yang akan melangsungkan perkawinan

atas permintaan orang tersebut dapat memberikan izin setelah lebih dahulu mendengar orang-orang yang disebutkan diatas.

6. Hal-hal yang disebutkan dimuka angka 1 (satu) sampai 5 (lima), berlaku sepanjang hukum masing-masing agama dan kepercayaan tida menentukan lain.⁴

Untuk mengetahui asas-asas yang terkandung dalam Undang-Undang No. 1 Tahun 1974 tentang Perkawinan dapat kita perhatikan Penjelasan Umum sub 3 yang pada pokoknya adalah⁵:

1. Undang-Undang No. 1 Tahun 1974 tentang Perkawinan menampung didalamnya unsur agama dan kepercayaan masing-masing anggota masyarakat yang bersangkutan.
2. Adanya *asas equilibrium* antara temporal dan kerohanian yang dapat kita simpulkan dari tujuan perkawinan yaitu untuk membentuk keluarga yang bahagia dan kekal,
3. Dalam Undang-Undang ini juga terdapat asas agar setiap perkawinan merupakan tindakan yang harus memenuhi syarat administrasi dengan jalan pencatatan pada catatan yang ditentukan oleh Undang-Undang artinya sebagai akte resmi yang termuat dalam catatan pemerintahan.
4. Adanya asas monogami akan tetapi tidak menutup kemungkinan untuk poligami jika agama yang bersangkutan mengizinkan untuk itu akan tetapi untuk pelaksanaannya harus melalui beberapa ketentuan sebagai persyaratan yang diatur dalam Undang-Undang ini.
5. Perkawinan harus dilakukan oleh pribadi-pribadi yang matang jiwa raganya.
6. Kedudukan suami istri dalam kehidupan keluarga adalah seimbang baik dalam kehidupan rumah tangga maupun dalam pergaulan kemasyarakatan.

⁴Wienarsih Imam Subekti dan Sri Soesilowati Mahdi, *loc. cit.*, hal.14.

⁵*Ibid.*, hal.44.

Undang-Undang No. 1 Tahun 1974 tentang Perkawinan menganut asas monogami, yaitu suatu perkawinan antara seorang pria dan seorang wanita sebagai istri dan seorang wanita hanya boleh mempunyai seorang suami. Namun demikian, undang-undang ini juga membuka kemungkinan seorang pria memiliki lebih dari seorang istri (poligami), namun untuk dapat melakukannya seorang pria harus mempunyai alasan-alasan yang kuat dan diterima oleh hukum yang berlaku.⁶

2.2 Akibat Perkawinan

2.2.1 Hubungan Antara Suami Istri Itu Sendiri

Perkawinan membuat seorang laki-laki yang menjadi suami memperoleh hak-haknya sebagai seorang suami dalam keluarga tersebut. Begitu juga dengan seorang wanita yang mengikatkan diri menjadi istri dalam suatu perkawinan maka wanita tersebut memperoleh hak-haknya sebagai seorang istri dalam keluarga tersebut.

Dengan dilangsungkannya pernikahan mengakibatkan hak dan kewajiban antara suami istri Pasal 30-34 Undang-Undang No. 1 Tahun 1974 tentang Perkawinan⁷:

1. Menegakkan rumah tangga, yaitu berusaha menciptakan rumah tangga yang utuh sebagai yang diatur dalam Pasal 30: Suami istri memikul kewajiban yang luhur untuk menegakkan rumah tangga yang menjadi sendi dasar dari susunan masyarakat, sesuai tujuan perkawinan yang diatur dalam Pasal 1 Undang-Undang No. 1 Tahun 1974 tentang Perkawinan.

⁶Martiman Prodjohamidjojo, *Hukum Perkawinan Indonesia*, cet. II, (Jakarta: Indonesia Legal Center Publishing, 2007), hal.10.

⁷Wienarsih Imam Subekti dan Sri Soesilowati Mahdi, *loc. cit.*, hal.80.

Hal ini penting untuk membentuk keluarga yang harmonis, sehingga tingkah laku suami istri tersebut dapat menjadi teladan anak-anaknya dan masyarakat sekelilingnya.

2. Suami sebagai kepala rumah tangga, istri adalah ibu rumah tangga sebagaimana diatur dalam Pasal 31: Hak dan kedudukan istri adalah seimbang dengan hak dan kedudukan suami dalam kehidupan rumah tangga dan pergaulan hidup bersama dalam masyarakat, masing-masing berhak melakukan perbuatan hukum. Kedudukan suami adalah sebagai kepala rumah tangga dan istri sebagai ibu rumah tangga.

Kedudukan suami istri adalah seimbang dalam rumah tangga, jadi istri cakap melakukan tindakan hukum sendiri, sehingga sifat hubungan hukum antara suami istri adalah bersifat individual. Dalam hal ini kedua pihak antara suami istri, masing-masing cakap bertindak, dapat dimintai pertanggung jawaban terhadap rumah tangga dan keluarganya. Hanya saja di dalam peraturan ini diatur pembagian tugas antara suami istri sesuai dengan kodratnya. Namun hal ini tidak diatur secara kaku artinya tidak terdapat perbedaan antara laki-laki dan perempuan dalam tugas dan tanggung jawab. Suami dan istri adalah dua komponen yang sama pentingnya dalam melaksanakan fungsi keluarga, tidak ada dominasi dan supremasi diantara keduanya baik dalam pembinaan rumah tangga itu sendiri maupun pembinaan keturunan sebagai pewaris generasi yang akan datang.

Di sini istri sudah ditempatkan sebagai manusia yang memiliki budi nuraini yang baik ditinjau dari segi kemanusiaan itu sendiri maupun dari sudut kehidupan sosial.

3. Suami istri harus mempunyai tempat tinggal (domisili) dan istri harus ikut suami sebagaimana diatur dalam Pasal 32 ayat (1) : Suami istri harus mempunyai kediaman yang tetap, yang ditentukan suami istri bersama-sama.

Untuk membentuk keluarga harmonis maka suami istri harus tinggal bersama-sama dalam satu rumah, hal tersebut penting untuk saling membina anak-anak yang telah diidam-idamkan. Selain itu untuk menghindari kemungkinan-

kemungkinan yang membuat para pihak curiga sehingga menimbulkan keretakan keluarga. Kecuali dalam hal-hal dimana tempat suami mencari nafkah tidak memungkinkan membawa istri.

4. Saling mencintai, saling hormat-menghormati sebagaimana diatur dalam Pasal 33 : Suami istri wajib saling cinta mencintai, hormat menghormati, setia dan memberi bantuan lahir batin yang satu dengan yang lain.

Hal tersebut untuk menjamin keutuhan keluarga di dalam mendidik anak-anaknya, namun sayang keharusan ini tidak disertai mengatur tentang sanksi yang tegas terhadap pelanggaran yang dilakukan suami atau istri misalnya suami bersikap keras yang melampaui batas terhadap istrinya atau keluarganya.

5. Suami wajib melindungi istri, memenuhi segala keperluan hidupnya sebagaimana diatur dalam Pasal 34 ayat (1): Suami wajib melindungi istrinya dan memberikan segala sesuatu keperluan hidup berumah tangga sesuai dengan kemampuannya.

Makna dari pasal tersebut adalah agar suami selalu bertanggung jawab terhadap keperluan hidup keluarganya.

2.2.2 Hubungan Hukum Antara Suami Istri Terhadap Anak

Undang-Undang No. 1 Tahun 1974 tentang Perkawinan mengatur mengenai ketentuan anak dalam perkawinan, yaitu:

1. Anak yang sah dari kedua orang tuanya. Hal ini diatur dalam Pasal 42 yaitu anak yang sah adalah anak yang dilahirkan dalam atau sebagai akibat perkawinan yang sah jadi menurut Pasal 42 anak sah adalah anak yang dilahirkan dalam dan selama perkawinan yang sah sehingga anak sah itu harus dengan jelas diketahui bapak dan ibunya dimana secara hukum mereka resmi terikat dalam suatu perkawinan yang sah.
2. Anak yang hanya mempunyai hubungan perdata dengan ibu dan keluarga si ibu yang melahirkannya (Pasal 43).

Dari ketentuan diatas, penulis berpendapat seorang suami dapat melakukan penyangkalan terhadap sah atau tidaknya anak yang dilahirkan istrinya, bilamana ia dapat membuktikan bahwa istrinya tersebut telah berzinah dan anak tersebut merupakan anak akibat dari perzinahan tersebut. Yang memutuskan sah tidaknya anak tersebut adalah Pengadilan atas permintaan pihak yang berkepentingan mengucapkan sumpah.

Dalam Undang-Undang No. 1 Tahun 1974 tentang Perkawinan, ditentukan bahwa anak yang sah adalah anak yang lahir dalam atau sebagai akibat perkawinan yang sah. Bila seorang wanita mengandung akibat perzinahannya dengan orang lain, kemudian ia kawin sah dengan pria yang bukan pemberi benih kandungan wanita itu, maka jika anak tersebut lahir, anak tersebut adalah anak sah dari perkawinan wanita yang telah melaukan perzinahan dengan orang lain dan pria yang bukan pemberi benih kandungan tersebut.

Pembuktian asal-usul anak dapat dilakukan dengan akte yang dikeluarkan oleh Pejabat yang berwenang. Bila akte kelahiran tersebut tidak ada, maka Pengadilan dapat mengeluarkan penetapan asal-usul anak setelah diadakan pemeriksaan yang teliti berdasarkan bukti-bukti yang memenuhi syarat. Pembuktian bahwa asal-usul seorang anak tersebut diatur dalam Pasal 55 Undang-Undang No. 1 Tahun 1974 tentang Perkawinan.

Hak dan kewajiban antara orang tua dan anak diatur dalam Pasal 45 sampai dengan Pasal 49 Undang-Undang No. 1 Tahun 1974 tentang Perkawinan beserta penjelasannya:

1. Hak dan Kewajiban Orang Tua

- Orang tua wajib memelihara dan mendidik anak-anak mereka sebaik-baiknya. Kewajiban ini berlaku sampai anak itu kawin atau dapat berdiri sendiri.
- Anak yang belum mencapai umur 18 (delapan belas) tahun atau belum kawin, berada di bawah kekuasaan orang tuanya. Selama orang tua tidak dicabut dari kekuasaannya sebagai orang tua. Orang tua mewakili anak

tersebut mengenai perbuatan hukum di dalam dan di luar Pengadilan orang tua tidak diperbolehkan memindahkan hak atau menggadaikan barang-barang tetap yang dimiliki anaknya, kecuali apabila kepentingan anak itu menghendaki.

2. Kewajiban Anak

- Anak wajib menghormati orang tua dan mentaati kehendak mereka dengan baik, jika anak telah dewasa, ia wajib memelihara orang tua dan keluarga dalam garis lurus keatas bila mereka memerlukan bantuan, sesuai dengan kemampuannya.
- Bila mereka memerlukan bantuannya, anak bertanggung jawab terhadap kehidupan orang tua pada umurnya yang senja sesuai dengan kepribadian adat istiadat bangsa Indonesia. Anak Indonesia sesungguhnya tidak hanya wajib bertanggung jawab dan ikut bertanggung jawab terhadap orang tua, kakek dan nenek baik dari pihak bapak maupun pihak ibu, dalam keadaan senang atau susah, diminta atau tidak diminta, mengurus dan membantu segala sesuatu yang diperlukannya sebagai orang yang sudah tua. Anak yang tahu pada tugas dan kewajibannya terhadap orang tua adalah anak yang memahami adat.

Salah seorang atau kedua orang tua dapat dicabut kekuasaannya terhadap seorang anak atau lebih untuk waktu tertentu. Pencabutan kekuasaan orang tua diatur dalam Pasal 49 Undang-Undang No. 1 Tahun 1974 tentang Perkawinan. Pencabutan kekuasaan ini merupakan suatu upaya hukum untuk menghindari cara pengawasan orang tua yang tidak sesuai mempergunakan kekuasaan orang tuanya terhadap anak-anak mereka sehingga anak-anak akan lebih aman terlepas dari kekuasaan orang tua. Yang dimaksud dengan kekuasaan ini tidak termasuk pencabutan kekuasaan dalam hal wali nikah, pencabutan kekuasaan orang tua tersebut ditetapkan dengan putusan Pengadilan dalam hal⁸:

1. Orang tua sangat melalaikan kekuasaanya terhadap anaknya.

⁸*Ibid.*, hal 86

2. Orang tua menderita penyakit yang sangat uzur atau pun penyakit syaraf.
3. Orang tua bepergian untuk suatu jangka waktu yang tidak diketahui kapan kembalinya dan kepergiannya itupun tanpa meninggalkan atau memberitahukan kemana tujuan kepergiannya itu.
4. Orang tua berkelakuan buruk sekali.

Sesuai ketentuan Pasal 49 Undang-Undang No. 1 Tahun 1974 tentang Perkawinan, pihak yang dapat mengajukan permintaan pencabutan kekuasaan orang tua ialah orang tua yang lain, keluarga anak dalam garis lurus keatas dan saudara kandung yang telah dewasa atau pejabat yang berwenang. Meskipun kekuasaan orang tua dicabut, mereka masih tetap berkewajiban untuk memberi biaya pemeliharaan kepada anak tersebut. Pencabutan kekuasaan tersebut tidak membawa hukum yang berupa melepaskan kewajiban hukum untuk memberi biaya pemeliharaan kepada anak-anaknya. Jadi orang tua masih memiliki kewajiban untuk memberikan biaya pemeliharaan kepada anak-anak yang meliputi pemberian uang nafkah dan uang pendidikan anak tersebut. Dalam hal pencabutan kekuasaan ini, yang dihapuskannya hanya kekuasaan atas pemeliharaan anak sehingga anak tersebut dapat memiliki pengawasan dan pemeliharaan yang lebih sesuai baginya.

Menurut pendapat penulis, perwalian yang diatur dalam Undang-Undang No. 1 Tahun 1974 tentang Perkawinan adalah dalam hal kedua orang tua secara bersama-sama melakukan suatu tindakan yang semata-mata demi kepentingan si anak, meskipun secara *de facto* pelaksanaannya hanya dijalankan oleh salah seorang dari mereka itu. Hal ini berarti antara si anak dengan orang tua yang *de facto* tidak menjalankan kekuasaan atas diri si anak tetap terjalin hubungan lahir batin, dan hal tersebut memiliki pengaruh yang baik terhadap perumbuhan pribadi si anak, sehingga diharapkan keadaan perubahan dalam status hubungan orang tuanya tidak terlalu berpengaruh bagi anak tersebut.

2.2.3 Hubungan Hukum Suami Istri Terhadap Harta Benda Dalam Perkawinan

Pengertian harta perkawinan dalam Undang-Undang No. 1 Tahun 1974 tentang Perkawinan adalah harta yang timbul selama perkawinan, tidak termasuk harta yang dibawa masing-masing sebelum perkawinan berlangsung. Ketentuan-ketentuan mengenai harta suami istri ditentukan pada Pasal 35, 36, 37 Undang-Undang No. 1 Tahun 1974 tentang Perkawinan dimana asas harta perkawinan adalah segala milik yang diperoleh selama perkawinan adalah harta pencarian bersama, yang menjadi harta bersama atau syarikat.

Harta benda perkawinan dalam Pasal 35 Undang-Undang No. 1 Tahun 1974 tentang Perkawinan terdapat 2 (dua) macam, yaitu:

1. Harta bawaan, hadiah dan warisan

Harta bawaan masing-masing suami istri dan harta benda yang diperoleh masing-masing sebagai hadiah atau warisan, berada dibawah penguasaan masing-masing suami dan istri, sepanjang kedua pihak tidak menentukan lain.

Terhadap harta bawaan masing-masing itu, suami dan istri mempunyai hak sepenuhnya untuk melakukan perbuatan hukum mengenai hartanya, seperti menjual menghibahkan, dan lain-lain.

2. Harta yang diperoleh selama masa perkawinan

Harta benda yang diperoleh selama masa perkawinan menjadi harta bersama suami istri. Terhadap harta bersama itu suami dan atau istri dapat bertindak atau melakukan perbuatan hukum atau persetujuan kedua belah pihak.

Hak suami istri atas harta bersama, diatur dalam Pasal 36 ayat (1) Undang-Undang No. 1 Tahun 1974 tentang Perkawinan, dimana disebutkan bahwa mengenai harta bersama, suami istri dapat bertindak atas persetujuan kedua belah pihak:

- a. Suami dapat bertindak atas harta bersama setelah ada persetujuan istri.

- b. Istri dapat bertindak atas harta bersama setelah mendapat persetujuan dari suami.

Bila perkawinan putus karena perceraian, harta bersama diatur menurut hukumnya masing-masing. Yang dimaksud dengan hukumnya masing-masing ialah hukum agama, hukum adat atau hukum yang hidup lainnya.

2.3 Putusnya Hubungan Perkawinan karena Perceraian

Pasal 38 Undang-Undang No. 1 Tahun 1974 tentang Perkawinan menentukan bahwa perkawinan dapat putus karena:

1. Kematian
2. Perceraian
3. Atas keputusan pengadilan

Dari ketentuan putusnya perkawinan karena kematian dalam Pasal 38 Undang-Undang No. 1 Tahun 1974 tersebut, penulis berpendapat dengan meninggalnya salah seorang diantara suami istri maka dengan sendirinya putuslah ikatan perkawinan, dan hal tersebut tidak akan menimbulkan banyak permasalahan. Namun lain halnya apabila putusnya perkawinan disebabkan oleh perceraian atau atas Putusan Pengadilan, bila hal tersebut yang menyebabkan suatu perkawinan berakhir maka dapat timbul beberapa permasalahan yang harus diselesaikan oleh pihak suami dan istri.

Secara teoritis putusnya perkawinan atas putusan pengadilan dengan putusnya perkawinan karena perceraian tidak ada perbedaannya karena putusnya perkawinan karena perceraian harus pula berdasarkan atas Putusan Pengadilan, letak perbedaannya disini adalah pada alasan yang mendasarnya.⁹

Pada putusnya perkawinan atas dasar Keputusan Pengadilan Undang-Undang No. 1 Tahun 1974 tentang Perkawinan tidak memuat alasan-alasan yang tertentu

⁹*Ibid.*, hal.129

dan putusan pengadilan tersebut bersifat deklaratif. Alasan yang bisa dipergunakan adalah karena ketidakmampuan memberi nafkah dan karena suami atau istri hilang tidak tahu kemana perginya dan adanya persangkaan bahwa pihak yang hilang itu sudah meninggal dunia. Untuk alasan salah satu pihak hilang atau tidak tahu dimana keberadaannya tersebut, harus kita bedakan dengan alasan meninggalkan tempat kediaman bersama selama dua tahun berturut-turut tanpa izin dari salah satu pihak, dimana bila salah satu pihak hilang terjadi dalam hal perginya salah satu pihak tersebut diketahui dan atas persetujuan bersama suami istri namun dalam kepergiannya tersebut terjadi suatu hal yang mungkin menyebabkan pihak yang pergi tersebut tidak dapat memberikan kabar sehingga tidak dapat diketahui lagi keberadaannya¹⁰.

Putusnya perkawinan yang disebabkan oleh perceraian dapat dilakukan di depan sidang pengadilan, dimana salah satu pihak yang menghendaki perceraian harus mengajukan gugatan perceraian kepada Pengadilan. Pasal 39 Undang-Undang No. 1 Tahun 1974 tentang Perkawinan berbunyi:

1. Perceraian hanya dapat dilakukan di depan Sidang Pengadilan setelah Pengadilan yang bersangkutan berusaha dan tidak berhasil mendamaikan kedua belah pihak.
2. Untuk melakukan perceraian harus ada cukup alasan, bahwa antara suami istri itu tidak akan dapat hidup rukun sebagai suami istri.
3. Tata cara perceraian di depan sidang Pengadilan diatur dalam peraturan perundang-undangan tersendiri.

Putusnya hubungan perkawinan karena perceraian, dilakukan dengan mengajukan tuntutan perceraian itu pada Pengadilan oleh salah satu pihak, dimana bagi yang beragama Islam tuntutan perceraian diajukan kepada Pengadilan Agama dan mulai berlaku terhitung sejak saat dijatuhkannya Putusan putusnya perkawinan oleh Pengadilan Agama dan memiliki kekuatan hukum tetap sesuai dengan ketentuan yang telah diatur dalam Pasal 35 dan Pasal 36 Peraturan

¹⁰*Ibid.*

Pemerintah No. 9. Sedangkan bagi mereka yang non muslim putusan dijatuhkan oleh Pengadilan Negeri dan dihitung sejak tanggal hari pendaftaran putusan yang berkekuatan hukum tetap didaftarkan pada daftar pencatatan oleh pegawai tercatat. Alasan-alasan yang dapat dipergunakan untuk mengajukan tuntutan perceraian sesuai dengan Pasal 19 Peraturan Pemerintah No. 9 Tahun 1975 adalah:

1. Salah satu pihak berbuat zinah atau menjadi pemabuk, pematat, penjudi dan lain sebagainya yang sukar disembuhkan.
2. Salah satu pihak meninggalkan yang lain selama 2 (dua) tahun berturut-turut tanpa izin pihak yang lain dan tanpa alasan yang sah atau karena hal lain diluar kemauannya.
3. Salah satu pihak mendapat hukuman penjara 5 (lima) tahun atau hukuman yang lebih berat setelah perkawinan berlangsung.
4. Salah satu pihak melakukan kekejaman atau penganiayaan berat yang membahayakan terhadap pihak yang lain.
5. Salah satu pihak mendapat cacat badan atau penyakit yang mengakibatkan tidak dapat menjalankan kewajiban sebagai suami/istri.
6. Antara suami dan istri terus menerus terjadi perselisihan dan pertengkaran dan tidak ada harapan akan hidup rukun lagi dalam rumah tangga.

Hal diatas telah diterapkan dalam Undang-Undang No. 1 Tahun 1974 tentang Perkawinan dan dituntut agar perceraian dijamin tidak terjadi dengan sewenang-wenang dan agar akibat dari perceraian diatur seadil-adilnya. Yang pada pokoknya alasan itu adalah bahwa untuk bercerai harus ada keretakan dalam kehidupan perkawinan suami istri dan antara suami istri tersebut tidak akan dapat hidup rukun sebagai suami istri lagi.

Untuk menilai ada atau tidaknya sesuatu keretakan perkawinan yang tidak dapat diperbaiki lagi, dalam hal ini Hakim harus bersikap sangat berhati-hati dan harus melakukan pemeriksaan yang cermat dan teliti, agar tidak terjadi perceraian

yang tidak bermanfaat, bahkan merugikan suami istri yang bersangkutan dan anak-anak yang telah dilahirkan.¹¹

Menurut pendapat penulis, alasan-alasan perceraian yang diatur dalam Undang-Undang No. 1 Tahun 1974 tentang Perkawinan ini lebih bersifat menyempit artinya lebih menyempitkan kemungkinan bercerai, karena diberlakukannya pembatasan-pembatasan tertentu yaitu perceraian hanya mungkin terjadi dikarenakan enam alasan tersebut diatas.

Putusnya perkawinan karena perceraian mempunyai akibat hukum terhadap:

1. Janda dan duda

Pengadilan dapat mewajibkan kepada bekas suami untuk memberikan biaya penghidupan atau juga menentukan sesuatu kewajiban kepada bekas istri, maka kepentingan bekas istri pun terjamin, pemberian nafkah ini kepada bekas istri oleh bekas suaminya digantungkan pada ada atau tidaknya kebutuhan istri akan nafkah itu tanpa mempersoalkan ada tidaknya kesalahan pada istri tersebut. Undang-Undang No. 1 Tahun 1974 tentang Perkawinan dalam usahanya melindungi kepentingan anak dan bekas istri setelah perceraian lebih banyak memperlihatkan segi-segi positifnya yang menurut penglihatan kami hal itu merupakan penjelmaan dari sikap lebih terbukanya terhadap unsur-unsur prikemanusiaan (Pasal 41 a, b, c)

2. Harta Bersama

Akibat hukum terhadap harta bersama diatur menurut hukumnya masing-masing, yaitu hukum agama, hukum adat atau hukum yang lainnya (Pasal 37 Undang-Undang No. 1 Tahun 1974 tentang Perkawinan). Akibat hukum yang menyangkut harta bersama atau harta pencarian ini Undang-Undang No. 1 Tahun 1974 tentang Perkawinan menyerahkan kepada para pihak yang bercerai tentang hukum mana dan hukum apa yang berlaku dan jika tidak ada kesepakatan Hakim dapat mempertimbangkan memuat rasa keadilan yang sewajarnya. Jika tidak ada perjanjian maka masing-masing tetap memiliki

¹¹*Ibid.*, hal.132.

asalnya atau bawaannya, yang menjadi kekayaan bersama hanyalah apa yang mereka peroleh selama perkawinan, dengan usaha bersama.

3. Anak dibawah Umur

Akibat hukum terhadap anak menurut Pasal 41 a, b, c Undang-Undang No. 1 Tahun 1974 tentang Perkawinan ialah apabila terjadi perceraian, maka baik bapak atau ibu tetap berkewajiban memelihara dan mendidik anak-anaknya, meskipun secara *de facto* kekuasaan itu dipegang oleh salah seorang dari mereka, semata-mata berdasarkan kepentingan anak, bilamana terjadi perselisihan mengenai penguasaan anak-anak, Pengadilan memberikan keputusannya. Jadi bapak yang bertanggung jawab atas semua biaya pemeliharaan dan pendidikan yang diperlukan anak, bilamana bapak kenyataannya tidak dapat memberikan kewajiban tersebut maka Pengadilan dapat menentukan bahwa ibu ikut memikul biaya tersebut.

2.4 Akibat Perceraian terhadap Anak Dibawah Umur

Setelah terjadinya perceraian hak asuh akan diberikan kepada salah satu dari kedua orang tua untuk mengasuh anak akibat perceraian tersebut. Bilamana terjadi perselisihan mengenai penguasaan anak-anak, Pengadilan akan memberi keputusannya. Namun masalah perwalian ini tidak selalu harus diajukan ke Pengadilan, sebab masalah penentuan wali anak dapat diselesaikan di luar sidang seperti melalui jalan mediasi. Dalam pelaksanaannya, antara si anak dengan orang tua yang tidak menjalankan kekuasaan atas diri si anak tetap dapat terjalin hubungan lahir bathin. Hal tersebut akan memberikan pengaruh yang baik terhadap pertumbuhan pribadi si anak; dimana nantinya si anak tidak akan begitu merasakan bahwa telah terjadi perubahan dalam status hubungan orang tuanya, hal ini semata-mata dilakukan berdasarkan kepentingan anak.

Pengadilan menentukan wali anak dibawah umur setelah terjadi perceraian, apabila dimintakan oleh para pihak yang melakukan perceraian. Menurut Pasal 41 Undang-Undang No. 1 Tahun 1974 tentang Perkawinan, kedua orang tua yang

telah bercerai itu tetap berkewajiban melakukan pemeliharaan dan pendidikan si anak, semata-mata berdasarkan kepentingan anak, sedangkan pihak yang akan bertanggung jawab atas semua biaya pemeliharaan dan pendidikan anak adalah bapak namun bilamana bapak dalam kenyataannya tidak dapat memenuhi kewajiban tersebut, Pengadilan dapat menentukan bahwa ibu ikut memikul biaya tersebut.

Menurut pendapat penulis dengan berlakunya Undang-Undang No. 1 Tahun 1974 tentang Perkawinan maka ketentuan yang berlaku dalam hal perwalian didasarkan pada kepentingan anak, kepentingan disini tidak hanya kepentingan lahiriah, namun juga kepentingan bathiniah si anak. Keduanya sedapat mungkin harus terpenuhi. Dalam pemenuhan kepentingan bathiniah inilah banyak yang akan didasarkan pada hubungan psikologis. Atas pertimbangan yang berlaku di masyarakat maka ada kecenderungan untuk mengangkat ibu sebagai wali, karena anak yang masih dibawah umur masih membutuhkan perawatan dan kasih sayang ibunya, apabila secara materil kedua orang tua si anak memiliki kemampuan yang sama yaitu mampu memelihara dan mendidik anak-anaknya.

Penulis berpendapat, dilakukannya perceraian tanpa adanya suatu pengendalian yang baik akan merugikan bukan hanya bagi kedua belah pihak tetapi terutama anak-anak, karena kurangnya kasih sayang, kebutuhan-kebutuhan anak menjadi tidak terpenuhi secara wajar, yang kemudian dapat membekas hingga anak tersebut dewasa, jika perceraian itu harus terjadi, maka orang tua harus mengusahakan agar bersikap sama dalam mendidik serta memberi kasih sayang seperti saat sebelum orang tuanya bercerai.

Menurut Subekti arti perwalian adalah pengawasan terhadap anak yang dibawah umur yang tidak berada dibawah penguasaan orang tua serta pengurusan benda atau kekayaan anak tersebut diatur oleh undang-undang".¹² Dari bunyi perumusan tersebut dapat kita tarik kesimpulan bahwa anak yang berada dibawah perwalian adalah:

¹²Subekti, *op.cit.*, hal. 52.

1. Anak sah yang kedua orang tuanya telah dicabut kekuasaannya sebagai orang tua.
2. Anak sah yang orang tuanya telah bercerai
3. Anak sah yang lahir diluar perkawinan.

Menurut Undang-Undang No. 1 Tahun 1974 tentang Perkawinan, perwalian dapat terjadi karena beberapa sebab yang salah satu penyebabnya adalah perwalian terhadap anak sah yang orang tuanya bercerai, dimana pelaksanaan kekuasaan orang tua beralih kepada perwalian salah satu orang tuanya.

Jenis perwalian menurut Undang-Undang No. 1 Tahun 1974 tentang Perkawinan ada 2 (dua), yaitu¹³:

1. Perwalian testamenter (*Testamentair Voogdy*)

Perwalian yang terjadi berdasarkan wasiat baik secara tertulis maupun lisan sebagaimana diatur dalam Pasal 51 ayat (1) Undang-Undang No. 1 Tahun 1974 tentang Perkawinan.

2. Perwalian karena keputusan hakim (*Datiefve Voogdy*)

Perwalian yang diangkat oleh pejabat/Hakim, yang diatur dalam Pasal 51 ayat (2) jo. Pasal 53 Undang-Undang No. 1 Tahun 1974 tentang Perkawinan.

Pasal 50 Undang-Undang No. 1 Tahun 1974 tentang Perkawinan menentukan bahwa anak yang belum mencapai umur 18 (delapan belas) tahun atau belum pernah melangsungkan perkawinan, yang berada di bawah kekuasaan orang tua, berada di bawah kekuasaan wali dan perwalian tersebut berlaku bagi diri pribadi anak maupun harta bendanya.

¹³Wienarsih Imam Subekti dan Sri Soesilowati Mahdi, *op.cit.*, hal.117.

Adapun tujuan dari dilakukannya perwalian adalah¹⁴:

1. Memberikan pengawasan kepada anak di bawah umur 18 (delapan belas) tahun yang tidak di bawah kekuasaan orang tua.
2. Memberikan pendidikan dan pemeliharaan terhadap anak-anak yang orang tuanya dicabut sebagai orang tua.

Pasal 51 ayat (1) dan (2) Undang-Undang No. 1 Tahun 1974 tentang Perkawinan menentukan bahwa seorang wali dapat ditunjuk oleh satu orang tua yang menjalankan kekuasaan orang tua, sebelum ia meninggal, dengan surat wasiat atau dengan lisan dihadapan 2 (dua) orang saksi. Wali dapat diambil dari keluarga anak atau orang lain yang sudah dewasa, berpikiran sehat, adil, jujur dan berkelakuan baik. Bila kekuasaan wali tersebut dicabut Pengadilan menunjuk seorang lain sebagai penggantinya.

Prioritas yang dijadikan wali adalah¹⁵:

1. Keluarga yang sehat.
2. Dewasa, mereka yang telah berumur 21 (dua puluh satu) tahun dan bukan 18 (delapan belas) tahun sesuai dengan Pasal 6 ayat (2) Undang-Undang No. 1 Tahun 1974 tentang Perkawinan yang tidak berpedoman pada Pasal 47 ayat (1), hal itu karena akan janggal apabila wali pada waktu memberikan izin kawin kepada mereka yang berumur sama (18 tahun) sehingga tidak bertentangan dengan Pasal 6 ayat (4) Undang-Undang No. 1 Tahun 1974 tentang Perkawinan tentang syarat perkawinan tentang izin kawin.
3. Jujur dan adil.
4. Berkelakuan baik jadi tidak pernah mabuk maupun melakukan judi. Bila pada waktu ditunjuk dengan wasiat dia sehat, tetapi pada waktu pewaris meninggal dia jahat/sakit ingatan maka wasiat itu batal.

¹⁴*Ibid.*, hal.115.

¹⁵*Ibid.*, hal.116.

Berdasarkan Pasal 51 ayat (3), (4) dan (5) Undang-Undang No. 1 Tahun 1974 tentang seorang Wali diwajibkan untuk:

1. Mengurus anak dan harta dibawah perwaliannya dengan sebaik-baiknya dengan menghormati agam dan kepercayaan anak itu.
2. Membuat daftar harta dan mencatat perubahan-perubahan dan kepercayaan anak itu.
3. Bertanggung jawab atas harta dan menanggung kerugian yang timbul karena kesalahan atau kelalaiannya. Pengantin ditetapkan dengan putusan pengadilan, atas tuntutan anak atau keluarganya.
4. Wali tidak diperbolehkan memindahkan hak atau menggadaikan barang-barang tetap milik anak, kecuali apabila kepentingan anak itu menghendaki.

Terhadap Wali berlaku juga larangan memindahkan hak atau menggadaikan barang-barang tetap yang dimiliki anaknya yang belum berumur 18 (delapan belas) tahun atau belum pernah melangsungkan perkawinan, kecuali apabila kepentingan anak itu menghendakinya, hal ini diatur dalam Pasal 52 Undang-Undang No. 1 Tahun 1974 tentang Perkawinan. Pencabutan kekuasaan seorang Wali diatur dalam Pasal 49 Undang-Undang No. 1 Tahun 1974 tentang Perkawinan dimana dalam hal kekuasaan seorang wali dicabut, sebagaimana dimaksud oleh Pengadilan ditunjuk orang lain sebagai wali harta benda anak tersebut dengan keputusan Pengadilan yang bersangkutan dapat diwajibkan untuk mengganti kerugian tersebut.

Menurut pendapat penulis, Undang-Undang No. 1 Tahun 1974 tentang Perkawinan dalam usahanya melindungi kepentingan anak setelah perceraian lebih banyak memperlihatkan segi-segi positif yang menurut penglihatan penulis hal itu merupakan penjelmaan dari sikap lebih terbukanya hukum perkawinan Indonesia terhadap unsur-unsur prikemusiaan. Penulis juga berpendapat bahwa sebenarnya dalam pelaksanaannya terdapat kerancuan pengertian antara perwalian dan pengasuhan serta pemeliharaan anak. Masyarakat selama ini mengetahui bahwa pengasuhan dan pemeliharaan anak akibat perceraian sama artinya dengan

perwalian. Dalam kenyataannya pengasuhan dan pemeliharaan dengan perwalian memiliki arti yang berbeda, dimana pengasuhan dan pemeliharaan anak dilakukan langsung oleh salah satu orang tua dan tidak mengabaikan orang tua lainnya untuk memperoleh hak dan kewajibannya untuk memelihara anak tersebut. Sedangkan perwalian biasanya dilakukan oleh lembaga perwalian dan tidak dilaksanakan oleh orang tua.¹⁶ Menurut Undang-Undang No. 1 Tahun 1974 tentang Perkawinan, kekuasaan orang tua tetap ada meskipun orang tuanya telah bercerai dan dalam undang-undang tersebut sesuai dengan Pasal 41 (a) dan (b), yang dimaksud sebenarnya adalah ketentuan mengenai pengasuhan anak bukan perwalian anak.

Dalam ketentuan Undang-Undang Perkawinan No. 1 Tahun 1974 tentang Perkawinan, PP No. 9 Tahun 1975 tentang Pelaksana Undang-Undang Perkawinan, maupun Undang-Undang No. 23 Tahun 2002 tentang Perlindungan Anak sebenarnya tidak mengatur secara rinci mengenai hak pengasuhan anak apabila terjadi perceraian terhadap kedua orang tuanya. Undang-Undang No. 1 Tahun 1974 tentang Perkawinan hanya memberikan amanat bahwa masalah pengasuhan anak dalam perkara perceraian orang tua adalah pengasuhan anak tetap merupakan bagian dari kewajiban dan tanggung jawab suami istri terhadap anak-anak yang lahir dari perkawinan mereka. Sedangkan dalam Undang-Undang No. 23 Tahun 2002 tentang Perlindungan Anak diatur bahwa sebenarnya dalam konteks undang-undang lebih berpengaruh terhadap masalah kuasa asuh orang tua dalam hal mengasuh, mendidik, memelihara, membina, melindungi serta menumbuhkembangkan anak sesuai dengan agama yang dianutnya dan kemampuan, bakat serta minatnya.

Undang-Undang No. 23 Tahun 2002 tentang Perlindungan Anak tersebut juga mengatur masalah kedudukan anak dalam lingkup hukum yaitu masalah kedudukan anak dalam negara, sedangkan dalam Undang-Undang No. 1 Tahun 1974 tentang Perkawinan sesuai ketentuan Pasal 42 disebutkan bahwa anak yang sah adalah anak yang dilahirkan dalam atau suatu akibat dari perkawinan yang

¹⁶ Budi Susilo, *Prosedur Gugatan Cerai*, (Yogyakarta: Pustaka Yustisia, 2007), hal. 110.

sah, sehingga dalam Undang-Undang ini kedudukan anak adalah sebagai subjek hukum yang diakui dalam suatu perkawinan.

Undang-Undang No. 23 Tahun 2002 tentang Perlindungan Anak Pasal 26 diatur bahwa orang tua berkewajiban dan bertanggung jawab untuk:

1. Mengasuh, memelihara, mendidik, dan melindungi anak;
2. Menumbuhkembangkan anak sesuai dengan kemampuan, bakat, dan minatnya; dan
3. Mencegah terjadinya perkawinan pada usia anak-anak.

Setiap anak berhak untuk diasuh oleh orang tuanya sendiri, kecuali jika ada alasan dan/atau aturan hukum yang sah menunjukkan bahwa pemisahan itu adalah demi kepentingan terbaik bagi anak dan merupakan pertimbangan terakhir. Dari ketentuan tersebut dapat kita lihat bahwa walaupun diantara orang tua telah terjadi perceraian, maka kedua orang tua masih memiliki tanggung jawab untuk melaksanakan kewajiban mereka sebagai orang tua dari anak tersebut.

Ditentukan pula bahwa kedua orang tua memiliki hak yang setara dan yang sama untuk mengasuh, memelihara, merawat serta melindungi hak-hak anak. Yang paling penting adalah kemampuan orang tua untuk mengasuh dan memelihara anak. Akan tetapi putusan pengadilan tetap dapat memutuskan hak asuh anak terhadap anak apabila salah satu orang tuanya berkelakuan buruk dan melalaikan kewajibannya terhadap anak tersebut. Selain itu harus tetpa kita ingat bahwa ditentukan pula dalam Pasal 31 ayat (4) Undang-Undang No. 23 Tahun 2002 tentang Perlindungan Anak bahwa seseorang yang melaksanakan hak pengasuhan anak harus seagama dengan agama yang dianut anak yang akan diasuhnya. Diberlakukannya ketentuan ini, akan menjamin bahwa orang tua akan memberikan sang anak pendidikan mengenai agama mereka dengan baik sehingga sang anak tetap dalam melaksanakan kewajiban dalam beribadah sesuai dengan agama mereka.

BAB 3

HAK ASUH ANAK DIBAWAH UMUR AKIBAT PERCERAIAN MENURUT AUSTRALIA FAMILY ACT 1975

3.1 Pengertian Perkawinan

Undang-undang yang mengatur perkawinan di Australia adalah Undang-Undang Perkawinan tahun 1961 (Marriage Act 1961). Undang-undang ini menetapkan siapa saja yang berhak untuk menikah, yang dapat melakukan upacara perkawinan, upacara dengan cara apa yang akan dilakukan dan di mana upacara tersebut akan diselenggarakan dan bila dapat dilakukan. Semua ketentuan dalam bagian ini merujuk kepada ketentuan Undang-Undang Perkawinan tahun 1961, kecuali apabila dinyatakan lain.¹

Berdasarkan Undang-Undang Perkawinan tahun 1961 Bab I Pasal 5 ayat (1), yang dimaksud dengan perkawinan di Australia adalah; *marriage means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life*, yang artinya perkawinan adalah persatuan antara seorang pria dan wanita secara sukarela dengan pengecualian lainnya, untuk seumur hidup. Setiap orang yang telah berusia lebih dari 18 (delapan belas) tahun diperbolehkan untuk melangsungkan pernikahan (sebagaimana diatur dalam Undang-Undang Perkawinan tahun 1961, Pasal 11 ayat 23) yang mensyaratkan orang tersebut²:

1. Diperbolehkan menurut hukum yang berlaku;
2. Tidak telah menikah dengan orang lain sebelumnya;
3. Tidak di dalam suatu hubungan yang dilarang (misalnya orangtua, saudara laki-laki, saudara perempuan atau eyang) dengan pasangan yang diusulkan.

¹Legal Service Commission of South Australia, "MARRIAGE," <<http://www.lawhandbook.sa.gov.au/ch19s04.php>>, 14 Agustus 2008, diakses pada hari Selasa, 9 Juni 2009.

²*Ibid.*

Bagi orang yang belum berumur 18 (delapan belas) tahun dan berkeinginan untuk melakukan pernikahan³:

1. Mereka harus minimal berusia 16 (enam belas) tahun dan salah satu pihak lainnya berusia 18 (delapan belas) tahun;
2. Harus mendapatkan perintah/persetujuan dari hakim melalui pengadilan; dan
3. Memiliki izin tertulis dari orang tua atau wali (kecuali jika pengadilan telah memberikan izin di tempat para orang tua).

Setiap perkawinan di Australia hanya dapat terjadi antara orang yang berlawanan jenis kelamin. Secara tradisional, apa yang dimaksud dengan jenis kelamin telah bergeser definisinya ke arah ilmu biologis, akan tetapi, Pengadilan Keluarga baru-baru ini telah mengizinkan perkawinan antara perempuan-perempuan dan laki-laki ke laki-laki lainnya. Keputusan ini didasarkan pada jenis kelamin yang secara nyata-nyata, bukan biologis. Hal tersebut pun hingga saat ini masih diperdebatkan dan masih melalui proses penyelesaian⁴.

Untuk dapat berlaku secara sah, sebuah perkawinan harus dilakukan oleh pihak yang menurut hukum berwenang untuk menyelenggarakannya, yaitu:

1. Menteri agama yang terdaftar di bawah Undang-Undang; atau
2. Ketua Pengadilan Agama untuk Negara atau Wilayah di mana perkawinan dilangsungkan; atau
3. Orang yang diizinkan oleh *Commonwealth Attorney-General* (dapat kita sebut sebagai Jaksa Umum).

Perkawinan dapat dilangsungkan oleh seorang menteri agama yang terdaftar sebagai pejabat yang berwenang untuk melangsungkan perkawinan, menurut kantor pendaftaran negara, atau oleh orang lain yang diizinkan oleh Kejaksaan

³*Ibid.*

⁴*Ibid.*

Agung.⁵ Pejabat yang berwenang untuk melangsungkan suatu perkawinan sipil dikenakan biaya sendiri, sedangkan biaya yang diberikan untuk Menteri Agama biasanya dalam bentuk sumbangan. Sebelum upacara perkawinan dapat dilakukan, sebuah pemberitahuan untuk menikah harus diberikan kepada pejabat yang berwenang untuk melangsungkan pernikahan tersebut, tidak lebih dari 18 (delapan belas) bulan dan tidak kurang dari satu bulan sebelum tanggal perkawinan. Pemberitahuan harus memberikan semua rincian yang diperlukan, dan ditandatangani oleh masing-masing pihak yang hendak melangsungkan perkawinan (calon suami dan calon istri) di hadapan yang pejabat berwenang atau orang lain diizinkan oleh undang-undang [Undang-Undang Perkawinan tahun 1961 Pasal 42].⁶

Masing-masing pihak harus melengkapi dan menandatangani pernyataan yang menyatakan status perkawinan mereka saat ini dan mereka saling percaya bahwa tidak ada alasan hukum yang dapat mencegah perkawinan tersebut tidak dapat dilaksanakan. Sertifikat kelahiran, atau hal-hal tambahan lainnya (yang menunjukkan tanggal dan tempat lahir) atau, jika tidak ada, suatu deklarasi tertulis yang menurut undang-undang ini memberikan rincian deklarasi, harus dibuat.⁷

Setiap orang yang telah melangsungkan perceraian, baik janda atau duda, harus memiliki bukti berupa sertifikat dari perceraian atau kematian tersebut. Dan beberapa dari keadaan tersebut yang harus mendapatkan persetujuan yang sesuai. Dalam kasus khusus, semua atau salah satu dari persyaratan tersebut dapat disesuaikan. Walaupun sebagian besar pernikahan berlangsung di gereja atau rumah, namun pernikahan dapat dilakukan kapanpun dan dimanapun, selama terdapat dua saksi yang hadir dewasa.⁸

⁵“Legal requirements for marriage in Australia,” <<http://mag.weddingcentral.com.au/weddings/legal/australians.htm>>, diakses pada hari Selasa, 9 juni 2009.

⁶ Legal Service Commission of South Australia, *op. cit.*

⁷ *Ibid.*

⁸ *Ibid.*

Tidak ada hukum yang mewajibkan bagi pihak perempuan untuk harus merubah nama belakang perempuan dalam suatu perkawinan. Meskipun pada prakteknya, umumnya bagi seorang istri untuk mengadopsi nama keluarga dari suaminya, ia dapat terus menggunakan nama sendiri setelah perkawinan dilangsungkan jika ia menghendaknya.⁹

Sertifikat Perkawinan akan memberikan bukti bahwa telah dilangsungkannya suatu perkawinan dan diperlukan untuk berbagai tujuan, seperti memperoleh paspor, bukti surat wasiat dalam kasus dan ketika mengajukan permohonan kepada Pengadilan Keluarga di bawah Undang-Undang Hukum Keluarga tahun 1975. Pada umumnya fotokopi Sertifikat Pernikahan yang akan cukup untuk mengajukan permohonan ke Pengadilan Keluarga.¹⁰

Sertifikat Perkawinan disediakan pada hari perkawinan oleh pejabat pelangsung perkawinan dan ditandatangani oleh suami dan istri, pejabat pelangsung perkawinan dan dua saksi, yang harus berusia 18 (delapan belas) tahun atau lebih. Sertifikat ini biasanya diberikan kepada pasangan menikah setelah upacara. Pejabat pelangsung perkawinan harus menyerahkan kedua sertifikat ke kantor pendaftaran kelahiran, kematian dan Perkawinan dalam waktu empat belas hari berikutnya, untuk merekam resmi perkawinan tersebut. [Undang-Undang Perkawinan tahun 1961 Pasal 50 ayat (4)].¹¹

Pejabat pelangsung perkawinan diwajibkan untuk mengirimkan sertifikat asli perkawinan dalam waktu 14 (empat belas) hari untuk dilakukan pendaftaran ke kabupaten registrasi di negara di mana perkawinan dilangsungkan.¹²

Secara umum, sebuah perkawinan yang diselenggarakan di luar negeri diakui di Australia sebagai perkawinan yang sah apabila perkawinan tersebut sah

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² "Legal Requirements for marriage in Australia," *op.cit.*

menurut undang-undang negara di mana perkawinan berlangsung. Namun, perkawinan tidak akan berlaku di Australia, apabila¹³:

1. Salah satu orang masih menikah, yaitu sebuah perkawinan *polygamous* (poligami) [Undang-Undang Perkawinan tahun 1961 Pasal 23A ayat (1) huruf (a) dan Pasal 23B ayat (1) huruf (a)];
2. Salah satu pihak tidak memenuhi syarat minimal umur perkawinan;
3. Pihak-pihak yang dilarang untuk melangsungkan perkawinan;
4. Sebenarnya tidak ada persetujuan [Undang-Undang Perkawinan tahun 1961 Pasal 23B pasal (1) ayat (d)].

Sebuah perkawinan yang dilangsungkan di luar Australia dapat dibuktikan dengan keputusan pejabat dari kantor pendaftaran asing. Bukti yang diperlukan perkawinan asing, misalnya, seluruh permohonan yang terdapat pada Pengadilan Keluarga. Sertifikat dalam bahasa asing harus didaftarkan disertai dengan terjemahannya dan bukti terjemahan tersebut dilakukan oleh seorang penerjemah tersumpah sebagai bukti bahwa ia adalah pihak yang kompeten untuk menerjemahkannya. Jika sertifikat perkawinan asing tidak tersedia, Pengadilan Keluarga dapat menerima bukti-bukti lainnya sebagai bukti yang cukup dari sebuah perkawinan.¹⁴

Perkawinan menurut hukum Australia dapat dilakukan di luar negeri jika upacara perkawinan tersebut disaksikan oleh pejabat (biasanya seorang pejabat konsuler Australia) dan hal tersebut diatur di bawah Undang-Undang Perkawinan tahun 1961. Perkawinan tersebut dicatat dalam Daftar Perkawinan dari Luar Negeri. Akan tetapi, Departemen Luar Negeri menghentikan program pelayanan seperti ini pada Januari 1995 dan tidak diketahui apakah akan dilanjutkan kembali. Pernikahan yang dilakukan di Australia, sesuai dengan undang-undang dari negara lain pada umumnya berlaku jika dibuat di hadapan staff diplomatik atau konsuler dari negara itu dan mereka yang mematuhi aturan-aturan tentang

¹³ Legal Service Commission of South Australia, *op. cit.*

¹⁴ *Ibid.*

umur dan hubungan yang dilarang untuk melangsungkan perkawinan [Undang-Undang Perkawinan tahun 1961 Pasal 55].¹⁵

Selain itu ditentukan juga bahwa dengan adanya ikatan perkawinan tersebut, tidak memberikan hak kepada suami atau istri untuk melakukan hubungan seksual. Seseorang dimungkinkan untuk divonis dari pelanggaran seksual pada pasangannya apabila pasangan tersebut melakukan hubungan seksual dengan pemaksaan. Juga, suatu pasangan yang secara seksual merasa diserang oleh pihak lainnya dapat melakukan penuntutan atas dasar penyerangan.¹⁶

3.2 Akibat Perkawinan

Setiap pihak dalam perkawinan ini memiliki hak dan kewajiban¹⁷:

1. Kewajiban untuk menjaga persatuan pernikahan;
2. Kewajiban untuk memberikan perawatan dan pembiayaan untuk anak-anak di perkawinan;
3. Persamaan hak dalam menjalankan urusan rumah tangga;
4. Hak untuk terlibat secara sendiri dalam aktivitas, pekerjaan atau kegiatan sosial;
5. Bagi perempuan, hak untuk menggunakan namanya dan nama keluarga sendiri.

Wanita yang telah menikah mampu untuk¹⁸:

1. Memperoleh, memiliki atau menjual properti;

¹⁵*Ibid.*

¹⁶*Ibid.*

¹⁷“Marriage Introduction-Rights and Duties of Husband and Wife,” <<http://www.wvlegal.com/module-guides-viewpage-pageid-95.html>>, 1 Januari 2001, diakses pada hari Selasa, 9 Juni 2009.

¹⁸*Ibid.*

2. Dapat bertanggung jawab atas kerugian apapun, kontrak, hutang atau kewajiban;
3. Menggugat atau digugat atas nama sendiri;
4. Berkedudukan sebagai subjek pada undang-undang kepailitan dan penegakan hukum atau putusan.

Pada kepailitan seorang suami, setiap pinjaman yang dilakukan oleh istrinya kepadanya untuk kepentingan atau kegiatan usahanya adalah¹⁹:

1. Tunduk kepada kreditur memiliki prioritas;
2. Kembali sebagai deviden dari estate .

Biaya rumah tangga yang diberikan oleh seorang suami (dalam tidak adanya kesepakatan yang bertentangan)²⁰:

1. Dimiliki oleh kedua belah pihak sama-sama, dan
2. Setiap properti yang didapat dari uang seperti itu juga dimiliki kedua belah pihak sama pembagiannya.

Hadiah yang diberikan oleh suami terhadap istri menjadi milik istri sepenuhnya. Tetapi di saat suami berurusan dengan hadiah seperti hak nya istri (dengan menjual, menginvestasi atau menggadaikan), maka dalam hal dimuka kreditur suami, hal tersebut akan tetap dianggap sebagai milik suami. Selain itu masing-masing pihak akan terus bertanggung jawab atas semua hutang dan kewajiban kontrak sebelum dia menikah.²¹

Setiap pihak memiliki hak untuk melakukan tindakan melawan pihak lainnya bila pihak lain tersebut menimbulkan kerugian, namun Pengadilan dapat menunda

¹⁹*Ibid.*

²⁰*Ibid.*

²¹*Ibid.*

melakukan tindakan jika pada kenyataannya tidak ada pihak yang akan menderita kerugian.²²

3.3 Putusnya Hubungan Perkawinan karena Perceraian

Hukum keluarga merupakan hukum yang khusus menangani masalah seputar perceraian, anak, dan harta. Sebagian besar masalah kekeluargaan di Australia telah dilindungi oleh Undang-Undang Keluarga tahun 1975 (*Family Law Act 1975*). Bahkan walaupun belum terbentuk suatu ikatan perkawinan, Undang-Undang Keluarga tahun 1975 akan tetap berlaku dalam setiap sengketa yang menyangkut anak. Perceraian menyebabkan hilangnya hubungan hukum yang ditimbulkan dari perkawinan.

Semua perceraian di Australia diselesaikan oleh *Federal Magistrates Court* (Pengadilan Federal Perkawinan). Sepasang suami istri harus hidup terpisah selama dua belas bulan dan tidak memiliki kemungkinan untuk rujuk, sebelum mereka mengajukan cerai. Ini menggambarkan bahwa perkawinan telah mengalami keretakan yang tak mungkin diperbaiki, yang merupakan alasan utama menurut Undang-Undang Keluarga tahun 1975. Tidak menjadi suatu masalah siapa yang salah ataupun jika salah seorang dari mereka tidak ingin bercerai. Jangka waktu dua belas bulan dimulai sejak hari pertama mereka berpisah. Salah seorang dari mereka biasanya tidak perlu memberitahu bahwa mereka sudah berpisah.²³

Perpisahan tidak secara otomatis berlaku jika dikarenakan alasan pindah tempat kerja, sakit, atau sedang dalam tahanan, selama mereka masih saling memperlakukan satu sama lain sebagai suami istri, secara hukum mereka tidak dianggap berpisah. Dalam situasi seperti ini salah seorang dari mereka harus mengabari pasangannya bahwa perpisahan mereka sudah terjadi sebelum jangka waktu dua belas bulan dimulai. Walaupun demikian jika terbukti salah seorang

²²*Ibid.*

²³Legal Service Commission of South Australia, "SEPARATION AND DIVORCE," <<http://www.lawhandbook.sa.gov.au/ch19s05.php>>, 18 Juli 2006, diakses pada hari Selasa, 9 Juni 2009.

dari mereka sudah tinggal bersama orang lain atau tidak ada lagi hubungan yang dilakukan secara rutin, maka pengadilan menganggap bahwa perpisahan sudah terjadi.²⁴

Sepasang suami istri dapat hidup terpisah dalam satu atap, tetapi harus menunjukkan bahwa salah satu dari mereka atau keduanya sudah tidak bersama lagi, dan mereka hidup mandiri tanpa tergantung satu sama lain. Karena setiap hubungan suami istri berbeda-beda, fakta yang ada menunjukkan bahwa perpisahan dalam satu atap selalu bervariasi pada setiap kasus.²⁵

Walaupun hidup terpisah, pihak-pihak yang terkait dengan dengan perkawinan tetap memiliki hak dan kewajiban tertentu. Contoh, kedua orang tua tersebut tetap memiliki tanggung jawab yang sama terhadap anak, sampai terdapat sebuah putusan pengadilan. Jika kedua orang tua tidak sepakat dengan masalah pengasuhan anak, maka salah satu dari mereka dapat mengajukan sengketa tersebut ke pengadilan, untuk menentukan mengenai pihak yang nantinya akan berkomunikasi, memiliki satu tempat tinggal dengan anak, atau masalah lainnya untuk selanjutnya akan dilakukan proses dan dikeluarkan suatu putusan. Orang tua yang hidup dengan si anak dapat meminta tolong kepada Lembaga Perlindungan Anak untuk membiayai biaya yang seharusnya ditanggung oleh pasangannya, bila memenuhi ketentuan tertentu. Setiap orang yang peduli dengan perawatan sang anak, berhak untuk menuntut pembiayaan anak kepada salah seorang dari orang tuanya.²⁶

Setelah berpisah, seseorang dapat membagi harta mereka sendiri, dan memperoleh persetujuan dari pengadilan. Atau dapat juga dengan cara lain, dimana salah seorang dari mereka dapat mengajukan kepada pengadilan untuk membagi masalah harta, sesuai dengan ketentuan dalam bagian harta. Jika salah seorang dari mereka mengancam untuk menyerang pasangan mereka atau sang

²⁴*Ibid.*

²⁵*Ibid.*

²⁶Legal Service Commission of South Australia, "Rights and duties during separation," <<http://www.lawhandbook.sa.gov.au/ch19s05s01.php>>, 18 Juli 2006, diakses pada hari Selasa, 9 Juni 2009.

anak, maka baik *Family Law Court* atau *Magistrates Court* dapat membuat surat peringatan untuk menghentikan tindakan tersebut.²⁷

Menurut pendapat penulis, suami atau istri yang berniat untuk berpisah namun tetap tinggal dalam satu atap harus memastikan bahwa pasangan mereka sadar bahwa mereka sudah berpisah, karena dalam kondisi tertentu pengadilan membutuhkan keterangan tertulis dari kedua pasangan tersebut dan juga dari lingkungan sekitar, teman serta kerabat, yang menyatakan bahwa mereka sudah berpisah. Walaupun tidak harus, tetapi akan lebih baik jika salah seorang dari mereka mengatakan bahwa perkawinan mereka sudah berakhir kepada pasangannya, agar tidak terjadi kebingungan serta kesalahpahaman di antara mereka sendiri.

Pada umumnya tidak dibutuhkan pengacara untuk melalui suatu proses perceraian. Jika dalam perceraian tersebut tidak terjadi pertentangan dan tidak terjadi sengketa masalah anak, maka perceraian tersebut hanya membutuhkan prosedur yang sederhana untuk selanjutnya akan diajukan suatu permohonan ke *Federal Magistrates Court Australia*. Lokasi *Federal Magistrates Court Australia* tersebut terletak pada lokasi yang sama seperti Pengadilan Federal lainnya. Lokasi utamanya adalah Melbourne, Dandenong, Sydney, Adelaide, Brisbane, Cairns, Canberra, Darwin, Launceston, Hobart, Newcastle, Parramatta, Perth dan Townsville. Biaya pengadilan dapat ditangguhkan jika si pemohon memiliki masalah keuangan.²⁸

Perceraian yang terjadi di Australia terjadi jika tidak dapat diselesaikannya suatu perpecahan dalam suatu perkawinan. Hal ini dapat dilihat dari perpisahan dalam jangka waktu 12 (dua belas) bulan dengan tidak menunjukkan adanya kemungkinan rekonsiliasi. Jangka waktu 12 (dua belas) bulan tersebut harus

²⁷*Ibid.*

²⁸Legal Service Commission of South Australia, "Applying for a divorce," <<http://www.lawhandbook.sa.gov.au/ch19s05s02.php>>, 13 Agustus 2008, diakses pada hari Selasa, 9 Juni 2009.

terjadi secara terus menerus atau total waktu 12 (dua belas) bulan dengan diselingi satu waktu rekonsiliasi yang kurang dari 3 (tiga) bulan.²⁹

Permohonan perceraian di Australia diajukan ke Pengadilan Keluarga oleh salah satu atau kedua belah pihak dalam perkawinan. Perceraian dapat dilakukan hanya bila salah satu pihak menginginkan. Permohonan cerai dapat dilakukan bagi pernikahan yang dilakukan di Australia maupun di luar Australia dengan syarat salah satu dari pihak suami atau istri merupakan warga negara Australia atau berdomisili di Australia, atau telah menjadi penduduk Australia selama 1 (satu) tahun. Permohonan harus diajukan setelah perpisahan selama 12 (dua belas) bulan terjadi dan pada umumnya gugatan akan diproses dalam jangka waktu 2 (dua) bulan setelah diajukannya gugatan.³⁰

Orang yang menikah kurang dari dua tahun tidak dapat mengajukan perceraian, kecuali³¹:

1. Memperoleh sertifikat dari konsultan perkawinan bahwa mereka telah menghadiri konseling perkawinan dan pernah mempertimbangkan untuk rujuk.
2. Walaupun kedua pasangan belum mempertimbangkan untuk rujuk, pengadilan membutuhkan alasan yang khusus mengapa mereka harus melanjutkan proses peradilan [Undang-Undang Keluarga tahun 1975 Pasal 44 ayat (1) huruf (B) dan pasal 44 ayat (1) huruf (C)].

Salah satu dari kedua pasangan dapat mengajukan cerai, dan tidak akan menjadi sebuah permasalahan siapa yang tidak setuju atau siapa yang menjadi penyebab hal tersebut terjadi. Mereka juga dapat mengajukan permohonan perceraian secara bersama. Sebelum *Federal Magistrates Court Australia* dapat memproses pengajuan cerai, harus terdapat bukti bahwa pihak-pihak yang terkait

²⁹Jeremy D. Morley, "Australia-Grounds for Divorce," <<http://www.international-divorce.com/d-australia.htm>>, diakses pada hari Senin 30 Maret 2009.

³⁰ *Ibid.*

³¹ *Ibid.*

memiliki hubungan dengan Australia. Pada saat pengajuan permohonan cerai tersebut, suami atau istri harus³²:

1. Warga negara australia, atau
2. Berdomisili di Australia , atau
3. Bertempat tinggal selama minimal dua belas bulan di australia sebelum mengajukan cerai.

Siapapun yang ingin mengajukan perceraian tanpa pengacara, pertama-tama harus memperoleh formulir kelengkapan perceraian dari *Federal Magistrates Court*. Formulir tersebut dapat diperoleh di *Family Court Registry* tanpa pungutan biaya. Seorang petugas peradilan biasanya tidak akan mengabulkan permintaan cerai kecuali jika pengaturan masalah anak telah diselesaikan untuk anak yang berusia dibawah 18 (delapan belas) tahun [Undang-Undang Keluarga tahun 1975 Pasal 55A].³³

Keterangan mengenai anak harus disertakan dalam formulir permohonan perceraian, termasuk dengan siapa dan dimana mereka tinggal, siapa yang menyokong mereka, seberapa sering mereka bertemu orang tua, berapa jumlah biaya hidup mereka, kesehatan dan proses pendidikan mereka. Petugas peradilan juga berhak menanyakan secara detail mengenai keterangan tersebut, dan jika sudah puas, dapat membuat pernyataan bahwa keterangan mengenai anak telah selesai dilaporkan³⁴.

Jika pengadilan sudah membuktikan bahwa jangka waktu dua belas bulan sudah terpenuhi dan pengaturan untuk anak sudah disiapkan, maka pengadilan

³²*Ibid.*

³³*Ibid.*

³⁴Legal Service Commission of South Australia, "Arrangements for children," <<http://www.lawhandbook.sa.gov.au/ch19s05s05.php>>, 18 Juli 2006, diakses pada hari Selasa 9 Juni 2009.

akan menjatuhkan putusan *nisi* (sementara). Pada saat ini para pihak yang terlibat dapat meninggalkan ruang pengadilan.³⁵

Putusan *nisi* akan bersifat final satu bulan setelah kedua pasangan mendapatkan putusan dalam bentuk surat. Secara teknis kedua pihak tersebut masih tetap menikah sampai ada putusan pengadilan yang sifatnya absolut, dan mereka tidak dapat menikah lagi dengan orang lain sebelum saat itu. Jangka waktu satu bulan tersebut dapat dipersingkat jika ada hal yang sifatnya mendesak.³⁶

Bagi mereka yang telah diakui menikah di bawah undang-undang Australia, suatu hubungan perkawinan hanya dapat berakhir ketika mereka bercerai. Untuk mereka yang hidup dalam suatu hubungan *de facto* (hubungan layaknya perkawinan tanpa disertai adanya surat/sertifikat perkawinan), hubungan berakhir pada akhir pemisahan. Tidak diperlukan adanya perintah pengadilan untuk mengatakan bahwa hal itu berakhir. Meskipun penting untuk mendapatkan nasihat tentang properti dan batas-waktu hak-hak pemeliharaan janda/duda sebagai berikut ini di akhir pemisahan atau perceraian.³⁷

Seseorang yang akan melakukan perceraian di Australia dapat melaksanakannya tanpa bantuan kuasa hukum ataupun dengan bantuan kuasa hukum mereka masing-masing, atau contohnya di wilayah Brisbane kita dapat mengajukan perceraian melalui bantuan *Legal Aid Community Divorce Scheme*, atau dalam hal-hal tertentu mengajukannya melalui *Legal Aid Queensland* yang akan berperan sebagai pendamping.³⁸

³⁵Legal Service Commission of South Australia, "Divorce Decree," <<http://www.lawhandbook.sa.gov.au/ch19s05s06.php>>, 18 Juli 2006, diakses pada hari Selasa 9 Juni 2009.

³⁶*Ibid.*

³⁷Stephen Page, "Australian Divorce Blog - Going to Court," <<http://australiandivorce.blogspot.com/search/label/Divorce>>, 15 Januari 2009, diakses pada hari Jumat, 22 Mei 2009.

³⁸*Ibid.*

Dalam suatu perceraian perihal yang mungkin dipermasalahkan dapat dikategorikan ke dalam tiga macam³⁹:

1. Harta benda;
2. Biaya pemeliharaan bagi janda/duda (walaupun ini tidak berlaku dalam semua hubungan);
3. Biaya pemeliharaan anak.

Dalam permasalahan penyelesaian sengketa harta benda dalam perkawinan biasanya dapat diselesaikan tanpa melalui jalur pengadilan. Kebanyakan, orang yang mencapai kesepakatan menggunakan bantuan jasa dari pengacara mereka masing-masing. Meskipun beberapa orang yang mengatakan bahwa hukum keluarga merupakan permasalahan hubungan internal, bukan merupakan permasalahan hukum, penyelesaian harta benda secara informal dapat mengakibatkan kesulitan keuangan. Seringkali penyelesaian sengketa harta benda secara formal diperlukan untuk memberikan perlindungan bagi pembebasan bea materai, pajak pertambahan modal, atau untuk kepastian keuangan.⁴⁰

Dalam hal hak pengasuhan anak, sebagian besar orang tua mencari jalan keluarnya apabila telah terjadi putusnya perkawinan, tanpa melibatkan pengacara. Dengan pengecualian untuk dugaan kasus yang melibatkan kekerasan domestik atau penyalahgunaan anak, atau dalam kasus-kasus tertentu yang mendesak harus diselesaikan maka keterlibatan seorang pengacara tidak dapat dihindari.⁴¹

Undang-Undang Keluarga tahun 1975 yang menyatakan bahwa sebelum pihak-pihak yang berkepentingan mengambil jalur pengadilan terdapat penyelesaian sengketa yang dapat digunakan terlebih dahulu adalah jalur konseling atau mediasi. Namun apabila hal tersebut tidak dapat berhasil maka

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

para pihak akan mempuh jalur pengadilan. Banyak kehidupan rumah tangga di Australia melibatkan penggunaan kekerasan dalam rumah tangga. Karena itu untuk menyelesaikan permasalahan tersebut dan untuk mengedepankan keamanan seluruh anggota keluarga yang terlibat maka terkadang diperlukan keterlibatan pengadilan dalam penyelesaian masalah tersebut.⁴²

3.4 Akibat Perceraian terhadap Anak dibawah Umur

Sebagian besar perkawinan yang berakhir dengan perceraian melibatkan anak dibawah umur. Selama ini, anak dibawah umur yang terlibat dalam perceraian tersebut selalu mengalami perdebatan orang tua yang tidak sehat, mereka tidak memiliki kesempatan untuk melalui perdebatan antar orang tua yang berlangsung sehat dan baik bagi mereka. Perdebatan yang panjang dan tidak berlangsung dengan baik masih sangat sering terjadi.⁴³

Namun Deborah Clemmensen, seorang ahli psikologi khusus anak-anak berpendapat bahwa⁴⁴:

“In spite of all evidence of high conflict everywhere, there's a thread of a better way to do this. There's a belief that there can be more respectful and dignified ways to relieve conflict. The minute you start on that path, you keep going. The path includes these three ideals:

1. *Keep families out of court*

The legal system, it turns out, is a terrible place for children and their divorcing parents, not only according to psychologists, but judges and lawyers, too. Divorce cases aren't like fine wines, improving with age. They turn uglier and more expensive, until any chance for kindness or reconciliation is crushed. The goal: Get families in and out as quickly as possible, using mental health professionals and mediators to uncover emotional landmines and detonate them quickly.

⁴² *Ibid.*

⁴³ Stephen Page, *op. cit.*

⁴⁴ *Ibid.*

2. *Minimize custody evaluations*

These evaluations are generally brutal on kids. They take up to four months and include interviews with both parents, the children, teachers, observations at school and the opening of school and medical records. The goal: Avoid evaluations in all but the most complicated cases. Give parents options and encourage them to decide what's best for their children with parenting time and other issues.

3. *Emphasize that divorcing parents can still be excellent co-parents.*

Divorced couples are often much better at being good co-parents living separately than being in a marriage that made them unhappy. The goal: Give couples a chance to feel proud and successful as co-parents.”

Adapun arti dari pendapat tersebut adalah diluar dari segala konflik yang dapat timbul dari segala hal, masih terdapat suatu jalan yang lebih baik untuk menyelesaikan perdebatan mengenai hak asuh anak dibawah umur. Terdapat suatu pendapat yang menyatakan masih ada suatu cara untuk menyelesaikan suatu konflik dengan tetap saling menghargai dan menghormati. Saat anda mengikuti cara tersebut, anda harus tetap menjalankannya hingga tuntas. Ada pun cara tersebut terdiri dari 3 (tiga) tahap yaitu:

1. Pertahankan agar keluarga anda selalu berada diluar pengadilan

Keadaan yang melibatkan suatu sistem hukum merupakan suatu keadaan yang sangat tidak baik bagi anak dibawah umur dan orang tua mereka yang akan bercerai, pendapat tersebut tidak hanya dinyatakan bagi seorang psikolog, namun hakim dan pengacara pun berpendapat demikian. Kasus perceraian tidak seperti sebuah minuman anggur yang semakin lama semakin membaik rasanya. Perceraian akan berlangsung semakin buruk dan biaya yang dikeluarkan pun semakin tinggi hingga adanya suatu kesempatan perbaikan atau rekonsiliasi menjadi hilang. Tujuannya: Usahakan agar keluarga masuk dan keluar dari situasi peradilan secepat mungkin, melibatkan seorang ahli kesehatan jiwa dan mediator untuk dapat mengeluarkan suatu emosi yang terpendam dan menghilangkannya dengan segera.

2. Minimalkan evaluasi mengenai hak asuh.

Evaluasi ini pada umumnya sangat buruk bagi seorang anak dibawah umur. Evaluasi ini menghabiskan waktu hingga 4 (empat) bulan, termasuk kegiatan mewawancarai kedua orang tua, anak-anak dibawah umur tersebut, guru, mempelajari lingkungan di sekolah dan mempelajari catatan perkembangan prestasi sekolah dan kesehatan anak tersebut. Tujuannya: hindari segala bentuk evaluasi. Berikan orang tua pilihan dan dorongan agar mereka dapat memutuskan apa yang terbaik bagi anak-anak mereka mengenai waktu bagi orang tua dan masalah-masalah lainnya.

3. Yakinkan bahwa orang tua yang bercerai tetap dapat saling bekerja sama dengan baik

Pasangan yang bercerai terkadang dapat menjadi pasangan yang lebih baik dalam menjalankan kerjasama bagi anaknya dengan hidup berpisah dibanding tetap menikah dan membuat pasangan tersebut tidak bahagia. Tujuannya: Memberikan pasangan suatu kesempatan untuk merasa bangga dan berhasil sebagai seorang orang tua yang bekerja sama walau berpisah.

Saat dikabulkan suatu permohonan perceraian, Pengadilan harus telah mendapat suatu keyakinan bahwa pengaturan yang selayaknya telah dibuat untuk kepentingan seorang anak dibawah umur. Apabila terdapat anak dibawah umur dalam suatu perceraian maka salah satu orang tua harus hadir dalam pengadilan mengenai perceraian mereka tersebut. Namun apabila tidak terdapat seorang anak dibawah umur, yaitu anak yang berumur dibawah 18 (delapan belas) tahun maka kedua pihak dapat meminta agar mereka tidak harus menghadiri proses permohonan perceraian. Namun, alangkah lebih baiknya bila kedua pihak dapat hadir.⁴⁵

Apabila pengadilan mengabulkan suatu permohonan perceraian, pengadilan akan mengeluarkan suatu putusan *nisi* (sementara) dalam proses peradilan dan perkawinan secara resmi berakhir 1 (satu) bulan sesudahnya, dimana pengadilan

⁴⁵Jeremy D. Morley, *op. cit.*

akan mengirimkan putusan absolut melalui surat. Seseorang tidak dapat mengajukan permohonan untuk menikah kembali hingga suatu putusan absolut keluar.⁴⁶

Semenjak 20 (dua puluh) tahun terakhir, proporsi suatu perceraian yang melibatkan anak dibawah umur semakin menurun, walaupun penurunannya melambat beberapa tahun terakhir ini. Proporsi suatu perceraian melibatkan anak dibawah umur adalah 49,3% di tahun 2007. Anak-anak yang terimbas dampak karena suatu perceraian juga semakin menurun dari 48.396 di tahun 2006 menjadi 44.371 di tahun 2007.⁴⁷

Berdasarkan pemahaman penulis, Undang-Undang Keluarga tahun 1975 mendorong kedua orang tua untuk menyelesaikan segala masalah yang melibatkan keluarga mereka tanpa harus melalui pengadilan, dan sedapat mungkin menjalankan suatu permasalahan seperti perceraian dengan cara yang kooperatif. Selain itu Undang-Undang Keluarga tahun 1975 juga telah mengedepankan ketentuan hak asuh bersama setelah terjadinya suatu perceraian yang melibatkan anak dibawah umur.

Pengadilan Keluarga merupakan pengadilan yang akan menindaklanjuti segala hal dalam keluarga yang melibatkan seorang anak, dan tidak membedakan apakah orang tua mereka menikah mau pun tidak. Pengadilan Keluarga berada dibawah ketentuan Undang-Undang Keluarga tahun 1975 Bab VII dan segala ketentuan perundang-undangan yang mengacu kepada ketentuan tersebut kecuali ditentukan lain. Bagi pengadilan tersebut untuk memiliki yurisdiksi bagi seorang anak, anak tersebut harus berada di Australia dan merupakan Warga Negara Australia atau salah satu pihak yang mengajukan permohonan Pengadilan berdomisili di Australia. Australia tidak memiliki yurisdiksi terhadap seorang anak yang berada diluar Australia.⁴⁸

⁴⁶*Ibid.*

⁴⁷Stephen Page, *op. cit.*

Undang-undang tersebut menciptakan suatu tanggung jawab orang tua, yang ditentukan dalam Pasal 61B Undang-Undang Keluarga tahun 1975 dan termasuk segala pertanggungjawaban hukum yang diberikan kepada orang tua dalam hubungannya dengan anak-anak mereka. Setiap orang tua pada umumnya bertanggung jawab atas anak mereka hingga umur 18 (delapan belas) tahun (atau lebih cepat bila anak tersebut telah menikah).⁴⁹

Pada umumnya, orang tua yang bercerai dapat memutuskan sendiri dimanakah anak mereka akan tinggal dan permasalahan lain tentang anak tanpa harus membawa permasalahan tersebut ke dalam proses peradilan. Walau keadaan ini dapat menjadi sesuatu yang sulit dan emosional bagi mereka yang terlibat, solusi yang diraih dengan jalan ini pada umumnya lebih mudah diterima bagi banyak orang dari keputusan yang dikeluarkan oleh pengadilan. Proses perolehan hak asuh anak melalui pengadilan akan lebih menimbulkan kepedihan bagi semua pihak yang terlibat, selain itu proses tersebut akan menjadi lebih terbuka bagi umum dan menghabiskan biaya yang lebih tinggi. Kedua orang tua pun terkadang dianggap mengetahui pengaturan yang lebih bagi anak mereka.⁵⁰

Putusan *Family Court* (Pengadilan Keluarga) yang mengeluarkan salah satu pihak sebagai pemenang dan pihak lainnya yang kalah juga menciptakan keadaan yang kurang baik bagi kedua pihak. Hal ini dapat kita hindari bila kedua orang tua dapat bersama-sama setuju, tanpa melibatkan pihak pengadilan, menentukan tempat yang paling baik dan ketentuan lain bagi anak dibawah umur tersebut. Jasa mediasi dan konsultasi dapat digunakan untuk membantu kedua orang tua mencapai suatu persetujuan. Pemerintahan Australia juga telah membiayai suatu *Family Relationship Centres* (Lembaga Hubungan Keluarga) untuk membantu

⁴⁸Legal Service Commission of South Australia, "CHILDREN," <<http://www.lawhandbook.sa.gov.au/ch19s07.php>>, 11 Juni 2008, diakses pada hari Selasa, 9 Juni 2009.

⁴⁹*Ibid.*

⁵⁰Legal Service Commission of South Australia, "COMING TO AN AGREEMENT," <<http://www.lawhandbook.sa.gov.au/ch19s07s01.php>>, 11 Juni 2008, diakses pada hari Selasa, 9 Juni 2009.

para orang tua mencapai suatu persetujuan mengenai anak mereka tanpa harus melalui proses peradilan.⁵¹

Apabila suatu perjanjian telah tercapai, pengadilan tidak perlu melakukan tindakan untuk meratifikasi keputusan selain itu juga tidak perlu dilakukan tindakan resmi lainnya. Suatu perjanjian dapat dilakukan tanpa tertulis, namun orang tua didorong untuk mempersiapkan ketentuan pengasuhan untuk membantu menghindari timbulnya suatu konflik. Ketentuan pengasuhan tersebut berupa perjanjian tertulis bagi kedua orang tua mengenai ketentuan yang berhubungan dengan anak dan dalam melakukan hal tersebut kedua orang tua dapat menerima bantuan yang disediakan oleh *Family Relationship Centre*. Walaupun begitu Ketentuan pengasuhan tersebut tidak memiliki kekuatan hukum bila tidak dimasukkan dalam putusan pengadilan. Setelah mencapai suatu persetujuan, beberapa orang lebih memilih untuk mengajukannya ke pengadilan untuk diberlakukan sebagai suatu perjanjian yang mengikat.⁵²

Dalam proses perceraian di Australia, pengadilan dapat mengajukan (dengan inisiatif atau dengan permintaan anak) agar anak tersebut diwakili secara terpisah [Undang-Undang Keluarga tahun 1975 Pasal 68L] dengan orang tua dan meminta sebuah lembaga bernama *Legal Services Commission* (Komisi/Lembaga Bantuan Hukum) untuk merencanakan presentasi mereka. Peran utama bagi seorang pengacara anak tersebut adalah untuk memberikan informasi mengenai segala sesuatu yang berhubungan dengan putusan pengadilan mengenai kesejahteraan sang anak. Pengacara tersebut pun dapat mengajukan pendapatnya mengenai apa yang menurutnya paling baik bagi sang anak dan dapat pula mengajukan permintaan sang anak dalam pengadilan. Hal ini diberlakukan agar peradilan dapat melakukan tindakan lebih lanjut terhadap tindakan-tindakan yang tidak diinginkan seperti dalam kasus sebagai berikut⁵³:

⁵¹*Ibid.*

⁵²*Ibid.*

1. Melibatkan adanya kemungkinan kekerasan pada anak, termasuk kekerasan fisik, seksual atau pun psikologi.
2. Adanya kemungkinan telah terjadi suatu permasalahan dengan kedua orang tua.
3. Adanya kemungkinan terdapat suatu masalah nyata menyangkut budaya atau perbedaan agama.

Pada umumnya, kedudukan bagi ayah dapat diakui oleh kedua orang tua. Pengadilan akan mengasumsikan berlakunya situasi tersebut [Undang-Undang Keluarga tahun 1975 Pasal 69R]. Seseorang akan diasumsikan sebagai seorang ayah dari anak dalam perkawinan apabila orang tersebut⁵⁴:

1. Telah menikah dan tinggal dengan sang ibu saat anak tersebut lahir [Undang-Undang Keluarga tahun 1975 Pasal 69P].
2. Telah menandatangani surat pernyataan bahwa dia adalah ayah dari sang anak dan tidak menyangkal nya [Undang-Undang Keluarga tahun 1975 Pasal 69Q].
3. Telah dinyatakan dalam akte kelahiran sang anak sebagai ayah dari anak tersebut [Undang-Undang Keluarga tahun 1975 Pasal 69T].

Permasalahan kadang timbul bilamana terdapat permintaan mengenai pembiayaan atau hubungan darah sang anak tersebut. Apabila kedudukan sang ayah merupakan suatu masalah sebelum masuk dalam *Family Court* (Pengadilan Keluarga), salah satu dari orang tua dapat meminta kepada pengadilan untuk mengeluarkan Pernyataan Kedudukan Ayah. Apabila pengadilan dapat melihat adanya suatu hubungan keluarga secara nyata maka putusan pernyataan kedudukan bagi sang ayah tersebut akan dikeluarkan oleh pengadilan. Seorang yang ingin menyangkal kedudukannya sebagai orang tua kandung seorang anak

⁵³Legal Service Commission of South Australia, "Applications by children," <<http://www.lawhandbook.sa.gov.au/ch19s07s02s02.php>>, 26 Juli 2006, diakses pada hari Selasa, 9 Juni 2009.

⁵⁴Legal Service Commission of South Australia, "Paternity," <<http://www.lawhandbook.sa.gov.au/ch19s07s02s03.php>>, 26 Juli 2006, diakses pada hari Selasa, 9 Juni 2009.

harus membuktikan kemungkinan bahwa dia bukan merupakan ayah kandung dari sang anak tersebut.

Sebelum 30 Juni 2006 terdapat 3 (tiga) jenis masalah utama dalam perceraian, yaitu⁵⁵:

1. Tempat tinggal – dengan siapakah anak akan tinggal
2. Komunikasi – dengan siapakah akan akan berkomunikasi
3. Masalah tertentu – masalah ini membahas mengenai masalah yang tidak termasuk dalam masalah tempat tinggal dan hubungan seperti pendidikan, agama dan pemeliharaan kesehatan.

Semenjak 1 Juli 2007, segala permasalahan menyangkut anak disebut sebagai ‘hak pengasuhan’. Hak pengasuhan mencakup segala aspek ketentuan pemeliharaan dan kesejahteraan anak. Saat pengadilan mengeluarkan keputusan yang menyangkut anak maka pengadilan harus selalu mempertimbangkan “kepentingan terbaik bagi sang anak” [Undang-Undang Keluarga tahun 1975 Pasal 60CA]. Pengadilan akan mengasumsikan bahwa merupakan kepentingan terbaik bagi sang anak untuk memiliki ‘hak pengasuhan anak yang seimbang’ [Undang-Undang Keluarga tahun 1975 Pasal 61DA]. Hal ini merupakan saat dimulainya bagi pengadilan untuk melakukan penilaian untuk keputusan yang nantinya akan dijatuhkan oleh pengadilan tersebut, dan dalam keadaan tertentu, hak pengasuhan anak yang seimbang tersebut tidak sesuai.⁵⁶

Hak pengasuhan anak yang seimbang merupakan keadaan dimana kedua orang tua memiliki hak asuh yang seimbang terhadap anak mereka dan memiliki hak yang seimbang pula terhadap segala keputusan penting dalam hidup anak tersebut. Bila suatu putusan pengadilan menyebutkan bahwa kedua orang tua

⁵⁵Legal Service Commission of South Australia, “Types of Applications,” <<http://www.lawhandbook.sa.gov.au/ch19s07s02s04.php>>, 26 Juli 2006, diakses pada hari Selasa, 9 Juni 2009.

⁵⁶Legal Service Commission of South Australia, “Parenting orders,” <<http://www.lawhandbook.sa.gov.au/ch19s07s04s01.php>>, 26 Juli 2006, diakses pada hari Selasa, 9 Juni 2009.

memiliki hak pengasuhan anak yang seimbang, maka kedua orang tua harus dapat saling berkomunikasi dan saling berpartisipasi dalam memutuskan suatu hal yang penting menyangkut kepentingan anak mereka tersebut. Hak pengasuhan anak yang seimbang tidak termasuk keputusan sehari-hari menyangkut sang anak seperti pakaian apa yang akan digunakan sang anak hari ini.⁵⁷

Hak pengasuhan anak yang seimbang memiliki arti yang berbeda dengan ketentuan anak menghabiskan waktu yang seimbang dengan kedua orang tua. Bila pengadilan berasumsi bahwa kedua orang tua harus memiliki hak pengasuhan anak yang seimbang, maka harus dilihat bahwa menghabiskan waktu yang seimbang dengan masing-masing orang tua akankah menjadi kepentingan terbaik bagi si anak dan juga apakah hal tersebut perlu dilakukan.⁵⁸

Bila waktu yang seimbang tidak dapat diterapkan, pengadilan harus melihat apakah 'substansial dan waktu tertentu' merupakan alternatif yang diperlukan dan merupakan kepentingan terbaik bagi sang anak. 'substansial dan waktu tertentu' berarti sang anak akan menghabiskan waktu dengan ibu atau ayah di akhir minggu, hari libur atau hari kerja sehingga terdapat suatu kesempatan untuk menghabiskan waktu saat sang anak melakukan aktivitas sehari-hari juga saat terdapat acara yang penting bagi sang anak seperti kegiatan berolahraga, ulang tahun dan aktivitas sekolah.⁵⁹

Dalam menentukan putusan harus dikeluarkan dengan memberlakukan 'waktu yang seimbang' atau 'substansial dan waktu tertentu', pengadilan akan mempertimbangkan hal-hal sebagai berikut⁶⁰:

1. Berapa jarak tempat tinggal masing-masing orang tua.
2. Setiap kemampuan orang tua untuk merawat sang anak saat itu dan saat nanti.

⁵⁷*Ibid.*

⁵⁸*Ibid.*

⁵⁹*Ibid.*

⁶⁰*Ibid.*

3. Kemampuan kedua orang tua untuk saling berkomunikasi dan memecahkan segala kesulitan yang mungkin terjadi, kesulitan tersebut termasuk yang sedang terjadi maupun yang akan terjadi.
4. Bagaimana ketentuan-ketentuan tersebut akan berpengaruh terhadap sang anak.
5. Hal lainnya yang dianggap penting bagi pengadilan.

Segala ketentuan pengadilan berhenti bila sang anak telah mencapai umur 18 (delapan belas) tahun, telah menikah atau telah diadopsi oleh orang lain. Apabila anak tersebut telah diadopsi oleh orang tua tiri, 'hak pengasuhan' tetap tidak berubah kecuali pengadilan menyetujui pengadopsian.⁶¹

Perintah pengasuhan yang menyatakan bahwa anak tersebut akan hidup dengan salah satu orang tua akan berhenti bila orang tua atau anak tersebut meninggal. Bila orang tua tersebut meninggal maka hal tersebut tidak langsung menimbulkan orang tua lainnya memiliki hak untuk tinggal dengan anak tersebut. Orang tua yang memiliki hak tersebut dapat menunjuk orang lain untuk memiliki hak tersebut sebagai wali dari anak apabila orang tua tersebut meninggal, namun cara ini tidak mengikat dan nantinya akan dianggap sebagai permintaan orang tua tersebut [Undang-Undang Keluarga tahun 1975 Pasal 63F]. Dalam keadaan terjadi suatu sengketa, orang tua yang masih hidup atau wali yang telah ditunjuk orang tua yang memiliki hak tinggal dengan sang anak dapat mengajukan kepada Pengadilan Keluarga untuk putusan baru yang penentuannya akan dipertimbangkan dari keadaan saat itu.

Pertimbangan utama bagi Pengadilan dalam mengeluarkan suatu putusan menyangkut anak adalah kepentingan terbaik bagi sang anak. Namun, terhitung sejak tanggal 1 Juli 2006, Undang-Undang Keluarga tahun 1975 telah diperbaharui untuk memperluas prinsip dari hak pengasuhan anak yang seimbang

⁶¹Legal Service Commission of South Australia, "Duration of orders," <<http://www.lawhandbook.sa.gov.au/ch19s07s04s01.php>>, 26 Juli 2006, diakses pada hari Selasa, 9 Juni 2009.

dan kepentingan keadaan yang akan berpengaruh terhadap kesejahteraan dan pertumbuhan anak.

Dalam menentukan apa yang menjadi kepentingan terbaik bagi sang anak, pengadilan harus melihat pada pertimbangan yang paling penting dan pertimbangan lainnya. Ada pun pertimbangan yang paling penting adalah⁶²:

1. Keuntungan bagi sang anak memiliki hubungan yang erat dengan kedua orang tua.
2. Anak tersebut harus dilindungi dari segala bentuk ketidakadilan.

Dalam mengeluarkan suatu putusan tentang apakah yang menjadi kepentingan terbaik bagi sang anak, Pengadilan harus berpegang pada prinsip-prinsip sebagai berikut [Undang-Undang Keluarga tahun 1975 Pasal 60B]⁶³:

1. Bahwa anak memiliki hak untuk mengetahui dan dirawat oleh kedua orang tua, diluar apakah orang tua menikah, berpisah, tidak pernah menikah atau tidak pernah tinggal bersama.
2. Bahwa anak memiliki hak untuk menghabiskan waktu dan berkomunikasi secara teratur dengan kedua orang tua dan orang lain yang berperan penting dalam perawatan, kesejahteraan dan pertumbuhan anak tersebut.
3. Kedua orang tua harus secara bersama dan sepakat untuk mengasuh anak di masa yang akan datang.
4. Anak memiliki hak untuk menikmati budaya mereka (termasuk hak untuk menikmati budaya tersebut dengan orang lain yang juga berbagi budaya yang sama).

Saat membuat suatu keputusan tentang 'hak pengasuhan', pengadilan harus memasukkan faktor-faktor sebagai berikut⁶⁴:

⁶² Legal Service Commission of South Australia, "How the court decides matters relating to children," <<http://www.lawhandbook.sa.gov.au/ch19s07s05s01.php>>, 11 Juni 2008, diakses pada hari Selasa, 9 Juni 2009.

⁶³ *Ibid.*

1. Bila pengadilan memutuskan bahwa salah satu atau kedua pihak memiliki hak pengasuhan anak yang seimbang, pengadilan juga harus mempertimbangkan apakah menghabiskan waktu dengan kedua orang tua secara seimbang merupakan hal yang sesuai dan terbaik bagi anak.
2. Saat membuat keputusan 'hak pengasuhan', pengadilan harus memperhatikan apakah orang tua dapat memenuhi tanggung jawab mereka sebagai orang tua atau tidak.
3. Orang tua harus membuat usaha yang sungguh-sungguh untuk menyelesaikan segala permasalahan sebelum mengajukan 'hak pengasuhan' kepada pengadilan. Namun terdapat pengecualian, sebagai contoh bila terdapat kekerasan dalam keluarga atau kekerasan terhadap naak tersebut atau situasi lainnya.
4. Pengadilan memiliki kekuatan yang lebih luas untuk menindak lanjuti pihak-pihak yang melanggar ketentuan 'hak pengasuhan'.
5. Jalannya peradilan dalam masalah pengasuhan telah berubah menjadi lebih informal, fleksibel dan bersifat mendukung kepada anak dan orang tua.
6. Ketakutan atau kekhawatiran akan terjadinya kekerasan dalam keluarga harus dengan alasan yang jelas.
7. Menetapkan pentingnya hubungan dengan kakek nenek, saudara dan segala pihak yang dekat dengan anak
8. Perwakilan dari pihak anak saat ini adalah Pengacara Anak Independen dan memiliki peran yang penting.
9. *Family Law Courts* sekarang dapat memutuskan tentang harta benda berapa pun nilainya.
10. Sebuah sistem telah diberlakukan untuk menjamin seluruh staff dari penyedia jasa sengketa keluarga dan penasihat seluruhnya memenuhi kualifikasi.

⁶⁴*Ibid.*

Pengadilan Keluarga memiliki kekuasaan untuk mengeluarkan ‘hak pengasuhan’ termasuk ketentuan dimanakah anak tersebut harus tinggal. Dalam membuat suatu putusan yang menyangkut tentang anak, pengadilan akan memperhatikan faktor pandangan anak tersebut, namun hal ini akan dipertimbangkan berdasarkan umur anak tersebut juga tingkat kedewasaan anak tersebut.⁶⁵

Tidak terdapat sebuah ketentuan tertulis yang menyebutkan anak dengan umur tertentu dianggap dapat membuat suatu keputusan sendiri tentang dimana ia akan tinggal. Terdapat beberapa alasan untuk hal ini termasuk kenyataan bahwa umur dan kedewasaan seseorang tidak bersangkut paut, setiap kasus harus selalu ditetapkan pada keadaannya masing-masing dan mungkin terdapat faktor-faktor lainnya yang juga harus dipertimbangkan.⁶⁶

Setiap kasus memiliki fakta yang berbeda-beda yang nantinya akan menjadi pertimbangan ‘hak pengasuhan’ apa yang akan diberlakukan bagi orang tua tersebut. Bagaimana pun kondisi setiap orang, Pengadilan Keluarga akan terlebih dahulu mempertimbangkan kesejahteraan dan kepentingan terbaik bagi sang anak. Pasal 65AA Undang-Undang Keluarga Tahun 1975 menentukan bahwa kepentingan terbaik bagi sang anak adalah merupakan pedoman penting dalam menentukan suatu ‘hak pengasuhan’. Pasal 60CC Undang-Undang Keluarga tahun 1975 menyebutkan secara jelas tentang hal-hal yang menyangkut kepentingan terbaik bagi sang anak. Hal tersebut dibagi menjadi pertimbangan utama (primer) dan pertimbangan lainnya (sekunder), sebagai berikut⁶⁷:

Pertimbangan utama:

1. Keuntungan bagi sang anak memiliki hubungan yang erat dengan kedua orang tua.

⁶⁵*Ibid.*

⁶⁶*Ibid.*

⁶⁷Legal Service Commission of South Australia, “Best interests of the child,” <<http://www.lawhandbook.sa.gov.au/ch19s07s05s02.php>>, 20 Juli 2006, diakses pada hari Selasa, 9 Juni 2009.

2. Anak tersebut harus dilindungi dari segala bentuk ketidakadilan kekerasan fisik maupun psikologi, atau kekerasan yang terjadi dalam keluarga atau penelantaran.

Pertimbangan lainnya:

1. Semua pandangan yang dikeluarkan oleh anak tersebut dipertimbangkan dengan memperhatikan faktor-faktor yang menurut Pengadilan penting seperti umur atau tingkat kedewasaan anak tersebut;
2. Hubungan alami sang anak dengan:
 - kedua orang tuanya
 - orang lain, termasuk kakek nenek dan saudara lainnya.
3. Keinginan dan kemampuan bagi masing-masing orang tua untuk memfasilitasi dan mendorong terciptanya suatu hubungan yang erat antara anak tersebut dan orang tua lainnya.
4. Kemungkinan dampak perubahan yang terjadi pada situasi kehidupan sang anak, termasuk dampak yang mungkin timbul karena perpisahan dari:
 - salah satu orang tuanya; atau
 - kakak atau adik; atau
 - orang lain (termasuk kakek nenek atau keluarga lain) yang pernah tinggal bersama anak tersebut.
5. Segala kesulitan dan pengeluaran dalam menghabiskan waktu bersama anak dan berkomunikasi dengan salah satu orang tua, dan apakah hal tersebut akan berpengaruh terhadap hak anak untuk menjaga hubungan dengan orang tua nya dan komunikasi secara langsung dengan kedua pihak secara teratur.

6. Kemampuan setiap orang tua dari sang anak dan orang lain untuk menyediakan kebutuhan bagi sang anak, termasuk kebutuhan emosional maupun intelektual.
7. Dalam hal pendewasaan, kehidupan sosial, gaya hidup, dan latar belakang (termasuk budaya dan kebiasaan) sang anak maupun masing-masing orang tua yang dianggap bersangkutan oleh Pengadilan.
8. Hak bagi setiap anak untuk menikmati kebudayaannya.
9. Cara mendidik dan tanggung jawab pengasuhan akan dilaksanakan oleh kedua orang tua anak tersebut.
10. Segala bentuk kekerasan tidak langsung kepada anak tersebut atau salah satu anggota keluarga.
11. Apakah perlu dekeluarkannya suatu putusan yang mungkin akan memberikan dampak pemeriksaan yang lebih mendalam dalam hubungannya dengan anak tersebut.
12. Alasan atau situasi lainnya yang dianggap penting bagi pengadilan.
13. Tindakan yang telah dilakukan atau seharusnya tidak dilakukan untuk memenuhi tanggung jawab sebagai orang tua.

BAB 4

ANALISA PERBANDINGAN ANTARA KETENTUAN MENGENAI HAK ASUH ANAK DIBAWAH UMUR AKIBAT PERCERAIAN MENURUT UNDANG-UNDANG NO.1 TAHUN 1974 TENTANG PERKAWINAN DAN AUSTRALIA FAMILY LAW ACT 1975

Berdasarkan ketentuan yang telah penulis uraikan pada bab-bab sebelumnya, dapat kita lihat bahwa pengaturan mengenai hak asuh anak dibawah umur akibat perceraian di Indonesia dan Australia memiliki beberapa perbedaan. Ketentuan mengenai hak asuh anak dibawah umur akibat perceraian di Indonesia diatur secara khusus dalam Undang-Undang No. 1 Tahun 1974. Dan perihal mengenai hak asuh anak dibawah umur akibat perceraian di Australia diatur dalam Undang-Undang Keluarga Tahun 1975.

Untuk lebih mendalami perbedaan dari ketentuan mengenai hak asuh anak dibawah umur akibat perceraian di Indonesia dan Australia tersebut, penulis akan menganalisa putusan perceraian yang memiliki ketentuan mengenai hak asuh anak dibawah umur pada kedua negara.

4.1 Analisa Putusan Perkara No. 309/PDT/G/2008/PN.Jkt.Ut (Indonesia)

Perkara ini merupakan salah satu contoh perkara mengenai perceraian yang melibatkan anak dibawah umur. Adapun perkara perceraian ini terjadi antara Robby Arif sebagai penggugat dan Tjoe Siauwing sebagai tergugat. Robby Arif dan Tjoe Siauwing telah melangsungkan perkawinan di Surakarta sebagaimana yang telah dimuat dalam Kutipan Akta Perkawinan yang dikeluarkan oleh Kantor Pencatatan Sipil Yogyakarta. Dalam perkawinan tersebut telah lahir 1 (satu) orang anak perempuan, yaitu Priscilla Raevita Natalia, yang lahir di Jakarta tanggal 28 Desember 2001 berdasarkan yang telah dimuat dalam Kutipan Akte Kelahiran No. 109/JU/2002.

Perkawinan tersebut merupakan perkawinan kedua bagi Robby Arif, dimana istri dari perkawinan pertamanya telah meninggal dunia pada tahun 1997 dan dalam perkawinan pertamanya tersebut telah dilahirkan seorang anak perempuan bernama Kristina Hariani yang pada tahun 2008 berusia 18 (delapan belas) tahun.

Pada awal perkawinan Robby Arif dan Tjoe Siauwing hidup dalam rumah tangga yang harmonis, namun memasuki tahun-tahun berikutnya mulai terjadi percekocokan dan ketidakharmonisan dalam rumah tangga mereka. Kedua pihak pun saling mengakui bahwa kehidupan rumah tangga mereka tidak dapat berjalan dengan sehat dan harmonis, percekocokan mengenai hal-hal kecil hingga hal-hal yang cukup serius terus menerus terjadi. Timbulnya banyak masalah dan ketidakcocokan yang tidak dapat ditolerir tersebut membuat Robby mengajukan gugatan perceraian kepada Pengadilan Negeri Jakarta Utara.

Dari gugatan Robby tersebut, maka Tjoe Siauwing sebagai tergugat menjawab dan mengajukan gugatan balik (rekonvensi) yang isinya menyangkut hak asuh anak mereka, yaitu Priscilla Raevita Natalia. Adapun dalam rekonvensinya tersebut Tjoe Siauwing menyebutkan, diantaranya:

1. Robby Arif tidak dapat lagi diharapkan menjadi suami dan ayah yang baik, karena Robby Arif tetap tidak mau mengubah sikap dan kelakuan buruknya, sombong dan tidak menghargai Tjoe Siauwing, meninggalkan rumah bersama dan tidak memperhatikan anak, Robby Arif tidak lagi mempedulikan keutuhan rumah tangga.
2. Robby Arif dalam gugatannya tidak meminta hak asuh anak, maka Tjoe Siauwing memohon kepada Majelis Hakim untuk mengabulkan anak perempuan mereka yang bernama Priscilla Raevita Natalia, berada dalam pengasuhan dan pemeliharaannya sebagai Ibu kandungnya.
3. Robby Arif selaku ayah kandung dari Priscilla Raevita Natalia, bertanggung jawab atas biaya pendidikan, kesehatan dan keperluan pertumbuhan anak hingga dewasa, maka Tjoe Siauwing menuntut kepada Robby Arif untuk memberikan biaya keperluan tersebut sebesar Rp 15.000.000,- (lima belas juta rupiah) setiap bulannya tiap-tiap tanggal 28 (dua puluh delapan) (akhir bulan).

Dalam putusan tersebut hakim menimbang gugatan Robby Arif dan gugatan balik Tjoe Siauwing berdasarkan Undang-Undang dan melalui jalur pembuktian dimana terdapat bukti-bukti berupa surat-surat bukti yaitu P-1 sampai dengan P-5 dan 3 (tiga) orang saksi yang rinciannya dapat dilihat dalam lampiran. Mengenai perihal perceraian antara Robby Arif dan Tjoe Siauwing berdasarkan Pasal 38 Undang-Undang No. 1 Tahun 1974 tentang Perkawinan menyebutkan bahwa perkawinan dapat putus karena kematian, perceraian dan/atau keputusan pengadilan dan berdasarkan Pasal 19F Peraturan Pemerintah Tahun 1975 yang menentukan bahwa merupakan salah satu alasan perceraian yang berbunyi sebagai “Antara suami istri terus menerus terjadi perselisihan dan pertengkaran dan tidak ada harapan akan hidup rukun lagi dalam rumah tangga.”

Dikarenakan perceraian ini melibatkan hak asuh anak dibawah umur, maka sesuai dengan rekonvensi yang diajukan oleh Tjoe Siauwing, dalam putusannya hakim menimbang bahwa Tjoe Siauwing yang mendalilkan bahwa agar hak asuh anak dari hasil perkawinan yang bernama Priscilla Raevita Natalia ditetapkan kepada Tjoe Siauwing sebagai dan untuk itu diperlukan biaya pendidikan dan kesehatan serta biaya hidup Rp 5.000.000,- (lima juta rupiah) per bulan sebagaimana yang juga disebutkan dalam jawaban dari Rekonvensi oleh Robby Arif dimana hak asuh anak tidak akan dibantah namun mengenai biaya untuk anak tersebut adalah tanggung jawab bersama antara Robby Arif dan Tjoe Siauwing sehingga biaya yang dianggap pantas untuk anak berumur 7 (tujuh) tahun adalah Rp 5.000.000,- (lima juta rupiah) dan biaya tersebut disanggupi oleh Robby Arif.

Selain itu majelis hakim dalam mengeluarkan putusannya juga menimbang melalui ketentuan undang-undang No. 1 Tahun 1974 tentang Perkawinan Jo. Peraturan Pemerintah No. 9 Tahun 1975 tentang Peraturan Pelaksanaan undang-Undang No. 1 Tahun 1974 tentang Perkawinan dan segala hukum yang bersangkutan.

Isi putusan dari perkara tersebut adalah:

- Dalam konvensi

1. Menerima dan mengabulkan gugatan penggugat untuk seluruhnya;
 2. Menyatakan perkawinan Penggugat dan Tergugat yang telah dilangsungkan di Yogyakarta pada tanggal 8 Juli 1999, sebagaimana telah dimuat dalam kutipan Akte Perkawinan, yang dikeluarkan oleh Kantor Catatan Sipil Kotamadya Yogyakarta PUTUS karena perceraian dengan segala akibat hukumnya;
 3. Memerintahkan kepada Panitera atau Pejabat Pengadilan Negeri Jakarta Utara yang ditunjuk mengirimkan salinan putusan perceraian ini telah berkekuatan hukum tetap tanpa bermaterai, kepada Kantor Dinas Kependudukan dan Catatan Sipil Kotamadya Yogyakarta dan Kantor Dinas Kependudukan dan Catatan Sipil Propinsi DKI Jakarta untuk dicatat dalam buku Register yang telah diperuntukkan untuk itu;
- Dalam rekonvensi
 1. Mengabulkan gugatan rekonvensi sebagian;
 2. Menyatakan Penggugat dalam rekonvensi sebagai wali anak dari anak bernama Priscilla Raevita Natalia umur 7 (tujuh) tahun jenis kelamin perempuan sampai dengan anak tersebut dewasa;
 3. Menghukum Tergugat dalam Rekonvensi untuk membiayai kehidupan dan pendidikan anak tersebut diatas sampai dengan anak tersebut dewasa sebesar Rp 5.000.000,- (lima juta rupiah) per bulan.

Sesuai dengan Pasal 41 Undang-Undang No. 1 Tahun 1974 tentang Perkawinan, kedua orang tua yang telah bercerai tersebut yang dalam kasus ini adalah Robby Arif dan Tjoe Siauwing tetap berkewajiban melakukan pemeliharaan dan pendidikan Priscilla Raevita Natalia, semata-mata berdasarkan kepentingan Priscilla. Sedangkan pihak yang akan bertanggung jawab atas semua biaya pemeliharaan dan pendidikan anak adalah Robby Arif selaku bapak namun bilamana dalam kenyataannya bapak tidak dapat memenuhi kewajiban tersebut, Pengadilan dapat menentukan bahwa ibu ikut memikul biaya tersebut

Dalam putusan tersebut dapat kita lihat pengadilan menentukan wali bagi Priscilla Raevita Natalia yang merupakan anak dari perkawinan Robby Arif dan

Tjoe Siauwing bersamaan dengan dikabulkannya gugatan mengenai perceraian yang diajukan oleh Robby Arif. Dalam putusan tersebut ditetapkan bahwa sang anak Priscilla Raevita Natalia berada dibawah perwalian sang ibu yaitu Tjoe Siauwing, hingga anak tersebut dewasa. Dalam hal perwalian tersebut harus kita ingat bahwa sebenarnya keberlakuan wali yang disebutkan dalam putusan tersebut lebih sesuai disebut pengasuhan. Dalam suatu perceraian, hak asuh anak seharusnya diputuskan dalam suatu pengadilan dengan penentuan pengasuhan anak, bukan perwalian karena dapat kita lihat sesuai dengan ketentuan Undang-undang No. 1 Tahun 1974 tentang Perkawinan, sebenarnya sebutan perwalian tidak sesuai dengan maksud penentuan hak pengasuhan anak akibat perceraian. Selain itu mengenai biaya kehidupan dan pendidikan anak tersebut sampai dengan anak tersebut dewasa akan ditanggung oleh bersama oleh Robby Arif dan Tjoe Siauwing, dan Robby Arif akan memberikan biaya kehidupan dan pendidikan sepenuhnya besar Rp 5.000.000,- (lima juta rupiah) setiap bulannya, dan baru berpindah kepada Tjoe Siauwing apabila Robby Arif pada kenyataannya tidak mampu.

Selain memberikan biaya kehidupan dan pendidikan tersebut, Robby Arif dan Tjoe Siauwing tetap memiliki kewajiban atas pemeliharaan dan pendidikan Priscilla Raevita Natalia, yang akan dilakukan semata-mata untuk kepentingan Priscilla. Adapun pemeliharaan dan pendidikan untuk Priscilla tersebut merupakan hal yang sangat penting bagi Priscilla sebagai seorang anak yang masih dibawah umur karena dengan terjadinya perceraian antara orang tua Priscilla maka sebisa mungkin kedua orang tua tetap harus saling bekerja sama dan ikut ambil bagian dalam kehidupan Priscilla sehingga kepentingan Priscilla sebagai seorang anak tetap terpenuhi.

Pasal 45 Undang-Undang No. 1 Tahun 1974 menyebutkan bahwa kedua orang tua memiliki kewajiban memelihara dan mendidik anak-anak mereka sebaik-baiknya, selain itu kewajiban tersebut berlaku sampai anak itu kawin atau dapat berdiri sendiri dan kewajiban tersebut berlaku terus meskipun perkawinan antara kedua orang tua putus. Mengenai batas dan kewajiban pemeliharaan dan pendidikan ini berlaku sampai anak tersebut berumah tangga atau dapat berdiri

sendiri dan kewajiban mana berlangsung terus menerus meskipun perkawinan orang tuanya putus. Jadi prinsip yang berlaku disini sifatnya adalah relatif.¹

Dari ketentuan tersebut dapat kita simpulkan bahwa menyangkut kepentingan pertumbuhan Priscilla Raevita Natalia yang merupakan anak dibawah umur dalam perceraian tersebut, maka walaupun perkawinan antara Robby Arif dan Tjoe Siauwing telah berakhir tetap memiliki kewajiban untuk memelihara dan mendidik Priscilla. Adapun bentuk-bentuk memelihara Priscilla dalam pertumbuhannya termasuk mengenai pengawasan, pemberian pelayanan yang semestinya serta kecukupan kebutuhan hidup dari Priscilla. Tanggung jawab tersebut bersifat terus-menerus hingga Priscilla mencapai batas usia sebagai orang dewasa yang bisa berdiri sendiri. Sedangkan yang dimaksud memberikan pendidikan yang sebaik-baiknya adalah Robby Arif dan Tjoe Siauwing tetap memiliki kewajiban untuk mendidik dan memberikan pengajaran kepada Priscilla agar Priscilla dapat berkembang menjadi seorang manusia yang memiliki kemampuan dan kecapakan sesuai dengan pembawaan bakat Priscilla.

Pasal 47 Undang-Undang Perkawinan No. 1 Tahun 1974 tentang Perkawinan mengatur mengenai kekuasaan orang tua terhadap anak dibawah umur, dimana disebutkan bahwa anak yang belum mencapai umur 18 (delapan belas) tahun atau belum pernah melangsungkan perkawinan, ada dibawah kekuasaan orang tuanya selama mereka tidak dicabut dari kekuasaannya. Ketentuan tersebut pun tetap berlaku meskipun perkawinan orang tuanya putus.

Dengan berlakunya ketentuan tersebut maka dapat kita simpulkan selama kekuasaan orang tua Priscilla Raevita Natalia tidak dicabut oleh Pengadilan maka orang tua Priscilla yaitu Robby Arif dan Tjoe Siauwing tetap memiliki kekuasaan sebagai orang tua. Priscilla Revita Natalia tetap berada dibawah kekuasaan kedua orang tuanya yaitu Robby Arif dan Tjoe Siauwing, sehingga bila diperlukan perwakilan terhadap anak terebut di dalam dan di luar pengadilan atau untuk sahnya suatu perbuatan hukum yang menyangkut pihak ketiga harus terdapat bantuan atau diwakili oleh orang tua dari Priscilla Reavita Natalia.

¹ Wienarsih Imam Subekti dan Sri Soesilowati Mahdi, *op.cit.*, hal.85.

4.2 Analisa Putusan Perkara Lachlan & Lachlan [2008]FamCA 455 file number SYF 3137 of 2006 (Australia)

Perkara ini merupakan salah satu perkara perceraian yang melibatkan anak dibawah umur. Ada pun perkara ini melibatkan Mrs. Lachlan sebagai pemohon, Mr. Lachlan sebagai termohon, *Legal Aid Commission of NSW (New South Wales)* sebagai Pengacara Independen Anak dan seorang anak dibawah umur hasil perkawinan antara Mr. Lachlan dan Mrs. Lachlan yang berumur 12 tahun pada tahun 2008.

Mr. dan Mrs. Lachlan melaksanakan perkawinan di Australia pada bulan Agustus tahun 1990 dan perkawinan tersebut berlangsung harmonis dan baik pada awalnya namun pada bulan Juni tahun 2006 pasangan tersebut memutuskan untuk berpisah tempat tinggal. Sang ayah dan anak meninggalkan rumah selama beberapa waktu namun tidak lama setelah itu mereka kembali dan memutuskan untuk kembali mencoba berumah tangga. Namun pada tanggal 23 November 2006 sang istri mengutarakan bahwa ia telah dianiaya oleh suaminya sehingga mereka kembali berpisah dan sang istri mengajukan permohonan perceraian dengan salah satu alasan berupa penganiayaan namun tindakan penganiayaan tersebut tidak dapat dibuktikan dalam proses pengadilan. Semenjak kejadian tersebut sang anak tinggal bersama ibu dan ayahnya secara bergantian, namun hampir dalam seluruh waktunya ia tinggal bersama sang ayah dan selama beberapa hari bermalam dirumah ibunya. Ketentuan mengenai hak asuh tersebut dapat diselesaikan diluar pengadilan karena Mr. dan Mrs. Lachlan sepakat untuk melakukan pengasuhan secara seimbang terhadap sang anak.

Pada tanggal 23 Januari 2007 saat sang anak tinggal dengan ibunya, sang ibu mengalami serangan *hypoglycaemic*, ia tidak sadarkan diri lalu sang anak meminta bantuan kepada ayahnya dan menghubungi gawat darurat sehingga ibunya mendapatkan pertolongan. Semenjak hari itu sang anak tidak pernah tinggal bersama sang ibu. Adapun perkara ini merupakan usaha sang ibu untuk memiliki hak asuh anak terhadap anaknya tersebut, dikarenakan semenjak terjadinya serangan *hypoglycaemic* anak tersebut tidak pernah lagi tinggal bersama ibunya.

Diajuikannya permohonan ini oleh Mrs. Lachman menyangkut pengasuhan sang anak dimana Mrs. Lachman mengajukan permohonan agar sang anak dapat tinggal dengannya setelah sebelumnya selama 4 (empat) minggu tinggal dengan bibi kandungnya, dimana selama waktu tersebut Mrs. Lachman dan anaknya akan melakukan perawatan kepada seorang terapis agar sang anak tidak mengalami ketakutan dan trauma semenjak kejadian dimana sang ibu terserang hypoglycaemic hingga tidak sadarkan diri. Namun Mr. Lachman yang sebelum adanya perkara ini telah lebih banyak menghabiskan waktu bersama sang anak menginginkan agar sang anak tinggal bersamanya. Dia mengajukan hak pengasuhan anak yang seimbang dan dia menginginkan agar sang ibu dapat menghabiskan waktu dengan sang anak sesuai dengan ketentuan yang dikeluarkan oleh Pengadilan.

Dalam putusan tersebut hakim menimbang mengenai ketentuan yang diajukan oleh ibu dan ketentuan yang diajukan oleh ayah berdasarkan proses pembuktian berkepanjangan yang keterangannya dapat dilihat pada lampiran, Undang-Undang Hukum Keluarga Tahun 1975 serta Undang-Undang Pembuktian Tahun 1995. Selain itu seperti yang telah dikemukakan sebelumnya bahwa segala ketentuan mengenai hak pengasuhan anak dibawah umur akibat perceraian selalu mengutamakan kepentingan terbaik sang anak. Pertimbangan utama bagi Pengadilan dalam mengeluarkan suatu putusan menyangkut anak adalah kepentingan terbaik bagi sang anak.

Isi putusan dari perkara tersebut adalah:

1. Bahwa semua ketentuan hak pengasuhan sebelumnya yang dalam hubungannya dengan anak dari Mr. Lachlan dan Mrs. Lachlan, tidak berlaku lagi.
2. Bahwa Mr. Lachlan (yang selanjutnya dalam putusan ini akan disebut sebagai ayah) memiliki tanggung jawab tunggal untuk anak. Ayah tetap akan berkonsultasi terlebih dahulu dengan Mrs. Lachlan (yang selanjutnya dalam putusan ini akan disebut sebagai ibu) melalui surat elektronik sebelum membuat keputusan penting dalam kaitannya dengan aspek-aspek penting kehidupan anak. Ayah dalam membuat keputusan tentang segala hal penting akan

mempertimbangkan secara bijak melalui pandangan sang anak dan pandangan dari ibu.

3. Anak tinggal bersama ayahnya.
4. Anak akan menghabiskan waktu dengan ibunya dengan ketentuan sebagai berikut:
 - (a) Selama minggu-minggu sekolah anak dapat menghabiskan satu sore per minggu dengan ibunya dari pengetahuan dari pihak sekolah sampai pukul 19.30. Ayah memiliki hak untuk menasihati ibu waktu sore apakah yang akan cocok untuk anak pada permulaan dari masing-masing sekolah dan untuk sisa dari waktu sore anak tersebut ialah waktu yang diperbolehkan untuk ibunya menghabiskan waktu dengan anaknya tersebut. menghabiskan dengan ibunya. Perubahan dapat dilakukan selama jangka waktu ini dengan kesepakatan anak dan ibu.
 - (b) Selama masa sekolah, setiap pekan kedua pada hari Sabtu dari kegiatan olahraga apapun sampai pukul 20.00 dan pada hari berikutnya (Minggu) dari 9.30 pagi sampai 17.30 sore. Ibu dapat menjemput sang anak dari kegiatan di hari Sabtu tersebut dengan tujuan untuk bertemu dengan anak. Ibu adalah pihak yang bertanggung jawab untuk menjemput anak dan kembali kepada ayahnya, kecuali jika disesuaikan dengan tempat tinggal yang dekat, sang ayah setuju bahwa anak dapat pulang dengan jalan kaki atau bersepeda antara rumah sang ayah dengan sang ibu. Dalam keadaan seperti itu ibu yang memiliki anak tersebut meminta anak untuk menelepon ayahnya sebelum dia meninggalkan rumah sang ibu dan menasihati ayahnya dia meninggalkan rumah ibunya. Selain itu, jika sang ayah setuju bahwa anak dapat berjalan atau bersepeda antara rumah sang ayah dengan sang ibu untuk tujuan pengeluaran waktu dengan ibunya kemudian ayah diharuskan untuk memastikan bahwa anak tersebut menelepon ibunya dengan segera sebelum dia meninggalkan rumah ayahnya untuk memberitahu dia akan meninggalkan rumah ayahnya. Pekan pertama milik ibunya tersebut akan dimulai pada pekan ini setelah perintah.

- (c) Akhir pekan milik sang ibu dimulai pada pekan pertama di sekolah baru dalam semester pertama jika sang ibu tersebut telah menghabiskan waktu dengan sang anak selama setengah dari liburan segera sebelum semester pertama masa sekolah dimulai dan pada pekan kedua jika sang ibu menghabiskan bagian terakhir liburan sekolah dengan sang anak.
- (d) Selama semua hari kecuali liburan pada masa natal sekolah, anak memiliki hak untuk menghabiskan satu minggu penuh dengan ibunya dengan waktu ke waktu selama siang hari saja kecuali sang anak setuju untuk menginap di tempat ibunya. Ibu diperbolehkan untuk mengusulkan minggu-minggu tertentu yang akan dipergunakan untuk menghabiskan waktu dengan anaknya tidak lebih dari 28 (dua puluh delapan) hari sebelum masa liburan. Kecuali ada beberapa alasan khusus untuk sang ibu untuk mengusulkan apakah minggu pertama atau kedua di bulan liburan sekolah ia akan menghabiskan waktu dengan sang anak. Ibu diharuskan untuk berkonsultasi dengan sang anak sebelum mengusulkan waktu liburan untuk memastikan apakah ia memiliki keinginan tentang minggu kapan ia akan menghabiskan waktu bersama-sama dengan sang ibu tersebut dan ibu adalah pihak yang diharuskan untuk memfasilitasi waktu anak sesuai keinginan anak tersebut jika dimungkinkan.
- (e) Dalam liburan natal sekolah, anak diberikan hak untuk bertemu dengan ibunya setiap dua minggu, kecuali ibu dan anak sepakat untuk mengganti dihari yang lain yang memungkinkan adanya waktu bagi sang anak untuk menghabiskan sekitar setengah dari hari-hari libur dengan ibunya. Ibu diwajibkan untuk memberitahukan sang ayah perihal proposal sang ibu untuk menghabiskan waktu dengan sang anak selama masa liburan natal sekolah selambat-lambatnya 28 (dua puluh delapan) hari sebelum masa liburan yang dimulai.
- (f) Semua komunikasi antara pihak-pihak akan dilakukan melalui surat elektronik. Setiap surat elektronik yang akan diterima diwajibkan untuk memberi balasan kembali surat elektronik tersebut.

- (g) Kedua belah pihak, baik sang ayah maupun sang ibu, diharapkan melalui berkomunikasi melalui surat elektronik untuk menyetujui untuk mengubah surat elektronik atas pesanan untuk waktu yang hendak dihabiskan untuk anak dengan ibunya di perintah ini yang dilakukan melalui surat elektronik, sehingga masing-masing dapat menyimpan salinan tertulis yang disertai dengan perubahan-perubahan yang telah disepakati..
 - (h) Perintah untuk anak menghabiskan waktu dengan ibu adalah sebatas usia anak hingga mencapai usia 15 (lima belas) tahun. Selanjutnya pihak-pihak yang memfasilitasi permintaan dari anak untuk menghabiskan waktu dengan orang tua dan salah satu orang tua (baik ayah maupun ibu) adalah untuk memastikan bahwa pihak orang tua satunya (antara ayah atau ibu) telah diberitahu melalui surat elektronik untuk setiap urusan mereka telah dibuat dengan anak untuk kepentingan menghabiskan waktu dengan orang tua. Anak tidak diperbolehkan untuk berpindah dari satu orang tua yang lain untuk tujuan menghabiskan waktu dengan orang tua lainnya tanpa adanya kesepakatan bahwa pemberitahuan telah diberikan melalui surat elektronik.
 - (i) Setiap saat apabila anak setuju untuk menghabiskan waktu semalam dengan ibunya, sang anak diharuskan untuk memberitahu sang ayah dan anak dimungkinkan untuk dapat menginap dengan ibunya pada sore hari dia menghabiskan waktu pada hari sekolah dan juga menginap di tempat ibunya pada akhir pekan dengan perintah ini. Jika dalam anak memilih ia bisa tinggal bersama ibunya pada Minggu malam pekan dengannya dan menginap kemudian pergi ke sekolah dari tempat tinggal ibunya, Senin pagi, itu pun diperbolehkan.
 - (j) Anak tidur di kamar sendiri ketika ia menghabiskan waktu semalam dengan ibunya.
5. Pengadilan MENGINGATKAN bahwa setiap pihak diperintahkan untuk tidak menekan anak dalam mengambil keputusan dalam bentuk apapun mengenai hal menginap dengan ibunya.

6. Kecuali jika perintah ini dikemukakan dengan cara berbeda, sang ibu harus bertanggung jawab untuk menjemput anak pada permulaan waktu sang ibu dengan sang anak dan mengembalikannya dengan tepat waktu. Tergantung pada keadaan dan ketentuan ini, sang anak dapat dijemput dari sekolah atau dari tempat tinggal ayahnya. Demikian juga anak dapat dikembalikan/dipulangkan baik ke sekolah atau ke ayahnya.
7. Sang ayah harus memastikan bahwa sang anak hadir pada sesi bertemu dengan dokter yang diusulkan oleh Pengacara Independen Anak dalam berkonsultasi dengan Dr L dengan tujuan untuk membantu anak dalam mengatasi hidup diantara dua rumah berbeda antara kedua orang tuanya dimana dimungkinkan terdapat konflik yang cukup tinggi di antara mereka.
8. Pengacara Independen Anak telah memerintahkan untuk memberikan salinan laporan dari Dr. L tanggal 19 Juni 2007, 28 Februari 2008 dan 30 Maret 2008 ke dokter yang terlibat untuk membantu anak.
9. Pengadilan MENINGATKAN bahwa terapis anak tersebut sesuai dengan keinginannya berkomunikasi dengan Dr L sehubungan dengan perawatan yang akan diberikan kepada anak.
10. Dokter yang ditunjuk untuk membantu anak, seperti yang diberikan dalam perintah ini diberi wewenang untuk berkomunikasi terlebih dahulu dengan Pengacara Independen Anak dalam kaitannya dengan perkembangan anak.
11. Bahwa sang ibu dilarang untuk menjelek-jelekkkan sang ayah atau anggota keluarga ayah kepada anak atau dalam kehadirannya atau mendengar, dan dia akan berjaga sebaik mungkin untuk memastikan bahwa tidak ada orang lain yang melakukan hal demikian.
12. Bahwa sang ayah dilarang untuk menjelek-jelekkkan sang ibu atau anggota keluarga ayah kepada anak atau dalam kehadirannya atau mendengar, dan dia akan berjaga sebaik mungkin untuk memastikan bahwa tidak ada orang lain yang melakukan hal demikian.
13. Orang tua dilarang membicarakan hal-hal mengenai proses perceraian ini dengan

si anak atau dalam suatu keadaan dimana si anak hadir atau dapat mendengar pembicaraan tersebut.

14. Orang tua dilarang menunjukkan kepada si anak dokumen apa pun yang terkait dengan proses perceraian ini termasuk, namun tidak terbatas pada, keterangan-keterangan resmi, laporan-laporan, surat-surat dan pengaturan-pengaturan
15. Penunjukkan Pengacara Independen Anak dilanjutkan untuk jangka waktu 12 (dua belas) bulan sejak tanggal pengaturan ini ditetapkan
16. Bahwa Pengacara Independen Anak telah meninggalkan untuk merinci kembali permasalahan ini dengan persiapan bersama koleganya sebelum menghadap sang hakim.
17. Bahwa dalam jangka waktu 3 (tiga) bulan, ayah akan membayar kepada *Legal Aid Commission of NSW* uang sejumlah \$11,483.60 yang merupakan bagiannya, dimana \$9,901.10 sebagai pelunasan atas bagiannya untuk membayar Pengacara Anak Independen dan \$1,582.50 sebagai pelunasan atas bagiannya untuk membayar ahli.
18. Bahwa dalam jangka waktu 3 (tiga) bulan, ibu akan membayar kepada *Legal Aid Commission of NSW* uang sejumlah \$11,482.60 yang merupakan bagiannya, dimana \$9,901.10 sebagai pelunasan atas bagiannya untuk membayar Pengacara Anak Independen dan \$1,582.50 sebagai pelunasan atas bagiannya untuk membayar ahli.
19. Bahwa masing-masing pihak membayar kepada *Legal Aid Commission of NSW* sebanyak setengah dari biaya tambahan untuk menghadirkan Dr L, Dr W dan Dr Y saat persidangan. Pembayaran tersebut dilakukan dalam jangka waktu 21 (dua puluh satu) hari sejak tanggal penerimaan tagihan dari Pengacara Independen Anak.
20. Bahwa ibu dan ayah dilarang untuk memindahkan sang anak dari Australia hingga ada perintah lebih lanjut dari Pengadilan.
21. Bahwa nama sang anak dicantumkan dalam *Passenger Automatic Selection*

System pada tempat keberangkatan internasional dari Australia, dan Pengadilan meminta bantuan kepada Polisi Federal Australia dalam pengimplementasian ketentuan ini.

22. Ayah membawa sang anak ke *Sydney Registry of The Family Court of Australia* untuk menemui Mr G, konsultan keluarga, dan *Justice Le Poer Trench* pada pukul 16.15 waktu setempat, hari Selasa, tanggal 1 Juli 2008.
23. Masing-masing pihak harus berada di the *Sydney Registry of The Family Court of Australia*, ruang sidang B, pada pukul 16.30, hari Selasa, tanggal 1 Juli 2008. Pengacara Independen Anak diminta untuk hadir pada waktu sebagaimana di atas. Para pihak tidak membutuhkan kuasa hukum, akan tetapi mereka dipersilahkan untuk membawa pengacaranya jika memang mereka menginginkannya.
24. Mengacu kepada Pasal 65DA(2) dan Pasal 62B Undang-Undang Keluarga tahun 1975, penjelasan mengenai kewajiban-kewajiban yang muncul dari pengaturan ini dan penjelasan mengenai konsekuensi-konsekuensi yang timbul jika seseorang melanggar pengaturan ini dan detail mengenai siapa yang dapat membantu para pihak dalam memenuhi suatu ketentuan, semua itu tercantum dalam Bukti Fakta yang dilampirkan disini dan penjelasan-penjelasan tersebut adalah termasuk dalam bagian yang tidak terpisahkan dari pengaturan ini.

Adapun dari putusan yang dikeluarkan oleh hakim tersebut, dapat kita lihat bahwa segala pertimbangan didasarkan pada bukti surat dan keterangan saksi yang perinciannya dapat dilihat pada lampiran. Selain itu terdapat pula ketentuan-ketentuan hukum yang oleh hakim dijadikan sebagai pertimbangan dalam menentukan keputusan tersebut. Prinsip-prinsip tentang hal pengasuhan anak tersebut diatur dalam Undang-Undang Hukum Keluarga 1975. Dalam memutuskan apakah akan membuat ketentuan mengenai pengasuhan hakim harus memperhatikan kepentingan yang terbaik anak sebagai pertimbangan terpenting yang diatur dalam Pasal 60CA dan Pasal 60CC. Pasal-pasal tersebut mengemukakan mengenai "pertimbangan utama" dan "pertimbangan tambahan" dalam penentuan hak pengasuhan anak dibawah umur.

Adapun pertimbangan utama dalam penentuan hak pengasuhan anak bagi hakim adalah sebagai berikut:

1. Keuntungan bagi sang anak memiliki hubungan yang erat dengan kedua orang tua.
2. Anak tersebut harus dilindungi dari segala bentuk ketidakadilan kekerasan fisik maupun psikologi, atau kekerasan yang terjadi dalam keluarga atau penelantaran.

Selain itu terdapat pula pertimbangan tambahan lainnya, yaitu:

1. Semua pandangan yang dikeluarkan oleh anak tersebut dipertimbangkan dengan memperhatikan faktor-faktor yang menurut Pengadilan penting seperti umur atau tingkat kedewasaan anak tersebut;
2. Hubungan alami sang anak dengan:
 - kedua orang tuanya
 - orang lain, termasuk kakek nenek dan saudara lainnya.
3. Keinginan dan kemampuan bagi masing-masing orang tua untuk memfasilitasi dan mendorong terciptanya suatu hubungan yang erat antara anak tersebut dan orang tua lainnya.
4. Kemungkinan dampak perubahan yang terjadi pada situasi kehidupan sang anak, termasuk dampak yang mungkin timbul karena perpisahan dari:
 - salah satu orang tuanya; atau
 - kakak atau adik; atau
 - orang lain (termasuk kakek nenek atau keluarga lain) yang pernah tinggal bersama anak tersebut.
5. Segala kesulitan dan pengeluaran dalam menghabiskan waktu bersama anak dan berkomunikasi dengan salah satu orang tua, dan apakah hal tersebut akan berpengaruh terhadap hak anak untuk menjaga hubungan dengan orang tuanya dan komunikasi secara langsung dengan kedua pihak secara teratur.

6. Kemampuan setiap orang tua dari sang anak dan orang lain untuk menyediakan kebutuhan bagi sang anak, termasuk kebutuhan emosional maupun intelektual.
7. Dalam hal pendewasaan, kehidupan sosial, gaya hidup, dan latar belakang (termasuk budaya dan kebiasaan) sang anak maupun masing-masing orang tua yang dianggap bersangkutan oleh Pengadilan.
8. Hak bagi setiap anak untuk menikmati kebudayaannya.
9. Cara mendidik dan tanggung jawab pengasuhan akan dilaksanakan oleh kedua orang tua anak tersebut.
10. Segala bentuk kekerasan tidak langsung kepada anak tersebut atau salah satu anggota keluarga.
11. Apakah perlu dikeluarkannya suatu putusan yang mungkin akan memberikan dampak pemeriksaan yang lebih mendalam dalam hubungannya dengan anak tersebut.
12. Alasan atau situasi lainnya yang dianggap penting bagi pengadilan.
13. Tindakan yang telah dilakukan atau seharusnya tidak dilakukan untuk memenuhi tanggung jawab sebagai orang tua.

Segala bentuk pertimbangan yang telah disebutkan diatas sangat penting bagi penentuan hak pengasuhan anak dibawah umur, mengingat dalam perkara Mr. dan Mrs. Lachlan tersebut perlu dilakukan pembuktian atas segala sesuatu yang sebelumnya pernah terjadi dan berpengaruh dalam hidup anak tersebut, seperti adanya kemungkinan sang ayah telah melakukan tindakan kepada ibu, atau kondisi kesehatan ibu yang memiliki penyakit hypoglicaemic, dan faktor-faktor lainnya.

Selain itu hakim harus memastikan bahwa ketentuan yang dikeluarkan akan menghindari tindakan kekerasan dalam keluarga dalam bentuk apa pun dan tidak menimbulkan resiko segala bentuk tindakan kekerasan keluarga terhadap seseorang, sampai batas-batas dalam melakukannya adalah selaras

dengan kepentingan terbaik dari anak yang diperlakukan sebagai kedudukan terpenting, hal ini sesuai dengan Pasal 60CG Undang-Undang Keluarga Tahun 1975.

Dalam perkara ini hakim juga mengacu Pasal 60B Undang-Undang Keluarga Tahun 1975 yang menetapkan obyek dari bagian dari Undang-Undang yang berhubungan dengan anak-anak dan prinsip-prinsip yang pokok:

Bagian dari objek dan prinsip-prinsip yang ialah:

(1) objek dari Bagian ini adalah untuk memastikan bahwa kepentingan terbaik dari anak-anak bertujuan sesuai dengan hal-hal sebagai berikut :

- (a) memastikan bahwa anak-anak mendapatkan manfaat dari kedua orang tua mereka yang memiliki keterlibatan yang berarti dalam hidup mereka, sebaik mungkin selaras dengan kepentingan terbaik dari anak dan*
- (b) melindungi anak-anak dari kerugian fisik atau psikologis dari subyek, atau terkena, penyalahgunaan, kelalaian atau kekerasan dalam keluarga, dan*
- (c) menjamin bahwa anak-anak menerima pengasuhan yang baik dan seusai untuk membantu mencapai potensi penuh dalam diri mereka dan*
- (d) memastikan bahwa orang tua mereka melaksanakan tugas dan memenuhi tanggung jawab mereka, mengenai perawatan, kesejahteraan dan perkembangan anak-anak mereka.*

(2) Prinsip-prinsip pokok ini adalah objek (kecuali jika atau akan bertentangan dengan kepentingan terbaik dari anak):

- (a) anak-anak memiliki hak untuk tahu dan untuk dirawat oleh kedua orang tua mereka, tanpa memperhatikan apakah orang tua mereka yang menikah, terpisah, tidak pernah menikah atau tidak pernah tinggal bersama, dan*
- (b) anak-anak memiliki hak untuk menghabiskan waktu secara teratur dengan, dan berkomunikasi secara teratur dengan kedua orang tua dan orang lain yang penting untuk mereka, kesejahteraan dan pengembangan (seperti kakek / nenek dan saudara lainnya); dan*
- (c) orang tua bersama-sama berbagi tugas dan tanggung jawab mengenai perawatan, kesejahteraan dan*

perkembangan anak-anak mereka, dan

(d) orang tua harus sepakat tentang masa depan orang tua anak-anak mereka, dan

(e) anak-anak memiliki hak untuk menikmati kebudayaan mereka (termasuk hak untuk menikmati kebudayaan yang dengan orang lain yang berbagi bahwa budaya).

(3) Untuk kepentingan subparagraph (2)(e), sebuah anak Aborijin atau Torres Strait Islander anak untuk menikmati hak-nya Aborijin atau Torres Strait Islander budaya termasuk hak:

(a) untuk memelihara hubungan dengan budaya, dan

(b) untuk mendapatkan dukungan, kesempatan dan dorongan diperlukan:

(i) untuk mencari segala kekuasaan itu budaya, konsisten dengan anak usia dan tingkat perkembangan anak dan dilihat, dan

(ii) untuk mengembangkan apresiasi positif dari budaya.

Dalam perkara ini hakim ikut mempertimbangkan melalui pasal 60CC ayat (4) dan (4A) dari Undang-Undang Keluarga Tahun 1975. Selain itu pasal 61DA ayat (1) mensyaratkan bahwa:

"... Ketika membuat pengaturan mengenai pengasuhan agar dalam kaitannya dengan seorang anak, pengadilan harus menerapkan segala sesuatunya lebih dahulu pada kepentingan terbaik bagi anak anak dari orang tua untuk memiliki tanggung jawab orang tua untuk anak bersama-sama. "

dan dalam Ayat (4) dinyatakan sebagai berikut:

"... Dugaan mungkin dibantah oleh bukti-bukti yang cukup di pengadilan yang tidak mengutamakan kepentingan terbaik bagi anak anak dari orang tua untuk bersama sama memiliki tanggung jawab orang tua untuk anak."

Pasal 65DAA Undang-Undang Keluarga Tahun 1975 juga mengharuskan bagi hakim untuk mempertimbangkan anak-anak menghabiskan waktu yang sama atau substansial dan signifikan dengan setiap orang tua bilmana pengadilan menentukan bahwa kedua orang tua anak memiliki tanggung jawab pengasuhan bersama.

Pertimbangan Bagian 60CC Undang-Undang Keluarga Tahun 1975, dalam hakim menentukan apa yang terbaik dalam kepentingan anak diharuskan untuk mempertimbangkan ketentuan pasal 60CC ayat (2) dan (3) serta ayat lainnya dalam Undang-Undang Keluarga Tahun 1975.

4.3 Perbandingan Ketentuan Mengenai Hak Asuh Anak Dibawah Umur Akibat Perceraian Menurut Undang-Undang No. 1 Tahun 1974 tentang Perkawinan dan Australia *Family Law Act 1975*

Dari kedua analisa putusan diatas dapat kita dapat membandingkan dan menemukan beberapa persamaan dan perbedaan mengenai ketentuan hak asuh anak dibawah umur akibat perceraian yang berlaku di Indonesia dan di Australia. Masing-masing negara memiliki ketentuan tersendiri mengenai hak pengasuhan anak akibat perceraian.

Persamaan dari ketentuan yang dimiliki oleh Indonesia dan Australia mengenai hak pengasuhan anak dibawah umur akibat perceraian tersebut, dapat kita lihat berdasarkan analisa diputusan diatas dimana persamaan keberlakuan ketentuan tersebut adalah:

1. Persamaan yang paling signifikan dalam ketentuan hak asuh anak yang berlaku di Indonesia dan Australia adalah dalam hal penentuan hak pengasuhan anak ketentuan kedua negara mengedepankan kepentingan terbaik bagi si anak. Hal tersebut dapat kita lihat pada Pasal 41 Undang-Undang No. 1 Tahun 1974 tentang Perkawinan dan Pasal 60B Undang-Undang Keluarga Tahun 1975. Menurut pendapat penulis dengan berlakunya Undang-Undang No. 1 Tahun 1974 tentang Perkawinan maka ketentuan yang berlaku dalam hal perwalian yang timbul akibat perceraian didasarkan pada kepentingan anak, kepentingan disini tidak hanya kepentingan lahiriah, namun juga kepentingan bathiniah si anak. Keduanya sedapat mungkin harus terpenuhi. Dalam pemenuhan kepentingan bathiniah inilah banyak pertimbangan yang akan didasarkan pada hubungan psikologis. Atas pertimbangan yang berlaku di masyarakat maka ada kecenderungan untuk mengangkat ibu sebagai wali,

karena anak yang masih dibawah umur masih membutuhkan perawatan dan kasih sayang ibunya. Menurut pendapat penulis, perwalian yang diatur dalam Undang-Undang No. 1 Tahun 1974 tentang Perkawinan juga mengatur perihal kewajiban agar kedua orang tua secara bersama-sama melakukan suatu tindakan yang semata-mata demi kepentingan si anak. Begitu pula ketentuan mengenai hak pengasuhan dalam Undang-Undang Keluarga Tahun 1975 dimana kedua orang tua demi kepentingan sang anak harus bekerja sama dalam melakukan semua tindakan dan mengeluarkan segala keputusan yang menyangkut anak tersebut.

2. Selain itu pada ketentuan Undang-Undang No. 1 Tahun 1974 dan Undang-Undang Keluarga Tahun 1975 pun diatur mengenai hak perwalian di Indonesia dan hak pengasuhan di Australia berlaku terhadap anak yang belum mencapai umur 18 (delapan belas) tahun atau belum kawin dan anak tersebut masih berada dibawah kekuasaan orang tuanya. Jadi kedua orang tua tetap memiliki kekuasaan atas sang anak selama kekuasaan orang tua tersebut belum dicabut oleh pengadilan.

Selain persamaan yang dimiliki oleh Indonesia dan Australia mengenai ketentuan hak pengasuhan anak dibawah umur akibat perceraian tersebut, terdapat pula perbedaan-perbedaan ketentuan yang berlaku di Australia dengan yang berlaku di Indonesia. Perbedaan-perbedaan tersebut dapat kita lihat dari analisa putusan diatas dimana keberlakuan ketentuan yang berbeda dalam hal pengasuhan anak dibawah umur akibat perceraian tersebut adalah:

1. Perbedaan yang cukup signifikan adalah dalam ketentuan hak asuh anak yang berlaku di Australia secara jelas ditegaskan mengenai hak pengasuhan anak yang seimbang yang merupakan keadaan dimana kedua orang tua yaitu Mr. dan Mrs Lachlan memiliki hak asuh yang seimbang terhadap anak mereka dan memiliki hak yang seimbang pula terhadap segala keputusan penting dalam hidup anak tersebut. Di Indonesia pada kenyataannya berlaku pula ketentuan kekuasaan kedua orang tua yang tidak akan berakhir karena perceraian, namun hal tersebut tidak dipertegas dengan keadaan hak pengasuhan yang seimbang karena pada sengketa mengenai hak asuh anak yang melalui jalur pengadilan

di Indonesia akan menimbulkan sebuah putusan perwalian atas salah satu orang tua terhadap anak tersebut. Sedangkan dalam putusan mengenai sengketa hak asuh anak di Australia selalu disebutkan mengenai kepemilikan hak pengasuhan anak yang seimbang yang menyebabkan kedua orang tua wajib menjalankan kewajiban mereka masing-masing sesuai keputusan yang telah dikeluarkan dan dijabarkan secara rinci oleh pengadilan.

2. Selain itu dalam proses sengketa hak asuh anak dibawah umur di Australia berlaku sebuah ketentuan yang menurut penulis sangat unik dan berguna dalam pelaksanaannya, yaitu dalam proses penentuan hak asuh anak melalui pengadilan tersebut, pengadilan dapat mengajukan (melalui inisiatif atau berdasarkan permintaan sang anak) agar anak tersebut diwakili secara terpisah dengan orang tuanya dan meminta sebuah lembaga yang bernama *Legal Services Commision* (Lembaga Bantuan Hukum) untuk mewakili dan merepresentasikan kepentingan anak tersebut. Adapun peran utama bagi seseorang yang mewakili anak tersebut atau yang biasa disebut dengan *Independent Child Lawyer* (Pengacara Independen Anak) adalah memberikan informasi mengenai segala kepentingan sang anak dan yang berhubungan dengan kesejahteraan sang anak. Pengacara tersebut dapat mengajukan pendapatnya mengenai apa yang menurutnya paling baik bagi sang anak dan pengacara tersebut dapat pula mengajukan permintaan yang diajukan sang anak dalam proses peradilan.

Adapun pemberlakuan ketentuan Pengacara Independen Anak tersebut sebenarnya dimaksudkan agar pengadilan dapat melakukan tindakan lebih lanjut bilamana ternyata dalam kehidupan keluarga sang anak terdapat adanya kemungkinan kekerasan pada anak, terutama kekerasan seksual atau pun psikologi; adanya kemungkinan telah terjadi suatu permasalahan dengan kedua orang tua; atau adanya kemungkinan terdapat suatu masalah nyata menyangkut budaya atau perbedaan agama. Keberadaan Pengacara Independen Anak sangat efektif karena pengacara tersebut dapat memperhatikan kepentingan yang terbaik bagi sang anak.

BAB 5

PENUTUP

5.1 Kesimpulan

Berdasarkan uraian dalam bab-bab sebelumnya, penulis menarik sebuah kesimpulan bahwa:

1. Peraturan di Indonesia yang mengatur mengenai hak asuh anak dibawah umur akibat perceraian adalah Undang-Undang No. 1 Tahun 1975 tentang Perkawinan, dimana dalam undang-undang tersebut disebutkan bahwa akibat hukum dari perceraian terhadap anak dibawah umur diatur menurut Pasal 41 a, b dan c Undang-Undang No. 1 Tahun 1974 tentang Perkawinan. Bilamana terjadi perceraian, maka bapak dan ibu tetap berkewajiban memelihara dan mendidik anak-anaknya. Namun harus kita ingat bahwa dalam hal terjadinya suatu perselisihan mengenai penguasaan anak, Pengadilanlah yang akan memberikan putusan mengenai pihak yang memiliki hak perwalian terhadap si anak sehingga secara *de facto* tersebut hanya dipegang oleh salah seorang dari mereka.

Seorang bapak akan bertanggung jawab atas semua biaya pemeliharaan dan pendidikan yang diperlukan anak, namun apabila pada kenyataannya bapak tidak dapat melaksanakan kewajibannya tersebut maka Pengadilan dapat menentukan bahwa Ibu ikut memikul biaya tersebut. Adapun mengenai hak pengasuhan anak tersebut kedua orang tua dalam menjalankan kekuasaannya harus melaksanakannya semata-mata berdasarkan kepentingan si anak. Kepentingan anak disini tidak hanya kepentingan lahiriah, namun juga kepentingan bathiniah si anak harus dapat terpenuhi.

2. Peraturan di Australia yang mengatur mengenai hak asuh anak dibawah umur akibat perceraian terdapat dalam *Family Law Act 1975* (Undang-Undang Keluarga tahun 1975). Dalam undang-undang tersebut ditentukan bahwa seorang anak dibawah umur yang terlibat dalam suatu proses perceraian dapat

ditentukan hak pengasuhannya diluar pengadilan, seperti melalui mediasi. Namun apabila hak pengasuhan tersebut harus diselesaikan melalui jalur pengadilan maka pengadilan akan mengasumsikan bahwa merupakan kepentingan terbaik bagi sang anak untuk memiliki ‘hak pengasuhan anak yang seimbang’ [Undang-Undang Keluarga tahun 1975 Pasal 61DA]. Saat pengadilan mengeluarkan keputusan yang menyangkut seorang anak maka pengadilan harus selalu mempertimbangkan “kepentingan terbaik bagi sang anak” [Undang-Undang Keluarga tahun 1975 Pasal 60CA].

3. Dari perbandingan yang telah penulis teliti dengan melakukan analisa terhadap sebuah putusan mengenai sengketa pengasuhan anak dibawah umur akibat perceraian pada negara Indonesia dan Australia tersebut maka penulis dapat menemukan persamaan dan perbedaan yang signifikan, yaitu:

- a. Persamaan:

1. Dalam hal penentuan hak pengasuhan anak ketentuan di Indonesia dan Australia mendahulukan kepentingan terbaik bagi si anak dibawah umur tersebut.
2. Kedua orang tua tetap memiliki kekuasaan atas sang anak selama kekuasaan orang tua tersebut belum dicabut oleh pengadilan. Dilakukannya perceraian oleh kedua orang tua tidak menimbulkan kekuasaan orang tua terhadap sang anak berakhir.

- b. Perbedaan:

1. Di Australia secara tegas ditentukan mengenai hak pengasuhan anak yang seimbang terhadap anak dibawah umur tersebut. Putusan pengadilan akan mengatur mengenai ketentuan pengasuhan yang akan berlaku bagi orang tua dan akan memperinci segala hak dan kewajiban masing-masing orang tua dalam putusan pengadilan. Sehingga apabila sewaktu-waktu orang tua tidak melakukan kewajibannya, pengadilan dapat mencabut kekuasaan orang tua terhadap anak tersebut.

2. Di Australia dalam proses penentuan hak asuh anak melalui pengadilan tersebut, pengadilan dapat mengajukan (melalui inisiatif atau berdasarkan permintaan sang anak) agar anak tersebut diwakili secara terpisah dengan orang tuanya. Seorang anak dapat memiliki seseorang representatif pribadi yang dapat kita sebut dengan Pengacara Independen Anak yang dimana orang tersebut akan merepresentasikan kepentingan terbaik bagi si anak tersebut diluar campur tangan orang tua sang anak.

5.2 Saran

1. Sehubungan dengan ketentuan akibat perceraian terhadap anak dibawah umur menurut Undang-Undang No. 1 Tahun 1974 tentang Perkawinan, hendaknya ketentuan mengenai hak pengasuhan anak dapat diperjelas dan diperinci lebih lanjut sehingga masyarakat dapat lebih memahami bahwa ketentuan mengenai hak asuh anak dan hak perwalian anak merupakan hal yang berbeda.
2. Ketentuan di Indonesia mengenai kekuasaan kedua orang tua atas anak dibawah umur tidak berakhir akibat perceraian sebaiknya dipertegas. Orang tua dan masyarakat akan lebih mengerti bahwa walaupun hak perwalian diberikan kepada salah satu orang tua, namun kedua orang tua tersebut masih memiliki tanggung jawab untuk melaksanakan kewajibannya sebagai orang tua dari anak tersebut untuk tetap mengasuh dan mendidik anak tersebut sesuai dengan kepentingan terbaik bagi sang anak.
3. Mengenai keberlakuan seorang Pengacara Independen Anak dalam sengketa hak pengasuhan anak dibawah umur akibat perceraian, menurut penulis merupakan hal yang sangat efektif bagi pihak anak dan orang tua. Karena itu alangkah baiknya bila Indonesia juga menerapkan ketentuan tersebut sehingga kepentingan setiap anak yang terlibat sengketa hak asuh anak akibat perceraian di pengadilan dapat disampaikan dengan baik oleh orang yang berwenang. Anak tersebut dapat mengeluarkan pikirannya tanpa adanya pengaruh dari kedua orang tua sehingga segala hal-hal yang mungkin terjadi

dalam kehidupan keluarga anak tersebut dapat disampaikan oleh anak tersebut melalui Pengacara Independen Anak.

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FAMILY COURT OF AUSTRALIA

LACHLAN & LACHLAN

[2008] FamCA 455

FAMILY LAW – CHILDREN - Best interests
FAMILY LAW – PROPERTY

Evidence Act 1995 (Cth)
Family Law Act 1975 (Cth)

A & D [2004] FamCA 879
C & C [2006] FamCA 701
Chorn and Hopkins (2004) FLC 93-204
Coghlan and Coghlan (2005) FLC 93-220
M & M (2006) FLC 93-281
ZN v YH (2002) 29 Fam LR 20

APPLICANT: Mrs Lachlan
RESPONDENT: Mr Lachlan
INDEPENDENT CHILDREN'S LAWYER: Legal Aid Commission of NSW
FILE NUMBER: SYF 3137 of 2006
DATE DELIVERED: 25 June 2008
PLACE DELIVERED: Sydney
PLACE HEARD: Sydney
JUDGMENT OF: Le Poer Trench J
HEARING DATE: 19-21 November 2007
14- 16 April 2008
18 April 2008

REPRESENTATION

COUNSEL FOR THE APPLICANT: Ms Messner
SOLICITOR FOR THE APPLICANT: Mitchell Lawyers
COUNSEL FOR THE RESPONDENT: In Person
SOLICITOR FOR THE RESPONDENT: In Person
COUNSEL FOR THE INDEPENDENT CHILDREN'S LAWYER: Ms Knox
SOLICITOR FOR THE INDEPENDENT CHILDREN'S LAWYER: Legal Aid Commission of NSW

ORDERS

Parenting Orders

- (1) That all previous parenting orders in relation to the child, ..., born ... September 1995, be discharged.
- (2) That the father shall have sole parental responsibility for the child. The father is to consult with the mother by email before making any decision in relation to important aspects of the child's life. The father in making a decision about any such matter the views of the child and the views of the mother.
- (3) The child is to live with his father.
- (4) The child is to spend time with his mother as follows:
 - (a) During each school week the child is to spend one afternoon per week with his mother from the conclusion of school until 7.30 p.m. The father is to advise the mother what afternoon will be suitable for the child at the commencement of each school term and thereafter for the remainder of the term that will be the afternoon the child is to spend with his mother. Changes can be made during the term with the agreement of the child and the mother.
 - (b) During school term, every second weekend on Saturday from the conclusion of any sporting commitment/school activity until 8.00 p.m and the next day (Sunday) from 9.30 a.m. until 5.30 p.m. The mother is to collect the child from his Saturday activity for the purpose of commencing her time with him. The mother is to otherwise be responsible for collecting the child from and returning him to his father's residence unless the father agrees that the child can walk or cycle between the parties' houses. In such circumstances the mother is to have the child telephone his father before he leaves his mother's house and advise his father he is leaving his mother's home. Further, if the father agrees that the child can either walk or cycle between the parties' houses for the purpose of spending time with his mother then the father is to ensure that the child telephones his mother immediately before he leaves his father's house to advise her he is leaving his father's house. The mother's first weekend period with the child is to commence on the first weekend after these orders.
 - (c) The mother's weekends commence on the first weekend in the new school term if she has spent time with the child during the first half of the school holidays immediately before the subject school term and on the second weekend if she spent the last part of the school holidays with him.
 - (d) During all but the Christmas school holidays the child is to spend a one week block with his mother with such time to be day time only unless he agrees to stay overnight. The mother is to nominate the week she proposes to spend with the child no later than twenty-eight (28) days before each holiday period. Unless there is some special reason the mother is to nominate either the first or the second week of the school holidays. The mother is to consult with the child prior to nominating her holiday time to ascertain whether he has a preference about the week he will spend with her and the mother is to facilitate the child's requested time if at all possible.
 - (e) In the Christmas School holidays the child is to spend every second week with his mother unless the mother and the child agree to another arrangement which sees the child spend about half of the holidays with his mother. The mother is to notify the father of the proposal for spending time with the child during the Christmas school holiday period no later than twenty-eight (28) days prior to the holiday period commencing.

- (f) All communication between the parties is to be by email. Each email received is to be acknowledged by return email.
- (g) The parties may by email agree to alter any of the orders for the time the child is to spend with his mother under these orders provided it is done by email so that each can retain a copy in writing of the agreed changes.
- (h) The orders for the child to spend time with the mother are to lapse upon the child attaining the age of fifteen (15) years. Thereafter the parties are to facilitate any request of the child to spend time with the other parent and each parent is to ensure that the other parent is advised by email of any arrangement they have made with the child to spend time with that parent. the child is not to be permitted to move from one parent to the other for the purpose of spending time with that parent without the parents confirming that arrangement by email.
- (i) At any time the child agrees to spend overnight time with his mother he is to notify his father and the child may then stay overnight with his mother on the afternoon he spends with her during the school term week and may also stay overnight on the weekends which he spends with her under these orders. If the child so elects he can stay with his mother on the Sunday night of his weekend with her and then go to school from her residence on Monday morning.
- (j) the child is to sleep in his own bedroom whenever he spends overnight periods with his mother.
- (5) The Court NOTES each party is ordered not to pressure the child into making a decision one way or another about staying overnight with his mother.
- (6) Unless these orders otherwise provide differently the mother is to be responsible for collecting the child at the commencement of her time with him and returning him at the conclusion of that time. Depending on the circumstances and the provisions of these orders the child may be collected from school or from his father's residence. Likewise the child may be returned to his school or to his father.
- (7) The father shall ensure that the child attends upon a therapist nominated by the Independent Children's Lawyer in consultation with Dr L for the purposes of assisting the child in living between his parents' homes where there remains a high level of conflict between them.
- (8) The Independent Children's Lawyer has leave to provide a copy of Dr L's reports dated 19 June 2007, 28 February 2008 and 30 March 2008 to the therapist engaged to assist the child.
- (9) The Court NOTES that the child's therapist may, if she/he so desires, liaise with Dr L in relation to the assistance to be provided to the child.
- (10) The therapist appointed to assist the child, as provided for in these orders is authorised to communicate with the Independent Children's Lawyer in relation to the child's progress.
- (11) That the mother is restrained from denigrating the father or any member of the father's family to the child or within his presence or hearing, and shall use her best endeavours to ensure that no other person does so.
- (12) That the father is restrained from denigrating the mother or any member of the mother's family to the child or within his presence or hearing, and shall use his best endeavours to ensure that no other person does so.

- (13) Each parent is restrained from discussing these proceedings with the child or within his presence or hearing.
- (14) Each parent is restrained from showing the child any documents relating to these proceedings including but not limited to affidavits, reports, letters and orders.
- (15) The appointment of the Independent Children's Lawyer be continued for a period of twelve (12) months from the date of these Orders.
- (16) That the Independent Children's Lawyer have leave to re-list this matter before Justice Le Poer Trench by arrangement with his Associate.
- (17) That within three (3) months the father pay to the Legal Aid Commission of NSW the amount of \$11,483.60 being his share of the costs of the Independent Children's Lawyer in the amount of \$9,901.10 and his share of the outstanding expert's costs in the amount of \$1,582.50
- (18) That within three (3) months the mother pay to the Legal Aid Commission of NSW the amount of \$11,483.60 being her share of the costs of the Independent Children's Lawyer in the amount of \$9,901.10 and her share of the outstanding expert's costs in the amount of \$1,582.50.
- (19) That each party pay to the Legal Aid Commission of NSW one half of the additional costs of Dr L, Dr W and Dr Y for their court attendance at the hearing. Such payment to be made within twenty- one (21) days of receiving an invoice from the Independent Children's Lawyer.
- (20) That the mother and father be restrained from removing the child, ..., born ... September 1995, from the Commonwealth of Australia pending further order of the Court.
- (21) That the name of the child be placed on the Passenger Automatic Selection System at points of international departure from Australia, and the Court requests the assistance of the Australian Federal Police in the implementation of this Order.
- (22) The father is to bring the child to the Sydney Registry of the Family Court of Australia to meet with Mr G, Family Consultant, and Justice Le Poer Trench at 4:15 p.m. on Tuesday 1 July 2008.
- (23) Each of the parties is to be at the Sydney Registry of the Family Court of Australia, court room 5B, at 4:30 p.m. on Tuesday 1 July 2008. The Independent Children's Lawyer is requested to be present at that time. The parties do not require legal representation; however, they are welcome to bring their lawyers should they so desire.
- (24) Pursuant to s65DA(2) and s62B, the particulars of the obligations these orders create and the particulars of the consequences that may follow if a person contravenes these orders and details of who can assist parties adjust to and comply with an order are set out in the Fact Sheet attached hereto and these particulars are included in these orders.

Property Orders

- (25) Within two (2) calendar months from the date hereof the mother is to pay the father the sum of \$187,812. In the event of her failing to pay that sum within the time required then the parties are to cause the property at D (the property) to be sold by an agreed real estate agent and at an agreed sale price. The property is to be offered for sale by private treaty unless the parties agree to sell the property by auction.

- (26) In the event of a dispute about the sale price for the property or the identity of the agent to be appointed to sell the property then the parties are to jointly appoint the President of the Real Estate Agents Institute of NSW to nominate an agent to act and/or nominate a valuer to appoint a fair sale price. The parties are to jointly pay the costs of the president and or his nominee which may be incurred in determining any such dispute.
- (27) The parties are to jointly appoint a solicitor to act for them on the sale of the property. If the parties cannot agree on a single solicitor to act for them collectively, then they are each to appoint their own solicitor to act on the sale and then instruct the solicitors to cooperate in order to carry out the orders of the court relating to the sale of the property.
- (28) Upon a sale of the property being completed the parties are to cause the sale proceeds to be applied as follows:-
- payment of any agents commissions and fees;
 - discharge of the registered mortgage;
 - payment of any legal costs of sale;
 - payment to the father of 40.4 per cent of the sale proceeds;
 - payment of the balance to the mother.
- (29) The mother is to have occupation of the property pending the sale and is to meet all the payments required under the mortgage, rates and taxes pending the sale. The mother is to keep the property presentable for prospective purchasers to inspect and co-operate with the real estate agent to provide access at all reasonable times.
- (30) The mother shall indemnify and keep indemnified the father in respect of all claims for rates and taxes, if any, outstanding in respect of the former matrimonial home and all claims for in respect of electricity, gas, telephone, and any other services connected to or supplied to the said property.
- (31) The mother shall indemnify and keep indemnified the father in respect of the registered mortgage on the property. In the event of the property being sold pursuant to these orders then the mortgage is to be discharged and that discharge will extinguish the mother's indemnity.
- (32) The parties are to be the trustee of the child's bank account. The mother is to forthwith cause the account to be transferred into the parties' joint names as Trustee for the child. Neither party is to be able to operate the account without the signature of the other. The mother is to cause details of the change in the particulars of the account, as required by these orders, to be provided to the father within twenty-eight (28) days of the date hereof. Thereafter the mother is to ensure the father receives copies of all statements and correspondence received by her in relation to the account. Upon the child attaining the age of eighteen (18) years the parties are to transfer the account to his absolute control.
- (33) The parties are to do all things necessary to cause the Coles cheque of \$2,000 and the un-deposited dividends of \$894.50 to be paid to the father.
- (34) The mother is to forthwith sign all documents necessary to allow the father to register the Toyota Camry registration number ... in his name.
- (35) Each party is to cause a copy of these orders to be forthwith served upon the Trustee of the mother's superannuation fund being the subject of orders made herein.

- (36) That the mother transfer to the father all of her right, title and interest and the father keep and retain all his right, title and interests in monies held in the following financial institution accounts:
- (a) The Gateway Credit Union Account No. ... in the name of the father;
 - (b) The Commonwealth Bank VR2 Account;
 - (c) The V Bank Account No. ... Offset Account in the name of the mother and the father
- (37) The parties cause the jointly owned shares to be sold and the proceeds to be divided between them. For the purpose of this order the mother is to forthwith arrange for the sale of the shares and cause the father to receive his share of the sale proceeds at the same time she receives her share. The mother is to provide to the father evidence of the sale of the shares, commissions charged and the like.
- (38) That the mother transfer to the father all of her right title and interest in the Forex Trading Account.
- (39) That the father transfer to the mother all of his right title and interest in the Timeshare holiday facility. The mother is to provide to the father for his signature and return to her, all of the documents necessary to effect a transfer of the time share interest.
- (40) The base amount allocated to the father out of the interest of the mother in the R Super Fund account number ... pursuant to section 90MT(4) of the *Family Law Act 1975* is \$218,845.
- (41) Pursuant to section 90MT(1) of the *Family Law Act 1975*, whenever a splittable payment becomes payable in respect of the interest of the mother in the R Super Fund account number ... the Trustee of the fund shall:
- (a) Pay to the father or his administrators, executors, beneficiaries, heirs or assigns the amount which is calculated in accordance with the *Family Law (Superannuation) Regulations 2001* using a base amount of \$218,845; and
 - (b) Make a corresponding reduction in the entitlement that the mother would have but for these orders.
- (42) The Trustee of the R Super Fund account number ... shall do all acts and things and sign all such documents as may be necessary so that, in accordance with the obligations set out under the *Family Law Act 1975* and the *Family Law (Superannuation) Regulations 2001*, the Trustee can calculate the entitlement of, and make payment to the father in accordance with foregoing Order.
- (43) That the operative time for the purpose of these Orders is the fourth business day after the day on which a sealed copy of these Orders is served on the Trustee of the R Super Fund.
- (44) Pursuant to section 106A of the *Family Law Act 1975 (Cth)*, in the event either party refuses or neglects to comply with the provisions of these orders, the Registrar of the Family Court of Australia is hereby appointed to execute all deeds and documents in the name of the father and/or the mother, and do all such acts and things necessary to give validity and operation to the said orders within fourteen (14) days of the reasonable request to do so being sent to the last known residential address of the party or solicitor acting for the parties.

- (45) Otherwise each party is declared the owner of any item of personalty in their sole name including any bank accounts and superannuation interest currently in their possession or control.

IT IS NOTED that publication of this judgment under the pseudonym *Lachlan & Lachlan* is approved pursuant to s 121(9)(g) of the *Family Law Act 1975* (Cth)

FAMILY COURT OF AUSTRALIA AT SYDNEY

FILE NUMBER: SYF 3137 of 2006

Mrs Lachlan
Applicant

And

Mr Lachlan
Respondent

REASONS FOR JUDGMENT

PARENTING MATTERS

INTRODUCTION

1. The subject child is the twelve year old son of Mr Lachlan (the father) and Mrs Lachlan (the mother). I have had the pleasure of meeting the child and speaking with him assisted by Mr G, a Family Consultant in this Court. Meeting with the child was an unusual event for me however, as will be seen later, the unusual circumstances of this case gave rise to that situation.
2. The child is a delightful young man and meeting him made me feel very sad given I have concluded he has been treated in an appalling and disrespectful way by his parents. The enduring and nagging recollection I have of meeting the child was his desire for the Court proceedings to stop. For his part he carries the burden of loving both his parents, pining for a reconciliation of their marriage, longing to once again be part of an intact family, albeit a dysfunctional and an argumentative one. He has, in a real sense, lost his parents to their acrimony and battle to win at all levels in their parenting and financial disputes. He has done nothing to deserve this and is powerless at this time to change the situation. His parents have treated him as a chattel and lost sight of the fact he is a living human being with feelings and rights. He is but a toy in the manipulative and psychological games the parents play. His ability to withstand the psychological damage his parents inflict on him must be limited and already the evidence suggests he has been damaged. It is clear that the child does hold a fear of him being the only adult present at a time when his mother might suffer from a hypoglycaemic attack ("hypo"). There is ample evidence to support a conclusion that such fear has been fostered and promoted by his father.
3. Since November 2006 the child has been living almost full time with his father. He has spent very little overnight time with his mother. He has spent no overnight time with his mother in 2008. His stated reason is a concern (fear) he holds that his mother might have a diabetic hypoglycaemic attack (severe drop in blood sugar levels potentially causing coma). He would like to spend time with his mother and desires a continuing relationship with her. He would like to spend day time periods with his mother and determine himself when it might be safe for him to stay overnight with her.
4. The court appointed expert, Dr L, holds the opinion that initially the fear the child had of staying overnight with his mother was fuelled by the father as part of the ongoing dispute between the parties. Dr L, in his last report dated 30th March 2008, says he accepts that the child's fear of spending overnight time with his mother has become real for him irrespective of the possible psychological manipulation by the father in enlivening that fear.

5. It is against that background that I come to determine the competing proposals for the child.
6. I apologise in advance to those who have to read this judgment for its length. There were four experts whose evidence was read and who were required for cross-examination. The issues were complex. The decision difficult. The reasons for a decision which is largely against the recommendation of the principal expert requires proper explanation.

PARTIES' PROPOSALS

7. The father has been self represented in the proceedings before me. The mother has been represented.
8. The orders sought by the mother are found in exhibit M14. She seeks that the child live with her after a four week period of living with his maternal aunt C. During this period the child and his mother will attend upon a therapist to assist in the transition of the child to the mother's house where he will no longer fear being left overnight with his mother. It is proposed that the child spend time with his father in one week from Friday night until Sunday night and the next week from Saturday night until Sunday night. The father is restrained from having any other contact with the child. At the conclusion of the hearing, when the Independent Children's Lawyer made known the orders she was supporting, the mother informed me she would support those orders with some slight amendments.
9. The father's proposals are found in his Amended Response filed 21 May 2007. He seeks the child live with him. He proposes an equal shared parental responsibility order. He seeks that the child spend time with the mother as agreed or as ordered by the Court. His submissions suggest an approach which sees the child being able to adjust the time he spends with each of his parents as the child's needs dictate. He seeks flexibility in the arrangement.

INDEPENDENT CHILDREN'S LAWYER'S PROPOSAL

10. The orders recommended by the Independent Children's Lawyer are contained in exhibit ICL6. The proposed orders provide for the child to live with his maternal aunt and then spend limited time with each of his parents over a graduating process which finally concludes with the child living with his mother at all times other than Monday and Wednesday afternoons after school and for Friday night until 5.00 p.m. Saturday. There are provisions for some holiday time for the child with his father. There are other incidental orders sought which I will refer to later in these reasons.

CREDIT

The father

11. The father presented as a very pleasant and straightforward man who was committed to his son. His evidence revealed to me that the child is the father's life. Irrespective of the concerns which Dr L has about the relationship between the child and his father, it appeared to me that the father had a high investment emotionally in his relationship with the child.
12. Unless I hereafter specifically deal with a piece of evidence which shows a contrary conclusion, I do accept the father has given his evidence honestly believing the content to be true. I do not believe he has deliberately sought to be untruthful. In the main he appeared to answer the questions asked of him in an apparently straightforward manner. He readily made concessions when they were appropriately sought. This included a concession that he had assaulted the mother on one occasion.

The mother

13. It appeared to me that the mother gave her evidence honestly. She was prone to divert from the question she was asked; however, I did not think this was excessive. Unless I specifically comment in these reasons about particular evidence, it should be understood that I accepted the mother as a truthful witness.

BACKGROUND FACTS

14. The father was born in October 1958 and is 49 years of age.
15. The mother was born in June 1961 and is 46 years of age.
16. Both parties were born in India. The mother came to Australia to live in early 1989. She obtained employment with the V Bank (her current employer) in April 1989. In about mid 1990 the father commenced to reside in Australia.
17. They married in Australia in August 1990.
18. The father was unemployed when the parties married. He secured employment in early 1991 and continued working in paid employment until 2001.
19. Both parties hold degrees from universities in India. The father also holds a Masters degree from the University of Western Sydney (UWS). The father holds other qualifications.
20. In the financial year ended 30 June 1998 the mother earned a taxable income of \$41,627. The next year she earned \$65,043. In the 1996 and 1997 years she earned in the \$30,000's. In 1998 she earned \$41,627. In 1999, 2000, 2001, 2002 and 2005 she earned in the \$60,000's. In 2003 and 2004 she earned in the \$70,000's and in 2006 she earned \$58,718.
21. In 1991 the mother sponsored her mother's migration to Australia. She then lived with the parties until 2004.
22. In 1994 and 1995 the father undertook a Masters degree at UWS. He attended university 3 to 4 nights per week in addition to holding down a full time job.
23. The child, the parties' only child, was born in September 1995. The mother took 3 months maternity leave and accrued annual leave to care for the child. In mid 1996 the mother returned to part time work and then in December 1997 she returned to full time work.
24. In 2001 the child commenced attending school.
25. The parties separated in about April or June 2006. The father and the child moved out of the home. They later reconciled to some extent. They continued to live under the same roof until 23 November 2006. On that day the mother claims she was assaulted by the father. The father was charged with assault but acquitted.
26. At the final separation of the parties they were living at the property in D.
27. During 2001 the father became aware that his father was very ill. It is common ground that the father's relationship with his parents broke down shortly before he left India to live in Australia.
28. In 2003 the father worked for three days with O Company. Otherwise he has not worked in paid employment since 2001.
29. Between 2002 and 2004 the father undertook a course with Forex at a cost of \$5,000. He then invested \$15,000 in Forex trading.
30. In about 2004 the father repaired his relationship with his mother.
31. In about March 2005 there was a separation of the parties under the one roof. This was a time when the mother's friend Ms B was living with the parties. The father alleged that

the mother and Ms B shared a bed. The way in which the father spoke of this event to others involved in this case led them to understand he was alleging a homosexual relationship between the mother and Ms B.

32. In September 2005 Ms B moved out of the parties' property and the mother and father resumed their relationship.
33. On about 22 October 2005 the father assaulted the mother by slapping her. The child was in the house at the time of the assault. About the end of 2005 there was an AVO issued against the father for the protection of the mother.
34. In October 2005 the mother says that the father threatened to kill himself with a kitchen knife. This is denied by the father. Whatever happened, it appears it traumatised the child who was present in the house.
35. From about early 2006 the father commenced to record conversations with the mother, the child and others. There may have been in the order of 300 recordings.
36. In about April 2006 there was a separation between the parties.
37. The father alleges that on 13 May 2006 the child tried to harm himself with a plastic knife. The father told the police about this incident two days later. The father alleges this behaviour on the part of the child was provoked by conflict between the mother and the child.
38. On 19 May 2006 the police attended at the former matrimonial home and reported a dispute between the parents. The father said the mother was angry with him and saying he did not work and stayed at home and accessed pornography on the computer all day.
39. On 1 June 2006 the father left the home taking the child with him. The mother called the police. The police spoke to the child and the father. The mother was seeking the help of police to restore the child to her care. The police refused to return the child to the mother.
40. In June 2006 the mother commenced the proceedings seeking, amongst other orders, a recovery order. The mother alleged the father had removed the child from the home at D for the purpose of residing elsewhere without her consent.
41. Consent orders were made on 7 June 2006 which provided for the child to live with the mother.
42. In July 2006 the father and the child returned to live at the former matrimonial home.
43. On 17 November 2006 further interim orders were made for the child to live with the father. The father was to vacate the home in December 2006.
44. In November 2006 the father's mother arrived in Australia and commenced to live with the parties.
45. On 23 November 2006 there was an incident in the home between the parents. The mother alleged that the father had assaulted her. The father denied any assault. The father's mother was alleged to be a witness to the assault. The police required the father to leave the home. The father was charged with assault. The charge was dismissed. The mother alleges that the charge was dismissed because the father's mother was not available to give evidence. A further AVO was granted to protect the mother. That AVO expires on 23 May 2009. The child left the home with his father on 23 November 2006.
46. In December 2006 the mother says she copied the hard drive on the father's computer and then gave the computer to him. The mother alleges that she discovered pornography on the computer which she then tendered in evidence before the court.
47. On 23 January 2007 whilst the child was staying with his mother, she suffered a hypoglycaemic attack. She became unconscious. The child could not revive her with lemonade. He rang his father who then called the ambulance to attend the mother's home. The front door was deadlocked by the mother and the child was not told where the keys were kept. With the assistance of the father talking to the child on the phone he was able

to find the keys and provide access to the ambulance officers. The father says that some 6 days after this attack the mother drove her car.

48. Since 23 January 2007 the child has not spent time overnight with his mother.
49. On 25 January 2007 the mother had a "hypo" during the day and the child revived her with lemonade.
50. On 11 April 2007 the court orders were varied to remove night time visits for the child with the mother.
51. In August 2007 there was an incident between the parties at changeover. The mother alleges the father was inspecting her car and so she took a photo of him. The father was disturbed by the photographing and thereafter required the changeovers to occur at a police station.
52. In September 2007 the father was investigated for and charged with redirecting the mother's mail. No conviction has been recorded in relation to the charge.
53. Until the end of 2007 the child was a pupil at S Primary School.
54. In 2008 the child commenced attending B High School. This is a state selective school.
55. Both parents agree the child is a keen cricket player. He commenced playing in 2001.
56. In May 2007 the mother was fitted with an insulin pump. She says that she understands this gives her much better control of her insulin levels. It provides 24 hour monitoring of glucose levels. On 5 July 2007 the mother took the child to see Dr O who explained to the child the functioning of the insulin pump.
57. Orders were made on 11 July 2007. These orders provided for the child to meet with Professor Y. They provided for the father to be examined by a psychiatrist (subsequently Dr W was appointed).
58. As referred to earlier there was an AVO issued on 23 May 2007 for a period of two years. It serves to protect the mother. It is against the father. It prevents a number of actions by the father. It does not permit the father to approach or contact the mother otherwise than authorised by an order under the *Family Law Act 1975*.
59. The mother's employer has agreed to the mother having flexible hours of work, including working from home in the mornings and afternoons if necessary in order to be available for the child.
60. The parties live within a kilometre of each other at the moment.

Financial Matters

61. The father was employed during the marriage from 1991 until July 2001.
62. The mother has been employed throughout the marriage with the exception of time she had off to give birth to the child. During that time she received maternity leave for three months. She had four and a half months of paid annual leave.
63. The mother is currently employed by the V Bank and earns \$96,600 per annum. The father has been unemployed virtually since July 2001.
64. The father holds a degree in engineering and a Masters degree from Western Sydney University.
65. At the date of the marriage the mother says she held a term deposit of \$25,000. The father had no assets of note.
66. The parties have owned two properties. The first they bought in 1991 at C. That property was purchased using savings and borrowings. There is a dispute as to the amount of savings the father contributed. That property was sold in 1999.

67. In 1998 the parties purchased D property. The purchase price was \$314,000. The whole of the purchase price was borrowed using both properties as security. The parties had at least \$50,000 in savings at the time of the purchase. The sale of the C property discharged the mortgage on the former matrimonial home.
68. At the date of separation the parties' assets were principally their interest in the former matrimonial home, savings and superannuation.
69. During the marriage the parties lent money to the mother's sister who paid interest and has repaid the loan. The father disputes the repayment largely because he says he has not seen any documentary evidence to support the allegation.
70. Since the separation the mother has paid child support. She currently pays \$745 per month.
71. In 1991 the parties sponsored the mother's mother to come to Australia. She then lived with the parties until a dispute between the parties. The mother alleges that the father forced her mother from the home.
72. In 2005 the father and says the mother suffered a hypoglycaemic attack whilst driving the car. The father says that after that date he prevented the mother driving the car unless it was absolutely necessary. The extent or intensity of the attack is disputed by the mother.
73. The mother has had exclusive occupation of the former matrimonial home since 17 November 2006.

RELEVANT LAW

Legal Principles

74. The principles governing this case are set out in the *Family Law Act 1975 (Cth)*. In deciding whether to make a particular parenting order I must regard the best interests of the child as the paramount consideration (see section 60CA). In determining what is in the child's best interests, I must consider certain matters under section 60CC. Those matters are the "primary considerations" and the "additional considerations" set out in that section.
75. I am required to ensure that any order I make is consistent with any family violence order and does not expose a person to an unacceptable risk of family violence, to the extent that doing so is consistent with the child's best interests being treated as paramount (see section 60CG).
76. I will also be guided by section 60B which sets out the objects of the part of the Act dealing with the children and the principles underlying it. I here set out the provisions of section 60B:

FAMILY LAW ACT 1975 - SECT 60B

Objects of Part and principles underlying it

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

77. I am required to consider matters set out under section 60CC(4) and (4A) of the Act. Without specifically setting out what those matters are I state that I will in these reasons deal with those matters.

78. Section 61DA(1) requires that: "... *When making a parenting order in relation to a child, the court must apply a presumption that it is in the best interests of the child for the child's parents to have equal shared parental responsibility for the child.*"
79. Subsection (4) provides as follows: "...*The presumption may be rebutted by evidence that satisfies the court that it would not be in the best interests of the child for the child's parents to have equal shared parental responsibility for the child.*"
80. Section 65DAA requires me to consider the children spending equal time or substantial and significant time with each parent where the court is proposing to make an order that the child's parents are to have equal shared parental responsibility.

Consideration of Section 60CC

81. In determining what is in the best interests of the child I am required to consider the provisions of sub sections (2) and (3) of section 60CC.
82. I am required to consider the following "Primary Considerations":
- a) the benefit to the child of having a meaningful relationship with both of the child's parents;
 - b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.
83. I understand and accept the application of the primary considerations in the determination I am required to make in this case.
84. I am also required to consider the other sub-sections of section 60CC.

THE EVIDENCE

The mother's affidavit evidence

85. In her affidavit material the mother is highly critical of the father in many areas. She is critical of him as an uninvolved father. She is critical that he has not been able to maintain employment.
86. In paragraph 35 of her affidavit filed on 2 August 2007 she said:
- "I have been constantly dismayed at the husband's apparent lack of motivation and drive and to make any contribution to the family existence and the day to day life and have held concerns of the potential negative psychological impact it may have upon [the child]."*
87. The mother concedes that in 2004 the father began taking the child to cricket and swimming. She further concedes that in 2006 the father became more involved in the child's recreational activities.
88. The mother claims that the father has been harassing her by making telephone calls during the night.
89. The mother attends upon a psychologist provided by her employer.
90. The mother alleges that the father "*labours under psychological or psychiatric pressure and lack of insight.*"(paragraph 58 of mother's affidavit). She says that the father has threatened to do her harm by saying, within her hearing to a friend "*if she opens her mouth again I will finish her off*" (paragraph 61 of the mother's affidavit). This was said shortly after the mother says the father slapped her twice. Following this incident the mother made a complaint to police. An AVO issued against the father for a period of 12 months commencing 22 February 2006.

91. On 31 October 2005 the mother said the father threatened to kill himself. He picked up a knife and said *"I will kill myself."* The mother said that the child was present and screamed. The mother reported the incident to police.
92. The mother alleges that the father has *"frequently and persistently accessed, subscribed to and downloaded pornography from the internet."*(paragraph 73 of the mother's affidavit). *"He also superimposed naked bodies onto photographs of relatives and friends of mine."* I will refer to this allegation later as it is referred to in other affidavits which annex material.
93. In paragraph 64 of her affidavit sworn on 2 August 2007 the mother says that in about March 2006 the child started to distance himself from her. He would only answer questions she asked him about school. The mother said she was frightened and started to write on pieces of paper questions for the child. These included things such as *"Who is putting you to bed tonight?"* The child would reply *"Dad"*. Sometimes he just shrugged his shoulders.
94. On 12 November 2006 the mother asked the child, *"Did I ever write notes to you to say that your Dad is bad?"* The child replied *"No"*. I have assumed that this question was asked of the child because of some allegation made by the father. In any event it is direct evidence of the mother involving the child directly in the dispute between the parties.
95. The mother alleges that on 31 October 2005 the father threatened to harm himself with a knife. The father denies this allegation.
96. In paragraph 66 of the mother's affidavit she says on 19 October 2006 she heard the father reading part of the mother's affidavit to the child. There then proceeded to be a loud argument between the parents where the father alleged the mother had grabbed his papers and also pulled and shook the child. The mother denies this. The father called the police. The mother says the police report refers to the child as *"deeply traumatised by the parents' arguments"*.
97. The mother alleges that on 23 November 2006 the father assaulted her. The mother annexed to her affidavit filed 2 August 2007 a copy of the statement she made to the police on the day of the assault. The father denies this assault. It is common ground that the father was charged with assault and that the case was dismissed. The mother claims the case failed because the supporting witness, namely the father's mother, had left the country.
98. In March 2007 the mother filed a contravention application claiming the father had failed to comply with court orders and make the child available to spend time with her. The case was dismissed.
99. The mother has permission from her employer to work flexible hours including working from home for some of her time.
100. The father in his affidavit filed on 10 October 2007 says that during the marriage when the mother had *"hypos"* she was very violent and the father had difficulty restraining her. Although he had injections to give her at these times he saved them for a *"last resort"* because of the fear of damage whilst giving the injections.
101. The father says that as the mother's diabetes progressed she underwent some type of personality change and became aggressive even when not having a *"hypo"*.
102. The father says that on 14 January 2006 the mother had a *"hypo"* and hurt herself. He says this was witnessed by the child. Again in July 2006 the father says that the child witnessed his mother suffering from a severe *"hypo"* which required the father to resuscitate her. He says that the child witnessed three *"hypos"* in 2006.
103. At the date of cohabitation the mother said that she had \$25,000 in cash savings in a term deposit. No evidence is provided to corroborate this; however, I accept her evidence in relation to same.

104. In 1991 the parties purchased a townhouse for \$161,000. Ten per cent deposit was provided. The mother alleged that the whole of the deposit came from her savings. The father denied this and said that he had been working for some time and had accumulated some savings. I accept that the father did contribute either directly or indirectly to the deposit. This contribution, however, came from his income which is a matter I will take into account (namely his income earned during the course of the cohabitation) as a contribution on his behalf. That property was sold in 1999.
105. In 1998 the parties purchased the former matrimonial home at D. By that time the parties had additional savings of \$50,000. Following the sale of the former property owned by the parties in C, they were able to discharge the mortgage on the former matrimonial home.
106. It is clear from the financial history that the parties were good savers and accumulated substantial assets by the time of the separation.
107. The parties currently have a mortgage on the former matrimonial home to the mother's employer. The mother says that it is a condition of the mortgage that she resides in that property.
108. The father left his employment in the middle of 2001. At that time he was employed by T Pty Limited. Shortly before he left that employment the father had been the subject of a review of his employment. The mother claims that the father left his employment because he received a poor review. The father denies that. The effect of the mother's evidence is that the father was on the point of being sacked and fearing being sacked he left the employment. The father denies that version of the facts. In relation to that issue I prefer the mother's view and I find that the father did leave his employment because he was concerned about the prospect of a further adverse report.
109. Apart from a few days work in 2003 it appears that the father has not generated income for the family from paid employment since July 2001. The father did undertake Forex training with a view to share trading. The mother says she contributed \$10,000 as a fund for share trading. In total the parties invested about \$15,000 of their capital into Forex Trading.
110. The mortgage on the former matrimonial home is paid for by the mother. It is deducted from her salary.
111. In 1994 the parties lent money to the mother's sister. That amount was paid back with interest. In 2003 the mother's sister borrowed money again and that was repaid with interest in April 2005. In this regard I accept the evidence of the mother. The father had not accepted the mother's evidence on this point and sought documentary evidence. The mother's version of the repayment has been corroborated by her sister.
112. In 2004 the parties purchased a holiday time share unit for \$12,500.
113. Following the physical separation between the parties the child has been predominately living with the father. The mother pays child support of approximately \$745 per month. This might have increased slightly because I was told at the hearing that she was paying \$800 per month and that the payments were up to date.
114. On 16 August 2007 the mother filed a further affidavit. In that affidavit the mother says that on 2 December 2006 she turned on the father's computer and investigated its contents. She searched for picture image files and found what she described as "pornography". The mother was obviously looking for evidence to use in this case. She was aware of the father viewing pornography on the computer as was evidenced by police reports of earlier attendances at the parties' home. She annexed to that affidavit printed copies of images she said she found on the computer. She says that the images show her sister, her niece and friends of hers. She says the photos show superimposing of faces of her relatives and friends onto pornographic images. The photos attached to the affidavit include plainly pornographic photos and it can clearly be seen that faces have been superimposed onto pornographic pictures. The father denies he created the images.

115. On 19 November 2007 the mother filed a further affidavit in which she says she found further images, I assume on the father's computer, which are in the form of cartoon. Again she says these computer images depict relatives of hers. Some of the words and pictures portray violent sexual activity. There is also reference to stupefying drugs being administered.
116. The father denied that he had created the pornographic images and directed my attention to the first page of the annexure to the affidavit of 19 November 2007 which shows the location of the file as K:/[mother's name]. He says that this indicates that the file was in fact saved by the mother.
117. I am unable to reach a conclusion as to whether or not the pornographic images were created by the father. There is, however, no evidence that the child has ever been exposed to pornographic images whilst in the care of either the mother or father. There is no evidence that the mother wiped the pornographic images from the father's computer before she gave it back to him. She could not have been concerned that the child would be exposed to such images in the father's house.
118. The mother's sister, the maternal aunt, signed two affidavits which were read by me in the proceedings. She gave evidence that she cared for the child from time to time when he was a baby. She offered herself as a carer for the child. She has a five bedroom house and would be able to provide accommodation for the child.
119. In her affidavit filed on 20 November 2007 she gave evidence that she had never locked the child in a house with toddlers and gone out. This was something which had been alleged by the father. She gave evidence that she had repaid all the monies lent to her by the mother. The loans advanced were \$20,000 in 1994 and \$50,000 in 2003.
120. The mother's mother, the maternal grandmother, also filed an affidavit. She is 87 years of age. She denied the father's allegations that she did not help care for the child. She said that on an evening in September 2004 the father had chased her out of the house, yelling "get out, get out".

The Father's Affidavit Evidence of 10 October 2007

121. The father says that in January 2006 he started to keep a complete diary of the incidents of hypoglycaemic attacks suffered by the mother. On 14 January 2006 she suffered a severe hypoglycaemic attack at night and hurt herself. The father said that the child observed that incident. In July 2006 she had another severe hypoglycaemic attack whilst asleep. Again the child witnessed that attack.
122. The father says that the child has a sleep disorder which causes him to wake at night and he would come into their bed. It is in such circumstances that he has observed his mother suffering the attacks.
123. The father says that the incidents of hypoglycaemic attacks observed by him in the mother in 2006 are not referred to in the report of Dr Y dated 7 August 2006. The father says the mother is deliberately under-reporting her diabetic condition.
124. In August and October 2006 the father said the mother had further severe hypoglycaemic attacks.
125. On 17 November 2006 orders were made for the child to reside with his father.
126. In paragraph 35 of his affidavit the father says as follows:

"Instead of obeying the Court orders my wife wanted to take [the child] to Dr [Y] so that Dr [Y] could convince [the child] that he was safe with her. Although this was never ordered, the child's representative wrote to [the child] on 22 November 2006 (annexure B) making it appear that this was in the orders."

127. I have read annexure “B” and I do not agree that the letter from the Independent Children’s Lawyer to the child dated 22 November 2006 suggests that seeing Professor Y was part of a court order.
128. The father says that on 23 January 2007 the child was spending time with his mother during the second half of the school holidays. At about 2.00 a.m. he phoned the father and said that his mother was having a hypo. He was unable to revive her with lemonade. The father then contacted the ambulance service and directed them to the mother’s home.
129. The father says that on the evening of 24 January 2007 the child was sleeping in the same bed as his mother. He says that during the night the mother struck him on the neck. The child then awoke and revived her. Again on 25 January 2007 the father says the mother had another hypo during the day when the child gave her lemonade and revived her. I have assumed that this information was provided by the child. The weight to be given to this evidence is limited.
130. In paragraph 41 of the affidavit the father alleges that the mother had a priest perform an exorcism in the house in the presence of the child during January 2007. The mother denies this; however, she agrees that a priest was present for the purposes of “*blessing the house*”.
131. The father says that following the return of the child to live with him on 29 January 2007 at the conclusion of the school holidays, the child was thereafter reluctant to spend nights with his mother. The father said he tried to make other arrangements so that the child could spend time with his mother during the day time rather than night time however he says his suggestions were rejected.
132. The father says that on 13 March 2007 the child ceased going to his mother’s house.
133. The father is critical of the mother driving the child on both 29 and 31 January 2007 within such a short proximity of a major hypoglycaemic attack on 23 January 2007. The father suggests that this was a potentially dangerous exercise.
134. On 11 April 2007 the interim orders were varied to remove the provision for overnight time for the child to spend with his mother.
135. In about May 2007 the father says the mother had her insulin pump in use.
136. Annexed to the father’s affidavit is a letter dated 13 August 2007 requesting answers to questions from Dr Y. Dr Y has answered that list of questions. I have read both the questions and answers. In answer to question 10, Dr Y said:
- “It is generally considered not advisable to drive within three months of an unconscious hypoglycaemic episode. If treatment has been optimised and the patient has not suffered unconscious hypoglycaemia for three months and is judged to take reasonably measure to detect and treat hypoglycaemia then application for a driving license is generally supported.”*
137. In 2001 the child started at school. Between 1996 and 2000 the child had been looked after by the mother’s sister, the maternal aunt, while the parties worked.
138. The father says at paragraph 55 of his affidavit that it was a condition of marriage that the mother’s mother lived with the parties. He said the parties sponsored the maternal grandmother to travel to Australia in 1991. The condition of the sponsorship was that the parties were to be responsible for the care of the maternal grandmother for ten years. The father says that although the maternal grandmother resided with them until late 2004, she provided no care for the child. During the period 1991 to 2004 the father says that the parties supported the maternal grandmother and although she received a pension, she saved that for her own purposes which was a holiday in Europe.
139. The father says that in 1994 the mother provided \$40,000 to her sister to buy a new house. A further \$50,000 was provided to the maternal aunt in 2003 to renovate the house. It is the mother’s case that the money has been repaid. Once the child

commenced school he began his schooling near the residence of the maternal aunt. He then went to school with his cousins. The father would deliver the child to the aunt's house in the mornings and collect him in the afternoon on the way home from work.

140. The father in his affidavit is very critical of the mother and her family. For example, he said that the mother's family claimed to be Portuguese and "*so had a right to call us dirty Indians*".

141. The father said that the child is a gifted and talented child with a brilliant academic performance:

"He is in the best selective primary school in the State and has gained admission to selective [B] High. He is evaluated as being in the top 1% in mathematics in the State. None of my wife's family or friends has more than a most basic of educations and they do not encourage their children to pursue a university education either."

142. In addition the father says that the child has a wide extracurricular interest and that he has taken the child to and from chess, piano, swimming, soccer and cricket matches and training. The father also says that he has assisted the child with academic problems but does not do his homework for him.

143. The father claims that despite a payment by way of interim order of \$86,507 to the mother, she has squandered the money on legal expenses and purchases for herself and friends and relatives. Despite complaints on the father's part that the mother was reluctant to or refused to pay child support, it now appears that she is making payments pursuant to a child support assessment.

144. Under the heading "Financial Contributions for the Family", the father in his affidavit provides the following relevant evidence. In 1991 the parties purchased their first property for \$161,000. A mortgage was taken with V Bank where the mother worked. The parties contributed \$18,000 from their savings. The payments on the mortgage were deducted from the mother's salary. The father contributed 100% of his salary to an off-set joint account which had been established with V Bank. The entirety of the \$145,000 borrowed to repurchase the home was repaid around 1994.

145. In 1998 the parties purchased the former matrimonial home for \$314,000. A second mortgage was taken with Westpac Bank in relation to the parties' existing property. Further borrowings were obtained from V Bank. The first property owned by the parties was retained as an investment but sold later for \$245,000. By 2000 the parties had paid off the second mortgage on the former matrimonial home.

146. As mentioned earlier there were two loans advanced by the mother to her sister, one of \$40,000 in 1994 and another of \$50,000 in 2003.

147. In 2004 \$15,000 was used by the father to establish a Forex trading account. The father paid \$5,000 for a Forex trading course undertaken by himself.

148. The father annexed to his affidavit as annexure "F" a spreadsheet of income earned during the course of cohabitation. As there were no primary documents in the normal course of events, such a document would not be accepted as evidence. However, in this case, the schedule clearly shows that the income of the mother throughout the course of cohabitation was significantly superior to that of the father. As such, the schedule amounts to an admission against interest and I will accept it as being accurate. On the father's own calculations commencing with the financial year ended 30 June 1991 and concluding on 30 June 2007, the total net salary received by the mother was in the order of \$709,000 and the total net salary received by the father was in the order of \$402,000. If the totals were taken at the date of separation in about mid 2006, the result is not much different.

149. On 17 November 2006 an order was made in this Court requiring the parties to cause the balance of their accounts with Gateway Credit Union to be divided equally between them.

A further order was made on that day requiring the father within 21 days to vacate the former matrimonial home at D. Annexure "D" to the father's affidavit evidences a payment to the mother of \$86,507.75 on 28 November 2006. On 17 November 2006 the Court further made an order, pending further order, for the child to live with his father.

150. On 23 July 2007 the father filed a further affidavit. The following facts emerged from that affidavit. On 11 April 2007, interim orders were made in the Court for the child to continue to live with the father. The time which the child was to spend with his mother overnight was removed. I should add that was an order made with the consent of each of the parties.
151. Annexed to the father's affidavit filed on 23 July 2007 is a document being a reply to Dr L's report dated 13 June 2007. The father also annexed a copy of a letter to Dr L requesting the answers to questions. He has also annexed a copy of a transcript and some emails passing between the mother and others and between himself and Dr Y.
152. The annexure dealing with Dr L's report I have read. Some of the matters outlined in this annexure were raised with Dr L.
153. There is not any matter of substance in the reply to Dr L's report which is not dealt with elsewhere by me in these reasons.

The Evidence of Dr W

154. On 27 September 2007, Dr W signed an affidavit. This affidavit annexed his report. In that report Dr W had examined the father following concerns raised by Dr L in his earlier report. Dr L was asked by the Independent Children's Lawyer in the letter of instruction whether the father suffers from any psychiatric condition or disorder. Dr L said:

"Based on the restrictions of a single cross-sectional interview and on the reliability of his history along with my mental state examination, I would indicate that [the father] was not suffering from a major mood disorder at the time I saw him"

...

"I have not made any diagnosis on AXIS I in relation to [the father]. As noted earlier he does not suffer from an antisocial personality disorder but a single cross-sectional interview can only provide you with a snapshot of an individual's personality."

...

"Based on my examination I am of the opinion that [the father] does not suffer any specific psychiatric illness and there are therefore no psychiatric reasons why he should not be able to either have residency or continuing access to his son, depending on the determinations of the court."

Evidence of Dr Y

155. Dr Y signed an affidavit on 30 July 2007. This affidavit annexed a copy of a report of his dated 21 May 2007. In this affidavit Dr Y gave details of the mother's diabetic condition. In the body of the report Dr Y says:

"Obviously any chronic illness can affect a person's ability to function in most activities, including that of caring for a child. However, in my judgment [the mother] is perfectly capable of looking after her son [the child]. Certainly in

every day clinical practice I will not consider her to have any degree of difficulty in this regard that would have alerted me.”

The Evidence of the Single Expert Dr L

156. Dr L was the expert appointed to prepare a report in this matter. There is no challenge to the expert’s expertise and/or credentials which have been provided with his report.

157. His first report was attached to an affidavit sworn on 14 June 2007. The report commences in paragraph 4 with these words: *“This was a most distressing case.”* In his oral evidence to me given on two occasions during the hearing of this case, Dr L described how the vitriol that was evident from the parents was of such intensity that Dr L himself found it necessary to seek a form of counselling or release from his experience.

158. In this report, Dr L says as follows:

“I do have concerns that the father’s behaviour may represent a delusional disorder of pathological jealousy although it also appears to serve a manipulative purpose that may indicate that it is more a strategy than a disorder and reflect maladaptive attempts at controlling his wife. No doubt there have been occasions, especially in 2005 and 2006, when [the mother] suffered behavioural disturbance as a result of hypoglycaemia, but this is a relatively transitory disturbance. The primary condition of relevance to this matter it seems both suffer from is pathological hatred of each other and the level of animosity is so great that neither have insight into the harm they are doing to their son.”

159. In his interview with the child, Dr L said *“[the child] is quite concerned about the risk of hypoglycaemic attack with his mother.”* He said *“[the child’s] fear is real.”* He said further,

“It is also, I believe common, not only grounded in the latest episode which does seemed to have been extremely concerning, but has been augmented by the constant conversation he has had with his father in which I believe his fear has been augmented.”

Dr L was concerned that the father was exaggerating earlier symptoms of the mother in relation to her diabetes and significant hypoglycaemic like disturbance prior to 2005 which Dr L said did not seem reasonable having regard to Dr Y’s report. I should add here that it is the father’s case that the mother significantly understated her symptoms to Professor Y in the period prior to 2007.

160. This brings me to a point of considering the evidence of the parties and Dr Y in relation to the extent and nature of the mother’s “hypos” prior to 23 January 2007. In this regard I do accept the evidence of the father which suggests that the number of and intensity of the mother’s hypoglycaemic attacks were more frequent and more severe than that reported by her to her medical practitioners. I reached that conclusion having observed the way the father gave his evidence in relation to those matters and the content of that evidence. I therefore do not accept the conclusion reached by Dr L that the father was attempting to exaggerate the severity of the mother’s medical condition.

161. Dr L records the child’s preferred position was to live together with both his mother and father in the house. Dr L said that the child missed his house. The child had a realisation that it was unlikely his parents could be together. He said he was happy with the current arrangements (living with his father and seeing his mother during the daytime). His preference was to live in his house with his father and visit his mother.

162. In his conversations with the child, Dr L was of the view that the child was being protective of his parents, conscious of the fact that they would read the report and what he says.

163. In conversations with both parents, Dr L said that they had revealed numerous times that they have questioned the child about behaviours and living conditions when with the other parent.
164. The child told Dr L that he liked his relatives on both sides of his family. He recalled that he used to stay with his (maternal) aunt when he was young.
165. The child told Dr L that he could not distinguish between his parents stating *“Neither gave him more of a hard time than the other.”* The child said that his father did not want him to go to his (maternal) cousin’s house. His mother did want him to go there. *“He says that his dad always says that his auntie and uncle are bad people and his mum disagrees with most things that his dad says.”* The child acknowledged that both of his parents love him.
166. In relation to the child’s wishes, Dr L said *“I do not think that [the child] has the maturity his parents ascribe to him.”* He said that the child presented as *“a typical 11 year old boy.”* Dr L said,
- “Although he has good levels of verbal expressive ability he remains no more mature than the average 11 year old boy and susceptible to the severe pressures placed on him by his parents. His primary aim is not to look like he is taking sides. As such, although he has stated his preference, I believe that his preference is as much a product of the extreme situation he finds himself in and is not, as yet, sufficiently competent to deal with.”*
167. In observing the child with each of his parents, although there were some differences, ultimately Dr L concluded that the interaction was very much the same. He noted, *“I did have to tell the father not to continue talking about the mother and the court issue. He seemed unaware of how he was trying to engage [the child] as an accomplice in his criticism of his mother with me.”* Dr L records, *“Both (parents) make allegations essentially the other has some kind of psychological disorder. The father says the mother has “a sexual deviation (lesbian interest)”.* Both describe the other with *“symptoms such as irrational thinking, high irritability and anger. It is [the mother’s] contention that her father is paranoid, jealous, violent and irrational with a deviant interest in pornography.”*
168. In the history provided by the father to Dr L there was a strong theme of discontent with the mother’s relationship with her family. He saw the situation as the mother’s loyalty to her family being greater than her loyalty to the new family of herself, the father and the child. Dr L said *“Such reports indicate a degree of jealousy about his mother’s time.”*
169. Part of the history provided by the father included the statement that on Good Friday 2005, he and the mother effected an in-house separation. The father moved to sleep in the study. He said that *“When he moved into the study to sleep his mother moved out of the main bedroom and began sleeping with her girlfriend, alleging a lesbian relationship.”* In the hearing before me the father did not allege a lesbian relationship. His concern about the relationship between the mother and this guest related to the mother’s medical condition. The father alleged that during the time this guest stayed in the house, the mother had deliberately kept her blood sugar levels high so she would not have a “hypo” during the night. He said it was this action of the mother, rather than the effect of stress which adversely impacted on the mother’s diabetic condition as referred to in the evidence of Dr Y.
170. It seems clear from Dr L’s report that he understood the father was making a clear allegation that the mother was having a sexual relationship with the guest in the house. To the extent that the father might now be denying that he made such an allegation I do not accept that and I do accept that Dr L accurately understood the allegation being made by the father in this respect.
171. Dr L records the history from the father that in about September 2005 the house guest’s father came to stay and the father then told that man what he believed was occurring between the two women. That man then took his wife and left the residence. The father

told Dr L that he and the mother then resumed a sexual relationship and recommenced sharing the same bedroom.

172. The father told Dr L that after he had recommenced his sexual relationship with the mother, he found out she was continuing to meet with the lady who had been a guest in the house and he told the child of this. He also says that on the day that he told the child the mother had rung saying that she would be late at work. The father said "*since he knew where she was going he called the police.*" The father told Dr L that there had been an incident between himself and his wife where he had slapped his wife which gave rise to an AVO. The circumstances were that his mother had called him on his birthday and whilst on the phone, the mother had spoken on an extension yelling at his mother.
173. The father also conceded he had been reading the mother's emails. As a consequence he said he knew the mother was meeting her friend at the sister in law's place. Consequently, he would not allow the child to go with his mother to that place.
174. Dr L reports the mother denies having been in a lesbian relationship. Dr L says that the father's behaviours as described in the report, "*with his allegations suggest a level of paranoia which, in my mind, is akin to pathological jealousy.*" Dr L said,

"There did not appear to be any accompanying psychotic symptoms. That is, there is no underlying bizarreness or psychotic symptoms. Although the diagnosis of delusional disorder (jealous type) may be available it seems to me the emergence of this jealousy within a mutually destructive and angry relationship makes the behaviour seem more manipulative than simply delusions."

Dr L says the father has developed possessiveness in relation to the child. "*There is no doubt in my mind that the intensity of the belief is well beyond the average angry man who wishes to find fault in his spouse.*"

175. In paragraph 30 of his report, Dr L refers to an occasion in May 2006. The father told him that in order to protect the child he had told the mother that he checked the child's homework. There was an argument between them about this matter. The father said that the child then told him, "*I can't believe you are fighting over my homework. I'm going to kill myself.*" The father said that the child then took a plastic knife and went through the motion of cutting his throat and wrist and slashing his stomach. Dr L recalls that the father was crying whilst retelling this incident. The father then took the child to the police who counselled him. The father said three days later, the mother had told the child, "*I will call up all your friend's parents and make sure that none of them come to your house.*" This very much upset the child. The father said he started hitting himself on the head. Dr L noted that from the mother's affidavit, she confirmed the last allegation took place in the heat of the moment.
176. The father told Dr L that following the incident in May 2006, he had called the police to come to the house and he had barricaded himself and his son in his bedroom. He told Dr L that the mother was "*raving*" outside the door. He said that when the police arrived, the mother told them he was downloading pornography and showing it to children. She said that he was encouraging the child to bring his friends home. In relation to this allegation Dr L notes that the mother claimed to have found pornography on the father's computer which involved images of her family being superimposed over pornographic poses. She told Dr L that she felt that showed a degree of deviance and disturbance in the father.
177. The father told Dr L that he considered the child to be a gifted and talented child. He considers him to be quite mature and able to make adult-like decisions. He said he often asked his son for advice.
178. The father told Dr L about a temporary separation that took place in May 2006 when he decided to take the child and move to an apartment he had rented. The mother's reaction was to initiate proceedings for a recovery order.

179. In relation to the information conveyed by the father to Dr L, he made the following comment in paragraph 34:

“What the above account shows is the complete lack of insight that [the father] reveals about the impact his action would have had on [the child], involving him in counselling, interviews with police, and attempting to have him act as a witness to the alleged machinations of the mother, barricading him in a room and heightening a sense of fear of his mother all to prove his point. Such behaviour is psychologically abusive, insensitive to his need to protect his son, and of great concern calling into question his ability to fully comprehend the result of his actions in disturbing his son.”

180. Dr L records that on 7 June 2006 the parties went to court. They reached agreement in relation to the care of the child which saw him sharing time with each of his parents. Following the lease expiring which the father had on the rented apartment he moved back to the former matrimonial home.

181. Dr L says the father believes that apart from the mother’s difficulties with diabetes she has a significant additional psychological problem attributed in some way to her father.

182. In his report, Dr L sets out in paragraph 41 the following:

“[The father] says the culture he comes from is that husbands and wives do not divorce, even if they do not talk to each other. A divorced man or woman is therefore seen as having a very low status. He agrees that it is not a good situation for [the child], even though to date it does not seem to have affected him. The father believes that [the child’s] experience of the current conflict may come out in his relationships later on. He says that he would like it to stop and to have a truce. However, he says that for a truce to be declared he would like to have his wife stop having psychological warfare with his son.”

183. The father admitted that he had told the child the mother was a thief. He said that the child became angered as a result of that allegation. He further said that the child had asked him did he love the mother, to which he replied he did not. The child had said to him, “*You must love her.*” The father acknowledged that the child was seeking reconciliation from the parents but said that was not possible.

184. It seems common ground that following the birth of the child and the return of the mother to full time work, the child was cared for by the mother’s sister until such time as he went to preschool. In his oral evidence the father told me he was critical of the mother’s sister’s capacity to care for the child properly.

185. In paragraph 48 of the report, Dr L looks at the question of the father’s employment. He records that the loss of employment was a matter of considerable concern to the mother. Although the mother insisted that she remained calm and did not cause stress, every day she tried to find employment for the father. At the conclusion of the paragraph, Dr L records this:

“I suspect she simply cannot view her own behaviour as being insistent or critical but it is not hard to see how it may have been so. Such discrepancies go to her inability to gain insight into the mutually difficult behaviours that have characterised this relationship for some years before it finally exploded into the current litigation.”

186. The mother told Dr L that one day she was at home and found the father was viewing and storing pornography. She said she talked to him about it. She then did not trust the father to look after the child and his young friends. She thought they might “*by mistake*” find the pornographic files.

187. Dr L reports as follows:

“[The mother] seemed very concerned about [the child] not keeping to routines such as practicing the piano and developed quite a complicated routine for him on a daily basis. She said the father was unable to maintain any kind of routine.”

188. In paragraph 52, Dr L comments as follows:

“[The mother] appears to have been quite regimented in what she expected of [the child] and displayed no insight into the demands she placed on both her husband and [the child] or the angry manner in which such pressure was applied. Whilst such behaviour might be problematic, her account does not indicate mental illness or obsessional disorder.”

189. The mother reported that in 2005 she felt it was time to bring the marriage to an end. She said that she was having her mail opened by the father and was being subjected to questions about bank statements and the like in circumstances where the father was not contributing to the family in any way. She said he accused her of having a lesbian affair with a good friend.

190. Dr L says in paragraph 53 *“Whilst this behaviour is denied by [the father] he does report a degree of investigation of his mother’s dealings including opening her email despite her attempts to safeguard it.”*

191. In paragraph 54 of his report Dr L sets out the mother’s statements in relation to her diabetic condition during 2005 through to 2007. The mother claims good diabetic control until 2005. She reported having quite a few hypoglycaemic attacks in 2006 and her last attack being 23 January 2007. Dr L has accepted the mother’s evidence in relation to her account of her diabetic state. Dr L said that:

“hypoglycaemia can result in dissociative like behaviour and in such a state a person may seem irrational and act in unusual ways. It is clear that from 2005 to early 2007 several of these episodes occurred and [the child] was exposed to such behaviours. However, such episodes do not, to my knowledge, cause lasting brain damage or major alterations of personality and in the absence of continued threat of attacks the significance of her diabetes for her mental state is not high.”

192. In paragraph 56 Dr L reports that the mother at first blush appears to have a recognition that the child does have a fear of the impact on the mother of her medical condition. He further says as follows:

“It seems she is attempting to undo the statements made that [the child] is scared of her disease, but in my view she is again trying to undo the reality of the situation that for whatever reasons, [the child] does have a genuine fear of her going into another coma and this fear has to be acknowledged appropriately. It is also clear from this and other comments by her that just as [the father] lacks insight into how he tried to enmesh [the child] in his attack on her, [the mother] does the same thing.”

193. In paragraph 58 of the report Dr L says the following:

“When pressed, [the mother’s] belief is that her husband is lazy and has been living off her and wants to get as much as he can get off her. She is quite angry at what she sees as his manipulative behaviour and has little intention to compromise given the anger and sense of injustice that she feels. She remains most concerned about financial issues as well as concerns about [the child] and her belief that the father is scheming to deprive her of her financial resources is a major factor in fuelling her anger. When pressed about the possibility of sharing care with [the child] (e.g. allowing [the father] some time in the house)

she was most opposed and quite clear there was no option for compromise that might be to [the child's] liking."

194. In paragraph 59 Dr L refers to domestic violence. He says that in October 2005 the mother claimed the father had slapped her. This was around a telephone conversation between the mother and the father's mother. She said that during a conversation, she had told the father's mother that the father had not worked for four and a half years. This provoked an attack on her where the father slapped her twice and then, a little later, slapped her a third time in front of the child. He then rang a friend and told the friend what had happened and in that conversation the mother claims he said, "*Next time she opens her mouth I will finish her off.*"
195. In the COPS records the father admitted the assault. Likewise in his evidence before me, the father admitted that he had slapped his wife. As a result of that assault, an AVO was issued against the father.
196. The mother further alleged an assault in 1998 where she was pushed and dragged by the father. This was not reported to police. At about the same time, the mother alleges the father took a knife and threatened to kill himself. The father denied that action. Dr L noted the COPS report that when the police were called to the house on that occasion, both parties expressed no concern over the action and seemed in good spirits.
197. The mother claimed another assault towards the end of 2006. She claimed that she had been pushed to the ground and knelt on by the father. She claimed this took place in the presence of his mother. No charge was proved.
198. The mother claimed the father had secretly taped conversations between them and conversations with other persons including the conversation with the psychologist, Ms K.
199. The mother admitted to Dr L that on 2 December 2006 she had checked his computer and found files containing a series of emails which she alleges contained false representations.
200. Dr L's reports are confirmed by the mother in relation to the accommodation which the father has for himself and the child. They live in a one bedroom flat and according to the father, share the bedroom with the child sleeping on the main bed and he sleeping on the trundle bed. The mother told Dr L that the child had said he sleeps with his father.
201. In his interview with the father, Dr L reports that the father told him of some difficulties with his family. This arose because of his sister's marriage and the father's view that his sister's husband was a "conman". He tried to express this view to his parents who would not accept it. The father said that he had no problems in his relationship with his parents or his sister when he was a child. He still gets along reasonably well with his sister who remains living in India. Other evidence in the case indicates that the father may now have repaired his relationship with his mother.
202. The father told Dr L that he had completed a five year course in India and then started working. He became interested in computers. He moved to working in the computer field. When he met his future wife, he said his family was neither against nor for the relationship. The father denied a history of interpersonal difficulties at work.
203. In 2003, the father said that the mother suffered increasing incidents of "*going crazy*". Almost daily aggression is alleged to have been shown by the mother towards himself or the child. Dr L records that the father alleged the mother had been misreporting the extent of her problems with diabetes.
204. In his interview with the father, Dr L records that the father told him that for a while there was a lot of stress associated with the court proceedings and he presently believes his wife is seeking to punish him financially through the court process. It is for this reason that he is self-represented. He said that the child had told him "*There are no winners in this business, only losers.*" He spoke about the circumstances in which he could become very angry. He agreed that he can be very sarcastic and cutting in his manner.

205. The father denied social alienation. He claimed he has friends, particularly friends in the same situation as himself. He said that during the relationship the mother only permitted him to socialise with her family and friends.
206. Although he denied that he was a controlling person, Dr L said, *“He reveals little insight into his son’s needs and is clearly trying to control the perceptions of others in the current situation as evidenced by the comments in the COPS statement.”* Dr L carried out a Personality Assessment Inventory in relation to the father. The result of the testing *“did not reveal any psychopathology although he did report mildly elevated stress levels. He does not describe any unusual behaviours, paranoid features or the like and reports a benign and self-proving description of his personality.”*
207. Under the heading “Relationship with [the child]” Dr L reports the following about the father:

“He says that if he had his own way he would not let [the child] have any time with his mother or her family or her friends. He says he knows his son wants time with her and so he lets him do it. He says he thinks it is dangerous for him to see his mother, and says that [the child] can’t handle the medical issues. He says that he knows [the child] still loves his mother and says that [the child] gets offended if he says anything bad about the mother”

...

“He says that [the child] sometimes says his mother sometimes calls him (the father) a devil, and has taken holy water and splashed it on the father’s door at home. He claims that the mother is paranoid, for instance having organised an exorcism of the house.”

208. In paragraph 86, Dr L reaches the following conclusion:

“To the extent that [the father] appears driven by a pathological hatred of his wife, it seems his concern about [the child] is solely couched in terms of the responsibility of his wife to make the appropriate changes. Whilst [the mother] disputes that [the father] has any interest in his son’s education, or even provides proper food, it seems that [the father] is capable of attending to the basic or material needs of [the child] but neglects his emotional needs for stability and being excluded from the drama of the parental conflict.”

209. In his interview with the mother, Dr L reports *“She wants the truth to come out about the life she shared with [the father] and the family relationship.”* ... *“She told me she wants to change the current orders so that [the child] is able to live with her as well as with his father.”* ... *“She sees her work with [the child] has been under-reported and unacknowledged.”*
210. In relation to her history she told Dr L that she does not know her father because her parents split when she was nine months old. She said that her relationship with the father was her first relationship.
211. In relation to the child’s early years, the mother denied the father’s assertion that he was involved in the care of the child. She said *“that [the father] was largely self-absorbed by his activities in his study.”* In the early years of the child’s life the mother’s mother lived with the parties and assisted in the care of the child. The mother said that this was because the father had asked her to live with them. I note the father denies the mother’s mother provided any assistance to the parties or to the child.
212. When providing her medical history, the mother told Dr L that *“there is a history of mental problems (suicide) in [the father’s] family but none in hers.”*

213. In relation to her medical history, Dr L says,

“[The mother] does admit to some problems (despite I think minimising their impact on [the child]) but now believes that the pump mechanism she has been given equates to an artificial pancreas and therefore is unlikely to experience any further significant problems.”

214. Under the heading “Psychological Assessment” Dr L reports in relation to the mother “*It does seem to me she is rather a driven personality and I believe has little in the way of flexibility when it comes to her understanding of others.*” The mother complained to Dr L of receiving phone calls where no one speaks. She had the calls traced and they were allegedly coming from a pre-paid mobile phone which was registered in the name of Mr Robert Lachlan. At a later time she got further calls from a pre-paid phone registered in the name of Mr Richard Lachlan. She accuses the father of being responsible for these calls. She also said that the father had requested a redirection of all mail, including her mail, from the former matrimonial home to his new address.

215. Under the heading “Observation” Dr L records the following:

“[The mother] presented in the interview as nervous and at times somewhat labile but as it wore on her behaviour began to seem odd to me, with an almost over-dramatic quality to her account. I felt she has become obsessed with the argument that is unfolding with [the father], and her manner when any attempt to consider compromise or a deeper consideration of [the child’s] issues was one of curt dismissal and deep hatred of [the father]. At one point I wondered whether the length and trauma of the interview was inducing a mild stress response in her.”

216. Having carried out the same testing process in relation to the mother, Dr L reports:

“Overall, whilst it seems she may be suffering from an adjustment disorder secondary to the stressful nature of the current litigation no significant psychological disorder was suggested. In my view, however, she lacks genuine insight into her issues and is locked into a destructive battle for victory with [the husband] and feels a strong need to vindicate herself over what she sees as [the machinations and vilification of herself as well as deliberate alienation of [the child] from her. Regrettably she does not see that in some ways she has engaged in the same behaviours and her inability to respond to [the child] at an emotional level (I think out of her own need to defend her position) is not helping her cause to mollify his concerns about her.”

217. When carrying out the parenting assessment of the parties Dr L discussed parenting matters with the mother. One of the matters which she brought to his attention was that his teachers had told her the child is concerned that no one knows what is happening to him at home. She referred to the father during discussions with Dr L as “*the other person*”. When Dr L pointed out that her language had become increasingly dismissive the mother said that although it sounded like she was “*bagging [the father]*” she was simply stating a fact.

218. Under the heading “Consideration of the Issues” Dr L reports “*I think it is probably the case that the father does have a psychological disturbance*” ... “*It does seem his behaviour is more extreme than is to be expected in a matter such as this.*” ... “*He appears to have no insight into his behaviour and the distress he is causing his son.*” ... “*In my view [the child] wishes to be neutral but it cannot be.*” ... “*It seems that the father has a peculiar intensity of anger and makes claims and engages in behaviours that are essentially so paranoid in flavour that his judgment is severely impaired. I do not discount that he may be sufficiently irrational to decide to take extreme action to prevent [the mother] having the victory in this matter.*”

219. Dr L further says, *“Whilst [the mother] is clearly hateful in her regard for [the father], I do not think she has a psychological disorder. She is, I believe, a rather obsessional woman and one strongly motivated to succeed.” ... “I think she is intolerant of the failures of her husband and has an over-idealistic view of her son.” ... “I think it is probably the case that the mother genuinely minimises her nagging behaviour and her explosive anger.” ... “I think [the mother] does have the capacity for good impulse control and anger control but is on edge because of the threat she feels in all aspects of her role as a mother and provider.”*
220. Dr L says further:
- “[The father] is disingenuous in the way he describes his activities with his son and the reality is he is quite controlling of the boy whose maturity is age appropriate and not able to contend with the deep seated manipulateness the father practices. It is for this reason I am uneasy with the notion that [the father] have unsupervised contact with his son. I have no doubt he is so convinced of his world view that he simply will not abide by any undertakings he may be asked to give. He will continue to strive to poison his wife in his son’s view and I cannot rule out that if he feels he has lost in his battle that he will seek to assert his victory by absconding with [the child].”*
221. Dr L concludes the report by recommending that the child should be placed back with his mother. If this involves some temporary placement with one of his aunts then this should occur. Dr L says that the child should have supervised time with his father only and progress to unsupervised time after the father has been asked to seek some consultation with a psychiatrist and preferably treatment.
222. I should mention here that I do not share the extremeness of the opinion Dr L formed of the father in his first report. Having observed the father over a number of court attendance days and seen and heard his evidence I do not subscribe to the view that the father would seek to abscond with the child nor do I hold the view that the father would harm the child physically. I was also left with the impression that Dr L’s view of the father softened with subsequent meetings with the child.
223. The first report from Dr L prompted the ordering of a report from Dr W, psychiatrist. Dr W met with the father and produced a report on 17 September 2007. Dr W was asked whether the father suffers from any psychiatric condition or disorder. He reported as follows:
- “Based on the restrictions of a single cross sectional interview and on the reliability of his history along with my mental state examination, I would indicate that [the father] was not suffering from a major mood disorder at the time I saw him.”*
224. Dr W said, *“He was alert and attentive and indeed he presented as being of high average and he is probably above average intelligence.”*
225. Further Dr W said,
- “Based on my examination, I am of the opinion that [the father] does not suffer any specific psychiatric illness and there are therefore no psychiatric reasons why he should not be able to either to have residency or continuing access to his son depending on the determinations of the court.”*
226. Dr W was required for oral examination and I will refer to his evidence later in these reasons.
227. On 28 February 2008 Dr L provided a further report. He said that he had been asked to update the earlier report. Prior to him being able to do that, he received a letter via email purporting to be from the child and expressing a view that he would not participate with

the assessment process. Dr L was further provided with a letter said to be by the child dated 17 December 2007 expressing concerns and his opposition to orders that had been made by the court.

228. In the letter of 17 December 2007, there is reference to the fact that Dr L “*thinks [the child] immature and that his father is mad.*” Dr L suspected the information was provided by the father. Dr L said “*[the child’s] letters suggest the father has no ability to preserve parental boundaries and prevent the recruitment of his son as a champion for his cause.*” The report of Dr L dated 28 February 2008 refers to his having read the child’s letters dated 7 February 2008 and 17 December 2007. These two letters form exhibit ICL2 in the proceedings. The first letter dated the 17 December 2007 is addressed to my Associate and is two pages in length, typed and purportedly signed by the child. I accept that the child did sign the letter. I should first record that in my experience it is a very unusual circumstance where a twelve year old boy writes to me. The letter complains about an order requiring the child to stay at his mother’s house. He expresses a concern that he might be hurt and his mother might be hurt if she was to have a “hypo”. He says that only his father and an ambulance officer can properly attend to his mother’s “hypo”. He claims “*She also forced me to play cricket without telling dad.*” He said that he did not want to see Dr L because Dr L knows nothing about diabetes. He said “*I do not like him because he said I am immature and that my dad is mad.*” ... “*I do not think that he is fair because he thinks I should not see my dad and my mum has the same idea.*” He said he did not want the report of Dr L to be sent to his school counsellor because “*it will embarrass me.*” In his last paragraph, he said “*My last point is that I do not want my solicitor to represent me because they are not doing it properly.*” ... “*They are not telling the court what I want and when the court sent us to [Dr L] my solicitor wanted me to pay from the money saved for my education.*” ... “*My dad wanted to come to see Professor [Y] about the insulin pump but mum did not let him.*” The child said that he wanted the court counsellor Mr G to replace his solicitor. He said he liked Mr G. He said “*I would like to talk to the Judge as well.*”

229. The letter dated 7 February 2008 is addressed to Ms Karen Shea who is the Independent Children’s Lawyer. In this letter he says as follows:

“I do not want to see you because I have already told you what I want. I’m also very, very busy with school and I cannot waste any time. I do not want to go to my mum’s place because she is creating problems. I also do not want to see any psychologist or Dr [L] because I am not crazy. Lastly I have already told the Judge what I want so you will not need to represent me anymore.”

230. Dr L also referred to a letter dated 24 February 2008 to himself allegedly from the child. That letter also forms part of exhibit ICL2. The letter informs Dr L that the child will not be coming to see him ever again. He said:

“I have fired my solicitor and I have told her that I’m not going to see you. I have also said this to the Judge. She told me that she will tell the court what is said and not my wishes. You are not a doctor who knows about diabetes and I will not pay you any money to make up stories.”

...

“If my mother or aunt tries to take me from school I have told my dad to call the police. I am not going to put myself in any danger because my solicitor is paying you to tell lies. If you are not lying why do you not let me see your report? Also why do you, my solicitor and Dr [Y] want to see me with my mum and never with my dad? My dad says that you did not use proper English in your report. You should not give your report to the court or you might have to go to primary school again.”

231. The last letter to Dr L is decidedly disrespectful and quite frankly, rude. Having met the child it is hard for me to believe that he is a disrespectful or rude child. Quite the contrary, I found him to be very respectful and careful in the wording that he used when he spoke with me.
232. Dr L was also provided with a copy of the father's affidavit sworn on 21 February 2008 and filed on 22 February 2008. The father set out in his affidavit details of his conversation with the child where the child had complained about the orders which had been made for him to spend time with his mother and stay overnight with another relative in the house. He also complained about seeing Dr L and the role of the Independent Children's Lawyer.
233. The father said that the child believed the Independent Children's Lawyer was being bribed by his mother. He said that the child believed that the Independent Children's Lawyer was trying to pay Dr L from the child's trust money. The father annexed to his affidavit a copy of a minute apparently proposed by the Independent Children's Lawyer for the appointment of Dr L as the court expert and for the cost to be met from the child's account.
234. The father noted the mother had already spent \$110,000.00 on legal fees. The father said that the Independent Children's Lawyer had provided a copy of the earlier report of Dr L to the child's school counsellor. This was despite the fact that Dr W had discounted the possibility that the father suffered a psychiatric disorder. The father said that the child believed Dr L was biased and would make another false report and the only way he could stop it was not to go to see Dr L.
235. In paragraph 10 of his affidavit the father says this:

"As the husband was prohibited from talking to the child by orders sought by the Independent Children's Lawyer it is the responsibility of the Independent Children's Lawyer to ensure compliance of their client with the orders. I asked [the child] to make his position clear in writing. He told me that he had already written to [Mr G], the court counsellor."

236. The father annexed a copy of a letter dated 25 September 2007 from the child to Mr G. In this letter the following appears:

"My name is [...] and you may remember because you met me on 11th of April in the school holidays at the family law court. I want to give evidence in the court and I want you to be the support person. I want you to do this because I want to prove that my solicitors are not doing their job well because they are not representing my wishes."

...

"My dad is filing an application for my evidence to be heard in court."

...

"I wrote several letters to my solicitors but they have not shown any to the court."

237. In paragraph 12 the father says that the child went to his mother in accordance with the orders of the Court between 5 December 2007 and 27 December 2007 with the exception of two days. The following then appears: *"His mother kept him locked in the house and [the child] did not have access to the keys to the house. [The child] would not have been*

able to leave the home in case of emergency or his mother having another violent attack.”

238. On 20 December 2007 there was an occasion when the child was spending time with his mother. The father says that there was altercation and that the child wanted to go home at 7:45 p.m. He says the mother refused. The mother apparently called the Police Station. The police called the father and consequently, the child was collected by the father about 70 metres from the mother’s residence at 8:30 p.m. The child told his father that he had been forced to call the police.
239. In paragraph 16, the father gives evidence about Christmas Day 2007. He concludes with this sentence: *“[the child] was sent back early by his mother because she did not want him around when she was being visited by her sister and family.”*
240. The father says that on Boxing Day 2007 after being with his mother the child was returned to the father by car by which was driven by the mother.
241. On 27 December 2007 the father received a telephone call from the child to say that he wanted to walk home; however, the mother would not allow it. The father then called the police. The mother took the child to the Police Station. The father picked up the child from the Police Station at about 8:45 p.m.
242. The father says that there has been no time shared by the child with the mother since 27 December 2007. It is noted that the affidavit was signed on 21 February 2008.
243. In paragraph 21 and following, the father answers the affidavit of the mother filed on 18 February 2008. He denies that the child called a policeman at the Police Station by his name. This was a matter which was specifically referred to in the report of Dr L. The father says that the child told him he had contacted the police and spoken to the policeman who was on duty and then asked for the policeman’s name. The father was critical of the mother using the police in order to provide evidence for the Family Court proceedings. The father denied that he had made any nuisance telephone calls to the mother. There are many denials by the father of the evidence given by the mother in her affidavit. I will not deal with each one of those as they are multitudinous.
244. In paragraph 24 of his affidavit he deals with the incident in December 2007 where the child wanted to walk from his mother’s house to his father’s house at about 8:00 p.m at night. In that paragraph the father says:

“I told him that I would be in danger of more fraudulent assault and AVO breach claims by his mother as shown in the police report (COPS [...] on the 23rd of August 2007) which is why we started to have the changeover at [the] Police Station where there are surveillance cameras.”

This paragraph also serves to show the extent to which the child is required to participate in his parents’ conflict.

245. Some insight into the father’s thinking in relation to matters can be obtained from the following words which appear in paragraph 26 of the father’s affidavit:

“The wife does not want any form of communication with the child that can be shown/ played in court so she can continue to make false allegations of contravention and complaints to the police. The wife wants to start a monologue with [the child] when he calls her to increase the phone bill of her husband. The wife also tells the Independent Children's Lawyer she does not want to keep [the child] with her during Christmas Day. The wife also complains to the Independent Children's Lawyer that [the child] did not spend time with her on his birthday [in] September 2007 which was not ordered to be her time anyway.”

246. In paragraph 28 the father refers to an email which he sent to the Independent Children's Lawyer and which appears as an annexure to the affidavit of the mother. The father said,

“This shows the complicity of the Independent Children's Lawyer in working in concert with the wife in total disregard to the interests of their client, the child. I have detailed a paper trail of the way the Independent Children's Lawyer has worked with the wife since November 2005.”

247. The father says that he has been advised by the police not to approach within a distance of 100 metres of the mother's residence. He acknowledged that in December 2007 there was not an order which would have prevented him from approaching the mother's residence for the purpose of collecting the child pursuant to court orders. It is further a non-issue that the apprehended violence order in place against the father permitted contact between the parents for the purposes of implementing orders of the Family Court.
248. In paragraph 36 of his affidavit the father replies to paragraph 22 of the mother's affidavit and refers to annexure J as being an email from the child to his mother.
249. The annexures to the affidavit of the mother filed on 18 February 2008 are of significant interest insofar as they annex copies of emails and a handwritten note of the child's. They also annex copies of letters from the father to the Independent Children's Lawyer and to the mother's lawyer. It is interesting to note that the form of letter which the father uses is remarkably similar to the form of the letter allegedly emanating from the child to my Associate and also to the Independent Children's Lawyer. Those letters have no grammatical errors and have been properly formatted. The emails from the child to his mother as annexed to the affidavit of the mother sworn on 18 February 2008 contain errors in the use of upper and lower case, contain syntax errors, commence a sentence with a preposition, and do not use the possessive form of words. These facts add weight, in my view, to the submissions of the Independent Children's Lawyer and the mother that the letters allegedly written by the child and forming part of exhibit ICL2 were in fact not all his work. When coupled with the additional information from Dr L in his final report dated 30 March 2008 where Dr L said,

“I spoke to [the child] about the fact that he had written a letter that he had fired his solicitor and another letter that he didn't want to talk to me (see appendix A). Somewhat of concern [the child] was unable to recall the detail of either letter and asked me to remind him what was in the letters.”

250. In paragraph 37 of the father's affidavit of 22 February 2008, he alleges the mother had fabricated the story about the child's sickness on 22 December 2007. He further said,

“The wife has also forced [the child] to sign at least two documents (a) saying that he preferred to live with his cousins instead of his dad and (b) that his dad forced him to make a complaint to the police. The wife has tried to enmesh the child in supporting her and getting his father in trouble with the police.”

251. In paragraph 37 of his affidavit the father also accuses the mother of harassing and annoying telephone calls. He also introduces, for the first time, the concept of the mother's boyfriend Mr I who the father says works night shifts in a factory. The father alleges that a COPS entry for 20 November 2006 records that Mr I had threatened the father with violence. At no other place in the evidence is there a suggestion that the mother has a boyfriend. There was no cross-examination of the mother of any further relationship and as I understand her evidence it is clear she has no relationship with a “boyfriend”.
252. The father annexed to his affidavit as annexure D emails which he described as “*the wife attempting to bribe and making religious threats to convince the child to come back to her house.*” The first email is dated 17 January 2008. I can see nothing in that email that fulfils the description by the father. The second email is dated 29 January 2008. I cannot see in that email any validity in the criticism by the father.
253. In paragraph 42 of his affidavit, the father says “*The wife and ICL have collaborated to recruit the wife's diabetic specialist Dr [Y] to indoctrinate the child that he was safe.*” In

paragraph 43 he says *“When a medical emergency on the 23rd of January 2007 caused JR Johnston to remove night time access to the wife on 11th April 2007, Dr [Y] was then recruited to have the wife fitted with an insulin pump when there was no medical reason for it.”*

254. In paragraph 45 the father says,

“Dr [L’s] report was tested by oral evidence by JR Loughnan on the 11th of July 2007 and found unreliable. The Independent Children’s Lawyer then asked for a forensic psychiatrist to evaluate the husband.”

There is no evidence before me that JR Loughnan found the evidence of Dr L unreliable. The Court record for 11 July 2007 shows that the following orders were made:

1. *Orders are made in terms of the document titled “Minutes of Order” as marked exhibit 1.*

2. *The Court requested the Independent Children’s Lawyer to make contact with the school counsellor of the school attended by the child and inform the school counsellor of matters of concern that have been raised in an expert’s report prepared by Dr [L] for the purpose of these proceedings.*

3. *Leave to either party, to the Independent Children’s Lawyer and to any other person interested in the welfare of the child to apply generally on seven days notice.*

4. *The Court noted that Dr [L], the single expert, wholly supports the expeditation of the final hearing of these proceedings.*

Nothing in that record suggest remotely that Dr L’s report was found to be unreliable.

255. The father is highly critical of Dr L in paragraph 48 of his affidavit. One of the allegations made by the father is contained in the last two sentences of the paragraph as follows: *“Dr [L] also took legal advice from the Independent Children’s Lawyer to avoid answering the husband’s questions. Dr [L] failed to abide by the rules.”* The father, further, was critical of the mother in paragraph 47 of his affidavit by saying the following: *“The wife also used this psychologist (not Dr [L]) to attempt to indoctrinate the child around the 24th of January 2007.”*

256. In paragraph 50 of the father’s affidavit he says *“A false allegation of assault was made leading to me and [the child] being evicted from the house.”* In paragraph 53 the father says,

“The Independent Children’s Lawyer has worked with the wife to provide witness reports favourable to the wife. The Independent Children’s Lawyer continues to prevent the expert witnesses from having their reports tested in court. The ICL continues to ask for orders that they are sure [the child] would not comply with and so get the husband branded as improper parent. The wife and Independent Children’s Lawyer are trying to escalate the problem into a care issue.”

257. In paragraph 59 of the father’s affidavit under the heading “[the child’s] failure to comply with orders” the following appears:

“I believe that [the child] is being subjected to intense psychological abuse by his mother. [The child] tells me that for the first three months he was crying

every second day. On at least one occasion he tells me he used physical force to stop his mother troubling him."

258. Paragraph 60 of the affidavit is as follows:

"[The child] told me that since the Independent Children's Lawyer had already told him that his wishes would not be considered and only what Dr [L] wanted to happen would be considered he made up his mind that he would provide no more cooperation with the Independent Children's Lawyer or Dr [L]."

259. In paragraph 61 the father says,

"A few days before the trial commenced on 19 November 2007 he ([the child]) was taken secretly by his mother to the Independent Children's Lawyer"

...

"The Independent Children's Lawyer told him that his wishes would not be taken into consideration and Dr [L] has said that he must live with his mother and have no contact with his father."

260. In paragraph 64 the father says,

"It is the responsibility of the Independent Children's Lawyer to convince [the child] to follow the orders. [The child] has not been restricted by his father in any physical way from contacting his mother or Independent Children's Lawyer but has chosen not to do so. I cannot physically force my son to meet them either against his wishes."

261. It was this affidavit of the father which was referred to in the report of Dr L dated the 28 February 2008. Dr L in his report refers to various parts of the father's affidavit filed the 22 February 2008 and concludes *"I'm not in a position to assess whether [the child] believes these things or not but I suspect that given the passion of the father he will have come to see things from his father's perspective."*

262. In paragraph 4 of his report Dr L said,

"I am concerned that my original considerations continue to be supported by the affidavit of [the father] and I am greatly concerned given the essential sequestration of [the child] by his father that [the father] is acting in an irrational way and a way that is extremely damaging to [the child]."

263. Dr L draws attention to paragraph 37 in the father's affidavit which comments on a note attached to the mother's affidavit and Dr L says *"implies that when [the child] did see his mother she too engaged in an activity of trying to gain advantage in this situation by forcing [the child] to write a note to the effect he was ill."*

264. Dr L says,

"It remains the case that [the father] appears to me to be intent on winning at all costs in this battle with his wife"

...

"It remains the case that [the father's] behaviour is to my mind irrational and dangerous to the psychological development of his son. His behaviour has

remained consistent over several years and apparently in varying environments. To that extent I believe it does satisfy criteria for a personality disorder although I remain concerned there is a deeper distortion of personality possible. His behaviour does serve his purpose, to enhance his own judgment by ascribing agreement with it to [the child], and to serve as a means of punishing his wife. My concern is however with [the child] and the damage that such a degree of distortion of reality will cause permanent damage in his ability to relate not only to his mother but to others as he matures.”

265. Dr L further stated his view that the child needs to be protected and will require being placed with a third party.

266. Dr L’s final report was dated 30 March 2008. For the purposes of this report, Dr L was able to meet with the child.

267. In paragraph 5, Dr L reports:

“[The child] said that he started to see his mother again because the Judge wanted him to see his mother but he said he also did as well. It appears that the interview he had with the Judge acted as a kind of circuit breaker for [the child] relieving him in some ways in that he was able to get across the concern that he had.”

The child complained to Dr L that his mother was insisting that he play with her rather than do homework. Dr L records:

“He has recently started at [B High School], which appears to be trying to encourage the children a certain amount of self directive responsibility, and according to [the child] his mother was somewhat intolerant of that. It seems she wanted to have his time to herself.”

268. In relation to staying overnight with his mother, the child told Dr L *“He said if Dr [Y] could convince him that the insulin pump would be OK then he could see his way clear to stay.”* The child told Dr L he would prefer to stay with his mother on Saturday night rather than stay on Sunday night. He said he would prefer to stay at his father’s place on Sunday night as it is closer to the train station. Dr L said,

“Nonetheless he continues to remain somewhat concerned and reticent to stay overnight with his mother because of the concern he has about her having some kind of diabetic difficulty. It appears that this has become a well entrenched fear in him at this point.”

269. Dr L spoke to the child about the letters that he had allegedly written to the Independent Children’s Lawyer about *“firing his solicitor”* and also complaining about Dr L. Dr L says,

“Somewhat of concern, [the child] was unable to recall any of the detail of either letter and asked me to remind him what was in the letters. It seems that he doesn’t remember writing them and doesn’t remember the content of the letters, which raises concerns about how the letters came to be written by him.”

This raised a concern for Dr L that the child was being required to take positions which were in fact not his. He said *“I believe that [the child] has been recruited to sign material that, whilst purportedly are documents in his name and reflect his positions on things, they are in fact the work and position of the father.”*

270. Dr L reports

“[The child] seemed quite enthusiastic about continuing to see his mother”

...

“[The child] has a genuine desire to have a relationship with both his mother and his father. He continues to hold out as his preferred option of his mum and dad getting back together again but recognises that is impossible given the degree to which they argue. It also seems to me that he does feel that his mother can become harsh towards him in relation to her failure to understand him and in the recent contacts where his mother has simply gone out with him, played cricket with him and the like it has been something which (as I thought would be the case) has improved his contact with his mother. To my mind, if the mother can quarantine her argument with the father from her time with [the child] I expect the mother son relationship to improve significantly. This may mean having to accept some inequality and some blatant manipulation on the part of the father”

...

“However, the quality of the relationship will improve to the extent that it can be normalised, and avoid having to use symbolic offices such as the Court and police to conduct family business.”

271. Dr L said that the child continued to be anxious about his mother trying to involve him in arguments at times.
272. Dr L said *“[The child] told me that this matter was indeed causing him considerable distress and the only people he was able to talk to about it was his school counsellor.”* ... *“It appears he has a considerable amount of fear of the wider community discovering what is happening with his family.”*
273. Under the heading “Consideration of the Issues” Dr L says,

“Since I assume the letters written under [the child’s] signature emanate from the father, it is clear the father is attempting to undermine any objective advice Dr [Y] might give. However, the mother also engages with [the child] in at times catastrophic ways (her argument about involving the police in having [the child] walk home is one such example). Whilst it may be a legitimate concern that an arrangement that sees [the child] walking home might be a concern, the reality is that the mother seems to have seized on this apparent renegeing of an agreement between herself and [the father] as a point scoring exercise, damaging her relationship accordingly with [the child].”

...

“I remain convinced the father has a completely irrational approach to this matter and has no capacity to negotiate or compromise (the recent issue of letters is but an example). Although he is able to provide the material elements of care for his son I remain concerned about the pressure he places on his son and the capacity for distorting his son’s view of interpersonal relationships and ways of relating.”

274. In relation to the future care of the child, Dr L is of the opinion that it would be too much to ask the child to confront head on his fear of his mother having another “hypo” whilst he was staying with her. Dr L says therefore, that the child either stays with his father through a period of increasing positive contact with his mother or he lives with a third party.

“The advantage of staying with his father is that there is less change required for him, he is in a familiar environment and he likes spending time with his father. The disadvantages remain my fear the father is remorseless in trying to have [the child] see things from the father’s perspective and continuing him live with his father will inevitably cause severe distortions of the actions and comments of his mother. I see no end to the argumentativeness if what is the status quo is essentially allowed to remain.”

Dr L considers continuing to allow the child to remain living with his father while he develops a better relationship with his mother will be very hard to manage.

275. It appears that Dr L has seen little change, if any, in the parents’ relationship over the time he has been working with them. He said *“My view is that to date each parent has done whatever they can, subtly or otherwise to advance their position and defeat the position of the other in the eyes of [the child].”* It is for that reason that Dr L is supporting a change for the child’s residence to a third party. Whilst acknowledging that such a move would be disruptive to the child and likely to cause him distress, he considered a “kin placement” could be less stressful and less distressing for the child. Dr L said,

“It should be the case that this is seen as a short term strategy with the view being to promote a move to the mother’s house as soon as possible and certainly within one or two months’ time frame.”

...

“Removing [the child] to a third party would only be a viable option if the decision is made to restore [the child] to the mother in the short term. If the court considers it is likely to retain the status quo in the long term then there is nothing to be gained and probably something to be lost by engaging a third party.”

276. Dr L said,

“It is inevitable that any contact with the father will continue his desire to undermine the mother and possibly the role any third party may play. In my view, that is simply going to have to be accepted (I hope that the mother will recognise the essentially self defeating nature of trying to engage with [the child] over her argument with the father). Any contact regime envisaged should not use the school as a place for continuing the debate between them. The school should be informed there is a co-parenting agreement and that each parent should get relevant documents and the like. No changeover should ever occur at school where both parents will be present.”

...

“I think that to allow [the child] to feel comfortable he should have equivalent contacts with each parent.”

277. During the time that the orders of the court are progressing so that the child might spend equivalent time with each of his parents, Dr L suggest that the mother complete some sessions with a psychologist. Likewise, he suggests that the child have a support person he can speak with about his concerns and if the school counsellor is available and prepared to do this more regularly, it might be appropriate for the school counsellor to be that person. Dr L suggested that the changes to the current arrangement should be reviewed within a month, and that following the review an accelerating amount of time

that the child spends with his mother take place. Dr L says it should be recognised that the child will always need, and probably want, to spend time with his father.

The Report of Mr G on the Meeting between Myself and the child on the 10 March 2008

278. This report set out what had occurred in the conversation between the child and myself. The meeting was convened by me for the purpose of seeing if it was possible and appropriate to prevail upon the child to see Dr L so that his update report may be completed. There were other matters spoken of in the interview and those matters are set out in Mr G's report.

The Oral Evidence

279. When the hearing commenced before me on 19 November 2007, the father also had before the Court two applications for the mother to be dealt with for contempt- one filed on 24 August 2007 and one filed on 4 September 2007. The father, after some discussion in Court, elected not to proceed with the contempt applications but sought leave to rely on the affidavits that supported those applications and I granted that leave. The father's affidavit addresses the orders made on 17 November 2006 and a complaint that the mother has not provided further medical reports as required under those orders.
280. The father's complaints about the mother's failure to comply with the orders appear to have some legitimate foundation. In terms of relevance to the decision to be made by me in this matter now they are of marginal importance. The father also raises a concern that the mother had been driving a motor car within three months of suffering a severe hypoglycaemic attack. Not only had the mother been driving but also had the child in the car with her as a passenger. This, in my view, raises a legitimate concern on the part of the father.
281. The affidavit filed on 4 September 2007 raises an allegation that the mother has failed to make a full and frank disclosure. The father sets out details of a number of documents which were provided by the mother to the Court and highlights inadequacies in relation to those documents. Again, in terms of the determination I have to make in this case this affidavit is of limited assistance.
282. On 19 November 2007 the mother gave oral evidence. She works from 7:30a.m. until 4:00p.m. She has permission to work from home. She will be able to work from home for a couple of hours in the morning and get to work by 9:30a.m. She can leave work at 2:30p.m in the afternoon. In relation to caring for the child during school holidays, the mother told me that at the moment she has five months long service leave and 60 days of annual leave accumulated. She would use that time to be available to care for the child during school holidays. Her normal allowance is twenty days of annual leave.
283. The mother asserted that when she saw Dr Y prior to 2005 she reported to him details of any hypoglycaemic attacks she had suffered since seeing him last. The mother conceded that prior to 2005 she was seeing Dr Y once or twice a year. She also conceded it was possible that as she suffered a number of hypoglycaemic attacks during those periods of time that she may have misreported history in respect of the number of attacks she had suffered since she last saw him. The mother said *"I have hypos on a regular basis during the night."* This related to the period between 1989 and 2005. She was not able to say how many attacks she had specifically had because frequently she sleeps through them. In relation to severe hypos, they would be events that she would be aware of. She had two or three in 1990. There was one particularly severe attack that she recalls. In 1991 the ambulance was called and she was given a glycogen injection. There was one occasion between 1990 and 1994 where the father gave the mother a glycogen injection in order to revive her. The mother said that generally she has some warning of an impending hypoglycaemic attack; however, on 23 January 2007 when she suffered a severe attack whilst the child was staying with her she had no notice at all. Using her best recollection the mother said she would estimate that she has had 25 to 30 such attacks where there has been no warning. These have been severe attacks. She estimated that between 15 and 20

of those attacks were before 2005. On most of those occasions the father was available to help the mother.

284. The mother attends on the diabetes centre about once a month and sees Dr Y once a year for a review. Since June 2007 when the mother had the insulin pump and monitors attached to her, she has not had the necessity to attend at the diabetes centre. The mother said both her sister and mother who currently live in Sydney have witnessed her suffering a hypoglycaemic attack. The mother's mother has seen the mother suffering a severe attack on about five or six occasions since 1989.
285. The mother said that she was sleeping seven nights a week at her house during 2007. This was contrary to the assertion of the father that the mother did not stay there overnight. The mother says she has occasionally stayed with her sister when there are parties. There was another occasion when the mother said somebody rang her doorbell in the early hours of the morning and frightened her. Thereafter she stayed for some nights with her sister and in addition she had another person stay with her in her house twice.
286. During the attack the mother suffered on 23 January 2007 (whilst the child was staying with her), it was her understanding that she involuntarily moved her arm in a way that hit the child. The child had told her about this.
287. The mother gave evidence that because she suffers from diabetes she is required by the NSW RTA to have a form signed by a doctor once every twelve months certifying that she is capable of driving a motor vehicle. The mother said that she was not aware that she was not to drive a motor vehicle within three months of suffering a hypoglycaemic attack. She said she was aware of the restriction but thought it was for one week. The mother conceded that she had suffered a hypoglycaemic attack whilst driving a car. She said she commenced to sweat profusely. However she asserted that she was still able to properly drive and drive the motor vehicle. The father's evidence in relation to the mother's ability to properly manage a motor vehicle whilst having an attack was different. The mother conceded that on one occasion the father had asked her to stop driving the vehicle but she did not. She was unaware that she was having a hypoglycaemic attack but later realised she was. She conceded that she scraped the mirror of the car on the side of the driveway at the house but claimed that that was not an unusual event as the pathway was very narrow. In relation to this event I accept the evidence of the father as more accurately describing what occurred. The mother accepted that with the benefit of hindsight she should not have been driving the car.
288. The mother conceded that she drove the car on 29 January 2007, which was within a seven day period of the severe hypoglycaemic attack on 23 January 2007. She conceded that she had the child in the car with her and she conceded that she should not driven a car. She also conceded that there would also have been other occasions when she had driven a motor vehicle within a three month period of having a severe hypoglycaemic attack. The mother told me that in the future should she suffer a hypoglycaemic attack she would consult with her specialist medical practitioner and would not drive a motor vehicle until he advised that in his opinion she was fit to undertake that activity.
289. In relation to the child's concern about his mother suffering a hypoglycaemic attack the mother says that the child has never told her that he is afraid of such circumstances but has told her "*I am worried Mum*".
290. The mother gave evidence that the father arranged for the child to see his school counsellor without consulting the mother. She said that made her suspicious and/or sceptical about information which may have been provided by the father to the counsellor. She therefore arranged for the child to see a psychologist provided through her workplace. She did not notify the father of her proposal to do so.
291. It was put to the mother that she was aware of the child's views that he still feels unsafe staying with his mother at night. She said she was not aware of that. She said that she had never asked him about it. She said that she intended to get the child counselled to help with his fear.

292. The mother has shown the child a letter that she received in the mail that suggests that the child may become a diabetic as a result of inheriting the condition from his mother. She was asked why she had chosen to raise that matter with the child whilst he is in the middle of proceedings between the parents and whom she acknowledges as being put through a very traumatic experience associated with the events of 23 January 2007. She wanted the child to have a blood test but she said he is afraid of needles and did not want to participate in it.
293. The mother was asked about a letter which the child had written to the Independent Children's Lawyer. She had not seen the letter and did not know about it until she read about it in the father's affidavit. It was put to the mother that she had been yelling at the child so much so that it caused him to cry. She denied that she had yelled. She conceded that she raised her voice and spoke loudly. She conceded that he cried. She said it was about a book which she had borrowed from the library and which she had demanded the child return to her. The child had told her the book was at his father's place. She was asked whether she accepted that the child had written the truth when writing to the Independent Children's Lawyer. She denied that the child had written the truth and said that in her opinion, the child had been coerced into writing the letter. She agreed that she had refused to give the child his cards and his computer and games. She said it was her computer. She said that the father had a computer which was adequate for the child to use. She said that she did give the child his video cards.
294. The mother was asked whether there was anything she had done in the last few years which may have contributed to the child's unhappiness or which may have affected the child. She said that the arguments she had with the father would have affected him. She said that she used to tell the child he needed to practice piano and that apparently distressed him. She said that he would get upset if he had asked her for some guidance or assistance with his homework and the guidance given was not the way he wanted it. The mother said *"I don't have to justify anything, sorry."* ... *"Yes. So me basically saying to [the child] that he needed to be more responsible, start doing things for himself."* She claimed that the child had been *"mollycoddled by his father."* She said that when the child dressed for school in the morning he would leave his night clothes in the lounge room. When she came home, she would say to the child, *"[Child], you are old enough to pick up your clothes and put them in the right place. You are old enough to make your bed."* The mother was asked, "Do you think you've been a bit tough on him in the past?" she answered, *"I think I have always been tough on [the child], always."* ... *"I think he's at an age where he's old enough to take responsibility for himself and I don't believe I would need to tell him what he should and should not be doing."*
295. When asked about her application for the father's time with the child to be supervised she said the reason for her seeking supervision is that she believed the child was constantly questioned by the father about what happens whilst the child is in her house. She also claimed that the father had watched inappropriate material on his computer and was concerned that the child may be exposed to that inappropriate material. The mother was asked about the father's allegation that she was in a lesbian relationship with a woman named Ms B. The mother explained that in 2004 her friend Ms B was posted for twelve months to a workplace nearby. The mother asked the father if he would agree to Ms B staying with them during her time whilst working nearby. The mother denied that she shared a bedroom with Ms B. The mother denied that she was in a lesbian relationship with the person called Ms B.
296. It was put to the mother that the verbal arguments between she and the father consisted of her "giving as good as she got." She said initially that was not the case but it reached the point where *"I had enough and I was giving it back."* She estimated that time to be about October 2005.
297. The mother agreed that on 21 October 2005 the police attended her home. She agreed that on that occasion she spoke to the father's mother on the telephone. She told the father's mother that the father had been unemployed for five years. The mother said she called the police on that occasion. The mother agreed that the father was present whilst she was

talking on the telephone and he became animated in reaction to her words. She said he grabbed the phone from her and he slapped her. The mother denied that she said to him, "Hit me, hit me." The mother said the father had slapped her twice. She said the child was not present. He spoke to his mother and concluded the call and then she says he slapped her again in front of the child. On 31 October 2005 the mother said that she had told the father that she thought "we should go our separate ways." In response to that she said the father had gone to the kitchen, taken out a sharp knife and threaten to harm himself. She said that had taken place in the presence of the child who had screamed. The mother did not think at the time that the father would harm himself but was "just drawing attention to himself because I said we'd go our separate ways." She agreed that she called the police. She said she did that because the child had screamed and she reacted by calling the police. When she was asked why she called the police she said,

"I had to ring the police because I had, after the assault or slapping on the 21st of October 2005, I was told that should anything happen that I should call the police to ensure that everything is documented, recorded and that the police are aware of it because my husband was being charged with domestic violence. He has a domestic violence charge against him."

298. The Independent Children's Lawyer asked the mother about conflict between herself and the child in about May 2006. It was put to the mother that she was arguing with the child. The mother said that she was not arguing with the child. The circumstances were that he would ask her to overview his assignments and when she gave him feedback which was not the feedback he was looking for he became distressed.
299. The mother was asked about an incident which occurred in about the middle of 2006 where it was alleged that the child had threatened to kill himself with a plastic knife. The mother said that she did not observe the occurrence and did not learn about it until later in 2006. She said that she then spoke to the child about the incident and he told her that he would not have done anything to take his life and when she asked him why he had made those threats he said "Mum I just wanted the fighting to stop."
300. The mother agreed that in about May 2006 there were arguments between herself and the father. She agreed that the arguments were principally about the fact that he did not have a job and that what he did with his time was to access pornographic websites. The mother conceded that arguments did take place in the presence of the child. The mother was asked "Did you consider the damage you might be doing to your child?" ... "Well, in the heat of the moment I did not consider it."
301. The mother said that she has been seeing a counsellor called Ms C. She is a psychologist and she is accessed through the mother's work. The mother has been seeing Ms C on about five occasions approximately one month apart.
302. The mother acknowledged that she was partly to blame for putting the child in a terrible situation. She acknowledged that in the past she had been incapable of protecting him. She acknowledged and agreed that when the police visited the house in response to a call they had noted that the child was deeply traumatised by the conduct of the parents. She acknowledged that she had said to the child that every time she has to get her solicitors to write a letter in relation to the family law proceedings it costs her money. She agreed the inference was "that because of your father I'm having to pay this money." She acknowledged that she had been rude about the father to the child on numerous occasions. She said that was in 2006. She acknowledged that there had been arguments between herself and the father about the child's homework and that the child had said "I cannot believe you are arguing about my homework." She acknowledged saying to the child "If your friends' parents knew what your Dad did they would not send their children to our house." She said she was referring to the reviewing and storing of pornography on the computer. She agreed that the child knew she had accused the father of watching and storing pornography. She denied that she had spoken directly to the child about the father watching pornography. She asserted that the child's knowledge of that accusation came from his being present during arguments about that subject between the parents.

303. The mother agreed that the child would understand that religion was important to her. She denied that she had called the child a devil. She agreed that she had splashed holy water throughout the house. She said she did that *“to make sure I keep evil out of my house.”* She denied that she had performed an exorcism at the house. She said that on 18 December 2006 she had a ceremony for the blessing of her house. She agreed that the child was present on that occasion.
304. The mother was asked about the possibility of the child staying with her sister for a short while having regard to the recommendations of Dr L. She said that she was agreeable to that proposal and she believed the child would also find that satisfactory. The mother said that she was receiving specific assistance in relation to improving communication between herself and the child.
305. The mother was asked about the pornographic cartoon that she accessed on the father’s computer and printed out and then attached to her affidavit. She said that she did not require a password to be able to access the computer or the program. She agreed that the child would have the same ability to access the computer and program that she did. She said that one of the named people in the cartoon was her niece. She said she did not know who Tom or Tyron might be as depicted in the cartoon.
306. The mother was cross examined by the father. She agreed that she was first diagnosed with Type 1 insulin dependent diabetes in 1986. She agreed that she migrated to Australia in 1989. In that year she commenced seeing Dr Y. The mother agreed that if she was suffering from a moderate or severe hypoglycaemic attack it would be dangerous for her to drive a car. The mother said that she was now aware that in event of her suffering such an attack she was not to drive for three months and that she required a report from a medical practitioner prior to her resuming driving. The mother agreed that she suffered a hypo whilst driving and in that situation she did not realise she was suffering a hypo at the time.
307. The mother was asked about the hypoglycaemic attack that she suffered on 23 January 2007. She was told that her reading was 3 by the ambulance attendants who attended at the house. She cavilled with the expression of “unconscious” as representing an accurate description of her state at the time that ambulance arrived. She said that she was *“in a deep sleep”*. It seems fairly clear to me that she was unconscious. The mother also claimed in her evidence that she could function at a blood sugar reading of 2.5. Given that she was unconscious with a reading of 3 it seems unlikely that she would be able to function at a blood sugar level of 2.5. The mother acknowledged that she was unable to be revived because her son was unable to give her lemonade due to her clenched teeth. The ambulance officers used a glucose gel which they squeezed into her mouth.
308. The father told me during this cross examination that he did not accept that the mother’s insulin pump which has now been fitted would provide an entirely different outcome for her in relation to controlling her diabetes and the incidence of hypoglycaemic attacks.
309. The mother conceded in cross examination that notwithstanding she now had the insulin pump and monitor she could not rule out absolutely that she would not have another hypoglycaemic attack. She was asked therefore if she did have an attack what role she had in mind for the child. She said that she had instructed the child that if there was any concern about her health he was to dial 000 and tell the operator the mother is a diabetic. She has told him *“do not call anyone else”*.

The mother’s sister gave oral evidence

310. She lives at F. She works with children. She said that she would be prepared to and be able to stay overnight at the mother’s house when the child was visiting. She also said that three of her children aged 21, 20 and 19 would also be available to assist in this manner. The father asked the maternal aunt about the loans which had been provided to her by the parties and she asserted that there were two loans, one in 1994 for \$20,000 and

one in 2003 for \$50,000. She said that all the monies had been repaid. She was asked whether she had records which demonstrated the repayment and she said she did not. She said that she paid the money to the mother.

311. In relation to the repayment of the \$50,000 loan, the aunt said that her husband had paid \$28,900 to the mother by cheques. The balance of the money to repay the \$50,000 came from an account in the name of the mother and her mother. The aunt said these funds were in fact her mother's funds and by arrangement with her mother they were released to the mother.
312. The aunt told the Court that some of the mother's mail arrives at her house at F. She said the mother had told her the mail had been redirected for its safety.

The mother's mother, gave evidence orally.

313. She said that between 1991 and 2004 she lived with the father and the mother.

The father gave oral evidence

314. The father was asked about any proposal to take the child to India. He said he had no present proposal; however, he would like the child to meet other members of his family whom the child has never met.
315. The father said he was last in paid employment in 2003. Since that time he has been involved in some share trading. Otherwise he has been caring for the child. The share trading lasted for about 12 months and during that time he made \$3,000 to \$4,000.
316. The father denied that he had in either 2005 or 2006 wanted to take the child to India. He agreed that he sought his passport from the mother in November 2006; however, he said that was for the purpose of proving identity with Centrelink. The father denied that following events of 23 January 2007 there was a lengthy period of time when the child did not see his mother. The father conceded that it was his view that the child should not see his mother until "*she gets herself fixed*". By this he was referring to his concern that the mother has not been accurately reporting her diabetic symptoms and readings to her doctors. This was all about his concern that the mother still has a propensity to suffer "hypos" because her medication has not been properly adjusted given the misreporting on the mother's part. He was further of the view that the mother's "hypos" contribute to some of the anger and stress that she suffers.
317. The father confirmed that his understanding is that the child does want to see his mother. He supports the child seeing his mother because that is the child's wish. He said he wanted the child to see his mother as long as there was no danger to the child. He did say that he felt the mother is not the right person morally to look after the child and in other ways she was inappropriate but he defers to his son's wishes. He said she says things that are untrue and gets really angry for no reason and creates a very stressful situation. The father said that he believed the mother in her present state is a bad influence on the child. He said the mother had come from a troubled background. When she was 21 years of age she and her family faked the death of her father.
318. The father said the child had written to the Independent Children's Lawyer on about four occasions. He saw those letters as he was the person who posted them. In relation to those letters the father said he was present when the letters were written; however, they were typed by the child. He denied that he had helped the child write the letters. The father agreed that he did print out some of the letters for the child but does not believe that he printed all of the letters.
319. The father said that he had urged the child to see a school counsellor. This commenced when he was at S Public School.

The mother's supervisor/boss Mr P, gave evidence orally

320. He is a senior manager with V Bank in Sydney. He wrote a reference for the mother dated 21 September 2007. He praised the mother for her work with V Bank. He said that the Organisation would be flexible with the mother's work hours. He said she is able to do some of her work from her home.

The father was cross-examined further.

321. On 27 March 2007, Miss E, the school counsellor, whom the child saw, provided a report. The father said that the report was provided to the child who gave it to him. It was put to the father that he had suggested to the child that he should obtain this report. The father denied that, and said *"I did not suggest to [the child] that he get everything in writing. I suggested to [the child] that he put everything in writing and you know see that he gets things in writing if possible."*
322. The father said that he had asked the child's previous school counsellor to provide a report about the child's wishes and fears. He said that when there was a new counsellor he *"told [the child] maybe you should go and talk to your new counsellor and talk to her and see that, you know, she agrees with the old counsellor."*
323. The father was asked *"what affect did you think that it would have on [the child] for you to be slapping his mother in front of him?"* The father replied *"In hindsight that was a very stupid thing to do, very wrong."* The father admitted that on that occasion he had slapped the mother three times.
324. The father was asked about an incident on 31 October 2005 where the mother alleged he had picked up a kitchen knife and threatened to harm himself. The father denied that he had attempted to harm himself. He admitted that the child might have thought he was proposing to harm himself. The father admitted that immediately before he picked up the knife he had said *"[Child] do you want to have a dead father like your mother's?"* There had been an argument between the parties immediately before that. The mother had told the father that he should leave. The child was in the parties' bed at that time. He was awake. The mother had said to the father *"I think it is better that you separate – you go away."* The mother had said to the child, *"[Child] do you need your Dad to look after you?"*
325. The father was asked about the events of Christmas Day 2005. On that day he agreed that he took the child to a police station. He said he took the child to the police station so that his wife would not allege that he had kidnapped the child. Later on the same day he agreed that the mother called the police to the home.
326. It appears that this Christmas Day visit to the police station was all about the father not agreeing to the mother taking the child to have Christmas lunch with her girlfriend.
327. The father agreed that on or about 30 April 2006 he had been to the M Police Station. He agreed that he complained that the mother had started to see another female and she often took the child with her when she sees that female. He said that he had gone to the police station not about that particular matter but because Mother's Day was approaching and he apprehended that there would be trouble between he and the mother on that day. During discussion with the police they asked him why he thought his wife would cause trouble and he told them of her friendship with this other female person. He said that he had told the police that the child had threatened to harm himself and asked whether one of the police youth counsellors could talk to him. He agreed that he had told the police he believed his wife might be suffering from mental illness. Thereafter on or about 16 May he had taken the child to meet with a youth liaison officer at the M Police Station.
328. The father agreed that on or about 1 June 2006 the police attended at the former matrimonial home at the request of the mother. He agreed that prior to that date he had decided to leave the premises and had arranged alternate accommodation. He further agreed that he had discussed this with the child and he told me that the child said he wished to leave with his father. He agreed that he had told the child that he should not

tell his mother about this proposal. He said that he had recommended that the child stay with his mother however the child had refused to do so.

329. The father agreed that he had discussed some aspects of the court case with the child. He denied he had given the child the mother's affidavit to read in full or in part. He agreed that he had asked the child questions in relation to matters that arose in the mother's affidavit. He said that he had asked the child one question about one phrase in his mother's affidavit and said to the child "*Did you say something like that to your mother?*" He agreed that he had discussed some parts of Dr L's report with the child. He told me he said to the child about Dr L's report "*The report was very bad for me. They say I should have no contact with you unless it is supervised.*"
330. The father was asked "*Do you agree with your wife that you have been looking at pornography on the internet?*" He replied "*I don't disagree with that statement. It is a very difficult thing to define.*" He agreed that pornography included sexual acts between humans. The father denied that there had been numerous arguments about him watching pornography. He said the mother had made some comment about it on one or two occasions. The father says he has a new laptop computer at home which is used by the child and it does not have any downloaded pornographic images on it. It appears that the father has another laptop computer which the child does not access and that may contain pornographic images.
331. It was put to the father that he had created the pornography that is annexed to the mother's affidavit sworn on 13 November 2007. He denied that he had created any of those animated images. The father denied that he had anything to do with the creation of the annexure to the mother's affidavit and the first time he saw the images was when he saw her affidavit. The father said in relation to the annexures to the mother's affidavit which has been described as a pornographic comic that he did not create the annexure. He said that there were aspects of the document which pointed to the creation of the document potentially by the mother and in particular at the commencement of the annexure there was a sheet that showed the location of the PDF file as K/:[mother's name]. He said if he had created such a document it's most unlikely that he would have stored it on his own computer under his wife's name.
332. The father was asked about Dr L's report. He was asked "*If it were to be a condition of your spending time with [the child] for you to attend upon a psychologist or psychiatrist would you do so?*" The father said he was not willing to go any further with psychiatrists or psychologists.
333. I asked the father a number of questions about the conflict between he and the mother and his view of her. He told me that she was basically a good person, but like all good people there are sometimes some bad aspects to them. He thought she was quite intelligent. He thought she had probably suffered some kind of damage to her brain as a result of her diabetic condition. He believed that she loved the child. He accepted that he and the mother had different views about feeding the child. He agreed that she was interested in his progress although he thought sometimes she pushed him a bit too much. When I asked him what she thought of him he said "*She'd probably say I'm the devil incarnate.*"
334. When the father gave his evidence in November 2007 he said that the current arrangements for the child provided that he spent four days a week spending time with his mother and on those occasions he has dinner with her and on one of those days he has lunch and breakfast with her.
335. The father gave evidence about the child's attendance at B High which he commenced to attend this year.

Oral Evidence of Dr L

336. Dr L, the Court expert, gave oral evidence on 21 November 2007. Dr L was told of the findings of Dr W to the extent that the father was not diagnosed as having a psychiatric illness. He said that that outcome did not change the concerns he had about the father

which he raised in his report. Dr L was told that the proceedings would not complete in this sitting in November and would have to go over for further hearing at a later time. He was asked whether in those circumstances he still had the view that the child should begin to live with his mother. Dr L said *“Yes, it’s my belief that I think he needs the normalisation of his relationship with his mother and that’s not going to happen unless he starts living with his mother.”* Dr L reiterated his view that the child does have a genuine fear in relation to his mother’s illness. Dr L outlined a program of transfer for the child from his father’s care to his mother’s care together with supportive counselling. He said that so far as the parents are concerned, both seem to have quite intense hatred of the other and a quite intense severe lack of insight into the impact on the child of the parental conflict.

337. Dr L said:

“I think, in my view, [the father] is at the extreme end of manipulative hateful behaviour towards his wife. He has locked himself into a position which does have a conspiracy flavour to it i.e. he has no insight at least none that was obvious to me, and I believe that these kinds of presentation is not one that’s going to shift with any great likelihood into the future.”

...

“Even if he was to see a psychologist or a social worker or whatever, a psychiatrist, to talk about it, I think he is completely self-justificatory in his approach and nothing is going to change.”

338. Dr L was asked about the pornographic material annexed to the mother’s affidavit. He said after discussing the denials of the father, *“If we assume that [the father] was responsible for this, then it goes to the concerns that I’ve got.”*

339. One of the questions that arise for determination is whether I have a concern that the child would be exposed to or could access pornography on the father’s computer if he was to spend unsupervised time with his father?

340. Dr L said:

“This has been a dispute which has blown out beyond normal proportions and that the attempt to try and win means that each is trying to distort the reality around the other so each are saying things about the other which are not true. Each are saying things about the other which are exaggerations of things that are true. There is an attempt to try and provide a world which is simply different from how it really is. So the father says things about the mother and the mother says things about the father that are so consistent and malicious in the ways in which they go about saying them that they are really distorting [this] young [child’s] perception of the world and the most important people in his world are his parents.”

341. I asked Dr L what he thought the impact on the child would be if his father was intensely unhappy about orders that might be made by the Court such as he spends considerable time, including overnight time, with his mother. Dr L said *“The father will intensely dislike any order that is not in his favour and he will continue to agitate and continue to do whatever he possibly can to have [the child] see the world from his perspective.”* He said that if circumstances arose where the child was not able to see his father it would create an untenable circumstance for the child. He said,

“I think there is a relationship between [the child] and his father which is strong and I think that should continue. It distresses me that the father would be so

bloody minded about it; nevertheless, I think it is not reasonable for [the child] not to have contact with his father."

342. Dr L spoke about the concept of fear. He said *"If a person has fear, they face the fear and no bad consequences occur then the fear is less strong the next time around."* He then explained that what he was trying to do was to give the child an opportunity to face that fear in a structured environment in a hope that he may overcome the fear.
343. Following the conclusion of the hearing on 21 November 2007 I reserved judgment on the interim issues and then made interim orders on 5 December 2007. Those orders were as follows:-

Pending Further Order it is Ordered that

(1) The orders made today are to operate as additional to the orders made the 11th April 2007

(2) Commencing on the next Sunday when [the child] is due to spend time with his mother pursuant to the orders of the 11th April 2007 and every second Sunday thereafter [the child] live with his mother from 9.00 am until the commencement of school the next morning or 10.00 a.m. if it is not a school day.

(3) [The child] is to have such other overnight period with his mother which the parties may agree upon.

(4) Unless Dr [L] advises in writing that another course is preferable then following the residency period referred to in Order 2, the father do all acts and things to ensure that [the child] attends upon and consults with expert Dr [L] on a date to be arranged by the Independent Children's Lawyer

(5) During the time that [the child] lives with his mother she is to ensure that either her sister [the maternal aunt], her nephew [...] or either of her nieces [...] and [...] sleep at her residence on any night that [the child] sleeps there, until such time as recommended by Dr [L].

(6) The parties cause [the child] to continue to attend upon Dr [L] in accordance with his recommendations. The parties will facilitate [the child's] attendance at all appointments scheduled by Dr [L] and be equally responsible for all professional fees charged by Dr [L] for such attendances.

(7) The parents communicate with one another by email in relation to any arrangements for [the child's] care or welfare provided that [the child] does not have access to this email communication.

(8) The mother and the father are permitted to attend the child's first day of school in 2008 and any other events to which parents are invited even if the child is not living with that parent at the time of the event.

(9) Both parties are to advise [the child's] School that they are each to be sent copies of all reports, notices and other material that is distributed to parents.

(10) Both parents are to ensure that [the child's] School has full contact details and addresses for each of them.

(11) The Independent Children's Lawyer is to serve a copy of these interim orders upon the Principals of [the child's] schools in 2007 and in 2008.

(12) The Independent Children's Lawyer is permitted to release to any school counselor who [the child] attends upon a copy of the expert report of [Dr L] dated 13 June 2007.

(13) Both parties are restrained from discussing these proceedings with [the child], within his presence or within his hearing and both parties are to as far as possible to restrain any other person from discussing these proceedings with [the child], within his hearing or within his presence other than the Independent Children's Lawyer or a professional counselor or medical practitioner who has been approved by the Independent Children's Lawyer.

(14) Both parties are restrained from showing [the child] any documents relating to these proceedings including but not limited to affidavits, reports, letters and orders.

(15) Both parties are restrained from questioning [the child] about his activities when in the other party's care.

(16) The husband is restrained from discussing the wife's diabetes or any other medical condition of the wife with [the child] unless specifically asked to do so by [the child].

(17) Both parties are restrained from denigrating the other or any members of the other's family to [the child], within his presence or within his hearing and both parties are to as far as possible to restrain any other person from denigrating the other or any members of the other's family to [the child], within his hearing or within his presence.

(18) The Independent Children's Lawyer forthwith advise [the child] of the effect of these orders.

(19) The husband is not to allow [the child] to view or be exposed to any form of pornography whilst ever [the child] is in his care.

(20) That until further order the mother and the father be restrained from removing [the child], born [...] September 1995 from the Commonwealth of Australia.

(21) That pending further order the name of the child be placed on the Passenger Automatic Selection System at points of international departure from Australia. And the Court requested the assistance of the Australian Federal Police in the implementation of this order.

(22) That Dr [L] prepare an update report for the Court which shall be submitted no later than three weeks prior to the further hearing date. The

parties shall facilitate the child meeting with Dr [L] for the report and are to attend themselves for interview. The fees for the report shall be met by the parties equally and paid for in advance of Dr [L] submitting the report to Court

344. The mother came back before me on a number of occasions between 21 November 2007 and 14 April 2008 when the hearing continued. On 10 March 2008 as a result of developments which included the failure of the father and/or the child to attend upon Dr L for an updated report, the matter again came on for interim hearing before me and I required on that day that the child be brought to the Court. With the assistance of Mr G, Family Consultant, I met with the child on 10 March 2008. In addition on that day I varied the orders which had been made on 5 December 2008 so as to provide that the child spend day time only with his mother each Sunday pending further order.

345. On 10 March 2008 Dr L gave oral evidence. I asked Dr L a number of questions arising from his report dated 28 February 2008. Dr L said of the father that he had an extremely intense mindset:

“His mindset is motivated either by complete and absolute hatred for the mother and has decided he is going to get back at her or by an obsessional interest in dominating [the child] and even may be a mixture of both of those but certainly that was my perception.”

He said, *“I think that what may happen over time is that under the influence of his father’s strong personality he may have become more critical in an adult way of his mother.”* Dr L predicted that the impact on the child of moving predominantly into his mother’s care is that he would be able to resume a normal developmental pathway and to have a relationship with each of his parents which is not too distorted and thereby have a normal adolescence. Dr L thought the downside for the child of moving away from his father is that he is likely to experience a lot of anxiety. He would no doubt be seeking a way to return to his father because he would be feeling that is what his father would want him to do. Consequently, there is likely to be challenging behaviour. The anxiety will affect his attention and concentration capacity at school. Dr L thought that anxiety would be reasonably short-lived. Dr L thought the upside benefits would outweigh the downside detriments for the child. Consequently, Dr L was supporting a move of the child from his father’s care.

346. I asked Dr L whether a move for the child effectively from his father’s primary care to his mother’s primary care may, so far as his development is concerned, be taking him out of the frying pan into the fire. Dr L agreed that there were concerns about the mother. He said *“I mean I don’t know whether she can do it because both these parents are locked in hatred of each other and it’s poisoned- they’re kind of poisoned each other really through [the child].”*

347. I said this to Dr L:

“We’re just about to take some incredibly intrusive action into this family. We know that it will be traumatic for [the child] and if there is no reasonable prospect that either his mother or his father can appreciate the impact that they have had in this whole dispute on [the child] then is it all going to be worthwhile? At the end of the day is it a better course of action to do nothing at all?”

Dr L said:

“I don’t know, I’m sorry. I don’t know. I thought mum had more opportunity to change her behaviour than dad. That’s all I can say... If it’s a frying pan into the fire situation, and I honestly, genuinely do not know how to move in the situation other than saying I think the intensity of the father’s attitude is extraordinarily disruptive to [the child] being able to form appropriate friendships with people

as he grows up. I don't know whether mum can come to the party but I would hope that if she was able to engage with somebody she might start to have some attitude changes in relation to [the child]. But I honestly don't know."

348. The Independent Children's Lawyer asked Dr L whether he felt the father might be able to modify his approach to parenting the child if he had some psychological support. Dr L said that he had formed the view of the father that he is quite fixed. He lacks any flexibility and *"if I felt that he was capable of that flexibility I wouldn't have been so concerned."*

349. The Independent Children's Lawyer asked Dr L, *"If that work (referring to assistance from a therapeutic psychologist) between [the child] and his mother is not done or not achieved what are the consequences for [the child]?"* Dr L replied,

"[The child] would grow up with a very distorted sense of how a family relationship is. At the time I think he is going to grow up with a very distorted view of women in particular and women in relationships and I think that if the work isn't done he will- that's how he'll grow up."

350. On 10 March 2008 I saw the child in the company of Mr G, a Family Consultant. Having met with the child, I then reconvened the Court and spoke to the parties and their legal representatives. I told the parties the following:

"He ([the child]) confirmed to me that he does want to spend time with his mother. He also made it clear that at this stage he is not wanting to spend overnight time with his mother... It is clear that his concern is what might happen if his mother were to become sick during the course of the night. His specific fear is that while his mother is asleep she may not hear alarms and consequently would again suffer a hypoglycaemic attack."

351. The child told me on that occasion that he would like to spend some of his free time with his mother. The free time he referred to was on a weekend. The child spoke of wanting to walk from his mother's place to his father's place after he spent time with her.

352. On that day the father told me there was an apprehended violence order that prevented him going to the mother's house. Further, he told me that the police had advised him to stay at least 100 metres from that house.

353. On 9 April 2008 I released a Family Report from Mr G, which detailed the interview between the child and myself. I also released the updated report from Dr L which I have referred to earlier in these reasons.

354. The hearing resumed before me on 14 April 2008.

355. Between 27 December 2007 and 10 March 2008 the child did not spend any time at his mother's house.

356. When the hearing resumed before me on 14 April 2008 the mother gave further oral evidence. The mother told me that she had been seeing a counsellor who was a psychologist called Ms C. She had seen her last in January 2008. She has seen her on eight occasions in total. She said she had provided a copy of the report from Dr L to her counsellor.

357. During the course of the mother's oral evidence it was interrupted to hear from Mr G, Family Consultant, who had provided the report in relation to the interview I conducted with the child. When Mr G was made available neither the mother nor the Independent Children's Lawyer sought to ask any questions of him. The father did ask questions.

358. When the mother's oral evidence resumed she was asked about the events of 20 December 2007 where the child had wanted to walk to his father's house at the conclusion of his time with his mother. The mother would not allow that and took the child to the police station. On that occasion the mother had allowed the child to call the

police for the purposes of having them call the father to either collect him or meet him on the street when the child walked home. The mother acknowledged that she could have driven him home if she had thought of it but she did not think of it. The mother said that she was not in a position to walk the child home because she would not feel safe about walking back. This was 8.15 p.m. in the middle of summer. The mother agreed that a similar event had taken place on 27 December 2007. On that occasion the child had called his father rather than the police. The mother said that was the child's idea. Again on that occasion the mother took the child to the police station. The evidence about the events of 20 and 27 December 2007 proved to illustrate that each of the parties apparently seemed quite powerless to modify their positions so as to accommodate their son's needs.

359. The mother reported that since the 10 March 2008 Orders, she has been seeing the child in accordance with those orders.
360. The mother proposes that the preferred method of communication with the father should be by email. The mother was of the opinion that the financial matters were significantly impacting on the parties' relationship and ability to be more cooperative and less conflictive in the parenting for the child.
361. On 14 April 2008 the father gave further oral evidence. The father was asked about his preference for the child to stay with either the mother's sister or a foster family in the event of him having to be removed from his father's care for some time. The father said that the child had expressed a preference to be with a foster family in such circumstances. The father said he has grave reservations about the mother's sister's ability to be an appropriate carer for the child, albeit a temporary one. The father said in his discussions with the child he has always made it clear to him that the child wants both his parents and the father said *"I have promised him that I will do whatever I can to make that happen."* The father was asked about the possibility of the child being placed with a foster family as opposed to living with his aunt should that be necessary under court orders. The father said it would be a very difficult decision but he thought the mother's family was not suitable. He said he would probably support a placement with a foster family in lieu of being placed with the aunt.
362. The father said that if the child was placed primarily in his care he would support as much contact between the child and his mother as the child desired. The father said that if the child asked him to help suggest a regime of time that the child might spend with his mother he would say to him, *"try to make it at least some bare minimum one weekend or at least a few hours every day or every alternate day. I would try to give her about 50% of the real time which is available."* The father said that in relation to the orders for the collection and return of the child he had discussed with the child towards the end of 2007 the possibility of the child walking home from his mother's house. This was something which was suggested by the child. The father said to the child that he should talk to his mother about it and if it was "ok" with her then he would support it. The father told me that the mother had allowed the child to walk home on some occasions. *"On certain days she has dropped him in the car to our residence and suddenly some day she suddenly gets some reason that she won't allow him to walk home and that is it is quite difficult to do it."* The father said that on 25 December the child had walked from his mother's house to his house at the conclusion of the time he spent with his mother. He said that on 26 December the mother delivered him home by car. When asked about the events of 20 December when the child had telephoned the police, the father said that the child had told him that his mother *"had made him telephone the police"*. The child had told him that the mother took the phone and gave it to him.
363. The father told me that the child has quite a few friends; however, he will not invite them home to the father's place because he does not want them to know that his parents are separated. The child has some sleep-overs with friends.
364. The evidence of the father referred to above, which suggests a liberal approach to the time which the child should spend with his mother if he was living with the father, seems in contrast to the view which the father seems to predominantly have that the mother is not really a suitable person for the child to spend considerable time with. The father's

conflicting statements about the mother and her value to the child cause me concern in this case as I have difficulty in determining which view of the father would prevail if the child was to reside principally with his father. I will address this matter again in the conclusion to these reasons.

365. The father was asked about his inability to apparently control the child. This was directed towards the fact that the child has declined to spend time with his mother as ordered by the Court in the early part of this year. The father said he believed in letting the child make those types of decisions so that he can learn from the consequence of his decisions. The father said that his method of control was “learn by your mistakes”. The father denied that he had either shown the child a copy of Dr L’s reports or read parts of them to him.
366. The father said that he had spoken to the child about the proposal of the Independent Children’s Lawyer to take money from the child’s trust account to pay for Dr L’s report. He said that the child had been opposed to his trust money being used in that fashion. He admitted that he had asked the child some questions arising out of affidavits from the mother which alleged that the child had made certain statements.
367. The father denied telling the child that Dr L was biased. The father agreed that he had kept the child informed about occasions such as the fact that he was attending at court, the fact that orders had been made at court, the fact that he was required to attend upon Dr W, a psychiatrist. The father admitted that the child had asked him after a court appearance, “*What did they say (meaning the Independent Children's Lawyer) about me? What did my solicitors say? What was their position?*” The father said he told the child that their position was the same as Dr L’s position.
368. The father was asked about the letter that the child wrote to the Judge. He agreed that he had told the child that he had to address it to the Associate to Justice Le Poer Trench. He said he also provided the child with the matter number. Otherwise he claimed he had no input to the letter at all and did not see it until he was provided with a copy of it by the Independent Children’s Lawyer. The father admitted that he had told the child that in some parts of Dr L’s report “*you can not understand the English*”. He agreed that he had assisted the child in sending a letter to Dr L. He had tried to send it by fax, however, Dr L’s fax was not working and so the letter was sent by email and followed up with a copy which was posted.
369. The father was questioned about his relationship with his own parents. He agreed that his parents did not attend his wedding. He agreed that he had a falling out with his parents prior to his marriage. He agreed that after his marriage and after arriving in Australia he received some letters from his parents but he did not respond to them. He said that his parents heard news about him and the child through relatives who visited them in Australia but not from him. He said that he had started speaking to his parents (his mother only as his father died some time before that) again maybe two years ago. It could have been four years ago. He agreed that he had been told that his father was dying and that did not cause him to contact his parents.
370. The father said that he had made numerous recordings of his wife including recordings of her having a hypo and that he put copies of these recordings in various places around the house as he wanted his wife to find them. He said that the child was aware of certain times when he was making recordings as the child has suggested he buy a recorder to record the mother whilst she was having a hypo as nobody was believing what the father said. The father said that that he had recorded about 300 conversations with his wife. He said every time he was with her he had the recorder on and the reason was that she had been making complaints to police and creating trouble. She was screaming and shouting at the father. Nobody was believing what he was saying. In particular the police at one stage had charged him with an offence at the complaint of the mother. This action of making recordings was, as the father saw it, some form of insurance against improper complaint. Again he said that the child had told him “*The police don’t believe you, get a recorder and record what she is saying.*”

371. The father denied that he had assaulted the mother whilst his mother was staying in Australia. It was put to the father that his mother left Australia shortly before the matter went to court. The father said that his mother was here in Australia for about four and a half months. She went back two days before her Visa expired. She had attended court on the first occasion the matter was before the Court, however, she was not called to give evidence. He said she left Australia on the day she had long planned to leave.
372. The father agreed that he had spoken to a priest in the mother's church, Father ..., and had told him about the mother's inappropriate relationship with Ms B. The father said he knew the two women were sharing a bed but he did not know what else might be happening between them. The father said that part of the reason he was recording the mother on his digital recorder was because he believed she was misreporting to her doctors her blood sugar readings. This was a reason he also decided to read her e-mail.
373. It was put to the father that he left his work in 2001 because he apprehended that he was about to be dismissed. He denied that. A letter dated 20 June 2001 became exhibit M3. This was a letter from the father's then employer to the father. The father's letter of resignation to his then employer in June 2001 T Pty Ltd became exhibit M4. I do accept that the father left his employment with T Pty Ltd because he feared he might be dismissed. The letter from the employer seems to me to raise very serious issues to be addressed by the father and has all the hallmarks of a preliminary letter to a dismissal.
374. The father was once again asked about his concerns for the child if he was to be cared for by the mother's sister. He said he did not think that she and her family were suitable people to care for the child. When he was asked why, he said:
- "They are liars, they borrow money and blow it. They enjoy themselves at other people's expense. They are not interested in studying (education). [The child] is a gifted boy and to that extent he needs to be with people of a similar nature. They were throwing parties. They were buying paintings. They were buying furniture."*
375. The father told me that as far as he was concerned the mother tells lies. The father said that the child knows that the mother tells lies. The child has told the father that *"my mother tells lies"*. The father said that the child had told him that the mother had taken him to a prayer meeting a few months earlier and she claimed that she had been cured of her diabetes. The child said that she had been eating ice cream and saying that she does not have a problem any more.
376. The father said that he had not discussed with the child his view that the mother had conducted a lesbian relationship with her friend Ms B. He said that there was one occasion where the mother had sent to the father an email saying that she would be late home from work but the father knew from other sources that she was in fact meeting with her friend Ms B and that on that occasion he said to the child *"Your Mum is lying, she is telling me she is working and she is going to meet this friend of hers."*
377. The father admitted saying to the child *"Your Mum's wasting a lot of money on this case which would be better given to you."*
378. Evidence was given by the father about a problem which had occurred at a changeover in about August 2007. The mother had taken a photograph of the father at the changeover. The father thereafter spoke to the mother's solicitor and required that the changeover take place at a nominated police station. The father then took the child to the police station for the changeovers, however, the mother failed to attend on a number of occasions. This appeared to be in part due to the mother not accepting the requirement to have the changeover take place at a police station.
379. The father spoke of his refusal to have any telephone communication with the mother because he said it inevitably led to an allegation being made about him, such allegations being made to the New South Wales Police. The father also said that he had the child ring the police at the station where the changeover was to take place on at least one

occasion to advise that he would not be attending due to his ill health. The father said he arranged this because he believed that the mother would not accept a statement from him that the child was ill. This had occurred on at least one occasion in November 2007.

380. The father was asked about his view of why the child has a reluctance to invite friends home. The father said he thought it was probably connected with the fact that the child has spent a considerable time moving in Indian and Sri Lankan circles and that he has the view that divorce is not acceptable in those societies.
381. The father agreed that he had told the child the mother had faked her father's death. The father agreed that when the mother was in India she lived in a society where it was shameful to be the child of a divorced parent. He agreed that in those circumstances the mother pretended that her father had passed away in preference to telling her friends and associates that her parents were separated. He said it was exactly this circumstance which he explained to the child.
382. The father was asked about the mother's offer in relation to Christmas Day 2007. He confirmed she had suggested she have the child with her from 8.30 a.m. to 1.00 p.m. and that the child be with his father from 1.00 p.m. for the balance of Christmas Day. He agreed that outwardly it was a generous offer, however, he said that his view was that the mother was either having somebody over who she did not want the child to see or she wanted to go somewhere where she did not want to take the child. He said, "*I would say that she is trying to present an unselfish attitude but where she's actually doing it for some selfish reason.*"
383. The father was asked about the child's extracurricular activities last year. He had played cricket during the summer. It was put to him that he ceased going to cricket because he did not wish to travel in his mother's car. The father agreed with this. It appears the parents were quite incapable of negotiating an arrangement where the father took the child to and from his cricket.
384. Following the oral evidence of Dr W, the father showed me three photographs for the purpose of illustrating that the mother had the capacity to digitally alter a photograph so as to remove a background she did not like and replace it with an alternate background to her liking. The purpose of showing these photographs was to illustrate the mother herself had the skills to manufacture the photographs with superimposed heads on them which she had described as pornographic photographs claimed to have been taken from the father's computer and have been created by him. The father had denied creating those images. The father was able to give the evidence about the mother altering the photographs because he saw her do it.
385. The father gave oral evidence about an occasion on 10 October 2007. On that occasion he said that the child had reported to the police that he had found a piece of paper next to his computer with a triangle written on it, some chemical symbols written on it and the word ethanol written on it. He also noticed that the smoke alarm had been removed from his room. He was concerned for his mother because of these matters and told the police.
386. On this occasion the police officer reported to the father that a visit to the mother's house took place but the police officer was unable to raise the mother. This apparently fuelled the father's belief that the mother did not reside at the former matrimonial home except on the occasions when the child was there with her.
387. The father was asked questions about his employment after 23 June 2001 when he resigned from his work at T Pty Ltd. He agreed that in 2003 he had worked for another company for three days. He said it was originally planned to be for about two weeks. He said it was a testing role which meant that he went there and tested the software and told the contractor that the software was not ready for use.
388. The father was asked about a statement he made to Ms K, psychologist, that he had money that the mother could not touch. He agreed that he had made that statement and when asked what the money was he said "*I come from a very wealthy and philanthropic family and she can't touch anything that they have.*" When asked about his family's

wealth, he said he did not know how rich his mother was however he concluded that she was rich because she has been sending him money and had given one of his sisters a unit and had given two pieces of land to the child. It also appears that she has given the child a residential unit. All that property is in India. The father said that his mother had given him \$A2500 just before he and his wife separated. Since then she has sent him a little bit of money. That consists of a few hundred dollars here and there. She would deposit the money into an account for the child. He confirmed that the child knows that the property is held for him in India, probably by his grandmother.

389. The father confirmed in oral evidence that he had commenced employment in Australia in either January or February of 1991. The father claimed to have contributed to the deposit of the first property acquired by the parties, that property being acquired in 1991. The father conceded that the mother had been in Australia since 1989 and he accepted that she had accumulated savings since she commenced work in this country. He conceded that he came to Australia with virtually no money at all. The property had been purchased in August 1991. The father acknowledged that for the 1991 tax year he had an income after tax of \$12,443.00. He later conceded that his taxable income for the 1991 tax year was \$11,572.00. It seems that the father in that year was also entitled to a credit for tax stamps.
390. The father's attention was drawn to the affidavit filed by him which annexed a schedule of income earned by the parties during the course of the cohabitation. In that schedule he agreed that he had calculated the mother's income as \$709,944.00 and his income as \$402,794.00. He said that it reflected figures as accurately as he could establish them.
391. It was put to the father that at the time of the marriage the mother had about \$25,000 in savings. He said he did not think she did. He said he did not know what she had at that time in the way of savings.
392. The father said he believed his university course in Australia was one or two years part time. He agreed that he had a Bachelors degree from a university in India and a Masters degree from the University of Western Sydney.
393. The father said that since May 2007 he has applied for between 25 and 50 jobs. The last job he applied for was approximately two or three weeks prior to the hearing on 16 April 2008 and it was for the position of a documentation specialist. The position was for a contract.
394. The father said that the child leaves home at 8.00 a.m. to go to school and returns between 4.30 p.m. and 6.30 p.m. depending on whether he has after school commitments. He said that a considerable amount of his time was taken up in preparing and running the court case. He agreed that after the court case has finished there would be no reason why he could not find some employment.
395. The father was shown a series of emails relating to possible repayment of loans by the mother to her sister. The father said that the emails were "a fake".
396. The father was asked about his contribution as a homemaker and parent. It was put to him that he did very little cooking during the course of cohabitation. He denied that. It was put to him that apart from vacuuming, the mother did the majority of the housework. The father denied that.
397. It was put to the father that the child gets on well with the mother's family. The father replied "*He gets on well with everybody.*"
398. It was put to the father that the mother did all of the grocery shopping during cohabitation. He denied that. He said "*We both went out mostly on weekends and did the shopping together.*" Sometimes the mother would pick up a couple of things on the way home from work.
399. It was put to the father that the mother prepared the evening meals. He said "*Not always*". He said that usually she did prepare the meal on the weekend. During the week

he said that he would cook once or twice a week which would provide meals for the week days.

400. It was put to the father that the mother usually did the washing including towels and manchester. He denied that. He said she very rarely touched the washing machine. She very rarely touched the vacuum cleaner. He denied that she dusted and cleaned the home. He denied that she made the beds in the house. He denied that she swept and mopped the home. He agreed that he did the mowing of the lawns and said that he did all of the outside work on the house. He agreed that he looked after the car. He agreed that the mother attended parent/teacher nights and that he did not.

401. The father was questioned again about his concern that the mother was conducting an improper relationship with her friend who stayed as a guest in the house for some period of time. In answer to a question the father said *"I have to qualify that answer. I have never stated a lesbian relationship. I have stated that my wife was sleeping with this [Ms B], this lady, and I found evidence to that."* The father explained that the relevance of putting evidence before the court that the mother was sleeping with her friend during this period in 2005 related to the mother's diabetes. The father said:

"During this period my wife was sleeping with this woman because I was not sleeping with her and because she was scared already having had a hypo with this [person] and knew that this [person] couldn't do anything. She was so scared she reduced her insulin and prevented her having a hypo at night... This caused her blood sugar to go up and when her blood sugar went up she went to the doctor (Dr [Y]) and told him that this was caused by family stress."

402. The father said it was Dr L who put the sexual message into the information that he had provided to Dr L. The father told me that he thought the mother sleeping with her friend was inappropriate because the child might see this and not like it.

403. The father was asked about his orders which he was seeking in respect of property. He went through those orders with counsel for the mother. In providing his answers, he emphasised that he was required to provide the mother with \$86,000 from his savings and that she has spent that on legal costs.

404. The father was asked about a conversation that he had recorded and which had been provided to him during the course of the trial to listen to. He agreed that the transcript prepared by the mother was accurate with the exception of one small alteration. He said that the conversation had taken place in about the first week of November 2006.

405. The father was asked about child support and he agreed that he is receiving about \$745 per month from the mother.

406. The mother gave oral evidence again on 16 April 2008. She gave evidence about the final repayment of the \$50,000 loan from her sister. The amount received, she said, was \$8,900.

407. On 14 April 2008, Dr Y gave oral evidence. He said that since the date of his report in May 2007 he had continued to see the mother and had seen her about half a dozen times. In addition he said that she had regular contact with his staff. Dr Y said that he thought there had been significant improvement in the mother's condition since his report of 2007. He said the insulin infusion pump generally causes less hypoglycaemia and that has been the case for the mother. In addition, he said that she is using a device which allows her to monitor the blood glucose continually so she knows what her blood glucose level is at all times. The monitor has an alarm on it which sounds if the blood glucose falls below a specified level. The machine itself has a memory which is checked by the staff at Dr Y's hospital and they report to him that in recent months the mother has not been suffering any significant hypoglycaemia. Dr Y reported that the mother still appeared to be free of significant diabetic complications.

408. Dr Y reported that the child had in recent times seen Dr O who is a doctor on his staff. She is not a medical practitioner but a nurse practitioner with a Ph.D.

409. Under cross-examination from the mother's counsel, Dr Y said that until such time as the mother had her glucose monitor attached he was completely reliant on self-reporting by the mother. Dr Y confirmed that stress can induce instability in diabetic control.
410. Dr Y confirmed that if the mother had a hypoglycaemic attack and her insulin pump continued to pump insulin into her body it could in fact kill her. It is for that reason that the glucose monitoring device with alarm is usually used in conjunction with an insulin pump. Dr Y confirmed that the glucose pump and monitor are an expensive item and can cost up to \$10,000. In addition, the sensors are expensive and need to be changed every two or three days. Dr Y said that he believed that the mother's attempt in using the machine successfully to improve the control has been impeccable.
411. In relation to the father's allegation that the mother was misreporting her diabetic condition to Dr Y, I asked Dr Y whether the objective evidence in the presentation of the mother in consultation with him supported a theory of extensive misreporting by her of her diabetic condition. He said it did not. He said he thought her reporting was reasonable and that since the mother has been fitted with the pump and monitor he has been able to see demonstrated good control. As stated earlier there is a memory in the monitor and this can be used as a check against history provided by a patient.

Dr W gave oral evidence on 15 April 2008

412. Dr W was asked to accept that the father created the cartoon type pornography which was annexed to the mother's affidavit. He was asked if he accepted the father created that cartoon, would that make any difference to his stated opinion about the father's psychiatric state as contained in his report. Dr W said it would not indicate a specific psychiatric problem. He said it may reflect a psychological problem or some psychosexual difficulties but it is not indicative of psychiatry diagnosis as such. He said that sexual pathology is identified when people become excessively preoccupied with pornography, where pornography involves under aged people or when the pornography is of a violent type. Dr W said that provided the father understands that the child must not get access to pornographic material, he could not see a problem per se with the father accessing adult pornographic material. Again, there is the over-riding assumption that is not an obsessional or excessive involvement in pornography on the father's part. Dr W also spoke of the potential problem for a person who experiences sexual stimulation only via pornography and has no sexual experiences in the broader community. This was a matter referred to in the submissions made by the mother.
413. Dr W was asked about his report and in particular his statement that he could not rule out a personality disorder. He was asked what treatment the father might take advantage of if he did have a personality disorder. He said he could participate in psychotherapy. He said this would involve long term treatment and could last for years.
414. Dr W said that if the father was required by court order to participate in the psychotherapy in circumstances where he did not believe it was necessary, the treatment would be more difficult in terms of being able to have any success.
415. I asked Dr W whether, notwithstanding he had not diagnosed the father as having a personality disorder, he had a suspicion that the father might suffer in this way. He said that he would not go so far as to say that. He said that he would really have to have clinical contact with the father over months and sometimes years and also have input from reliable objective collateral history before he could make such diagnosis.
416. I asked Dr W to what extent an understanding of cultural background was important or otherwise to psychiatrists in being able to properly diagnose a psychiatric condition. He replied that it was not such a problem in diagnosing psychiatric conditions. He said what is sometimes more difficult is to interpret various behaviours in a cultural context when the psychiatrist has not had exposure to that cultural background. He said that the same was also a problem for psychologists. I then asked:

“If you are looking for patterns of behaviour, perhaps for personality disorders, in order to determine whether any particular behaviour is unusual you would have to have a good idea of the cultural background and what was the norm or what wasn't the norm in that cultural background wouldn't you?”

417. Dr W said:

“That is correct. There was one example in this case where some reference was made to the son sharing the father's bed and I raised that with him and I have made reference to that in the report. He gave an explanation that it was not necessarily uncommon in his cultural background for that to happen and unlike Western cultures where it might be possibly perceived in a sexual context, it was not necessarily so in his cultural context.”

418. Counsel for the mother asked Dr W whether he was aware of the diagnostic criteria for paranoid personality disorder. He said yes. Counsel then took Dr W to the evidence that she believed supported various diagnostic criteria which she had specified as associated with paranoid personality disorder.

419. Dr W said:

“I think one of the things you have to remember about the examples you have given me, are all intra familial. They are family related matters. Paranoid personality disorders are very global. People with paranoid personalities are paranoid about everyone, not just families where there may be family conflicts, but they tend to be people who have no friends. They isolate. They are generally socially withdrawn. They are suspicious. They are odd. They are paranoid, not just about family matters, but about a wide range of things in their lives. They don't have many social interactions. They are unable to trust people. They are really quite lonely isolated individuals.”

420. Dr W said that so far as the father was concerned:

“I certainly didn't feel that he was suspicious or paranoid in the context in which I saw him. He seemed to be, within the limits of such an interview or assessment, he seemed to be fairly forthcoming with his history.”

421. Dr W said he could not exclude in the case that the father might have been mildly paranoid but that he did not come across to Dr W as suspicious, even suspicious of Dr W, even though he understood he was seeing him for a third party and for an assessment of his own psychiatric state.

422. I asked Dr W whether the types of behaviours which had been described to him by the mother's counsel as being potentially part of a paranoid personality disorder were in fact more consistent with the circumstances surrounding the breakdown of his marriage? Whether some of the behaviours described by the mother's counsel are likely to disappear once the litigation has concluded as opposed to being life long tenants of the father's personality? Dr W said:

“Yes, your Honour, that is very very important because personalities are life long. We define personality as those enduring characteristics of an individual which enable us to distinguish him or her from other individuals and which help form the basis of predictions about future behaviour.

...

Individuals in certain circumstances can become quite paranoid, but it is circumstance specific. What we are looking for in personality disorders of whatever type is a long history of paranoid behaviour or histrionic behaviour or antisocial behaviour. That is why I have excluded antisocial in this case. It might be argued that some of his actions are of an antisocial type, but really he doesn't have earlier behavioural disturbances in childhood and adolescence. There doesn't appear to be a forensic history, so his chances of having an antisocial personality disorder can really be excluded because you are looking at it long term."

423. The mother's counsel asked Dr W if he was concerned to hear that the father's relationship with his parents was a troubled and poor relationship for a considerable period of time commencing at about the time he left India. He said he was not particularly concerned about that information. He was then asked whether he would be concerned about evidence that the father had recorded up to three hundred recordings of the mother and of the child and perhaps others. He said it did not necessarily concern him. He said: *"It does suggest that he is a bit hyper vigilant. There may be grounds for that I don't know."*
424. Counsel for the mother continued to put examples to Dr W of evidence which appeared on the face of it to be consistent with the criteria in the DSN4 for paranoid personality order. Dr W said: *"If all your examples are going to be family based and related to intra familial conflict the diagnosis will not be achieved."*
425. Dr W said that all the examples put to him by the mother's counsel may suggest some paranoid traits as opposed to paranoid personality disorder. This would be a possibility.
426. The father asked Dr W whether he had raised with the doctor an allegation that his wife was having a lesbian relationship. Dr W said, *"No, I raised that issue with you."* It appears that the information came from the report of Dr L which Dr W had read.

Dr L gave further oral evidence on 16 April 2008

427. Dr L was asked to listen to the CD of the interview between the father and the child. He then said after listening to the interview:

"The nature of the questioning and the sort of conspiratorial way in which it was conducted leads me to affirm my belief that this is a psychologically abusive form of communication with [the child] and raises child protection issues in my view."

428. He said:

"[The child] has been placed in a position where an attempt is being made to convince him of the fact that his mother is doing something wrong, that his mother will abandon him and that his mother is lying to him. He is distorting the relationship that he might have with one parent and instilling a sense of fear about the potential for his relationship with that parent. In my view that is a form of psychological abuse."

429. It was put to Dr L by the Independent Children's Lawyer that the father is not likely to abide by any court orders if he does not see it to be in his interest. Dr L was asked whether he agreed with that. He said:

"I do. It has been my belief that [the father] has a very self-preferential way of looking at this problem. I think he believes himself to have the right way to look at this matter and will continue to act accordingly to what he sees as the right thing for him to do."

430. Dr L took an adverse view of the father in relation to his actions on the occasion when the child rang him in the middle of the night to say that the mother was having a hypo attack (23 January 2007). Dr L understood that the father's response was to have the child ring for an ambulance. He said the father should have offered to ring for an ambulance himself and perhaps ring the police and then try and go to the mother's house himself as soon as possible.
431. As it transpired, Dr L was in error about the fact that the child had been required to ring the ambulance. The father's evidence on this matter, which I accept, was that he rang the ambulance service for the child on that occasion. Further he kept talking to the child until such time as the ambulance arrived. He helped him find the key to the deadlock which the mother had installed and then placed the key for safe keeping in a site which she had not disclosed to the child.
432. I then asked Dr L the following:
- "I wonder to what extent we can judge what is normal and what is not normal (in relation to this family) when all of the developmental years of the parents arise geographically and emotionally in an environment which is completely foreign to us. I am wondering to what extent the views you have taken and which I might take about the actions of both the mother and the father in this case, which seem to be different from the usual, whether it is fair to form conclusions and be judgmental about it without understanding the environment in which they grew up?"*
433. Dr L told me he did not think that was a concern. He said he had worked with a number of people from the sub-continent. He did not think their culture was that different from our own. He thought both parents have been able to work within the social systems in Australia to their benefit. He said that the father had told him that he had been brought up in a middle class family in which he was treated more like an American. He said: *"I don't think his life style would be that different or his understanding of issues would be that different from someone who was brought up in Australia."*
434. At the time I thought that answer was quite extraordinary and I continue to hold that view. It is a different view to that expressed by Dr W to a similar question asked by myself. Without having specific evidence about the nature of the society in which the parents grew up it would be unjust and potentially erroneous to diagnose a psychological/psychiatric disorder based on apparent paranoia about or a high level of suspicion evident in the parties of government, semi-government, police, professionals, military authorities and the like. If the parents were raised in a society where corruption was endemic there might be high justification for being suspicious of persons associated with those bodies. That view may well survive years of living in a society such as ours which thankfully is devoid of such circumstance. I think that because of those matters a degree of caution needs to be applied in this case in reaching a conclusion that the father is afflicted by some type of psychological/psychiatric disorder.
435. Dr L was of the view that each party, if they perceived themselves to be the loser in the case, could continue to litigate. He said: *"I've said there is a winner takes all mentality here and that if the case finishes in such a way that [the father] feels that he has won, the battle will be over. If he feels that he has lost then I feel that the battle will not be over."*
436. Dr L thought that the mother might be able to disengage from the battle even though there was a result which was not exactly what she wanted.
437. Dr L thought that if orders were made for the child to remain living with his father and to have some kind of reasonable contact with his mother, then he thought the father would continue to undermine that contact thereby initiating further legal matters on the part of the mother. If the decision was that the father would have residency of the child and that the child was not to have contact with the mother, then Dr L thought the mother would perceive that as manifestly unfair and there would be litigation anyway. Dr L said that his proposal that the child live primarily with his mother and spend time with his father

will give the child an opportunity of some relief of from the excesses of the father's parenting and in particular the manipulative nature of that parenting which Dr L has spoken of.

438. In relation to the possibility that an order be made for the child to live with his father and that his father might then be accommodating of an ongoing relationship between the child and the mother, Dr L said:

"No, I think quite the contrary. I think the father has a conspiratorial view of this. I think the father believes there is something very bad about the mother and that he will continue to attempt in any way possible to undermine any future contact that could occur and will continue to blacken the mother's name and will continue to leave [the child] with a distorted view of how people conduct relationships. Also there is a potential for [the father] to continue to wish to control [the child's] behaviour even when [the child] starts to come into those adolescent years when independence and autonomy become more important."

439. I asked Dr L what made him think that the mother was any better than the father in that regard. He said:

"I felt the mother had a little bit more flexibility, not a lot, but within this jurisdiction we are looking at what we've got and I felt – I personally feel there are enormous child protection issues here but that can't be exercised in this jurisdiction. I think the mother had more flexibility available in her presentation than did the father. I think there is more possibility of change in the mother's perceptions than in the father's, but I agree I think it is a very difficult situation. As I think I said in my report, the first time I gave evidence, I was taken back by the degree of venom in the mother when I tried to put to her what I saw as a reasonable possibility. I was genuinely taken aback and I think I said the first time I actually went and debriefed with someone after it because I hadn't been in a room so full of hate like that for a long time."

440. I raised with Dr L the possibility that the father would not participate in spending time with the child if he was principally required to live with his mother and his mother's family under orders of the court. I spoke of the very poor view the father holds of the mother's family and the conclusion he might reach which is that the child would become "a lost cause". Dr L said he had not really turned his mind to the possibility that the father would use that strategy but it is a possible strategy. He said,

"I think there are risks if [the child] stays with his father anyway and I think there are risks because if he doesn't. I would hope the father would not do that but it is a strategy open to him. It had not been one that I think the father would do."

441. Dr L agreed that the child protection issues that he had been concerned about in this case were not of the nature that would provoke the Department of Community Services to take action.

442. When I expressed my view that the child seemed to be doomed whatever orders I made, Dr L said:

"No, that's not my feeling. I think if we consider [the child] himself, [the child] shows extraordinary resilience and he has looked for ways to find a way through this for himself"

...

I think he's intelligence is probably helpful in that regard."

443. I raised with Dr L the possibility of making an order for the child to be placed in a boarding school. He did not think on balance that was an option worth pursuing.

444. I told Dr L that the Act requires me to consider all possibilities in terms of the configuration of how the child would live with each of his parents and that includes possibilities not raised by the parents themselves. I asked him whether he had any other ideas which may be of assistance to me in determining the matter. He said:

"My conceptualisation of [the child] is that [the child] wants to have contact with his mother and wants to have contact with his father and wants to be free of the battle."

...

"From a child psychologist perspective [the child] has a distorted relationship with both his mother and his father. He has anxious attachments and he is scared of what will happen to either of them as a result of all this stuff that has been floating around. If you put him away from his family he is going to worry about them, it is going to become a preoccupation with him so I think that is something you need to take into account."

445. Dr L also said:

"My concern is that he either lives with his father or he lives with his mother. He can't go directly to live with his mother because he has to test out the reality of his fear. So there needs to be a process whereby some relatively quick, but nevertheless gradual, exposure to that fear can take place such that his anxieties are lessened."

...

"This was only ever thought of as a short term option."

446. I raised with Dr L the possibility of having another person stay in the house with the mother and with the child. He thought that would be perhaps too confronting for the child and not gradual enough. He also thought that it was probably too demanding on the relatives to have them stay in the house seven nights a week.

447. I raised with Dr L the possibility of engaging a housekeeper for a period of time. Dr L thought that might be a reasonable alternative.

448. I discussed with Dr L the prospect of equal shared time with each of his parents. He said:

"I don't believe equal time is the issue here. This really is about who wins not about who shares."

...

"I think really in this case it is one where each parent feels that the child shares that parent's view of the other parent. Whatever time is spent with that other parent is minimal and not particularly good quality. I think that is what, up to now anyway, winning has meant. I don't believe that it is going to go beyond that with the father. That is the view that I have. I think there is a prospect of some change in that with the mother but again I'm not really sure about that."

449. I asked Dr L the following:

“If I come to the conclusion that I just don’t think placing [the child] predominately in the care of his mother can possibly be a lasting result for [the child] in the dynamic of this family, should I nonetheless try it? Is it worth trying for his sake?”

450. Dr L said:

“It is my belief that [the child] is likely to suffer more psychological harm with his father than with his mother, therefore I would say yes it is worth trying. On the other hand if you take the view that the machinations that might then involve [the child] trying to restore the status quo, that will cause more problem for [the child] and that is a decision for you. My belief is that I am trying to reduce the amount of harm that is being done to him.”

451. Dr L was asked questions by the Independent Children’s Lawyer. She asked whether given that there was no AXIS 1 diagnoses by Dr W would it be still beneficial for the father to undertake treatment from a psychologist or a psychiatrist. Dr L said he could see no benefit of treatment in those circumstances. He did consider however that the mother might benefit from attending upon a psychologist. Dr L thought that the mother should be attending upon a therapist frequently probably on a weekly basis. Dr L named two psychologists who he thought would be suitable therapists for the mother. He recommended counselling for the child commencing with a frequent basis of weekly, perhaps even twice weekly, but quickly settling into less frequent sessions as his situation settles. He recommended the child and family mental health team at S or M. He also recommended Ms He also said the school counsellor would be of assistance. However, there would be concerns about how frequently the child may be able to attend on a school counsellor due to the school counsellor’s work loads and secondly if he was attending frequently on the school counsellor it may become apparent to his fellow students and other teachers and the like at the school that he was attending counselling and that would be a problem for the child.

452. Dr L recommended final orders rather than interim orders even though he had in paragraph 20 of his report recommended a review of changes to occur within one month of orders being made.

Dr L was cross examined by the mother’s counsel

453. The mother’s counsel put to Dr L all of the aspects of behaviour which have been the subject of evidence and which might point to the existence of a condition known as paranoid personality disorder and advised Dr L that Dr W had said that where those behaviours occur in the context of a family dispute then he would not diagnose that condition. He said that the behaviours have to be evident over virtually every aspect of a person’s life and interactions with people outside the family context. Dr L agreed with that. Dr L said that he would continue with his view that with the father:

“We are looking at something that is quite intense and quite pervasive and probably more than traits of behaviour, although the outcome isn’t going to be all that much different. What we have got here is the entrenched form of behaviour for which there seems to be little likelihood there would be any change.”

454. Following on the line of cross examination from the mother’s counsel, I asked Dr L whether his recommendations for the court about the arrangements for the child in the future would be different if he was more confident about his suspicion of a personality disorder or traits of personality disorder in the father. His short reply was “No”. He said as far as he was concerned:

“It has been clear that over the period of time this is a pervasive intense way of looking at things in which there is no room for flexibility and the outcome is the same. Irrespective of whether you say he has traits or whether you say he has a disorder, the outcome in this situation is the same.”

455. Dr L was asked about the predicted consequences for the child if he was to reside virtually full time with his father. He said:

“I have already said that I see that [the child] is being isolated and is having a perception of the world and the way in which people act in the world in a very distorted way from his father. The impact on [the child] will be that he will have a great deal of difficulty in being able to develop his own independent ways of responding and acting to other people. He will internalise the models of behaviour that the father’s primary influence will give to him

...

I believe that [the child] is currently being exposed to a form of psychological abuse as a result of the current situation.”

456. In relation to the view Dr L had formed about the mother, he said he formed the view that the mother:

“[W]as operating out of this sense of revenge and anger and that if the situation cooled down she might be able to exercise different ways of acting largely because the history I got from her indicated a greater range of behaviour, more flexible behaviour, most socialised forms of behaviour. On the other hand the affidavit of February, whatever date it was I can’t remember now, and the discussion I had with [the child] about the way the mother appeared to have a lot of difficulty in being able to moderate her behaviour around him suggests that she also has a long way to go. This is in regards to the escalation and involvement of police and just inability to see things from [the child’s] perspective

...

She still appears to be locked into battle with [the father] in which [the child] is the collateral damage. I think that there needs to be a perspective that in this issue I have to think of what I do to my child.”

457. Dr L went on to say:

“I thought quite an irrational war of roses type situation had developed. I felt that there was still in the history of the mother a greater sense of flexibility, a greater sense that something could be recovered. That is where I am currently positioned.”

458. Dr L spoke about the recording which he had listened to of the conversation between the child and his father which had been recorded of November 2006. He said:

“The technique in the recording is one of raising fear and increasing the personal responsibility. If you assume that technique is still in play today, then what it does is prevent [the child] from being able to establish a sense of genuine independence and genuine power to voice his opinions because the techniques that are being used on him are designed to overbear his rational

mind by creating emotional feelings and also by making him personally responsible for the outcome and in particular the person responsible for the happiness of the father.”

...

“What is going to happen is that in a couple of years’ time [the child] is going to go through a series of hormonal emotional changes and things that will be promoted by experiences of school and the like where he will start to have a difference of opinion (with his father). What I am very concerned about then is given everything that I have heard here today and heard in my own interviews and read in the affidavit material about [the father], is that he is an entirely controlling individual.”

459. Dr L said that, in his opinion, that environment could lead to the potential for a significant conflict between the child and his father: *“If he has burnt his bridges with his mum by then he will have no where and no one to turn to.”*

460. Dr L said that although the child’s actions appear to be controlled by his father, nevertheless:

“[The child] is going to come to see that he has been the one that has excluded his mum.”

...

“That is really going to affect his ongoing relationship, if he has an opportunity to have some kind of ongoing relationship with his mum.”

461. Dr L was asked whether there was anything that came from listening from the CD of the conversation between the child and his father as opposed to reading the transcript. Dr L said, *“There wasn’t a huge difference for me. What came across is what came across.”*

462. Dr L was asked questions by the father. The father told him his version of what had happened on 23 January 2007; that is, that the father had telephoned the ambulance to attend at the mother’s house. The father had continued to talk to the child until the ambulance arrived. The father had assisted the child to find the key to the deadlock on the front door. Dr L said that now he had heard a different explanation of what had happened, he thought that the child would have felt reasonably supported in those circumstances.

463. In answering questions from the father, Dr L said that he would anticipated that during the heady days of conflict between the parties that each of the parents might have acted in irrational ways. Dr L told the father:

“I believe you have a problem. I believe your wife has a problem. I believe your wife has less inflexibility in her behaviour than you but I have never said there is not a problem.”

The Documents Tendered During the Course of the Trial

464. Exhibit ICL1 is a copy of three letters purportedly written by the child to Mr Edward Tyler, the Independent Children’s Lawyer in the case. The letters are dated 5 March 2007, 26 March 2007 and 3 April 2007. Submissions have been made about these letters to the effect that I should not accept they have been written by the child. I do accept that the letters have been written by the child. I do not accept that the father had no input or influence on the letters either being sent or their contents.

465. The letter of 3 April 2007 sets out that the child wants to stay in his home with both his parents. That is his preference. I think it probably was not the father's preference at that time. There is no direct evidence of what the father wanted at that time. This leads me to conclude that at least at that date the child may still have had the capacity to express his own view notwithstanding the influence of his father.
466. Exhibit ICL 2 which was tendered on 14 April 2008 consists of a copy of three letters purportedly written by the child. The first is dated 17 December 2007 and is addressed to myself. The second letter is dated 7 February 2008 and is addressed to Miss Karen Shea, the Independent Children's Lawyer. The third letter is dated 24 February 2008 and is addressed to Dr L.
467. I accept that the child did write each of the letters contained in this exhibit. I accept that he signed each of the letters. I do not accept that the letters were produced without assistance and/or influence from the father.
468. In the letter addressed to me, the child complains about the court order requiring him to stay overnight with his mother. I accept that when he wrote that letter it was his genuine desire not to stay overnight with his mother.
469. In that same letter to me, the child complained about having to see Dr L for a further report. He attributed to Dr L the statement that *"I am immature and that my Dad is mad."*
470. One of the matters that arise out of this letter is a view that the child has that his mother does not want him to see his father. I cannot be sure of the source or cause of that belief. It is certainly possible that he holds that belief as a result of interaction directly with his mother. The child also made clear that he did not want a copy of Dr L's report sent to his school. I accept that was his genuine desire.
471. The child also complained about his solicitor and in particular the fact that monies which had been put aside for his education were to be used to pay Dr L. I suspect that the child was influenced by his father's view that this money should not be used to pay for court proceedings between the parties.
472. The child expressed a desire to meet with and speak to myself. Again I think this was instigated by the father; however, I accept that the child was content to meet with me.
473. In the letter to Dr L, The child said that he had fired his solicitor. The letter to Dr L has a disrespectful tone about it. It also has a conspiratorial tone to it where the child claimed *"my solicitor is paying you to tell lies."* The letter has a very angry tone to it. I conclude that either this writing was formulated by the father's ideas or alternatively the child has started to assume his father's view of the world.
474. Exhibit ICL 3 tendered on 16 April 2008 is a list of questions under cover of letter dated 29 June 2007 from the father to Dr L and Dr L's reply under cover of letter received on about 20 August 2007 but undated. In that letter from Dr L the following appears:
- "I am not sure whether the term deviation was used by [the father] but the term lesbian was not used by [the father]. He told me he knew his wife and friend were in bed together and he had to clean the mess up afterwards. He told me he filmed them together. He told me he had intercepted emails where they were arranging to be together. He told me he eventually told the husband of the woman she was having a relationship with his wife and that after that the husband took his wife away. I asked him if he was implying a sexual relationship between his wife and her female friend. [The father] went to great lengths to imply a sexual relationship but for a reason I could not understand was careful not to ever actually say the words. Nonetheless the import of his detailed description is impossible not to arrive at that conclusion."*
475. Exhibit ICL 5 tendered on 18 April 2008 is a statement of costs incurred by and on behalf of the Independent Children's Lawyer. The total amount of fees sought to be recovered is

\$19,802.00. The Independent Children's Lawyer seeks \$9,901.10 from each of the parties. In addition, there are outstanding fees owing to Dr L, Dr W and Dr Y which total \$3,165.

476. Exhibit H3 tendered on 18 April 2008 were records from the S Public School. These records were produced to the court under cover of letter dated 27 September 2007 and related to the child's attendance at that school. Included in the material were notes and reports from the school counsellor. In the normal circumstances I would be very opposed to allowing the parties to tender material from a therapeutic counsellor working with a child the subject of family law proceedings. In this case however, the child has moved on from the school and each of the parents have had access to the school records and have seen the notes from the school counsellor. I should also add here that as this case was not a less adversarial trial adopting the procedure set out in Division 12A of Part VII no leave was sought to issue a subpoena to the school counsellor.
477. The notes of the school counsellor are in my opinion very revealing because they give insight into what was occurring for the child, particularly during 2006. The notes start with an entry dated 1 November 2006. They are easy to read. The child told the school counsellor that he was worried about meeting with the Independent Children's Lawyer and he did not know what to expect.
478. The school counsellor met with the child again on 6 November 2006. She reported that the child was very upset and said that he found out that his father knew nothing about his meeting with the Independent Children's Lawyer. His mother had led him to believe that the father knew about the meeting so when the child told his father of the meeting his father was very surprised and worried. The child was then afraid that his mother would be angry with him for telling his father. The father had told the child not to tell his mother that he had spoken about this with the father. The child did not feel comfortable with being deceitful. The child further reported that his mother was not very happy with him as he did not want to go to the school fete so she went on her own and then had an argument with his father because the father supported the child's decision. Somehow the mother blamed the father for the child's decision and that upset the child.
479. The child saw the school counsellor on 13 November 2006. The child reported that his grandmother had arrived on Friday. He said that his mother was not really happy and the child was worried she had already told the grandmother bad things about his father. The child was happy to have his grandmother here. He said he felt it would be good for everyone. The child reported telling his solicitor that he was concerned about his mother and father arguing and his fears for his mother's health. He said that his mother was very angry with his father for coming to pick him up and take him to the solicitors. The child also said that his mother was very angry because his grandmother was at the house. She complained that the father had not given her enough notice that the grandmother was coming to stay. The child said his grandmother was in shock because of the fighting and also with things that the mother has been telling her that the father apparently does. The child thought it was unfair for his mother to tell his grandmother all these things in her first few days in Australia. He said that his father had not seen his mother for 20 years. The child said he felt that his mother had humiliated his father in front of his grandmother and that this was not fair.
480. The school counsellor reports on the 27 November 2006 meeting with the child. By this time orders had been made for the child to live with his father and the father and the child had moved from the former matrimonial home. The child reported that his mother was very upset with him. She expected him to stay with her. The child said he can not do this. He's worried that if he stays with his mother until his father finds a home he may then not be able to go with his father. He was adamant he would prefer for all to live in the same house but know his mother and father have to stay separated.
481. The notes from the school counsellor reveal that on 6 December 2006 the child spoke to her reporting that he was very worried about his mother going on a school excursion with him. He was concerned that she may say things about his father to his friends or teachers. The child reported that his mother was very upset and angry about the court outcome. He

thought it may be her way to get back at the father. The child was also worried because his mother had threatened to do this several times before and now that the class has recently done a child protection workshop they will know what a paedophile is. The child said the mother made a police report accusing the father of being a paedophile. The child reported that his mother was very strict about “her time” and “father’s time”. He said that the mother would not allow him to have any extra time with his father.

482. The notes from the school counsellor (Miss E) report on a conversation in January 2007 which appears to have followed the events of 23 January 2007. The conversation was with the child. The child told the counsellor what had happened with his mother and the involvement of the ambulance in the middle of the night. The child described that he had seen his mother have a hypo three to five times. He said that she acts weird. Her behaviour becomes uncontrollable and scary. She is not aware of her behaviour. The child said he fears she might hurt herself or him. The child further reported that his mother shouts at him, accuses him of being idle. She says bad things about his father that she had threatened to leave the child at church because he would not tell her what she wants to know. She asks about what goes on at the father’s house and the father asks what goes on at the mother’s house. His father talks to him about financial stress of the court proceedings. The child told the school counsellor that his mother screams and shouts. This happens when he says he does not want to stay with her. He wants his mother to be more caring.
483. Exhibited as exhibit M5 is a transcript of a recording made by the father which recording is M7. The recording is of a conversation between the father and the child in about November 2006.
484. In my view, having taken the time to listen to the recording nothing is added by being able to hear the conversation between the child and his father. The transcript illustrates a quite appalling interrogation and instruction of the child and an infusion into his mind of suspicion, hatred and distrust in relation to his mother. The child was invited to accept that his mother will abandon him in the city if he does not say what she wants him to say to the Independent Children’s Lawyer. She is portrayed as a liar. She is portrayed as completely selfish and having no concern for the wellbeing of the child. She is talked about in a way that suggests she is a common enemy of both the father and the child. The child is invited to keep secrets from his mother. There is some suggestion that the father has invited his mother to come and stay with him in Sydney and that the child is not to tell his mother about this event. The father imposes on the child responsibility for the proceedings that the father is locked into in the Family Court. It is suggested that the father is only involved in these proceedings to “fight for you”. All in all it is an appalling illustration of the emotional environment to which the child has been exposed in his father’s household.
485. Having seen the mother give her evidence and having heard and read other evidence in this case, I am left with the distinct impression that the type of conversation that is reported in exhibit M5 could easily have taken place between the mother and the child in the mother’s household. I think it is probable that the mother has had conversations with the child which likewise suggest to him:
- a) that his father is a liar;
 - b) his father is worthless;
 - c) his father is a paedophile and that the child is to keep secrets from his father;
 - d) the mother is only continuing the legal proceedings “to fight for [the child]”.
 - e) the child, like the mother, needs to be suspicious of all the father’s words and actions.
486. Exhibit M3 is a document produced under subpoena from the father’s former employer, T Pty Ltd. It is a memo registering “*a formal warning of [T Pty Ltd’s] concern about your performance of duties*”. The complaint highlights a history of significantly more time

being required for projects assigned to the father than was anticipated. Further, the projects have to some extent been incomplete.

487. The letter refers to a review of the father's work over the next month and a consideration again of the father's position in July 2001.
488. The father dismissed this notice as being of little consequence. I do not accept that evidence. It seems to me that the father's employers were significantly dissatisfied with his work at that time and I accept the mother's submission that the father left that employment before it was terminated involuntary by his employer.
489. Exhibit M9 contains documents produced by the Commissioner of Police for New South Wales to the Court. The exhibit only relates to the tagged pages. An entry on 1 June 2006 relates to the father having relocated from the former matrimonial home at D to a unit at C. The father had taken the child with him and the mother was seeking intervention by the police for the return of the child.
490. The police spoke to the father and to the child. The father told the police that he had been arranging alternate accommodation for the past two weeks. He said further that the child had known of this and had not disclosed it to his mother. The child indicated to the police that he wished to stay living with his father.
491. The parties agree that some time after this event the father returned to live in the former matrimonial home with the mother and the child. It does demonstrate that as early as June 2006 the father was involving the child in the matrimonial dispute.
492. In that same exhibit is a report dated 19 May 2006. On this occasion at about 7.20 a.m. the police attended at the former matrimonial home and spoke to the parties. The father told the police that the mother was screaming and shouting at him, making accusations that he does nothing but access pornographic websites on the internet all day while she works to financially support the family. The police spoke to the child. He told the police he was present for the duration of the argument and that it had occurred in his bedroom. He told the police that he hates it when his parents fight and that it makes him feel sad.
493. A report dated 22 October 2005 refers to an attendance at the parties' home at D at about 7.50 p.m. on Friday evening. The report provides the following information:

"About 7.50 p.m. on Friday 21 October 2005 the victim and the person of interest were at home with their child. The victim commenced talking on the phone with the person of interest's mother. During the conversation with the person of interest's mother the victim told mother that the person of interest was unemployed and useless. The person of interest has taken offence at this and has grabbed the phone off the victim. A verbal argument has ensued and the victim yelled at the person of interest "hit me hit me". The person of interest has then slapped the victim with an open right hand, twice to her left cheek. The child was in the same room and was witness to the assault.

The argument continued for about three or four minutes until the person of interest once again slapped the victim to the left cheek once with an open right hand. The argument has ended and the victim has contacted police."

494. Other police reports which have been tagged as part of exhibit M9 disclose a shocking circumstance for the child living in his parent's house with them and being subjected to their arguments.
495. Exhibit M10 are records (tagged) produced by Dr R. They relate to the mother and in particular relate to her diabetic condition. The records date from 2001 through to 2007.
496. Exhibit M11 contains reports produced to the Court by the New South Wales Police. In a report dated 21 July 2007 a police officer records speaking with the mother who had alleged the father had redirected her mail to his new address. The police officer made enquiries and ascertained that the father had filed documents and paid fees to enable the

mail of the mother, the father and the child to be redirected to his unit at S. The police officer then spoke to the father who admitted that he had arranged for the redirection. He said he did so because the parties owned jointly held shares and he only intended that it would be the mail addressed to both of the parties that would be redirected.

497. Exhibit M12 and H4 (the same exhibit) contained records produced by the Royal Prince Alfred Hospital. That part of the record which is relied on by the father is a computer record showing the date of a visit on 24 May 1990. It is this record that the father claims has been fabricated. I do not accept that the record has been fabricated as alleged by the father.
498. Exhibit M16 is a document prepared by the mother's counsel of dot points setting out evidence which was put to Dr L. This material recites a lengthy list of behaviours, actions and words attributed to the father and which the mother's counsel sought to rely on to establish that the father had a psychiatric illness or a psychological disturbance.

ISSUES

499. The issues between the parties are multitudinous. They include the following:
- a) Does the father have a personality disorder or other psychiatric / psychological disorder which significantly impairs his ability to appropriately parent the child?
 - b) Has the father created pornographic images which have been tendered by the mother? If so, does any adverse consequence flow to the child if he is significantly parented by his father?
 - c) Does the mother have appropriate parenting skills to enable her to adequately parent the child into the future? If she does, will she be able to parent him in a situation where she has to do that predominantly on her own and with the child spending limited time with his father?
 - d) Is the mother's health sufficiently good to be able to parent the child?
 - e) Is the child likely to stay with his mother overnight in the near future?
 - f) Given his age and the circumstances of the case, to what extent should the court give weight to the wishes of the child to live with his father and spend time with his mother?
 - g) Is there any reason for the court to have any confidence that the level of hostility and acrimony between the parties might lessen in the foreseeable future?
 - h) Is it reasonable to conclude that the mother will probably be more flexible in the future in relation to her parenting of the child?
 - i) If the child lives with his father, will he be able to have a good and ongoing relationship with his mother?

SECTION 60CC CONSIDERATIONS

Primary Considerations

- (a) **the benefit to the child of having a meaningful relationship with both of the child's parents**
500. This is a matter which will be at the forefront of my mind as I consider the other matters to be considered in this case. Given the level of acrimony, mistrust, suspicion and ill will which is evident between the parties in this case a real concern is raised for the court that the child may not be able to have a meaningful relationship with each of his parents because each parent has engaged in a "winner take all" battle and may not be able to tolerate a relationship with the child which has room for the other parent.

(b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

501. There is very little prospect of the child being deliberately physically harmed by either of his parents. The child is concerned that his mother might inadvertently injure him whilst she is having a hypoglycaemic attack.
502. The expert evidence suggests that each of the parents has the capacity to psychologically damage the child and probably will if there is no dramatic change in the way they have parented him to this time. Both appear enormously self centred and treat the child as an unfeeling appendage to them. They deal with him on the basis that he has no allegiance to the other party or any relationship worth having.
503. Dr L is particularly concerned about the father and his inflexibility in his attitude towards the mother and her family. The father lives in a world where he has a high level of suspicion of other people and is very ready to label them corrupt or untrustworthy with very little objective evidence. There are indications that the child is starting to think the same way. If the child is in fact the author of a number of letters tendered in the proceedings which had been written to the Independent Children's Lawyer and Dr L, then adoption of his father's view of the world is becoming apparent.

Additional Considerations

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

504. I am satisfied on the evidence that the child wishes to live predominantly with his father but also to spend time with his mother. He would like to be the determiner of the amount of time he spends with his mother and he certainly does not at this time wish to spend over night time with her.

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

505. The evidence supports a conclusion that the child has a good and close relationship with each of his parents. I conclude that he has a degree of comfort in his relationship with his father which is not evident in the relationship with his mother. His conversations with his school counsellor suggest that the mother annoys the child on occasions. She nags him and she distresses him. He seems to identify his mother as saying nasty things about his father. As against that it is clear in the conversation recorded by the father with the child in about November 2006 (exhibit M5) that his father has made some very derogatory comments about the mother to the child. It may be that the father couches his criticism of the mother in words which are less disturbing to the child than he experiences with his mother.
506. There is a possibility that the child has formed his own view about who has been the trouble maker in the family by being exposed to what seems to be constant fighting between the parties prior to the separation.
507. For whatever reason I find that there is something about the nature of the relationship between the father and the child which is perceived by the child to be more positive than the relationship with his mother. My feeling is that if the child lost his relationship with his father he would be significantly more distressed and affected than if he lost his relationship with his mother. Clearly he does not want to lose either relationship.

(c) the willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent

508. Each parent has demonstrated to me that they have a poor capacity to encourage the child to have a close and continuing relationship with the other parent. I am satisfied that each parent has an appallingly low opinion of the other as a person. The father has said the mother is a liar. He considers her to have the qualities of her family; namely, that they do not promote education as being of importance for their children. They waste money. They consider themselves superior (the father says labelling themselves as of Portugese background rather than Indian background) to the father and his family. The father considers the mother to be deceitful. In particular his conversation with the child (as contained in exhibit M5) illustrated his view that she was proposing to take the child to see the Independent Children's Lawyer without the father's knowledge although having told the child that she had informed the father of this.
509. The mother holds the opinion that the father is "useless" as a provider. There has been an issue between them for a considerable period of time (since 2001 when the father quit his job) that the father is not contributing financially to the support of the family. There is evidence that the mother has verbally attacked the father about this in the home prior to the final separation in the presence of the child. I accept that it would be very difficult for the mother to have any trust in the father at this time.
510. Both parties have chosen to rigorously follow the orders of the court to the last letter even where circumstances have been in place to suggest to caring parents that an alternate arrangement for that particular occasion would be in the child's best interests. An illustration of this was the child not being able to walk to his father's house following spending time with his mother at the end of last year. This led to handovers reverting to the police station. Both parents, in my view, contributed to this circumstance.

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

511. This is a matter which has troubled me deeply as I have come to review the evidence in this case. On the one hand, I am urged by Dr L and the mother's counsel to move the child to live predominantly with his mother for reasons which relate to child protection (perceived and or anticipated psychological abuse by the father). As against that I have the very definite wishes of the child to remain living predominantly with his father. As stated earlier I determine there is a quality to the relationship between the child and his father which is not evident in the relationship between the child and his mother.
512. I have no doubt that the child will be very distressed by any decision that he lives predominantly with his mother. There is further the very real threat that he may lose his relationship with his father, at least in the short term. Given the father's view that the child will be a lost cause if he falls under the influence of the mother and her family and given that the father has a history of disconnecting from close family members (his parents) there is a real threat of a substantial shift in the relationship between the child and his father. It may be that the father would continue to see the child; however, it seems likely that he would be suspicious of whether the child would succumb to the influence of his mother and her family. I think it likely that a reserve in the relationship would quickly emerge. What would happen then needs to be considered. Could the child tolerate any change in the relationship with his father at this time? If he is faced with the necessity to effectively estrange one of his parents which one would he choose to distance himself from? In my view he would chose to distance himself from his mother.
513. It concerns me greatly that I am being asked to place the child in a circumstance where he may "vote with his feet" and simply run away from his mother or refuse to go to her place. What then does a court do in such circumstances? If the child thought he would be returned to his mother by force he may run away from both his parents, placing himself in

extreme danger. This possibility needs to be balanced against my determination of the risk which might be posed to the child of remaining in the principle care of his father.

514. One matter of concern to Dr L is that if the child lived with his father then his relationship with his mother may not be tolerated by the father. Alternatively, the emotional environment in the father's residence may be so toxic to the mother as to lead the child to the conclusion that he could not continue to live with the father and spend time with his mother.

515. I will consider this matter further when reaching a conclusion on the matter as a whole.

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

516. The parties live very close to each other and there is no aspect of difficulty, in a geographical sense, which will interfere with the child spending time with each of his parents.

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

517. There is no issue in this case that each of the parents will be able to provide for the physical needs of the child. The issue which dominates this case is the capacity of each parent to provide for the emotional and intellectual needs of the child. The end analysis of the evidence of Dr L is, I think, that as between the two parents it is the mother who is more likely to be able to have some capacity to care for the child in an emotional and psychological environment which is not abusive. One of the questions to be determined by me is whether the likelihood of the mother being able to do that is sufficiently certain to warrant making orders which are contrary to the child's wishes. I have detailed the evidence of Dr L earlier in these reasons and it can be seen that he is very concerned about the capacity of each parent in this area but particularly the father. Dr L is reasonably certain that the father will continue to parent the child the way in which he has demonstrated thus far. He has a reasonable expectation that the mother is more flexible than the father and therefore has the capacity to be less damaging to the emotional development of the child than the father.

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

518. The child is a 12 year old boy. He will be 13 in three and a half months. He is on the cusp of puberty. He enjoys cricket and chess. Both these games, it appears, are interests of the father. Both the child's parents were born in India. His parents move in social circles which include other Indian expatriates. I am satisfied that there are aspects of the parents cultural backgrounds which impact upon their parenting styles.

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

519. This consideration does not apply to this case.

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

520. Both parents have demonstrated a style of parenting and personality which places their interests ahead of the child's when a choice is required. Both parents have demonstrated to me that they are so committed to the battle between them they have been oblivious to the collateral damage which they wreak on their son. The evidence of Dr L attests to this fact. It is clear to me that the child is loved by each of his parents. However, each parent appears to me to treat the child more as a chattel than as a living individual human being. This approach may be cultural, however it would have to be said that Australian born parents are not necessarily devoid of the same phenomenon.

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

521. There is family violence which has been conceded by the father. There is another incident which was alleged by the mother and denied by the father. This incident allegedly occurred on the 23rd November 2006 whilst the father's mother was still residing with the parties and whilst they resided in the former matrimonial home. The mother alleged it was the day after the previous AVO against the father expired. The police took action and charged the father with assault. There was a hearing which took place. The father's mother had left the country to return to India shortly before that hearing. The proceedings failed to establish the mother's allegations. That would not prevent me from making a finding based on the standard set out in section 140 of the *Evidence Act*.

522. The evidence is not clear enough for me to make a finding in relation to this matter in favour of the mother. I would simply conclude that the mother has not established to my satisfaction that she was assaulted as she has alleged. The father should note that such a finding is not the same as saying it positively did not happen.

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

523. The assault in which the father admitted that he slapped the mother three times gave rise to a AVO on the 22nd February 2006.

524. On the 23rd of November 2006 the mother alleged that the father assaulted her. The police brought assault proceedings against the father. Those proceedings were dismissed. An AVO was made against the father and that expires on the 23rd May 2009.

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

525. It seems to me that the child has had to tolerate litigation between his parents for a lengthy period of time and therefore the court should make final orders and hopefully bring the litigation to an end. In determining the matter it seems to me that my conclusion about a set of orders which is likely to lead to a more settled life for this family outside of litigation is important and I will return to this later in these reasons.

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

526. There is no other matter which I have not already canvassed in these reasons.

Section 60CC(4) & (4A)

527. The parents in this case have been unable to properly co-operate with each other or to communicate with each other at any acceptable manner since prior to the final separation. The court orders have been breached by the father because he says the child had refused to comply with the orders and the father refused to exert any pressure on the child to

comply with the order. The failure to comply was largely about the child spending over night periods of time at his mother's home.

528. Between February and March 2007 the child did not spend time with his mother as was required by the Court orders. Between the 27th of December 2007 and March 2008 the child did not spend time with his mother as required by the courts orders.
529. Both parents have demonstrated they are highly suspicious of each others' motives and actions. This fact has impacted upon their ability to fulfil their responsibilities as parents. I have referred to the recording of the conversation between the child and his father which is in evidence. This demonstrates this suspicion I am referring to.

SECTION 61DA

530. The mother seeks an order for sole parental responsibility. The Independent Children's Lawyer made no submission about section 61DA. However, exhibit ICL6 suggests an order for sole parental responsibility to the mother. The father made no submission about the section.
531. It seems clear to me that the parties' relationship is so appalling that to order equal shared parental responsibility would be to make an order which is unworkable. It seems to me that the only practical order which could be made in these circumstances is to order that one party have sole parental responsibility and require that party to consult with the other by email prior to making any decision which touches on the long term interest of the child or involves any serious medical issue. Further, neither party should be able to remove the child from Australia without the written consent of the other parent.

SECTION 65DAA

532. It is clear in this case that there will need to be a sole parental responsibility order. Consequently the provisions of section 65DAA do not apply to this case. The question of the time that the child will spend with each of his parents is to be determined with a view to the child being able to spend as much time as possible with each of his parents subject to that time not being contrary to his best interests. I will address the amount of time to be spent by the child with each of his parents later in these reasons.

Section 65DAA(5)

533. This section does not have application in this case as I am not proposing to make an order for equal shared parental responsibility.

THE PARTIES' SUBMISSIONS

534. The Independent Children's Lawyer gave her submissions orally. As there was not time for the parents to give their submissions orally they were given in writing.

The Submissions of the Independent Children's Lawyer

535. The Independent Children's Lawyer submitted that in the first report of Dr L, the child is reported to say he would like to live with each of his parents. By the third report, the child was stating his wishes to see both of his parents and he would like to see his mother on Saturday and Sunday.
536. It was submitted that the child does have a genuine fear of residing with his mother and that fear will become more entrenched if he does not have an opportunity to deal with it in the way in which Dr L proposes. In the last report from Dr L it is apparent that the child was open to the prospect of spending overnight time with his mother after the child had been to see Dr Y.
537. It was a submission of the Independent Children's Lawyer that if the child is to spend overnight periods with his mother then it should not be a requirement that he sleep in the

mother's room. On the contrary, orders should be made requiring the child to sleep in his bedroom.

538. It was submitted that despite his age I cannot take his views with the same weight as another child of that age because of the overwhelming influence of his father. Exhibit M5 is said to demonstrate the extent of the pressure that the child has been placed under by his father. Further, Exhibit ICL2 being the letters to the Independent Children's Lawyer, Mr G and myself again demonstrate, so it is submitted, the extent of the influence by the father on the child.
539. It was submitted that the child has an anxious attachment to his parents. This was the evidence of Dr L. Neither parent has the capacity to put the child's interest ahead of their own. Dr L predicts that the mother has greater prospect of change. She seemed not as inflexible.
540. The mother appears to have a greater interaction with the community. She is supported in her work. She is seeing a psychologist, albeit sparingly, through her work. She is willing to do more.
541. The mother has strong family ties. This is quite different to the position the father offers and has available to him. The child's relationship with his father is an intense one with few outside interactions. The child's idea that it is shameful to be divorced appears to come from the father. There is an understanding from all the evidence that the child will be very isolated with his father. He and his father do not appear to go on holidays together or participate in activities outside of their home. The father has not been to any of the child's parent-teacher interviews.
542. In paragraph 9 of Dr L's last report, he reports that the child is being manipulated by the father. It appears likely that the child was told by his father that the mother had faked her father's death.
543. The father has used extreme language with the child such as describing the blessing of the mother's house by the local priest as an "exorcism".
544. Both parents have involved the child with the police.
545. The father allowed two lengthy periods, firstly in February and March 2007 and secondly between the 27 December 2007 and March 2008 when the child did not see his mother.
546. I was reminded in the father's evidence that the child is very "ethical". The father takes the view that the mother is a bad influence on the child.
547. Both the police reports and Dr L understood that the father had made an allegation that the mother was having a lesbian relationship with her friend that had stayed in the house with them. In appearing before me, the father had declined to describe the relationship as a lesbian one; however, much of what he described would have led a reasonable person to understand he was endeavouring to describe a lesbian relationship between the mother and her friend.
548. It was submitted that the pornography that has been tendered by the mother in these proceedings is highly likely to have been created by the father. If the father did create the pornography and particularly the cartoon, then there would have to be some concern about the violent aspects of that cartoon. That is, it reflects badly on the father's attitude to women.
549. The father admitted that he had told the child that the mother wanted to use the child's money as part of the legal proceedings.
550. In his February 2008 affidavit, the father in paragraphs 7, 9 and 11 sets out the child's belief that the Independent Children's Lawyer is being bribed.
551. It was submitted that the child appears to have a good relationship with his mother's family.

552. It was submitted that the child must have a clear understanding that his parents hate each other. The mother's attempts to alienate the child from the father are less serious than the father's attempts to alienate the child from his mother.
553. If the child remains with his father, there is no evidence to suggest anything will change for him in the future.
554. Dr L described the father as an entirely controlling person.

The Submissions of the Mother

555. The submissions by the mother were in writing and very lengthy. I will summarise those as best I can here. I am reminded that the mother's sister, the maternal aunt, has indicated to the Court that she is prepared to be joined in these proceedings for the purpose of acceding to orders as sought by the Independent Children's Lawyer.
556. The mother indicates that she concurs with the orders sought by the Independent Children's Lawyer with the exception of some minor details. Firstly, she seeks to have a Saturday each month with the child, exchanging the time he spends with his father to Sunday that weekend. She seeks that orders for collection and delivery of the child before and after times spent with the father be the responsibility of the mother or her agent and be from the front of the father's residence.
557. The mother made submissions in respect of credit. She submitted that the Court should not accept any aspect of the father's evidence. She made very lengthy and detailed submissions in relation to the psychological environment that the child would be exposed to if he remains predominantly in the care of his father. There is very little reference to any negative evidence against the mother. This is notwithstanding that Dr L was very critical of the mother as well as the father. There is a heavy emphasis on trying to establish that the father has a diagnosable psychiatric disorder. Ultimately, as Dr L said, it does not really matter if you can or cannot put a label on behaviour which is seriously inculcated with paranoia and which is driven by a desire to be "the winner at all costs".

The Submissions of the Father

558. The father has provided detailed written submissions in relation to the proceedings.
559. In those submissions, the father says he opposes any changeover for the child between the mother and father that involves the mother's sister or members of her family.
560. The father submits:

"the wife conducted what can only have been an exorcism of the house on 18 December 2006 after the husband and son were evicted on the 23rd of November 2006. The wife also admits to sprinkling holy water on the husband's bedroom door while they were living under the same roof. Dr [L] did not ask [the child] about the exorcism occurring in his presence."

561. In his submissions the father sought to defend the conversation between himself and the child which is contained in exhibits W9 and W11. The father in his written submissions says the following:

"The wife has an emotional problem with [the child] not wishing to go to see her family. She also wants her family to have access to the matrimonial home and the husband to leave it. The wife constantly uses her religious beliefs to attempt to persuade [the child] to take sides with her against his father and has selectively displayed emails between her and [the child] to the Court. The wife does not want [the child] to have his own circle of friends but spend time only with her family and friends. [The child] has had no willing contact with the wife's family for over five years. He is forced to go there by his mother."

562. The father referred to Exhibit H3 which was a file produced by the S Public School and contained a letter titled "To whom it may concern" signed by Ms H, school counsellor/registered psychologist S Primary School. The letter in parts is as follows:

"To whom it may concern,

[The child] was referred for counselling support by his father and class teacher in March of 2006 because there was concern for [the child's] emotional wellbeing as result of ongoing conflict between his parents. [The father] wanted [the child] to have someone he could talk to if he was feeling worried about things. [The father] has been most alarmed when [the child] threatened to harm himself on two occasions.

[The child] was happy to engage in counselling sessions and he frequently makes his own follow up appointments when he needs to. [The child] is finding the deteriorating relationship between his parents very stressful, he is very anxious about what will happen to his family. [The child] now feels that his parent's separation is inevitable, whereas a few months he was more hopeful of reconciliation.

[The child] has told the counsellor that he loves both parents but gets on better with his father because he is more predictable and stays calm. [The child] says that his father spends lots of time with him, takes him to interesting places like the aquarium and museums, helps him with his research for all his projects and takes him to all his after school activities. [The child] reports that his relationship with his mother is a lot less relaxed because he is afraid of saying the wrong thing to her and worries about upsetting her. [The child] says he has learnt to stay in his room when his parents argue because otherwise he is drawn into the argument. [The child] reports to feeling great distress when his parents argue.

When [the father] moved out of the family home earlier this year, it was [the child's] decision to go with him. [The child] told the counsellor that although he was very concerned about his mother's health, he did not want to stay at home with his mother on his own because he was very worried that he could not look after her properly in the event of a medical emergency. [The child] also said he would have to go to before and after school care because his mother works long hours and he would be at home on his own, he would also have to discontinue his after school activities because his mother would be unable to take him. [The child] reports that his father works from home and his hours are more flexible and he can take time to get him to and from places.

[The child] is very anxious about where he will live when his parents finally do separate. He told his counsellor he would like to live with both parents if possible and feels this would be less stressful if they could agree on a compromise. [The child] told the counsellor that he had two major worries about his parents' impending separation, firstly that he would not be able to spend time with his father and secondly he was worried about his mother living on her own. [The child] reports that he is most concerned that if he is forced to live with his mother he would not be allowed to see his father or spend time with him, whereas he does not feel this would be the case if he lived with his father. [The child] also believes he cannot let his mother live by herself in case anything should happen to her."

563. The above quote is from the school counsellor at the child's former school. The child spent some time with this counsellor. I have referred earlier in these reasons to some of the notes kept by this counsellor from meetings with the child. The notes suggest that there were at least seven occasions when the child met with the counsellor.
564. It is not possible to discern to what extent the child's concerns as raised with his counsellor reflected what he was being told by his father. However, the school counsellor obviously considered that they were genuinely held views by the child and that they appeared age appropriate and to be his own thoughts. Anything to the contrary with a person of Ms H's training would have led to a comment.
565. In the last paragraph of her letter which I have quoted from shortly before this, the following appears: "*[The child] is a very bright and intuitive young man who has obviously thought about the many consequences of his parent's imminent separation. It is no wonder he is very anxious about the outcome.*"

DETERMINING THE ISSUES

(a) Does the father have a personality disorder or other psychiatric/psychological disorder which significantly impairs his ability to appropriately parent the child?

566. Dr W said that the father does not have a diagnosable AXIS 1 condition. He was able to tell me that the father does not apparently suffer from a paranoid personality disorder. He explained that for such a diagnosis the paranoia needs to be evidence in all aspects of the patient's life. He said that if the evidence of paranoia was confined to family matters then that would not establish the diagnosis.
567. Dr L said that it may be the father has traits of the condition known as paranoid personality disorder. He went on to say that being able to put a label on the father's personality manifestations did not advance the case very much. He had described the parenting being provided by the father as psychologically damaging to the child.

(b) Has the father created pornographic images which have been tendered by the mother? If so, does any adverse consequence flow to the child if he is significantly parented by his father?

568. I am really unable on the evidence to reach a firm conclusion about the creator of the documents annexed to the mother's affidavits which are pornographic in nature. I consider that each of the parties had the expertise to create the documents. I do conclude however, that the evidence is more favourable to the mother than to the father. That is, it seems to me that the possibilities are stronger in suggesting the father was the creator rather than the mother. However, as I have said I cannot make a finding on the balance of probabilities that the father was the creator of the material.
569. If I assume that the father had created the images what is the implication for the child of that assumption? There is no evidence that the child has been exposed to any pornographic images in either household. The mother said she copied the documents from the father's computer. There is no evidence that she removed the images from the computer. She then gave the computer to the father. At that time the child was living principally with his father. She could not really be heard to say that there was a risk to the child that he might be exposed to pornography when she knowingly delivers to the father a computer upon which she knows there is store pornography.
570. Dr W was asked about the father viewing pornography and what impact it might have on him as a parent. Dr W did not conclude that it would be a problem for the father provided that the pornography did not become an obsession for him and that he had other sexual contact in the community. Counsel for the mother points to the fact that the father appears to have very limited social contact outside of his household. He does not work in the workforce. He does not appear to have a large friendship base. His social interaction with the community seems very limited.

571. On this issue, I conclude that if the father continues to privately view pornography in a way which is within the law and which is not extensive or obsessive it is unlikely the child will be adversely affected by that behaviour whether he lives with his father or spends unsupervised time with him.

(c) Does the mother have appropriate parenting skills to enable her to adequately parent the child into the future? If she does, will she be able to parent him in a situation where she has to do that predominantly on her own and with the child spending limited time with his father?

572. It seems clear that each of the parties is adequately equipped to attend to the physical needs of the child. This issue relates to the ability of the mother to be able to attend to the psychological needs of the the child.

573. The evidence which I have referred to in these reasons satisfies me that the mother has little insight into the effect on the child of some of the actions she has subjected him to. I accept that in her conflict with the father she has not been able to shield the child. I accept that she has spoken openly in the child's presence about the father watching pornography on the internet. She has called the father a paedophile within the hearing of the child. She has openly criticised the father for not working. She has left no doubt in the child's mind that she regards the father as "useless" as a provider and a drain on the family's finances which she was earning. I accept what the child said to his school counsellor about his mother. I accept that she has said to the child words to the effect "*If the parents of your friends knew what your father did (watch pornography on the net) they would not allow their children to come to our house*".

(d) Is the mother's health sufficiently good to be able to parent the child?

574. I am satisfied that the mother's health is sufficiently well controlled to enable her to care for the child, if needs be, on a full time basis. The father made submissions to the effect that the mother has misrepresented to her medical practitioners for years what the true position was in relation to her diabetes. The evidence from Dr Y is that is not the case. He said that the objective assessment of her condition as observed by him did not suggest misreporting by the mother. Further he said that the new apparatus which the mother is using to assist her with her condition has a memory which can be downloaded and read by the technicians. That information did not suggest the mother was misreporting.

575. Dr Y had no concern about the mother not being able to properly parent the child should he need to be in her care.

(e) Is the child likely to stay with his mother overnight in the near future?

576. I conclude that provided the child feels comfortable, because of the other aspects of his relationship with his mother (other than her medical condition), and such comfort extends to his feeling he could spend overnight periods with his mother, then he is likely, over the next two years, to overcome his fear that his mother might have a "hypo" and injure herself or him.

577. For the child to feel comfortable to spend time with his mother of any real duration it seems to me he has to see that his mother has ceased being critical of his father and become a little more relaxed about how the orders for the child to spend time with her are implemented. Additionally, the child will have to feel that he can spend time with his mother and not thereby cause too many adverse reactions from his father. To date, the child has been able to spend time with his mother on a fairly frequent basis (although such periods are not long in duration) notwithstanding that the father has clearly demonstrated contempt for the mother. He portrays to the child that the mother is a common enemy to both he and the father. He openly criticises the mother in a way which must be very hurtful to the child. He makes it clear to the child that the mother is a liar. Is untrustworthy. Is deceitful. Is not a good steward of the family finances. He also extends his criticism to the mother's family and again this is expressed in vitriolic terms. Notwithstanding all that behaviour the child has been able to assert himself enough to

insist on spending time with his mother. He certainly wants to spend that time on his terms, however, I think it is likely that the reasons put forward by the child for the time he wishes to spend with his mother are largely his own (perhaps selfish) reasons rather than those composed for him by his father. The reasons relate to school commitments and sporting commitments.

578. Another matter which will, in my view, impact on the amount of time the child spends with his mother is the manner in which she interacts with her. The child has complained about his mother dictating the types of activities he engages in with her. It seems that the child feels he receives no recognition from his mother about what he wishes to do with her. As the child grows in stature and confidence it is likely there will be conflict between the child and his mother about this matter if she does not modify her approach to him. Ultimately, if the conflict impacts on the child in a way he finds onerous, I suspect he will opt out of spending time with his mother.

(f) Given his age and the circumstances of the case, to what extent should the court give weight to the wishes of the child to live with his father and spend time with his mother?

579. The child presents as an intelligent, articulate twelve year old boy. He is very successful at school and has won a place for himself in a selective school. His maturity is the subject of comment by Dr L. He appears to have appropriate skills in making friends. He enjoys playing cricket and chess. It seems he is good at both those activities.

580. The child has made it clear he wishes to live with his father and spend time with his mother. Dr L cautioned against placing significant weight on those wishes. Dr L talked of the child having a lack of maturity and metacognitive skill (capacity to be aware of his thought process). He said at paragraph 14 of his first report:

“[The child] has expressed his wishes and these are that he live with his father, preferably in the family home, and visit his mother. However, I do not think that [the child] has the maturity his parents ascribe to him...[The child] engaged with me in what I regard as age appropriate conversation about playing computer games and the like and seemed like a typical 11 year old boy...[The child] clearly has good verbal skills, but lacks metacognitive thought and does not understand the consequences of his comments...he remains no more mature than the average 11 year old boy and susceptible to severe pressures placed on him by his parents. His primary aim is not to look like he is taking sides ...I believe that his preference is as much a product of the extreme situation he finds himself in and is not, as yet, sufficiently competent to deal with.”

581. Dr L saw the child on the 31st of May 2007. A year has expired since that time and the child is now in high school.

582. The above material leads me to the conclusion that I need to be very cautious about giving significant weight to the child’s stated wish. There is other evidence about the relationship between the child and each of his parents which suggests that the child finds it a more peaceful and harmonious environment to live with his father than to live with his mother at this time. I have referred to such evidence earlier in these reasons. The evidence from the school counsellor is an example of such evidence.

583. Determining the weight to be given to the wishes of a young person the child’s age is obviously a complex matter. I accept the expertise of Dr L in relation to the complexity of the exercise. There are, however, a number of matters which stand out in this case and which do, in my opinion, give an insight as to why the child may have at least voiced the desire to remain living with his father. Those matters are as follows:-

a) There appears to be little to no conflict in the relationship between the child and his father.

- b) The child has complained of conflict with his mother. In these reasons I have referred to the cross-examination of the mother where she was asked about some of the matters reported by the child in his letters to the Independent Children's Lawyers. She largely confirmed the matters complained of by the child. This demonstrated a difficulty in the relationship between the child and his mother and pointed up a contrast to the parenting he received from his father. The mother was critical of the father for "mollycoddling him". The mother said "*I think I have always been tough on [the child], always.*"
- c) There appears to be an element of concern by the child as to the unpredictability of his mother (see the evidence from the material of the school counsellor where the child was concerned that his mother may embarrass him by accompanying him on the school excursion). His concern was that his mother may say rude things about his father to his friends and their parents.
- d) Contrary to the prediction of Dr L that the mother may be more flexible than the father I think the child's experiences would be to the contrary. I think particularly of the Christmas 2007 experiences where the child wanted to walk to his father's house from his mother's house at the end of the period of time he spent with her. His father had agreed to this however his mother did not in circumstances where I accept it would be difficult for the child to understand why.
- e) The child has held the view that his mother embarrassed and humiliated his father by telling the paternal grandmother whilst she was staying with the parties in about 2005 that the father was a "useless provider" for the family.

584. There are other matters which for me need to be weighted in the exercise. Those are:

- a) The child has been the subject of what appear to be very substantial gifts of property by the paternal grandmother. There may therefore be a concern on his part that if he burns his bridges with his father then the gifts will be removed. In the context of a family which shows many signs of being very concerned about material wealth this could be a very important matter.
- b) The child has a strong connection with his father which may have been affected already by the parenting style which Dr L describes as abusive. Observing the transcript of the conversation between the child and his father which is exhibited in the proceedings it is clear that the father is treating the child as an ally in the battle against the mother. I have already made observations about the content of the conversation and the way the father had disregarded the fact that the child is entitled to have a relationship with his mother untainted by the father's views of her. To be precise, my concern is that the child might already be inculcated to some extent with his father's view of his mother and her family.

(g) Is there any reason for the court to have any confidence that the level of hostility and acrimony between the parties might lessen in the foreseeable future?

585. Dr L concluded, by what appears to me to be a relatively small margin, that the mother's ability to get on with her life and let go of the battle between the parties is better than he would predict the father could do. I do not have the confidence of Dr L. I have had the advantage over Dr L of observing the parties in these proceedings over a considerable number of days. I do not detect any greater flexibility in the mother than the father. Notwithstanding her evidence that she is unaffected now by the father and his behaviour I do not accept that to be the case. She is still acting in a way which is combative. The same is equally true of the father. The difference appears to me to be that the father is more open (and honest) about his very adverse views which he holds of the mother and her family. The mother appears to have greater insight into the impact on the proceedings and the orders she is seeking of being as open as the father about her feelings, opinions and views of the father. The mother has been represented in these proceedings at all times. It may be that she has been less exposed to me because of that. She has not had to

talk for herself during the hearing. Because this has been run as an adversarial trial, I have not had the same ability to communicate directly with the mother and that may have had an impact upon her presentation. I would also have to accept that as she has been represented by experienced family lawyers they will have explained to her the effect of presenting herself in ways which may not put her case in its best light.

586. Dr L is witness to the extent of the mother's acrimony. He was significantly affected by it and told me so. I find it hard to accept that the intensity of the hatred she clearly has for the father can disappear quickly and that she can just "put it all behind her" and move on unaffected following the conclusion of the case. I conclude, therefore, that in the near to mid term future it is improbable that the level of hostility and acrimony between the parties will appreciably lessen.

(h) Is it reasonable to conclude that the mother will probably be more flexible in the future in relation to her parenting of the child?

587. Following on from and incorporating what I have said in the previous topics I find it improbable that the mother will suddenly change and become more flexible in her parenting of the child and in her attitude to the father. As I have said, I do not have the confidence of Dr L that the mother appears to have the capacity to be more flexible than the father. If she does have that capacity it appears to me to be by such a marginal amount that it would be lost on the child.

(i) If the child lives with his father will he be able to have a good and ongoing relationship with his mother?

588. Dr L is concerned that the child will find it very difficult to live with his father and maintain an ongoing relationship with his mother. I am not as concerned as he is about that matter. I think there is evidence to suggest that the child has been able to weather the storm to date and that he shows signs of wishing to do so in the future. The father appears to be resigned to the fact that the child intends to have an ongoing relationship with his mother.

589. When I listened to the CD recording of the conversation between the child and the father I detected a note of caution in the responses of the child. He appears to me to have already developed an understanding of the fact that the types of statements being made by the father are just more of what his father says about his mother. Likewise, I am sure that when his mother says adverse things about his father the child can view those statements with caution.

590. The child has been exposed to his parents' vitriolic disputes for what appears to be at least two years prior to the physical separation. He must understand what each complains about in relation to the other. There is no doubt he is sad when they fight. This must be at least in some part because he still harbours the fantasy of reconciliation between his parents.

591. As somewhat of a contradiction to the view the father is thought to have of the mother based on considerable portions of the evidence I have recorded in these reasons the following:

I asked the father a number of questions about the conflict between he and the mother and his view of her. He told me that she was basically a good person, but like all good people there are sometimes some bad aspects to them. He thought she was quite intelligent. He thought she had probably suffered some kind of damage to her brain as a result of her diabetic condition. He believed that she loved [the child]. He accepted that he and the mother had different views about feeding [the child]. He agreed that she was interested in his progress although he thought sometimes she pushed him a bit too much. When I asked him what she thought of him he said "She'd probably say I'm the devil incarnate."

592. I referred earlier in these reasons to my dilemma in being able to discern which of the conflicting views held by the father of the mother might prevail if an order were made for the child to live with his father. In particular, I had referred to what appeared to be a generous proposal by the father for the child to spend time with his mother.
593. If Dr L is correct in his view that the battle between the parties is about winning and “winner takes all”, then I think it reasonable to predict that the father would probably be more gracious in his view of the mother and the time that the child should spend with her, however I could not have any degree of certainty about this. Dr L said about this aspect of the case:
- “I’ve said there is a winner takes all mentality here and that if the case finishes in such a way that [the father] feels that he has won, the battle will be over. If he feels that he has lost then I feel that the battle will not be over.”*
594. Dr L thought that the father would continue to act in a way which would blacken the mother’s name to the child.
595. I would have to conclude on the evidence that the answer to this question could not be certain. It may well be that as the child increases in age and personal development, if the acrimony between the parties does not significantly decrease, he will find the atmosphere too difficult to handle and will opt out of a relationship with one of his parents. I would have to predict at this time that it would be the relationship with the mother which the child would forgo if he had to choose.
596. I am conscious of the concern of Dr L that if the child does burn his relationship with his mother and then has a fallout with his father then he will be left in an extremely difficult situation. Against that I have to consider the reaction of the father if orders are made for the child to live with his mother. The father has spoken about his proposal to be involved with the child in those circumstances. In those circumstances, I am reasonably sure that the father would find it too difficult for a variety of reasons to continue to play a secondary role in the care of the child and would opt out of spending any time with him at all. That situation would be, I am sure, intolerable for the child, who would be forced to vote with his feet and simply refuse to live with his mother.

CONCLUSION ON THE CARE OF THE CHILD

597. The evidence which I have referred to in these reasons (especially the evidence of the father himself) illustrates to me that the father has a highly suspicious view of the world. His thinking, as illustrated in his own evidence, does have the ring of “everyone is out to get me” about it. He does not appear to be able to tolerate or consider personal criticism. There is nothing to suggest his view of the world, as above described, is a new aspect to his personality; however, in the proceedings before me much of this thought is related, directly or indirectly, to the matrimonial breakdown. In the absence of evidence to the contrary I must reasonably accept that this is the way he has always been. The intensity of the matrimonial dispute may well highlight the father’s thinking in a way that ordinary life in a harmonious household might not. It is the fact that the child will be subjected to this type of personality for a significant part of his life which concerns Dr L and causes him to recommend the child spend limited time with his father. Having read the affidavit of the father filed in February 2008 Dr L said:

“I am concerned that my original considerations continue to be supported by the affidavit of [the father] and I am greatly concerned given the essential sequestration of [the child] by his father that [the father] is acting in an irrational way and a way that is extremely damaging to [the child].”

Further, he said:

“It remains the case that [the father] appears to me to be intent on winning at all costs in this battle with his wife”

...

“It remains the case that [the father’s] behaviour is to my mind irrational and dangerous to the psychological development of his son. His behaviour has remained consistent over several years and apparently in varying environments. To that extent I believe it does satisfy criteria for a personality disorder although I remain concerned there is a deeper distortion of personality possible. His behaviour does serve his purpose, to enhance his own judgment by ascribing agreement with it to [the child], and to serve as a means of punishing his wife. My concern is however with [the child] and the damage that such a degree of distortion of reality will cause permanent damage in his ability to relate not only to his mother but to others as he matures.”

598. I accept that opinion of Dr L. That does not, however, lead me to immediately conclude that the child must live with his mother and spend limited time with his father. That one very important piece of evidence needs to be balanced against considerations such as:

(a) Will the aspects of the father’s personality which Dr L identifies as damaging to the child’s development recede/ be less evident once the proceedings are concluded?

599. It seems to me based on the evidence of Dr W that there is a significant prospect that there will be a change once the proceedings have concluded. I must acknowledge that the father’s personality will not change.

(b) Is the child able to understand already that some of his father’s thoughts are odd? Will the child have sufficient role models in the other part of his life outside of the family home (such as school teachers, friends parents, etc) to enable him to understand that the vast majority of our society does not have the same suspicious, conspiratorial view of the world which his father does?

600. I conclude that it will not be long before the child will understand his father does have a suspicious view of the world if he does not understand that already. He will have exposure to many different influential people as he progresses through his school and teenage life. He is highly intelligent and he attends a school which selects for intelligence and so his friends are likely to be “smarter than the average”. I think those circumstances should give the child some balance against his father’s views of the world.

(c) Is it too late for the child to be removed from his father’s care? By that I mean is the child already thinking like his father and therefore would be most unlikely to be able to tolerate living apart from his father?

601. Dr L thought this might be a possibility. He was unable to determine if this had happened. There is insufficient other evidence to enable me to make a decision about that question.

(d) What will be the father’s likely reaction to the type of orders sought by the Independent Children’s Lawyer and the mother be? Is it possible/ probable that he would cut himself off from the child because he would consider him a lost cause given the influence of the mother and her family would be likely to have on the child in those circumstances?

602. During the course of the hearing I asked the father what his position would be in the event that I made an order for the child to live with his maternal aunt. He said he would not spend time with the child. He would attend functions which the child might invite him to if he felt comfortable being there with the others present.

603. On the one hand this type of position might reasonably be described as “blackmailing the court.” In the father’s case, however, it is probably not a false threat given his prior history of the father having severed the relationship with his own parents about the time he came to Australia to marry the mother. He did not return to India to see his father prior to his father’s death. He did not reconcile with his mother until she came to Australia to stay with the parties after her husband had died.
604. Dr L agrees that the child would be very distressed by being cut off from one of his parents. Given the fact that the child has expressed a wish to live with his father and given my conclusions about the nature of the relationship between the child and each of his parents, I conclude that the child would be quite traumatised by such an action on the part of the father and would probably refuse to live with his aunt. If asked, the child must be predicted to be aware of this possible reaction by his father.
605. I conclude that there is a significant prospect (a probability) that the father would take the action stated by him in his evidence. If he did take that action the next question to be asked is for how long is he likely to sustain such a stand. The answer would be difficult to predict.
- (e) How do I balance the child’s age and wishes to be living with his father against the possible damage which may be occasioned to his development? Dr L in his last report said that the child was still enthusiastic about seeing his mother.**
606. I dealt earlier in these reasons with Dr L’s evidence about the weight to be placed on the child’s wishes. That evidence did not really deal with the question of the strength of the child’s wishes and the impact upon him of holding those wishes. For reasons already set out in this judgment I see the child as having a considerable amount of determination for a boy of his age. He has demonstrated the capacity to act contrary to the recommendation of the Independent Children's Lawyer and contrary to what he knew to be orders of the Court. I refer specifically to his opposition to attending upon Dr L for the update report. True it is that he may have been acting as the puppet of his father in that resistance; however, in my experience as a Judge I have not seen this type of resistance demonstrated in other children of the same age group. Further, he has resisted all attempts by his mother to have him stay overnight with her. The Court has put in place safeguards for the child if he was to agree to stay with his mother however, he has steadfastly refused to cooperate and at least try and spend an overnight period with his mother.
607. All of the evidence on this point, when weighed by me, leads me to conclude that the child’s desire to live with his father is a very strongly held view.
- (f) Should I give weight to what could be the child’s intuition? That is, that he has lived all his life with his parents and he has chosen for himself a pathway which he is the most comfortable with for many complex reasons which may not be in evidence before me.**
608. I think Dr L would again caution my giving weight to what might be an expression of the child’s intuition on the basis that it really would be impossible to ascertain. I conclude in such circumstances that I really should not explore this subject further.
- (g) What are the consequences for the child of the orders sought by the Independent Children's Lawyer and the mother not working for the child? Is there a possibility/probability he might run away from his mother and/ or his aunt? Could he subject himself to other dangers in order to achieve a result he requires? He is the son of two highly wilful and strong minded parents. Why would I assume that he is not likewise just as wilful and strong minded?**
609. I have touched on this subject matter elsewhere in these reasons. I conclude that there is a significant probability that the child will take things into his own hands and refuse to cooperate with court orders which would place him in what he would regard as against his wishes. There might be some prospect of him tolerating the circumstances of living with his aunt and his mother for a short period of time if his father was to support the

placement. However, I cannot see any prospect that the father would support it. I think the probabilities are that the orders would be doomed to failure and the child would in the process be exposed to significant stress, anxiety and trauma.

(h) What are the prospects of the child self harming in order to make his point?

610. I would not exclude some form of dramatic action on the part of the child should he become desperate enough to achieve the outcome he would be able to live with. I would hope the action would not be self harming.

611. The evidence convinces me that there is little prospect of the child self harming unless he felt there was no other available way to make his point that he will not live with his mother on her terms.

(i) Is there some hope/ prospect that the child may be able to have an ongoing relationship with his mother in the future if he lives with his father?

612. I have dealt with this question when I provided my conclusions on the issues raised by the parties earlier in these reasons.

(j) Would the orders sought by the Independent Children's Lawyer and the mother provide a substantial as opposed to marginal difference to the child's development? If there was little likelihood of a substantial improvement for the child should he be required to suffer the pain which the orders will inevitably bring to him in the short term?

613. I have answered these questions largely in the reasons I have already provided.

614. I have considered the possibility of the child being exposed to pornography by the father. There is no evidence that he has been exposed to pornography by his father or anyone else to date. I find it most unlikely that he would accidentally access pornography on his father's computer. I am satisfied that if the father does have saved pornographic images on his computer then they will now be saved in a place which cannot be accessed by the child. I accept that the father would not knowingly expose the child to pornography.

615. The mother acknowledged that she had been unable to protect the child from the conflict between the parents. She agreed that she engaged in arguments with the father which ignored the presence of the child. She agreed she accused the father of watching and storing pornography in the presence of the child. She said to him words the effect that if his friends' parents knew what his father did they would not allow their children to come to the house. She agreed this was reference to the father watching pornography. She had accused the father of causing her to have to pay more in legal fees by his actions. This was said in the hearing of the child.

616. One matter of great impact upon my decision is "could I conclude there would be any positive change for the child if he were to now live predominantly with his mother?" and my overwhelming feeling is the answer would be no. The mother has been undertaking some counselling since the end of 2006. However, I did not detect any apparent benefit which the mother may have received from that counselling. She has been physically separated from the father now for over 12 months and there does not appear to be any diminution in the conflict between the parents on her part. She did profess at one stage to "be over it" suggesting that she is not interested in further fighting with the father. However, the events of early 2008 suggest that the suspicion, acrimony and position taking is still well alive in both parties.

617. Another matter which concerns me about the mother's ability to present a different face for the child is the patently clear opinion she holds of the father. Her despising of him is of no less intensity, in my estimation, than the reciprocating opinion the father holds of her. My conclusion is that she considers that he is lazy and of no use in the area of supporting the family. She considers he is immoral because of her opinion that he obsessively views pornography on the internet. I was not able to detect one genuinely held opinion of respect which the mother might hold for the father. I should add that the

same is almost true of the father's opinion of the mother. At one place in the evidence, which I have referred to in these reasons, the father did make some positive statements about the mother as a person and as a mother for the child. However, those statements appear to be in contrast to other statements made by the father about the mother.

618. When Dr L was giving his oral evidence in this case on the last occasion he was in the court I canvassed with him a number of possible alternatives to the proposal to place the child with his aunt. These alternatives included:

- requiring the parties to enrol the child in a boarding school;
- engaging a paid housekeeper to be present in the mother's house for a period of time following orders being made for the child to live with his mother;
- The child living with family friends who both parents would be satisfied with as carers;

619. Ultimately Dr L was against all of those alternatives.

620. Weighing all of the evidence, I conclude that the child should continue to live with his father and spend time with his mother. The time he spends with his mother should not be disruptive to his school and extracurricular activities. In reaching this decision I acknowledge that it has been a very difficult task and there are many risks involved for the child and his development in each of the alternative possible outcomes.

621. I acknowledge and accept that there is validity in the opinion of Dr L that the child will be exposed to the damaging and psychologically abusive personality of the father. I do not accept the opinion of Dr L that the mother would be significantly less psychologically damaging than the father although, I accept that she may be marginally less damaging.

622. I do not accept the suggestion of Dr L that it would be worth experimenting with the move for the child to live with his mother and spend time with his father. I see that as being potentially more hazardous to the child than the alternate path of leaving him with his father. I conclude that if I did make orders placing the child in the care of his Aunt with the orders providing for a move over a reasonably short period of time to live with his mother, I think his father would probably react by not availing himself of spending time with the child under the orders. I believe, based on the evidence, the father would see the child as a lost cause. Such a stand by his father would, I conclude, be intolerable to the child and he would refuse to co-operate with the orders and simply return to live with his father. In those circumstances, the Court would be really powerless to re-enforce the orders.

623. If the child did comply with the orders and the father did not opt out of spending time with the child then I think within a short period of time the child would force the circumstance where he was living with his father for the majority of the time.

624. It is not clear to me what amount of time the child might be able to spend with his father without being subjected to the abuse of which Dr L has spoken or being psychologically damaged by same. I find it difficult to see how the child could be damaged by living with his father and spending time with his mother as proposed by the father and not damaged by the father by spending the amount of time with him as suggested by Dr L in his later evidence.

625. Consequently, I reach the conclusion that the only viable orders the court can make is to provide for the child to live with his father and spend time with his mother. Although the orders for the time the child spends with his mother should be prescribed in the short term it needs to be acknowledged that within the space of about two years the child ought to have the right to negotiate that time with his parents.

626. The making of orders for the child to live with his father is likely to lead to a more settled life for the child than orders which provide for him to live with his mother. I conclude that the child will comply with orders for him to live with his father. I conclude that the child is of the view that living with his father provides for an easier life for himself less

attended by parental child conflict than he would expect from his mother. These conclusions are based on the evidence referred to in these reasons.

627. I am reasonably confident that the child is strong enough to withstand most of his father's adverse comment about the mother. He is dedicated himself to a continuing relationship with his mother. The father has been compliant with the child's wishes about spending time with his mother. It seems reasonable to predict that he will continue to accommodate the child's wishes in relation to spending time with his mother.

WHAT ORDERS SHOULD BE MADE?

628. I propose to make an order for the father to have sole parental responsibility for the child. I propose to order that the father consult with the mother by e-mail in relation to all important decisions which need to be made in relation to the child's future. He should consider the mother's views on any matter before he makes a decision about same.
629. The child should live with his father and spend time with his mother. The orders should permit the child to spend some time with his mother on weekends, during the week and during holiday times. The order should provide for day contact only until such time as the child agrees on his own motion to spend overnight times with his mother. The parties should then be required to accommodate the child's wishes in relation to the overnight time he spends with his mother.
630. Upon the child attaining the age of 15 the orders prescribing the time he spends with each parent are to lapse and thereafter the child is to spend time with each parent as he arranges with that parent.
631. The mother should collect the child from and return him to the father's residence on occasions when he spends time with her. In the summer time the child should be allowed to walk to his father's house from his mother's house provided he has telephoned his father and confirmed that his father is at home and agrees to the child being able to walk rather than being delivered by the mother.
632. The father is to arrange for the child to attend upon a therapist nominated by the Independent Children's Lawyer. The father is to ensure that the child attends upon such therapist at the frequency recommended by the therapist over the next two years. The father is to pay for that therapy. The funds are to be drawn from the account established by the property orders to be made in these proceedings.
633. Each party is to be restrained from denigrating the other.
634. Each party is to be prevented by injunction from showing the child any document relating to these proceedings other than the court orders made by me at the time of publishing these reasons.
635. The Independent Children's Lawyer sought an order that the school counsellor be provided with a copy of Dr L's report. I do not propose to make that order. It seems that the father is currently supporting the child in seeing the school counsellor. I would not have confidence that he would continue to do so if the counsellor was provided with a copy of each of Dr L's reports.
636. The appointment of the Independent Children's Lawyer should be extended for a period of 12 months to assist in the implementation of the orders.
637. The mother in her "minute of order sought" (exhibit M14 in the proceedings) sought an order for an injunction under section 68B of the Act for her own protection. The order was sought against the father. The mother seeks that the father be restrained from approaching the mother, contacting her by any means other than through her solicitor, and being within 100 metres of the mother's residence in D or within 100 metres of her place of employment. She also sought an injunction to prevent the father attending at the child's school. The fact that she sought such an order at the conclusion of the hearing (the document tendered on 18 April 2008) does not suggest to me that she has flexibility at the

forefront of her mind nor does it suggest that she would be likely to embrace a less combative approach to the father.

638. I would not be prepared to make such an order. I do not accept that the evidence establishes that there is any need for such an order. The father has studiously avoided contact with the mother since the making of the last AVO. He has declined to go within 100 metres of the mother's home on the advice of the police. I can see no reason why I would prevent the father from attending at the child's school. Further, the terms of the orders sought by the mother would prevent the father ever attending at any school function or function associated with any extracurricular activity of the child if the mother was going to be present. I can not see how that would be likely to advance the child's best interests.
639. Once this judgement has been released I propose to meet with the child for the purpose of explaining the orders and the reasons. I propose then to meet with the parties and the Independent Children's Lawyer for a discussion following allowing time for each of them to read the reasons I have delivered. I will in that discussion satisfy myself that the parties understand the orders I have made. I will also attempt to discuss with them the benefits to the child of now ending the intense conflict between the parents.

ORDER REFUSING ACCESS TO THE RECORDING OF THE MEETING BETWEEN THE CHILD AND THE TRIAL JUDGE

640. During the trial I met with the child. I did so for a number of reasons. The child had requested to meet with me. The child had told the Independent Children's Lawyer that he would not meet with Dr L any further. It was necessary to have an update report from Dr L in order to complete the evidence and embark on the final part of the hearing.
641. At the time of the meeting with the child I required the meeting to be recorded in audio visual form. I also required Mr G, Family Consultant, to be present and prepare a report in relation to the interview. The report was prepared and released. The report was more extensive than that envisaged by Rule 15.02. When the report was released the mother sought to view the recording of the interview. The Independent Children's Lawyer initially also sought to view the interview; however, withdrew the request at a later time.
642. I refused the application of the mother and said I would provide reasons as part of this judgment.
643. The previous position under the *Family Law Rules* provided that the information imparted in the course of a judicial interview were confidential. Nicholson CJ noted in *ZN v YH* (2002) 29 Fam LR 20:

“Writing extra-curially, Chisholm J draws attention to the fact that O 23 r 4 of the Family Law Rules provides that the information given in what are termed ‘interviews’ is confidential and thus the judge may act on information that is unknown and untestable by the parties: see (1998) ‘Children's Participation in Litigation’, paper presented at the Third National Family Law Conference, Melbourne, Australia, October 1998.”

644. Under the 2004 amendments the position that such information was inadmissible was omitted, “*leaving this issue somewhat uncertain*” (per Guest J, *Aquilina & Degabriele* [2004] FamCA 879 (unreported)). However, there is strong support (primarily in the legislative provisions) that although there is no blanket provision of confidentiality, the Court should not go so far as to allow the admission of any recording of the judicial interview into evidence.

Provision for the preparation of a Family Report

645. The relevant rule providing for judicial interview is as follows:

15.02 Interviewing a child

(1) *A judicial officer may interview a child who is the subject of a case under Part VII of the Act.*

(2) *The interview may be conducted in the presence of a family consultant or another person specified by the judicial officer.*

(3) *If the child expresses a wish during the interview that is relevant to the case, the judicial officer may order a family report to be prepared.*

646. The provision under rule 15.02(3) for the preparation of a family report implies that this is the form in which it is envisaged that any evidence of the interview would be admissible as evidence. This is a view that is supported by the learned Justice Guest in the unreported case of *C & C* [2006] FamCA 701, where his Honour noted:

*“Although not pertinent to the circumstances confronting me, Rule 15.02(3) provides that if a child expresses a wish during the interview that is relevant to the case, the judicial officer may order a family report be prepared, **presumably to be presented in admissible form.**”* [emphasis added]

647. Furthermore, Rule 15.03 sets out the various methods in which the Court may utilise the information contained in the report. Although not expressly disallowed, it is evident that the rules do not go so far as to envisage the release of any transcript or recording of the interview itself to the parties:

15.03 Family reports

(5) *If a family report is prepared in accordance with an order made under this rule, the court may:*

(a) *give copies of the report to each party, or the party’s lawyer, and to an independent children’s lawyer;*

(b) *receive the report in evidence;*

(c) *permit oral examination of the person making the report; and*

(d) *order that the report not be released to a person or that access to the report be restricted.*

Information imparted during the course of a judicial interview constitute a ‘protected confidence’ under the *Evidence Act 1995*

648. In the alternative, the stronger argument is that the legislation expressly protects evidence imparted where the child is a protected confider. Section 100C of the *Family Law Act* provides for an application for the admission of evidence where the child is protected confider:

S100C Evidence in respect of which a child is a protected confider

(1) *In any proceedings in the Family Court, or in the Federal Magistrates Court when exercising jurisdiction under this Act, a person described in subsection (2) may, on a child’s behalf, apply to the court for:*

(a) a direction under subsection 126B(1) of the Evidence Act 1995 ; or

(b) an order under section 126E of that Act;

in relation to evidence in respect of which the child is a protected confider (within the meaning of section 126A of that Act).

(2) For the purposes of subsection (1), the following persons may apply to the court on a child's behalf:

(a) the independent children's lawyer; or

(b) a parent of the child who has responsibility for making decisions about major long-term issues in relation to the child; or

(c) a person other than a parent who has responsibility for making decisions about major long-term issues in relation to the child.

649. I should say at this point no application under section 100C was made in the proceedings before me.

650. Under s126A of the *Evidence Act*, a person is a protected confider where they have made a protected confidence. A “protected confidence” is defined under the Act to mean:

a communication made by a person in confidence to another person (in this Division called the "confidant"):

(a) in the course of a relationship in which the confidant was acting in a professional capacity, and

(b) when the confidant was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law or can be inferred from the nature of the relationship between the person and the confidant.

Prima facie, the information disclosed by a child to a judicial officer and the family consultant in the course of a judicial interview is a “protected confidence” under s126 of the *Evidence Act*.

651. Where an application is made under s100C, the Court must make a discretionary decision with regards to the factors outlined under s126B of the *Evidence Act*:

S126B Exclusion of evidence of protected confidences

(1) The court may direct that evidence not be adduced in a proceeding if the court finds that adducing it would disclose:

(a) a protected confidence; or

(b) the contents of a document recording a protected confidence; or

(c) protected identity information.

(2) The court may give such a direction:

(a) on its own initiative; or

(b) on the application of the protected confider or confidant concerned (whether or not either is a party).

(3) The court must give such a direction if it is satisfied that:

(a) it is likely that harm would or might be caused (whether directly or indirectly) to a protected confider if the evidence is adduced; and

(b) the nature and extent of the harm outweighs the desirability of the evidence being given.

(4) Without limiting the matters that the court may take into account for the purposes of this section, it is to take into account the following matters:

(a) the probative value of the evidence in the proceeding;

(b) the importance of the evidence in the proceeding;

(c) the nature and gravity of the relevant offence, cause of action or defence and the nature of the subject matter of the proceeding;

(d) the availability of any other evidence concerning the matters to which the protected confidence or protected identity information relates;

(e) the likely effect of adducing evidence of the protected confidence or protected identity information, including the likelihood of harm, and the nature and extent of harm that would be caused to the protected confider;

(f) the means (including any ancillary orders that may be made under section 126E) available to the court to limit the harm or extent of the harm that is likely to be caused if evidence of the protected confidence or the protected identity information is disclosed;

(g) if the proceeding is a criminal proceeding--whether the party seeking to adduce evidence of the protected confidence or protected identity information is a defendant or the prosecutor;

(h) whether the substance of the protected confidence or the protected identity information has already been disclosed by the protected confider or any other person.

The court must also take into account, and give the greatest weight to, any risk of prejudice to national security (within the meaning of section 8 of the National Security Information (Criminal and Civil Proceedings) Act 2004).

(5) The court must state its reasons for giving or refusing to give a direction under this section.

652. It should be noted that s126A defined “harm” as including actual physical bodily harm, financial loss, stress or shock, damage to reputation or emotional or psychological harm (such as shame, humiliation and fear).

653. However, the Division does not prevent the adducing of evidence where there is the consent of the protected confer is given: s126C.

A further note on the question of confidentiality

654. Guest J noted further in *C and C* (supra) that the question of confidentiality is answered by the consent of the parties as to the conduct of the interview:

“The issue of confidentiality and matters such as that can be answered by establishing an open procedure under which the interview is to be conducted. In each of the three cases I have dealt with thus far, I have regulated the process with the consent of the parties. If there were to be no consent to any one step of that process, I would not have proceeded to conduct the interview. I assessed the parties and also assessed their practitioners as I did the Child Representative.

When it is made clear that a judicial interview is appropriate, and that can be readily determined also from the welfare reports and the affidavits of the parties, then there is no problem, in my view, concerning the issue of confidentiality. It is an open process the terms and procedure of which has been agreed to by all parties. There is no confidentiality attached and there is no secrecy.

If parties do not reach an agreement following the judicial interview then the contested applications continue in the normal course. It is absolutely unnecessary to entertain an application that a Child Representative be called and cross-examined on his report of the process. If such an application were requested in my court, it would be rejected. In any event, in regulating the procedure I make it quite clear that the report of the Child Representative is to be delivered and that there would be no cross-examination upon it. All that is being reported by the Child Representative are “facts” relating to the interview, followed by my own comments which are incorporated in the transcript, and where appropriate, a judgment.”

Conclusion on this Issue

655. In the case before me it was, ultimately, only the mother who persisted with her demand to have access to the video tape which had been recorded of the interview between myself and the child. All parties consented to my meeting with the child.
656. These are proceedings which were not the subject of consent being given for the proceedings to be conducted under the provisions of Division 12A of PART VII of the Act. The only legitimate issue which the mother could raise is one of procedural fairness. She had the opportunity to ask Mr G any questions about his report and/or the interview which he supervised and witnessed between the child and myself. That, in my view, ends any concern the Court or the mother could have about the mother being afforded procedural fairness.
657. The High Court and the Full Court of this Court have said that children’s proceedings are not strictly adversarial proceedings. They are, in my opinion, proceedings of a most extraordinary nature. Nowhere else in our legal system are proceedings conducted where an interested person has no right of personal appearance. Only if a person is disabled do they have the right to be represented by another. In children’s cases the principal subjects of the courts attention (the children) are disabled because of their age; however, they have no right to be represented by another. The Court may appoint an Independent Children’s Lawyer in certain cases. The appointment of an Independent Children’s Lawyer for all children’s cases is not mandatory.
658. In my opinion, there is an onus on a trial judge to limit the adverse impact upon children of the litigation in the Court. The trial judge also has to have regard to the fact that the child is in the throws of developing into adulthood. Each child in each case is likely to be at a different stage of developing. Children should have the right to some confidentiality in certain circumstances. One of those places would be within therapeutic counselling. Another should be in a meeting with the trial judge.
659. There may be circumstances where it would be exceedingly damaging to a child to have some information which has been provided to a judge in conference published to parents. The trial judge should have the discretion to not publish such information.

660. If the court is to make orders which are in the best interests of children it needs to be armed with all relevant information to enable such decision to be made. Progressively, I predict, judges will meet with children as part of the process of hearing children's cases. The process should not give rise to damaging children psychologically by release of sensitive material which is provided by a child to a judge in an interview of the nature conducted by myself with the child.
661. As it transpires there was not, in my view, any information given to me in the interview with the child which falls into the category of being confidential. That is, there is nothing of that nature which might be apparent to me. However, without understanding all of the history of the family I could be entirely insensitive to some piece of information which the child gave me which I thought unimportant to the decision to be made by me. If I were to make available to the parties the recording of the interview I might inadvertently cause damage to an aspect of the relationships between the child and his parents. It is this aspect of the matter which in this case I find compellingly drives me not to release the recording of the interview.
662. In interviewing the child I complied with the provisions of Rule 15.02. That Rule does not envisage the recording of the interview.

PROPERTY MATTERS

ORDERS SOUGHT BY EACH PARTY

663. The orders sought by the mother are contained in exhibit M14. In broad terms she seeks the father transfer to her his interest in the D property (the former matrimonial home) subject to the existing mortgage. She proposes that she transfer to the father her interest in the father's Gateway Credit account, the Commonwealth Bank V2 Account and the joint account with the V Bank titled Offset Account. She says the father should have the shares in Telstra and Coles Myer, IAG and AXA. He should also receive the Forex Trading Account.
664. The mother says the father should have the Toyota Camry vehicle. He should transfer to her his interest in the Timeshare.
665. The mother proposes a splitting order in favour of the father in the sum of \$111,900.
666. Otherwise each of the parties should retain the items of personalty they each have in their possession.
667. The father's property orders are sought in his Amended Response filed on 21 May 2007. He seeks the transfer of the former matrimonial home to himself unencumbered by mortgage which he proposes to be paid off from the parties' bank account with V Bank. The father seeks to control the trust account for the child. He proposes he have the Forex Trading Account and the mother have the time share property. He says the shares should be sold and the proceeds divided equally. He should keep the Toyota Camry vehicle.
668. In his oral evidence the father said that after appropriate consideration of the money spent by the mother on legal costs (by that I take him to be referring to what is commonly called an "Add Back") the parties' net assets should be divided 55% to him and 45% to the mother.

BACKGROUND FACTS

669. The background facts in relation to the property matters are largely set out earlier in these reasons.
670. The father's mother has provided funds for the father and the child to assist in their support. The father says that he has received "*a few hundred dollars here and there*" from his wife since the separation. Additionally his mother had given him \$2,500 for the child shortly before the parties' separation.

671. The parties are trustees for the child of money in a bank account standing in the mother's name. The balance is \$20,589. This money has accumulated over time. Each party seeks to control the funds pending the child reaching his majority.

672. By orders made on 17 November 2006 the parties agreed to cause the two accounts with the Gateway Credit Union to be divided equally. The parties had previously had orders made on 7 June 2006. Those orders provided as follows:-

1. *The husband be at liberty to withdraw \$17,000.00 from the gateway Credit Union account number [...].*

2. *Both parties be restrained from withdrawing any funds from the following accounts:*

○ *Account [...] ([The child's] account) – operated by wife with approximate balance of \$18,000.00.*

○ *[V Bank] account [...] in the joint names of the parties with an approximate credit balance of \$150,000.00.*

○ *Subject to order 1 hereof account [...] with Gateway Credit Union.*

3. *The husband be at liberty to operate and use the following account:*

○ *The VR2 account in the joint names of the parties with an approximate balance of \$3,000.00.*

4. *The wife be at liberty to operate and use the funds in account [...] in the Gateway Credit Union with an approximate balance of \$30,000.00.*

673. The father says that when the Gateway Credit Union account was divided each of the parties received \$86,500.

674. There was a notation made to the orders made on 17 November 2006 to this effect:

“That the orders for division of the funds held in the Gateway Credit Union is not intended by the parties to be by way of interim or partial settlement of property but the parties understand that the distribution of funds may be the subject of a finding by the trial Judge in the context of the settlement of property.”

675. Although the father has submitted that the mother has hidden funds he has not been able to establish on the evidence that such is the case. I am satisfied that the mother has operated accounts in the name of her nieces. However, I have no sense from the evidence that this was part of some scheme to hide funds or commit some type of fraud.

676. Between 1991 and 2004 the mother's mother resided with the parties. The evidence is relatively silent about the financial relationship between the parties and the mother's mother. The father said that she received a pension which she banked and used to pay for her travel to Europe. He said in his affidavit that the mother's mother did not contribute to the family financially or in kind. He claimed she had refused to assist in the care of the child when the mother had to return to work following the child's birth. He said the parties met all of the mother's mother's expenses whilst she lived with them. The mother's mother gave evidence in the case which I refer to hereafter.

677. There is reference in the evidence to the mother's mother having savings which were in an account in the mother's name. These funds were made available to the mother as part of the repayment of the loan from the parties to the mother's sister. Whether they were funds accumulated from the pension received by the mother's mother during the time she lived with the parties is not made clear.
678. There is a dispute between the parties about the contribution the mother's mother may have made to the household in exchange for free board over a lengthy period of time. The mother said by way of submission and/or evidence that her mother had performed a considerable amount of caring for the child. The father denied that. The father said in paragraph 55 of his affidavit filed 10 October 2007 the following:
- "It was a condition of marriage that [the mother's] mother lived with us. We sponsored her mother, [...], on an old age residency in 1991 (before [the child] was born in 1995) that required us to look after her for 10 years. After her mother got her citizenship two years later she went to social security and claimed we were not feeding her and got a special pension. She continued to stay with us until late 2004 but provided no care for [the child]. We continued to meet all her expenses between 1991 and 2004. [The mother's mother] did not contribute to her expenses but used the money from social security to go for a holiday in Europe. I believe my wife was hiding the money received by her mother in accounts in the name of her nieces and nephew to prevent scrutiny by the welfare and taxation agencies."*
679. The mother's mother filed an affidavit on 20 November 2007. She said: *"I deny that I did not want to help care for [the child]. I cared for him on occasions before and after pre-school and sometimes in the evening when [the mother] and the husband went out."*
680. She said the father had chased her from the house in September 2004.
681. There is no evidence from the mother's mother asserting she had made any other contribution to the household. There is no evidence from the mother about any contribution from her mother either financial or non financial.
682. The parties have owned two properties. The first they bought in 1991 at C. That property was purchased using savings and borrowings. There is a dispute as to the amount of savings the father contributed. Given that the father had no savings at the commencement of the cohabitation he could only have contributed from his income all of which will be taken into account as a contribution by him to the marriage. That property was sold in 1999.
683. During the marriage the parties lent money to the mother's sister who paid interest and has repaid the loan. The father disputes the repayment largely because he says he has not seen any documentary evidence to support the allegation. I have found that the money was repaid.

THE BALANCE SHEET

<u>Property</u>	<u>Ownership</u>	<u>Value</u>
Home	Joint	\$600,000.00
Father's Car	Joint	\$ 1,500.00
Mother's Car	M	\$ 9,500.00
Shares	F and M	\$ 16,115.49
Shares	F	\$ 7,302.98
Shares	M	\$ 6,929.30
Coles cheque	F and M	\$ 2,000.00
Undeposited Dividends	F and M	\$ 894.50
Cash - Offset A/C	Joint	\$150,485.00
Cash in Bank	F	E\$77,010.00
Cash in Bank	M	\$ 19,395.32

Mother's paid legal fees	M		\$ 71,647.30
Father's paid legal fees.	F		\$ 47,209.00
Timeshare		Joint	\$ 12,000.00
Forex Trading A/C		F	\$E12,101.00
<u>Total</u>			<u>\$1,034,089.89</u>

Liabilities

Mortgage on home		Joint	\$135,043.15
Father's credit cards		F	\$ 1,800.00
Mother's credit cards	M		\$ 1,660.00
<u>Total</u>			<u>\$138,503.15</u>

Net property other than Superannuation - \$895,586.74

Superannuation

Mother's Superannuation	M		\$450,719.00
Father's Superannuation	F		\$ 64,556.00
<u>Total</u>			<u>\$515,275.00</u>

Net property including superannuation - \$1,410,861.74

Child's account with Gateway Credit Union: \$ 20,589.01

684. Not included are the parties' liability for any further costs of the Expert Witnesses and the costs of the Independent Children's Lawyer. The Independent Children's Lawyer has sought an order for the payment of costs by the father in the sum of \$11,483.60 and by the mother in the sum of \$11,483.60. There will be additional fees for Dr L, Dr W and Dr Y to be paid by the parties. Their quantum was unknown at the time the case concluded.

Issues on the Balance Sheet

685. The balance sheet which is set out above was tendered as an agreed balance sheet. The only addition to that document which I have made is to add the paid legal fees of the parties which have been considerable and which based on the authority of *Chorn and Hopkins* (2004) FLC 93-204 should properly be added back given that they have been paid from matrimonial savings which the parties had at the date of separation. It is reasonable to assume that the parties have met their legal costs from the savings each of them received following the orders of 17 November 2006. Each of the parties received the sum of about \$86,000. They each further had access to funds of about \$30,000. Further, in this case, the father has made the deliberate choice not to be represented in the proceedings because of the legal costs involved. The mother has continued to be represented and has paid considerably more than the father for legal costs. It would be unjust not to add the costs back as a notional entry on the balance sheet. I will assume that the balance of the parties' \$86,000 funds have either been spent on ordinary living expenses or found their way into other savings.

686. The evidence does not tell me what the asset position of the parties was at the date of the separation. Injunctive orders were made on 7 June 2006 which prevented the parties dealing with certain bank accounts and permitting them to use other accounts. The father was permitted to transfer \$17,000 from one account to another account where the orders permitted him to be able to use the funds in the latter account. The mother was permitted to use the funds in the Gateway account which stood in credit with the sum of \$30,000. I assume that the funds in the account upon which the father was permitted to operate after the transfer of the \$17,000 had a balance similar to that of the mother's account.

687. The father claimed that the mother held accounts in banks which stood in relatives' names. Ultimately the mother agreed that was the case. The status of the funds in the

accounts was a little unclear; however, as the accounts were controlled by the mother, I assume she is the beneficial owner of the accounts. The accounts had relatively small balances. They have not been included in the balance sheet as far as I can determine.

THE MOTHER'S CONTRIBUTIONS

688. The mother relies on the following contributions, all of which I accept she made.

- At about the time of marriage the mother had savings of about \$25,000.
- Throughout the cohabitation the mother was in full time employment. The only exception to that was when she took 18 months full time off work to give birth to the child. At that time she took maternity leave and accumulated leave. She was off work for seven months and then worked part time over the remaining 18 month period. Evidence of the father makes a concession about the income earned by the mother throughout the cohabitation. He calculates that the mother's total income was \$709,544 and his was \$402,794. No issue is taken with this calculation by the mother.
- At the time cohabitation commenced the mother was already a contributor to her superannuation fund. She had been in the fund for about two years prior to the marriage. She contributed during the cohabitation and since. I will deal with this contribution separately hereafter.
- The mother obtained finance through the V Bank for the properties owned by the parties. The mother claims that she received a preferential interest rate on the loans. This is probably true; however, there is no evidence to establish what was saved by the parties as a result of that preferential rate. I cannot therefore take this contribution into account as it is impossible to weight it.
- The mother contributed as a homemaker and parent. She was the primary caregiver for the child during at least the first 7 months following the birth of the child. For the next period of 11 months she worked part time and her involvement in the care of the child, I accept, was extensive. The father at the time was working full time. He was also finishing off his masters degree in 1995. The mother participated in most of the range of activities usually associated with the domestic requirements of a family. Until 2001 I accept she was responsible for the major portion of the home maker and parent contributions. The mother attended school functions for the child. She attended parent teacher interviews, something the father agrees he did not participate in. The father did attend the child's school for some time to take the scripture classes. The mother attended sporting and extracurricular activities with the child as did the father.
- There is an issue between the parties about the extent of their contributions as a home maker and parent. The mother claims that until separation she did the vast majority of the domestic duties associated with the family. This is denied by the father. The mother concedes that the father did vacuuming in the house. She claims she did all the shopping for the house. The father denies this and says it was shared. She claimed she cooked most of the meals. The father agreed she cooked on the weekends. However, he claimed he did the cooking during the week. The mother claimed she did most of the washing. The father denied that. He said "she rarely touched the washing machine or the vacuum". The mother said she made the beds. The father denied that. She said sometimes the father did work in the yard of the house. He said he did all of the outside work. Given the fact that the father did not work outside of the house after 2001 I think it likely that he did contribute significantly from that time. I also accept the father made contributions on the nature described by him in his evidence. My determination is that over the spread of the cohabitation the parties should be assessed to have contributed about equally as home makers and parents until the date of separation.

- In 1994 the father commenced to study for his masters degree at Western Sydney University. He attended night classes. The course took two years. He graduated with a maters degree. During this period the mother's contributions as a home maker and parent (after the child's birth) must be seen as having been greater because of the unavailability of the father. Further the father's additional accreditation must be seen as increasing his marketability for future employment. The mother has contributed to that.
689. The mother did not make submissions suggesting a separate consideration of the contributions to the parties' superannuation. However, given that a splitting order is sought and having regard to the Full court decision in *Coghlan and Coghlan* (2005) FLC 93-220 I propose to assess contributions to the parties' superannuation separately from the balance of the assets.
690. The mother sought a division of assets and superannuation based on assessment of contribution as to 65 % to her and 35% to the father.

Contributions towards Superannuation

691. The mother in her submissions has not sought a separate assessment of the parties' contributions towards superannuation. She has treated the superannuation as part of the same pool as the balance of the assets for the purpose of assessing contribution. As I said earlier, *Coghlan* (supra) recommends against such approach where a splitting order is sought.
692. The mother's superannuation has a value of \$450,719. That figure represents a calculation as at 2October 2007. The mother commenced contributing to her superannuation fund before the marriage. She first became a member of the plan on 17 April 1989. There is no evidence as to the value of the mother's entitlement at the date cohabitation commenced.
693. The father's superannuation has a value of \$64,556. The father contributed to his fund wholly within the period of the parties' cohabitation.
694. Each of the parties must be seen to make indirect contributions towards the superannuation of the other. Each party has indirectly enabled the other to have enjoyed employment during the cohabitation and thereby gain their entitlements to superannuation.
695. This was a marriage of some 15 years in which a child was born. The Full Court authorities such as *Coghlan* (supra) and *M & M* (2006) FLC 93-281 require the court to consider the contributions to superannuation within the context of all of the parties other contributions under section 79(4).
696. The Full Court in *M & M* (supra) dealt with assessment of contributions to superannuation. In that decision, the Full Court said at paragraph 123:

"123. In our view it is clear from those comments that the majority in Coghlan (supra) was concerned with a consideration of actual contributions where they were ascertainable. The relationship between years of fund membership and cohabitation might be relevant in a defined benefits scheme whereas actual contributions made by the fund member at the commencement of the cohabitation might be relevant to an accumulation fund where in both cases the marriage was of short duration. However, in our view there is nothing said by the majority in Coghlan (supra) that would give any support for the application of some kind of a formula or that contributions to superannuation whatever the nature of the fund, should be treated in a different way from contributions to other property under s 79(4). This is so in our view whether the superannuation is considered as part of one pool of assets or in a separate pool."

697. I assess the contributions of the parties in each of their funds as 52.5% to the mother and 47.5% to the father. This reflects my view of the parties overall contributions in all the areas referred to in section 79(4) (a), (b) and (c).

Post Separation Contributions

698. The mother has met the mortgage payments and outgoings on the former matrimonial home.

699. The mother has paid child support. The payment has been significant and not token.

700. Post separation the mother has continued to contribute to her superannuation. The value of the interest which appears in the balance sheet is the value at October 2007.

THE FATHER'S CONTRIBUTIONS

701. The father is entitled to rely upon the following contributions based on my acceptance of the evidence.

- His income earned during the cohabitation. I have referred to the comparative amounts earned during the cohabitation in detailing the mother's contributions.
- The father was involved in share trading over a period of about 12 months and he estimates he made about \$3,000 to \$4,000 in that time.
- The father was asked about his contribution as a homemaker and parent. It was put to him that he did very little cooking during the course of cohabitation. He denied that. It was put to him that apart from vacuuming, the mother did the majority of the housework. The father denied that.
- It was put to the father that the mother did all of the grocery shopping during cohabitation. He denied that. He said "*We both went out mostly on weekends and did the shopping together.*" Sometimes the mother would pick up a couple of things on the way home from work.
- It was put to the father that the mother prepared the evening meals. He said "Not always". He said that usually she did prepare the meal on the weekend. During the week he said that he would cook once or twice a week which would provide meals for the week days.
- It was put to the father that the mother usually did the washing including towels and manchester. He denied that. He said she very rarely touched the washing machine. She very rarely touched the vacuum cleaner. He denied that she dusted and cleaned the home. He denied that she made the beds in the house. He denied that she swept and mopped the home. He agreed that he did the mowing of the lawns and said that he did all of the outside work on the house. He agreed that he looked after the car. He agreed that the mother attended parent/teacher nights and that he did not.
- As detailed during my consideration of the mother's contributions as a home maker and parent I conclude that to the date of separation in November 2006 the parties' contributions in this area should be assessed as equal.

Contributions towards Superannuation

702. I have dealt with this under the assessment of the mother's contributions as set out above.

Post Separation Contributions

703. The father has had the responsibility to care for and predominantly financially support the child (albeit with the benefit of the mother's paid child support). The child has spent very limited time with his wife since the end of 2006.

CONCLUSION BASED ON ASSESSMENT OF CONTRIBUTIONS

704. The mother submitted that all contributions should be assessed as favouring the mother by proportion 65% to her and 35% to the father.
705. The father did not ascribe a percentage to the assessment of contribution. However, he did say he proposed the assets (and superannuation) should be divided 55% to him and 45% to the mother.
706. My assessment of the contributions is that the balance should fall in favour of the mother in assessment to the date of separation. Post separation I conclude the father's contributions were greater than the mother's. The very considerable contribution he made in caring for the child has tipped the scales in his favour during this period. Notwithstanding that period post separation favouring the father I still hold that the mother's overall contributions were greater than the father's by a small margin and this is largely because of the financial contribution of the mother following the father leaving his employment in 2001. I assess the contributions as being 52.5% to the mother and 47.5% to the father.
707. That determination would result in the mother receiving \$470,183 in non superannuation assets and \$270,519 in superannuation. The father will receive \$425,403 of non superannuation assets and \$244,756 in superannuation.

SECTION 75(2) MATTERS

708. Before dealing with the matters which the parties and the evidence suggests I should consider under this heading I need to make clear that in considering these matters I do so in relation to both the assets and the superannuation pools.
709. The father was born in October 1958. He is 49 years of age. The mother was born in June 1961 and is almost 47 years of age.
710. This was a marriage of some 15 years in which a child was born.
711. The mother has a long history of diabetes. This has affected her general health in differing ways over the course of the marriage and since. She now has fitted a glucose pump and a blood monitor. This has given her a comparatively lengthy period of good health without apparently suffering from severe hypoglycaemic attacks.
712. Dr Y confirmed that the glucose pump and monitor currently used by the mother are an expensive item and can cost up to \$10,000 per annum to maintain. The mother will have this expenditure into the foreseeable future.
713. The father is in good health physically. However, Dr L has raised concerns about his psychological health. Dr W was unable to diagnose an AXIS 1 disorder. The father has been unemployed since 2001. The length of his unemployment and the circumstances in which he came to leave his last employment do raise concerns about his ability to work in a conventional workplace and meet the requirements of an employer. The matters raised by his last employer as criticism included his being unable to complete tasks in what was regarded as an appropriate time. There were also concerns about the standard of his work.
714. The father said that since May 2007 he has applied for between 25 and 50 jobs
715. He agreed that after the court case has finished there would be no reason why he could not find some employment. He had said that having to conduct his own case in the court had required his full attention during the last 12 months or so.
716. The father is highly credentialed in his field. He holds a Masters Degree from Western Sydney University. Although the father was confident he could obtain contract work in the industry I do have some reservations about that possibility. Certainly I think it probable that he could obtain small contract jobs from time to time; however, I do not share his confidence that he will obtain a continuity of work which might be equivalent to full time employment.

717. The father's foray into the world of share trading took the form of undertaking a course of study with Forex and then doing some trading. Although the father says he made a profit it was hardly the type of income which could sustain the father. His involvement in share trading seems to have ceased some time ago.
718. I conclude that the father's prospects of obtaining consistent work in the future are not good. I consider that he may from time to time obtain some small contract jobs. I think his ability to generate reasonable income (at least comparable to that earned by him prior to his employment ceasing in 2001) in the future is quite limited.
719. The mother is employed as a full time employee with the V Bank. She receives a salary of \$96,200 per year (see the mother's Financial Statement filed 2 August 2007). The mother in her submissions said that her income was \$62,296 per annum and referred me to the mother's Financial Statement filed 26 October 2007. That document was not relied upon in the hearing. The Case Summary Document filed by the mother on the 19 November 2007 only seeks to rely upon the Financial Statement which I have referred to.
720. The mother has been paying child support for the child for some time now. Her obligation would have commenced following the physical separation of the parties in November 2006. The payment is about \$750 per month.
721. The father told me in evidence that he has been receiving some financial support for the child and himself from his wife since the separation in November 2006. The amount he has received is about "*a few hundred dollars here and there*". She did provide a sum of \$2,500 for the child shortly before the separation in November 2006.
722. The mother has occupied the former matrimonial home since the separation in November 2006. She has also met the outgoings on the property.
723. The mother has a liability for further legal costs not paid at the time of the hearing in the sum of about \$15,000. Given that the mother has had written submissions provided by her counsel post the hearing, I think it reasonable to conclude that the mother's liability for legal costs has grown further.
724. The mother sought to rely on a possible inheritance from the father's mother. There is insufficient evidence before the court to enable me to take that matter into account.
725. The child will reside principally with the father into the foreseeable future. He is almost 13 years of age; however, he will require housing and financial support for at least the next five years. The children's orders I propose to make provide for the child to attend upon a therapist as recommended by Dr L. It will be the father's responsibility to make that happen and it may well require some payment by the father. As I do not know from any evidence what this is likely to cost I can only take it into account in a minor way. I understand from the evidence of Dr L the child will need to see a psychologist in private practice. I know that there is some relief for payment by allowances now available through Medicare. The extent to which the father may qualify for such relief is not known to me.
726. It is reasonably anticipated that the mother will pay child support for the child at a reasonably high rate for the foreseeable future.
727. The financial commitments of each party and the cost of self support are set out in each of their Financial Statements.
728. The parties have lived a frugal lifestyle. They have been able to save a large amount of money. That has only occurred in this family because they have avoided unnecessary expenditure. There is no evidence of lavish holidays or lifestyle.
729. Both parties have entitlements accruing in superannuation funds. The mother's entitlement is very significant having regard to the balance of the assets. She seeks a splitting order so that the father would receive 34% of the mother's fund.
730. The decision I have made about the division of assets based upon assessment of contribution means that the mother will receive \$470,183 in non superannuation assets

and \$270,519 in superannuation. The father will receive \$425,403 of non superannuation assets and \$244,756 in superannuation.

731. My view of the parties' relative financial futures is, as I have set out, that the mother is likely to continue in secure employment into the foreseeable future. The father's prospect of future employment I see as not good. I need to consider that with that secure future employment for the mother there is the ability to continue to grow her superannuation. She is now 47 years of age and might reasonably be expected to work to the age of 60 to 65 years. Thus she has another 13 to 18 years of employment life ahead of her.
732. The mother sought a further adjustment in her favour of 5%. In fairness to her it was premised on the assumption that the child would be predominantly living with her. That is not my decision in the case.
733. The mother's mother lived with the parties from 1991 to 2004. The father says that although she received a pension she saved that money to fund overseas travel. The father's evidence, which I accept, is that the expenses of the mother's mother were met by the parties. The parties had sponsored the mother's mother to come to Australia. After about two years she received a pension. She contributed nothing from her pension to the family expenses. The parties provided her with a home and met all her expenses. It must be reasonably concluded that a considerable provision was made by the parties for the support of the mother's mother with very little provided by her in return. I do not accept she provided any meaningful assistance to the parties for the care of the child or in any other way. There is no ability to consider this matter under the "contribution" headings having regard to the provisions of sections 79(4)(a), (b) and (c). This factor requires a significant adjustment in favour of the father.
734. Having regard to all those matters I conclude there should be a significant adjustment in favour of the father. That adjustment should be 12.5%. That adjustment should be calculated across both the asset pool and the superannuation pool.
735. The end result is that there should be a division of the parties' assets and superannuation as to 55% to the father and 45% to the mother.
736. Nothing in my determination is likely to have an effect upon the earning capacity of either party.
737. I have taken into account under section 75(2), as above addressed, the effect of the children's orders I propose to make upon the determination to be made by me in relation to the parties property.
738. I have considered above the fact that the mother has been assessed to pay child support for the child.

SHOULD THERE BE A SPLITTING ORDER AS SOUGHT BY THE MOTHER?

739. The issue here is whether the father should be able to take some of his share of superannuation as an adjustment in relation to the pool of non superannuation assets. He considers if he is able to take his interest from that pool he may be able to take the property at D as his share of the assets. In the circumstances of this case that is an understandable approach. However, the mother also wishes to retain the property.
740. As I have said earlier I have concerns about the father's future employment prospects. If he is unable to obtain employment or contract work then he has little opportunity to contribute further towards superannuation. His current entitlement is comparatively small and would be unlikely to allow the father a reasonable standard of living when he retires. If he retains the totality of his entitlement to the superannuation of the parties through the making of a splitting order, then the prospect of being able to support him after retirement increases.
741. The parties are still reasonably young and there are a number of years to pass before either would become entitled to draw on superannuation. It would be unfair to the mother if I allowed the father to take his proportion of her superannuation as I have determined

above, in current assets and then have her have to wait until she retires to receive her benefit of the orders I am required to make.

742. I am of the view that there should be a superannuation splitting order. I have been advised that the mother's superannuation trustee has been given proper notice of her proposed splitting order and raises no objection to same.
743. The father is to receive \$283,401 in superannuation benefit. He has an entitlement in his own fund of \$64,556. Therefore the amount to be used to calculate the future entitlement of the father in the mother's fund will be a base figure of \$218,845.
744. In this case I conclude it is important for the superannuation of the parties to be split. I think that the prospects of the father being able to significantly grow his superannuation before he retires are not very high. Therefore if the father is to have the prospect of some comfort in his retirement it will be important for him to receive a significant share of the parties' superannuation as it now exists.
745. I can understand the father seeking no splitting order and effectively taking his interest in the mother's superannuation fund as property now. If he does not secure enough money from the parties' assets now to enable him to acquire the mother's interest in the former matrimonial home then he would see himself as having little chance of being able to buy a comparable property on the open market given that he would have to borrow funds and he does not have a secure job.
746. Notwithstanding the father's position I think it is fair and appropriate that there be a splitting order as proposed by the mother.

JUST AND EQUITABLE

747. The effect of the orders to be made by the court dividing the parties' assets and superannuation 55% to the father and 45% to the mother is that the father will receive \$492,572 in assets and \$283,401 in superannuation and the mother will receive \$403,014 in assets and \$231,874 in superannuation. That leaves the father with \$89,558 more than the mother in assets and \$51,527 more than the mother in superannuation.
748. Given the circumstances of this marriage I conclude that the determination above referred to will provide a just and equitable division of the parties' assets and superannuation.

THE PROPOSED PROPERTY ORDERS

749. The parties are unable to agree about the items of joint property which should be retained by each party. I therefore need to consider how the property should be divided before any cash adjustment or sale of the former matrimonial home. Both parties sought to offload to the other every bit of available property and savings that they could in order to bolster their ability to retain the former matrimonial home.
750. The Coles cheque of \$2,000 and the un-deposited dividends of \$894.50 should go to the father as they would both potentially carry an incident of taxation. Given that the father has no income for the purpose of assessing taxation it is unlikely that he will have to pay any income tax on the dividends. The mother would certainly be expected to have to pay tax on the dividends.
751. Each of the parties should retain the shares that stand in their sole names. The father has shares valued at \$7302.98 and the mother has shares valued at \$6,929.30. These parcels therefore are about equal. The parties jointly own shares worth \$16,115.49 on the balance sheet. Given that in recent times there has been volatility on the stock market, it seems to me that the fairest way to deal with this item is to have it sold and the net proceeds divided equally between the parties. This will mean if there has been a diminution in the value of the shares the parties will equally suffer the loss and the converse is true also. Consequently when I consider the division of the assets between the parties I will have an entry in each parties' lists of assets to be retained "Half the joint share portfolio \$8,057.75".

752. The father should retain the Forex Trading A/C as that has been his venture.
753. The Timeshare could be used by either; however, each suggests the other should receive this asset. It seems to me that the father is unlikely to have the resources/income to be able to afford to use the timeshare unit whereas the mother could well have and so I propose that she retain that asset.
754. Each of the parties would like to retain the former matrimonial home. The father would need to borrow a considerable amount of money to pay out the mother and there is no evidence that he could do so. The mother works for the V Bank and has a good income. She may be able to borrow sufficient funds to pay out the father and keep the house. She should be given two months to do that otherwise the house is to be sold.
755. The house has a value of \$600,000. There is \$135,043 owing on the mortgage. The net value is therefore \$464,957. The father is to receive \$187,812 from the mother if she retains the house. That sum as a % of the equity in the home (value less amount outstanding on the mortgage) is 40.4%. Therefore the orders should provide that if the mother has not paid the father the sum of \$187,812 within two months of the date of order the house is to be sold. The mortgage and sale costs paid and the father is to receive 40.4% of the sale proceeds thereafter.
756. The orders I propose will see the father having to receive \$492,572 worth of the parties' assets. He will retain from the balance sheet the following items as his property:

PROPERTY	OWNERSHIP	VALUE
Father's car	joint	\$
1,500.00		
Half the joint share portfolio		\$ 8,057.75
Shares (Father's)	F	\$
7,302.98		
Coles cheque	F and M	\$ 2,000.00
Undeposited Dividends	F and M	\$ 894.50
Cash - Offset A/C	Joint	
\$150,485.00		
Cash in Bank	F	
E\$77,010.00		
Father's paid legal fees.	F	\$ 47,209.00
Forex Trading A/C	F	
<u>\$E12,101.00</u>		
	Total	<u>\$306,560.23</u>

Liabilities

Father's credit cards	F	\$
1,800.00		
		<u>Total</u> \$
<u>1,800.00</u>		

Net assets to be retained by the father:	\$304,760.23
Amount to be paid by the mother	<u>\$187,812.00</u>
Net Assets to be received by father:	\$492,572.00

The mother would therefore be required to pay the father the sum of \$187,812.

757. The mother will retain the following assets from the balance sheet:

PROPERTY	OWNERSHIP	VALUE
Home	Joint	
\$600,000.00		
Mother's Car	M	\$
9,500.00		
Half the joint share portfolio		\$ 8,057.75
Shares	M	\$
6,929.30		
Cash in Bank	M	\$
19,395.32		
Mother's paid legal fees	M	\$ 71,647.30
Timeshare	Joint	\$
<u>12,000.00</u>		
	Total	<u>\$727,529.67</u>

Liabilities

Mortgage on home	Joint	
\$135,043.15		
Mother's credit cards	M	\$ 1,660.00
Sum to be paid to the father		<u>\$187,812.00</u>
		<u>Total \$</u>
<u>324,515.15</u>		

Net assets retained by the mother: \$403,014.00

I certify that the preceding seven hundred and fifty-seven (757) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Le Poer Trench.

Associate:

Date: 25 June 2008



Family Law Act 1975

Act No. 53 of 1975 as amended

This compilation was prepared on 17 December 2004
taking into account amendments up to Act No. 140 of 2003

The text of any of those amendments not in force
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be
affected by application provisions that are set out in the Notes section

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Contents

Part I—Preliminary	1
1 Short title [see Note 1]	1
2 Commencement [see Note 1]	1
3 Repeal and saving	1
4 Interpretation	2
4A Third party proceedings to set aside financial agreement	13
6 Polygamous marriages	14
7 Extension of Act to certain Territories	14
7A Application of the <i>Criminal Code</i>	14
8 Supersession of existing laws	14
9 Transitional	15
Part II—Counselling organisations and mediation organisations	18
Division 1—What this Part does	18
11 What this Part does	18
Division 2—Approval of counselling organisations and mediation organisations	19
12 Meaning of <i>approved counselling organisation</i> and <i>approved mediation organisation</i>	19
13 Organisation may be approved as an approved counselling organisation, an approved mediation organisation or both	19
13A Approval of counselling organisations	19
13B Approval of mediation organisations	20
13C Approvals subject to conditions	20
13D Revocation of approvals	21
13E Minister to publish lists of approved counselling organisations and approved mediation organisations	22
Division 3—Reporting by approved counselling organisations and approved mediation organisations	23
13F Reports and financial statements of approved organisations	23
13G Minister may exempt organisation from requirements of section 13F	23
Division 4—Funding of approved counselling organisations and approved mediation organisations	25
13H Grants to approved counselling organisations and approved mediation organisations	25

Part III—Primary dispute resolution	26
Division 1—Object and outline	26
14 Object of Part.....	26
14A Outline of Part.....	26
Division 2—Obligations to consider the possibility of reconciliation	28
14B Interpretation.....	28
14C Duty of judges.....	28
14D Duty of legal practitioners.....	29
Division 3—Obligations to consider advising people about primary dispute resolution methods	30
14E Interpretation.....	30
14F Duty of courts	30
14G Duty of legal practitioners.....	30
Division 4—Counselling	31
14H Division 3 of Part VII deals with counselling in matters affecting children.....	31
15 Notice seeking counselling	31
15A Request for assistance of a family and child counsellor—Federal Magistrates Court.....	31
16 Advice as to counselling	32
16A Courts to direct or advise people to attend counselling.....	32
16B Courts may advise people to attend counselling if it may improve their relationship etc.	33
16C Obligations to consider advising people about counselling for marital breakdown.....	33
17 Provision of certain documents.....	34
19 Oath or affirmation of secrecy	34
Division 5—Mediation and arbitration	35
Subdivision A—Mediation	35
19A Request for mediation—request made through a Family Court.....	35
19AAA Request for mediation—Federal Magistrates Court.....	35
19AA Request for mediation—where made direct to a family and child mediator	36
19B Family Court may refer matters for mediation.....	36
19BAA Federal Magistrates Court may refer matters for mediation.....	37
19BA Court to advise people to attend mediation.....	38
Subdivision B—Arbitration	38
19D Court may refer proceedings to arbitration	38
19E Private arbitration	39

19EA	Referral by arbitrator of questions of law to a Family Court	39
19EB	Referral by arbitrator of questions of law to the Federal Magistrates Court.....	40
19F	Review of awards by a Family Court.....	40
19FA	Review of awards by the Federal Magistrates Court.....	40
19G	Setting aside awards—Family Courts.....	41
19GA	Setting aside awards—Federal Magistrates Court	41
19H	Fees for arbitration.....	42
Subdivision C—Miscellaneous		42
19J	Advice about mediation and arbitration	42
19K	Oath or affirmation by court mediator or community mediator	42
19L	Oath or affirmation by arbitrator.....	43
19M	Protection of mediators and arbitrators	43
Division 6—Miscellaneous		44
19N	Admissions made to counsellors, mediators etc.....	44
19P	Regulations to be complied with by family and child mediators	45
19Q	Advertising in Family Court registries of counselling, mediation and arbitration services	45
Part IV—The Family Court of Australia		46
Division 1—Interpretation		46
20	Interpretation.....	46
Division 2—The Family Court of Australia		47
21	Creation of Court	47
21A	Divisions of Court.....	47
21B	Arrangement of business of Court	47
Division 3—Judges		49
22	Appointment, removal and resignation of Judges	49
23	Seniority.....	51
24	Absence or illness of Chief Judge	52
25	Salary and Allowances.....	53
26	Oath or affirmation of allegiance and office	53
Division 4—Judicial Registrars		54
26A	Judicial Registrars.....	54
26B	Powers of Judicial Registrars.....	54
26C	Review of decisions of Judicial Registrars.....	55
26D	Exercise of delegated powers by Court.....	56
26E	Rules of Court disallowable etc.	56
26F	Independence of Judicial Registrars.....	56
26G	Judicial Registrars hold office on full time or part time basis	57

26H	Qualifications for appointment etc.....	57
26I	Term of office	57
26J	Remuneration and allowances	57
26JA	Leave of absence.....	58
26K	Resignation	58
26L	Termination of appointment.....	58
26M	Oath or affirmation of office	58
26N	Terms and conditions of appointment not provided for by Act	59
Division 5—Jurisdiction and exercise of jurisdiction		60
27	Place of sitting	60
28	Exercise of jurisdiction	60
30	Court divided in opinion	61
31	Original jurisdiction of Family Court	62
33	Jurisdiction in associated matters.....	62
33A	Proceedings not to be instituted in the Family Court if an associated matter is before the Federal Magistrates Court.....	63
33B	Discretionary transfer of proceedings to the Federal Magistrates Court.....	63
33C	Mandatory transfer of proceedings to the Federal Magistrates Court.....	65
34	Issue of certain writs etc.	65
35	Contempt of court	66
Division 6—Registries and officers		67
36	Registries	67
37	Officers of Court.....	67
37A	Delegation of powers to Registrars	67
37B	Independence of Registrars.....	71
37C	Oath or affirmation of office	72
Division 7—Practice and procedure		73
38	Practice and procedure	73
Part IVA—Management of the Court		74
Division 1—Management responsibilities of the Chief Judge and the Chief Executive Officer		74
38A	Management of administrative affairs of Court	74
38B	Chief Executive Officer.....	74
Division 2—Appointment, powers etc. of Chief Executive Officer		75
38C	Appointment of Chief Executive Officer	75
38D	Powers of Chief Executive Officer	75
38E	Remuneration of Chief Executive Officer.....	75
38F	Terms and conditions of appointment of Chief Executive Officer.....	76

38G	Leave of absence.....	76
38H	Resignation	76
38J	Outside employment of Chief Executive Officer.....	76
38K	Termination of appointment.....	76
38L	Disclosure of interests by Chief Executive Officer	78
38M	Acting Chief Executive Officer	78
Division 3—Other officers and staff of Registries		79
38N	Personnel other than the Chief Executive Officer	79
38P	Marshal	80
38Q	Statutory Agency etc. for purposes of Public Service Act	80
38R	Engagement of consultants etc.....	81
Division 4—Miscellaneous administrative matters		82
38S	Annual report.....	82
38W	Delegation of administrative powers of Chief Judge	82
38X	Proceedings arising out of administration of Court.....	82
Part V—Jurisdiction in matrimonial causes		83
39	Jurisdiction in matrimonial causes.....	83
40	Jurisdiction of Family Court	86
40A	Exercise of jurisdiction of Federal Magistrates Court in certain States and Territories.....	88
41	Establishment of State Family Courts.....	88
42	Law to be applied.....	90
43	Principles to be applied by courts	90
44	Institution of proceedings	90
44A	Proceedings for decree of dissolution of marriage	94
45	Stay and transfer of proceedings.....	94
45A	Transfer of property proceedings from the Federal Magistrates Court—value exceeds \$300,000.....	95
46	Transfer of proceedings from court of summary jurisdiction in certain cases	96
47	Courts to act in aid of each other	98
Part VI—Dissolution and nullity of marriage		99
48	Dissolution of marriage.....	99
49	Meaning of separation.....	99
50	Effect of resumption of cohabitation.....	99
51	Nullity of marriage.....	100
52	Court not to make decree of dissolution where application for decree of nullity before it	100
53	Circumstances occurring before commencement of Act or outside Australia	100
54	Decree <i>nisi</i> in first instance.....	100
55	When decree becomes absolute	100

55A	Decree absolute where children	102
56	Certificate as to decree absolute.....	103
57	Rescission of decree <i>nisi</i> where parties reconciled	103
58	Rescission of decree <i>nisi</i> on ground of miscarriage of justice.....	103
59	Re-marriage	104
Part VII—Children		105
Division 1—Introductory		105
Subdivision A—What this Division does		105
60A	What this Division does	105
Subdivision B—Object, principles and outline		105
60B	Object of Part and principles underlying it	105
60C	Outline of Part.....	106
Subdivision C—Interpretation and application of Part		109
60D	Defined expressions	109
60E	Application of Part to void marriages	115
Subdivision D—Interpretation—how this Act applies to certain children		115
60F	Certain children are children of marriage etc.	115
60G	Family Court may grant leave for adoption proceedings by prescribed adopting parent.....	116
60H	Children born as a result of artificial conception procedures	116
Division 2—Parental responsibility		118
61A	What this Division does	118
61B	Meaning of <i>parental responsibility</i>	118
61C	Each parent has parental responsibility (subject to court orders).....	118
61D	Parenting orders and parental responsibility	118
61E	Effect of adoption on parental responsibility	119
Division 3—Counselling etc.		120
62A	What this Division does	120
62B	Obligations to consider advising people about counselling for Part VII orders.....	120
62C	Request for counselling—request made through a Family Court.....	121
62CA	Request for counselling—request made through Federal Magistrates Court.....	121
62D	Request for counselling—where made direct to a family and child counsellor.....	122
62E	Court counselling facilities to be made available.....	122
62F	Conferences with family and child counsellors or welfare officers	122

62G	Reports by family and child counsellors and welfare officers	124
62H	Provision of certain documents.....	125
Division 4—Parenting plans		126
63A	What this Division does	126
63B	Parents encouraged to reach agreement	126
63C	Meaning of <i>parenting plan</i> and related terms	126
63CAA	Parenting plans may include child support provisions	127
63D	Parenting plan may be varied or revoked by further written agreement.....	128
63DA	Explanation by person advising or assisting in the making of a parenting plan.....	128
63DB	Registered parenting plans.....	128
63E	Registration of a revocation of a registered parenting plan.....	129
63F	Child welfare provisions of registered parenting plans.....	130
63G	Child maintenance provisions of registered parenting plans—where not enforceable as maintenance agreements.....	131
63H	Court’s powers to set aside, discharge, vary, suspend or revive registered parenting plans	132
Division 5—Parenting orders—what they are		134
64A	What this Division does	134
64B	Meaning of <i>parenting order</i> and related terms.....	134
64C	Parenting orders may be made in favour of parents or other persons.....	135
Division 6—Parenting orders other than child maintenance orders		136
Subdivision A—Introductory		136
65A	What this Division does	136
65AA	Measures to promote the exercise of parental responsibility.....	136
65B	Division does not apply to child maintenance orders.....	137
Subdivision B—Applying for and making parenting orders		137
65C	Who may apply for a parenting order	137
65D	Court’s power to make parenting order.....	137
65DA	Parenting orders: stage 1 of parenting compliance regime.....	138
65E	Child’s best interests paramount consideration in making a parenting order.....	139
65F	General requirements for counselling before parenting order made.....	139
65G	Special conditions for making residence order or specific issues order by consent in favour of non-parent.....	140
65H	Children who are 18 or over or who have married or entered de facto relationships	140
65J	Effect of adoption on parenting order	141

65K	What happens when parenting order that is or includes residence order does not make provision in relation to death of parent with whom child lives.....	141
65L	Counsellors may be required to supervise or assist compliance with parenting orders	142
65LA	Court may order attendance at a post-separation parenting program.....	142
Subdivision C—General obligations created by residence orders, contact orders and specific issues orders		143
65M	General obligations created by residence order.....	143
65N	General obligations created by contact order	143
65P	General obligations created by specific issues orders that confer responsibility for a child’s care, welfare and development.....	144
65Q	Court may issue warrant for arrest of alleged offender	144
Subdivision D—Dealing with people who have been arrested		145
65R	Situation to which Subdivision applies	145
65S	Arrested person to be brought before a court	145
65T	Obligation of court—where application before it to deal with contravention	146
65U	Obligation of court—where no application before it, but application before another court, to deal with contravention	146
65V	Obligation of court—where no application before any court to deal with contravention.....	147
65W	Applications heard as required by subsection 65T(2) or paragraph 65U(3)(b)	148
Subdivision E—Obligations under parenting orders relating to taking or sending children from Australia		148
65X	Interpretation.....	148
65Y	Obligations if residence order, contact order or care order has been made	149
65Z	Obligations if proceedings for the making of residence order, contact order or care order are pending.....	149
65ZA	Obligations of owners etc. of aircraft and vessels if residence order, contact order or care order made	150
65ZB	Obligations of owners etc. of aircraft and vessels if proceedings for the making of residence order, contact order or care order are pending	151
65ZC	General provisions applicable to sections 65ZA and 65ZB	152
65ZD	State or Territory laws stopping children leaving Australia not affected	153
Division 7—Child maintenance orders		154
Subdivision A—What this Division does		154
66A	What this Division does	154

Subdivision B—Objects and principles	154
66B Objects.....	154
66C Principles—parents have primary duty to maintain	154
66D Principles—when step-parents have a duty to maintain.....	155
Subdivision C—Relationship with Child Support (Assessment) Act	155
66E Child maintenance order not to be made etc. if application for administrative assessment of child support could be made	155
Subdivision D—Applying for and making child maintenance orders	156
66F Who may apply for a child maintenance order	156
66G Court’s power to make child maintenance order.....	157
66H Approach to be taken in proceedings for child maintenance order.....	157
66J Matters to be taken into account in considering financial support necessary for maintenance of child	157
66K Matters to be taken into account in determining contribution that should be made by party etc.....	158
66L Children who are 18 or over	160
66M When step-parents have a duty to maintain.....	160
66N Determining financial contribution of step-parent	161
Subdivision E—Other aspects of courts’ powers	161
66P General powers of court.....	161
66Q Urgent child maintenance orders	162
66R Specification in orders of payments etc. for child maintenance purposes	162
66S Modification of child maintenance orders.....	163
Subdivision EA—Varying the maintenance of certain children	166
66SA Varying the maintenance of certain children	166
Subdivision F—When child maintenance orders stop being in force	167
66T Effect of child turning 18.....	167
66U Effect of death of child, person liable to pay or person entitled to receive.....	167
66V Effect of adoption, marriage or entering into a de facto relationship	168
66VA Children who are 18 or over: change of circumstances.....	169
66W Recovery of arrears	169
Division 8—Other matters relating to children	170
Subdivision A—What this Division does	170
67A What this Division does.....	170

Subdivision B—Father’s liability to contribute towards child bearing expenses if not married to mother	170
67B Father liable to contribute towards maintenance and expenses of mother	170
67C Matters to be taken into account in proceedings under Subdivision	171
67D Powers of court in proceedings under Subdivision	171
67E Urgent orders	172
67F Who may institute proceedings.....	173
67G Time limit for institution of proceedings	173
Subdivision C—Location and recovery of children	173
67H Interpretation.....	173
67J Meaning of <i>location order</i> and <i>Commonwealth information order</i>	175
67K Who may apply for a location order.....	175
67L Child’s best interests paramount consideration in making a location order	176
67M Provisions about location orders, other than Commonwealth information orders.....	176
67N Provisions about Commonwealth information orders	176
67P Information provided under location order not to be disclosed except to limited persons.....	178
67Q Meaning of <i>recovery order</i>	179
67R How recovery orders authorise or direct people.....	180
67S How recovery orders to stop and search etc. name or describe vehicles, places etc.....	181
67T Who may apply for a recovery order	181
67U Court’s power to make recovery order.....	181
67V Child’s best interests paramount consideration in making a recovery order	182
67W How long recovery order remains in force.....	182
67X Persons not to prevent or hinder taking of action under recovery order	182
67Y Obligation to notify persons of child’s return	183
Subdivision D—Allegations of child abuse	183
67Z Where party to proceedings makes allegation of child abuse.....	183
67ZA Where member of the Court personnel, counsellor, mediator or arbitrator suspects child abuse etc.....	184
67ZB No liability for notification under section 67Z or 67ZA	185
Subdivision E—Other orders about children	186
67ZC Orders relating to welfare of children	186
67ZD Orders for delivery of passports.....	186

Division 9—Injunctions	187
68A What this Division does	187
68B Injunctions	187
68C Powers of arrest	188
Division 10—The best interests of children and the representation of children	189
Subdivision A—What this Division does	189
68D What this Division does	189
Subdivision B—Determining the best interests of a child	189
68E Proceedings to which Subdivision applies	189
68F How a court determines what is in a child’s best interests	189
68G How the wishes of a child are expressed.....	191
68H Children not required to express wishes	191
68J Informing court of relevant family violence orders	191
68K Court to consider risk of family violence.....	192
Subdivision C—Separate representation of children	192
68L Court orders for separate representation	192
68M Order that child be made available for examination	193
Division 11—Family violence	194
68N What this Division does	194
68P Interpretation.....	194
68Q Purposes of Division.....	195
68R Provisions about making an order for contact that is inconsistent with a family violence order	195
68S Section 68R contact orders prevail over inconsistent family violence orders.....	196
68T Variation etc. of Division 11 contact order by court making etc. family violence order	197
Division 12—Proceedings and jurisdiction	200
Subdivision A—What this Division does	200
69A What this Division does	200
Subdivision B—Institution of proceedings and procedure	200
69B Certain proceedings to be instituted only under this Part.....	200
69C Who may institute proceedings.....	200
69D Institution of maintenance proceedings by authorised authority or person.....	201
69E Child or parent to be present in Australia etc.....	201
69F Applicant may be in contempt	202
Subdivision C—Jurisdiction of courts	202
69G Interpretation.....	202

69H	Jurisdiction of Family Court, State Family Courts, Northern Territory Supreme Court and Federal Magistrates Court.....	202
69J	Jurisdiction of courts of summary jurisdiction.....	203
69K	Territory court does not have jurisdiction unless a party is ordinarily resident in the Territory.....	204
69L	Jurisdiction in relation to transferred matters under other Commonwealth laws.....	204
69M	Jurisdiction is additional to other jurisdiction.....	204
69N	Transfer of proceedings from courts of summary jurisdiction in certain cases.....	204
Subdivision D—Presumptions of parentage		206
69P	Presumptions of parentage arising from marriage.....	206
69Q	Presumption of paternity arising from cohabitation.....	206
69R	Presumption of parentage arising from registration of birth.....	207
69S	Presumptions of parentage arising from findings of courts.....	207
69T	Presumption of paternity arising from acknowledgments.....	207
69U	Rebuttal of presumptions etc.....	208
Subdivision E—Parentage evidence		208
69V	Evidence of parentage.....	208
69VA	Declarations of parentage.....	208
69W	Orders for carrying out of parentage testing procedures.....	208
69X	Orders associated with parentage testing orders.....	209
69Y	Orders directed to persons 18 or over.....	210
69Z	Orders directed to children under 18.....	210
69ZA	No liability if parent etc. consents.....	210
69ZB	Regulations about carrying out, and reporting on, parentage testing procedures.....	211
69ZC	Reports of information obtained may be received in evidence.....	211
69ZD	Parentage testing for purposes of international maintenance agreements.....	212
Subdivision F—Extension, application and additional operation of Part		212
69ZE	Extension of Part to the States.....	212
69ZF	Unless declaration in force, Part’s extension to a State has effect subject to modifications.....	213
69ZG	Application of Part in, and in relation to, Territories.....	214
69ZH	Additional application of Part.....	214
69ZJ	Additional jurisdiction of courts.....	215
69ZK	Child welfare laws not affected.....	215
Division 13—State, Territory and overseas orders		217
Subdivision A—What this Division does		217
70A	What this Division does.....	217

Subdivision B—Registration of State and Territory orders	217
70B Interpretation.....	217
70C General registration of orders made under law of prescribed State	217
70D Registration of orders in a particular State.....	218
70E Effect of registration	218
Subdivision C—Registration of overseas orders	218
70F Interpretation.....	218
70G Registration of orders.....	219
70H Effect of registration—general.....	219
70J Effect of registration on exercise of jurisdiction	219
70K Cancellation of registration if residence order, contact order or care order made	220
70L Relationship between Australian orders and registered overseas child orders.....	220
Subdivision D—Transmission of Australian orders to overseas jurisdictions	221
70M Registrar to send documents etc. to overseas jurisdiction	221
70N Regulations may deal with sending Australian orders etc. to overseas jurisdiction	222
Division 13A—Consequences of failure to comply with orders, and other obligations, that affect children	224
Subdivision A—Preliminary	224
70NB Definitions	224
70NBA Application of Division.....	225
70NC Meaning of <i>contravened</i> an order	226
70ND Requirements taken to be included in certain orders.....	226
70NE Meaning of <i>reasonable excuse for contravening</i> an order	226
70NEA Standard of proof of reasonable excuse	228
Subdivision B—Powers of court where a person contravenes an order under this Act affecting children: stage 2 of parenting compliance regime	228
70NF Application of Subdivision	228
70NG Powers of court	229
70NH Duties of provider of program	231
70NI Evidence	231
70NIA Court may make further orders in relation to attendance at program.....	232
70NIB List of program providers	232

Subdivision C—Court to take action in respect of person who contravenes an order: stage 3 of parenting compliance regime	233
70NJ Powers of court	233
70NK When court is empowered to make a community service order	236
70NL Variation and discharge of community service orders	237
70NM Bonds	237
70NN Procedure for enforcing community service orders or bonds	238
70NO Sentences of imprisonment	240
70NP Relationship between Subdivision and other laws	242
70NQ Arrangements with States and Territories for carrying out of sentences and orders	242
70NR Subdivision does not limit operation of section 105	242
Division 14—Miscellaneous	243
70P What this Division does	243
70Q Certain instruments not liable to duty	243
Part VIII—Property, spousal maintenance and maintenance agreements	244
71 Interpretation	244
71A This Part does not apply to certain matters covered by binding financial agreements	244
72 Right of spouse to maintenance	244
74 Power of court in spousal maintenance proceedings	245
75 Matters to be taken into consideration in relation to spousal maintenance	245
77 Urgent spousal maintenance cases	246
77A Specification in orders of payments etc. for spouse maintenance purposes	247
78 Declaration of interests in property	247
79 Alteration of property interests	248
79A Setting aside of orders altering property interests	252
79B Notification of proceeds of crime orders etc.	254
79C Court to stay property or spousal maintenance proceedings affected by proceeds of crime orders etc.	255
79D Lifting a stay	256
79E Intervention by DPP	256
80 General powers of court	257
81 Duty of court to end financial relations	258
82 Cessation of spousal maintenance orders	258
83 Modification of spousal maintenance orders	259
85A Ante-nuptial and post-nuptial settlements	261
86A Certain maintenance agreements ineffective	261

86	Registered maintenance agreements	261
87	Operation of maintenance agreements entered into in substitution for rights under Act	263
87A	Specification in maintenance agreements of payments etc. for maintenance purposes	268
88	Enforcement of maintenance agreements.....	269
89	Overseas maintenance agreements.....	269
89A	Institution of spousal maintenance proceedings by authority or person	269
90	Certain instruments not liable to duty	269
Part VIII A A—Orders and injunctions binding third parties		272
Division 1—Preliminary		272
Subdivision A—Scope of this Part		272
90AA	Object of this Part	272
90AB	Definitions	272
90AC	This Part overrides other laws, trust deeds etc.	272
90AD	Extended meaning of <i>matrimonial cause</i> and <i>property</i>	273
90ADA	Other provisions of this Act not affected by this Part	273
Division 2—Orders under section 79		274
90AE	Court may make an order under section 79 binding a third party	274
Division 3—Orders or injunctions under section 114		276
90AF	Court may make an order or injunction under section 114 binding a third party	276
Division 4—Other matters		278
90AG	Orders and injunctions binding on trustees	278
90AH	Protection for a third party	278
90AI	Service of documents on a third party.....	278
90AJ	Expenses of third party	278
90AK	Acquisition of property	279
Part VIII A—Financial agreements		280
90A	Definitions	280
90B	Financial agreements before marriage	280
90C	Financial agreements during marriage	281
90D	Financial agreements after dissolution of marriage.....	281
90E	Requirements with respect to provisions in financial agreements relating to the maintenance of a party or a child or children.....	282
90F	Certain provisions in agreements	283
90G	When financial agreements are binding	283
90H	Effect of death of party to financial agreement.....	284

90J	Termination of financial agreement	284
90K	Circumstances in which court may set aside a financial agreement or termination agreement.....	285
90KA	Validity, enforceability and effect of financial agreements and termination agreements	287
90L	Financial and other agreements etc. not liable to duty	288
90M	Notification of proceeds of crime orders etc.	288
90N	Court to stay property or spousal maintenance proceedings affected by proceeds of crime orders etc.....	289
90P	Lifting a stay	290
90Q	Intervention by DPP.....	290
Part VIII B—Superannuation interests		291
Division 1—Preliminary		291
Subdivision A—Scope of this Part		291
90MA	Object of this Part	291
90MB	This Part overrides other laws, trust deeds etc.	291
90MC	Extended meaning of <i>matrimonial cause</i>	291
Subdivision B—Interpretation		292
90MD	Definitions	292
90MDA	Extended meaning of <i>trustee</i>	295
90ME	Splittable payments.....	295
90MF	Reversionary interest	296
90MG	Meaning of <i>in force</i>	296
Division 2—Payment splitting or flagging by agreement		297
Subdivision A—Superannuation agreements		297
90MH	Superannuation agreement to be included in financial agreement.....	297
Subdivision B—Payment splitting		297
90MI	Operative time for payment split.....	297
90MJ	Payment split under superannuation agreement or flag lifting agreement.....	298
Subdivision C—Payment flagging		299
90MK	Operative time for payment flag	299
90ML	Payment flag	300
90MLA	Some splittable payments payable if payment flag operating	301
90MM	Payment flag may be terminated by court.....	302
90MN	Flag lifting agreement etc.	302
Subdivision D—Miscellaneous		303
90MO	Limitation on section 79 order	303
90MP	Separation declaration.....	303

90MQ	Superannuation interests in excess of ETP threshold.....	304
90MR	Enforcement by court order	305
Division 3	—Payment splitting or flagging by court order	306
90MS	Order under section 79 may include orders in relation to superannuation interests.....	306
90MT	Splitting order	306
90MU	Flagging order.....	307
90MUA	Some splittable payments may be made without leave of court.....	308
Division 4	—General provisions about payment splitting	309
90MV	Court may cancel payment split.....	309
90MW	Deductions from splittable payment before calculating payment split.....	309
90MX	Multiple payment splits applying to the same splittable payment	309
90MY	Fees payable to trustee	310
90MZ	Superannuation preservation requirements	310
90MZA	Waiver of rights under payment split.....	311
90MZB	Trustee to provide information	311
90MZC	Death of non-member spouse	313
Division 5	—Miscellaneous	314
90MZD	Orders binding on trustee.....	314
90MZE	Protection for trustee.....	314
90MZF	Service of documents on trustee	315
90MZG	False declarations.....	315
90MZH	Terminating employment because of payment flag etc.....	315
Part IX	—Intervention	316
91	Intervention by Attorney-General	316
91A	Delegation by Attorney-General	316
91B	Intervention by child welfare officer.....	317
92	Intervention by other persons.....	317
92A	Intervention in child abuse cases.....	318
Part X	—Appeals	319
93	No appeal after decree absolute	319
93A	Appellate jurisdiction of Family Court	319
94	Appeals to Family Court from courts other than the Federal Magistrates Court.....	319
94AAA	Appeals to Family Court from the Federal Magistrates Court	321
94AA	Leave to appeal needed in some cases	323
94A	Case stated	324
95	Appeals to High Court	324
96	Appeals from courts of summary jurisdiction.....	325

96A	Part does not apply to section 111C jurisdiction.....	326
Part XI—Procedure and evidence		327
Division 1—General matters concerning procedure and evidence		327
97	Procedure.....	327
98	Evidence by affidavit.....	328
98A	Proceedings in absence of parties.....	328
100	Evidence of husbands and wives.....	329
100A	Evidence of children.....	330
100B	Children swearing affidavits, being called as witnesses or being present in court.....	330
101	Protection of witnesses.....	330
102	Proof of birth, parentage, death or marriage.....	331
102A	Restrictions on examination of children.....	331
102B	Assessors.....	332
Division 2—Use of video link, audio link or other appropriate means to give testimony, make appearances and give submissions etc.		333
102C	Testimony.....	333
102D	Appearance of persons.....	334
102E	Making of submissions.....	334
102F	Conditions for use of links.....	335
102G	Putting documents to a person.....	337
102H	Putting documents to a split court.....	338
102J	Administration of oaths and affirmations.....	339
102K	Expenses.....	339
102L	New Zealand proceedings.....	340
Division 3—Split court		341
102M	Determination that there is to be a split court.....	341
102N	Conditions for split court.....	341
Part XII—Recognition of decrees		343
103	Decrees under this Act.....	343
104	Overseas decrees.....	343
104A	Recognition in external Territories.....	346
Part XIII—Enforcement of decrees		348
105	Enforcement generally.....	348
106	Maintenance orders—more than 12 months in arrears.....	348
106A	Execution of instruments by order of court.....	348
106B	Transactions to defeat claims.....	349
107	People not to be imprisoned for failure to comply with certain orders.....	350
109	Inter-State enforcement of child bearing expenses order.....	351

109A	Rules of Court relating to enforcement	351
109B	Rules of Court relating to enforcement—Federal Magistrates Court	353
Part XIII AA—International conventions, international agreements and international enforcement		354
Division 1—International maintenance orders and agreements etc.		354
110	Overseas enforcement of maintenance orders etc.	354
110A	Registration and enforcement in Australia of overseas maintenance agreements etc.....	357
110B	Transmission of agreements etc. to overseas jurisdictions.....	357
111	Convention on Recovery Abroad of Maintenance	357
111A	Convention on Recognition and Enforcement of Decisions Relating to Maintenance Obligations.....	358
Division 2—International child abduction		359
111B	Convention on the Civil Aspects of International Child Abduction	359
Division 3—International agreements about adoption etc.		362
111C	International agreements about adoption etc.....	362
Division 4—International protection of children		364
Subdivision A—Preliminary		364
111CA	Definitions	364
111CB	Relationship between this Division and other provisions	366
Subdivision B—Jurisdiction for the person of a child		367
111CC	Application of this Subdivision.....	367
111CD	Jurisdiction relating to the person of a child	367
111CE	Limitation when a child is wrongfully removed from or retained outside a Convention country.....	369
111CF	Limitations when prior proceedings pending in a Convention country.....	369
111CG	If a court is asked to assume jurisdiction	371
111CH	Limitation if a competent authority of a Convention country is asked to assume jurisdiction.....	371
111CI	When a certain Commonwealth personal protection measure lapses	372
Subdivision C—Jurisdiction for decisions about a guardian of a child’s property		374
111CJ	Application of this Subdivision.....	374
111CK	Jurisdiction to appoint, or determine the powers of, a guardian for a child’s property.....	374

111CL	Limitation when a child is wrongfully removed from or retained outside a Convention country.....	376
111CM	Limitations when prior proceedings pending in a Convention country.....	376
111CN	If a court is asked to assume jurisdiction	377
111CO	Limitation if a competent authority of a Convention country is asked to assume jurisdiction.....	378
111CP	When a certain Commonwealth property protection measure lapses	379
Subdivision D—Applicable law		380
111CQ	Meaning of <i>law</i>	380
111CR	Applicable law generally	380
111CS	Applicable law concerning parental responsibility	381
Subdivision E—Recognition of foreign measures		382
111CT	Effect of registered foreign measures.....	382
Subdivision F—Co-operation		383
111CU	Obligation to obtain consent to place child.....	383
111CV	Obligation to inform competent authority about serious danger to a child.....	383
111CW	Court proceedings for contact.....	384
111CX	Jurisdiction for a location order or a Commonwealth information order	385
111CY	Giving information to central authorities and competent authorities in Convention countries	385
Subdivision G—Regulations		385
111CZ	Regulations to implement the Convention	385
Division 5—Other matters		387
111D	Regulations may provide for rules of evidence.....	387
Part XIII A—Sanctions for failure to comply with orders, and other obligations, that do not affect children		388
Division 1—Interpretation		388
112AA	Interpretation.....	388
112AB	Meaning of <i>contravene an order</i>	389
112AC	Meaning of <i>reasonable excuse for contravening an order</i>	389
Division 2—Sanctions for failure to comply with orders		391
112AD	Sanctions for failure to comply with orders	391
112AE	Sentences of imprisonment	392
112AF	Bonds.....	393
112AG	Additional sentencing alternatives	393
112AH	Failure to comply with sentence passed, or order made, pursuant to paragraph 112AD(2)(b).....	395

112AK	Variation and discharge of orders	398
112AM	Relationship between Division and other laws	398
112AN	Arrangements with States and Territories for carrying out of sentences and orders	399
112AO	Division does not limit operation of section 105.....	399
Part XIIB—Contempt of court		400
112AP	Contempt	400
Part XIV—Declarations and injunctions		402
112A	Interpretation.....	402
113	Proceedings for declarations	402
114	Injunctions	402
114AA	Powers of arrest	403
114AB	Operation of State and Territory laws.....	405
Part XIVA—The Australian Institute of Family Studies		406
114A	Interpretation.....	406
114B	Establishment of Institute	406
114BA	Institute to be a body corporate.....	407
114BB	Powers of Institute	407
114C	Director and Board of Management.....	408
114D	Management of Institute	408
114E	Term of office of members	408
114F	Remuneration and allowances	408
114G	Leave of absence.....	409
114H	Resignation of members	409
114J	Termination of appointments.....	409
114K	Acting Director	410
114L	Meetings etc.....	410
114M	Staff	411
114MA	Money payable to Institute.....	411
114MC	Contracts	411
114MD	Application of money	411
114MF	Exemption from taxation	412
Part XV—Miscellaneous		413
115	Family Law Council	413
116C	Payments to legal practitioners by legal aid bodies.....	414
117	Costs	415
117AA	Costs in proceedings relating to overseas enforcement and international Conventions	417
117A	Reparation for certain losses and expenses relating to children	417
117B	Interest on moneys ordered to be paid	419

117C	Offers of settlement	419
118	Frivolous or vexatious proceedings	420
119	Married persons may sue each other	420
120	Criminal conversation, adultery and enticement	420
121	Restriction on publication of court proceedings.....	421
122	Rights of legal practitioners	424
122AA	Use of reasonable force in arresting persons.....	424
122A	Powers of entry and search for purposes of arresting persons.....	424
122B	Arrangements with States and Territories	425
123	Rules of Court.....	426
124	Rules Advisory Committee.....	429
124A	Regulations in relation to overseas-related maintenance obligations etc.....	430
125	Regulations	431
Schedule 1—Child Protection Convention		433
Notes		457

An Act relating to Marriage and to Divorce and Matrimonial Causes and, in relation thereto and otherwise, Parental Responsibility for Children, and certain other Matters

Part I—Preliminary

1 Short title [see Note 1]

This Act may be cited as the *Family Law Act 1975*.

2 Commencement [see Note 1]

This Act shall come into operation on a date to be fixed by Proclamation.

3 Repeal and saving

- (1) The *Matrimonial Causes Act 1959*, the *Matrimonial Causes Act 1965* and the *Matrimonial Causes Act 1966* are repealed.
- (2) Notwithstanding the repeal effected by subsection (1):
 - (a) the validity of a decree made before the commencement of the *Matrimonial Causes Act 1959* by virtue of the Imperial Act entitled the Matrimonial Causes (War Marriages) Act, 1944 or Part I of the Matrimonial Causes (War Marriages) Act 1947 of New Zealand and in force immediately before the commencement of this Act shall continue to be recognized in all courts in Australia;
 - (b) a decree of the Supreme Court of a State or Territory made before the commencement of the *Matrimonial Causes Act 1959* in the exercise of jurisdiction invested or conferred by the *Matrimonial Causes Act 1945*, or that Act as amended by the *Matrimonial Causes Act 1955*, and in force immediately before the commencement of this Act shall continue to have effect throughout Australia; and

Section 4

- (c) a decree of the Supreme Court, or of a court of summary jurisdiction, of a State or Territory:
- (i) made before the commencement of this Act in the exercise of jurisdiction invested or conferred by the repealed Act, or in a matrimonial cause or proceedings for a separation order instituted under the law of that State or Territory, being a decree that was in force immediately before the commencement of this Act; or
 - (ii) made after the commencement of this Act in proceedings to which subsection 9(1) applied; shall have, or continue to have, effect throughout Australia, and, except in the case of:
 - (iii) a decree of nullity of marriage made on the ground that the marriage was voidable;
 - (iv) a decree of judicial separation;
 - (v) a decree of restitution of conjugal rights;
 - (vi) a decree of jactitation of marriage; or
 - (vii) a separation order;this Act applies to and in relation to the decree as if the decree had been made under this Act.
- (3) For the purposes of paragraph (2)(c), a purported decree to which section 5 of the *Matrimonial Causes Act 1971* applied made in a State shall be deemed to be a decree of the Supreme Court of that State made in the exercise of jurisdiction invested by the repealed Act.

4 Interpretation

- (1) In this Act, the standard Rules of Court and the related Federal Magistrates Rules, unless the contrary intention appears:
- appeal*** includes an application for a re-hearing.
- Appeal Division*** means the Appeal Division of the Family Court.
- applicable Rules of Court***:
- (a) in relation to the Federal Magistrates Court—means the related Federal Magistrates Rules; and

(b) in relation to any other court—means the standard Rules of Court.

applicant includes a cross-applicant and, in relation to proceedings for dissolution of marriage instituted before the commencement of this Act, includes a petitioner or cross-petitioner.

appropriate officer, when used in Division 5 of Part III in relation to the Family Court, means:

- (a) the Chief Executive Officer of the Family Court; or
- (b) any other officer of the Family Court specified in writing by the Chief Executive Officer for the purposes of this definition.

approved counselling organisation has the meaning given by subsection 12(1).

approved mediation organisation has the meaning given by subsection 12(2).

arbitrator means a person who meets the prescribed requirements for an arbitrator.

audio link means facilities (for example, telephone facilities) that enable audio communication between persons in different places.

Australia includes Norfolk Island.

Chief Executive Officer means the Chief Executive Officer of the Family Court.

Note: The Chief Executive Officer is appointed under section 38C. A person is appointed to act as the Chief Executive Officer under section 38M.

child counselling means counselling to:

- (a) discuss the care, welfare or development of a child; or
- (b) discuss, and try to resolve, differences between persons that affect the care, welfare or development of a child.

child maintenance order has the meaning given by subsection 64B(5).

child of a marriage includes a child who is, under subsection 60F(1) or (2), a child of a marriage, but does not include a child

Section 4

who has, under subsection 60F(3), ceased to be a child of a marriage.

child representative means a person who represents a child in proceedings under an appointment made under a court order under subsection 68L(2).

Commonwealth instrumentality means a body or authority established for a public purpose by or under a law of the Commonwealth.

community mediator means a person referred to in paragraph (b) of the definition of **family and child mediator**.

contact order has the meaning given by subsection 64B(4).

court, in relation to any proceedings, means the court exercising jurisdiction in those proceedings by virtue of this Act.

court counsellor means:

- (a) the Principal Mediator, a Manager Mediation, a mediator or a court counsellor appointed under section 38N; or
- (b) a person appointed under a law of a State as a counsellor in relation to a Family Court of that State.

court mediator means a person referred to in paragraph (a) of the definition of **family and child mediator**.

decree means decree, judgment or order, and includes a decree *nisi* and an order dismissing an application or refusing to make a decree or order.

DPP means the Director of Public Prosecutions.

family and child counselling means any of the following kinds of counselling:

- (a) marriage counselling;
- (b) child counselling;
- (c) counselling about any matter that arises out of proceedings under this Act and that involves:
 - (i) a parent or adoptive parent of a child; or
 - (ii) a child; or
 - (iii) a party to a marriage.

family and child counsellor means:

- (a) a court counsellor; or
- (b) a person authorised by an approved counselling organisation to offer family and child counselling on behalf of the organisation; or
- (c) a person authorised under the regulations to offer family and child counselling.

family and child mediation means mediation, conducted in accordance with the regulations, of any dispute that could be the subject of proceedings (other than prescribed proceedings) under this Act and that involves:

- (a) a parent or adoptive parent of a child; or
- (b) a child; or
- (c) a party to a marriage.

family and child mediator means:

- (a) a person employed or engaged by the Family Court or a Family Court of a State to provide family and child mediation services; or
- (b) a person authorised by an approved mediation organisation to offer family and child mediation on behalf of the organisation; or
- (c) a person, other than a person mentioned in paragraph (a) or (b), who offers family and child mediation.

financial agreement means an agreement that is a financial agreement under section 90B, 90C or 90D, but does not include an ante-nuptial or post-nuptial settlement to which section 85A applies.

financial matters, in relation to the parties to a marriage, means matters with respect to:

- (a) the maintenance of one of the parties;
- (b) the property of those parties or of either of them; or
- (c) the maintenance of children of the marriage.

financial or Part VII proceedings means proceedings (being, unless the context otherwise requires, proceedings under this Act) of a kind referred to in any of paragraphs (c) to (eb) of the

Section 4

definition of *matrimonial cause* in this subsection or proceedings under Part VII.

forfeiture application means an application for a forfeiture order under the *Proceeds of Crime Act 2002*.

forfeiture order means a forfeiture order under the *Proceeds of Crime Act 2002*.

Full Court means:

- (a) 3 or more Judges of the Family Court sitting together, where a majority of those Judges are members of the Appeal Division; or
- (b) in relation to particular proceedings:
 - (i) 3 or more Judges of the Family Court sitting together, where, at the commencement of the hearing of the proceedings, a majority of those Judges were members of the Appeal Division; or
 - (ii) 2 Judges of the Family Court sitting together, where those Judges are permitted, by subsection 28(4), to complete the hearing and determination, or the determination, of those proceedings.

General Division means the General Division of the Family Court.

has, in relation to a residence order, a contact order or a specific issues order, has the meaning given by subsection 64B(8).

income tested pension, allowance or benefit means a pension, allowance or benefit prescribed, or included in a class of pensions, allowances or benefits prescribed, for the purposes of this definition.

made, in relation to a decree, being a judgment, means given.

made in favour, in relation to a residence order, a contact order or a specific issues order, has the meaning given by subsection 64B(7).

maintenance agreement means an agreement in writing made, whether before or after the commencement of this Act and whether within or outside Australia, between the parties to a marriage, being an agreement that makes provision with respect to financial

matters, whether or not there are other parties to the agreement and whether or not it also makes provision with respect to other matters, and includes such an agreement that varies an earlier maintenance agreement.

marriage counselling includes the counselling of a person in relation to:

- (a) entering into marriage;
- (b) reconciliation of the parties to a marriage;
- (c) separation of the parties to a marriage;
- (d) the dissolution or annulment of a marriage; or
- (e) adjusting to the dissolution or annulment of a marriage;

whether that counselling is provided in relation to the proposed marriage, marriage or former marriage of that person or in relation to the proposed marriage, marriage or former marriage of another person or other persons, and whether that counselling is provided to that person individually or as a member of a group of persons.

matrimonial cause means:

- (a) proceedings between the parties to a marriage, or by the parties to a marriage, for a decree of:
 - (i) dissolution of marriage; or
 - (ii) nullity of marriage; or
- (b) proceedings for a declaration as to the validity of a marriage or of the dissolution or annulment of a marriage by decree or otherwise; or
- (c) proceedings between the parties to a marriage with respect to the maintenance of one of the parties to the marriage; or
- (ca) proceedings between the parties to a marriage with respect to the property of the parties to the marriage or either of them, being proceedings:
 - (i) arising out of the marital relationship;
 - (ii) in relation to concurrent, pending or completed proceedings between those parties for principal relief; or
 - (iii) in relation to the dissolution or annulment of that marriage or the legal separation of the parties to that marriage, being a dissolution, annulment or legal separation effected in accordance with the law of an overseas jurisdiction, where that dissolution, annulment

Section 4

- or legal separation is recognized as valid in Australia under section 104; or
- (d) proceedings between the parties to a marriage for the approval by a court of a maintenance agreement or for the revocation of such an approval or for the registration of a maintenance agreement; or
 - (e) proceedings between the parties to a marriage for an order or injunction in circumstances arising out of the marital relationship (other than proceedings under a law of a State or Territory prescribed for the purposes of section 114AB); or
 - (ea) proceedings between:
 - (i) the parties to a marriage; or
 - (ii) if one of the parties to a marriage has died—the other party to the marriage and the legal personal representative of the deceased party to the marriage; being proceedings:
 - (iii) for the enforcement of, or otherwise in relation to, a maintenance agreement that has been approved under section 87 and the approval of which has not been revoked;
 - (iv) in relation to a maintenance agreement the approval of which under section 87 has been revoked; or
 - (v) with respect to the enforcement under this Act or the applicable Rules of Court of a maintenance agreement that is registered in a court under section 86 or an overseas maintenance agreement that is registered in a court under regulations made pursuant to section 89; or
 - (eaa) without limiting any of the preceding paragraphs, proceedings between the parties to a marriage with respect to a financial agreement made by them; or
 - (eab) third party proceedings (as defined in section 4A) to set aside a financial agreement; or
 - (eb) proceedings with respect to the enforcement of a decree made under the law of an overseas jurisdiction in proceedings of a kind referred to in paragraph (c); or
 - (f) any other proceedings (including proceedings with respect to the enforcement of a decree or the service of process) in relation to concurrent, pending or completed proceedings of a kind referred to in any of paragraphs (a) to (eb), including

proceedings of such a kind pending at, or completed before, the commencement of this Act.

ordinarily resident includes habitually resident.

overseas jurisdiction means a country, or part of a country, outside Australia.

overseas maintenance agreement means a maintenance agreement that has force and effect in a prescribed overseas jurisdiction by reason of the registration of the agreement, or the taking of any other action in relation to the agreement, under the law of that jurisdiction and includes an agreement with respect to the maintenance of an ex-nuptial child that would be covered by the foregoing provisions of this definition if the child were a child of the marriage of the parties to the agreement.

parenting order has the meaning given by subsection 64B(1).

parenting plan has the meaning given by subsection 63C(1).

Part VIII proceedings means proceedings under Part VIII for orders with respect to spousal maintenance or the property of parties to a marriage, but does not include any proceedings specified in the regulations for the purposes of this definition.

police officer means:

- (a) a member or special member of the Australian Federal Police; or
- (b) a member, however described, of the police force of a State or Territory.

prescribed overseas jurisdiction means any country, or part of a country, outside Australia that is declared by the regulations to be a prescribed overseas jurisdiction for the purposes of the provision in which the expression is used.

prescribed proceedings means:

- (a) proceedings for principal relief; or
- (b) proceedings in relation to concurrent, pending or completed proceedings for principal relief.

Section 4

private arbitration means arbitration other than arbitration carried out as a result of an order made under section 19D.

private mediator means a person referred to in paragraph (c) of the definition of ***family and child mediator***.

proceedings means a proceeding in a court, whether between parties or not, and includes cross-proceedings or an incidental proceeding in the course of or in connexion with a proceeding.

proceedings for principal relief means proceedings under this Act of a kind referred to in paragraph (a) or (b) of the definition of ***matrimonial cause*** in this subsection.

proceeds of crime order means:

- (a) a restraining order under the *Proceeds of Crime Act 2002*; or
- (b) a forfeiture order under the *Proceeds of Crime Act 2002*.

property, in relation to the parties to a marriage or either of them, means property to which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion.

property settlement or spousal maintenance proceedings means proceedings with respect to:

- (a) the property of the parties to a marriage or either of them; or
- (b) the maintenance of a party to a marriage.

Registrar means:

- (a) in relation to the Family Court—the Principal Registrar, a Registrar, or a Deputy Registrar of the Court; and
- (b) in relation to a court other than the Family Court—the principal legal officer of the court or any other appropriate officer of the court.

Registry Manager, except in Subdivision C of Division 8 of Part VII and section 67Z, means:

- (a) in relation to the Family Court—the Registry Manager of a Registry of the Court; and
- (b) in relation to a court other than the Family Court—the principal officer of the court or any other appropriate officer of the court.

related Federal Magistrates Rules means the Rules of Court made under the *Federal Magistrates Act 1999* to the extent to which they relate to this Act.

repealed Act means the *Matrimonial Causes Act 1959*.

residence order has the meaning given by subsection 64B(3).

separation order means a decree, not being a decree of dissolution or nullity of marriage or for a judicial separation, having the effect of relieving a party to a marriage from any obligation to cohabit with the other party to the marriage.

specific issues order has the meaning given by subsection 64B(6).

split court has the meaning given by subsection 27(2).

standard Rules of Court means Rules of Court made under this Act.

Territory includes:

- (a) Norfolk Island;
- (b) the Territory of Christmas Island;
- (c) the Territory of Cocos (Keeling) Islands;

but does not include any other external Territory.

this Act includes the regulations.

video link means facilities (for example, closed-circuit television facilities) that enable audio and visual communication between persons in different places.

voluntary organization includes a branch or section of such an organization, being a branch or section that is identified by a distinct name and in respect of which separate financial accounts are maintained.

warrant issued under a provision of this Act includes a warrant issued under the standard Rules of Court or the related Federal Magistrates Rules.

welfare officer means:

- (a) a person appointed under a law of a State as a welfare officer in relation to a Family Court of that State;

Section 4

- (b) a person engaged under the *Public Service Act 1999* performing duties in the Australian Public Service as a welfare officer;
 - (ba) a person who is permanently or temporarily employed as a welfare officer in the Public Service of a Territory;
 - (c) a person who is permanently or temporarily employed as a welfare officer in the Public Service of a State and whose services have been made available for the purposes of this Act in pursuance of an arrangement between the Government of the Commonwealth and the Government of the State;
 - (d) a person nominated by an organization concerned with the welfare of children, being an organization that has been approved by the Attorney-General; or
 - (e) a person appointed as a welfare officer in accordance with the regulations.
- (1A) In this Act, the standard Rules of Court and the related Federal Magistrates Rules:
- (a) a reference to the Family Court is a reference to the Family Court of Australia; and
 - (b) a reference to a Family Court of a State is a reference to a court to which section 41 applies.
- (2) A reference in this Act, the standard Rules of Court or the related Federal Magistrates Rules to a party to a marriage includes a reference to a person who was a party to a marriage that has been dissolved or annulled, in Australia or elsewhere, or that has been terminated by the death of one party to the marriage.
- (3) To avoid doubt, for all purposes:
- (a) jurisdiction under the standard Rules of Court is taken to be jurisdiction under this Act; and
 - (b) jurisdiction under the related Federal Magistrates Rules is taken to be jurisdiction under this Act; and
 - (c) proceedings under the standard Rules of Court are taken to be proceedings under this Act; and
 - (d) proceedings under the related Federal Magistrates Rules are taken to be proceedings under this Act; and

- (e) an order (however described) made by a court under the standard Rules of Court is taken to be an order made by the court under this Act; and
- (f) an order (however described) made by a court under the related Federal Magistrates Rules is taken to be an order made by the court under this Act.

4A Third party proceedings to set aside financial agreement

- (1) For the purposes of paragraph (eab) of the definition of *matrimonial cause* in subsection 4(1), *third party proceedings* means proceedings between:

- (a) either or both of the parties to a financial agreement; and
- (b) a creditor or a government body acting in the interests of a creditor;

being proceedings for the setting aside of the financial agreement on the ground specified in paragraph 90K(1)(aa).

- (2) In this section:

creditor means:

- (a) a creditor of either of the parties to the financial agreement; or
- (b) a person who, at the commencement of the proceedings, could reasonably have been foreseen by the court as being reasonably likely to become a creditor of either of the parties to the financial agreement.

government body means:

- (a) the Commonwealth, a State or a Territory; or
- (b) an official or authority of the Commonwealth, a State or a Territory.

Section 6

6 Polygamous marriages

For the purpose of proceedings under this Act, a union in the nature of a marriage which is, or has at any time been, polygamous, being a union entered into in a place outside Australia, shall be deemed to be a marriage.

7 Extension of Act to certain Territories

This Act extends to the following Territories:

- (a) Norfolk Island;
- (b) the Territory of Christmas Island;
- (c) the Territory of Cocos (Keeling) Islands.

7A Application of the *Criminal Code*

Chapter 2 of the *Criminal Code* applies to all offences against this Act.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

8 Supersession of existing laws

- (1) After the commencement of this Act:
 - (a) proceedings by way of a matrimonial cause shall not be instituted except under this Act; and
 - (b) proceedings by way of a matrimonial cause instituted before the commencement of this Act shall not be continued except in accordance with section 9.
- (2) Proceedings for a decree of restitution of conjugal rights, of jactitation of marriage or of judicial separation shall not be instituted or continued after the commencement of this Act.
- (3) Proceedings for a separation order shall not be instituted after the commencement of this Act.

9 Transitional

- (1) Subject to subsections (2) and (2A), pending proceedings for a decree of dissolution of marriage or for a decree of nullity of marriage on the ground that the marriage is voidable, and pending proceedings for a separation order, may be continued and shall be dealt with as if this Act had not been passed.
- (2) Where the parties have lived separately and apart for a continuous period of not less than 12 months immediately preceding the date of commencement of this Act, pending proceedings for a decree of dissolution of marriage shall, if either party so requests, be dealt with as if they were proceedings instituted under this Act on the ground referred to in section 48, and, in relation to proceedings in which such a request is made, subsection 48(2) has effect as if the proceedings for dissolution of marriage had been instituted by an application filed on the date of commencement of this Act.
- (2A) Where subsection (2) does not apply but the parties have lived separately and apart for a continuous period of not less than 12 months immediately preceding the date of making of the request under this subsection, pending proceedings for a decree of dissolution of marriage shall, if either party so requests, be dealt with as if they were proceedings instituted under this Act on the ground referred to in section 48, and, in relation to proceedings in which such a request is made, subsection 48(2) has effect as if the proceedings for dissolution of marriage had been instituted by an application filed on the date of making of the request.
- (3) Pending proceedings for a decree of nullity of marriage on the ground that the marriage is void or proceedings of a kind referred to in paragraph (b) of the definition of *matrimonial cause* in subsection 4(1) may be continued and shall be dealt with as if they were proceedings instituted under this Act.
- (4) Pending proceedings constituting a matrimonial cause, not being proceedings for principal relief, whether instituted under the repealed Act or under the law of a State or Territory, may be continued and shall be dealt with as if they were proceedings instituted under this Act.

Section 9

- (5) Subsection 117(1) does not apply to proceedings continued and dealt with under this section.
- (6) Where, in any proceedings constituting a matrimonial cause, a decree has been made before the commencement of this Act:
- (a) any appeal in respect of that decree may be continued or instituted;
 - (b) any new trial or re-hearing ordered upon the hearing of such an appeal, or upon an appeal heard before the commencement of this Act, may be had and completed; and
 - (c) any decree may be made upon any such appeal, new trial or re-hearing, and, if a decree so made is a decree *nisi*, the decree may become absolute;
- as if this Act had not been passed.
- (7) Where, in any proceedings constituting a matrimonial cause, a decree *nisi* was made before the commencement of this Act but did not become absolute before that date, the decree becomes absolute upon:
- (a) the expiration of 1 month from the date of making of the decree;
 - (b) the expiration of 1 month from the date of making of a relevant order under subsection 71(1) of the repealed Act or section 55A of this Act; or
 - (c) the date of commencement of this Act;
- whichever is the latest.
- (7A) Where, in any proceedings constituting a matrimonial cause, being proceedings continued and dealt with in accordance with subsection (1), a decree *nisi* was made on or after 5 January 1976 and before the date of commencement of this subsection, being a decree that did not become absolute before that last-mentioned date, or is made on or after the date of commencement of this subsection, then:
- (a) except in the case of a decree made before the date of commencement of this subsection in respect of which a relevant order was made under subsection 71(1) of the repealed Act before that date—section 55A of this Act applies in relation to the decree; and
 - (b) the decree becomes absolute upon:

- (i) the expiration of one month from:
 - (A) in the case of a decree in respect of which a relevant order was made under subsection 71(1) of the repealed Act before the date of commencement of this subsection—the date of making of that order; or
 - (B) in any other case—the date of making of a relevant order under section 55A of this Act; or
 - (ii) the date of commencement of this subsection;
- whichever is the later.
- (8) The law to be applied, and the practice and the procedure to be followed, in and in relation to pending proceedings that are continued as if this Act had not been passed shall be the same as if this Act had not been passed.
- (9) In this section:
- appeal*** includes:
- (a) an application for leave or special leave to appeal;
 - (b) an application for a new trial or for a re-hearing; and
 - (c) an intervention.

pending proceedings means proceedings that were instituted before the date of commencement of this Act but were not completed before that date.

Part II Counselling organisations and mediation organisations

Division 1 What this Part does

Section 11

Part II—Counselling organisations and mediation organisations

Division 1—What this Part does

11 What this Part does

This Part provides for:

- (a) the approval of counselling organisations and mediation organisations (Division 2); and
- (b) reporting by approved counselling organisations and approved mediation organisations (Division 3); and
- (c) funding of approved counselling organisations and approved mediation organisations (Division 4).

Division 2—Approval of counselling organisations and mediation organisations

12 Meaning of *approved counselling organisation* and *approved mediation organisation*

- (1) An *approved counselling organisation* is an organisation in relation to which an approval under section 13A is in force.
- (2) An *approved mediation organisation* is an organisation in relation to which an approval under section 13B is in force.

13 Organisation may be approved as an approved counselling organisation, an approved mediation organisation or both

Subject to sections 13A and 13B, an organisation may be approved as:

- (a) an approved counselling organisation; or
- (b) an approved mediation organisation; or
- (c) both an approved counselling organisation and an approved mediation organisation.

13A Approval of counselling organisations

- (1) A voluntary organisation may apply to the Minister for approval as a counselling organisation.
- (2) The Minister may, in writing, approve the organisation as a counselling organisation if, and only if, the Minister is satisfied that:
 - (a) the organisation is willing and able to engage in family and child counselling; and
 - (b) the whole, or a substantial part, of the organisation's activities consist, or will consist, of family and child counselling.
- (3) If the Minister decides to refuse to approve the organisation, the Minister must give written notice of that decision to the organisation.

Section 13B

13B Approval of mediation organisations

- (1) A voluntary organisation may apply to the Minister for approval as a mediation organisation.
- (2) The Minister may, in writing, approve the organisation as a mediation organisation if, and only if, the Minister is satisfied that:
 - (a) the organisation is willing and able to engage in family and child mediation; and
 - (b) the whole, or a substantial part, of the organisation's activities consist, or will consist, of family and child mediation.
- (3) If the Minister decides to refuse to approve the organisation, the Minister must give written notice of that decision to the organisation.

13C Approvals subject to conditions

- (1) An approval under section 13A is subject to such conditions (if any) as are specified in the instrument of approval.
- (2) An approval under section 13B is subject to:
 - (a) a condition that the organisation must comply with the requirements of the regulations when it engages in family and child mediation; and
 - (b) such other conditions (if any) as are specified in the instrument of approval.
- (3) If an approval is subject to conditions specified in the instrument of approval, the Minister may, from time to time, revoke or vary all or any of those conditions or add further conditions.
- (4) The Minister's power to revoke, vary or add conditions must be exercised by notice in writing to the organisation concerned.

13D Revocation of approvals

- (1) The Minister may, at any time, revoke the approval of an organisation under section 13A if:
 - (a) the organisation has failed to comply with a condition of the approval; or
 - (b) the organisation has failed to comply with its obligations as an approved counselling organisation under section 13F; or
 - (c) a person authorised by the organisation to offer family and child counselling on behalf of the organisation has failed to comply with a requirement of this Act or a direction made by a court under this Act; or
 - (d) the Minister is no longer satisfied as mentioned in paragraph 13A(2)(b) in relation to the organisation; or
 - (e) the Minister is satisfied that the organisation is not adequately carrying out family and child counselling.
- (2) The Minister may, at any time, revoke the approval of an organisation under section 13B if:
 - (a) the organisation has failed to comply with a condition of the approval; or
 - (b) the organisation has failed to comply with its obligations as an approved mediation organisation under section 13F; or
 - (c) a person authorised by the organisation to offer family and child mediation on behalf of the organisation has failed to comply with a requirement of this Act or a direction made by a court under this Act; or
 - (d) the Minister is no longer satisfied as mentioned in paragraph 13B(2)(b) in relation to the organisation; or
 - (e) the Minister is satisfied that the organisation is not adequately carrying out family and child mediation.
- (3) The Minister's power to revoke an approval must be exercised by notice in writing to the organisation concerned.
- (4) In this section:

this Act includes:

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

Section 13E

13E Minister to publish lists of approved counselling organisations and approved mediation organisations

The Minister must publish annually, in such manner as the Minister thinks appropriate:

- (a) a list of all approved counselling organisations; and
- (b) a list of all approved mediation organisations.

Division 3—Reporting by approved counselling organisations and approved mediation organisations

13F Reports and financial statements of approved organisations

- (1) An approved counselling organisation must, in respect of each financial year, give the Minister:
 - (a) an audited financial statement of the receipts and payments of the organisation, in which receipts and payments in respect of its family and child counselling activities are shown separately from other receipts and payments; and
 - (b) a report on its family and child counselling activities, including information about the number of cases dealt with by the organisation during the year.
- (2) An approved mediation organisation must, in respect of each financial year, give the Minister:
 - (a) an audited financial statement of the receipts and payments of the organisation, in which receipts and payments in respect of its family and child mediation activities are shown separately from other receipts and payments; and
 - (b) a report on its family and child mediation activities, including information about the number of cases dealt with by the organisation during the year.
- (3) A report under subsection (1) or (2) in relation to a financial year must be given to the Minister by 30 September in the next financial year.

13G Minister may exempt organisation from requirements of section 13F

- (1) The Minister may, in writing, exempt an organisation from complying with some or all of the requirements of section 13F if the Minister is satisfied that:
 - (a) it would be impracticable for the organisation to comply with those requirements; or

Part II Counselling organisations and mediation organisations

Division 3 Reporting by approved counselling organisations and approved mediation organisations

Section 13G

(b) it would be unduly onerous to require the organisation to comply with those requirements.

(2) An exemption under subsection (1) has effect accordingly.

**Division 4—Funding of approved counselling organisations
and approved mediation organisations**

**13H Grants to approved counselling organisations and approved
mediation organisations**

- (1) The Minister may, from time to time, out of money appropriated by the Parliament for the purposes of this Part, grant to an approved counselling organisation or an approved mediation organisation such sums by way of financial assistance as the Minister determines.
- (2) A grant may be made on terms and conditions (if any) that the Minister thinks appropriate.

Part III—Primary dispute resolution

Division 1—Object and outline

14 Object of Part

The object of this Part is:

- (a) to encourage people to use primary dispute resolution mechanisms (such as counselling, mediation, arbitration or other means of conciliation or reconciliation) to resolve matters in which a court order might otherwise be made under this Act, provided the mechanisms are appropriate in the circumstances and proper procedures are followed; and
- (b) to ensure that people have access to counselling:
 - (i) to improve relationships covered by this Act; and
 - (ii) to help them adjust to court orders under this Act.

14A Outline of Part

An outline of this Part is set out below.

OUTLINE OF PART	
Item	Divisions and coverage
1	Division 1—Object and outline <ul style="list-style-type: none">• object of this Part• outline of this Part
2	Division 2—Obligations to consider the possibility of reconciliation <ul style="list-style-type: none">• duty of judges and of legal practitioners to consider the possibility of a reconciliation of the parties
3	Division 3—Obligations to consider advising people about primary dispute resolution methods <ul style="list-style-type: none">• duty of courts and of legal practitioners to consider advising people about primary dispute resolution methods
4	Division 4—Counselling <ul style="list-style-type: none">• parties to a marriage seeking counselling• courts advising or directing people to attend counselling• other matters related to counselling
5	Division 5—Mediation and arbitration <ul style="list-style-type: none">• requests for mediation and courts advising or directing parties to attend mediation• private arbitration, courts referring proceedings to arbitration and review of awards of arbitration• provision of information about mediation and arbitration services and other matters relating to mediators and arbitrators
6	Division 6—Miscellaneous <ul style="list-style-type: none">• miscellaneous matters

Division 2—Obligations to consider the possibility of reconciliation

14B Interpretation

In this Division:

Division 2 proceedings means:

- (a) proceedings for a dissolution of marriage; or
- (b) financial or Part VII proceedings instituted by a party to a subsisting marriage.

judge includes a Federal Magistrate, magistrate, Judicial Registrar or Registrar.

14C Duty of judges

- (1) A judge constituting the court in which Division 2 proceedings are being heard must consider, from time to time, the possibility of a reconciliation of the parties.
- (2) If, during the proceedings, the judge considers, from the evidence in the proceedings or the attitude of the parties, that there is a reasonable possibility of a reconciliation of the parties, the judge may:
 - (a) adjourn the proceedings to give the parties the opportunity to consider a reconciliation; or
 - (b) with the consent of the parties, interview them in chambers, with or without counsel, as the judge thinks proper, to assist in a possible reconciliation.
- (3) If the judge adjourns the proceedings under paragraph (2)(a), the judge may advise the parties:
 - (a) to make use of the services of a family and child counsellor to assist in a possible reconciliation; or

- (b) to request the Registry Manager, or an appropriate officer of a Family Court of a State, to nominate some other suitable person or organisation to assist in considering a possible reconciliation.
- (4) If, after an adjournment under subsection (2), either of the parties requests that the proceedings resume, the judge must resume the proceedings as soon as practicable.

14D Duty of legal practitioners

A legal practitioner representing a party to Division 2 proceedings must consider, from time to time, the possibility of a reconciliation of the parties.

Part III Primary dispute resolution

Division 3 Obligations to consider advising people about primary dispute resolution methods

Section 14E

Division 3—Obligations to consider advising people about primary dispute resolution methods

14E Interpretation

In this Division:

primary dispute resolution methods means procedures and services for the resolution of disputes out of court, including:

- (a) counselling services provided by family and child counsellors; and
- (b) mediation services provided by family and child mediators; and
- (c) arbitration services provided by arbitrators.

14F Duty of courts

A court exercising jurisdiction in proceedings under this Act must consider whether or not to advise the parties to the proceedings about the primary dispute resolution methods that could be used to resolve any matter in dispute.

14G Duty of legal practitioners

A legal practitioner acting in proceedings under this Act, or consulted by a person considering instituting such proceedings, must consider whether or not to advise the parties to the proceedings, or the person considering instituting proceedings, about the primary dispute resolution methods that could be used to resolve any matter in dispute.

Division 4—Counselling

14H Division 3 of Part VII deals with counselling in matters affecting children

Division 3 of Part VII contains provisions that deal with counselling in matters affecting children.

15 Notice seeking counselling

- (1) A party to a marriage may file in the Family Court or in a Family Court of a State a notice stating that the party wishes to have the assistance of the counselling facilities of that Court.
- (2) Where such a notice is filed, the Registry Manager or an appropriate officer of the Family Court of that State, as the case may be, shall arrange for the parties to the marriage to be interviewed by a family and child counsellor for the purpose of assisting the parties with a view to a reconciliation or the improvement of their relationship to each other or to any of their children.

15A Request for assistance of a family and child counsellor— Federal Magistrates Court

- (1) A person who is:
 - (a) a party to a marriage; or
 - (b) a party to proceedings under this Act in the Federal Magistrates Court;may ask a designated officer of the Federal Magistrates Court for the assistance of a family and child counsellor.
- (2) If a request is made under subsection (1), a designated officer of the Federal Magistrates Court must, as far as practicable, arrange for the parties to the marriage, or the parties to the proceedings, as the case may be, to be interviewed by a family and child counsellor for any or all of the following purposes (to the extent that the purposes are relevant):
 - (a) assisting the parties with a view to a reconciliation;

Section 16

- (b) improving the parties' relationship to each other or to any of their children;
 - (c) assisting the parties and their children to adjust to the consequences of the breakdown of the marriage;
 - (d) undertaking any other family and child counselling in order to assist the parties to resolve any matter in dispute between them.
- (3) For the purposes of this section, a member of the staff of the Federal Magistrates Court is taken to be an officer of the Federal Magistrates Court.
- (4) For the purposes of this section, a *designated officer* of the Federal Magistrates Court is an officer of the Federal Magistrates Court specified in writing by the Chief Executive Officer of the Federal Magistrates Court for the purposes of this subsection.
- (5) In this section:

dispute means a dispute about a matter with respect to which proceedings (other than prescribed proceedings) could be instituted under this Act.

Note: See also section 62CA, which deals with counselling in matters relating to children.

16 Advice as to counselling

- (1) The Registry Manager may advertise the existence and availability of the counselling and welfare facilities of the Family Court and of other courts having jurisdiction under this Act.
- (2) A party to a marriage, or to proceedings under this Act, may seek the assistance of the counselling facilities of the Family Court or of a Family Court of a State, and the Registry Manager or an appropriate officer of the Family Court of that State, as the case may be, shall, as far as practicable, make those facilities available.

16A Courts to direct or advise people to attend counselling

- (1) If a court makes an order or grants an injunction under section 114, the court must, if the court considers that it is in the interests of the

parties or their children to do so, direct or advise either or both of the parties to attend upon a family and child counsellor.

- (2) Failure to comply with a direction or advice referred to in subsection (1) does not constitute a contempt of the court.

16B Courts may advise people to attend counselling if it may improve their relationship etc.

- (1) If a court having jurisdiction under this Act considers that counselling may assist the parties to a marriage to improve their relationship to each other or to any of their children, it may advise the parties to attend upon a family and child counsellor or an approved counselling organisation.
- (2) If the court does so advise the parties, it may, if it considers it desirable to do so, adjourn any proceedings before it to enable attendance at counselling.

16C Obligations to consider advising people about counselling for marital breakdown

- (1) In this section, *counselling for marital breakdown* is counselling to assist the parties to a marriage and their children to adjust to the consequences of marital breakdown.
- (2) A court exercising jurisdiction in proceedings under this Act, other than Part VII, must consider whether or not to advise parties to the proceedings about counselling for marital breakdown available through courts exercising jurisdiction under this Act and through approved counselling organisations.
- (3) A legal practitioner acting in proceedings under this Act, other than Part VII, or consulted by a person considering instituting such proceedings, must consider whether or not to advise the parties to the proceedings, or the person considering instituting proceedings, about counselling for marital breakdown available through courts exercising jurisdiction under this Act and through approved counselling organisations.

Section 17

17 Provision of certain documents

The court must provide documents to persons proposing to institute proceedings under this Act (other than under Part VII), and in appropriate cases to their spouses, setting out:

- (a) the legal and possible social effects of the proposed proceedings (including the consequences for children whose care, welfare or development is likely to be affected by the proceedings); and
- (b) the counselling and welfare facilities available within the Family Court and elsewhere.

19 Oath or affirmation of secrecy

- (1) A family and child counsellor shall, before entering upon the performance of the functions as such a counsellor, make before a person authorized under the law of the Commonwealth or of a State or a Territory to take affidavits, an oath or affirmation of secrecy in accordance with the prescribed form.
- (2) A family and child counsellor who has made an oath or affirmation of secrecy under the repealed Act shall be deemed to have made an oath or affirmation under this section.

Division 5—Mediation and arbitration

Subdivision A—Mediation

19A Request for mediation—request made through a Family Court

- (1) A person who is:
 - (a) the parent or adoptive parent of a child; or
 - (b) a child; or
 - (c) a party to a marriage;and who is not a party to proceedings under this Act, may file in the Family Court, or in a Family Court of a State, a notice asking for the help of a mediator in settling a dispute to which the person is a party.
- (2) The appropriate officer at the court must make arrangements for the dispute to be mediated.
- (3) In this section:

dispute means a dispute about a matter with respect to which proceedings (other than prescribed proceedings) could be instituted under this Act.

19AAA Request for mediation—Federal Magistrates Court

- (1) A person who is:
 - (a) the parent or adoptive parent of a child; or
 - (b) a child; or
 - (c) a party to a marriage; or
 - (d) a party to proceedings in the Federal Magistrates Court under this Act;may ask a designated officer of the Federal Magistrates Court for the help of a family and child mediator in settling a dispute to which the person is a party.
- (2) If a request is made under subsection (1), a designated officer of the Federal Magistrates Court must, as far as practicable, arrange for a family and child mediator to mediate the dispute.

Section 19AA

- (3) For the purposes of this section, a member of the staff of the Federal Magistrates Court is taken to be an officer of the Federal Magistrates Court.
- (4) For the purposes of this section, a *designated officer* of the Federal Magistrates Court is an officer of the Federal Magistrates Court specified in writing by the Chief Executive Officer of the Federal Magistrates Court for the purposes of this subsection.
- (5) In this section:

dispute means a dispute about a matter with respect to which proceedings (other than prescribed proceedings) could be instituted under this Act.

19AA Request for mediation—where made direct to a family and child mediator

A person may at any time request a family and child mediator to mediate a dispute.

19B Family Court may refer matters for mediation

- (1) The Family Court or a Family Court of a State, may, with the consent of the parties to any proceedings before it under this Act (other than prescribed proceedings), make an order referring any or all of the matters in dispute in the proceedings for mediation by a court mediator.
- (2) Where a court makes an order under subsection (1), it may, if necessary, adjourn the proceedings and may make such additional orders as it thinks appropriate to facilitate the effective conduct of the mediation.
- (3) Where a court makes an order under subsection (1), the appropriate officer of the court must make arrangements for a court mediator to mediate the relevant disputed matter.
- (4) Where:
 - (a) a court makes an order under subsection (1) in relation to any matter in dispute in proceedings before it; and

(b) a party to the proceedings files a notice in the court that the mediation of the matter has ended;
the court may make such orders, or give such directions, as it thinks appropriate in relation to the proceedings.

19BAA Federal Magistrates Court may refer matters for mediation

- (1) The Federal Magistrates Court may, with the consent of the parties to any proceedings before it under this Act (other than prescribed proceedings), make an order referring any or all of the matters in dispute in the proceedings for mediation by a family and child mediator.
- (2) Subsection (1) has effect subject to the related Federal Magistrates Rules.
- (3) If the Federal Magistrates Court makes an order under subsection (1), it may, if necessary, adjourn the proceedings and may make such additional orders as it thinks appropriate to facilitate the effective conduct of the mediation.
- (4) If the Federal Magistrates Court makes an order under subsection (1), a designated officer of the Federal Magistrates Court must make arrangements for a family and child mediator to mediate the relevant disputed matter or matters in accordance with the related Federal Magistrates Rules.
- (5) If:
 - (a) the Federal Magistrates Court or a Federal Magistrate makes an order under subsection (1) in relation to any matter in dispute in proceedings before it; and
 - (b) a party to the proceedings files a notice in the Federal Magistrates Court that the mediation of the matter has ended;the Federal Magistrates Court may make such orders, or give such directions, as it thinks appropriate in relation to the proceedings.
- (6) For the purposes of this section, a member of the staff of the Federal Magistrates Court is taken to be an officer of the Federal Magistrates Court.
- (7) For the purposes of this section, a *designated officer* of the Federal Magistrates Court is an officer of the Federal Magistrates Court

Section 19BA

specified in writing by the Chief Executive Officer of the Federal Magistrates Court for the purposes of this subsection.

19BA Court to advise people to attend mediation

- (1) Subject to the regulations (if any), a court having jurisdiction under this Act must, if it considers it may help the parties to a dispute before it to resolve that dispute, advise the parties to seek the help of a family and child mediator.
- (2) If the court does so advise the parties, it may, if it considers it desirable to do so, adjourn any proceedings before it to enable attendance at mediation.

Subdivision B—Arbitration

19D Court may refer proceedings to arbitration

- (1) In any Part VIII proceedings the court may, subject to the applicable Rules of Court, make an order referring the proceedings, or any part of them, or any matter arising in them, to an arbitrator for arbitration in accordance with the applicable Rules of Court.
- (2) However, a court may only make an order under subsection (1) with the consent of all the parties to the proceedings.
- (3) Where a court makes an order under subsection (1), it may, if necessary, adjourn the proceedings and may make such additional orders as it thinks appropriate to facilitate the effective conduct of the arbitration.
- (4) Where a court makes an order under subsection (1), the arbitration must be carried out by the arbitrator in accordance with the applicable Rules of Court.
- (5) A party to an award in an arbitration carried out as a result of an order under this section may register the award, in accordance with the regulations, in the court that made that order and the award, when so registered, has effect as if it were a decree made by that court.

19E Private arbitration

- (1) A court having jurisdiction under this Act may, on application by a party to the private arbitration of a dispute, make such orders as the court thinks appropriate to facilitate the effective conduct of the arbitration.
- (2) A party to an award made in a private arbitration of a dispute may register the award, in accordance with the regulations, in a court having jurisdiction under this Act and the award, when so registered, has effect as if it were a decree made by that court.
- (3) In this section:
dispute means:
 - (a) Part VIII proceedings; or
 - (b) any part of such proceedings; or
 - (c) any matter arising in such proceedings; or
 - (d) a dispute about a matter with respect to which such proceedings could be instituted.

19EA Referral by arbitrator of questions of law to a Family Court

- (1) At any time before making an award in section 19D arbitration or private arbitration, the arbitrator may refer for determination by a single Judge of the Family Court, or of a Family Court of a State, a question of law arising in relation to the arbitration.
- (2) The arbitrator may do so:
 - (a) on his or her own initiative; or
 - (b) at the request of one or more of the parties to the arbitration if the arbitrator considers it appropriate to do so.
- (3) The arbitrator must not make an award in the arbitration before the Judge has either:
 - (a) determined the question of law; or
 - (b) remitted the matter to the arbitrator having found that no question of law arises.

Section 19EB

19EB Referral by arbitrator of questions of law to the Federal Magistrates Court

- (1) At any time before making an award in section 19D arbitration or private arbitration, the arbitrator may refer for determination by the Federal Magistrates Court a question of law arising in relation to the arbitration.
- (2) The arbitrator may do so:
 - (a) on his or her own initiative; or
 - (b) at the request of one or more of the parties to the arbitration if the arbitrator considers it appropriate to do so.
- (3) The arbitrator must not make an award in the arbitration before the Federal Magistrates Court has either:
 - (a) determined the question of law; or
 - (b) remitted the matter to the arbitrator having found that no question of law arises.

19F Review of awards by a Family Court

- (1) A party to a registered award made in section 19D arbitration or private arbitration may apply to a single Judge of the Family Court, or of a Family Court of a State, for review of the award on questions of law.

Note: There may be Rules of Court providing for when, and how, an application for review of the award can be made (see paragraph 123(1)(sf)).

- (2) On a review of an award under this section, the Judge may:
 - (a) determine all questions of law arising in relation to the arbitration; and
 - (b) make such decrees as he or she thinks appropriate, including a decree affirming, reversing or varying the award.

19FA Review of awards by the Federal Magistrates Court

- (1) A party to a registered award made in section 19D arbitration or private arbitration may apply to the Federal Magistrates Court for review of the award on questions of law.

- (2) On a review of an award under this section, the Federal Magistrates Court may:
- (a) determine all questions of law arising in relation to the arbitration; and
 - (b) make such decrees as it thinks appropriate, including a decree affirming, reversing or varying the award.

19G Setting aside awards—Family Courts

If an award made in section 19D arbitration or private arbitration, or an agreement made as a result of such arbitration, is registered in the Family Court or a Family Court of a State, the court may make a decree affirming, reversing or varying the award or agreement if the court is satisfied that:

- (a) the award or agreement was obtained by fraud (including non-disclosure of a material matter); or
- (b) the award or agreement is void, voidable or unenforceable; or
- (c) in the circumstances that have arisen since the award or agreement was made it is impracticable for some or all of it to be carried out; or
- (d) the arbitration was affected by bias, or there was a lack of procedural fairness in the way in which the arbitration process, as agreed between the parties and the arbitrator, was conducted.

19GA Setting aside awards—Federal Magistrates Court

If an award made in section 19D arbitration or private arbitration, or an agreement made as a result of such arbitration, is registered in the Federal Magistrates Court, the Federal Magistrates Court may make a decree affirming, reversing or varying the award or agreement if it is satisfied that:

- (a) the award or agreement was obtained by fraud (including non-disclosure of a material matter); or
- (b) the award or agreement is void, voidable or unenforceable; or
- (c) in the circumstances that have arisen since the award or agreement was made it is impracticable for some or all of it to be carried out; or

Section 19H

- (d) the arbitration was affected by bias, or there was a lack of procedural fairness in the way in which the arbitration process, as agreed between the parties and the arbitrator, was conducted.

19H Fees for arbitration

- (1) An arbitrator conducting section 19D arbitration or private arbitration may charge the parties to the arbitration fees for conducting it.
- (2) The arbitrator must give written information about those fees to the parties before the arbitration starts.

Note: There may be Rules of Court or regulations relating to the costs of arbitration and how they are assessed or taxed (see paragraphs 123(1)(se) and 125(1)(bc)).

Subdivision C—Miscellaneous

19J Advice about mediation and arbitration

- (1) The appropriate officer of the Family Court or of a Family Court of a State must, as far as practicable, on request by a party to a marriage or to proceedings under this Act, advise the party about:
 - (a) the mediation or arbitration facilities (if any) available in the court and how those facilities are made available; and
 - (b) the mediation services provided by approved mediation organisations.
- (2) The court must provide to persons who propose to institute proceedings under this Act, and (in appropriate cases) their spouses, and other interested persons, a document setting out particulars of any mediation and arbitration facilities available in the Family Court and elsewhere.

19K Oath or affirmation by court mediator or community mediator

A court mediator or a community mediator must, before starting to perform the functions of such a mediator, make an oath or affirmation of secrecy in accordance with the prescribed form

before a person authorised under a law of the Commonwealth, or of a State or Territory, to take affidavits.

19L Oath or affirmation by arbitrator

An arbitrator must, before starting to perform the functions of such an arbitrator, make an oath or affirmation in accordance with the prescribed form before a person authorised under a law of the Commonwealth, or of a State or Territory, to take affidavits.

19M Protection of mediators and arbitrators

A family and child mediator or an arbitrator has, in performing the functions of such a mediator or arbitrator, the same protection and immunity as a Judge of the Family Court has in performing the functions of such a Judge.

Division 6—Miscellaneous

19N Admissions made to counsellors, mediators etc.

- (1) This section applies to:
 - (a) a family and child counsellor; or
 - (b) a court mediator; or
 - (c) subject to the regulations, a community mediator or a private mediator; or
 - (d) a person nominated, or acting on behalf of an organisation nominated, for the purposes of paragraph 14C(3)(b) or subparagraph 44(1B)(a)(ii); or
 - (e) a person to whom a party to a marriage has been referred, for medical or other professional consultation, by a person referred to in paragraph (a), (b), (c) or (d).
- (2) Evidence of anything said, or any admission made, at a meeting or conference conducted by a person to whom this section applies while the person is acting as such a person is not admissible:
 - (a) in any court (whether exercising federal jurisdiction or not); or
 - (b) in any proceedings before a person authorised by a law of the Commonwealth or of a State or Territory, or by the consent of the parties, to hear evidence.
- (3) Subsection (2) does not apply to the following:
 - (a) an admission by an adult that indicates that a child has been abused or is at risk of abuse;
 - (b) a 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.
- (4) In this section:

abuse, in relation to a child, means:

 - (a) an assault, including a sexual assault, of the child which is an offence under a law, written or unwritten, in force in the

State or Territory in which the act constituting the assault occurs; or

- (b) a person involving the child in a sexual activity with that person or another person in which the child is used, directly or indirectly, as a sexual object by the first-mentioned person or the other person, and where there is unequal power in the relationship between the child and the first-mentioned person.

child means a person who is under 18.

19P Regulations to be complied with by family and child mediators

- (1) The regulations may prescribe requirements to be complied with by family and child mediators in relation to the family and child mediation services they provide.
- (2) The regulations may prescribe penalties not exceeding 10 penalty units in respect of offences against regulations made for the purposes of subsection (1).

19Q Advertising in Family Court registries of counselling, mediation and arbitration services

- (1) Subject to the regulations (if any), a family and child counsellor, or an approved counselling organisation, may advertise, at a Registry of the Family Court, the counselling services the counsellor or organisation provides.
- (2) Subject to the regulations (if any), a family and child mediator, or an approved mediation organisation, may advertise, at a Registry of the Family Court, the mediation services the mediator or organisation provides.
- (3) Subject to the regulations (if any), an arbitrator may advertise, at a Registry of the Family Court, the arbitration services the arbitrator provides.

Part IV—The Family Court of Australia

Division 1—Interpretation

20 Interpretation

In this Part, unless the contrary intention appears:

Chief Judge means the Chief Judge of the Court, and includes the Deputy Chief Judge or a Judge Administrator if the Deputy Chief Judge or Judge Administrator is for the time being performing the duties and exercising the powers of the Chief Judge.

Court means the Family Court of Australia.

Deputy Chief Judge means the Deputy Chief Judge of the Court.

Judge means a Judge of the Family Court (including the Chief Judge, the Deputy Chief Judge, a Judge Administrator or a Senior Judge).

Judge Administrator means a Judge Administrator of the Court.

Principal Registrar means the Principal Registrar of the Court.

Division 2—The Family Court of Australia

21 Creation of Court

- (1) A Court, to be known as the Family Court of Australia, is created by this Act.
- (2) The Court is a superior court of record.
- (3) The Court consists of:
 - (a) a Chief Judge, who shall be called the Chief Justice of the Court;
 - (b) a Deputy Chief Judge, who shall be called the Deputy Chief Justice of the Court; and
 - (c) Judge Administrators, Senior Judges and other Judges, not exceeding, in total, such number as is prescribed.
- (4) Regulations made pursuant to subsection (3) shall take effect at the expiration of 7 sitting days after the regulations have been laid before each House of the Parliament.

21A Divisions of Court

For the purposes of the organization and conduct of the business of the Court, the Court comprises 2 Divisions, namely, the Appeal Division and the General Division.

21B Arrangement of business of Court

- (1) The Chief Judge is responsible for ensuring the orderly and expeditious discharge of the business of the Court and accordingly may, subject to this Act and to such consultation with the Judges as is appropriate and practicable, make arrangements as to the Judge or Judges who is or are to constitute the Court, or the Full Court, in particular matters or classes of matters.

Section 21B

- (2) The Deputy Chief Judge shall assist the Chief Judge in the exercise of the functions conferred on the Chief Judge by subsection (1).
- (3) A Judge Administrator shall, in relation to such part of Australia as is from time to time assigned by the Chief Judge, assist the Chief Judge and the Deputy Chief Judge in the exercise of such of the functions conferred on the Chief Judge by subsection (1) as are from time to time so assigned.

Division 3—Judges

22 Appointment, removal and resignation of Judges

- (1) A Judge:
 - (a) shall be appointed by the Governor-General; and
 - (b) shall not be removed except by the Governor-General, on an address from both Houses of the Parliament in the same session praying for the Judge's removal on the grounds of proved misbehaviour or incapacity.
- (2) A person shall not be appointed as a Judge unless:
 - (a) the person is or has been a Judge of another court created by the Parliament or of a court of a State or has been enrolled as a legal practitioner of the High Court or of the Supreme Court of a State or Territory for not less than 5 years; and
 - (b) by reason of training, experience and personality, the person is a suitable person to deal with matters of family law.
- (2AA) The members of the Appeal Division of the Court are the Chief Judge, the Deputy Chief Judge and such other Judges as are assigned to the Appeal Division under this section.
- (2AB) The Governor-General may, in the commission of appointment of a Judge or, with the consent of the Judge but not otherwise, at a later time assign a Judge to the Appeal Division.
- (2AC) The Governor-General shall not assign a Judge to the Appeal Division under subsection (2AB) if, as a result of that assignment, the number of members of the Appeal Division assigned under that subsection would exceed the prescribed number.
- (2AF) A Judge (other than the Chief Judge or the Deputy Chief Judge) who is not assigned to the Appeal Division shall be deemed to be assigned to the General Division.

Section 22

- (2AFA) Where a person holding office as a Senior Judge or Judge of the Court is appointed Deputy Chief Judge or a Judge Administrator, the person retains that office as Senior Judge or Judge, as the case may be, and may resign the office of Deputy Chief Judge or Judge Administrator without resigning that first-mentioned office.
- (2AG) Notwithstanding anything contained in any other Act, a person may hold office at the one time as a Judge of the Court and as a Judge of a prescribed court or of 2 or more prescribed courts.
- (2AH) In subsection (2AG), *prescribed court* means:
- (a) a court (other than the Court) created by the Parliament; or
 - (b) the Supreme Court of the Northern Territory.
- (2A) A person may be appointed to the office of Judge of the Family Court of Australia notwithstanding that he holds an office of Judge of a Family Court of a State and may serve in that office of Judge of the Family Court of Australia notwithstanding that he continues to hold, and serve in, the office of Judge of the Family Court of that State.
- (2B) If a person who holds office as a Judge of the Family Court of Australia is appointed or serves as a Judge of a Family Court of a State, the appointment or service shall not affect his or her tenure of that office of Judge of the Family Court of Australia or his or her rank, title, status, precedence, salary or annual allowance or other rights or privileges as the holder of that office of Judge of the Family Court of Australia and, for all purposes, his or her service as a Judge of the Family Court of that State shall be taken to be service as the holder of that office of Judge of the Family Court of Australia.
- (3) A Judge may resign office by writing under his or her hand addressed to the Governor-General.
- (3A) The resignation takes effect on:
- (a) the day on which it is received by the Governor-General; or
 - (b) a later day specified in the resignation document.
- (4) A Judge or former Judge is entitled to be styled "The Honourable".

23 Seniority

- (1) The Chief Judge is senior to all other Judges of the Court.
- (2) The Deputy Chief Judge is senior to all other Judges of the Court other than the Chief Judge.
- (3) Judges appointed as Judge Administrators or assigned to the Appeal Division before, or not later than 3 months after, the commencement of section 13 of the *Family Court of Australia (Additional Jurisdiction and Exercise of Powers) Act 1988* have seniority next to the Deputy Chief Judge, and have such seniority in relation to each other as they had immediately before that commencement.
- (4) The remaining Judge Administrators and Judges assigned to the Appeal Division have seniority next to the Judges to whom subsection (3) applies according to the days on which their appointments as Judge Administrators and their assignments to the Appeal Division (whichever first occurred) took effect.
- (5) Where, because 2 or more appointments as Judge Administrator and assignments to the Appeal Division took effect on the same day, subsection (4) does not determine priority between the Judges concerned, those Judges have such seniority in relation to each other as is assigned to them by the Governor-General.
- (6) The Senior Judges not assigned to the Appeal Division have seniority next to the Judges to whom subsection (4) applies according to the days on which their appointments as Senior Judges took effect.
- (7) Where, because 2 or more commissions of appointment as Senior Judge took effect on the same day, subsection (6) does not determine seniority between the Senior Judges concerned, those Judges have such seniority in relation to each other as is assigned to them by the Governor-General.

Section 24

- (8) The Judges who are not Judge Administrators or Senior Judges and are not assigned to the Appeal Division have seniority next to the Senior Judges to whom subsection (6) applies according to the days on which their appointments as Judges took effect.
- (9) Where, because 2 or more commissions of appointment as Judge took effect on the same day on or after the commencement of this subsection, subsection (8) does not determine seniority between the Judges concerned, those Judges have such seniority in relation to each other as is assigned to them by the Governor-General.
- (10) If:
- (a) a person's commission of appointment as a Judge of a particular kind terminates; and
 - (b) a new commission of appointment of the person as a Judge of that kind takes effect immediately after the termination;
- the day of appointment of the person as a Judge of that kind is, for the purposes of this section, the day on which the earlier appointment took effect and not the day on which the later appointment took effect.
- (11) Subsection (10) applies to the termination of a commission of appointment however it occurs (whether because of resignation or because of the expiration of the term of the appointment or otherwise).

24 Absence or illness of Chief Judge

- (1) Whenever:
- (a) the Chief Judge is absent from Australia or from duty; or
 - (b) there is a vacancy in the office of Chief Judge;
- the Deputy Chief Judge or, if the Deputy Chief Judge is unavailable, the senior Judge Administrator who is in Australia and is available and willing to do so shall perform the duties and may exercise the powers of the Chief Judge.
- (2) A Judge who is, under subsection (1), performing the duties and exercising the powers of the Chief Judge shall be called the Acting Chief Justice of the Court.

25 Salary and Allowances

- (1) The Chief Judge, Deputy Chief Judge, Judge Administrators, Judges assigned to the Appeal Division, Senior Judges and other Judges of the Court shall receive salary, annual allowances and travelling allowances at such respective rates as are fixed from time to time by the Parliament.
- (2) The salary and annual allowances of the Judges accrue from day to day and are payable monthly.
- (3) The Consolidated Revenue Fund is appropriated to the extent necessary for payment of salaries and annual allowances in accordance with this section.

26 Oath or affirmation of allegiance and office

A Judge shall, before proceeding to discharge the duties of the office, take, before the Chief Justice or a Justice of the High Court of Australia or a Judge of the Family Court or of another court created by the Parliament, an oath or affirmation of allegiance in the form in the Schedule to the Constitution, and also an oath or affirmation in the following form:

“I, _____, do swear that I will well and truly serve in the office of (*Chief Judge, Deputy Chief Judge, Judge Administrator, Senior Judge or Judge*, as the case may be) of the Family Court of Australia and that I will do right to all manner of people according to law, without fear or favour, affection or ill-will, So help me God.”

or

“I, _____, do solemnly and sincerely promise and declare that _____” (*as above, omitting the words “So help me God”*).

Division 4—Judicial Registrars

26A Judicial Registrars

The Governor-General may appoint one or more Judicial Registrars of the Court.

26B Powers of Judicial Registrars

(1) The Judges, or a majority of them, may make Rules of Court delegating to the Judicial Registrars all or any of the powers of the Court except the power to make an excluded child order (as defined in subsection (1A)) and the power to make an order setting aside a registered award under section 19G.

(1A) An *excluded child order* is:

- (a) a residence order; or
- (b) a contact order; or
- (c) a specific issues order conferring responsibility for the long-term or day-to-day care, welfare and development of a child; or
- (d) an order in relation to the welfare of a child;

other than:

- (e) a parenting order made under paragraph 70NG(1)(b) or an order made under paragraph 70NJ(3)(c) that has the same effect as such a parenting order; or
- (f) an order until further order; or
- (g) an order made in undefended proceedings; or
- (h) an order made with the consent of all the parties to the proceedings.

(2) Without limiting the generality of subsection (1), the Judges, or a majority of them, may make Rules of Court under that subsection:

- (a) delegating to the Judicial Registrars all or any of the powers of the Court that could be delegated to the Registrars of the Court; and

- (b) delegating to the Judicial Registrars powers of the Court by reference to powers of the Court that have been delegated to the Registrars of the Court under section 37A.
- (3) A power delegated to the Judicial Registrars shall, when exercised by a Judicial Registrar, be deemed to have been exercised by the Court or a Judge, as the case requires.
- (4) The delegation of a power to the Judicial Registrars does not prevent the exercise of the power by the Court or a Judge.
- (5) The provisions of this Act, the regulations and the standard Rules of Court, and other laws of the Commonwealth, that relate to the exercise by the Court of a power that is, under a delegation made under subsection (1), exercisable by a Judicial Registrar, apply in relation to an exercise of the power by a Judicial Registrar as if references to the Court, or to a court exercising jurisdiction under this Act, were references to a Judicial Registrar.
- (6) The Judicial Registrars shall have, in addition to the powers delegated to them under subsection (1), such other powers (if any) as are conferred on them by this Act, the regulations and the standard Rules of Court.

Note: Powers to make Rules of Court are also contained in sections 37A, 109A and 123.

26C Review of decisions of Judicial Registrars

- (1) A party to proceedings in which a Judicial Registrar has exercised a power delegated under subsection 26B(1) may, within the time prescribed by, or within such further time as is allowed in accordance with, Rules of Court made by the Judges or a majority of them, apply to the Court to review the exercise of the power.
- (2) The Court may, on application made under subsection (1) or of its own motion, review the exercise by a Judicial Registrar of a power delegated under subsection 26B(1), and may make such orders as it considers appropriate in relation to the matter in relation to which the power was exercised.
- (3) The Court may, on the application of a party or of its own motion, refer an application under subsection (1) to a Full Court of the Court.

Section 26D

26D Exercise of delegated powers by Court

- (1) Where:
 - (a) an application for the exercise of a power delegated under subsection 26B(1) is to be, or is being, heard by a Judicial Registrar; and
 - (b) the Judicial Registrar considers that it is not appropriate for the application to be determined by a Judicial Registrar;the Judicial Registrar shall not hear, or continue to hear, the application, and shall make appropriate arrangements for the application to be heard by the Court.
- (2) Where:
 - (a) a power delegated under subsection 26B(1) is proposed to be exercised in a particular case by a Judicial Registrar; but
 - (b) the Judicial Registrar has not commenced to exercise the power in that case;a Judge may, on application by a person who would be a party to the proceedings before the Judicial Registrar in relation to the proposed exercise of the power, order that the power be exercised in that case by a Judge.
- (3) Where an application is made to a Judge under subsection (2) seeking an order that, in a particular case, a power be exercised by a Judge, the Judicial Registrar shall not commence to exercise the power in that case until the application has been determined.

26E Rules of Court disallowable etc.

Sections 48, 48A, 48B, 49 and 50 of the *Acts Interpretation Act 1901* apply in relation to Rules of Court made under sections 26B and 26C as if references to regulations were references to the Rules of Court.

26F Independence of Judicial Registrars

Notwithstanding any provision of this Act or any other law, a Judicial Registrar is not subject to the direction or control of any person or body in the exercise of a power delegated under subsection 26B(1).

26G Judicial Registrars hold office on full time or part time basis

A Judicial Registrar may be appointed on a full time or part time basis.

26H Qualifications for appointment etc.

- (1) A person shall not be appointed as a Judicial Registrar unless:
 - (a) the person is or has been a Judge of a court created by the Parliament or of a court of a State or the Northern Territory or has been enrolled as a legal practitioner of the High Court or of the Supreme Court of a State or Territory for not less than 5 years; and
 - (b) the person is, by reason of training, experience and personality, a suitable person to deal with matters of family law.

26I Term of office

- (1) A Judicial Registrar:
 - (a) shall be appointed with effect from the day specified in the instrument of appointment; and
 - (b) holds office, subject to this Act:
 - (i) for such term (not exceeding 7 years) as is specified in the instrument of appointment, but is eligible for re-appointment; or
 - (ii) if the instrument of appointment so provides, until attaining 65 years of age, but is eligible for re-appointment.

26J Remuneration and allowances

- (1) A Judicial Registrar shall be paid such remuneration as is determined by the Remuneration Tribunal.
- (2) A Judicial Registrar shall be paid such allowances as are prescribed.
- (3) This section has effect subject to the *Remuneration Tribunal Act 1973*.

Section 26JA

26JA Leave of absence

- (1) A person appointed as a full-time Judicial Registrar has such recreation leave entitlements as are determined by the Remuneration Tribunal.
- (2) The Chief Judge may grant a person appointed as a full-time Judicial Registrar leave of absence, other than recreation leave, on such terms and conditions as to remuneration or otherwise as the Chief Judge, with the approval of the Attorney-General, determines.

26K Resignation

- (1) A Judicial Registrar may resign office by writing under his or her hand addressed to the Governor-General.
- (2) The resignation takes effect on:
 - (a) the day on which it is received by the Governor-General; or
 - (b) a later day specified in the resignation document.

26L Termination of appointment

- (1) The Governor-General may terminate the appointment of a Judicial Registrar for misbehaviour or physical or mental incapacity.
- (2) The Governor-General shall terminate the appointment of a Judicial Registrar if the Judicial Registrar becomes bankrupt, applies to take the benefit of a law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefit.

26M Oath or affirmation of office

A Judicial Registrar shall, before proceeding to discharge the duties of the office, take, before the Chief Judge or another Judge of the Family Court, an oath or affirmation in the following form:

“I, _____, do swear that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Her Heirs and Successors according to law and that I will well and truly

serve Her in the office of Judicial Registrar of the Family Court of Australia, So help me God.”

or

“I, _____, do solemnly and sincerely promise and declare that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Her Heirs and Successors according to law and that I will well and truly serve Her in the office of Judicial Registrar of the Family Court of Australia.”

26N Terms and conditions of appointment not provided for by Act

A Judicial Registrar holds office on such terms and conditions (if any) in relation to matters not provided by this Act as are determined, in writing, by the Governor-General.

Division 5—Jurisdiction and exercise of jurisdiction

27 Place of sitting

- (1) Sittings of the Court must be held from time to time as required and the Court may sit at any place in Australia.
- (2) The Court, in respect of proceedings, may be constituted by 2 or more Judges sitting at the same time, but in different places in Australia, using video link, audio link or other appropriate means to facilitate the Court sitting (*split court*).

Note: Section 21B provides for the Chief Judge to make arrangements for the constitution of the Court for particular matters.

- (3) For the purpose of determining which law to apply in proceedings in which a split court is sitting, the Court is taken to be sitting at the place at which the presiding Judge is sitting.

28 Exercise of jurisdiction

- (1) The original jurisdiction of the Court may be exercised by one or more Judges.
- (2) The jurisdiction of the Court in an appeal from a court of summary jurisdiction may be exercised by one Judge or by a Full Court.
- (2A) Nothing in this Act prevents a Judge who is a member of the Appeal Division from exercising the jurisdiction of the Court that, under subsection (1) or (2), may be exercised by one or more Judges.
- (3) The jurisdiction of the Court in an appeal from a Judge of the Court or of the Supreme Court of a State or Territory shall be exercised by a Full Court.
- (3A) The jurisdiction of the Court to hear and determine a case stated under section 94A shall be exercised by a Full Court.
- (4) Where, after a Full Court (including a Full Court constituted in accordance with this subsection) has commenced the hearing, or further hearing, of proceedings and before the proceedings have

been determined, one of the Judges constituting the Full Court dies, resigns his or her office, ceases to be a member of the Court by reason that the term of his or her appointment expires or otherwise becomes unable to continue as a member of the Full Court for the purposes of the proceedings, then the hearing and determination, or the determination, of the proceedings may be completed:

- (a) if only 2 Judges remain and one of those Judges is assigned to the Appeal Division, or if more than 2 Judges remain and a majority of those Judges are assigned to the Appeal Division—by the Court constituted by the remaining Judges; or
 - (b) with the consent of the parties—by the Court constituted by the remaining Judge or Judges and an additional Judge or Judges, where a majority of the Judges constituting the Court are assigned to the Appeal Division.
- (5) A Full Court constituted in accordance with subsection (4) may have regard to any evidence given or received, and arguments adduced, by or before the Full Court as previously constituted.
- (6) The Court constituted by one or more Judges may sit and exercise the jurisdiction of the Court notwithstanding that the Court constituted by one or more other Judges is at the same time sitting and exercising the jurisdiction of the Court.

30 Court divided in opinion

If the Judges constituting the Court for the purposes of any proceedings are divided in opinion as to the judgment to be pronounced, judgment shall be pronounced according to the opinion of the majority, if there is a majority, but, if the Judges are equally divided in opinion:

- (a) in the case of an appeal from a judgment of the Family Court constituted by a single Judge, or of a Family Court of a State or the Supreme Court of a State or Territory—the judgment appealed from shall be affirmed; and
- (b) in any other case—the opinion of the Chief Judge or, if he is not one of the Judges constituting the Court, the opinion of the most senior of those Judges, shall prevail.

Section 31

31 Original jurisdiction of Family Court

- (1) Jurisdiction is conferred on the Family Court with respect to:
- (a) matters arising under this Act or under the repealed Act in respect of which matrimonial causes are instituted or continued under this Act;
 - (b) matters arising under the *Marriage Act 1961* in respect of which proceedings (other than proceedings under Part VII of that Act) are instituted or continued under that Act;
 - (c) matters arising under a law of a Territory (other than the Northern Territory) concerning:
 - (i) the adoption of children;
 - (iv) the property of the parties to a marriage or either of them, being matters arising between those parties other than matters referred to in the definition of *matrimonial cause* in subsection 4(1); or
 - (v) the rights and status of a person who is an ex-nuptial child, and the relationship of such a person to his parents; and
 - (d) matters (other than matters referred to in any of the preceding paragraphs) with respect to which proceedings may be instituted in the Family Court under this Act or any other Act.
- (2) Subject to such restrictions and conditions (if any) as are contained in the regulations or the standard Rules of Court, the jurisdiction of the Family Court may be exercised in relation to persons or things outside Australia and the Territories.

Note: Division 4 of Part XIII AA (International protection of children) may affect the jurisdiction of the Court.

33 Jurisdiction in associated matters

To the extent that the Constitution permits, jurisdiction is conferred on the Court in respect of matters not otherwise within the jurisdiction expressed by this Act or any law to be conferred on the Court that are associated with matters (including matters before the Court upon an appeal) in which the jurisdiction of the Court is invoked or that arise in proceedings (including proceedings upon an appeal) before the Court.

33A Proceedings not to be instituted in the Family Court if an associated matter is before the Federal Magistrates Court

- (1) Proceedings must not be instituted in the Family Court in respect of a matter if:
 - (a) the Federal Magistrates Court has jurisdiction in that matter; and
 - (b) proceedings in respect of an associated matter are pending in the Federal Magistrates Court.
- (2) Subsection (1) does not apply to:
 - (a) proceedings for a decree of dissolution of marriage; or
 - (b) proceedings instituted in the Family Court under Division 13A of Part VII or under Part XIII or XIII A.
- (3) If:
 - (a) proceedings are instituted in the Family Court in contravention of subsection (1); and
 - (b) the proceedings are subsequently transferred to the Federal Magistrates Court;the proceedings are taken to be as valid as they would have been if subsection (1) had not been enacted.

33B Discretionary transfer of proceedings to the Federal Magistrates Court

- (1) If a proceeding is pending in the Family Court, the Family Court may, by order, transfer the proceeding from the Family Court to the Federal Magistrates Court.
- (2) The Family Court may transfer a proceeding under subsection (1):
 - (a) on the application of a party to the proceeding; or
 - (b) on its own initiative.
- (3) The standard Rules of Court may make provision in relation to the transfer of proceedings to the Federal Magistrates Court under subsection (1).
- (4) In particular, the standard Rules of Court may set out factors that are to be taken into account by the Family Court in deciding

Section 33B

whether to transfer a proceeding to the Federal Magistrates Court under subsection (1).

- (5) Before standard Rules of Court are made for the purposes of subsection (3) or (4), the Family Court must consult the Federal Magistrates Court.
- (6) In deciding whether to transfer a proceeding to the Federal Magistrates Court under subsection (1), the Family Court must have regard to:
 - (a) any standard Rules of Court made for the purposes of subsection (4); and
 - (b) whether proceedings in respect of an associated matter are pending in the Federal Magistrates Court; and
 - (c) whether the resources of the Federal Magistrates Court are sufficient to hear and determine the proceeding; and
 - (d) the interests of the administration of justice.
- (7) If an order is made under subsection (1), the Family Court may make such orders as it considers necessary pending the disposal of the proceeding by the Federal Magistrates Court.
- (8) An appeal does not lie from a decision of the Family Court in relation to the transfer of a proceeding under subsection (1).
- (9) The reference in subsection (1) to a proceeding pending in the Family Court includes a reference to a proceeding that was instituted in contravention of section 33A.
- (10) This section does not apply to proceedings of a kind specified in the regulations.

33C Mandatory transfer of proceedings to the Federal Magistrates Court

- (1) If a proceeding of a kind specified in regulations made for the purposes of this subsection is pending in the Family Court, the Family Court must, before going on to hear and determine the proceeding, transfer the proceeding to the Federal Magistrates Court.
- (2) If a proceeding is transferred under subsection (1), the Family Court may make such orders as it considers necessary pending the disposal of the proceedings by the Federal Magistrates Court.
- (3) An appeal does not lie from a decision of the Family Court in relation to the transfer of a proceeding under subsection (1).
- (4) The reference in subsection (1) to a proceeding pending in the Family Court includes a reference to a proceeding that was instituted in contravention of section 33A.
- (5) The Minister must cause a copy of regulations (*transfer regulations*) made for the purposes of subsection (1) to be tabled in each House of the Parliament.
- (6) Either House may, following a motion upon notice, pass a resolution disallowing the transfer regulations. To be effective, the resolution must be passed within 15 sittings days of the House after the copy of the transfer regulations was tabled in the House.
- (7) If neither House passes such a resolution, the transfer regulations take effect on the day immediately after the last day upon which such a resolution could have been passed.
- (8) Subsections (5), (6) and (7) have effect despite anything in:
 - (a) the *Acts Interpretation Act 1901*; or
 - (b) the *Legislative Instruments Act 1999*.

34 Issue of certain writs etc.

- (1) The Court has power, in relation to matters in which it has jurisdiction, to make orders of such kinds, and to issue, or direct the issue of, writs of such kinds, as the Court considers appropriate.

Section 35

35 Contempt of court

Subject to this and any other Act, the Family Court has the same power to punish contempts of its power and authority as is possessed by the High Court in respect of contempts of the High Court.

Division 6—Registries and officers

36 Registries

- (1) The Governor-General shall cause such Registries of the Court to be established as the Governor-General thinks fit.
- (2) Unless and until the regulations otherwise provide, the Principal Registry shall be located in Sydney.

37 Officers of Court

- (1) In relation to a proceeding under this Act, the officers of the Court have such duties, powers and functions as are given by this Act or the standard Rules of Court or by the Chief Judge.
- (2) The Principal Registrar of the Court may, subject to this Act, the regulations, the standard Rules of Court and any directions of the Chief Judge, give directions to the officers of the Court (other than the court counsellors) in relation to the manner in which the functions and duties of those officers are to be performed and the powers of those officers are to be exercised in relation to proceedings under this Act.

37A Delegation of powers to Registrars

- (1) The Judges, or a majority of them, may, subject to subsection (2), make Rules of Court delegating to the Registrars all or any of the powers of the Court, including, without limiting the generality of the foregoing, all or any of the following powers of the Court:
 - (a) the power to dispense with the service of any process under this Act;
 - (b) the power to make orders in relation to substituted service;
 - (c) the power, in proceedings under this Act, to make orders in relation to discovery, inspection and production of documents in the possession, power or custody of a party to the proceedings or of any other person;
 - (d) the power, in proceedings under this Act, to direct a party to the proceedings to answer particular questions;

Section 37A

- (e) the power to direct the parties to proceedings under this Act to attend conferences conducted by court counsellors or welfare officers;
 - (f) the power, in proceedings under this Act, to make:
 - (i) an order under section 66Q, 67E or 77; or
 - (ii) an order for the payment of maintenance pending the disposal of the proceedings;
 - (g) the power to make, in proceedings under this Act, an order the terms of which have been agreed upon by all the parties to the proceedings;
 - (h) the power, in proceedings under this Act, to make an order adjourning the hearing of the proceedings;
 - (j) the power under section 117 to make an order as to costs;
 - (m) the power to make an order exempting a party to proceedings under this Act from compliance with a provision of the regulations or Rules of Court.
- (2) The powers of the Court that may be delegated under subsection (1) do not include the power to make:
- (a) a decree of dissolution of marriage in proceedings that are defended; or
 - (b) a decree of nullity of marriage; or
 - (c) a declaration as to the validity of a marriage or the dissolution or annulment of a marriage; or
 - (d) an excluded child order (as defined in subsection (2A)); or
 - (e) an order setting aside a registered award under section 19G.
- (2A) An *excluded child order* is:
- (a) a residence order; or
 - (b) a contact order; or
 - (c) a specific issues order conferring responsibility for the long-term or day-to-day care, welfare and development of a child; or
 - (d) an order in relation to the welfare of a child;
- other than an order until further order, an order made in undefended proceedings or an order made with the consent of all the parties to the proceedings.

- (3) A power delegated by applicable Rules of Court under subsection (1), when exercised by a Registrar, shall, for all purposes, be deemed to have been exercised by the Court or a Judge, as the case requires.
- (4) The delegation of a power by applicable Rules of Court under subsection (1) does not prevent the exercise of the power by the Court or a Judge.
- (5) If the power referred to in paragraph (1)(f) is delegated under subsection (1), a Registrar shall not exercise the power on application by a party to proceedings under this Act unless:
 - (a) the other party to the proceedings appears at the hearing of the application; or
 - (b) the Registrar is satisfied that notice of the intention of the first-mentioned party to make the application has been served on the other party.
- (6) If the power referred to in paragraph (1)(j) is delegated under subsection (1), a Registrar shall not exercise the power except in relation to costs of or in connection with an application heard by a Registrar.
- (7) The provisions of this Act, the regulations, the standard Rules of Court, and other laws of the Commonwealth, that relate to the exercise by the Court of a power that is, by virtue of a delegation under subsection (1), exercisable by a Registrar apply in relation to an exercise of the power by a Registrar under the delegation as if references in those provisions to the Court or to a court exercising jurisdiction under this Act were references to a Registrar.
- (8) Notwithstanding any other provision of this Act and any provision of the *Public Service Act 1999* or of any other law, a Registrar is not subject to the direction or control of any person or body in relation to the manner in which he or she exercises powers pursuant to a delegation under subsection (1).
- (9) A party to proceedings in which a Registrar has exercised any of the powers of the Court pursuant to a delegation under subsection (1) may, within the time prescribed by, or within such further time as is allowed in accordance with, applicable Rules of

Section 37A

Court made by the Judges or a majority of them for the purposes of this subsection, apply to the Court to review that exercise of power.

- (10) The Court may, on application under subsection (9) or of its own motion, review an exercise of power by a Registrar pursuant to a delegation under this section and may make such order or orders as it considers appropriate with respect to the matter with respect to which the power was exercised.
- (11) Where:
- (a) an application for the exercise of a power delegated under subsection (1) is to be, or is being, heard by a Registrar; and
 - (b) the Registrar considers that it is not appropriate for the application to be determined by a Registrar acting under the delegation;
- the Registrar shall not hear, or continue to hear, the application and shall make appropriate arrangements for the application to be heard by the Court.
- (12) Where:
- (a) a power delegated under subsection (1) is proposed to be exercised in a particular case by a Registrar; but
 - (b) the Registrar has not commenced to exercise the power in that case;
- a Judge may, on application by a person who would be a party to the proceedings before the Registrar in relation to the proposed exercise of the power, order that the power be exercised in that case by a Judge.
- (13) Where an application is made to a Judge under subsection (12) seeking an order that, in a particular case, a power be exercised by a Judge, the Registrar shall not commence to exercise the power in that case until the application has been determined.
- (14) Sections 48, 48A, 48B, 49 and 50 of the *Acts Interpretation Act 1901* apply in relation to Rules of Court made under this section as if references in those sections of that Act to regulations were references to such Rules of Court.
- (15) In this section, **Registrar** means the Principal Registrar, a Registrar or a Deputy Registrar of the Court.

Note: Powers to make Rules of Court are also contained in sections 26B, 109A and 123.

37B Independence of Registrars

- (1) Notwithstanding any provision of this Act other than subsection (3), and any provision of the *Public Service Act 1999* or any other law, in the performance of a function or the exercise of a power under this Act, under the regulations or under the standard Rules of Court (other than a power delegated by standard Rules of Court under subsection 37A(1)):
 - (a) the Principal Registrar is subject to the direction and control of the Chief Judge and is not subject to the direction or control of any other person or body;
 - (b) a Registrar is subject to the direction and control of:
 - (i) the Chief Judge;
 - (ii) any other Judge authorized by the Chief Judge to direct and control that Registrar; and
 - (iii) the Principal Registrar;and is not subject to the direction or control of any other person or body; and
 - (c) a Deputy Registrar is subject to the direction and control of:
 - (i) the Chief Judge;
 - (ii) any other Judge authorized by the Chief Judge to direct and control that Deputy Registrar;
 - (iii) the Principal Registrar; and
 - (iv) the Registrars;and is not subject to the direction or control of any other person or body.
- (2) Without limiting the generality of subsection (1), the Principal Registrar may, subject to this Act and to any directions of the Chief Judge, make arrangements as to the Registrars or Deputy Registrars who are to perform any functions or exercise any power under this Act, under the regulations or under the standard Rules of Court (including a power delegated by standard Rules of Court under subsection 37A(1)) in particular matters or classes of matters.

Section 37C

- (3) The powers of the Principal Registrar in relation to the Registrars and the Deputy Registrars, and the powers of the Registrars in relation to the Deputy Registrars, shall be exercised subject to the directions of the Chief Judge.
- (4) An Agency Head (within the meaning of the *Public Service Act 1999*) cannot take action under section 15 of the *Public Service Act 1999* against the Principal Registrar, a Registrar or a Deputy Registrar unless such action is requested by the Chief Judge.
- (5) In this section, **Registrar** means a Registrar of the Court.

37C Oath or affirmation of office

A Principal Registrar, Registrar or Deputy Registrar shall, before proceeding to discharge the duties of the office, take, before the Chief Judge or another Judge of the Family Court, an oath or affirmation in the following form:

“I, _____, do swear that I will well and truly serve in the office of (*Principal Registrar, Registrar or Deputy Registrar*, as the case may be) of the Family Court of Australia and that I will do right to all manner of people according to law, without fear or favour, affection or illwill, So help me God.”

or

“I, _____, do solemnly and sincerely promise and declare that _____” (*as above, omitting the words “So help me God”*).

Division 7—Practice and procedure

38 Practice and procedure

- (1) Subject to this Act, the practice and procedure of the Court shall be in accordance with the regulations and the standard Rules of Court.
- (2) In so far as the provisions applicable in accordance with subsection (1) are insufficient, the Rules of the High Court, as in force for the time being, apply, *mutatis mutandis*, so far as they are capable of application and subject to any directions of the Court or a Judge, to the practice and procedure of the Court.
- (2A) This section does not apply in relation to proceedings that are transferred to the Court from the Federal Court of Australia.
- (3) In this section, ***practice and procedure*** includes all matters with respect to which regulations or standard Rules of Court may be made under this Act.

Part IVA Management of the Court

Division 1 Management responsibilities of the Chief Judge and the Chief Executive Officer

Section 38A

Part IVA—Management of the Court

Division 1—Management responsibilities of the Chief Judge and the Chief Executive Officer

38A Management of administrative affairs of Court

- (1) The Chief Judge is responsible for managing the administrative affairs of the Court.
- (2) For that purpose, the Chief Judge has power to do all things that are necessary or convenient to be done, including, on behalf of the Commonwealth:
 - (a) entering into contracts; and
 - (b) acquiring or disposing of personal property.
- (3) The powers given to the Chief Judge by subsection (2) are in addition to any powers given to the Chief Judge by any other provision of this Act or by any other Act.
- (4) Subsection (2) does not authorise the Chief Judge to:
 - (a) acquire any interest or right that would constitute an interest in land for the purposes of the *Lands Acquisition Act 1989*; or
 - (b) enter into a contract under which the Commonwealth is to pay or receive an amount exceeding \$250,000 or, if a higher amount is prescribed, that higher amount, except with the approval of the Attorney-General.

38B Chief Executive Officer

In the management of the administrative affairs of the Court, the Chief Judge is assisted by a Chief Executive Officer.

Division 2—Appointment, powers etc. of Chief Executive Officer

38C Appointment of Chief Executive Officer

The Chief Executive Officer is appointed by the Governor-General on the nomination of the Chief Judge.

38D Powers of Chief Executive Officer

- (1) The Chief Executive Officer has power to do all things necessary or convenient to be done for the purpose of assisting the Chief Judge under section 38B.
- (2) In particular, the Chief Executive Officer may act on behalf of the Chief Judge in relation to the administrative affairs of the Court.
- (3) The Chief Judge may give the Chief Executive Officer directions regarding the exercise of his or her powers.

38E Remuneration of Chief Executive Officer

- (1) The Chief Executive Officer is to be paid the remuneration and allowances determined by the Remuneration Tribunal.
- (2) If there is no determination in force, the Chief Executive Officer is to be paid such remuneration as is prescribed.
- (3) The Chief Executive Officer is to be paid such other allowances as are prescribed.
- (4) Remuneration and allowances payable to the Chief Executive Officer under this section are to be paid out of money appropriated by the Parliament for the purposes of the Court.

Section 38F

38F Terms and conditions of appointment of Chief Executive Officer

- (1) The Chief Executive Officer holds office for the period (not longer than 5 years) specified in the instrument of his or her appointment, but is eligible for re-appointment.
- (4) The Chief Executive Officer holds office on such terms and conditions (if any) in respect of matters not provided for by this Act as are determined by the Chief Judge.

38G Leave of absence

- (1) The Chief Executive Officer has such recreation leave entitlements as are determined by the Remuneration Tribunal.
- (2) The Chief Judge may grant the Chief Executive Officer leave of absence, other than recreation leave, on such terms and conditions as to remuneration or otherwise as the Chief Judge, with the approval of the Attorney-General, determines.

38H Resignation

The Chief Executive Officer may resign by giving a signed notice of resignation to the Governor-General.

38J Outside employment of Chief Executive Officer

- (1) Except with the consent of the Chief Judge, the Chief Executive Officer must not engage in paid employment outside the duties of his or her office.
- (2) The reference in subsection (1) to paid employment does not include service in the Defence Force.

38K Termination of appointment

- (1) The Governor-General may terminate the appointment of the Chief Executive Officer for misbehaviour or physical or mental incapacity.

- (2) The Governor-General is required to terminate the appointment of the Chief Executive Officer if he or she:
- (a) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with creditors or makes an assignment of remuneration for their benefit; or
 - (b) is absent from duty, except on leave of absence, for 14 consecutive days or for 28 days in any 12 months; or
 - (c) engages in paid employment contrary to section 38J; or
 - (d) fails, without reasonable excuse, to comply with section 38L.
- (3) The Governor-General may, with the consent of the Chief Executive Officer who is:
- (a) an eligible employee for the purposes of the *Superannuation Act 1976*; or
 - (b) a member of the superannuation scheme established by deed under the *Superannuation Act 1990*;
- retire the Chief Executive Officer from office on the ground of incapacity.
- (4) In spite of anything contained in this section, if the Chief Executive Officer:
- (a) is an eligible employee for the purposes of the *Superannuation Act 1976*; and
 - (b) has not reached his or her maximum retiring age within the meaning of that Act;
- he or she is not capable of being retired from office on the ground of invalidity within the meaning of Part IVA of that Act unless the Commonwealth Superannuation Board of Trustees No. 2 has given a certificate under section 54C of that Act.
- (5) In spite of anything contained in this section, if the Chief Executive Officer:
- (a) is a member of the superannuation scheme established by deed under the *Superannuation Act 1990*; and
 - (b) is under 60 years of age;
- he or she is not capable of being retired from office on the ground of invalidity within the meaning of that Act unless the Commonwealth Superannuation Board of Trustees No. 1 has given a certificate under section 13 of that Act.
-

Section 38L

38L Disclosure of interests by Chief Executive Officer

The Chief Executive Officer must give written notice to the Chief Judge of all direct or indirect pecuniary interests that the Chief Executive Officer has or acquires in any business or in any body corporate carrying on a business.

38M Acting Chief Executive Officer

- (1) The Chief Judge may, in writing, appoint a person to act in the office of Chief Executive Officer:
 - (a) during a vacancy in the office (whether or not an appointment has previously been made to the office); or
 - (b) during any period, or during all periods, when the Chief Executive Officer is absent from duty or from Australia or is, for any other reason, unable to perform the duties of the office.
- (2) A person appointed to act in the office of Chief Executive Officer during a vacancy may not continue to act in that office for more than 12 months.
- (3) Anything done by or in relation to a person purporting to act under subsection (1) is not invalid on the ground that:
 - (a) the occasion for the appointment had not arisen; or
 - (b) there was a defect or irregularity in connection with the appointment; or
 - (c) the appointment had ceased to have effect; or
 - (d) the occasion for the person to act had not arisen or had ceased.

Division 3—Other officers and staff of Registries

38N Personnel other than the Chief Executive Officer

- (1) In addition to the Chief Executive Officer, there are the following officers of the Court:
 - (a) a Principal Registrar of the Court;
 - (b) such Registrars and Deputy Registrars of the Court as are necessary;
 - (c) such Registry Managers of the Court as are necessary;
 - (d) such court counsellors as are necessary;
 - (da) a Principal Mediator;
 - (daa) such Managers Mediation as are necessary;
 - (db) such mediators as are necessary;
 - (e) the Marshal of the Court;
 - (f) such Deputy Marshals of the Court as are necessary.
- (2) The officers of the Court, other than the Chief Executive Officer, have such duties, powers and functions as are given to them by this Act, by the standard Rules of Court or by the Chief Judge.
- (3) The officers of the Court are appointed by the Chief Executive Officer.
- (4) The officers of the Court, other than the Chief Executive Officer and the Deputy Marshals, are to be persons engaged under the *Public Service Act 1999*.
- (5) The Deputy Marshals may be persons engaged under the *Public Service Act 1999*.
- (6) The Chief Executive Officer may, on behalf of the Chief Judge, arrange with an Agency Head (within the meaning of the *Public Service Act 1999*), or with an authority of the Commonwealth, for the services of officers or employees of the Department or authority to be made available for the purposes of the Court.
- (7) There are to be such staff of the Registries as are necessary.

Section 38P

- (8) The staff of the Registries is to consist of persons engaged under the *Public Service Act 1999*.

38P Marshal

- (1) The Marshal of the Court is responsible for the service and execution of all process of the Court directed to the Marshal.
- (2) The Marshal is also responsible for:
- (a) dealing, on behalf of the Court, with the Australian Federal Police and the police forces of the States and Territories in relation to the service and execution of process of the Court directed to members of any of those police forces; and
 - (b) the security of the Court and the personal security of the Judges and officers of the Court; and
 - (c) taking, receiving and detaining all persons committed to his or her custody by the Court; and
 - (d) discharging such persons when so directed by the Court or otherwise required by law.
- (3) A Deputy Marshal may, subject to any directions of the Marshal, exercise or perform any of the powers and functions of the Marshal.
- (4) The Marshal or a Deputy Marshal may authorise persons to assist him or her in the exercise of any of his or her powers or the performance of any of his or her functions.

38Q Statutory Agency etc. for purposes of Public Service Act

For the purposes of the *Public Service Act 1999*:

- (a) the Chief Executive Officer and the APS employees assisting the Chief Executive Officer together constitute a Statutory Agency; and
- (b) the Chief Executive Officer is the Head of that Statutory Agency.

38R Engagement of consultants etc.

- (1) The Chief Executive Officer may engage persons having suitable qualifications and experience as consultants to, or to perform services for, the Chief Executive Officer.
- (2) An engagement under subsection (1) is to be made:
 - (a) on behalf of the Commonwealth; and
 - (b) by written agreement.

Division 4—Miscellaneous administrative matters

38S Annual report

- (1) As soon as practicable after 30 June in each year, the Chief Judge must prepare and give to the Attorney-General a report of the management of the administrative affairs of the Court during the year.
- (2) The report must include:
 - (a) the financial statements required by section 49 of the *Financial Management and Accountability Act 1997*; and
 - (b) an audit report on those statements under section 57 of the *Financial Management and Accountability Act 1997*.
- (3) The Attorney-General must cause a copy of the report to be tabled in each House of the Parliament as soon as practicable.

38W Delegation of administrative powers of Chief Judge

The Chief Judge may, in writing, delegate all or any of his or her powers under section 38A to any one or more of the Judges.

38X Proceedings arising out of administration of Court

Any judicial or other proceeding relating to a matter arising out of the management of the administrative affairs of the Court under this Part, including any proceeding relating to anything done by the Chief Executive Officer under this Part, may be instituted by or against the Commonwealth, as the case requires.

Part V—Jurisdiction in matrimonial causes

39 Jurisdiction in matrimonial causes

- (1) Subject to this Part, a matrimonial cause may be instituted under this Act:
 - (a) in the Family Court; or
 - (b) in the Supreme Court of a State or a Territory.
- (1A) Subject to this Part, a matrimonial cause (other than proceedings of a kind referred to in subparagraph (a)(ii) or paragraph (b) of the definition of *matrimonial cause* in subsection 4(1)) may be instituted under this Act in the Federal Magistrates Court.
- (2) Subject to this Part, a matrimonial cause (other than proceedings of a kind referred to in subparagraph (a)(ii) or paragraph (b) of the definition of *matrimonial cause* in subsection 4(1)) may be instituted under this Act in a Court of summary jurisdiction of a State or Territory.
- (3) Proceedings for a decree of dissolution of marriage may be instituted under this Act if, at the date on which the application for the decree is filed in a court, either party to the marriage:
 - (a) is an Australian citizen;
 - (b) is domiciled in Australia; or
 - (c) is ordinarily resident in Australia and has been so resident for 1 year immediately preceding that date.
- (4) Proceedings of a kind referred to in the definition of *matrimonial cause* in subsection 4(1), other than proceedings for a decree of dissolution of marriage or proceedings referred to in paragraph (f) of that definition, may be instituted under this Act if:
 - (a) in the case of proceedings between the parties to a marriage or proceedings of a kind referred to in paragraph (b) of that definition in relation to a marriage—either party to the marriage is an Australian citizen, is ordinarily resident in Australia, or is present in Australia, at the relevant date; and

Section 39

- (b) in any other case—any party to the proceedings is an Australian citizen, is ordinarily resident in Australia, or is present in Australia, at the relevant date.
- (4A) In subsection (4), *relevant date*, in relation to proceedings, means:
- (a) if the application instituting the proceedings is filed in a court—the date on which the application is so filed; or
 - (b) in any other case—the date on which the application instituting the proceedings is made.
- (5) Subject to this Part, the Supreme Court of each State is invested with federal jurisdiction, and jurisdiction is conferred on the Family Court and on the Supreme Court of each Territory, with respect to matters arising under this Act in respect of which:
- (a) matrimonial causes are instituted under this Act; or
 - (b) matrimonial causes are continued in accordance with section 9; or
 - (d) proceedings are instituted under regulations made for the purposes of section 109, 110, 111, 111A or 111B or of paragraph 125(1)(f) or (g) or under Rules of Court made for the purposes of paragraph 123(1)(r); or
 - (da) proceedings are instituted under Division 4 of Part XIII AA or under regulations made for the purposes of section 111CZ; or
 - (e) proceedings are instituted under section 117A.
- (5AA) Subject to this Part, the Federal Magistrates Court has, and is taken always to have had, jurisdiction with respect to matters arising under this Act in respect of which matrimonial causes (other than proceedings of a kind referred to in subparagraph (a)(ii) or paragraph (b) of the definition of *matrimonial cause* in subsection 4(1)) are instituted under this Act.
- (5A) Subject to this Part, the Federal Magistrates Court has jurisdiction with respect to matters arising under this Act in respect of which proceedings are instituted under:
- (a) regulations made for the purposes of section 109, 110, 111, 111A or 111B; or
 - (b) regulations made for the purposes of paragraph 125(1)(f) or (g); or
 - (c) section 117A; or

- (d) proceedings are instituted under Division 4 of Part XIII AA or under regulations made for the purposes of section 111CZ.
- (6) Subject to this Part, each court of summary jurisdiction of each State is invested with federal jurisdiction, and jurisdiction is conferred on each court of summary jurisdiction of each Territory, with respect to matters arising under this Act in respect of which:
 - (a) matrimonial causes (other than proceedings of a kind referred to in subparagraph (a)(ii) or paragraph (b) of the definition of **matrimonial cause** in subsection 4(1)) are instituted under this Act; or
 - (b) matrimonial causes (other than proceedings of a kind referred to in subparagraph (a)(ii) or paragraph (b) of the definition of **matrimonial cause** in subsection 4(1)) are continued in accordance with section 9; or
 - (d) proceedings are instituted under:
 - (i) regulations made for the purposes of section 109, 110, 111, 111A or 111B; or
 - (ii) regulations made for the purposes of paragraph 125(1)(f) or (g); or
 - (iii) standard Rules of Court made for the purposes of paragraph 123(1)(r); or
 - (iv) Rules of Court made for the purposes of paragraph 87(1)(j) of the *Federal Magistrates Act 1999*; or
 - (da) proceedings are instituted under Division 4 of Part XIII AA or under regulations made for the purposes of section 111CZ; or
 - (e) proceedings are instituted under section 117A.
- (7) The Governor-General may, by Proclamation, fix a date as the date on and after which matrimonial causes, and other proceedings, referred to in subsection (6) may not be instituted in or transferred to a court of summary jurisdiction in a State or Territory specified in the Proclamation, and such a Proclamation may be expressed to apply only to proceedings of a specified class or specified classes and may be expressed to apply only to the institution of proceedings in, or the transfer of proceedings to, a court of summary jurisdiction in a part of a State or Territory specified in the Proclamation.

Section 40

- (7AA) A court of summary jurisdiction in a State or Territory shall not hear or determine proceedings under this Act instituted in or transferred to that court otherwise than in accordance with any Proclamation in force under subsection (7).
- (7A) The Governor-General may, by Proclamation, declare that a Proclamation made under subsection (7) is revoked on and from a specified date and, on and after the specified date, this Act (including subsection (7)) has effect as if the revoked Proclamation had not been made, but without prejudice to the effect of the revoked Proclamation in respect of the jurisdiction of courts before the specified date.
- (8) Jurisdiction with respect to a matter arising under this Act in respect of which a matrimonial cause is instituted under this Act is not conferred on a court of a Territory unless at least one of the parties to the proceedings is, at the date of the institution of the proceedings or the date of the transfer of the proceedings to the court of the Territory, ordinarily resident in the Territory.
- (9) The jurisdiction conferred on or invested in a court by this section includes jurisdiction with respect to matters arising under any law of the Commonwealth in respect of which proceedings are transferred to that court in accordance with this Act.

40 Jurisdiction of Family Court

- (1) The jurisdiction of the Family Court under this Act shall not be exercised except in accordance with Proclamations under this section.
- (2) The Governor-General may, by Proclamation, fix a date as the date on and after which the jurisdiction of the Family Court under this Act may be exercised in respect of all proceedings, or a class of proceedings, in such States and Territories as are specified in the Proclamation.
- (3) The Governor-General may, by Proclamation, fix a date as the date on and after which matrimonial causes, and other proceedings, referred to in subsection 39(5) may not be instituted in or transferred to the Supreme Court of a State or Territory specified in the Proclamation, or may be so instituted or transferred only where

specified conditions are complied with, and such a Proclamation may be expressed to apply only to proceedings of a specified class or specified classes and may be expressed to apply only to the institution of proceedings in, or the transfer of proceedings to, a particular Registry or Registries of a Supreme Court referred to in the Proclamation.

- (4) The Supreme Court of a State or Territory shall not hear and determine proceedings under this Act instituted in or transferred to that Court otherwise than in accordance with any Proclamation in force under subsection (3), but nothing in this section invalidates a decree made by such a Supreme Court.
- (4A) The Governor-General may, by Proclamation, declare that a Proclamation made under subsection (3) is revoked on and from a specified date and, on and after the specified date, this Act (including subsection (3)) has effect as if the revoked Proclamation had not been made, but without prejudice to the effect of the revoked Proclamation in respect of the jurisdiction of courts before the specified date.
- (5) Proclamations under subsections (2) and (3) may be made from time to time.
- (6) A party to proceedings instituted or continued under this Act that are at any time pending in the Supreme Court of a State or Territory, being proceedings that could, at the date of the application under this subsection, have been instituted in the Family Court, may apply to the Family Court for an order transferring the proceedings to the Family Court, and the Court may order accordingly.
- (7) The standard Rules of Court may make provision in relation to matters arising in or in connexion with the transfer of proceedings in accordance with an order under subsection (6).
- (8) This section does not apply in relation to proceedings under Part VII or in relation to jurisdiction conferred on a federal court or a court of a Territory, or invested in a court of a State, by regulations made for the purposes of section 111C.

Section 40A

40A Exercise of jurisdiction of Federal Magistrates Court in certain States and Territories

The jurisdiction of the Federal Magistrates Court under this Act must not be exercised in respect of a particular proceeding in a particular State or Territory if the corresponding jurisdiction of the Family Court is not capable of being exercised in the State or Territory.

41 Establishment of State Family Courts

- (1) As soon as practicable after the commencement of this Act, the Commonwealth Government shall take steps with a view to the making of agreements with the governments of the States providing for the creation of State courts to be known as Family Courts, being agreements under which the Commonwealth Government will provide the necessary funds for the establishment and administration of those courts (including the provision of counselling facilities for those courts).
 - (2) Where, whether before or after the commencement of this Act, a State has created a court known as a Family Court, the Governor-General may, by Proclamation, declare that, on and after a date specified in the Proclamation, this section applies to that court.
 - (3) Where, by virtue of a Proclamation under subsection (2), this section applies to a court, this Act has effect in relation to the institution of proceedings on or after the date fixed by the Proclamation, and in relation to proceedings so instituted and proceedings transferred to that court in accordance with this Act, as if references in sections 39, 46, 94 and 96 to the Supreme Court of a State were, in relation to the State in which the court referred to in the Proclamation is established, references to that court, and that court is invested with federal jurisdiction accordingly.
- (3A) Notwithstanding the issue of a Proclamation under subsection (2) and the provisions of subsection (3):
- (a) proceedings by way of cross-proceedings in relation to proceedings for principal relief that were pending in the

Supreme Court of the State concerned immediately before the date fixed by the Proclamation; or

(b) proceedings of a kind referred to in any of paragraphs (c) to (f) of the definition of *matrimonial cause* in subsection 4(1) that:

(i) relate to proceedings for principal relief that were pending in the Supreme Court of the State concerned immediately before the date fixed by the Proclamation; or

(ii) are between parties between whom proceedings of a kind referred to in any of paragraphs (c) to (f) of that definition were so pending immediately before that date;

may be instituted, heard and determined in that Supreme Court on or after the date fixed by the Proclamation.

(4) The Governor-General shall not make a Proclamation under this section in respect of a court unless the Governor-General is satisfied that:

(a) arrangements have been made under which Judges will not be appointed to that court except with the approval of the Attorney-General of the Commonwealth;

(b) Judges appointed to that court are by reason of training, experience and personality, suitable persons to deal with matters of family law and cannot hold office beyond the age of 70 years; and

(c) counselling facilities will be available to that court.

(4A) A party to proceedings instituted or continued under this Act that are at any time pending in the Supreme Court of a State or Territory, being proceedings that could, at the date of the application under this subsection, have been instituted in a Family Court of a State, may apply to a Family Court of a State for an order transferring the proceedings to that Court, and the Court may order accordingly.

(5) References in this Act or the standard Rules of Court to a court of summary jurisdiction shall not be read as including references to a court to which this section applies.

Section 42

42 Law to be applied

- (1) The jurisdiction conferred on a court, or with which a court is invested, by this Act shall be exercised in accordance with this Act and the applicable Rules of Court.
- (2) Where it would be in accordance with the common law rules of private international law to apply the laws of any country or place (including a State or Territory), the court shall, subject to the provisions of the *Marriage Act 1961*, apply the laws of that country or place.

Note: Subdivision D of Division 4 of Part XIII AA (Applicable law) may affect the law to be applied by a court.

43 Principles to be applied by courts

The Family Court shall, in the exercise of its jurisdiction under this Act, and any other court exercising jurisdiction under this Act shall, in the exercise of that jurisdiction, have regard to:

- (a) the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life;
- (b) the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while it is responsible for the care and education of dependent children;
- (c) the need to protect the rights of children and to promote their welfare;
- (ca) the need to ensure safety from family violence; and
- (d) the means available for assisting parties to a marriage to consider reconciliation or the improvement of their relationship to each other and to their children.

44 Institution of proceedings

- (1) Except as otherwise prescribed by the regulations or by the applicable Rules of Court, proceedings under this Act shall be instituted by application.

- (1A) Proceedings under this Act for a decree of dissolution of marriage or nullity of marriage may be instituted by either party to the marriage or jointly by both parties to the marriage.
- (1B) An application for dissolution of a marriage shall not, without the leave of the court granted under subsection (1C), be filed within the period of 2 years after the date of the marriage unless there is filed with the application a certificate:
- (a) stating that the parties to the marriage have considered a reconciliation, with the assistance of a specified person or organization, being:
 - (i) a family and child counsellor or an approved counselling organisation; or
 - (ii) another suitable person or organisation nominated by the Principal Mediator or by an appropriate officer of a Family Court of a State; and
 - (b) signed by that person or on behalf of that organisation, as the case may be.
- (1C) Notwithstanding subsection (1B), if the court is satisfied that there are special circumstances by reason of which the hearing of an application for dissolution of a marriage should proceed notwithstanding that the parties have not considered a reconciliation with assistance of the kind referred to in subsection (1B), the court may:
- (a) if the application has not been filed—give leave for the application to be filed; or
 - (b) if the application has been filed—at any time before or during the hearing of the application, declare that it is so satisfied;
- and, where the court makes a declaration under paragraph (b), the application shall be deemed to have been duly filed and everything done pursuant to that application shall be as valid and effectual as if the court had, before the application was filed, given leave under paragraph (a) for the application to be filed.
- (2) Notwithstanding subsections (3) and (3A), a respondent may, in an answer to an application, include an application for any decree or declaration under this Act.

Section 44

(3) Where, whether before or after the commencement of section 21 of the *Family Law Amendment Act 1983*:

(a) a decree *nisi* of dissolution of marriage has become absolute;
or

(b) a decree of nullity of marriage has been made;

proceedings of a kind referred to in paragraph (c) or (ca) of the definition of *matrimonial cause* in subsection 4(1) (not being proceedings under section 78 or 79A or proceedings seeking the discharge, suspension, revival or variation of an order previously made in proceedings with respect to the maintenance of a party) shall not be instituted, except by leave of the court in which the proceedings are to be instituted or with the consent of both of the parties to the marriage, after the expiration of 12 months after:

(c) in a case referred to in paragraph (a)—the date on which the decree *nisi* became absolute; or

(d) in a case referred to in paragraph (b)—the date of the making of the decree.

The court may grant such leave at any time, even if the proceedings have already been instituted.

(3AA) However, if such proceedings are instituted with the consent of both of the parties to the marriage, the court may dismiss the proceedings if it is satisfied that, because the consent was obtained by fraud, duress or unconscionable conduct, allowing the proceedings to continue would amount to a miscarriage of justice.

(3A) Notwithstanding subsection (3), where, whether before or after the commencement of section 21 of the *Family Law Amendment Act 1983*:

(a) a decree *nisi* of dissolution of marriage has become absolute or a decree of nullity of marriage has been made; and

(b) the approval under section 87 of a maintenance agreement between the parties to the marriage has been revoked;

proceedings of a kind referred to in paragraph (c) or (ca) of the definition of *matrimonial cause* in subsection 4(1) (not being proceedings under section 78 or 79A or proceedings seeking the discharge, suspension, revival or variation of an order previously made in proceedings with respect to the maintenance of a party) may be instituted:

(c) within the period of 12 months after:

- (i) the date on which the decree *nisi* became absolute or the date of the making of the decree of nullity, as the case may be; or
 - (ii) the date on which the approval of the maintenance agreement was revoked;
- whichever is the later; or
- (d) with the leave of the court in which the proceedings are to be instituted;
- and not otherwise.
- (3B) Despite subsection (3), if, whether before or after the commencement of Schedule 2 to the *Family Law Amendment Act 2000*:
- (a) a decree nisi of dissolution of marriage has become absolute or a decree of nullity of marriage has been made; and
 - (b) a financial agreement between the parties to the marriage has been set aside under section 90K or found to be invalid under section 90KA;
- proceedings of a kind referred to in paragraph (c) or (ca) of the definition of *matrimonial cause* in subsection 4(1) (not being proceedings under section 78 or 79A or proceedings seeking the discharge, suspension, revival or variation of an order previously made in proceedings with respect to the maintenance of a party) may be instituted:
- (c) within the period of 12 months after the later of:
 - (i) the date on which the decree nisi became absolute or the date of the making of the decree of nullity, as the case may be; or
 - (ii) the date on which the financial agreement was set aside, or found to be invalid, as the case may be; or
 - (d) with the leave of the court in which the proceedings are to be instituted;
- and not otherwise.
- (4) The court shall not grant leave under subsection (3) or (3A) unless it is satisfied:
- (a) that hardship would be caused to a party to the relevant marriage or a child if leave were not granted; or

Section 44A

- (b) in the case of proceedings in relation to the maintenance of a party to a marriage—that, at the end of the period within which the proceedings could have been instituted without the leave of the court, the circumstances of the applicant were such that the applicant would have been unable to support himself or herself without an income tested pension, allowance or benefit.

44A Proceedings for decree of dissolution of marriage

The regulations may provide that proceedings for a decree of dissolution of marriage may not be instituted in, or transferred to, a court of summary jurisdiction other than a prescribed court.

45 Stay and transfer of proceedings

- (1) Where there are pending in a court proceedings that have been instituted under this Act or are being continued in accordance with any of the provisions of section 9 and it appears to that court that other proceedings that have been so instituted or are being so continued in relation to the same marriage or void marriage or the same matter are pending in another court, the first-mentioned court may stay the first-mentioned proceedings for such time as it considers appropriate or may dismiss the proceedings.
- (2) Where there are pending in a court proceedings that have been instituted under this Act or are being continued in accordance with any of the provisions of section 9 and it appears to that court that it is in the interests of justice, or of convenience to the parties, that the proceedings be dealt with in another court having jurisdiction under this Act, the court may transfer the proceedings to the other court. However, this subsection does not apply to particular proceedings if:
 - (a) the first-mentioned court is the Family Court and the other court is the Federal Magistrates Court; or
 - (b) the first-mentioned court is the Federal Magistrates Court and the other court is the Family Court.

Note 1: For transfers from the Family Court to the Federal Magistrates Court, see section 33B.

Note 2: For transfers from the Federal Magistrates Court to the Family Court, see section 39 of the *Federal Magistrates Act 1999*.

- (3) A transfer under subsection (2) may be made on the application of any party to the proceedings.
- (4) A transfer under subsection (2) may be made on the transferring court's own initiative if the transfer is:
 - (a) from a Family Court of a State to a court of summary jurisdiction prescribed in regulations made for the purposes of section 44A; or
 - (b) from a court of summary jurisdiction prescribed in those regulations to a Family Court of a State.

45A Transfer of property proceedings from the Federal Magistrates Court—value exceeds \$300,000

- (1) If:
 - (a) proceedings are instituted in the Federal Magistrates Court in relation to property of a total value exceeding:
 - (i) \$300,000; or
 - (ii) if another amount is specified in the regulations—that other amount; and
 - (b) the respondent, in answer to the application by which the proceedings are instituted, seeks an order different from that sought in the application;

the Federal Magistrates Court must, before going on to hear and determine the proceedings, inform the parties that, unless each of them consents to the Federal Magistrates Court hearing and determining the proceedings, the Federal Magistrates Court is required to transfer the proceedings to the Family Court.
- (2) If the parties do not consent to the Federal Magistrates Court hearing and determining the proceedings, the Federal Magistrates Court must transfer the proceedings accordingly.
- (3) If the parties consent to the Federal Magistrates Court hearing and determining the proceedings, a party is not entitled subsequently to object to the proceedings being heard and determined by the Federal Magistrates Court.
- (4) A reference in subsection (1) to proceedings in relation to property does not include a reference to proceedings with respect to arrears of maintenance.

Section 46

- (5) In determining the value of any property for the purposes of subsection (1), any mortgage, lien, charge or other security over the property is to be disregarded.
- (6) Before transferring proceedings under this section, the Federal Magistrates Court may make such orders as it considers necessary pending the disposal of the proceedings by the Family Court.
- (7) Failure by the Federal Magistrates Court to comply with this section does not invalidate any order of the Federal Magistrates Court in the proceedings.
- (8) This section does not apply to proceedings under Part XIII or XIII A.

46 Transfer of proceedings from court of summary jurisdiction in certain cases

- (1) Where proceedings are instituted in a court of summary jurisdiction in relation to property of a total value exceeding \$20,000 and the respondent, in answer to the application by which the proceedings are instituted, seeks an order different from that sought in the application:
 - (a) the court shall, before proceeding to hear and determine the proceedings, inform the parties that, unless each of them consents to the court hearing and determining the proceedings, the court is required to transfer the proceedings to the Family Court or to the Supreme Court of a State or Territory; and
 - (b) unless the parties consent to the court hearing and determining the proceedings—the court must transfer the proceedings to the Family Court or to the Supreme Court of a State or Territory.
- (1A) A reference in subsection (1) to proceedings with respect to property does not include a reference to proceedings with respect to arrears of maintenance.
- (1AB) In determining the value of any property for the purposes of subsection (1), any mortgage, lien, charge or other security over the property is to be disregarded.

- (1B) Where proceedings referred to in subsection (1) are instituted in a court of summary jurisdiction and the parties consent to the proceedings being heard and determined by that court, a party is not entitled, without the leave of the court, subsequently to object to the proceedings being so heard and determined, but, where the court subsequently gives leave to a party to object to the proceedings being so heard and determined, the court shall transfer the proceedings to the Family Court or to the Supreme Court of a State or Territory.
- (2) Where proceedings referred to in subsection (1) are before it, the court may transfer the proceedings of its own motion, notwithstanding that the parties would be willing for the court to hear and determine the proceedings.
- (2A) Where:
- (a) proceedings for a decree of dissolution of a marriage have been instituted in or transferred to a court of summary jurisdiction; and
 - (b) the proceedings are defended;
- the court is required to transfer the proceedings to the Family Court or the Supreme Court of a State or Territory.
- (3) Before transferring proceedings under subsection (1) or (2A), the court may make such orders as it considers necessary pending the disposal of the proceedings by the court to which they are to be transferred.
- (3A) Where proceedings instituted under this Act, or continued under section 9, are pending in a court of summary jurisdiction, the Family Court or the Supreme Court of a State or Territory may, on the application of a party or of its own motion, order that the proceedings be removed to the Family Court or the Supreme Court, as the case may be.
- (4) Where proceedings are transferred or removed to a court in pursuance of this section, that court shall proceed as if the proceedings had been originally instituted in that court.
- (5) Without prejudice to the duty of a court of summary jurisdiction to comply with this section, failure by such a court so to comply does not invalidate any order of the court in the proceedings.
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Section 47

47 Courts to act in aid of each other

All courts having jurisdiction under this Act shall severally act in aid of and be auxiliary to each other in all matters under this Act.

Part VI—Dissolution and nullity of marriage

48 Dissolution of marriage

- (1) An application under this Act for a decree of dissolution of a marriage shall be based on the ground that the marriage has broken down irretrievably.
- (2) Subject to subsection (3), in a proceeding instituted by such an application, the ground shall be held to have been established, and a decree of dissolution of the marriage shall be made, if, and only if, the court is satisfied that the parties separated and thereafter lived separately and apart for a continuous period of not less than 12 months immediately preceding the date of the filing of the application for dissolution of marriage.
- (3) A decree of dissolution of marriage shall not be made if the court is satisfied that there is a reasonable likelihood of cohabitation being resumed.

49 Meaning of separation

- (1) The parties to a marriage may be held to have separated notwithstanding that the cohabitation was brought to an end by the action or conduct of one only of the parties.
- (2) The parties to a marriage may be held to have separated and to have lived separately and apart notwithstanding that they have continued to reside in the same residence or that either party has rendered some household services to the other.

50 Effect of resumption of cohabitation

- (1) For the purposes of proceedings for a decree of dissolution of marriage, where, after the parties to the marriage separated, they resumed cohabitation on one occasion but, within a period of 3 months after the resumption of cohabitation, they again separated and thereafter lived separately and apart up to the date of the filing of the application, the periods of living separately and apart before

Section 51

and after the period of cohabitation may be aggregated as if they were one continuous period, but the period of cohabitation shall not be deemed to be part of the period of living separately and apart.

- (2) For the purposes of subsection (1), a period of cohabitation shall be deemed to have continued during any interruption of the cohabitation that, in the opinion of the court, was not substantial.

51 Nullity of marriage

An application under this Act for a decree of nullity of marriage shall be based on the ground that the marriage is void.

52 Court not to make decree of dissolution where application for decree of nullity before it

Where both an application for a decree of nullity of a marriage and an application for a decree of dissolution of that marriage are before a court, the court shall not make a decree of dissolution of the marriage unless it has dismissed the application for a decree of nullity of the marriage.

53 Circumstances occurring before commencement of Act or outside Australia

A decree may be made, or refused, under this Part by reason of facts and circumstances notwithstanding that those facts and circumstances, or some of them, took place before the commencement of this Act or outside Australia.

54 Decree *nisi* in first instance

A decree of dissolution of marriage under this Act shall, in the first instance, be a decree *nisi*.

55 When decree becomes absolute

- (1) Subject to this section, a decree *nisi* made under this Act becomes absolute by force of this section at the expiration of a period of 1

month from the making of the decree or from the making of an order under section 55A, whichever is the later.

- (2) Where a decree *nisi* has been made in any proceedings, the court of first instance (whether or not it made the decree), or a court in which an appeal has been instituted, may, either before or after it has disposed of the proceedings or appeal, and whether or not a previous order has been made under this subsection:
- (a) having regard to the possibility of an appeal or further appeal, make an order extending the period at the expiration of which the decree *nisi* will become absolute; or
 - (b) if it is satisfied that there are special circumstances that justify its so doing, make an order reducing the period at the expiration of which the decree *nisi* will become absolute.
- (3) Where an appeal is instituted (whether or not it is the first appeal) before a decree *nisi* has become absolute, then, notwithstanding any order in force under subsection (2) at the time of the institution of the appeal but subject to any such order made after the institution of the appeal, the decree *nisi*, unless reversed or rescinded, becomes absolute by force of this section:
- (a) at the expiration of a period of 1 month from the day on which the appeal is determined or discontinued; or
 - (b) on the day on which the decree would have become absolute under subsection (1) if no appeal had been instituted; whichever is the later.
- (4) A decree *nisi* shall not become absolute by force of this section where either of the parties to the marriage has died.
- (5) In this section, ***appeal***, in relation to a decree *nisi*, means:
- (a) an appeal or application for leave to appeal against, or an intervention or application for a re-hearing relating to:
 - (i) the decree *nisi*; or
 - (ii) an order under section 55A in relation to the proceedings in which the decree *nisi* was made; or
 - (b) an application under section 57 or 58 for rescission of the decree or an appeal or application for leave to appeal arising out of such an application.

Section 55A

- (6) For the purposes of this section, where an application for leave to appeal, or for a re-hearing, is granted, the application shall be deemed not to have been determined or discontinued so long as:
- (a) the leave granted remains capable of being exercised; or
 - (b) an appeal or re-hearing instituted in pursuance of the leave is pending.

55A Decree absolute where children

- (1) A decree *nisi* of dissolution of marriage does not become absolute unless the court has, by order, declared that it is satisfied:
- (a) that there are no children of the marriage who have not attained 18 years of age; or
 - (b) that the only children of the marriage who have not attained 18 years of age are the children specified in the order and that:
 - (i) proper arrangements in all the circumstances have been made for the care, welfare and development of those children; or
 - (ii) there are circumstances by reason of which the decree *nisi* should become absolute even though the court is not satisfied that such arrangements have been made.
- (2) Where, in proceedings for a decree of dissolution of marriage, the court doubts whether the arrangements made for the care, welfare and development of a child of the marriage are proper in all the circumstances, the court may adjourn the proceedings until a report has been obtained from a family and child counsellor or welfare officer regarding those arrangements.
- (3) For the purposes of this section, a child (including an ex-nuptial child of either the husband or the wife, a child adopted by either of them or a child who is not a child of either of them) is a child of the marriage if the child was treated by the husband and wife as a child of their family at the relevant time.
- (4) For the purposes of subsection (3), the relevant time is the time immediately before the time when the husband and wife separated or, if they have separated on more than one occasion, the time immediately before the time when they last separated before the

institution of the proceedings in which the decree *nisi* of dissolution of marriage was made.

56 Certificate as to decree absolute

- (1) Where a decree *nisi* becomes absolute, the Registry Manager of the court by which the decree was made shall prepare and file a memorandum of the fact and of the date upon which the decree became absolute.
- (2) Where a decree *nisi* has become absolute, any person is entitled, on application to the Registry Manager of the court by which the decree was made, to receive a certificate signed by the Registry Manager that the decree *nisi* has become absolute.
- (3) A certificate given under subsection (2) is, in all courts (whether exercising federal jurisdiction or not) and for all purposes, evidence of the matters specified in the certificate.
- (4) The regulations may provide for the establishment of central records of decrees made under this Act and for the notification of decrees to the appropriate marriage registering authorities of the States and Territories.

57 Rescission of decree *nisi* where parties reconciled

Notwithstanding anything contained in this Part, where a decree *nisi* has been made in proceedings for a decree of dissolution of marriage, the court may, at any time before the decree becomes absolute, upon the application of the parties to the marriage, rescind the decree on the ground that the parties have become reconciled.

58 Rescission of decree *nisi* on ground of miscarriage of justice

Where a decree *nisi* has been made but has not become absolute, the court by which the decree was made may, on the application of a party to the proceedings, or on the intervention of the Attorney-General, if it is satisfied that there has been a miscarriage of justice by reason of fraud, perjury, suppression of evidence or any other circumstance, rescind the decree and, if it thinks fit, order that the proceedings be re-heard.

Part VI Dissolution and nullity of marriage

Section 59

59 Re-marriage

Where a decree of dissolution of marriage under this Act has become absolute, a party to the marriage may marry again.

Part VII—Children

Division 1—Introductory

Subdivision A—What this Division does

60A What this Division does

This Division contains:

- (a) a statement of the object of this Part and the principles underlying it, and an outline of this Part (Subdivision B); and
- (b) provisions relevant to the interpretation and application of this Part (Subdivision C); and
- (c) provisions relevant to how this Act applies to certain children (Subdivision D).

Note: The extension and application of this Part is also dealt with in Subdivision F of Division 12.

Subdivision B—Object, principles and outline

60B Object of Part and principles underlying it

- (1) The object of this Part is to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.
- (2) The principles underlying these objects are that, except when it is or would be contrary to a child's best interests:
 - (a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and
 - (b) children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development; and

Section 60C

- (c) parents share duties and responsibilities concerning the care, welfare and development of their children; and
- (d) parents should agree about the future parenting of their children.

60C Outline of Part

An outline of this Part is set out below.

OUTLINE OF PART	
Item	Divisions and coverage
1	Division 1—Introductory <ul style="list-style-type: none">• object of Part and principles underlying it, and outline of Part• interpretation and application of this Part• how this Act applies to certain children Note: The extension and application of this Part is also dealt with in Subdivision F of Division 12.
2	Division 2—Parental responsibility <ul style="list-style-type: none">• the concept of parental responsibility
3	Division 3—Counselling etc. <ul style="list-style-type: none">• counselling of people in relation to matters affecting children• preparation of reports for use in proceedings relating to children under 18• provision of documents about counselling and welfare
4	Division 4—Parenting plans <ul style="list-style-type: none">• what parenting plans are
5	Division 5—Parenting orders—what they are <ul style="list-style-type: none">• what parenting orders are

OUTLINE OF PART	
Item	Divisions and coverage
6	<p>Division 6—Parenting orders other than child maintenance orders</p> <ul style="list-style-type: none"> • applying for and making parenting orders, other than child maintenance orders • general obligations created by residence orders, contact orders and specific issues orders • measures to promote the exercise of parental responsibility—stage 1 of parenting compliance regime • dealing with people who have been arrested • obligations under parenting orders, other than child maintenance orders, relating to taking or sending children from Australia
7	<p>Division 7—Child maintenance orders</p> <ul style="list-style-type: none"> • objects and principles relevant to the making of child maintenance orders • the relationship between Division 7 and the <i>Child Support (Assessment) Act 1989</i> • applying for and making child maintenance orders • other aspects of courts' powers in relation to child maintenance orders • when child maintenance orders stop being in force
8	<p>Division 8—Other matters relating to children</p> <ul style="list-style-type: none"> • liability of a father to contribute towards child bearing expenses if he is not married to the child's mother • orders for the location and recovery of children • reporting of allegations of child abuse • other orders about children
9	<p>Division 9—Injunctions</p> <ul style="list-style-type: none"> • proceedings for injunctions in relation to children
10	<p>Division 10—The best interests of children and the representation of children</p> <ul style="list-style-type: none"> • determining what is in a child's best interests (including in situations of family violence) • separate representation of children

Section 60C

OUTLINE OF PART	
Item	Divisions and coverage
11	Division 11—Family violence <ul style="list-style-type: none">• the relationship between certain contact orders etc. and family violence orders
12	Division 12—Proceedings and jurisdiction <ul style="list-style-type: none">• institution of proceedings and procedure• jurisdiction of courts• presumptions of parentage• parentage evidence• places and people to which this Part extends and applies
13	Division 13—State, Territory and overseas orders <ul style="list-style-type: none">• registration of State and Territory orders dealing with children• registration of overseas orders dealing with children• transmission of Australian orders to overseas jurisdictions

OUTLINE OF PART	
Item	Divisions and coverage
13A	<p>Division 13A—Enforcement of orders affecting children</p> <ul style="list-style-type: none">• court may do any or all of the following:<ul style="list-style-type: none">(a) require a person who contravenes an order affecting children to participate in an appropriate post-separation parenting program designed to help in the resolution of conflicts about parenting;(b) make a further parenting order that compensates for contact forgone as a result of the contravention;(c) adjourn the proceedings to enable an application to be made for a further parenting order;—stage 2 of parenting compliance regime• court must take other action in respect of a person who contravenes an order affecting children if the court is satisfied:<ul style="list-style-type: none">(a) where the contravention is an initial contravention—that the person has behaved in a way that showed a serious disregard for his or her parenting obligations; or(b) where the contravention is a second or subsequent contravention—that it is not appropriate for the person to be dealt with by requiring his or her attendance at a post-separation parenting program;—stage 3 of parenting compliance regime
14	<p>Division 14—Miscellaneous</p> <ul style="list-style-type: none">• miscellaneous matters relating to children

Subdivision C—Interpretation and application of Part

60D Defined expressions

(1) In this Part:

abuse, in relation to a child, means:

Section 60D

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

adopted, in relation to a child, means adopted under the law of any place (whether in or out of Australia) relating to the adoption of children.

artificial conception procedure includes:

- (a) artificial insemination; and
- (b) the implantation of an embryo in the body of a woman.

birth includes stillbirth.

child includes an adopted child and a stillborn child.

childbirth maintenance period, in relation to the birth of a child, means the period:

- (a) commencing:
 - (i) in a case where the mother:
 - (A) works in paid employment; and
 - (B) is advised by a medical practitioner to stop working for medical reasons related to her pregnancy; and
 - (C) stops working after being so advised and more than 2 months before the child is due to be born;
on the day on which she stops working; or
 - (ii) in any other case—2 months before the child is due to be born; and
- (b) ending 3 months after the child's birth.

child maintenance order has the meaning given by subsection 64B(5).

child maintenance provisions, in relation to a parenting plan, has the meaning given by subsection 63C(5).

child welfare law means a law of a State or Territory prescribed, or included in a class of laws of a State or Territory prescribed, for the purposes of this definition.

child welfare officer, in relation to a State or Territory, means:

- (a) a person who, because he or she holds, or performs the duties of, a prescribed office of the State or Territory, has responsibilities in relation to a child welfare law of the State or Territory; or
- (b) a person authorised in writing by such a person for the purposes of this Part.

child welfare provisions, in relation to a parenting plan, has the meaning given by subsection 63C(4).

contact order has the meaning given by subsection 64B(4).

de facto relationship means the relationship between a man and a woman who live with each other as spouses on a genuine domestic basis although not legally married to each other.

education includes apprenticeship or vocational training.

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

family violence order means an order (including an interim order) made under a prescribed law of a State or Territory to protect a person from family violence.

guardian, in relation to a child, includes a person who has been granted (whether alone or jointly with another person or other persons) guardianship of the child under the law of the Commonwealth or of a State or Territory.

has, in relation to a residence order, a contact order or a specific issues order, has the meaning given by subsection 64B(8).

Section 60D

interests, in relation to a child, includes matters related to the care, welfare or development of the child.

made in favour, in relation to a residence order, a contact order or a specific issues order, has the meaning given by subsection 64B(7).

medical expenses includes medical, surgical, dental, diagnostic, hospital, nursing, pharmaceutical and physiotherapy expenses.

medical practitioner means a person registered or licensed as a medical practitioner under a law of a State or Territory that provides for the registration or licensing of medical practitioners.

member of the Court personnel means:

- (a) a court counsellor; or
- (b) a court mediator; or
- (d) a welfare officer; or
- (e) the Registrar or a Deputy Registrar of a Registry of the Family Court of Australia; or
- (f) the Registrar or a Deputy Registrar of the Family Court of Western Australia; or
- (g) a Registrar of the Federal Magistrates Court.

member of the family, in relation to a person, has, for the purposes of this section, paragraphs 68F(2)(i) and (j) and section 68J, the meaning given by subsection (2).

parent, in relation to a child who has been adopted, means an adoptive parent of the child.

parentage testing order has the meaning given by subsection 69W(1).

parentage testing procedure means a medical procedure prescribed, or included in a class of medical procedures prescribed, for the purposes of this definition.

parental responsibility has the meaning given by section 61B.

parenting order has the meaning given by subsection 64B(1).

parenting plan has the meaning given by subsection 63C(1).

prescribed adopting parent, in relation to a child, means:

- (a) a parent of the child; or
- (b) the spouse of, or a person in a de facto relationship with, a parent of the child; or
- (c) a parent of the child and either his or her spouse or a person in a de facto relationship with the parent.

prescribed child welfare authority, in relation to abuse of a child, means:

- (a) if the child is the subject of proceedings under this Part in a State or Territory—an officer of the State or Territory who is responsible for the administration of the child welfare laws of the State or Territory, or some other prescribed person; or
- (b) if the child is not the subject of proceedings under this Part—an officer of the State or Territory in which the child is located or is believed to be located who is responsible for the administration of the child welfare laws of the State or Territory, or some other prescribed person.

professional ethics includes:

- (a) rules of professional conduct; and
- (b) rules of professional etiquette; and
- (c) a code of ethics; and
- (d) standards of professional conduct.

residence order has the meaning given by subsection 64B(3).

specific issues order has the meaning given by subsection 64B(6).

step-parent, in relation to a child, means a person who:

- (a) is not a parent of the child; and
 - (b) is or has been married to a parent of the child; and
 - (c) treats, or at any time during the marriage treated, the child as a member of the family formed with the parent.
- (2) For the purposes of this section, paragraphs 68F(2)(i) and (j) and section 68J, a person (the ***first person***) is a ***member of the family*** of another person (the ***second person***) if:
- (a) the first person is or has been married to, or in a de facto relationship with, the second person; or

Section 60D

- (b) the first person is or has been a relative of the second person (as defined in subsection (3)); or
 - (c) an order under this Act described in subparagraph (i) or (ii) is or was (at any time) in force:
 - (i) a residence order, contact order or specific issues order that relates to a child who is either the first person or the second person and that is in favour of the other of those persons;
 - (ii) an order providing for the first person or the second person to have custody or guardianship of, or a right of access to, the other of those persons; or
 - (d) an order under a law of a State or Territory described in subparagraph (i) or (ii) is or was (at any time) in force:
 - (i) an order determining that the first person or the second person is or was to live with the other of those persons, or is or was to have custody or guardianship of the other of those persons;
 - (ii) an order providing for contact between the first person and the second person, or for the first person or the second person to have a right of access to the other of those persons; or
 - (e) the first person ordinarily or regularly resides or resided with the second person, or with another member of the family of the second person; or
 - (f) the first person is or has been a member of the family of a child of the second person.
- (3) For the purposes of this section, a *relative* of a person is:
- (a) a father, mother, grandfather, grandmother, step-father or step-mother of the person; or
 - (b) a son, daughter, grandson, grand-daughter, step-son or step-daughter of the person; or
 - (c) a brother, sister, half-brother, half-sister, step-brother or step-sister of the person; or
 - (d) an uncle or aunt of the person; or
 - (e) a nephew or niece of the person; or
 - (f) a cousin of the person; or

- (g) if the person is or was married—in addition to paragraphs (a) to (f), a person who is or was a relative, of the kind described in any of those paragraphs, of the person's spouse; or
- (h) if the person is or was in a de facto relationship with another person—in addition to paragraphs (a) to (f), a person who would be a relative of a kind described in any of those paragraphs if the persons in that de facto relationship were or had been married to each other.

60E Application of Part to void marriages

This Part applies in relation to a purported marriage that is void as if:

- (a) the purported marriage were a marriage; and
- (b) the parties to the purported marriage were husband and wife.

Subdivision D—Interpretation—how this Act applies to certain children

60F Certain children are children of marriage etc.

- (1) A reference in this Act to a child of a marriage includes, subject to subsection (3), a reference to each of the following children:
 - (a) a child adopted since the marriage by the husband and wife or by either of them with the consent of the other;
 - (b) a child of the husband and wife born before the marriage;
 - (c) a child who is, under subsection 60H(1), the child of the husband and wife.
- (2) A reference in this Act to a child of a marriage includes a reference to a child of:
 - (a) a marriage that has been dissolved or annulled, in Australia or elsewhere; or
 - (b) a marriage that has been terminated by the death of one party to the marriage.
- (3) A child of a marriage who is adopted by a person who, before the adoption, is not a prescribed adopting parent ceases to be a child of that marriage for the purposes of this Act.

Section 60G

- (4) The following provisions apply in relation to a child of a marriage who is adopted by a prescribed adopting parent:
- (a) if a court granted leave under section 60G for the adoption proceedings to be commenced—the child ceases to be a child of the marriage for the purposes of this Act;
 - (b) in any other case—the child continues to be a child of the marriage for the purposes of this Act.
- (5) In this section:
- this Act* includes:
- (a) the standard Rules of Court; and
 - (b) the related Federal Magistrates Rules.

60G Family Court may grant leave for adoption proceedings by prescribed adopting parent

- (1) Subject to subsection (2), the Family Court, the Supreme Court of the Northern Territory or the Family Court of a State may grant leave for proceedings to be commenced for the adoption of a child by a prescribed adopting parent.
- (2) In proceedings for leave under subsection (1), the court must consider whether granting leave would be in the child's best interests, having regard to the effect of paragraph 60F(4)(a) and of sections 61E and 65J.

Note: Division 10 deals with how a court determines a child's best interests.

60H Children born as a result of artificial conception procedures

- (1) If:
- (a) a child is born to a woman as a result of the carrying out of an artificial conception procedure while the woman was married to a man; and
 - (b) either of the following paragraphs apply:
 - (i) the procedure was carried out with their consent;
 - (ii) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of the woman and of the man;

then, whether or not the child is biologically a child of the woman and of the man, the child is their child for the purposes of this Act.

(2) If:

- (a) a child is born to a woman as a result of the carrying out of an artificial conception procedure; and
- (b) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of the woman;

then, whether or not the child is biologically a child of the woman, the child is her child for the purposes of this Act.

(3) If:

- (a) a child is born to a woman as a result of the carrying out of an artificial conception procedure; and
- (b) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of a man;

then, whether or not the child is biologically a child of the man, the child is his child for the purposes of this Act.

(4) If a person lives with another person as the husband or wife of the first-mentioned person on a genuine domestic basis although not legally married to that person, subsection (1) applies in relation to them as if:

- (a) they were married to each other; and
- (b) neither person were married to any other person.

(5) For the purposes of subsection (1), a person is to be presumed to have consented to an artificial conception procedure being carried out unless it is proved, on the balance of probabilities, that the person did not consent.

(6) In this section:

this Act includes:

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

Division 2—Parental responsibility

61A What this Division does

This Division deals with the concept of parental responsibility including, in particular:

- (a) what parental responsibility is; and
- (b) who has parental responsibility.

61B Meaning of *parental responsibility*

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

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

- (1) Each of the parents of a child who is not 18 has parental responsibility for the child.
- (2) Subsection (1) has effect despite any changes in the nature of the relationships of the child's parents. It is not affected, for example, by the parents becoming separated or by either or both of them marrying or re-marrying.
- (3) Subsection (1) has effect subject to any order of a court for the time being in force (whether or not made under this Act and whether made before or after the commencement of this section).

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

61D Parenting orders and parental responsibility

- (1) A parenting order confers parental responsibility for a child on a person, but only to the extent to which the order confers on the person duties, powers, responsibilities or authority in relation to the child.

- (2) A parenting order in relation to a child does not take away or diminish any aspect of the parental responsibility of any person for the child except to the extent (if any):
- (a) expressly provided for in the order; or
 - (b) necessary to give effect to the order.

61E Effect of adoption on parental responsibility

- (1) This section applies if:
- (a) a child is adopted; and
 - (b) immediately before the adoption, a person had parental responsibility for the child, whether in full or to a limited extent and whether because of section 61C or because of a parenting order.
- (2) The person's parental responsibility for the child ends on the adoption of the child, unless the adoption is by a prescribed adopting parent and leave was not granted under section 60G for the adoption proceedings to be commenced.

Division 3—Counselling etc.

62A What this Division does

This Division deals with:

- (a) the counselling of people in relation to matters affecting children; and
- (b) the preparation of reports for use in proceedings relating to children who are under 18; and
- (c) the provision of documents about counselling and welfare.

62B Obligations to consider advising people about counselling for Part VII orders

- (1) In this section, *counselling for Part VII orders* is counselling to assist children and parties to proceedings under this Part to adjust to the consequences of orders under this Part.
- (2) A court exercising jurisdiction in proceedings under this Part must consider whether or not to advise parties to the proceedings about counselling for Part VII orders available through courts exercising jurisdiction under this Part and through approved counselling organisations.
- (3) A legal practitioner acting in proceedings under this Part, or consulted by a person considering commencing such proceedings, must consider whether or not to advise the parties to the proceedings, or the person considering commencing proceedings, about counselling for Part VII orders available through courts exercising jurisdiction under this Part and through approved counselling organisations.

62C Request for counselling—request made through a Family Court

- (1) A party to proceedings under this Part, or a person representing a child under an order made under section 68L, may file in the Family Court or a Family Court of a State a notice stating that he or she wishes to have the assistance of the counselling facilities of that Court.
- (2) On the filing of the notice, the Registry Manager or an appropriate officer of the Family Court of the State, as the case may be, must arrange for parties to the proceedings (with or without the child) to be interviewed by a family and child counsellor or welfare officer to assess whether counselling is appropriate in all the circumstances, and if it is:
 - (a) to discuss the care, welfare and development of the child; and
 - (b) if there are differences between the parties in relation to matters affecting the care, welfare and development of the child, to try to resolve those differences.

62CA Request for counselling—request made through Federal Magistrates Court

- (1) A person who is:
 - (a) a party to proceedings under this Part in the Federal Magistrates Court; or
 - (b) a person representing a child in the Federal Magistrates Court under an order made under section 68L; or
 - (c) the parent of a child; or
 - (d) a child;may ask a designated officer of the Federal Magistrates Court for the assistance of a family and child counsellor.
- (2) If a request is made under subsection (1), a designated officer of the Federal Magistrates Court must, as far as practicable, arrange for any or all of the following:
 - (a) the parties to the proceedings;
 - (b) the parents of the child;
 - (c) such other persons as the designated officer thinks appropriate;

Section 62D

to be interviewed (with or without the child) by a family and child counsellor or welfare officer to assess whether counselling is appropriate in all the circumstances, and if it is:

- (d) to discuss the care, welfare and development of the child; and
 - (e) if there are differences between persons in relation to matters affecting the care, welfare and development of the child, to try to resolve those differences.
- (3) For the purposes of this section, a member of the staff of the Federal Magistrates Court is taken to be an officer of the Federal Magistrates Court.
- (4) For the purposes of this section, a *designated officer* of the Federal Magistrates Court is an officer of the Federal Magistrates Court specified in writing by the Chief Executive Officer of the Federal Magistrates Court for the purposes of this subsection.

62D Request for counselling—where made direct to a family and child counsellor

A person may at any time request a family and child counsellor to provide counselling about a matter relating to a child.

62E Court counselling facilities to be made available

- (1) A parent of a child, a child or a party to proceedings under this Part may seek the assistance of the counselling facilities of the Family Court or a Family Court of a State.
- (2) The Registry Manager or an appropriate officer of the Family Court of the State, as the case may be, must, as far as practicable, make those facilities available.

62F Conferences with family and child counsellors or welfare officers

- (1) This section applies if, in proceedings under this Act, the care, welfare and development of a child who is under 18 is relevant.

- (2) The court may, at any stage of the proceedings, make an order directing the parties to the proceedings to attend a conference with a family and child counsellor or welfare officer:
 - (a) to discuss the care, welfare and development of the child; and
 - (b) if there are differences between the parties in relation to matters affecting the care, welfare and development of the child—to try to resolve those differences.
 - (3) The court may make an order under subsection (2):
 - (a) on its own initiative; or
 - (b) on the application of:
 - (i) a party to the proceedings; or
 - (ii) a person representing the child under an order made under section 68L.
 - (4) The court may, in an order under subsection (2):
 - (a) fix a place and time for the conference to take place; or
 - (b) direct that the conference is to take place at a place and time to be fixed by a family and child counsellor or welfare officer.
 - (5) If a person fails to attend a conference in respect of which the court has made an order under subsection (2), the counsellor or welfare officer must report the failure to the court.
 - (6) On receiving a report under subsection (5), the court may give such further directions in relation to the conference as it considers appropriate.
 - (7) The court may make further directions under subsection (6):
 - (a) on its own initiative; or
 - (b) on the application of:
 - (i) a party to the proceedings; or
 - (ii) a person representing the child under an order made under section 68L.
 - (8) Evidence of anything said, or of any admission made, at a conference that takes place pursuant to an order under subsection (2) is not admissible:
 - (a) in any court (whether exercising federal jurisdiction or not);
or
-

Section 62G

- (b) in any proceedings before a person authorised by a law of the Commonwealth or of a State or Territory, or by consent of the parties, to hear evidence.
- (9) Subsection (8) does not apply to the following:
- (a) an admission by an adult that indicates that a child has been abused or is at risk of abuse;
 - (b) a 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.
- (10) In this section:
- abuse**, in relation to a child, means:
- (a) an assault, including a sexual assault, of the child which is an offence under a law, written or unwritten, in force in the State or Territory in which the act constituting the assault occurs; or
 - (b) a person involving the child in a sexual activity with that person or another person in which the child is used, directly or indirectly, as a sexual object by the first-mentioned person or the other person, and where there is unequal power in the relationship between the child and the first-mentioned person.

child means a person who is under 18.

62G Reports by family and child counsellors and welfare officers

- (1) This section applies if, in proceedings under this Act, the care, welfare and development of a child who is under 18 is relevant.
- (2) The court may direct a family and child counsellor or welfare officer to give the court a report on such matters relevant to the proceedings as the court thinks desirable.
- (3) If the court makes a direction under subsection (2), it may, if it thinks it necessary, adjourn the proceedings until the report has been given to the court.

- (4) A counsellor or welfare officer may include in a report prepared pursuant to a direction under subsection (2), in addition to the matters required to be included in it, any other matters that relate to the care, welfare or development of the child.
- (5) For the purpose of the preparation of a report pursuant to a direction under subsection (2), the court may make such orders, or give such further directions, as it considers appropriate, including orders or directions for the attendance on the counsellor or welfare officer of a party to the proceedings or of the child.
- (6) If a person fails to comply with an order or direction under subsection (5), the counsellor or welfare officer must report the failure to the court.
- (7) On receiving a report under subsection (6), the court may give such further directions in relation to the preparation of the report as it considers appropriate.
- (8) A report given to the court pursuant to a direction under subsection (2) may be received in evidence in any proceedings under this Act.

62H Provision of certain documents

The court must provide to people proposing to institute proceedings under this Part in relation to children, and in appropriate cases to other persons who may be interested in the care, welfare and development of children, documents setting out:

- (a) the legal and possible social effects of the proposed proceedings; and
- (b) the counselling and welfare facilities available within the Family Court and elsewhere.

Division 4—Parenting plans

63A What this Division does

This Division explains what parenting plans are.

63B Parents encouraged to reach agreement

The parents of a child are encouraged:

- (a) to agree about matters concerning the child; and
- (b) to take responsibility for their parenting arrangements and for resolving parental conflict; and
- (c) to use the legal system as a last resort rather than a first resort; and
- (d) to minimise the possibility of present and future conflict by using or reaching an agreement; and
- (e) in reaching their agreement, to regard the best interests of the child as the paramount consideration.

Note: Parents are encouraged to reach an informal agreement between themselves about matters concerning their children by entering into a parenting plan. Parents who seek enforceable arrangements require court orders. These can be obtained by consent.

63C Meaning of *parenting plan* and related terms

- (1) A *parenting plan* is an agreement that:
 - (a) is in writing; and
 - (b) is or was made between the parents of a child; and
 - (c) deals with a matter or matters mentioned in subsection (2).
- (2) A parenting plan may deal with one or more of the following:
 - (a) the person or persons with whom a child is to live;
 - (b) contact between a child and another person or other persons;
 - (c) maintenance of a child;
 - (d) any other aspect of parental responsibility for a child.

Note: If the *Child Support (Assessment) Act 1989* applies, provisions in a parenting plan dealing with the maintenance of a child (as distinct from child support under that Act) are unenforceable and of no effect

Section 63CAA

(see subsection 63G(5)). A parenting plan may, however, also operate as a child support agreement (see section 63CAA).

- (3) An agreement may be a parenting plan:
- (a) whether made before or after the commencement of this section; and
 - (b) whether made inside or outside Australia; and
 - (c) whether other persons as well as a child's parents are also parties; and
 - (d) whether it deals with other matters as well as matters mentioned in subsection (2).
- Note: One of the other matters with which a parenting plan may deal is child support (see section 63CAA).
- (4) Provisions of a parenting plan that deal with any of the matters mentioned in paragraphs (2)(a), (b) and (d) are ***child welfare provisions***.
- (5) Provisions of a parenting plan that deal with the matter mentioned in paragraph (2)(c) are ***child maintenance provisions***.
- (6) A ***registered parenting plan*** is a parenting plan:
- (a) that was registered in a court under section 63E as in force at any time before the commencement of the *Family Law Amendment Act 2003*; and
 - (b) that continued to be registered immediately before the commencement of the *Family Law Amendment Act 2003*.

63CAA Parenting plans may include child support provisions

- (1) If a parenting plan includes provisions of a kind referred to in subsection 84(1) of the *Child Support (Assessment) Act 1989*, the provisions do not have effect for the purposes of this Act.
- (2) Subsection (1) does not affect the operation of the provisions for any other purpose.
- (3) Nothing in this Division is to be taken to prevent the same agreement being both a parenting plan under this Part and a child support agreement under Part 6 of the *Child Support (Assessment) Act 1989*.

Section 63D

63D Parenting plan may be varied or revoked by further written agreement

A parenting plan, other than a plan to which section 63DB applies, may be varied or revoked by agreement in writing between the parties to the plan.

63DA Explanation by person advising or assisting in the making of a parenting plan

If a person who is:

- (a) a family and child counsellor; or
- (b) a family and child mediator; or
- (c) a legal practitioner;

gives advice or assistance to people in connection with the making by them of a parenting plan, the person must explain to them, in language likely to be readily understood by them, the availability of programs to help people who experience difficulties in complying with a parenting plan.

63DB Registered parenting plans

Application of section

- (1) This section applies to a registered parenting plan.

Saving of registered parenting plan

- (2) A registered parenting plan continues in force until revoked in accordance with section 63E, or set aside, varied or discharged as referred to in section 63H.

No variation of registered parenting plan

- (3) A registered parenting plan cannot be varied.

Revocation of registered parenting plan

- (4) Subject to subsection (5), a registered parenting plan may be revoked by agreement in writing between the parties to the plan.

Registration of revocation required

- (5) An agreement revoking a registered parenting plan:
 - (a) may, subject to the applicable Rules of Court, be registered, in a court having jurisdiction under this Part, under section 63E; and
 - (b) does not have effect to revoke the plan until it is so registered.

63E Registration of a revocation of a registered parenting plan

- (1) This section applies to a registered parenting plan.
- (2) To apply for registration of an agreement (*revocation agreement*) revoking a registered parenting plan:
 - (a) an application for registration of the revocation agreement must be lodged in accordance with the applicable Rules of Court; and
 - (b) the application must be accompanied by:
 - (i) a copy of the revocation agreement; and
 - (ii) the information required by the applicable Rules of Court; and
 - (iii) a statement, in relation to each party, that is to the effect that the party has been provided with independent legal advice as to the meaning and effect of the revocation agreement and that is signed by the practitioner who provided that advice.
- (3) The court may register the revocation agreement if it considers it appropriate to do so having regard to the best interests of the child to whom the agreement relates. In determining whether it is appropriate to register the revocation agreement, the court:
 - (a) must have regard to the information accompanying the application for registration; and
 - (b) may, but is not required to, have regard to all or any of the matters set out in subsection 68F(2).

Section 63F

63F Child welfare provisions of registered parenting plans

Application of section

- (1) This section applies to a registered parenting plan that contains child welfare provisions.
- (2) The court may, by order, vary the child welfare provisions in the plan if it considers the variation is required in the best interests of a child.
- (3) The child welfare provisions have effect, subject to subsections (5) and (6), as if they were:
 - (a) to the extent they deal with the person or persons with whom the child is to live—a residence order made by the court; and
 - (b) to the extent they deal with contact between the child and another person or other persons—a contact order made by the court; and
 - (c) to the extent they deal with any other aspect of parental responsibility for the child—a specific issues order made by the court.

Note: Provisions of this Act relevant to the child welfare provisions having effect as provided in this subsection include:

- (a) Subdivisions C, D and E of Division 6 of this Part (dealing with obligations created by residence orders, contact orders and specific issues orders); and
- (b) Division 13A of this Part and Part XIII (dealing generally with enforcement of orders and sanctions for contravening orders); and
- (c) subsection 65D(2) (providing for discharge, variation, suspension and revival of parenting orders other than child maintenance orders); and
- (d) other provisions of this Act (including subsections 64B(7) and (8)) that refer to parenting orders, or to residence orders, contact orders or specific issues orders.

- (4) If provisions of the plan have effect under subsection (3) as a court order, a person who is a party to the plan is taken (for example, for the purposes of section 65Y) to be a party to the proceedings in which the order was made.
- (5) Subsection (3) does not apply to the plan (whenever registered) to the extent (if at all) that the plan purports to determine that the child concerned is to live with a person who is not a parent of the child.

- (6) Even though the plan is registered, the court, or another court having jurisdiction under this Part, must not enforce the child welfare provisions if it considers that to do so would be contrary to the best interests of a child.

Note: Division 10 deals with how a court determines a child's best interests.

63G Child maintenance provisions of registered parenting plans— where not enforceable as maintenance agreements

- (1) This section applies if:
- (a) a registered parenting plan contains child maintenance provisions; and
 - (b) the plan is not a maintenance agreement or, if it is a maintenance agreement, the child concerned is not a child of the relevant marriage.

- (2) The child maintenance provisions have effect, subject to subsections (3), (4) and (5), as if they were a child maintenance order made by the court.

Note: Provisions of this Act relevant to the child maintenance provisions having effect as a child maintenance order include:

- (a) Parts XIII and XIII A (dealing generally with enforcement of orders and sanctions for contravening orders); and
- (b) section 66S (providing for discharge, variation, suspension and revival of child maintenance orders); and
- (c) other provisions of this Act that refer to parenting orders, or to child maintenance orders.

- (3) Unless the plan provides otherwise, the child maintenance provisions (other than provisions for the periodic payment of maintenance) continue to operate in spite of the death of a party to the plan and operate in favour of, and are binding on, the legal personal representative of that party.

- (4) If the child maintenance provisions include provisions (the *periodic provisions*) for the periodic payment of maintenance:
- (a) the periodic provisions continue to operate, if the plan so provides, in spite of the death of a party to the plan who is liable to make the periodic payments, and are binding on the legal personal representative of that party; but

Section 63H

- (b) the periodic provisions do not continue to operate, in spite of anything in the plan, after the death of the person entitled to receive the periodic payments.
- (5) The child maintenance provisions have no effect, and are not enforceable in any way, at any time when an application could properly be made under the *Child Support (Assessment) Act 1989* by one of the parties to the plan for administrative assessment of child support (within the meaning of that Act) for the child concerned seeking payment of child support by the other party to the plan.
- Note: This subsection does not affect the operation of provisions of a parenting plan referred to in section 63CAA (child support matters).
- (6) Subsection (5) has effect whether or not an application for administrative assessment of child support for the child has in fact been made by a party to the plan.

63H Court's powers to set aside, discharge, vary, suspend or revive registered parenting plans

- (1A) This section applies to a registered parenting plan.
- (1) The court in which the plan was registered may set aside the plan, and its registration, if the court is satisfied:
- (a) that the concurrence of a party was obtained by fraud, duress or undue influence; or
 - (b) that the parties want the plan set aside; or
 - (c) that it is in the best interests of a child to set aside the plan.
- (2) In proceedings under subsection (1), to the extent that they are proceedings on the ground mentioned in paragraph (1)(c), the best interests of the child concerned are the paramount consideration.
- Note: Division 10 deals with how a court determines a child's best interests.
- (3) Other provisions of this Act under which provisions of the parenting plan may be set aside or otherwise affected are:
- (a) subsection 63F(2)—under that subsection a court may vary child welfare provisions in the plan; and
 - (b) subsection 65D(2)—under that subsection a court may make a parenting order that discharges, varies, suspends or revives

- provisions of the plan that have effect as if they were a parenting order (other than a child maintenance order); and
- (c) section 66S—under that section a court may discharge, vary, suspend or revive provisions of the plan that have effect as if they were a child maintenance order.
- (4) Except as permitted by subsection (1) or by a provision mentioned in subsection (3), a court must not set aside, discharge, vary, suspend or revive the whole or a part of the parenting plan.

Division 5—Parenting orders—what they are

64A What this Division does

This Division explains what parenting orders are.

64B Meaning of *parenting order* and related terms

- (1) A *parenting order* is:
 - (a) an order under this Part (including an order until further order) dealing with a matter mentioned in subsection (2); or
 - (b) an order under this Part discharging, varying, suspending or reviving an order, or part of an order, described in paragraph (a).
- (2) A parenting order may deal with one or more of the following:
 - (a) the person or persons with whom a child is to live;
 - (b) contact between a child and another person or other persons;
 - (c) maintenance of a child;
 - (d) any other aspect of parental responsibility for a child.
- (3) To the extent (if at all) that a parenting order deals with the matter mentioned in paragraph (2)(a), the order is a *residence order*.
- (4) To the extent (if at all) that a parenting order deals with the matter mentioned in paragraph (2)(b), the order is a *contact order*.
- (5) To the extent (if at all) that a parenting order deals with the matter mentioned in paragraph (2)(c), the order is a *child maintenance order*.
- (6) To the extent (if at all) that a parenting order deals with any other aspect of parental responsibility for a child, the order is a *specific issues order*. A specific issues order may, for example, confer on a person (whether alone or jointly with another person) responsibility for the long-term care, welfare and development of the child or for the day-to-day care, welfare and development of the child.

- (7) For the purposes of this Act:
- (a) a residence order is *made in favour* of a person, or the person, with whom the child concerned is supposed to live under the order; and
 - (b) a contact order is *made in favour* of a person, or the person, with whom the child concerned is supposed to have contact under the order; and
 - (c) a specific issues order is *made in favour* of a person, or the person, on whom the order confers duties, powers, responsibilities or authority in relation to the child concerned.
- (8) For the purposes of this Act:
- (a) a person *has a residence order* in relation to a child if a residence order made in favour of the person is in force in relation to the child; and
 - (b) a person *has a contact order* in relation to a child if a contact order made in favour of the person is in force in relation to the child; and
 - (c) a person *has a specific issues order* in relation to a child if a specific issues order made in favour of the person is in force in relation to the child.
- (9) In this section:
- this Act* includes:
- (a) the standard Rules of Court; and
 - (b) the related Federal Magistrates Rules.

64C Parenting orders may be made in favour of parents or other persons

A parenting order in relation to a child may be made in favour of a parent of the child or some other person.

Division 6—Parenting orders other than child maintenance orders

Subdivision A—Introductory

65A What this Division does

This Division deals with:

- (a) applying for and making parenting orders, other than child maintenance orders (Subdivision B); and
- (b) the general obligations created by residence orders, contact orders and specific issues orders (Subdivision C); and
- (c) dealing with people who have been arrested (Subdivision D); and
- (d) the obligations under parenting orders, other than child maintenance orders, relating to taking or sending children from Australia (Subdivision E).

65AA Measures to promote the exercise of parental responsibility

Measures designed, as stage 1 of a parenting compliance regime, to improve communication between separated parents and to educate parents about their respective responsibilities in relation to their children are contained in this Division (see section 65DA).

Remedial measures designed, as stage 2 of a parenting compliance regime, to enable parents to resolve issues of conflict about parenting and to help in the negotiation of improved parenting are contained in Subdivision B of Division 13A.

Further measures designed, as stage 3 of a parenting compliance regime, to ensure that, as a last resort, a parent is dealt with for deliberate disregard of an order made by a court are contained in Subdivision C of Division 13A.

65B Division does not apply to child maintenance orders

This Division does not apply to parenting orders to the extent that they consist of child maintenance orders. Child maintenance orders are dealt with in Division 7.

Subdivision B—Applying for and making parenting orders

65C Who may apply for a parenting order

A parenting order in relation to a child may be applied for by:

- (a) either or both of the child's parents; or
- (b) the child; or
- (ba) a grandparent of the child; or
- (c) any other person concerned with the care, welfare or development of the child.

65D Court's power to make parenting order

- (1) In proceedings for a parenting order, the court may, subject to this Division, make such parenting order as it thinks proper.

Note: Division 4 of Part XIII AA (International protection of children) may affect the jurisdiction of a court to make a parenting order.

- (2) Without limiting the generality of subsection (1) and subject to this Division, a court may make a parenting order that discharges, varies, suspends or revives some or all of an earlier parenting order.
- (3) If the application for the parenting order was made as a result of the adjournment under paragraph 70NG(1)(c) of proceedings under Subdivision B of Division 13A of Part VII:
- (a) the court must hear and determine the application as soon as practicable; and
 - (b) if the court makes a parenting order on the application, the court may, if it thinks it is appropriate to do so, dismiss the proceedings under that Subdivision.

Section 65DA

Note: The applicant may apply to the Family Court or to the Federal Magistrates Court for the application for the parenting order or for the proceedings under Subdivision B of Division 13A of Part VII, or both, to be transferred to the Federal Magistrates Court or to the Family Court, as the case requires (see section 33B of this Act and section 39 of the *Federal Magistrates Act 1999*).

65DA Parenting orders: stage 1 of parenting compliance regime

- (1) This section applies when a court makes a parenting order.
- (2) It is the duty of the court to include in the order particulars of:
 - (a) the obligations that the order creates; and
 - (b) the consequences that may follow if a person contravenes the order.
- (3) If any of the persons to whom the order is directed is not represented by a legal practitioner, it is also the duty of the court to explain to the person, or to each of the persons:
 - (a) the availability of programs to help people to understand their responsibilities under parenting orders; and
 - (b) the availability and use of location and recovery orders to ensure that parenting orders are complied with.
- (4) The court may cause to be prepared, and given to persons to whom a parenting order is directed, a document setting out particulars of the matters mentioned in paragraphs (3)(a) and (b).
- (5) If a person to whom the order is directed is represented by a legal practitioner, the court may request the practitioner:
 - (a) to assist in explaining to the person the matters mentioned in paragraphs (2)(a) and (b); and
 - (b) to explain to the person the matters mentioned in paragraphs (3)(a) and (b).
- (6) If a request is made by the court to a legal practitioner under paragraph (5)(a) or (b), it is the duty of the practitioner to comply with the request.
- (7) Failure to comply with a requirement of, or with a request made under, this section does not affect the validity of a parenting order.

- (8) Any matter that is required by this section to be included in a parenting order or any explanation that is required by this section to be given to a person is to be expressed in language that is likely to be readily understood by the person to whom the order is directed or the explanation is given.

65E Child's best interests paramount consideration in making a parenting order

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

Note: Division 10 deals with how a court determines a child's best interests.

65F General requirements for counselling before parenting order made

- (1) In proceedings for a parenting order in relation to a child, the court may order the parties to the proceedings to attend a conference with a family and child counsellor or a welfare officer to discuss the matter to which the proceedings relate.
- (2) Subject to subsection (3), a court must not make a parenting order in relation to a child unless:
- (a) the parties to the proceedings have attended a conference with a family and child counsellor or a welfare officer to discuss the matter to which the proceedings relate; or
 - (b) the court is satisfied that there is an urgent need for the parenting order, or there is some other special circumstance (such as family violence), that makes it appropriate to make the order even though the parties to the proceedings have not attended a conference as mentioned in paragraph (a); or
 - (c) the court is satisfied that it is not practicable to require the parties to the proceedings to attend a conference as mentioned in paragraph (a).
- (3) Subsection (2) does not apply to the making of a parenting order if:
- (a) it is made with the consent of all the parties to the proceedings; or
 - (b) it is an order until further order.

Section 65G

65G Special conditions for making residence order or specific issues order by consent in favour of non-parent

- (1) This section applies if:
 - (a) a court proposes to make:
 - (i) a residence order; or
 - (ii) a specific issues order under which a person will be responsible for a child's long-term or day-to-day care, welfare and development; and
 - (b) the court proposes to make that order:
 - (i) otherwise than in favour of a parent, or of persons who include a parent, of the child concerned; and
 - (ii) with the consent of all the parties to the proceedings.
- (2) The court must not make the proposed order unless:
 - (a) these conditions are satisfied:
 - (i) the parties to the proceedings have attended a conference with a family and child counsellor or a welfare officer to discuss the matter to be determined by the proposed order; and
 - (ii) the court has considered a report prepared by the counsellor or officer about that matter; or
 - (b) the court is satisfied that there are circumstances that make it appropriate to make the proposed order even though the conditions in paragraph (a) are not satisfied.

65H Children who are 18 or over or who have married or entered de facto relationships

- (1) A parenting order must not be made in relation to a child who:
 - (a) is 18 or over; or
 - (b) is or has been married; or
 - (c) is in a de facto relationship.
- (2) A parenting order in relation to a child stops being in force if the child turns 18, marries or enters into a de facto relationship.
- (3) A court having jurisdiction under this Part may make a declaration to the effect that the child is in, or has entered into, a de facto relationship.

- (4) A declaration under subsection (3) has effect for the purposes of this Act but does not have effect for any other purpose (including, for example, other laws of the Commonwealth or laws of the States and Territories).

65J Effect of adoption on parenting order

- (1) This section applies if:
- (a) a child is adopted; and
 - (b) immediately before the adoption, a parenting order was in force in relation to the child.
- (2) The parenting order stops being in force on the adoption of the child, unless the adoption is by a prescribed adopting parent and leave was not granted under section 60G for the adoption proceedings to be commenced.

65K What happens when parenting order that is or includes residence order does not make provision in relation to death of parent with whom child lives

- (1) This section applies if:
- (a) a parenting order that is or includes a residence order is in force determining that a child is to live with one of the child's parents; and
 - (b) that parent dies; and
 - (c) the parenting order does not provide for what is to happen on that parent's death.
- (2) The surviving parent cannot require the child to live with him or her.
- (3) The surviving parent, or another person (subject to section 65C), may apply for the making of a residence order in relation to the child.
- (4) In an application under subsection (3) by a person who does not, at the time of the application, have any parental responsibility for the child, any person who, at that time, has any parental responsibility for the child is entitled to be a party to the proceedings.

Section 65L

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

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

Note: Division 10 deals with how a court determines a child's best interests.

65LA Court may order attendance at a post-separation parenting program

- (1) In proceedings for a parenting order, the court may also make an order in respect of any party to the proceedings as follows:
 - (a) directing the party or each party to attend before a provider so that the provider can make an initial assessment as to the suitability of the party concerned to attend a program;
 - (b) if a party so attending before a provider is assessed by the provider to be suitable to attend a program or a part of a program and the provider nominates a particular program for the party to attend—directing the party to attend that program or that part of that program.
- (2) In deciding whether to make a particular order under subsection (1), a court must regard the best interests of the child as the paramount consideration.

Note: Division 10 deals with how a court determines a child's best interests.

- (3) In this section:

post-separation parenting program or ***program*** means a program that:

- (a) is designed (including by providing counselling services or by teaching techniques to resolve disputes) to help people to resolve problems that adversely affect the carrying out of their parenting responsibilities; and
- (b) is provided by a provider; and
- (c) consists of lectures, discussions (including group discussions) or other activities.

post-separation parenting program provider or ***provider*** means a provider of a program that is included in a list of providers compiled by the Attorney-General.

Subdivision C—General obligations created by residence orders, contact orders and specific issues orders

65M General obligations created by residence order

- (1) This section applies if a residence order is in force in relation to a child.
- (2) A person must not, contrary to the order:
 - (a) remove the child from the care of a person; or
 - (b) refuse or fail to deliver or return the child to a person; or
 - (c) interfere with the exercise or performance of any of the powers, duties or responsibilities that a person has under the order.

65N General obligations created by contact order

- (1) This section applies if a contact order is in force in relation to a child.
- (2) A person must not:
 - (a) hinder or prevent a person and the child from having contact in accordance with the order; or
 - (b) interfere with the contact that a person and the child are supposed to have with each other under the order.

Section 65P

65P General obligations created by specific issues orders that confer responsibility for a child's care, welfare and development

- (1) This section applies if a specific issues order:
 - (a) is in force in relation to a child; and
 - (b) confers responsibility on a person (the *carer*) for the child's long-term or day-to-day care, welfare and development.
- (2) A person must not hinder the carer in, or prevent the carer from, discharging that responsibility.

65Q Court may issue warrant for arrest of alleged offender

- (1) This section applies if:
 - (a) a residence order or a contact order is in force in relation to a child; and
 - (b) a court having jurisdiction under this Part is satisfied, on application by a person in whose favour the order was made, that there are reasonable grounds for believing that a person (the *alleged offender*) has contravened section 65M or 65N in relation to the order; and
 - (c) there is an application before the court for the alleged offender to be dealt with under Division 13A for the alleged contravention; and
 - (d) the court is satisfied that the issue of a warrant is necessary to ensure that the alleged offender will attend before a court to be dealt with under Division 13A for the alleged contravention.
- (2) The court may issue a warrant authorising a person to whom it is addressed to arrest the alleged offender.
- (3) A warrant stops being in force:
 - (a) if a date not later than 6 months after the issue of the warrant is specified in the warrant as the date when it stops being in force—on that date; or
 - (b) otherwise—6 months after the issue of the warrant.

Subdivision D—Dealing with people who have been arrested

65R Situation to which Subdivision applies

- (1) This Subdivision applies if a person:
 - (a) is arrested under a warrant issued under subsection 65Q(2);
or
 - (b) is arrested without warrant under a recovery order.
- (2) In this Subdivision:

alleged contravention means the alleged contravention because of which the alleged offender is arrested.

alleged offender means the person who is arrested.

arresting person means the person who arrests the alleged offender.

65S Arrested person to be brought before a court

- (1) The arresting person must:
 - (a) ensure that the alleged offender is brought before a court having jurisdiction under this Part before the end of the holding period applicable under subsection (4); and
 - (b) take all reasonable steps to ensure that, before the alleged offender is brought before a court, the person who applied for the warrant or recovery order is aware:
 - (i) that the alleged offender has been arrested; and
 - (ii) of the court before which the alleged offender is to be brought.
- (2) The alleged offender must not be released before the end of the holding period except under an order of a court having jurisdiction under this Part.
- (3) This section does not authorise the holding in custody of the alleged offender after the end of the holding period.
- (4) The *holding period* is:

Section 65T

- (a) if a Saturday, Sunday or public holiday starts within 24 hours after the arrest of the alleged offender—the longer of the following periods:
 - (i) the period starting with the arrest and ending 48 hours later;
 - (ii) the period starting with the arrest and ending at the end of the next day after the day of the arrest that is not a Saturday, Sunday or public holiday; or
- (b) in any other case—the period starting with the arrest and ending 24 hours later.

65T Obligation of court—where application before it to deal with contravention

- (1) This section applies if:
 - (a) the alleged offender is brought before a court under section 65S; and
 - (b) there is an application before the court for the alleged offender to be dealt with under Division 13A for the alleged contravention.
- (2) The court must, without delay, proceed to hear and determine the application.

65U Obligation of court—where no application before it, but application before another court, to deal with contravention

- (1) This section applies if:
 - (a) the alleged offender is brought before a court under section 65S; and
 - (b) there is no application, or no longer any application, before the court for the alleged offender to be dealt with under Division 13A for the alleged contravention; and
 - (c) the court is aware that there is an application before another court for the alleged offender to be dealt with under Division 13A for the alleged contravention.
- (2) The court must, without delay:

- (a) order that the alleged offender is to be released from custody on his or her entering into a recognizance (with or without surety or security) that he or she will attend before the other court on a date, at a time and at a place specified by the court; or
 - (b) order the arresting person to arrange for the alleged offender to be brought before the other court on such date and at such time as the court specifies, being a date and time such that the alleged offender is to be brought before the other court as soon as practicable, and in any event not more than 72 hours, after the order is made.
- (3) If a court makes an order under paragraph (2)(b) for the alleged offender to be brought before another court:
- (a) subject to paragraph (c), the alleged offender may be kept in custody until he or she is brought before the other court; and
 - (b) if the alleged offender is brought before the other court as required by the order, the other court must, without delay, proceed to hear and determine the application mentioned in paragraph (1)(c); and
 - (c) if the alleged offender is not brought before the other court as required by the order, he or she must be released without delay.

65V Obligation of court—where no application before any court to deal with contravention

- (1) This section applies if:
 - (a) the alleged offender is brought before a court under section 65S; and
 - (b) there is no application, or no longer any application, before the court for the alleged offender to be dealt with under Division 13A for the alleged contravention; and
 - (c) so far as the court is aware, there is no application, or no longer any application, before any other court for the alleged offender to be dealt with under Division 13A for the alleged contravention.
- (2) The court must, without delay, order the release of the alleged offender.

Section 65W

65W Applications heard as required by subsection 65T(2) or paragraph 65U(3)(b)

- (1) If a court hearing an application as required by subsection 65T(2) or paragraph 65U(3)(b) adjourns the hearing, the court must:
 - (a) order the alleged offender to be kept in such custody as the court considers appropriate during the adjournment; or
 - (b) order that the alleged offender is to be released from custody, either on his or her entering into a recognizance (with or without surety or security) that he or she will attend before the court on the resumption of the hearing or otherwise.
- (2) This section does not authorise the holding in custody of the alleged offender during an adjournment of proceedings that:
 - (a) is expressed to be for a period of more than 24 hours; or
 - (b) continues for more than 24 hours.

Subdivision E—Obligations under parenting orders relating to taking or sending children from Australia

65X Interpretation

- (1) In this Subdivision:

captain, in relation to an aircraft or vessel, means the person in charge or command of the aircraft or vessel.

care order means a specific issues order under which a person is responsible for a child's long-term or day-to-day care, welfare and development.

child means a person who is under 18.

pending has a meaning affected by subsection (2).

- (2) For the purposes of this Subdivision, if an appeal against a decision of a court in proceedings has been instituted and is pending, the proceedings are taken to be pending and sections 65Z and 65ZB (rather than sections 65Y and 65ZA) apply.

65Y Obligations if residence order, contact order or care order has been made

- (1) If a residence order, a contact order or a care order (the *Part VII order*) is in force, a person who was a party to the proceedings in which the order was made, or a person who is acting on behalf of, or at the request of, a party, must not take or send the child concerned from Australia to a place outside Australia except as permitted by subsection (2).

Penalty: Imprisonment for 3 years.

Note: The ancillary offence provisions of the *Criminal Code*, including section 11.1 (attempts), apply in relation to the offence created by subsection (1).

- (2) Subsection (1) does not prohibit taking or sending the child from Australia to a place outside Australia if:
- (a) it is done with the consent in writing (authenticated as prescribed) of each person in whose favour the Part VII order was made; or
 - (b) it is done in accordance with an order of a court made, under this Part or under a law of a State or Territory, at the time of, or after, the making of the Part VII order.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2) (see subsection 13.3(3) of the *Criminal Code*).

65Z Obligations if proceedings for the making of residence order, contact order or care order are pending

- (1) If proceedings (the *Part VII proceedings*) for the making of a residence order, a contact order or a care order are pending, a person who is a party to the proceedings, or who is acting on behalf of, or at the request of, a party, must not take or send the child concerned from Australia to a place outside Australia except as mentioned in subsection (2).

Penalty: Imprisonment for 3 years.

Note: The ancillary offence provisions of the *Criminal Code*, including section 11.1 (attempts), apply in relation to the offence created by subsection (1).

Part VII Children

Division 6 Parenting orders other than child maintenance orders

Section 65ZA

- (2) Subsection (1) does not prohibit taking or sending the child from Australia to a place outside Australia if:
- (a) it is done with the consent in writing (authenticated as prescribed) of each other party to the Part VII proceedings; or
 - (b) it is done in accordance with an order of a court made, under this Part or under a law of a State or Territory, after the institution of the Part VII proceedings.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2) (see subsection 13.3(3) of the *Criminal Code*).

65ZA Obligations of owners etc. of aircraft and vessels if residence order, contact order or care order made

- (1) This section applies if:
- (a) a residence order, a contact order or a care order (the *Part VII order*) is in force; and
 - (b) a person in whose favour the Part VII order was made has served on the captain, owner or charterer of an aircraft or vessel a statutory declaration made by the person not earlier than 7 days before the date of service that:
 - (i) relates to the order; and
 - (ii) complies with subsection (4).
- (2) The person on whom the declaration is served must not permit the child identified in the declaration to leave a port or place in Australia in the aircraft or vessel for a destination outside Australia except as permitted by subsection (3).

Penalty: 60 penalty units.

- (2A) Subsection (2) does not apply if the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2A) (see subsection 13.3(3) of the *Criminal Code*).

- (3) Subsection (2) does not prohibit permitting the child to leave Australia in the aircraft or vessel if:
- (a) the child leaves in the company, or with the consent in writing (authenticated as prescribed), of the person who made the statutory declaration; or

- (b) the child leaves in accordance with an order of a court made, under this Part or under a law of a State or Territory, at the time of, or after, the making of the Part VII order.

Note: A defendant bears an evidential burden in relation to the matter in subsection (3) (see subsection 13.3(3) of the *Criminal Code*).

- (4) The statutory declaration must contain:
 - (a) full particulars of the Part VII order, including:
 - (i) the full name and the date of birth of the child to whom the order relates; and
 - (ii) the full names of the parties to the proceedings in which the order was made; and
 - (iii) the terms of the order; and
 - (b) such other matters (if any) as are prescribed.

65ZB Obligations of owners etc. of aircraft and vessels if proceedings for the making of residence order, contact order or care order are pending

- (1) This section applies if:
 - (a) proceedings (the *Part VII proceedings*) for the making of a residence order, a contact order or a care order are pending; and
 - (b) a party to the proceedings has served on the captain, owner or charterer of a vessel a statutory declaration made by the party not earlier than 7 days before the date of service that:
 - (i) relates to the proceedings; and
 - (ii) complies with subsection (4).
- (2) The person on whom the declaration is served must not permit the child identified in the declaration to leave a port or place in Australia in the aircraft or vessel for a destination outside Australia except as permitted by subsection (3).

Penalty: 60 penalty units.

- (2A) Subsection (2) does not apply if the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2A) (see subsection 13.3(3) of the *Criminal Code*).

Part VII Children

Division 6 Parenting orders other than child maintenance orders

Section 65ZC

- (3) Subsection (2) does not prohibit permitting the child to leave Australia in the aircraft or vessel if:
- (a) the child leaves in the company, or with the consent in writing (authenticated as prescribed), of the party who made the statutory declaration; or
 - (b) in accordance with an order of a court made, under this Part or under a law of a State or Territory, after the institution of the Part VII proceedings.

Note: A defendant bears an evidential burden in relation to the matter in subsection (3) (see subsection 13.3(3) of the *Criminal Code*).

- (4) The statutory declaration must contain:
- (a) full particulars of the Part VII proceedings, including:
 - (i) the full name and the date of birth of the child to whom the proceedings relate; and
 - (ii) the full names of the parties to the proceedings; and
 - (iii) the name of the court, the nature of the proceedings and the date of institution of the proceedings; and
 - (iv) if an appeal has been instituted in the proceedings—the name of the court in which the appeal was instituted and the date on which it was instituted; and
 - (b) a statement that the Part VII proceedings are pending at the date of the declaration; and
 - (c) such other matters (if any) as are prescribed.

65ZC General provisions applicable to sections 65ZA and 65ZB

- (1) A declaration under section 65ZA or 65ZB may be served on the owner or charterer of an aircraft or vessel, or on the agent of the owner of an aircraft or vessel, by sending the declaration by registered post addressed to the owner, charterer or agent at the principal place of business of the owner, charterer or agent.
- (2) The captain, owner or charterer of an aircraft or vessel, or the agent of the owner of an aircraft or vessel, is not liable in any civil or criminal proceedings in respect of anything done in good faith for the purpose of complying with section 65ZA or 65ZB.
- (3) If an act or omission by a person that constitutes an offence against subsection 65ZA(2) or 65ZB(2) is also an offence against any other

law, the person may be prosecuted and convicted under that other law, but nothing in this subsection makes a person liable to be punished twice in respect of the same act or omission.

65ZD State or Territory laws stopping children leaving Australia not affected

Nothing in this Subdivision prevents or restricts the operation of any law of a State or Territory under which:

- (a) action may be taken to prevent a child from leaving Australia or being taken or sent outside Australia; or
- (b) a person may be punished in respect of the taking or sending of a child outside Australia.

Division 7—Child maintenance orders

Subdivision A—What this Division does

66A What this Division does

This Division:

- (a) contains statements of objects and principles relevant to the making of child maintenance orders (Subdivision B); and
- (b) deals with the relationship between this Division and the *Child Support (Assessment) Act 1989* (Subdivision C); and
- (c) deals with applying for and making child maintenance orders (Subdivision D); and
- (d) deals with other aspects of courts' powers in relation to child maintenance orders (Subdivision E); and
- (da) deals with varying the maintenance of certain children (Subdivision EA); and
- (e) deals with when child maintenance orders stop being in force (Subdivision F).

Subdivision B—Objects and principles

66B Objects

- (1) The principal object of this Division is to ensure that children receive a proper level of financial support from their parents.
- (2) Particular objects of this Division include ensuring:
 - (a) that children have their proper needs met from reasonable and adequate shares in the income, earning capacity, property and financial resources of both of their parents; and
 - (b) that parents share equitably in the support of their children.

66C Principles—parents have primary duty to maintain

- (1) The parents of a child have, subject to this Division, the primary duty to maintain the child.

- (2) Without limiting the generality of subsection (1), the duty of a parent to maintain a child:
- (a) is not of lower priority than the duty of the parent to maintain any other child or another person; and
 - (b) has priority over all commitments of the parent other than commitments necessary to enable the parent to support:
 - (i) himself or herself; or
 - (ii) any other child or another person that the parent has a duty to maintain; and
 - (c) is not affected by:
 - (i) the duty of any other person to maintain the child; or
 - (ii) any entitlement of the child or another person to an income tested pension, allowance or benefit.

66D Principles—when step-parents have a duty to maintain

- (1) The step-parent of a child has, subject to this Division, the duty of maintaining a child if, and only if, a court, by order under section 66M, determines that it is proper for the step-parent to have that duty.
- (2) Any duty of a step-parent to maintain a step-child:
- (a) is a secondary duty subject to the primary duty of the parents of the child to maintain the child; and
 - (b) does not derogate from the primary duty of the parents to maintain the child.

Subdivision C—Relationship with Child Support (Assessment) Act

66E Child maintenance order not to be made etc. if application for administrative assessment of child support could be made

- (1) A court having jurisdiction under this Part must not, at any time, make, revive or vary a child maintenance order in relation to a child on the application of a person (the *applicant*) against, or in favour of, a person (the *respondent*) if an application could properly be made, at that time, under the *Child Support*

Section 66F

(Assessment) Act 1989 for administrative assessment of child support (within the meaning of that Act):

- (a) by the applicant seeking payment of child support for the child from the respondent; or
 - (b) by the respondent seeking payment of child support for the child from the applicant.
- (2) Subsection (1) has effect whether or not an application for administrative assessment of child support for the child has in fact been made (whether by the applicant, the respondent or another person).
- (3) This section does not apply to proceedings under regulations made for the purposes of section 110 or 111A.

Subdivision D—Applying for and making child maintenance orders

66F Who may apply for a child maintenance order

- (1) Unless subsection (2) applies, a child maintenance order in relation to a child may be applied for by:
- (a) either or both of the child's parents; or
 - (b) the child; or
 - (ba) a grandparent of the child; or
 - (c) any other person concerned with the care, welfare or development of the child.
- (2) A child maintenance order in relation to a child who is under the guardianship, or in the care (however described), of a person under a child welfare law may only be applied for by:
- (a) the child; or
 - (b) a parent of the child who has the daily care of the child; or
 - (c) a relative of the child who has the daily care of the child; or
 - (d) a child welfare officer of the relevant State or Territory.

66G Court's power to make child maintenance order

In proceedings for a child maintenance order, the court may, subject to this Division, make such child maintenance order as it thinks proper.

66H Approach to be taken in proceedings for child maintenance order

In proceedings for the making of a child maintenance order in relation to a child, the court must:

- (a) consider the financial support necessary for the maintenance of the child (this is expanded on in section 66J); and
- (b) determine the financial contribution, or respective financial contributions, towards the financial support necessary for the maintenance of the child, that should be made by a party, or by parties, to the proceedings (this is expanded on in section 66K).

66J Matters to be taken into account in considering financial support necessary for maintenance of child

- (1) In considering the financial support necessary for the maintenance of a child, the court must take into account these (and no other) matters:
 - (a) the matters mentioned in section 66B; and
 - (b) the proper needs of the child (this is expanded on in subsection (2)); and
 - (c) the income, earning capacity, property and financial resources of the child (this is expanded on in subsection (3)).
- (2) In taking into account the proper needs of the child the court:
 - (a) must have regard to:
 - (i) the age of the child; and
 - (ii) the manner in which the child is being, and in which the parents expected the child to be, educated or trained; and
 - (iii) any special needs of the child; and

Section 66K

- (b) may have regard, to the extent to which the court considers appropriate in the circumstances of the case, to any relevant findings of published research in relation to the maintenance of children.
- (3) In taking into account the income, earning capacity, property and financial resources of the child, the court must:
 - (a) have regard to the capacity of the child to earn or derive income, including any assets of, under the control of or held for the benefit of the child that do not produce, but are capable of producing, income; and
 - (b) disregard:
 - (i) the income, earning capacity, property and financial resources of any other person unless, in the special circumstances of the case, the court considers it appropriate to have regard to them; and
 - (ii) any entitlement of the child or any other person to an income tested pension, allowance or benefit.
- (4) Subsections (2) and (3) do not limit, by implication, the matters to which the court may have regard in taking into account the matters referred to in subsection (1).

66K Matters to be taken into account in determining contribution that should be made by party etc.

- (1) In determining the financial contribution, or respective financial contributions, towards the financial support necessary for the maintenance of a child that should be made by a party, or by parties, to the proceedings, the court must take into account these (and no other) matters:
 - (a) the matters mentioned in sections 66B, 66C and 66D; and
 - (b) the income, earning capacity, property and financial resources of the party or each of those parties (this is expanded on in subsection (2)); and
 - (c) the commitments of the party, or each of those parties, that are necessary to enable the party to support:
 - (i) himself or herself; or
 - (ii) any other child or another person that the person has a duty to maintain; and

- (d) the direct and indirect costs incurred by the parent or other person with whom the child lives in providing care for the child (this is expanded on in subsection (3)); and
 - (e) any special circumstances which, if not taken into account in the particular case, would result in injustice or undue hardship to any person.
- (2) In taking into account the income, earning capacity, property and financial resources of a party to the proceedings, the court must have regard to the capacity of the party to earn and derive income, including any assets of, under the control of or held for the benefit of the party that do not produce, but are capable of producing, income.
- (3) In taking into account the direct and indirect costs incurred by the parent or other person with whom the child lives in providing care for the child, the court must have regard to the income and earning capacity forgone by the parent or other person in providing that care.
- (4) In determining the financial contribution, or respective financial contributions, that should be made by a party, or by parties, to the proceedings, the court must disregard:
- (a) any entitlement of the child, or the person with whom the child lives, to an income tested pension, allowance or benefit; and
 - (b) the income, earning capacity, property and financial resources of any person who does not have a duty to maintain the child, or has such a duty but is not a party to the proceedings, unless, in the special circumstances of the case, the court considers it appropriate to have regard to them.
- (5) In determining the financial contribution, or respective financial contributions, that should be made by a party, or by parties, to the proceedings, the court must consider the capacity of the party, or each of those parties, to provide maintenance by way of periodic payments before considering the capacity of the party, or each of those parties, to provide maintenance:
- (a) by way of lump sum payment; or
 - (b) by way of transfer or settlement of property; or
 - (c) in any other way.

Section 66L

- (6) Subsections (2) to (5) do not limit, by implication, the matters to which the court may have regard in taking into account the matters referred to in subsection (1).

66L Children who are 18 or over

- (1) A court must not make a child maintenance order in relation to a child who is 18 or over unless the court is satisfied that the provision of the maintenance is necessary:
- (a) to enable the child to complete his or her education; or
 - (b) because of a mental or physical disability of the child.
- The court may make such a child maintenance order, in relation to a child who is 17, to take effect when or after the child turns 18.
- (2) A court must not make a child maintenance order in relation to a child that extends beyond the day on which the child will turn 18 unless the court is satisfied that the provision of the maintenance beyond that day is necessary:
- (a) to enable the child to complete his or her education; or
 - (b) because of a mental or physical disability of the child.
- (3) A child maintenance order in relation to a child stops being in force when the child turns 18 unless the order is expressed to continue in force after then.

66M When step-parents have a duty to maintain

- (1) As stated in section 66D, a step-parent of a child has a duty of maintaining a child if, and only if, there is an order in force under this section.
- (2) A court having jurisdiction under this Part may, by order, determine that it is proper for a step-parent to have a duty of maintaining a step-child.
- (3) In making an order under subsection (2), the court must have regard to these (and no other) matters:
- (a) the matters referred to in sections 60F, 66B and 66C; and
 - (b) the length and circumstances of the marriage to the relevant parent of the child; and

- (c) the relationship that has existed between the step-parent and the child; and
- (d) the arrangements that have existed for the maintenance of the child; and
- (e) any special circumstances which, if not taken into account in the particular case, would result in injustice or undue hardship to any person.

66N Determining financial contribution of step-parent

In determining the financial contribution towards the financial support necessary for the maintenance of the child that should be made by a party to the proceedings who is a step-parent of the child, the court must take into account:

- (a) the matters referred to in sections 60F, 66B, 66C, 66D and 66K; and
- (b) the extent to which the primary duty of the parents to maintain the child is being, and can be fulfilled.

Subdivision E—Other aspects of courts' powers

66P General powers of court

- (1) In proceedings for a child maintenance order, a court may do all or any of the following:
 - (a) order payment of a lump sum, whether in one amount or by instalments;
 - (b) order payment of a weekly, monthly, yearly or other periodic amount;
 - (c) order that a specified transfer or settlement of property be made by way of maintenance for a child;
 - (d) order that payment of an amount ordered to be paid be wholly or partly secured as the court specifies;
 - (e) order that any necessary instrument be executed, and that such documents of title be produced and such other things be done, as are necessary to enable an order to be carried out effectively or to provide security for the due performance of an order;

Section 66Q

- (f) order that payment be made to a specified person or public authority or into court;
 - (g) make a permanent order, an order pending the disposal of proceedings, an order for a fixed period, an order until a child attains a specified age or an order until further order;
 - (h) make an order imposing terms and conditions;
 - (i) make an order by consent;
 - (j) make any other order (whether or not of the same nature as those referred to in paragraphs (a) to (i)) that it considers appropriate;
 - (k) make an order under this Division at any time.
- (2) The making of an order of a kind referred to in paragraph (1)(c), or of any other order under this Division, in relation to the maintenance of a child does not prevent a court from making a subsequent order in relation to the maintenance of the child.
- (3) The applicable Rules of Court may make provision with respect to the making of orders under this Division (whether as to their form or otherwise) for the purpose of facilitating their enforcement and the collection of maintenance payable under them.

66Q Urgent child maintenance orders

If, in proceedings for a child maintenance order in relation to a child:

- (a) the court considers that the child is in immediate need of financial assistance; but
 - (b) it is not practicable in the circumstances to determine immediately what order (if any) should be made;
- the court may order the payment, pending the disposal of the proceedings, of such periodic or other amount as the court considers appropriate.

66R Specification in orders of payments etc. for child maintenance purposes

- (1) If:
- (a) a court makes an order under this Act (whether or not the order is made in proceedings in relation to the maintenance

of a child, is made by consent or varies an earlier order) that has the effect of requiring:

- (i) payment of a lump sum, whether in one amount or by instalments; or
 - (ii) the transfer or settlement of property; and
- (b) the purpose, or one of the purposes, of the payment, transfer or settlement is to make provision for the maintenance of a child or children;

the court must:

- (c) express the order to be an order to which this section applies; and
- (d) specify:
 - (i) the child or children for whose maintenance provision is made by the payment, transfer or settlement; and
 - (ii) the portion of the payment, or the value of the portion of the property, attributable to the provision of maintenance for the child or each child, as the case may be.

(2) If:

- (a) a court makes an order of a kind referred to in paragraph (1)(a); and
- (b) the order:
 - (i) is not expressed to be an order to which this section applies; or
 - (ii) is expressed to be an order to which this section applies, but does not comply with paragraph (1)(d);

any payment, transfer or settlement of a kind referred to in paragraph (1)(a), that the order has the effect of requiring, is to be taken not to make provision for the maintenance of a child.

66S Modification of child maintenance orders

(1) This section applies if:

- (a) there is in force an order (the *first order*), for the maintenance of a child (whether or not made under this Act and whether made before or after the commencement of this section):
 - (i) made by a court; or

Section 66S

- (ii) registered in a court; and
 - (b) a person (being someone who could apply for a child maintenance order in relation to the child) or persons (each of whom could do that) apply to the court for an order under this section in relation to the first order.
- (1A) With the consent of all the parties to the first order, the court may make an order:
- (a) discharging the first order; or
 - (b) suspending its operation wholly or in part and either until further order or until a fixed time or the happening of a future event; or
 - (c) if the operation of the order has been suspended under paragraph (b) or (2)(b)—reviving its operation wholly or in part; or
 - (d) varying the order:
 - (i) so as to increase or decrease any amount ordered to be paid by the order; or
 - (ii) in any other way.
- (1B) However, the court must not make an order under subsection (1A) that allows any entitlement of a child or another person to an income tested pension, allowance or benefit, to affect the duty of that child's parents to maintain the child.

Note: For the duty of a parent to maintain a child, see section 66C.

- (2) In any other case, the court may, by order:
- (a) discharge the first order if there is just cause for so doing; or
 - (b) suspend its operation wholly or in part and either until further order or until a fixed time or the happening of a future event; or
 - (c) if the operation of the order has been suspended under paragraph (b) or (1A)(b), revive its operation wholly or in part; or
 - (d) subject to subsection (3), vary the order:
 - (i) so as to increase or decrease any amount ordered to be paid by the order; or
 - (ii) in any other way.

- (3) The court must not vary the order so as to increase or decrease any amount ordered to be paid by the order unless it is satisfied:
- (a) that, since the order was made or last varied:
 - (i) the circumstances of the child have changed so as to justify the variation; or
 - (ii) the circumstances of the person liable to make payments under the order have changed so as to justify the variation; or
 - (iii) the circumstances of the person entitled to receive payments under the order have changed so as to justify the variation; or
 - (iv) in the case of an order that operates in favour of, or is binding on, a legal personal representative—the circumstances of the estate are such as to justify the variation; or
 - (b) that, since the order was made or last varied, the cost of living has changed to such an extent as to justify its so doing (this is expanded on in subsections (4) and (5)); or
 - (c) if the order was made by consent—that the amount ordered to be paid is not proper or adequate (this is expanded on in subsection (6)); or
 - (d) that material facts were withheld from the court that made the order or from a court that varied the order, or material evidence previously given before such a court was false.
- (4) In satisfying itself for the purposes of paragraph (3)(b), the court must have regard to any changes that have occurred in the Consumer Price Index published by the Australian Statistician.
- (5) The court must not, in considering the variation of an order, have regard to a change in the cost of living unless at least 12 months have elapsed since the order was made or last varied having regard to a change in the cost of living.
- (6) In satisfying itself for the purposes of paragraph (3)(c), the court must have regard to any payments, and any transfer or settlement of property, previously made to the child, or to any other person for the benefit of the child, by the person against whom the order was made.
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Section 66SA

- (7) An order decreasing a periodic amount payable under the order, or discharging the order, may be expressed to be retrospective to such day as the court considers appropriate.
- (8) If an order (the *subsequent order*) decreasing a periodic amount payable under the first order is expressed to be retrospective, amounts paid under the first order that are not payable under the first order as varied by the subsequent order may be recovered in a court having jurisdiction under this Part.
- (9) If an order discharging the first order is expressed to be retrospective to a specified day, amounts paid under the first order since the specified day may be recovered in a court having jurisdiction under this Part.
- (10) For the purposes of this section, the court must have regard to the provisions of Subdivisions B, C and D (to the extent applicable).
- (11) The discharge of the first order does not affect the recovery of arrears due under the order when the discharge takes effect.

Subdivision EA—Varying the maintenance of certain children

66SA Varying the maintenance of certain children

- (1) This section applies to persons who:
 - (a) are parties to an agreement (the *original agreement*) dealing with the maintenance of a child; or
 - (b) are entitled to receive, or required to pay, maintenance in respect of a child under a court order;and cannot properly make an application under the *Child Support (Assessment) Act 1989* for administrative assessment of child support (within the meaning of that Act) for the child seeking payment of child support by the other person.
- (2) The persons may, by registering a written agreement in a court having jurisdiction under this Part, vary or revoke the original agreement or order to the extent that it deals with maintenance of the child.

- (3) However, the registered agreement is of no effect to the extent that it allows any entitlement of a child or another person to an income tested pension, allowance or benefit to affect the duty of that child's parents to maintain the child.

Note: For the duty of a parent to maintain a child, see section 66C.

- (4) If the original agreement or order is varied under subsection (2), it:
- (a) continues to operate despite the death of a party to the agreement or of a person entitled to receive, or required to pay, maintenance under the order; and
 - (b) operates in favour of, and is binding on, the legal representative of that party or person;
- unless the agreement or order provides otherwise.
- (5) However, despite anything in the agreement or order, it does not continue to operate, to the extent that it requires the periodic payment of maintenance, after the death of the person entitled to receive those payments.
- (6) This section applies despite anything in Division 4.

Subdivision F—When child maintenance orders stop being in force

66T Effect of child turning 18

As stated in subsection 66L(3), a child maintenance order in relation to a child stops being in force when the child turns 18, unless the order is expressed to continue in force after then.

66U Effect of death of child, person liable to pay or person entitled to receive

- (1) A child maintenance order in relation to a child stops being in force on the death of the child.
- (2) A child maintenance order in relation to a child stops being in force on the death of the person liable to make payments under the order.
- (3) Subsection (2) does not apply to an order made before the commencement of section 38 of the *Family Law Amendment Act*

Section 66V

1983 if the order was expressed to continue in force throughout the life of the person for whose benefit the order was made or for a period that had not expired at the death of the person liable to make payments under the order and, in that case, the order is binding on the legal personal representative of the deceased person.

- (4) A child maintenance order in relation to a child stops being in force on the death of the person entitled to receive payments under the order.
- (5) Subsection (4) does not apply to an order if:
 - (a) the order is expressed to continue in force after the death of the person first entitled to receive payments under the order; and
 - (b) the order specifies the person who is to receive the payments after that death.

66V Effect of adoption, marriage or entering into a de facto relationship

- (1) A child maintenance order in relation to a child stops being in force if the child is adopted, marries or enters into a de facto relationship.
- (2) If a child to whom a child maintenance order applies dies, is adopted, marries or enters into a de facto relationship, the person entitled to receive payments under the order must, without delay, inform the person liable to make payments under the order.
- (3) Any amounts paid under a child maintenance order in relation to a period after the child dies, is adopted, marries or enters into a de facto relationship may be recovered in a court having jurisdiction under this Part.
- (4) A court having jurisdiction under this Part may make a declaration to the effect that a child is in, or has entered into, a de facto relationship.
- (5) A declaration under subsection (4) has effect for the purposes of this Act but does not have effect for any other purpose (including, for example, other laws of the Commonwealth or laws of the States and Territories).

66VA Children who are 18 or over: change of circumstances

- (1) A child maintenance order made under section 66L:
 - (a) to enable the child to complete his or her education; or
 - (b) because of a mental or physical disability of the child;stops being in force if the child ceases that education or ceases to have that disability.
- (2) The person to whom the maintenance is payable must, as soon as practicable, inform the person required to pay it of that change in circumstances.
- (3) Any amounts of maintenance paid under the child maintenance order after it stops being in force may be recovered in a court having jurisdiction under this Part.

66W Recovery of arrears

- (1) Nothing in subsection 66L(3), or in this Subdivision (apart from subsection (2) of this section), affects the recovery of arrears due under a child maintenance order in relation to a child when the order ceases to be in force.
- (2) If arrears are due under such an order when the order ceases to be in force, the court may, by order, retrospectively:
 - (a) discharge the order if there is just cause for doing so; or
 - (b) vary the order so as to increase or decrease the arrears to be paid under the order if the court is satisfied that:
 - (i) the circumstances of the person liable to pay the arrears are such as to justify the variation; or
 - (ii) the circumstances of the person entitled to receive the arrears are such as to justify the variation; or
 - (iii) in the case of an order that operated in favour of, or that was binding on, a legal personal representative—the circumstances of the estate are such as to justify the variation.

Division 8—Other matters relating to children

Subdivision A—What this Division does

67A What this Division does

This Division deals with:

- (a) the liability of a father to contribute towards child bearing expenses if he is not married to the child's mother (Subdivision B); and
- (b) orders for the location and recovery of children (Subdivision C); and
- (c) the reporting of allegations of child abuse (Subdivision D); and
- (d) other orders about children (Subdivision E).

Subdivision B—Father's liability to contribute towards child bearing expenses if not married to mother

67B Father liable to contribute towards maintenance and expenses of mother

The father of a child who is not married to the child's mother is, subject to this Division, liable to make a proper contribution towards:

- (a) the maintenance of the mother for the childbirth maintenance period in relation to the birth of the child; and
- (b) the mother's reasonable medical expenses in relation to the pregnancy and birth; and
- (c) if the mother dies and the death is as a result of the pregnancy or birth, the reasonable expenses of the mother's funeral; and
- (d) if the child is stillborn, or dies and the death is related to the birth, the reasonable expenses of the child's funeral.

67C Matters to be taken into account in proceedings under Subdivision

- (1) In proceedings under this Subdivision in relation to the birth of a child, the court must, in determining the contribution that should be made by the father of the child, take into account the following matters only:
 - (a) the income, earning capacity, property and financial resources of the mother and the father of the child;
 - (b) commitments of each of those persons that are necessary to enable the person to support:
 - (i) himself or herself; or
 - (ii) any other child or another person that the person has a duty to maintain;
 - (c) any special circumstances which, if not taken into account in the particular case, would result in injustice or undue hardship to any person.
- (2) In taking into account the income, earning capacity, property and financial resources of a person, the court must have regard to the capacity of the person to earn and derive income, including any assets of, under the control of or held for the benefit of the person that do not produce, but are capable of producing, income.
- (3) In taking into account the income, earning capacity, property and financial resources of the mother, the court must disregard any entitlement of the mother to an income tested pension, allowance or benefit.
- (4) Subsections (2) and (3) do not limit the matters to which the court may have regard in taking into account matters referred to in subsection (1).

67D Powers of court in proceedings under Subdivision

- (1) In proceedings under this Subdivision in relation to the birth of a child, the court may make such order as it thinks proper.

Section 67E

- (2) In exercising its powers under this Subdivision, a court may do all or any of the following:
- (a) order payment of a lump sum, whether in one amount or by instalments;
 - (b) order payment of a weekly, monthly or other periodic amount;
 - (c) order that payment of an amount ordered to be paid be wholly or partly secured as the court specifies;
 - (d) order that any necessary instrument be executed, and that such documents of title be produced and such other things be done, as are necessary to enable an order to be carried out effectively or to provide security for the due performance of an order;
 - (e) order that payment be made to a specified person or public authority or into court;
 - (f) make a permanent order, an order pending the disposal of proceedings, an order for a fixed period or an order until further order;
 - (g) make an order imposing terms and conditions;
 - (h) make an order by consent;
 - (i) make any other order (whether or not of the same nature as those referred to in paragraphs (a) to (h)) that it considers appropriate;
 - (j) make an order under this Subdivision at any time (whether before or after the birth of the relevant child).
- (3) The applicable Rules of Court may make provision with respect to the making of orders under this Subdivision (whether as to their form or otherwise) for the purpose of facilitating their enforcement and the collection of amounts payable under them.

67E Urgent orders

If, in proceedings under this Subdivision in relation to the birth of a child:

- (a) the court is of the opinion that the applicant is in immediate need of financial assistance; but

- (b) it is not practicable in the circumstances to determine immediately what order (if any) should be made (whether because the applicant has not yet given birth to the child or otherwise);

the court may order the payment, pending the disposal of the proceedings, of such periodic or other amount as the court considers appropriate.

67F Who may institute proceedings

Proceedings under this Subdivision in relation to the birth of a child may be instituted by the mother or by the mother's legal personal representative.

67G Time limit for institution of proceedings

- (1) Proceedings under this Subdivision in relation to the birth of a child may be instituted:
- (a) at any time during the pregnancy of the mother; or
 - (b) after the birth of the child, but not later than 12 months after the birth except by leave of the court.
- (2) The court must not grant leave under paragraph (1)(b) unless it is satisfied that refusal to grant leave would cause hardship to the applicant, the child or another person.

Subdivision C—Location and recovery of children

67H Interpretation

In this Subdivision:

appropriate authority, in relation to a Commonwealth instrumentality, means a person:

- (a) who in, or in relation to, the instrumentality:
 - (i) is an SES employee or acting SES employee; or
 - (ii) holds an office or position that is at a level equivalent to that of an SES employee; or

Section 67H

- (b) who is authorised in writing by the principal officer of the instrumentality to provide information under Commonwealth information orders.

Commonwealth information order has the meaning given by subsection 67J(2).

Department means a Department of State of the Commonwealth.

information about the child's location, in the context of a location order made or to be made by a court in relation to a child, means information about:

- (a) where the child is; or
- (b) where a person who the court has reasonable cause to believe has the child is.

location order has the meaning given by subsection 67J(1).

principal officer, in relation to a Commonwealth instrumentality, means:

- (a) if the regulations declare an office to be the principal office in respect of the instrumentality—the person holding, or performing the duties of, that office; or
- (b) the person who constitutes the instrumentality or who is entitled to preside at any meeting of the instrumentality, or of its governing body, at which the person is present.

recovery order has the meaning given by section 67Q.

Registry Manager means:

- (a) in relation to the Family Court—the Registry Manager of the Registry of the Court; and
- (b) in relation to the Family Court of Western Australia—the Principal Registrar, a Registrar or a Deputy Registrar, of the court; and
- (c) in relation to any other court—the principal officer of the court.

67J Meaning of *location order* and *Commonwealth information order*

- (1) A *location order* is an order made by a court requiring:
 - (a) a person to provide the Registry Manager of the court with information that the person has or obtains about the child's location; or
 - (b) the Secretary of a Department, or an appropriate authority of a Commonwealth instrumentality, to provide the Registry Manager of the court with information about the child's location that is contained in or comes into the records of the Department or instrumentality.
- (2) A *Commonwealth information order* is a location order described in paragraph (1)(b).

67K Who may apply for a location order

- (1) A location order in relation to a child may be applied for by:
 - (a) a person who has a residence order in relation to the child; or
 - (b) a person who has a contact order in relation to the child; or
 - (c) a person who has a specific issues order in relation to the child under which the person is responsible for the child's long-term or day-to-day care, welfare and development; or
 - (ca) a grandparent of the child; or
 - (d) any other person concerned with the care, welfare or development of the child.
- (2) For the purposes of the Child Protection Convention, a person (including the Commonwealth central authority) may apply to a court for a location order.
- (3) In subsection (2):

Child Protection Convention has the same meaning as in section 111CA.

Commonwealth central authority has the same meaning as in section 111CA.

Section 67L

67L Child's best interests paramount consideration in making a location order

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

Note: Division 10 deals with how a court determines a child's best interests.

67M Provisions about location orders, other than Commonwealth information orders

- (1) This section applies to location orders other than Commonwealth information orders.
- (2) Subject to section 67L, a court having jurisdiction under this Part or section 111CX, or exercising jurisdiction in proceedings arising under regulations made for the purposes of Part XIII AA, may make a location order if it is satisfied that the person to whom the order applies is likely to have information about the child's location.
- (3) If the person to whom a location order applies holds an office or position in, or in relation to, a Department or a Commonwealth instrumentality, the order does not apply to information that the person has or obtains because of holding that office or position.
- (4) A location order stays in force for 12 months or such longer period as the court considers appropriate.
- (5) While a location order is in force, the person to whom it applies must provide the information sought by the order as soon as practicable, or as soon as practicable after the person obtains it.
- (6) The person to whom a location order applies must comply with the order in spite of anything in any other law.

67N Provisions about Commonwealth information orders

- (1) This section applies to Commonwealth information orders.
 - (2) Subject to section 67L, a court having jurisdiction under this Part or section 111CX, or exercising jurisdiction in proceedings arising
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under regulations made for the purposes of Part XIII AA, may make a Commonwealth information order if it is satisfied that information about the child's location is likely to be contained in, or to come into, the records of the Department or Commonwealth instrumentality concerned.

- (3) A court must not make a Commonwealth information order unless:
- (a) a copy of the application for the order has been served in accordance with the applicable Rules of Court on the person to whom the order will apply (being the Secretary of the Department concerned or an appropriate authority of the Commonwealth instrumentality concerned); and
 - (b) if that Department or Commonwealth instrumentality is prescribed for the purposes of this paragraph—either:
 - (i) the period of 7 days after service of that copy of the application has expired; or
 - (ii) the court considers that there are special circumstances because of which the order should be made before the end of that period of 7 days.
- (4) If an application for a Commonwealth information order relates to more than one Department or Commonwealth instrumentality, the court must not make the order in relation to more than one of them unless the court considers it should do so because of exceptional circumstances.
- (5) A court may state that a Commonwealth information order only applies to records of a particular kind if the court considers that:
- (a) the information sought by the order is only likely to be contained in records of that kind; and
 - (b) to apply the order to all records of the Department or Commonwealth instrumentality concerned would place an unreasonable burden on its resources.
- (6) A Commonwealth information order stays in force for 12 months.
- (7) While a Commonwealth information order is in force, the person to whom the order applies must, subject to subsection (9), provide the information sought by the order as soon as practicable, or as soon as practicable after it comes into the records of the Department or Commonwealth instrumentality concerned.
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Section 67P

- (8) If the person (the *official*) to whom a Commonwealth information order applies provides another person (in accordance with the order) with information sought by the order, the official must, at the same time, provide the other person with any information about actual or threatened violence to the child concerned, to a parent of the child, or to another person with whom the child lives, that is in the records of the Department or Commonwealth instrumentality concerned.
- (9) A Commonwealth information order does not require the records of the Department or Commonwealth instrumentality concerned to be searched for the information sought by the order more often than once every 3 months unless specifically so ordered by the court.
- (10) The person to whom a Commonwealth information order applies must comply with the order in spite of anything in any other law.

67P Information provided under location order not to be disclosed except to limited persons

- (1) Information provided to the Registry Manager of a court under a location order (including a Commonwealth information order) must not be disclosed by the Registry Manager, or by any other person who obtains the information (whether directly or indirectly and whether under this section or otherwise) because of the provision of the information to the Registry Manager, except to:
 - (a) the Registry Manager of another court; or
 - (b) an officer of the court, or of another court, for the purpose of that officer's responsibilities or duties; or
 - (c) a process-server engaged by, or by an officer of, the court or another court; or
 - (d) with the leave of the court that made the location order:
 - (i) the legal adviser of the applicant for the order; or
 - (ii) a process-server engaged by that legal adviser; or
 - (e) if a recovery order that consists of or includes an authorisation or direction described in paragraph 67Q(b) or (c) is in force—a person to whom the authorisation or direction is addressed; or
 - (f) with the leave of the court that made the location order:

- (i) the Commonwealth central authority; or
- (ii) a central authority or a competent authority of a Convention country.

Penalty: 120 penalty units.

Note: For the value of a penalty unit, see subsection 4AA(1) of the *Crimes Act 1914*.

- (2) Nothing in paragraphs (1)(a) to (e) authorises the disclosure of information to the applicant for the location order.
- (3) In paragraph (1)(f):

central authority has the same meaning as in section 111CA.

Commonwealth central authority has the same meaning as in section 111CA.

competent authority has the same meaning as in section 111CA.

Convention country has the same meaning as in section 111CA.

67Q Meaning of *recovery order*

A *recovery order* is an order made by a court doing all or any of the following:

- (a) requiring the return of a child to:
 - (i) a parent of the child; or
 - (ii) a person who has a residence order or a contact order in relation to the child; or
 - (iii) a person who has a specific issues order in relation to the child under which the person is responsible for the child's long-term or day-to-day care, welfare and development;
- (b) authorising or directing a person or persons, with such assistance as he or she requires or they require, and if necessary by force, to stop and search any vehicle, vessel or aircraft, and to enter and search any premises or place, for the purpose of finding a child;
- (c) authorising or directing a person or persons, with such assistance as he or she requires or they require, and if necessary by force, to recover a child;

Section 67R

- (d) authorising or directing a person to whom a child is returned, or who recovers a child, to deliver the child to:
 - (i) a parent of the child; or
 - (ii) a person who has a residence order or a contact order in relation to the child; or
 - (iii) a person who has a specific issues order in relation to the child under which the person is responsible for the child's long-term or day-to-day care, welfare and development; or
 - (iv) some other person on behalf of a person described in subparagraph (i), (ii) or (iii);
- (e) giving directions about the day-to-day care of a child until the child is returned or delivered to another person;
- (f) prohibiting a person from again removing or taking possession of a child;
- (g) authorising or directing a person to arrest, without warrant, a person who again removes or takes possession of a child.

Note 1: Section 122AA authorises the use of reasonable force in making an arrest, and Subdivision D of Division 6 deals with what is to happen to a person arrested without warrant under a recovery order.

Note 2: If a recovery order authorises a person to recover a child, the person is authorised to recover the child on each occasion that it is necessary to do so while the order remains in force: see subsection 67W(3).

67R How recovery orders authorise or direct people

- (1) An authorisation or direction described in paragraph 67Q(b), (c) or (d) may be addressed to:
 - (a) a named person; or
 - (b) every person from time to time holding or acting in a specified office of the Commonwealth or of a State or Territory.
- (2) Without limiting the generality of subsection (1), an authorisation or direction described in paragraph 67Q(b), (c) or (d) may be addressed to:
 - (a) a named person who holds an appointment as a child recovery officer under subsection (3); or
 - (b) every person from time to time holding or acting in an office of child recovery officer.

- (3) The Attorney-General may appoint persons to be child recovery officers for the purposes of this Subdivision.
- (4) An appointment under subsection (3) may be of:
 - (a) a named person only; or
 - (b) every person from time to time holding or acting in a specified office of the Commonwealth or of a State or Territory.

67S How recovery orders to stop and search etc. name or describe vehicles, places etc.

An authorisation or direction described in paragraph 67Q(b) may be expressed to apply to:

- (a) a vehicle, vessel, aircraft, premises or place named or described either specifically or in general terms; or
- (b) any vehicle, vessel, aircraft, premises or place in which there is, at any time, reasonable cause to believe that the child concerned may be found.

67T Who may apply for a recovery order

A recovery order in relation to a child may be applied for by:

- (a) a person who has a residence order in relation to the child; or
- (b) a person who has a contact order in relation to the child; or
- (c) a person who has a specific issues order in relation to the child under which the person is responsible for the child's long-term or day-to-day care, welfare and development; or
- (ca) a grandparent of the child; or
- (d) any other person concerned with the care, welfare or development of the child.

67U Court's power to make recovery order

In proceedings for a recovery order, the court may, subject to section 67V, make such recovery order as it thinks proper.

Section 67V

67V Child's best interests paramount consideration in making a recovery order

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

Note: Division 10 deals with how a court determines a child's best interests.

67W How long recovery order remains in force

- (1) A recovery order remains in force for the period specified in the order or 12 months, whichever is the shorter period.
- (3) To avoid doubt, unless a recovery order specifically provides to the contrary, each term of the order continues to have effect until the end of the period for which it remains in force regardless of whether anything has previously been done in accordance with the order.

67X Persons not to prevent or hinder taking of action under recovery order

- (1) This section applies to a recovery order that authorises or directs a person or persons to take action as described in paragraph 67Q(b), (c) or (d).
- (2) A person must not prevent or hinder the taking of the action by the person or persons authorised or directed to take the action.
- (3) If a court having jurisdiction under this Part is satisfied that a person has intentionally, and without reasonable excuse, contravened subsection (2), the court may:
 - (a) order the person to pay a fine not exceeding 10 penalty units; or
 - (b) order the person to enter into a recognizance (with or without surety or security) on conditions specified by the court; or
 - (c) order the person to be imprisoned until he or she enters into a recognizance (with or without surety or security) on conditions specified by the court, or until the person has been imprisoned for 3 months, whichever happens first.

Note: For the value of a penalty unit, see subsection 4AA(1) of the *Crimes Act 1914*.

- (4) A court that makes an order under subsection (3) may make such other orders as it considers necessary to ensure the person does not again contravene subsection (2).

67Y Obligation to notify persons of child's return

- (1) This section applies if:
- (a) a recovery order that consists of or includes provisions described in paragraph 67Q(a), (b), (c) or (d) is in force in relation to a child; and
 - (b) the child returns, or is returned, to the person who applied for the order.
- (2) The person must, as soon as practicable after the child's return, give notice of the child's return to:
- (a) the Registry Manager of the court that issued the recovery order; and
 - (b) if a location order in relation to the child is in force and was applied for by the person—the person to whom the location order applies.

Subdivision D—Allegations of child abuse

67Z Where party to proceedings makes allegation of child abuse

- (1) This section applies if a party to proceedings under this Act alleges that a child to whom the proceedings relate has been abused or is at risk of being abused.
- (2) The party must file a notice in the prescribed form in the court hearing the proceedings, and serve a true copy of the notice upon the person who is alleged to have abused the child or from whom the child is alleged to be at risk of abuse.
- (3) If a notice under subsection (2) is filed in a court, the Registry Manager must, as soon as practicable, notify a prescribed child welfare authority.

Section 67ZA

(4) In this section:

prescribed form means the form prescribed by the applicable Rules of Court.

Registry Manager means:

- (a) in relation to the Family Court—the Registry Manager of the Registry of the Court; and
- (b) in relation to the Family Court of Western Australia—the Principal Registrar, a Registrar or a Deputy Registrar, of the court; and
- (c) in relation to any other court—the principal officer of that court.

67ZA Where member of the Court personnel, counsellor, mediator or arbitrator suspects child abuse etc.

- (1) This section applies to a person in the course of carrying out duties, performing functions or exercising powers as:
 - (a) a member of the Court personnel; or
 - (b) a family and child counsellor; or
 - (c) a family and child mediator; or
 - (d) an arbitrator.
- (2) If the person has reasonable grounds for suspecting that a child has been abused, or is at risk of being abused, the person must, as soon as practicable, notify a prescribed child welfare authority of his or her suspicion and the basis for the suspicion.
- (3) If the person has reasonable grounds for suspecting that a child:
 - (a) has been ill treated, or is at risk of being ill treated; or
 - (b) has been exposed or subjected, or is at risk of being exposed or subjected, to behaviour which psychologically harms the child;the person may notify a prescribed child welfare authority of his or her suspicion and the basis for the suspicion.

- (4) The person need not notify a prescribed child welfare authority of his or her suspicion that a child has been abused, or is at risk of being abused, if the person knows that the authority has previously been notified about the abuse or risk under subsection (2) or subsection 67Z(3), but the person may notify the authority of his or her suspicion.
- (5) If notice under this section is given orally, written notice confirming the oral notice is to be given to the prescribed child welfare authority as soon as practicable after the oral notice.
- (6) If the person notifies a prescribed child welfare authority under this section or subsection 67Z(3), the person may make such disclosures of other information as the person reasonably believes are necessary to enable the authority to properly manage the matter the subject of the notification.

67ZB No liability for notification under section 67Z or 67ZA

- (1) A person:
 - (a) must give notice under subsection 67Z(3) or 67ZA(2); or
 - (b) may give notice under subsection 67ZA(3) or (4); or
 - (c) may disclose other information under subsection 67ZA(6);in spite of any obligation of confidentiality imposed on the person by this Act, another Act, another law or anything else (including a contract or professional ethics).
- (2) A person is not liable in civil or criminal proceedings, and is not to be considered to have breached any professional ethics, in respect of a notification under subsection 67Z(3) or 67ZA(2).
- (3) A person is not liable in civil or criminal proceedings, and is not to be considered to have breached any professional ethics, in respect of a notification under subsection 67ZA(3) or (4), or a disclosure under subsection 67ZA(6), if the notification or disclosure is made in good faith.

Part VII Children

Division 8 Other matters relating to children

Section 67ZC

- (4) Evidence of a notification under subsection 67Z(3) or subsection 67ZA(2), (3) or (4), or a disclosure under subsection 67ZA(6), is not admissible in any court except where that evidence is given by the person who made the notification or disclosure.
- (5) In this section:

court means a court (whether or not exercising jurisdiction under this Act) and includes a tribunal or other body concerned with professional ethics.

Subdivision E—Other orders about children

67ZC Orders relating to welfare of children

- (1) In addition to the jurisdiction that a court has under this Part in relation to children, the court also has jurisdiction to make orders relating to the welfare of children.

Note: Division 4 of Part XIII AA (International protection of children) may affect the jurisdiction of a court to make an order relating to the welfare of a child.

- (2) In deciding whether to make an order under subsection (1) in relation to a child, a court must regard the best interests of the child as the paramount consideration.

Note: Division 10 deals with how a court determines a child's best interests.

67ZD Orders for delivery of passports

If a court having jurisdiction under this Part considers that there is a possibility or threat that a child may be removed from Australia, it may order the passport of the child and of any other person concerned to be delivered up to the court upon such conditions as the court considers appropriate.

Division 9—Injunctions

68A What this Division does

This Division deals with proceedings for injunctions in relation to children.

68B Injunctions

- (1) If proceedings are instituted in a court having jurisdiction under this Part for an injunction in relation to a child, the court may make such order or grant such injunction as it considers appropriate for the welfare of the child, including:
 - (a) an injunction for the personal protection of the child; or
 - (b) an injunction for the personal protection of:
 - (i) a parent of the child; or
 - (ii) a person who has a residence order or a contact order in relation to the child; or
 - (iii) a person who has a specific issues order in relation to the child under which the person is responsible for the child's long-term or day-to-day care, welfare and development; or
 - (c) an injunction restraining a person from entering or remaining in:
 - (i) a place of residence, employment or education of the child; or
 - (ii) a specified area that contains a place of a kind referred to in subparagraph (i); or
 - (d) an injunction restraining a person from entering or remaining in:
 - (i) a place of residence, employment or education of a person referred to in paragraph (b); or
 - (ii) a specified area that contains a place of a kind referred to in subparagraph (i).
- (2) A court exercising jurisdiction under this Act (other than in proceedings to which subsection (1) applies) may grant an injunction in relation to a child, by interlocutory order or

Section 68C

otherwise, in any case in which it appears to the court to be just or convenient to do so.

- (3) An injunction under this section may be granted unconditionally or on such terms and conditions as the court considers appropriate.

68C Powers of arrest

- (1) If:

- (a) an injunction is in force under section 68B for the personal protection of a person (the *protected person*); and
- (b) a police officer believes, on reasonable grounds, that the person (the *respondent*) against whom the injunction is directed has breached the injunction by:
 - (i) causing, or threatening to cause, bodily harm to the protected person; or
 - (ii) harassing, molesting or stalking that person;

the police officer may arrest the respondent without warrant.

Note: Section 122AA authorises the use of reasonable force in making an arrest.

- (2) For the purposes of subsection (1), an injunction granted under section 68B is an injunction for the personal protection of a person if, and only if, it is expressed to be for the personal protection of the person.
- (3) Subsections 114AA(3), (4), (5) and (7) apply in relation to a person arrested under this section as if:
- (a) the person had been arrested under subsection 114AA(1) because he or she was believed to have breached an injunction granted under section 114; and
 - (b) the person on whose application the injunction was granted under section 68B were the person on whose application the injunction under section 114 had been granted.

Division 10—The best interests of children and the representation of children

Subdivision A—What this Division does

68D What this Division does

This Division deals with:

- (a) determining what is in a child's best interests (including in situations of family violence) (Subdivision B); and
- (b) the separate representation of children (Subdivision C).

Subdivision B—Determining the best interests of a child

68E Proceedings to which Subdivision applies

- (1) This Subdivision applies to any proceedings under this Part in which the best interests of a child are the paramount consideration.
- (2) This Subdivision also applies to proceedings, in relation to a child, to which subsection 60G(2), 63F(2) or 63F(6) or section 68T applies.

68F How a court determines what is in a child's best interests

- (1) Subject to subsection (3), in determining what is in the child's best interests, the court must consider the matters set out in subsection (2).
- (2) The court must consider:
 - (a) any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's wishes;
 - (b) the nature of the relationship of the child with each of the child's parents and with other persons;

Section 68F

- (c) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:
 - (i) either of his or her parents; or
 - (ii) any other child, or other person, with whom he or she has been living;
- (d) the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;
- (e) the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;
- (f) the child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders) and any other characteristics of the child that the court thinks are relevant;
- (g) the need to protect the child from physical or psychological harm caused, or that may be caused, by:
 - (i) being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or
 - (ii) being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person;
- (h) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;
- (i) any family violence involving the child or a member of the child's family;
- (j) any family violence order that applies to the child or a member of the child's family;
- (k) 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;
- (l) any other fact or circumstance that the court thinks is relevant.

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

Aboriginal peoples means the peoples of the Aboriginal race of Australia.

Torres Strait Islanders means the descendants of the indigenous inhabitants of the Torres Strait Islands.

68G How the wishes of a child are expressed

- (1) Paragraph 68F(2)(a) requires the court to consider any wishes expressed by a child in deciding whether to make a particular parenting order in relation to the child. This section deals with how the court informs itself of wishes expressed by a child.
- (2) The court may inform itself of wishes expressed by a child:
 - (a) by having regard to anything contained in a report given to the court under subsection 62G(2); or
 - (b) subject to the applicable Rules of Court, by such other means as the court thinks appropriate.

68H Children not required to express wishes

Nothing in this Part permits the court or any person to require the child to express his or her wishes in relation to any matter.

68J Informing court of relevant family violence orders

- (1) If a party to the proceedings is aware that a family violence order applies to the child, or a member of the child's family, that party must inform the court of the family violence order.

Part VII Children

Division 10 The best interests of children and the representation of children

Section 68K

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

68K Court to consider risk of family violence

- (1) In considering what order to make, the court must, to the extent that it is possible to do so consistently with the child's best interests being the paramount consideration, ensure that the order:
 - (a) is consistent with any family violence order; and
 - (b) does not expose a person to an unacceptable risk of family violence.
- (2) For the purposes of paragraph (1)(b) the court may include in the order any safeguards that it considers necessary for the safety of those affected by the order.

Subdivision C—Separate representation of children

68L Court orders for separate representation

- (1) This section applies to proceedings under this Act in which a child's best interests are, or a child's welfare is, the paramount, or a relevant, consideration.
- (2) If it appears to the court that the child ought to be separately represented, the court may order that the child is to be separately represented, and may also make such other orders as it considers necessary to secure that separate representation.
- (2A) However, if the proceedings arise under regulations made for the purposes of section 111B, the court may order that the child be separately represented only if the court considers there are exceptional circumstances that justify doing so, and must specify those circumstances in making the order.

Note: Section 111B is about the Convention on the Civil Aspects of International Child Abduction.

- (3) A court may make an order for separate representation:
- (a) on its own initiative; or
 - (b) on the application of:
 - (i) the child; or
 - (ii) an organisation concerned with the welfare of children;
or
 - (iii) any other person.

68M Order that child be made available for examination

- (1) This section applies if, in proceedings under this Act, a child is separately represented by a person (the *child's representative*) under an order under section 68L.
- (2) The court may, on application by the child's representative, order a person mentioned in subsection (3) to make the child available, as specified in the order, for a psychiatric or psychological examination to be made for the purpose of preparing a report about the child for use by the child's representative in connection with the proceedings.
- (3) The order may be directed to:
- (a) a parent of the child; or
 - (b) a person who has a residence order or a contact order in relation to the child; or
 - (c) a person who has a specific issues order in relation to the child under which the person is responsible for the child's long-term or day-to-day care, welfare and development.

Division 11—Family violence

68N What this Division does

This Division deals with the relationship between Division 11 contact orders (as defined in section 68P) and family violence orders.

Note: Other provisions dealing with family violence and family violence orders are:

- (a) section 60D (which contains the relevant definitions); and
- (b) paragraphs 65F(2)(b) and 68F(2)(i) and (j); and
- (c) sections 68J and 68K.

68P Interpretation

In this Division:

Division 11 contact order means:

- (a) a contact order; or
- (b) any of the following, to the extent that it requires or authorises (expressly or impliedly) contact between a child and another person or other persons:
 - (i) a recovery order, a specific issues order or any other order (however described) made under this Act;
 - (ii) an injunction granted under section 68B or 114;
 - (iii) an undertaking given to, and accepted by, a court exercising jurisdiction under this Act;
 - (iv) a registered parenting plan within the meaning of subsection 63C(6);
 - (v) a recognizance entered into pursuant to an order under this Act.

section 68R contact order means:

- (a) a contact order; or
- (b) any of the following, to the extent that it requires or authorises (expressly or impliedly) contact between a child and another person or other persons:
 - (i) a recovery order, a specific issues order or any other order (however described) made under this Act;

- (ii) an injunction granted under section 68B or 114.

68Q Purposes of Division

The purposes of this Division are:

- (a) to resolve inconsistencies between Division 11 contact orders and family violence orders; and
- (b) to ensure that Division 11 contact orders do not expose people to family violence; and
- (c) to respect the right of a child to have contact, on a regular basis, with both the child's parents where:
 - (i) contact is diminished by the making or variation of a family violence order; and
 - (ii) it is in the best interests of the child to have contact with both parents on a regular basis.

68R Provisions about making an order for contact that is inconsistent with a family violence order

- (1) This section applies if a court makes a section 68R contact order that is inconsistent with a family violence order.
- (2) The court must explain, or arrange for someone else to explain, the order in accordance with subsection (3) to:
 - (a) the applicant and the respondent in the proceedings for the section 68R contact order; and
 - (b) if the person against whom the family violence order is directed is not covered by paragraph (a)—that person; and
 - (c) if the person protected by the family violence order is not covered by paragraph (a)—that person.
- (3) An explanation under subsection (2) must explain, in language likely to be readily understood by the person to whom the explanation is given:
 - (a) the purpose of the section 68R contact order; and
 - (b) the obligations that the order creates; and
 - (c) the consequences that may follow if a person fails to comply with the order; and

Section 68S

- (d) the court's reasons for making an order that is inconsistent with a family violence order; and
 - (e) the circumstances in which a person may apply for the order to be revoked or varied.
- (4) In addition to the requirements mentioned in subsection (3), the court must:
- (a) include in the section 68R contact order a detailed explanation of how the contact provided for in the order is to take place; and
 - (b) as soon as practicable, but not later than 14 days after making the section 68R contact order, give a copy of that order to:
 - (i) the applicant and the respondent in the proceedings for the section 68R contact order; and
 - (ii) if the person against whom the family violence order is directed is not covered by subparagraph (i)—that person; and
 - (iii) if the person protected by the family violence order is not covered by subparagraph (i)—that person; and
 - (iv) if the family violence order was made or last varied by the Family Court—the Registry Manager of the Registry of the Court; and
 - (iva) if subparagraph (iv) does not apply—the Registrar, Principal Officer or any other appropriate officer of the court; and
 - (v) the Commissioner or head (however described) of the police force of the State or Territory in which the person protected by the family violence order resides.
- (5) Failure to comply with a requirement of this section does not affect the validity of a section 68R contact order.

68S Section 68R contact orders prevail over inconsistent family violence orders

- (1) If a section 68R contact order is inconsistent with a family violence order, the section 68R contact order prevails and the family violence order is invalid to the extent of the inconsistency.

- (2) Any of the following persons may apply to a court having jurisdiction under this Part for a declaration of the extent to which a section 68R contact order is inconsistent with a family violence order:
 - (a) the applicant and the respondent in the proceedings for the section 68R contact order;
 - (b) if the person against whom the family violence order is directed is not covered by paragraph (a)—that person;
 - (c) if the person protected by the family violence order is not covered by paragraph (a)—that person.
- (3) The court to which an application for a declaration is made must hear and determine the application and make such declaration as it considers appropriate.

68T Variation etc. of Division 11 contact order by court making etc. family violence order

- (1) If proceedings (the *family violence proceedings*) for the making or variation of a family violence order are before a court of a State or Territory that has jurisdiction in relation to matters arising under this Part, the court may, subject to this section, exercise that jurisdiction, in the course of the family violence proceedings, to make, revive, vary, discharge or suspend a Division 11 contact order.
- (2) The court's power to make, revive, vary, suspend or discharge a Division 11 contact order in the family violence proceedings is subject to the following provisions:
 - (a) the court must not exercise that power unless, whether by interim order or otherwise, it makes or varies a family violence order in those proceedings;
 - (b) the court must exercise that power having regard to the purposes of this Division (as stated in section 68Q) and to the best interests of any relevant child;
 - (c) if section 68R applied to the making of a Division 11 contact order—the court must not exercise the power to vary, discharge or suspend the order unless it is satisfied that it is appropriate to do so:

Section 68T

- (i) because a person has been exposed, or is likely to be exposed, to family violence as a result of the operation of the order; and
- (ii) having regard to the matters mentioned in paragraph (b);
- (d) if the court makes an interim family violence order, or an interim order varying a family violence order, the court must not discharge a Division 11 contact order in those proceedings.

Note: Division 10 deals with how a court determines a child's best interests.

- (3) This Part, and the applicable Rules of Court, apply to the making, revival, variation, discharge or suspension of a Division 11 contact order in the family violence proceedings subject to the following qualifications:
 - (a) the following provisions do not apply:
 - (i) sections 65C, 68K and 69N and subsection 65F(2);
 - (ii) any provisions (for example, section 65E) that would otherwise make the best interests of a child the paramount consideration;
 - (iii) any other prescribed provisions;
 - (b) if the court makes an interim family violence order, or an interim order varying a family violence order, then, in addition to the effect of paragraph (a):
 - (i) the court has a discretion whether to apply paragraph 68F(2)(a); and
 - (ii) any other prescribed provisions do not apply;
 - (c) the court may dispense with such applicable Rules of Court as it thinks appropriate.

Note: Because of subparagraph (3)(a)(ii), the best interests of a child are not the paramount consideration. They must, however, still be taken into account as required by paragraphs (2)(b) and (c).

- (4) The court may (subject to this section) make, revive, vary, discharge or suspend a Division 11 contact order in the family violence proceedings:
 - (a) on its own initiative; or
 - (b) on application by any person.
- (5) If, in the family violence proceedings:

- (a) the court makes an interim family violence order, or an interim order varying a family violence order (the *interim order*); and
 - (b) the court makes, revives, varies or suspends a Division 11 contact order;
- the following provisions apply:
- (c) the Division 11 contact order made, or the revival, variation or suspension of the Division 11 contact order, as the case may be, does not have effect at a time that is after whichever of the following occurs first:
 - (i) the interim order stops being in force;
 - (ii) the end of the period of 21 days starting when the interim order was made;
 - (d) no appeal lies in relation to the making, revival, variation or suspension of the Division 11 contact order.
- (6) The regulations may require a copy of the court's decision to make, revive, vary, discharge or suspend a Division 11 contact order to be registered in accordance with the regulations. Failure to comply with such a requirement of the regulations does not affect the validity of the court's decision.

Division 12—Proceedings and jurisdiction

Subdivision A—What this Division does

69A What this Division does

This Division deals with:

- (a) the institution of proceedings and procedure (Subdivision B); and
- (b) jurisdiction of courts (Subdivision C); and
- (c) presumptions of parentage (Subdivision D); and
- (d) parentage evidence (Subdivision E); and
- (e) the places and people to which this Part extends and applies (Subdivision F).

Subdivision B—Institution of proceedings and procedure

69B Certain proceedings to be instituted only under this Part

- (1) Proceedings that may be instituted under this Part must not, after the commencement of this section, be instituted otherwise than under this Part.
- (2) Subsection (1) does not apply in relation to the institution of proceedings under the *Child Support (Assessment) Act 1989*.

69C Who may institute proceedings

- (1) Sections 65C, 66F, 67F, 67K and 67T and subsection 68T(4) are express provisions dealing with who may institute particular kinds of proceedings in relation to children.
- (2) Any other kind of proceedings under this Act in relation to a child may, unless a contrary intention appears, be instituted by:
 - (a) either or both of the child's parents; or
 - (b) the child; or
 - (c) a grandparent of the child; or

- (d) any other person concerned with the care, welfare or development of the child.

69D Institution of maintenance proceedings by authorised authority or person

- (1) The regulations may make provision with respect to authorising:
- (a) a specified authority of the Commonwealth or of a State or Territory; or
 - (b) the person from time to time holding or acting in a specified office established under a law of the Commonwealth or of a State or Territory;
- to institute and conduct, on behalf of a child, in the authority's or person's discretion, proceedings with respect to the maintenance of the child.
- (2) Proceedings instituted on behalf of a child under regulations covered by subsection (1) are taken, for the purposes of section 69C and the provisions referred to in it, to have been instituted by the child.

69E Child or parent to be present in Australia etc.

- (1) Proceedings may be instituted under this Act in relation to a child only if:
- (a) the child is present in Australia on the relevant day (as defined in subsection (2)); or
 - (b) the child is an Australian citizen, or is ordinarily resident in Australia, on the relevant day; or
 - (c) a parent of the child is an Australian citizen, is ordinarily resident in Australia, or is present in Australia, on the relevant day; or
 - (d) a party to the proceedings is an Australian citizen, is ordinarily resident in Australia, or is present in Australia, on the relevant day; or

Part VII Children

Division 12 Proceedings and jurisdiction

Section 69F

- (e) it would be in accordance with a treaty or arrangement in force between Australia and an overseas jurisdiction, or the common law rules of private international law, for the court to exercise jurisdiction in the proceedings.

- (2) In this section:

relevant day, in relation to proceedings, means:

- (a) if the application instituting the proceedings is filed in a court—the day on which the application is filed; or
- (b) in any other case—the day on which the application instituting the proceedings is made.

Note: Division 4 of Part XIII A (International protection of children) has effect despite this section.

69F Applicant may be in contempt

A court may proceed with the hearing of proceedings in relation to a child even though the person who instituted the proceedings has failed to comply with an order of the court or of another court having jurisdiction under this Act.

Subdivision C—Jurisdiction of courts

69G Interpretation

In this Subdivision:

matters arising under this Part includes proceedings under Division 9 or section 68S.

69H Jurisdiction of Family Court, State Family Courts, Northern Territory Supreme Court and Federal Magistrates Court

- (1) Jurisdiction is conferred on the Family Court in relation to matters arising under this Part.
- (2) Each Family Court of a State is invested with federal jurisdiction in relation to matters arising under this Part.

- (3) Subject to section 69K, jurisdiction is conferred on the Supreme Court of the Northern Territory in relation to matters arising under this Part.
- (4) Jurisdiction is conferred on the Federal Magistrates Court in relation to matters arising under this Part (other than proceedings for leave under section 60G).

69J Jurisdiction of courts of summary jurisdiction

- (1) Subject to subsection (5), each court of summary jurisdiction of each State is invested with federal jurisdiction in relation to matters arising under this Part (other than proceedings for leave under section 60G).
- (2) Subject to subsection (5) and section 69K, jurisdiction is conferred on each court of summary jurisdiction of each Territory in relation to matters arising under this Part (other than proceedings for leave under section 60G).
- (3) The Governor-General may, by Proclamation, fix a day as the day on and after which proceedings in relation to matters arising under this Part may not be instituted in, or transferred to, a court of summary jurisdiction in a specified State or Territory.
- (4) Without limiting the generality of subsection (3), a Proclamation under that subsection may be expressed to apply only in relation to:
 - (a) proceedings of specified classes; or
 - (b) the institution of proceedings in, or the transfer of proceedings to, a court of summary jurisdiction in a specified part of a State or Territory.
- (5) A court of summary jurisdiction must not hear and determine proceedings under this Part otherwise than in accordance with any Proclamation in force under subsection (3).
- (6) The Governor-General may, by Proclamation, declare that a Proclamation under subsection (3) is revoked on and from a specified day.
- (7) If, under subsection (6), the Governor-General declares that a Proclamation under subsection (3) is revoked:

Section 69K

- (a) this Part (including subsection (3)) has effect as if the revoked Proclamation had not been made; but
- (b) the effect of the revoked Proclamation on the jurisdiction of courts before the specified day is not affected.

69K Territory court does not have jurisdiction unless a party is ordinarily resident in the Territory

A court of a Territory must not hear or determine proceedings under this Part unless at least one of the parties to the proceedings is ordinarily resident in the Territory when the proceedings are instituted or are transferred to the court.

69L Jurisdiction in relation to transferred matters under other Commonwealth laws

If proceedings in relation to a matter arising under a law of the Commonwealth are transferred under this Act to a court that has jurisdiction conferred on or invested in it by this Division, the jurisdiction so conferred on or invested in the court includes jurisdiction in relation to that matter.

69M Jurisdiction is additional to other jurisdiction

The jurisdiction conferred on or invested in a court by this Division is in addition to any jurisdiction conferred on or invested in the court apart from this Division.

69N Transfer of proceedings from courts of summary jurisdiction in certain cases

- (1) This section applies if:
 - (a) proceedings for a parenting order (other than a child maintenance order) are instituted in a court of summary jurisdiction; and
 - (b) the respondent, in answer to the application by which the proceedings were instituted, seeks an order different from that sought in the application.

- (2) The court must, before going on to hear and determine the proceedings, inform the parties that, unless each of them consents to the court hearing and determining the proceedings, the court is required to transfer the proceedings to the Family Court, a Family Court of a State or the Supreme Court of the Northern Territory.
- (3) If the parties do not consent to the court hearing and determining the proceedings, the court must transfer the proceedings accordingly.
- (4) Before transferring the proceedings, the court may make such orders (including an order under subsection 62F(2)) as it considers necessary pending the disposal of the proceedings by the court to which they are transferred.
- (5) If the parties consent to the court hearing and determining the proceedings:
 - (a) a party is not entitled, without leave of the court, subsequently to object to the proceedings being heard and determined by the court; but
 - (b) the court may, on its own initiative, transfer the proceedings to the Family Court, a Family Court of a State or the Supreme Court of the Northern Territory.
- (6) If the court subsequently gives leave to a party to object to the proceedings being heard and determined by the court, the court must transfer the proceedings to the Family Court, a Family Court of a State or the Supreme Court of the Northern Territory.
- (7) A court to which proceedings are transferred must deal with the proceedings as if they had been instituted in the court.
- (8) Failure by a court of summary jurisdiction to comply with this section in relation to proceedings does not invalidate any order made by the court in the proceedings.
- (9) Subsection (8) does not affect the duty of a court of summary jurisdiction to comply with this section.

Subdivision D—Presumptions of parentage

69P Presumptions of parentage arising from marriage

- (1) If a child is born to a woman while she is married, the child is presumed to be a child of the woman and her husband.
- (2) If:
 - (a) at a particular time:
 - (i) a marriage to which a woman is a party is ended by death; or
 - (ii) a purported marriage to which a woman is a party is annulled; and
 - (b) a child is born to the woman within 44 weeks after that time; the child is presumed to be a child of the woman and the husband or purported husband.
- (3) If:
 - (a) the parties to a marriage separated at any time; and
 - (b) after the separation, they resumed cohabitation on one occasion; and
 - (c) within 3 months after the resumption of cohabitation, they separated again and lived separately and apart; and
 - (d) a child is born to the woman within 44 weeks after the end of the cohabitation, but after the dissolution of the marriage; the child is presumed to be a child of the woman and the husband.

69Q Presumption of paternity arising from cohabitation

- If:
- (a) a child is born to a woman; and
 - (b) at any time during the period beginning not earlier than 44 weeks and ending not less than 20 weeks before the birth, the woman cohabited with a man to whom she was not married; the child is presumed to be a child of the man.

69R Presumption of parentage arising from registration of birth

If a person's name is entered as a parent of a child in a register of births or parentage information kept under a law of the Commonwealth or of a State, Territory or prescribed overseas jurisdiction, the person is presumed to be a parent of the child.

69S Presumptions of parentage arising from findings of courts

- (1) If:
- (a) during the lifetime of a particular person, a prescribed court has:
 - (i) found expressly that the person is a parent of a particular child; or
 - (ii) made a finding that it could not have made unless the person was a parent of a particular child; and
 - (b) the finding has not been altered, set aside or reversed;
- the person is conclusively presumed to be a parent of the child.
- (2) If:
- (a) after the death of a particular person, a prescribed court has:
 - (i) found expressly that the person was a parent of a particular child; or
 - (ii) made a finding that it could not have made unless the person was a parent of a particular child; and
 - (b) the finding has not been altered, set aside or reversed;
- the person is presumed to have been a parent of the child.
- (3) In this section:

prescribed court means a federal court, a court of a State or Territory or a court of a prescribed overseas jurisdiction.

69T Presumption of paternity arising from acknowledgments

- If:
- (a) under the law of the Commonwealth or of a State, Territory or prescribed overseas jurisdiction, a man has executed an instrument acknowledging that he is the father of a specified child; and

Section 69U

(b) the instrument has not been annulled or otherwise set aside;
the man is presumed to be the father of the child.

69U Rebuttal of presumptions etc.

- (1) A presumption arising under this Subdivision is rebuttable by proof on a balance of probabilities.
- (2) Where:
 - (a) 2 or more presumptions arising under this Subdivision are relevant in any proceedings; and
 - (b) those presumptions, or some of those presumptions, conflict with each other and are not rebutted in the proceedings;
the presumption that appears to the court to be the more or most likely to be correct prevails.
- (3) This section does not apply to a presumption arising under subsection 69S(1).

Subdivision E—Parentage evidence

69V Evidence of parentage

If the parentage of a child is a question in issue in proceedings under this Act, the court may make an order requiring any person to give such evidence as is material to the question.

69VA Declarations of parentage

As well as deciding, after receiving evidence, the issue of the parentage of a child for the purposes of proceedings, the court may also issue a declaration of parentage that is conclusive evidence of parentage for the purposes of all laws of the Commonwealth.

69W Orders for carrying out of parentage testing procedures

- (1) If the parentage of a child is a question in issue in proceedings under this Act, the court may make an order (a *parentage testing order*) requiring a parentage testing procedure to be carried out on

a person mentioned in subsection (3) for the purpose of obtaining information to assist in determining the parentage of the child.

- (2) A court may make a parentage testing order:
 - (a) on its own initiative; or
 - (b) on the application of:
 - (i) a party to the proceedings; or
 - (ii) a person representing the child under an order made under section 68L.
- (3) A parentage testing order may be made in relation to:
 - (a) the child; or
 - (b) a person known to be the mother of the child; or
 - (c) any other person, if the court is of the opinion that, if the parentage testing procedure were to be carried out in relation to the person, the information that could be obtained might assist in determining the parentage of the child.
- (4) A parentage testing order may be made subject to terms and conditions.
- (5) This section does not affect the generality of section 69V.

69X Orders associated with parentage testing orders

- (1) If a court makes a parentage testing order, it may also make orders under subsection (2) or (4).
- (2) The court may make such orders as it considers necessary or desirable:
 - (a) to enable the parentage testing procedure to be carried out; or
 - (b) to make the parentage testing procedure more effective or reliable.
- (3) Some examples of the kinds of orders the court may make under subsection (2) are as follows:
 - (a) an order requiring a person to submit to a medical procedure;
 - (b) an order requiring a person to provide a bodily sample;
 - (c) an order requiring a person to provide information relevant to the person's medical or family history.

Section 69Y

- (4) The court may make such orders as it considers just in relation to costs incurred in relation to:
 - (a) the carrying out of the parentage testing procedure or other orders made by the court in relation to the parentage testing procedure; or
 - (b) the preparation of reports relating to the information obtained as a result of carrying out the parentage testing procedure.

69Y Orders directed to persons 18 or over

- (1) If a person who is 18 or over contravenes a parentage testing order or an order under section 69X, the person is not liable to any penalty in relation to the contravention.
- (2) The court may draw such inferences from the contravention as appear just in the circumstances.

69Z Orders directed to children under 18

- (1) This section applies if a parentage testing order, or an order under section 69X, requires a medical procedure or other act to be carried out in relation to a child who is under 18.
- (2) The procedure or act must not be carried out in relation to the child under the order without the consent of:
 - (a) a parent of the child; or
 - (b) a guardian of the child; or
 - (c) a person who, under a specific issues order, is responsible for the child's long-term or day-to-day care, welfare and development.
- (3) The court may draw such inferences from a failure or refusal to consent as mentioned in subsection (2) as appear just in the circumstances.

69ZA No liability if parent etc. consents

- (1) A person who carries out, or who assists in the carrying out of, a medical procedure or other act in relation to a child under a parentage testing order is not liable to any civil or criminal action

in relation to the proper carrying out of the procedure or act if it is carried out with the consent of:

- (a) a parent of the child; or
 - (b) a guardian of the child; or
 - (c) a person who, under a specific issues order, is responsible for the child's long-term or day-to-day care, welfare and development.
- (2) Subsection (1) does not affect any liability of a person for an act done negligently, or negligently omitted to be done, in relation to the carrying out of the medical procedure or act.

69ZB Regulations about carrying out, and reporting on, parentage testing procedures

The regulations may make provision relating to:

- (a) the carrying out of parentage testing procedures under parentage testing orders; and
- (b) the preparation of reports relating to the information obtained as the result of carrying out such procedures.

69ZC Reports of information obtained may be received in evidence

- (1) A report made in accordance with regulations covered by paragraph 69ZB(b) may be received in evidence in any proceedings under this Act.
- (2) If, under subsection (1), a report is received in evidence in proceedings under this Act, the court may make an order requiring the person who made the report, or any person whose evidence may be relevant in relation to the report, to appear before the court and give evidence in relation to the report.
- (3) A court may make an order under subsection (2):
 - (a) on its own initiative; or
 - (b) on the application of:
 - (i) a party to the proceedings; or
 - (ii) a person representing the relevant child under an order made under section 68L.

Section 69ZD

69ZD Parentage testing for purposes of international maintenance agreements

For the purpose of the carrying out of any of Australia's obligations under:

- (a) an arrangement with a reciprocating jurisdiction, or with a jurisdiction with restricted reciprocity, within the meaning of section 110; or
- (b) the Convention referred to in section 111;

the regulations may make provision:

- (c) conferring jurisdiction on a court to make an order requiring a parentage testing procedure to be carried out at the request of:
 - (i) a court or authority in a foreign country; or
 - (ii) the Secretary to the Department, or a person authorised by the Secretary; or
- (d) for the carrying out of a parentage testing procedure, and the preparation of a report in relation to the information obtained as a result of the carrying out of the procedure; or
- (e) for the admissibility in legal proceedings of a report, in relation to the information obtained as a result of the carrying out of a parentage testing procedure, received from an authority in a foreign country;

whether or not there is any express provision in the relevant arrangement or in the Convention authorising the carrying out of a parentage testing procedure.

Subdivision F—Extension, application and additional operation of Part

69ZE Extension of Part to the States

- (1) Subject to this section and section 69ZF, this Part extends to New South Wales, Victoria, Queensland, South Australia and Tasmania.
- (2) Subject to this section and section 69ZF, this Part extends to Western Australia if:

- (a) the Parliament of Western Australia refers to the Parliament of the Commonwealth the following matters or matters that include, or are included in, the following matters:
 - (i) the maintenance of children and the payment of expenses in relation to children or child bearing;
 - (ii) parental responsibility for children; or
 - (b) Western Australia adopts this Part.
- (3) This Part extends to a State under subsection (1) or (2) only for so long as there is in force:
- (a) an Act of the Parliament of the State by which there is referred to the Parliament of the Commonwealth:
 - (i) the matters referred to in subparagraphs (2)(a)(i) and (ii); or
 - (ii) matters that include, or are included in, those matters; or
 - (b) a law of the State adopting this Part.
- (4) This Part extends to a State at any time under subsection (1) or paragraph (2)(a) only in so far as it makes provision with respect to:
- (a) the matters that are at that time referred to the Parliament of the Commonwealth by the Parliament of the State; or
 - (b) matters incidental to the execution of any power vested by the Constitution in the Parliament of the Commonwealth in relation to those matters.

69ZF Unless declaration in force, Part's extension to a State has effect subject to modifications

- (1) The Governor-General may, by Proclamation, declare that all the child welfare law provisions of this Part extend to a specified State.
- (2) Despite anything in section 69ZE, if no declaration under subsection (1) is in force in relation to a particular State, this Part, as it extends to that State because of section 69ZE, has effect as if:
 - (a) subsection 66F(2) were omitted; and
 - (b) subsections 69ZE(1) and (2) were amended by omitting "and section 69ZF"; and
 - (c) section 69ZF were omitted; and
 - (d) paragraph 69ZK(1)(b) were omitted; and

Section 69ZG

- (e) subsection 69ZK(2) were amended by adding at the end the following word and paragraphs:
- “; or (d) the jurisdiction of a court under a child welfare law to make an order in relation to the maintenance of the child; or
- (e) an order of the kind referred to in paragraph (d).”.
- (3) A Proclamation that was in force in relation to a State under subsection 60E(6) of this Act as in force before the commencement of this section has effect, after that commencement, as if it were a Proclamation under subsection (1) of this section.

Note: This section preserves the effect of subsections 60E(6) and (7) of this Act as in force before the commencement of this section. Under those subsections, the amendments of this Act made by the *Law and Justice Legislation Amendment Act 1992* did not extend to a State unless a Proclamation was in force in relation to the State.

69ZG Application of Part in, and in relation to, Territories

This Part applies in and in relation to the Territories.

69ZH Additional application of Part

- (1) Without prejudice to its effect apart from this section, this Part also has effect as provided by this section.
- (2) By virtue of this subsection, Divisions 2 to 7 (inclusive) (other than Subdivisions C, D and E of Division 6 and sections 66D, 66M and 66N), Subdivisions C and E of Division 8, Divisions 9, 10 and 11 and Subdivisions B and C of Division 12 (other than section 69D) have the effect, subject to subsection (3), that they would have if:
- (a) each reference to a child were, by express provision, confined to a child of a marriage; and
- (b) each reference to the parents of the child were, by express provision, confined to the parties to the marriage.
- (3) The provisions mentioned in subsection (2) only have effect as mentioned in that subsection so far as they make provision with respect to the parental responsibility of the parties to a marriage for a child of the marriage, including (but not being limited to):

- (a) the duties, powers, responsibilities and authority of those parties in relation to:
 - (i) the maintenance of the child and the payment of expenses in relation to the child; or
 - (ii) the residence of the child, contact between the child and other persons and other aspects of the care, welfare and development of the child; and
 - (b) other aspects of duties, powers, responsibilities and authority in relation to the child:
 - (i) arising out of the marital relationship; or
 - (ii) in relation to concurrent, pending or completed proceedings between those parties for principal relief; or
 - (iii) in relation to a dissolution or annulment of that marriage, or a legal separation of the parties to the marriage, that is effected in accordance with the law of an overseas jurisdiction and that is recognised as valid in Australia under section 104.
- (4) By virtue of this subsection, Division 1, Subdivisions C, D and E of Division 6, section 69D, Subdivisions D and E of Division 12 and Divisions 13 and 14 and this Subdivision, have effect according to their tenor.

69ZJ Additional jurisdiction of courts

In addition to the jurisdiction that, apart from this section, is invested in or conferred on a court under this Part, the court is invested with jurisdiction or jurisdiction is conferred on the court, as the case requires, in matters between residents of different States, being matters with respect to:

- (a) the maintenance of children and the payment of expenses in relation to children or child bearing; or
- (b) parental responsibility in relation to children.

69ZK Child welfare laws not affected

- (1) A court having jurisdiction under this Act must not make an order under this Act (other than an order under Division 7) in relation to a child who is under the care (however described) of a person under a child welfare law unless:

Section 69ZK

- (a) the order is expressed to come into effect when the child ceases to be under that care; or
 - (b) the order is made in proceedings relating to the child in respect of the institution or continuation of which the written consent of a child welfare officer of the relevant State or Territory has been obtained.
- (2) Nothing in this Act, and no decree under this Act, affects:
- (a) the jurisdiction of a court, or the power of an authority, under a child welfare law to make an order, or to take any other action, by which a child is placed under the care (however described) of a person under a child welfare law; or
 - (b) any such order made or action taken; or
 - (c) the operation of a child welfare law in relation to a child.
- (3) If it appears to a court having jurisdiction under this Act that another court or an authority proposes to make an order, or to take any other action, of the kind referred to in paragraph (2)(a) in relation to a child, the first-mentioned court may adjourn any proceedings before it that relate to the child.

Division 13—State, Territory and overseas orders

Subdivision A—What this Division does

70A What this Division does

This Division provides for:

- (a) the registration of State and Territory orders dealing with children (Subdivision B); and
- (b) the registration of overseas orders dealing with children (Subdivision C); and
- (c) the transmission of Australian orders to overseas jurisdictions (Subdivision D).

Subdivision B—Registration of State and Territory orders

70B Interpretation

In this Subdivision:

State includes a Territory.

State child order means an order made under the law of a State:

- (a) that (however it is expressed) has the effect of determining the person or persons with whom a child who is under 18 is to live, or that provides for a person or persons to have custody of a child who is under 18; or
- (b) that (however it is expressed) has the effect of providing for contact between a child who is under 18 and another person or persons, or that provides for a person or persons to have access to a child who is under 18.

70C General registration of orders made under law of prescribed State

The applicable Rules of Court may make provision for and in relation to the registration in a court having jurisdiction under this Part of State child orders made under a law of a prescribed State.

Section 70D

70D Registration of orders in a particular State

The applicable Rules of Court may make provision for and in relation to the registration in a State in a court having jurisdiction under this Act of State child orders made by a court in another State.

70E Effect of registration

A State child order registered in a court under section 70C or 70D has the same force and effect as if it were an order made by that court under this Part.

Subdivision C—Registration of overseas orders

70F Interpretation

In this Subdivision:

care order means a specific issues order under which a person is responsible for a child's day-to-day care, welfare and development.

excluded order means:

- (a) an interim order; or
- (b) an order made in favour of a person where:
 - (i) the order was made on the application of the person; and
 - (ii) notice of making the application was not served on any other person; and
 - (iii) no other person appeared at the hearing of the application.

overseas child order means:

- (a) an order made by a court of a prescribed overseas jurisdiction that:
 - (i) however it is expressed, has the effect of determining the person or persons with whom a child who is under 18 is to live, or that provides for a person or persons to have custody of a child who is under 18; or
 - (ii) however it is expressed, has the effect of providing for contact between a child who is under 18 and another

- person or persons, or that provides for a person or persons to have access to a child who is under 18; or
- (iii) varies or discharges an order of the kind referred to in subparagraph (i) or (ii), including an order of that kind made under this Act; or
- (b) an order made for the purposes of the Convention referred to in section 111B by a judicial or administrative authority of a convention country (within the meaning of the regulations made for the purposes of that section).

70G Registration of orders

The regulations may make provision for and in relation to the registration in courts in Australia of overseas child orders, other than excluded orders.

70H Effect of registration—general

An overseas child order registered in a court under section 70G has the same force and effect as if it were an order made by that court under this Part.

Note: Division 4 of Part XIII A A (International protection of children) may affect the operation of a registered overseas child order.

70J Effect of registration on exercise of jurisdiction

- (1) A court in Australia that is aware that an overseas child order is registered under section 70G must not exercise jurisdiction in proceedings for the making of a residence order, a contact order or a care order in relation to the child concerned unless:
- (a) each person with whom the child is supposed to live or have contact under the overseas order, or who has rights of custody or access in relation to the child concerned under the order, consents to the exercise of jurisdiction by the court in the proceedings; or
- (b) the court is satisfied that there are substantial grounds for believing that the child's welfare requires that the court exercise jurisdiction in the proceedings.

Section 70K

- (2) If a court exercises jurisdiction in proceedings for a residence order, a contact order or a care order in relation to a child who is the subject of an overseas child order, the court must not make a residence order, a contact order or a care order in relation to the child unless it is satisfied:
- (a) that the welfare of the child is likely to be adversely affected if the order is not made; or
 - (b) that there has been such a change in the circumstances of the child since the making of the overseas child order that the residence order, contact order or care order ought to be made.

70K Cancellation of registration if residence order, contact order or care order made

If a court:

- (a) is aware that an overseas child order is registered under section 70G; and
- (b) makes a residence order, a contact order or a care order in relation to the child concerned;

the court must cancel the registration of the overseas child order.

70L Relationship between Australian orders and registered overseas child orders

- (1) In this section:

Australian child order means:

- (a) a residence order, a contact order or a care order; or
- (b) a State child order as defined in section 70B.

responsible person, in relation to an Australian child order or an overseas child order, means a person:

- (a) with whom the child is supposed to live or have contact under the order; or
- (b) who is responsible for the child's day-to-day care, welfare and development under the order; or
- (c) who has a right to custody of, or access to, the child under the order.

- (2) This section applies if:
-

- (a) an Australian child order, whether made under this Part or another law, is in force under this Part in relation to a child; and
 - (b) an overseas child order, other than an excluded order, that relates to the child but that has a different effect from the Australian order has been registered under section 70G (whether before or after the making of the Australian child order) and its registration has not been cancelled.
- (3) A responsible person under the overseas child order may apply to a court having jurisdiction under this Part for the discharge of the Australian child order.
- (4) A responsible person under the Australian child order may apply to a court having jurisdiction under this Part for the cancellation of the registration of the overseas child order.
- (5) If an application is made under subsection (3) or (4), the court must:
- (a) if a condition specified in subsection (6) is satisfied—cancel the registration of the overseas child order; or
 - (b) in any other case—discharge the Australian child order.
- (6) For the purposes of paragraph (5)(a), the conditions are:
- (a) each responsible person under the overseas child order consents to the cancellation of the registration of the order; or
 - (b) the court is satisfied that there are substantial grounds for believing that the child's welfare will be adversely affected if the overseas child order continues to operate in relation to the child; or
 - (c) the court is satisfied that there has been a change in the circumstances of the child since the overseas child order was made that makes it inappropriate for the order to continue to operate in relation to the child.

Subdivision D—Transmission of Australian orders to overseas jurisdictions

70M Registrar to send documents etc. to overseas jurisdiction

- (1) This section applies if:
-

Section 70N

- (a) a court in Australia makes, in relation to a child who is under 18, a residence order, a contact order or a specific issues order, or a State child order as defined in section 70B; and
 - (b) the order is enforceable in a prescribed overseas jurisdiction under provisions corresponding to Subdivision C.
- (1A) This section also applies if:
- (a) a court in Australia makes, in relation to a child who is under 18, an order under regulations made for the purposes of section 111B; and
 - (b) the order is enforceable in a convention country (within the meaning of those regulations) under provisions corresponding to Subdivision C.
- (2) A person referred to in subsection (3) may, in writing, request the Registry Manager of the court to send to an appropriate court or authority in the overseas jurisdiction or convention country the documents and information necessary for securing the enforcement of the order in the overseas jurisdiction or convention country.
- (3) A request under subsection (2) may be made by:
- (a) a person with whom the child is supposed to live or have contact under the order; or
 - (b) a person who has a right to custody of, or of access to, the child under the order.
- (4) The Registry Manager of the court must comply with a request under subsection (2).

70N Regulations may deal with sending Australian orders etc. to overseas jurisdiction

- (1) The regulations may make provision for and in relation to the sending to a prescribed overseas jurisdiction of copies of, and documents relating to, a residence order, a contact order or a specific issues order, or a State child order as defined in section 70B, that relates to a child to whom an overseas child order relates.
- (2) The regulations may make provision for and in relation to the sending to a convention country (within the meaning of the

regulations made for the purposes of section 111B) of copies of, and documents relating to, an order under regulations made for the purposes of that section, that relates to a child to whom an overseas child order relates.

Part VII Children

Division 13A Consequences of failure to comply with orders, and other obligations, that affect children

Section 70NB

Division 13A—Consequences of failure to comply with orders, and other obligations, that affect children

Subdivision A—Preliminary

70NB Definitions

In this Division:

applied provisions, in relation to a community service order made under paragraph 70NJ(3)(a), means the provisions of the laws of a State or Territory (as modified by regulations made under subsection 70NK(3)), that, because of regulations made under that subsection, apply in relation to the order.

community service order has the meaning given by subsection 70NK(2A).

contravened an order has the meaning given by section 70NC.

order under this Act affecting children, in relation to a court, means:

- (a) a parenting order; or
- (b) an injunction granted by the court:
 - (i) under section 68B; or
 - (ii) under section 114 in so far as the injunction is for the protection of a child; or
- (c) an undertaking given to, and accepted by, the court:
 - (i) that relates to, or to the making of, an order or injunction referred to in paragraph (a) or (b) or a community service order referred to in paragraph (ea); or
 - (ii) that relates to a bond referred to in paragraph (f); or
- (d) a subpoena issued under the applicable Rules of Court:
 - (i) that relates to, or to the making of, an order or injunction referred to in paragraph (a) or (b) or a community service order referred to in paragraph (ea); or

Section 70NBA

- (ii) that relates to a bond referred to in paragraph (f);
being a subpoena issued to a party to the proceedings for the
order, injunction or bond, as the case may be; or
 - (e) a registered parenting plan within the meaning of subsection
63C(6); or
 - (ea) a community service order made under paragraph
70NJ(3)(a); or
 - (f) a bond entered into:
 - (i) under a parenting order; or
 - (ii) under paragraph 70NJ(3)(b); or
 - (iii) for the purposes of subsection 70NO(5);
- and includes an order, injunction, plan or bond that:
- (g) is an order under this Act affecting children made by another
court because of paragraph (a), (b), (e) or (f); and
 - (h) has been registered in the first-mentioned court.

post-separation parenting program or ***program*** means a program
that:

- (a) is designed (including by providing counselling services or
by teaching techniques to resolve disputes) to help people to
resolve problems that adversely affect the carrying out of
their parenting responsibilities; and
- (b) is provided by a provider; and
- (c) consists of lectures, discussions (including group
discussions) or other activities.

post-separation parenting program provider or ***provider*** means a
provider of a program that is included in a list of providers
compiled by the Attorney-General.

primary order means an order under this Act affecting children and
includes such order as varied.

reasonable excuse for contravening an order includes the
meanings given by section 70NE.

70NBA Application of Division

Despite anything contained in any other provision of this Division,
this Division does not apply in respect of a contravention,

Part VII Children

Division 13A Consequences of failure to comply with orders, and other obligations, that affect children

Section 70NC

committed before this Division commences, of an order under this Act affecting children if a court made an order, in respect of that contravention before this Division commences, under this Act as previously in force.

70NC Meaning of *contravened* an order

A person is taken for the purposes of this Division to have ***contravened*** an order under this Act affecting children if, and only if:

- (a) where the person is bound by the order—he or she has:
 - (i) intentionally failed to comply with the order; or
 - (ii) made no reasonable attempt to comply with the order;or
- (b) otherwise—he or she has:
 - (i) intentionally prevented compliance with the order by a person who is bound by it; or
 - (ii) aided or abetted a contravention of the order by a person who is bound by it.

70ND Requirements taken to be included in certain orders

For the purposes of this Division:

- (a) a residence order is taken to include a requirement that people act in accordance with section 65M in relation to the order; and
- (b) a contact order is taken to include a requirement that people act in accordance with section 65N in relation to the order; and
- (c) a specific issues order to which section 65P applies is taken to include a requirement that people act in accordance with that section in relation to the order.

70NE Meaning of *reasonable excuse for contravening* an order

- (1) The circumstances in which a person may be taken to have had, for the purposes of this Division, a ***reasonable excuse for contravening*** an order under this Act affecting children include,

but are not limited to, the circumstances set out in subsections (1A), (2), (3) and (4).

(1A) A person (the *respondent*) is taken to have had a *reasonable excuse for contravening* an order under this Act affecting children if:

- (a) the respondent contravened the order because, or substantially because, he or she did not, at the time of the contravention, understand the obligations imposed by the order on the person who was bound by it; and
- (b) the court is satisfied that the respondent ought to be excused in respect of the contravention.

(1B) If a court decides that a person had a reasonable excuse for contravening an order under this Act for the reason referred to in paragraph (1A)(a), it is the duty of the court to explain to the person, in language likely to be readily understood by the person, the obligations imposed on him or her by the order and the consequences that may follow if he or she again contravenes the order.

(2) A person (the *respondent*) is taken to have had a reasonable excuse for contravening a residence order in a way that resulted in a child not living with a person in whose favour the order was made if:

- (a) the respondent believed on reasonable grounds that the actions constituting the contravention were necessary to protect the health or safety of a person (including the respondent or the child); and
- (b) the period during which, because of the contravention, the child did not live with the person in whose favour the order was made was not longer than was necessary to protect the health or safety of the person referred to in paragraph (a).

(3) A person (the *respondent*) is taken to have had a reasonable excuse for contravening a contact order in a way that resulted in a person and a child being deprived of contact they were supposed to have had under the order if:

- (a) the respondent believed on reasonable grounds that the deprivation of contact was necessary to protect the health or safety of a person (including the respondent or the child); and

Part VII Children

Division 13A Consequences of failure to comply with orders, and other obligations, that affect children

Section 70NEA

- (b) the deprivation of contact was not longer than was necessary to protect the health or safety of the person referred to in paragraph (a).
- (4) A person (the *respondent*) is taken to have had a reasonable excuse for contravening a specific issues order by acting contrary to section 65P if:
 - (a) the respondent believed on reasonable grounds that the action constituting the contravention was necessary to protect the health or safety of a person (including the respondent or the child); and
 - (b) the period during which, because of that action, a person in whose favour the order was made was hindered in or prevented from discharging responsibilities under the order was not for longer than was necessary to protect the health or safety of the person referred to in paragraph (a).

70NEA Standard of proof of reasonable excuse

The standard of proof to be applied in determining, in proceedings under this Division, whether a person who contravened an order under this Act affecting children had a reasonable excuse for the contravention is proof on the balance of probabilities.

Subdivision B—Powers of court where a person contravenes an order under this Act affecting children: stage 2 of parenting compliance regime

70NF Application of Subdivision

- (1) Subject to subsection (2), this Subdivision applies if:
 - (a) a primary order has been made, whether before or after the commencement of this Division; and
 - (b) a court having jurisdiction under this Act is satisfied that a person has, whether before or after that commencement, committed a contravention (the *current contravention*) of the primary order; and
 - (ba) the person does not prove that he or she had a reasonable excuse for the current contravention; and

Section 70NG

- (c) either subsection (1A) or (1B) applies;
and, if the primary order is an order for the maintenance of a child,
this Subdivision applies irrespective of the period since the current
contravention occurred.
- (1A) For the purposes of paragraph (1)(c), this subsection applies if no
court has previously:
- (a) made an order imposing a sanction or taking an action in
respect of a contravention by the person of the primary order;
or
 - (b) under paragraph 70NG(1)(c), adjourned proceedings in
respect of a contravention by the person of the primary order.
- (1B) For the purposes of paragraph (1)(c), this subsection applies if:
- (a) a court has previously:
 - (i) made an order imposing a sanction or taking an action
in respect of a contravention by the person of the
primary order; or
 - (ii) under paragraph 70NG(1)(c), adjourned proceedings in
respect of a contravention by the person of the primary
order; and
 - (b) the court, in dealing with the current contravention, is
satisfied that it is more appropriate for that contravention to
be dealt with under this Subdivision.
- (2) This Subdivision does not apply if, in circumstances mentioned in
subsection (1A), the court dealing with the current contravention 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.

70NG Powers of court

- (1) If this Subdivision applies, the court may do any or all of the
following:
- (a) make an order in respect of the person who committed the
current contravention, or (subject to subsection (2)) in respect
of both that person and another specified person, as follows:
 - (i) directing the person or each person to attend before a
provider so that the provider can make an initial

Part VII Children

Division 13A Consequences of failure to comply with orders, and other obligations, that affect children

Section 70NG

- assessment as to the suitability of the person concerned to attend a program;
- (ii) if a person so attending before a provider is assessed by the provider to be suitable to attend a program or a part of a program and the provider nominates a particular program for the person to attend—directing the person to attend that program or that part of that program;
 - (b) make a further parenting order that compensates for contact or residence forgone as a result of the current contravention;
 - (ba) make any other order varying the order so contravened;
 - (c) adjourn the proceedings to allow either or both of the parties to the primary order to apply for a further parenting order under Division 6 of Part VII that discharges, varies or suspends the primary order or revives some or all of an earlier parenting order.
- (1A) In deciding whether to adjourn the proceedings as mentioned in paragraph (1)(c), the court must have regard to the following:
- (a) whether the primary order was made by consent;
 - (b) whether either or both of the parties to the proceedings in which the primary order was made were represented in those proceedings by a legal practitioner;
 - (c) the length of the period between the making of the primary order and the occurrence of the current contravention;
 - (d) any other matters that the court thinks relevant.
- (2) The court must not make an order under paragraph (1)(a) directed to a person other than the person who committed the current contravention unless:
- (a) the person brought the proceedings before the court in relation to the current contravention or is otherwise a party to those proceedings; and
 - (b) the court is satisfied that it is appropriate to direct the order to the person because of the connection between the current contravention and the carrying out by the person of his or her parental responsibilities in relation to the child or children to whom the primary order relates.

- (3) If the court makes an order under paragraph (1)(a) 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.

70NH Duties of provider of program

- (1) The provider of a program before whom a person attends under an order made under subparagraph 70NG(1)(a)(i) must inform the court, in accordance with the applicable Rules of Court, if the person is unsuitable to attend any program.
- (2) If a person is ordered to attend a program or a part of a program, the provider of the program must inform the court, in accordance with the applicable Rules of Court, if:
- (a) the person fails to attend the program or the part of the program; or
 - (b) the provider considers that the person is unsuitable to take any further part in the program or part of the program.

70NI Evidence

- (1) Evidence of anything said, or of any admission made, by a person attending before the provider of a program for assessment, or attending a program, is not admissible:
- (a) in any court (whether exercising federal jurisdiction or not);
or
 - (b) in any proceedings before a person authorised by a law of the Commonwealth, of a State or of a Territory, or by the consent of the parties, to hear evidence.
- (2) Subsection (1) does not apply to the following:
- (a) an admission by an adult that indicates that a child has been abused or is at risk of abuse;
 - (b) a 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.
- (3) In this section:

Part VII Children

Division 13A Consequences of failure to comply with orders, and other obligations, that affect children

Section 70NIA

abuse, in relation to a child, means:

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

child means a person who is under 18.

70NIA Court may make further orders in relation to attendance at program

The court may make such orders as it considers appropriate, other than the orders referred to in subsection 70NJ(3), in respect of a person, if:

- (a) it appears to the court that the person has not attended before a provider that the person was ordered to attend before; or
- (b) it appears to the court that the person has not attended a program or a part of a program that the person was ordered to attend; or
- (c) the person was assessed as unsuitable to attend a program.

70NIB List of program providers

The Attorney-General:

- (a) is to compile, for each calendar year, a list of post-separation parenting program providers; and
- (b) is to publish the list in such manner as he or she determines; and
- (c) if he or she amends the list during the calendar year for which it is compiled—is to publish a revised list in such manner as he or she determines.

**Subdivision C—Court to take action in respect of person who
contravenes an order: stage 3 of parenting
compliance regime**

70NJ Powers of court

- (1) Subject to subsection (2), this Subdivision applies if:
- (a) a primary order has been made, whether before or after the commencement of this Division; and
 - (b) a court having jurisdiction under this Act is satisfied that a person has, whether before or after that commencement, committed a contravention (the *current contravention*) of the primary order; and
 - (ba) the person does not prove that he or she had a reasonable excuse for the current contravention; and
 - (c) either subsection (1A) or (1B) applies.

Note: For the standard of proof to be applied in determining whether a contravention of the primary order has been committed, see section 140 of the *Evidence Act 1995*.

- (1A) For the purposes of paragraph (1)(c), this subsection applies if:
- (a) no court has previously:
 - (i) made an order imposing a sanction or taking an action in respect of a contravention by the person of the primary order; or
 - (ii) under paragraph 70NG(1)(c), adjourned proceedings in respect of contravention by the person of the primary order; and
 - (b) the court dealing with the current contravention is satisfied that the person has behaved in a way that showed a serious disregard of his or her obligations under the primary order.
- (1B) For the purposes of paragraph (1)(c), this subsection applies if a court has previously:
- (a) made an order imposing a sanction or taking an action in respect of a contravention by the person of the primary order;
or
 - (b) under paragraph 70NG(1)(c), adjourned proceedings in respect of a contravention by the person of the primary order.

Part VII Children

Division 13A Consequences of failure to comply with orders, and other obligations, that affect children

Section 70NJ

- (2) This Subdivision does not apply if the court dealing with the current contravention is satisfied that it is more appropriate for that contravention to be dealt with under Subdivision B.
- (2A) If this Subdivision applies, the court must make, in respect of the person who committed the current contravention, the order or orders available to be made under subsection (3) that it considers to be the most appropriate in the circumstances.
- (2B) This section applies whether the primary order was made, and whether the current contravention occurred, before or after the commencement of this Division.
- (3) The orders that are available to be made by the court are:
 - (a) if the court is empowered under section 70NK to make a community service order—to make such an order; or
 - (b) to make an order requiring the person to enter into a bond in accordance with section 70NM; or
 - (c) if the person has contravened a parenting order—subject to subsection (5), to make an order varying the order so contravened; or
 - (d) to fine the person not more than 60 penalty units; or
 - (e) subject to subsection (6), to impose a sentence of imprisonment on the person in accordance with section 70NO.
- (4) If a court varies or discharges under section 70NL a community service order made under paragraph (3)(a), the court may give any directions as to the effect of the variation or discharge that the court considers appropriate.
- (5) When making an order under paragraph (3)(c) varying a parenting order, the court, in addition to regarding, under section 65E, the best interests of the child as the paramount consideration, must, if any of the following considerations is relevant, take that consideration into account:
 - (a) the person who contravened the parenting order did so after having attended, after having refused or failed to attend, or after having been found to be unsuitable to take any further part in, a post-separation parenting program or a part of such a program;

Section 70NJ

- (ab) the person who contravened the parenting order did so after having refused or failed to attend before a provider that the person was ordered to attend before;
 - (b) there was no post-separation parenting program that the person who contravened the parenting order could attend;
 - (c) because of the behaviour of the person who contravened the parenting order, it was not appropriate, in the court's opinion, for the person to attend a post-separation parenting program, or a part of such a program;
 - (d) the parenting order was a compensatory parenting order made under paragraph 70NG(1)(b) after the person had contravened a previous order under this Act affecting children.
- (6) The court must not make an order imposing a sentence of imprisonment on a person under this section in respect of a contravention of a child maintenance order made under this Act unless the court is satisfied that the contravention was intentional or fraudulent.
- (6A) The court must not make an order imposing a sentence of imprisonment on a person under this section in respect of:
- (a) a contravention of an administrative assessment of child support made under the *Child Support (Assessment) Act 1989*; or
 - (b) a breach of a child support agreement made under that Act; or
 - (c) a contravention of an order made by a court under Division 4 of Part 7 of that Act for a departure from such an assessment (including such an order that contains matters mentioned in section 141 of that Act).
- (7) An order under this section may be expressed to take effect immediately, at the end of a specified period or on the occurrence of a specified event.
- (8) When a court makes an order under this section, the court may make any other orders that the court considers necessary to ensure compliance with the order that was contravened.

Part VII Children

Division 13A Consequences of failure to comply with orders, and other obligations, that affect children

Section 70NK

70NK When court is empowered to make a community service order

- (1) Subject to this section, if, under the law of a participating State or a participating Territory, a court is empowered (whether generally or in particular cases) to make a community service order in respect of a person convicted of an offence against the law of the State or Territory, a court exercising jurisdiction in the State or Territory may, under paragraph 70NJ(3)(a) make a community service order.
- (2) A community service order made under paragraph 70NJ(3)(a):
 - (a) is to be such that the total number of hours during which the order regulates the conduct of the person in respect of whom it is made does not exceed the maximum period in relation to the State or Territory in which the order is made; and
 - (b) ceases to have effect 2 years after it was made, or after such lesser period as is specified in the order.
- (2A) A community service order may be an order of any of the following kinds:
 - (a) an order known as:
 - (i) a community service order; or
 - (ii) a work order; or
 - (iii) an attendance centre order; or
 - (iv) an attendance order; or
 - (v) a community based order;
 - (b) an order that is similar to an order referred to in paragraph (a);
 - (c) an order prescribed for the purposes of this paragraph.
- (3) If a court exercising jurisdiction under section 70NJ in a particular State or Territory makes a community service order under paragraph 70NJ(3)(a), the provisions of the laws of the State or Territory with respect to a community service order that is made under those laws are, to the extent provided by the regulations and subject to such modifications as are specified in the regulations, to apply in relation to the order.
- (4) If a court proposes to make a community service order under paragraph 70NJ(3)(a), it must, before doing so, explain to the

person in respect of whom it is made, in language likely to be readily understood by the person:

- (a) the purpose and effect of the proposed order; and
- (b) the consequences that may follow if the person fails to comply with the proposed order or with any requirements made in relation to the order by or under the applied provisions; and
- (c) if the proposed order may be revoked or varied under the applied provisions—that the proposed order may be so revoked or varied.

Note: For *applied provisions*, see section 70NB.

(5) In this section:

maximum period, in relation to a State or Territory, means 500 hours or such lesser period as is prescribed in relation to the State or Territory.

participating State means a State in relation to which an agreement under section 70NQ is in force.

participating Territory means a Territory in relation to which an agreement under section 70NQ is in force.

70NL Variation and discharge of community service orders

A community service order made under paragraph 70NJ(3)(a) may be varied or discharged:

- (a) if the court that made the order is the Family Court or the Federal Magistrates Court—by either of those Courts; or
- (b) otherwise—by the court that made the order or the Family Court.

70NM Bonds

- (1) This section provides for bonds that a court may require a person to enter into under paragraph 70NJ(3)(b).
- (2) A bond is to be for a specified period of up to 2 years.
- (3) A bond may be:

Part VII Children

Division 13A Consequences of failure to comply with orders, and other obligations, that affect children

Section 70NN

- (a) with or without surety; and
 - (b) with or without security.
- (4) The conditions that may be imposed on a person by a bond include, but are not limited to, conditions of the following kinds:
- (a) a condition requiring the person to attend upon a family and child counsellor, or a welfare officer, for counselling;
 - (b) a condition requiring the person to be of good behaviour.
- (5) If a court proposes to require a person to enter into a bond, it must, before making the requirement, explain to the person, in language likely to be readily understood by the person:
- (a) the purpose and effect of the proposed requirement; and
 - (b) the consequences that may follow if the person:
 - (i) fails to enter into the bond; or
 - (ii) having entered into the bond—fails to act in accordance with the bond.

70NN Procedure for enforcing community service orders or bonds

- (1) If a court makes a community service order under paragraph 70NJ(3)(a) in respect of a person, or an order under paragraph 70NJ(3)(b) requiring a person to enter into a bond in accordance with section 70NM, the following provisions have effect.
- (2) If an information is laid before a magistrate, whether before or after the end of the period for which the community service order or the bond is to operate, or operated, alleging that the person has, without reasonable excuse, contravened the order or bond, the magistrate may:
 - (a) issue a summons directing the person to appear, on a date, at a time and at a place fixed in the summons, before the court; or
 - (b) if the information is laid on oath or affirmation and the magistrate thinks that proceedings against the person by summons might not be effective—issue a warrant for the arrest of the person.
- (3) If:

Section 70NN

- (a) the person is served with a summons issued under subsection (2); and
 - (b) the person fails to attend before the court as required by the summons;
- the court may, on proof of the service of the summons, issue a warrant for the arrest of the person.
- (4) If:
- (a) the person is arrested under a warrant issued under subsection (2), (3) or (6); and
 - (b) the court is not sitting at the time of the arrest;
- the person is to be brought before a magistrate.
- (5) The magistrate may:
- (a) order that the person be released from custody on his or her entering into a bond (with or without surety or security) that he or she will attend before the court on a date, at a time and at a place specified by the magistrate; or
 - (b) direct that the person be kept in custody in accordance with the warrant.
- (6) If:
- (a) on entering into a bond under subsection (5), the person is released under an order made by a magistrate under paragraph (5)(a); and
 - (b) the person fails to attend before the court as required by the bond;
- the court may, on proof of the entering into of the bond, issue a warrant for the arrest of the person.
- (7) If:
- (a) in accordance with this section, the person is brought before the court; and
 - (b) the court (whether or not constituted by the judge or magistrate who made the community service order or required the bond to be entered into in accordance with section 70NM) is satisfied that the person has, without reasonable excuse, failed to comply with the order or bond;
- the court may take action under subsection (8).
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Part VII Children

Division 13A Consequences of failure to comply with orders, and other obligations, that affect children

Section 70NO

- (8) The court may:
- (a) without prejudice to the continuance of the community service order or the bond entered into in accordance with section 70NM, impose a fine not exceeding 10 penalty units on the person; or
 - (b) revoke the community service order or the bond entered into in accordance with section 70NM and, subject to subsection (9), deal with the person, for the contravention in respect of which the community service order was made or the bond was entered into, in any manner in which the person could have been dealt with for the contravention if:
 - (i) the community service order had not been made or the bond had not been entered into; and
 - (ii) the person was before the court under section 70NJ in respect of the contravention.
- (9) In dealing with the person as mentioned in paragraph (8)(b), the court must, in addition to any other matters that it considers should be taken into account, take into account:
- (a) the fact that the community service order was made or the bond was entered into; and
 - (b) anything done under the community service order or pursuant to the bond; and
 - (c) any fine imposed, and any other order made, for or in respect of the contravention.
- (10) A warrant issued under subsection (2), (3) or (6) in relation to the person authorises:
- (a) the arrest of the person; and
 - (b) the bringing of the person before the court as soon as practicable after his or her arrest; and
 - (c) the detention of the person in custody until he or she is released by order of the court, or in accordance with subsection (5).

70NO Sentences of imprisonment

- (1) A sentence of imprisonment imposed on a person under paragraph 70NJ(3)(e) is to be expressed to be:
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Section 70NO

- (a) for a specified period of 12 months or less; or
 - (b) for a period ending when the person:
 - (i) complies with the order concerned; or
 - (ii) has been imprisoned under the sentence for 12 months or such lesser period as is specified by the court;whichever happens first.
- (2) A court must not sentence a person to imprisonment under paragraph 70NJ(3)(e) unless the court is satisfied that, in all the circumstances of the case, it would not be appropriate for the court to deal with the contravention under any of the other paragraphs of subsection 70NJ(3).
- (3) If a court sentences a person to imprisonment under paragraph 70NJ(3)(e), the court must:
- (a) state the reasons why it is satisfied as mentioned in subsection (2); and
 - (b) cause those reasons to be entered in the records of the court.
- (4) The failure of a court to comply with subsection (3) does not invalidate a sentence.
- (5) A court, when sentencing a person to imprisonment under paragraph 70NJ(3)(e), may, if it considers it appropriate to do so, direct that the person be released upon the person entering into a bond described in subsection (6) after he or she has served a specified part of the term of imprisonment.
- (6) A bond for the purposes of subsection (5) is a bond (with or without surety or security) that the person will be of good behaviour for a specified period of up to 2 years.
- (7) A court that has sentenced a person to imprisonment for a period expressed as provided by paragraph (1)(b) may order the release of the person if it is satisfied that the person will, if he or she is released, comply with the order concerned.
- (8) To avoid doubt, the serving by a person of a period of imprisonment under a sentence imposed on the person under paragraph 70NJ(3)(e) for failure to make a payment under a child maintenance order does not affect the person's liability to make the payment.
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Part VII Children

Division 13A Consequences of failure to comply with orders, and other obligations, that affect children

Section 70NP

70NP Relationship between Subdivision and other laws

- (1) This section applies where an act or omission by a person:
 - (a) constitutes a contravention of an order under this Act affecting children; and
 - (b) is also an offence against any law.
- (2) If the person is prosecuted in respect of the offence, a court in which proceedings have been brought under section 70NJ in respect of the contravention of the order must:
 - (a) adjourn those proceedings until the prosecution has been completed; or
 - (b) dismiss those proceedings.
- (3) The person may be prosecuted for, and convicted of, the offence.
- (4) Nothing in this section renders the person liable to be punished twice in respect of the same act or omission.

70NQ Arrangements with States and Territories for carrying out of sentences and orders

An arrangement made under section 112AN for or in relation to the carrying out of sentences imposed, or orders made, under Division 2 of Part XIII A is taken to extend to the carrying out of sentences imposed, or orders made, under this Subdivision.

70NR Subdivision does not limit operation of section 105

Nothing in this Subdivision is intended to limit the operation of section 105.

Division 14—Miscellaneous

70P What this Division does

This Division deals with miscellaneous matters relating to children.

70Q Certain instruments not liable to duty

- (1) The following instruments are not subject to any duty or charge under any law of a State or Territory or any law of the Commonwealth that applies only in relation to a Territory:
 - (a) an instrument executed under, or for the purposes of, an order made under this Part;
 - (b) an eligible parenting plan that confers a benefit in relation to a child, to the extent to which it confers the benefit;
 - (c) an instrument executed under, or for the purposes of, an eligible parenting plan and that confers a benefit in relation to a child, to the extent to which it confers the benefit.
- (2) An *eligible parenting plan* is a parenting plan:
 - (a) that is a registered parenting plan within the meaning of subsection 63C(6); and
 - (b) that is not a maintenance agreement, or, if it is a maintenance agreement, it relates to a child who is not a child of the marriage to which the maintenance agreement relates; and
 - (c) that:
 - (i) is made by the parties to a de facto relationship in connection with the breakdown of that relationship; or
 - (ii) relates to a child whose parents (being parties to the plan) were neither married to each other, nor living with each other in a de facto relationship, at the time of the child's conception.
- (3) In this section, a reference to an instrument that *confers a benefit in relation to a child* includes a reference to an instrument that confers an entitlement to property in relation to a child even though the instrument also deprives the child or another person of an entitlement to other property in relation to the child.

Part VIII—Property, spousal maintenance and maintenance agreements

71 Interpretation

In this Part:

marriage includes a void marriage.

re-marriage, in relation to a person who was a party to a purported marriage that is void, means marriage.

71A This Part does not apply to certain matters covered by binding financial agreements

This Part does not apply to:

- (a) financial matters to which a financial agreement that is binding on the parties to the agreement applies; or
- (b) financial resources to which a financial agreement that is binding on the parties to the agreement applies.

72 Right of spouse to maintenance

A party to a marriage is liable to maintain the other party, to the extent that the first-mentioned party is reasonably able to do so, if, and only if, that other party is unable to support herself or himself adequately whether:

- (a) by reason of having the care and control of a child of the marriage who has not attained the age of 18 years;
- (b) by reason of age or physical or mental incapacity for appropriate gainful employment; or
- (c) for any other adequate reason;

having regard to any relevant matter referred to in subsection 75(2).

74 Power of court in spousal maintenance proceedings

In proceedings with respect to the maintenance of a party to a marriage, the court may make such order as it considers proper for the provision of maintenance in accordance with this Part.

75 Matters to be taken into consideration in relation to spousal maintenance

- (1) In exercising jurisdiction under section 74, the court shall take into account only the matters referred to in subsection (2).
- (2) The matters to be so taken into account are:
 - (a) the age and state of health of each of the parties;
 - (b) the income, property and financial resources of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment;
 - (c) whether either party has the care or control of a child of the marriage who has not attained the age of 18 years;
 - (d) commitments of each of the parties that are necessary to enable the party to support:
 - (i) himself or herself; and
 - (ii) a child or another person that the party has a duty to maintain;
 - (e) the responsibilities of either party to support any other person;
 - (f) subject to subsection (3), the eligibility of either party for a pension, allowance or benefit under:
 - (i) any law of the Commonwealth, of a State or Territory or of another country; or
 - (ii) any superannuation fund or scheme, whether the fund or scheme was established, or operates, within or outside Australia;
and the rate of any such pension, allowance or benefit being paid to either party;
 - (g) where the parties have separated or the marriage has been dissolved, a standard of living that in all the circumstances is reasonable;

Section 77

- (h) the extent to which the payment of maintenance to the party whose maintenance is under consideration would increase the earning capacity of that party by enabling that party to undertake a course of education or training or to establish himself or herself in a business or otherwise to obtain an adequate income;
 - (j) the extent to which the party whose maintenance is under consideration has contributed to the income, earning capacity, property and financial resources of the other party;
 - (k) the duration of the marriage and the extent to which it has affected the earning capacity of the party whose maintenance is under consideration;
 - (l) the need to protect a party who wishes to continue that party's role as a parent;
 - (m) if either party is cohabiting with another person—the financial circumstances relating to the cohabitation;
 - (n) the terms of any order made or proposed to be made under section 79 in relation to the property of the parties;
 - (na) any child support under the *Child Support (Assessment) Act 1989* that a party to the marriage has provided, is to provide, or might be liable to provide in the future, for a child of the marriage; and
 - (o) any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account; and
 - (p) the terms of any financial agreement that is binding on the parties.
- (3) In exercising its jurisdiction under section 74, a court shall disregard any entitlement of the party whose maintenance is under consideration to an income tested pension, allowance or benefit.

77 Urgent spousal maintenance cases

Where, in proceedings with respect to the maintenance of a party to a marriage, it appears to the court that the party is in immediate need of financial assistance, but it is not practicable in the circumstances to determine immediately what order, if any, should be made, the court may order the payment, pending the disposal of the proceedings, of such periodic sum or other sums as the court considers reasonable.

77A Specification in orders of payments etc. for spouse maintenance purposes

(1) Where:

(a) a court makes an order under this Act (whether or not the order is made in proceedings in relation to the maintenance of a party to a marriage, is made by consent or varies an earlier order), and the order has the effect of requiring:

- (i) payment of a lump sum, whether in one amount or by instalments; or
- (ii) the transfer or settlement of property; and

(b) the purpose, or one of the purposes, of the payment, transfer or settlement is to make provision for the maintenance of a party to a marriage;

the court shall:

(c) express the order to be an order to which this section applies; and

(d) specify the portion of the payment, or the value of the portion of the property, attributable to the provision of maintenance for the party.

(2) Where:

(a) a court makes an order of a kind referred to in paragraph (1)(a); and

(b) the order:

(i) is not expressed to be an order to which this section applies; or

(ii) is expressed to be an order to which this section applies, but does not comply with paragraph (1)(d);

any payment, transfer or settlement of a kind referred to in paragraph (1)(a), that the order has the effect of requiring, shall be taken not to make provision for the maintenance of a party to the relevant marriage.

78 Declaration of interests in property

(1) In proceedings between the parties to a marriage with respect to existing title or rights in respect of property, the court may declare the title or rights, if any, that a party has in respect of the property.

Section 79

- (2) Where a court makes a declaration under subsection (1), it may make consequential orders to give effect to the declaration, including orders as to sale or partition and interim or permanent orders as to possession.

79 Alteration of property interests

- (1) In proceedings with respect to the property of the parties to a marriage or either of them, the court may make such order as it considers appropriate altering the interests of the parties in the property, including an order for a settlement of property in substitution for any interest in the property and including an order requiring either or both of the parties to make, for the benefit of either or both of the parties or a child of the marriage, such settlement or transfer of property as the court determines.
- (1A) An order made under subsection (1) in proceedings with respect to the property of the parties to a marriage or either of them may, after the death of a party to the proceedings, be enforced on behalf of, or against, as the case may be, the estate of the deceased party.
- (1B) The court may adjourn proceedings with respect to the property of the parties to a marriage or either of them, except where the parties to the proceedings are:
- (a) parties to concurrent, pending or completed proceedings for principal relief;
 - (b) parties to a marriage that has been dissolved or annulled under the law of an overseas country, where that dissolution or annulment is recognized as valid in Australia under section 104; or
 - (c) parties to a marriage who have been granted a legal separation under the law of an overseas country, where that legal separation is recognized as valid in Australia under section 104;

on such terms and conditions as it considers appropriate, for such period as it considers necessary to enable the parties to the proceedings to consider the likely effects (if any) of an order under this section on the marriage or the children of the marriage, but nothing in this subsection shall be taken to limit any other power of the court to adjourn such proceedings.

- (1C) Where the period for which a court has adjourned proceedings with respect to the property of the parties to a marriage or either of them as provided by subsection (1B) has not expired and:
- (a) proceedings for principal relief are instituted by one or both of those parties;
 - (b) the marriage is dissolved or annulled under the law of an overseas country and the dissolution or annulment is recognized as valid in Australia under section 104; or
 - (c) the parties are granted a legal separation under the law of an overseas country and the legal separation is recognized as valid in Australia under section 104;
- either party to the first-mentioned proceedings may apply to the court for the hearing of those proceedings to be continued.
- (2) The court shall not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order.
- (4) In considering what order (if any) should be made under this section in proceedings with respect to any property of the parties to a marriage or either of them, the court shall take into account:
- (a) the financial contribution made directly or indirectly by or on behalf of a party to the marriage or a child of the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them, or otherwise in relation to any of that last-mentioned property, whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the marriage or either of them;
 - (b) the contribution (other than a financial contribution) made directly or indirectly by or on behalf of a party to the marriage or a child of the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them, or otherwise in relation to any of that last-mentioned property, whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the marriage or either of them;
 - (c) the contribution made by a party to the marriage to the welfare of the family constituted by the parties to the
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Section 79

- marriage and any children of the marriage, including any contribution made in the capacity of homemaker or parent;
- (d) the effect of any proposed order upon the earning capacity of either party to the marriage;
 - (e) the matters referred to in subsection 75(2) so far as they are relevant;
 - (f) any other order made under this Act affecting a party to the marriage or a child of the marriage; and
 - (g) any child support under the *Child Support (Assessment) Act 1989* that a party to the marriage has provided, is to provide, or might be liable to provide in the future, for a child of the marriage.
- (5) Without limiting the power of any court to grant an adjournment in proceedings under this Act, where, in proceedings with respect to the property of the parties to a marriage or either of them, a court is of the opinion:
- (a) that there is likely to be a significant change in the financial circumstances of the parties to the marriage or either of them and that, having regard to the time when that change is likely to take place, it is reasonable to adjourn the proceedings; and
 - (b) that an order that the court could make with respect to the property of the parties to the marriage or either of them if that significant change in financial circumstances occurs is more likely to do justice as between the parties to the marriage than an order that the court could make immediately with respect to the property of the parties to the marriage or either of them;
- the court may, if so requested by either party to the marriage, adjourn the proceedings until such time, before the expiration of a period specified by the court, as that party to the marriage applies for the proceedings to be determined, but nothing in this subsection requires the court to adjourn any proceedings in any particular circumstances.
- (6) Where a court proposes to adjourn proceedings as provided by subsection (5), the court may, before so adjourning the proceedings, make such interim order or orders or such other order or orders (if any) as it considers appropriate with respect to any of the property of the parties to the marriage or of either of them.

- (7) The court may, in forming an opinion for the purposes of subsection (5) as to whether there is likely to be a significant change in the financial circumstances of either or both of the parties to the marriage, have regard to any change in the financial circumstances of a party to the marriage that may occur by reason that the party to the marriage:
- (a) is a contributor to a superannuation fund or scheme, or participates in any scheme or arrangement that is in the nature of a superannuation scheme; or
 - (b) may become entitled to property as the result of the exercise in his or her favour, by the trustee of a discretionary trust, of a power to distribute trust property;
- but nothing in this subsection shall be taken to limit the circumstances in which the court may form the opinion that there is likely to be a significant change in the financial circumstances of a party to the marriage.
- (8) Where, before proceedings with respect to the property of the parties to a marriage or either of them are completed, either party to the proceedings dies:
- (a) the proceedings may be continued by or against, as the case may be, the legal personal representative of the deceased party and the applicable Rules of Court may make provision in relation to the substitution of the legal personal representative as a party to the proceedings;
 - (b) if the court is of the opinion:
 - (i) that it would have made an order with respect to property if the deceased party had not died; and
 - (ii) that it is still appropriate to make an order with respect to property;the court may make such order as it considers appropriate with respect to any of the property of the parties to the marriage or either of them; and
 - (c) an order made by the court pursuant to paragraph (b) may be enforced on behalf of, or against, as the case may be, the estate of the deceased party.
- (9) The Family Court, or a Family Court of a State, shall not make an order under this section in proceedings with respect to the property of the parties to a marriage or either of them (other than an order
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Section 79A

until further order or an order made with the consent of all the parties to the proceedings) unless:

- (a) the parties to the proceedings have attended a conference in relation to the matter to which the proceedings relate with a Registrar or Deputy Registrar of the Family Court, or a Registrar or Deputy Registrar of the Family Court of that State, as the case may be;
- (b) the court is satisfied that, having regard to the need to make an order urgently, or to any other special circumstance, it is appropriate to make the order notwithstanding that the parties to the proceedings have not attended a conference as mentioned in paragraph (a); or
- (c) the court is satisfied that it is not practicable to require the parties to the proceedings to attend a conference as mentioned in paragraph (a).

79A Setting aside of orders altering property interests

- (1) Where, on application by a person affected by an order made by a court under section 79 in proceedings with respect to the property of the parties to a marriage or either of them, the court is satisfied that:
 - (a) there has been a miscarriage of justice by reason of fraud, duress, suppression of evidence (including failure to disclose relevant information), the giving of false evidence or any other circumstance; or
 - (b) in the circumstances that have arisen since the order was made it is impracticable for the order to be carried out or impracticable for a part of the order to be carried out; or
 - (c) a person has defaulted in carrying out an obligation imposed on the person by the order and, in the circumstances that have arisen as a result of that default, it is just and equitable to vary the order or to set the order aside and make another order in substitution for the order; or
 - (d) in the circumstances that have arisen since the making of the order, being circumstances of an exceptional nature relating to the care, welfare and development of a child of the marriage, the child or, where the applicant has caring responsibility for the child (as defined in subsection (1AA)), the applicant, will suffer hardship if the court does not vary

- the order or set the order aside and make another order in substitution for the order; or
- (e) a proceeds of crime order has been made covering property of the parties to the marriage or either of them, or a proceeds of crime order has been made against a party to the marriage; the court may, in its discretion, vary the order or set the order aside and, if it considers appropriate, make another order under section 79 in substitution for the order so set aside.
- (1A) A court may, on application by a person affected by an order made by a court under section 79 in proceedings with respect to the property of the parties to a marriage or either of them, and with the consent of all the parties to the proceedings in which the order was made, vary the order or set the order aside and, if it considers appropriate, make another order under section 79 in substitution for the order so set aside.
- (1AA) For the purposes of paragraph (1)(d), a person has *caring responsibility* for a child if:
- (a) the person is a parent of the child with whom the child lives; or
 - (b) the person has a residence order in relation to the child; or
 - (c) the person has a specific issues order in relation to the child under which the person is responsible for the child's long-term or day-to-day care, welfare and development.
- (1B) An order varied or made under subsection (1) or (1A) may, after the death of a party to the proceedings in which the order was so varied or made, be enforced on behalf of, or against, as the case may be, the estate of the deceased party.
- (1C) Where, before proceedings under this section in relation to an order made under section 79 are completed, either party to the proceedings dies:
- (a) the proceedings may be continued by or against, as the case may be, the legal personal representative of the deceased party and the applicable Rules of Court may make provision in relation to the substitution of the legal personal representative as a party to the proceedings;
 - (b) if the court is of the opinion:

Section 79B

- (i) that it would have exercised its powers under subsection (1) or (1A) in relation to the order if the deceased party had not died; and
 - (ii) that it is still appropriate to exercise its powers under subsection (1) or (1A) in relation to the order;
- the court may vary the order, set the order aside, or set the order aside and make another order under section 79 in substitution for the order so set aside; and
- (c) an order varied or made by the court pursuant to paragraph (b) may be enforced on behalf of, or against, as the case may be, the estate of the deceased party.
- (2) In the exercise of its powers under subsection (1), (1A) or (1C), a court shall have regard to the interests of, and shall make any order proper for the protection of, a *bona fide* purchaser or other person interested.
- (3) In this section, a reference to an order made by a court under section 79 includes a reference to an order made by a court under section 86 of the repealed Act.

79B Notification of proceeds of crime orders etc.

- (1) If:
- (a) a person makes an application for an order, under this Part, with respect to:
 - (i) the property of the parties to a marriage or either of them; or
 - (ii) the maintenance of a party to a marriage; and
 - (b) the person knows that the property of the parties to the marriage or either of them is covered by:
 - (i) a proceeds of crime order; or
 - (ii) a forfeiture application;
- the person must:
- (c) disclose in the application the proceeds of crime order or forfeiture application; and
 - (d) give to the court a sealed copy of that order or application.

- (2) A person who does not comply with subsection (1) commits an offence punishable, on conviction, by a fine not exceeding 50 penalty units.
- (3) If:
- (a) a person is a party to property settlement or spousal maintenance proceedings under this Part; and
 - (b) the person is notified by the DPP that the property of the parties to the marriage or either of them is covered by:
 - (i) a proceeds of crime order; or
 - (ii) a forfeiture application;
- the person must notify the Registry Manager in writing of the proceeds of crime order or forfeiture application.
- (4) A person who does not comply with subsection (3) commits an offence punishable, on conviction, by a fine not exceeding 50 penalty units.

79C Court to stay property or spousal maintenance proceedings affected by proceeds of crime orders etc.

- (1) A court in which property settlement or spousal maintenance proceedings are pending must stay those proceedings if notified under section 79B in relation to the proceedings.
- (1A) The court may, before staying proceedings under subsection (1), invite or require the DPP to make submissions relating to staying the proceedings.
- (2) A court must, on the application of the DPP, stay property settlement or spousal maintenance proceedings under this Part if the property of the parties to the marriage or either of them is covered by:
- (a) a proceeds of crime order; or
 - (b) a forfeiture application.
- (3) A court must notify the DPP if the court stays property settlement or spousal maintenance proceedings under subsection (1) or (2).
- (4) The DPP must notify the Registry Manager if:
- (a) a proceeds of crime order ceases to be in force; or

Section 79D

- (b) a forfeiture application is finally determined.
- (5) For the purposes of subsection (4), a forfeiture application is taken to be finally determined when:
 - (a) the application is withdrawn; or
 - (b) if the application is successful—the resulting forfeiture order comes into force; or
 - (c) if the application is unsuccessful—the time within which an appeal can be made has expired and any appeals have been finally determined or otherwise disposed of.

79D Lifting a stay

- (1) A court that stayed the property settlement or spousal maintenance proceedings under section 79C must wholly or partially lift the stay if:
 - (a) either party to the proceedings makes an application for the stay to be lifted and the DPP consents to such an application; or
 - (b) the DPP makes an application for the stay to be lifted.
- (2) A court that stayed the property settlement or spousal maintenance proceedings under section 79C may, on its own motion, wholly or partially lift the stay if the DPP consents to such a motion.
- (3) Giving the Registry Manager written notice of the DPP's consent under this section is taken to be the giving of that consent, unless the court requires the DPP to appear in the proceedings. The notice may be given by the DPP or by a party to the proceedings.

79E Intervention by DPP

- (1) The DPP may intervene in any property settlement or spousal maintenance proceedings in relation to which a court is notified under section 79B, or in any proceedings under section 79C or 79D in which the DPP is not already a party.
- (2) If the DPP intervenes, the DPP is taken to be a party to the proceedings with all the rights, duties and liabilities of a party.

80 General powers of court

- (1) The court, in exercising its powers under this Part, may do any or all of the following:
 - (a) order payment of a lump sum, whether in one amount or by instalments;
 - (b) order payment of a weekly, monthly, yearly or other periodic sum;
 - (ba) order that a specified transfer or settlement of property be made by way of maintenance for a party to a marriage;
 - (c) order that payment of any sum ordered to be paid be wholly or partly secured in such manner as the court directs;
 - (d) order that any necessary deed or instrument be executed and that such documents of title be produced or such other things be done as are necessary to enable an order to be carried out effectively or to provide security for the due performance of an order;
 - (e) appoint or remove trustees;
 - (f) order that payments be made direct to a party to the marriage, to a trustee to be appointed or into court or to a public authority for the benefit of a party to the marriage;
 - (h) make a permanent order, an order pending the disposal of proceedings or an order for a fixed term or for a life or during joint lives or until further order;
 - (i) impose terms and conditions;
 - (j) make an order by consent;
 - (k) make any other order (whether or not of the same nature as those mentioned in the preceding paragraphs of this section), which it thinks it is necessary to make to do justice; and
 - (l) subject to this Act and the applicable Rules of Court, make an order under this Part at any time before or after the making of a decree under another Part.
 - (2) The making of an order of a kind referred to in paragraph (1)(ba), or of any other order under this Part, in relation to the maintenance of a party to a marriage does not prevent a court from making a subsequent order in relation to the maintenance of the party.
 - (3) The applicable Rules of Court may make provision with respect to the making of orders under this Part in relation to the maintenance
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Section 81

of parties to marriages (whether as to their form or otherwise) for the purpose of facilitating their enforcement and the collection of maintenance payable under them.

81 Duty of court to end financial relations

In proceedings under this Part, other than proceedings under section 78 or proceedings with respect to maintenance payable during the subsistence of a marriage, the court shall, as far as practicable, make such orders as will finally determine the financial relationships between the parties to the marriage and avoid further proceedings between them.

82 Cessation of spousal maintenance orders

- (1) An order with respect to the maintenance of a party to a marriage ceases to have effect upon the death of the party.
- (2) Subject to subsection (3), an order with respect to the maintenance of a party to a marriage ceases to have effect upon the death of the person liable to make payments under the order.
- (3) Subsection (2) does not apply in relation to an order made before the date of commencement of section 38 of the *Family Law Amendment Act 1983* if the order is expressed to continue in force throughout the life of the person for whose benefit the order was made or for a period that had not expired at the time of the death of the person liable to make payments under the order and, in that case, the order is binding upon the legal personal representative of the deceased person.
- (4) An order with respect to the maintenance of a party to a marriage ceases to have effect upon the re-marriage of the party unless in special circumstances a court having jurisdiction under this Act otherwise orders.
- (6) Where a re-marriage referred to in subsection (4) takes place, it is the duty of the person for whose benefit the order was made to inform without delay the person liable to make payments under the order of the date of the re-marriage.

- (7) Any moneys paid in respect of a period after the event referred to in subsection (4) may be recovered in a court having jurisdiction under this Act.
- (8) Nothing in this section affects the recovery of arrears due under an order at the time when the order ceased to have effect.

83 Modification of spousal maintenance orders

- (1) In proceedings with respect to the maintenance of a party to a marriage, if there is in force an order (whether made before or after the commencement of this Act) with respect to the maintenance of that party by the other party to the marriage:
 - (a) made by the court; or
 - (b) made by another court and registered in the first-mentioned court in accordance with the applicable Rules of Court;the court may:
 - (c) discharge the order if there is any just cause for so doing;
 - (d) suspend its operation wholly or in part and either until further order or until a fixed time or the happening of some future event;
 - (e) revive wholly or in part an order suspended under paragraph (d); or
 - (f) subject to subsection (2), vary the order so as to increase or decrease any amount ordered to be paid or in any other manner.
- (2) The court shall not make an order increasing or decreasing an amount ordered to be paid by an order unless it is satisfied:
 - (a) that, since the order was made or last varied:
 - (i) the circumstances of a person for whose benefit the order was made have so changed;
 - (ii) the circumstances of the person liable to make payments under the order have so changed; or
 - (iii) in the case of an order that operates in favour of, or is binding on, a legal personal representative—the circumstances of the estate are such;
as to justify its so doing;

Section 83

- (b) that, since the order was made, or last varied, the cost of living has changed to such an extent as to justify its so doing;
 - (ba) in a case where the order was made by consent—that the amount ordered to be paid is not proper or adequate;
 - (c) that material facts were withheld from the court that made the order or from a court that varied the order or material evidence previously given before such a court was false.
- (3) Subsection (2) does not prevent the court from making an order varying an order made before the date of commencement of this Act if the first-mentioned order is made for the purpose of giving effect to this Part.
- (4) In satisfying itself for the purposes of paragraph (2)(b), the court shall have regard to any changes that have occurred in the Consumer Price Index published by the Australian Statistician.
- (5) The court shall not, in considering the variation of an order, have regard to a change in the cost of living unless at least 12 months have elapsed since the order was made or was last varied having regard to a change in the cost of living.
- (5A) In satisfying itself for the purposes of paragraph (2)(ba), the court shall have regard to any payments, and any transfer or settlement of property, previously made by a party to the marriage to:
 - (a) the other party; or
 - (b) any other person for the benefit of the other party.
- (6) An order decreasing the amount of a periodic sum payable under an order or discharging an order may be expressed to be retrospective to such date as the court considers appropriate.
- (6A) Where, as provided by subsection (6), an order decreasing the amount of a periodic sum payable under an order is expressed to be retrospective to a specified date, any moneys paid under the second-mentioned order since the specified date, being moneys that would not have been required to be paid under the second-mentioned order as varied by the first-mentioned order, may be recovered in a court having jurisdiction under this Act.
- (6B) Where, as provided by subsection (6), an order discharging an order is expressed to be retrospective to a specified date, any

moneys paid under the second-mentioned order since the specified date may be recovered in a court having jurisdiction under this Act.

- (7) For the purposes of this section, the court shall have regard to the provisions of sections 72 and 75.
- (8) The discharge of an order does not affect the recovery of arrears due under the order at the time as at which the discharge takes effect.

85A Ante-nuptial and post-nuptial settlements

- (1) The court may, in proceedings under this Act, make such order as the court considers just and equitable with respect to the application, for the benefit of all or any of the parties to, and the children of, the marriage, of the whole or part of property dealt with by ante-nuptial or post-nuptial settlements made in relation to the marriage.
- (2) In considering what order (if any) should be made under subsection (1), the court shall take into account the matters referred to in subsection 79(4) so far as they are relevant.
- (3) A court cannot make an order under this section in respect of matters that are included in a financial agreement.

86A Certain maintenance agreements ineffective

A maintenance agreement made after the commencement of this section that is not a financial agreement does not have any effect and is not enforceable in any way.

86 Registered maintenance agreements

- (1) A maintenance agreement other than an agreement to which section 87 applies may be registered, as prescribed by the applicable Rules of Court, in any court having jurisdiction under this Act.
- (1A) A maintenance agreement made after the commencement of this subsection cannot be registered.

Section 86

- (2) Section 66S applies in relation to the variation of a maintenance agreement registered under subsection (1), in so far as the agreement makes provision for the maintenance of a child of the relevant marriage, as if the agreement were an order made by consent under Part VII by the court in which the agreement is registered.
- (2A) Section 83 applies in relation to the variation of a maintenance agreement registered under subsection (1), in so far as the agreement makes provision for the maintenance of a party to the relevant marriage, as if the agreement were an order made by consent under this Act by the court in which the agreement is registered.
- (3) The court in which a maintenance agreement is registered under subsection (1) may set aside the agreement if, and only if, the court is satisfied that the concurrence of a party was obtained by fraud or undue influence or that the parties desire the agreement to be set aside.
- (3A) Where a maintenance agreement has been registered under subsection (1), then:
 - (a) unless the agreement otherwise provides, the agreement (other than a provision in the agreement providing for the payment by way of maintenance of a periodic sum) continues to operate notwithstanding the death of a party to the agreement and operates in favour of, and is binding on, the legal personal representative of that party; and
 - (b) if the agreement so provides, a provision in the agreement providing for the payment to a person by way of maintenance of a periodic sum continues to operate notwithstanding the death of any party to the agreement who is liable to make payments pursuant to that provision and is binding on the legal personal representative of that party but, notwithstanding any provision in the agreement, does not continue to operate after the death of the person who is entitled to receive those payments.
- (3B) Where:
 - (a) a maintenance agreement is, at any time, registered under subsection (1); and

- (b) the maintenance agreement makes provision for the maintenance of a child; and
 - (c) an application could properly be made, at that time, under the *Child Support (Assessment) Act 1989* by one of the parties to the agreement for administrative assessment of child support (within the meaning of that Act) for the child, seeking payment of the child support by the other party to the agreement (whether or not such an application has in fact been made by the party or by another person);
- the maintenance agreement, so far as it makes provision for the maintenance of the child, has no effect and is not enforceable in any way.
- (4) Subject to section 89, this section does not apply to overseas maintenance agreements.

87 Operation of maintenance agreements entered into in substitution for rights under Act

- (1) Subject to this section, a maintenance agreement may make provision to the effect that the agreement shall operate, in relation to the financial matters dealt within the agreement, in substitution for any rights of the parties to the agreement under this Part.
- (1A) Subsection (1) does not apply to a maintenance agreement made after the commencement of this subsection.
- (2) Where a maintenance agreement makes provision as mentioned in subsection (1), the maintenance agreement has no effect, and is not enforceable in any way, unless it has been approved by the court.
- (3) In proceedings for the approval of a maintenance agreement, if the court is satisfied that the provisions of the agreement with respect to financial matters are proper, the court shall, by order, approve the agreement, but if the court is not so satisfied, it shall, by order, refuse to approve the agreement.
- (4) Where a maintenance agreement that makes provision as mentioned in subsection (1) is approved by the court:
 - (a) any order having effect under this Part or any order made under Part VIII of the repealed Act and continued in effect by virtue of paragraph 3(2)(c) ceases to have effect in so far as it

Section 87

relates to the financial matters dealt with in the agreement and, whether or not the approval of the agreement is revoked, has no further effect; and

- (b) subject to subsections (4A) to (4C) (inclusive), no court having jurisdiction under this Act may make an order (other than an order under this section or an order in connection with the enforcement of the agreement) with respect to those financial matters unless the approval of the agreement is revoked.
- (4A) The approval, after the commencement of this subsection, of a maintenance agreement under this section does not exclude or limit the power of a court having jurisdiction under this Act to make an order in relation to the maintenance of a party to the relevant marriage if the court is satisfied that, at the time the agreement was approved, the circumstances of the party were such that, taking into account the terms and effect of the agreement, the party would have been unable to support himself or herself without an income tested pension, allowance or benefit.
- (4B) Where subsection (4A) applies in relation to an approved maintenance agreement, section 83 applies in relation to the variation of the agreement, in so far as the agreement makes provision for the maintenance of a party to the marriage, as if the agreement were an order made by consent under this Act by a court in which the agreement is registered or deemed to be registered.
- (4C) The approval, whether before or after the commencement of this subsection, of a maintenance agreement under this section does not exclude or limit the power of a court having jurisdiction under Part VII to make any order under that Part in relation to a child of the relevant marriage and, where the agreement makes provision for the maintenance of a child of the marriage, section 66S applies in relation to the variation of the agreement, in so far as it makes that provision, as if the agreement were an order made by consent under that Part by a court in which the agreement is registered or deemed to be registered.
- (4D) Where:
 - (a) a maintenance agreement that makes provision as mentioned in subsection (1) is, at any time, approved by the court; and

- (b) the maintenance agreement makes provision for the maintenance of a child; and
 - (c) an application could properly be made, at that time, under the *Child Support (Assessment) Act 1989* by one of the parties to the agreement for administrative assessment of child support (within the meaning of that Act) for the child seeking payment of the child support by the other party to the agreement (whether or not such an application has in fact been made by the party or by another person);
- the maintenance agreement, so far as it makes provision for the maintenance of the child, has no effect and is not enforceable in any way.
- (5) Notwithstanding any rule of law or equity, an approved maintenance agreement shall not be taken to be void, voidable or unenforceable by reason that it makes provision as mentioned in subsection (1).
 - (6) Where a court has approved a maintenance agreement, the agreement shall be deemed to be registered in that court.
 - (7) An agreement that is by virtue of subsection (6) deemed to be registered in a court may be registered, as prescribed by the applicable Rules of Court, in another court having jurisdiction under this Act.
 - (8) A court may, by order, revoke the approval of a maintenance agreement under this section if, and only if, the agreement is registered or deemed to be registered in that court and the court is satisfied that:
 - (a) the approval was obtained by fraud;
 - (b) the parties to the agreement desire the revocation of the approval;
 - (c) the agreement is void, voidable or unenforceable; or
 - (d) in the circumstances that have arisen since the agreement was approved it is impracticable for the agreement to be carried out or impracticable for a part of the agreement to be carried out.
 - (9) Where the approval of a maintenance agreement under this section is revoked by a court:
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Section 87

- (a) the agreement ceases, for all purposes, to be in force; and
- (b) the court may, in proceedings for the revocation of the approval or on application by a party to the agreement or any other interested person, make such order or orders (including an order for the transfer of property) as it considers just and equitable for the purpose of preserving or adjusting the rights of the parties to the agreement and any other interested persons;

and, in exercising its powers under paragraph (b), the court shall have regard to the ground on which it revoked the approval of the agreement.

- (10) Where a maintenance agreement has been approved by a court as provided by this section, then:
 - (a) unless the agreement otherwise provides, the agreement (other than a provision in the agreement providing for the payment by way of maintenance of a periodic sum) continues to operate notwithstanding the death of a party to the agreement and operates in favour of, and is binding on, the legal personal representative of that party; and
 - (b) if the agreement so provides, a provision in the agreement providing for the payment to a person by way of maintenance of a periodic sum continues to operate notwithstanding the death of any party to the agreement who is liable to make payments pursuant to that provision and is binding on the legal personal representative of that party but, notwithstanding any provision in the agreement, does not continue to operate after the death of the person who is entitled to receive those payments.
- (11) Apart from the provision made by subsections (2), (4A), (4C), (5), (9) and (10), the validity, enforceability and effect of an approved maintenance agreement shall be determined by the court according to the principles of law and equity that are applicable in determining the validity, enforceability and effect of contracts and purported contracts, and, in proceedings of the kind referred to in subparagraph (ea)(iii) of the definition of *matrimonial cause* in subsection 4(1), being proceedings instituted in a court in which the approved maintenance agreement is registered or deemed to be registered, the court:

- (a) subject to paragraph (b), has the same powers, may grant the same remedies and shall have the same regard to the rights of third parties as the High Court has, may grant and is required to have in proceedings in connection with contracts or purported contracts, being proceedings in which the High Court has original jurisdiction;
 - (b) has power to make an order for the payment, by a party to the agreement to another party to the agreement, of interest on an amount payable pursuant to the agreement, from the time when the amount became or becomes due and payable, at a rate not exceeding the rate prescribed by the Rules of the Court; and
 - (c) in addition to, or instead of, making an order or orders pursuant to paragraph (a) or (b), may order that the agreement, or a specified part of the agreement, be enforced as if it were an order of the court.
- (12) Where the approval of a maintenance agreement under this section has been revoked, a court shall, in considering whether, and if so, how, to exercise any powers under this Part, have regard to:
- (a) anything done or omitted to be done by a party to the agreement pursuant to the agreement;
 - (b) any change in the circumstances of a party to the agreement arising out of the doing of any act by a person, or the failure of a person to do an act, pursuant to the agreement;
 - (c) any order made by that court or another court exercising jurisdiction under this Act in connection with the agreement while the agreement was in force; and
 - (d) any order made under paragraph (9)(b) in connection with the revocation of the approval of the agreement.
- (15) In this section, ***approved maintenance agreement*** means a maintenance agreement that has been approved under this section and the approval of which has not been revoked.
- (16) Nothing in this Act affects the operation of an agreement sanctioned under paragraph 87(1)(k) of the repealed Act or the rights and obligations of a person under such an agreement.
- (17) Subject to section 89, this section does not apply to overseas maintenance agreements.
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Section 87A

87A Specification in maintenance agreements of payments etc. for maintenance purposes

(1) Where:

- (a) a maintenance agreement (whether or not registered under section 86 or approved under section 87) has the effect of requiring:
 - (i) payment of a lump sum, whether in one amount or by instalments; or
 - (ii) the transfer or settlement of property; and
- (b) the purpose, or one of the purposes, of the payment, transfer or settlement is to make provision for the maintenance of a party to a marriage or a child or children of a marriage;

the agreement shall:

- (c) state that the agreement is an agreement to which this section applies; and
- (d) specify:
 - (i) the person or persons for whose maintenance provision is made by the payment, transfer or settlement; and
 - (ii) the portion of the payment, or the value of the portion of the property, attributable to the provision of maintenance for that person or each of those persons, as the case may be.

(2) Where a maintenance agreement of a kind referred to in paragraph (1)(a):

- (a) does not state that the agreement is an agreement to which this section applies; or
- (b) states that the agreement is an agreement to which this section applies, but does not comply with paragraph (1)(d);

any payment, transfer or settlement of a kind referred to in paragraph (1)(a), that the agreement has the effect of requiring, shall be taken not to make provision for the maintenance of a party to the relevant marriage or of a child of the relevant marriage.

88 Enforcement of maintenance agreements

- (1) A maintenance agreement that has been registered, or is deemed to have been registered, in a court may be enforced as if it were an order of that court.
- (2) Subsection (1) does not apply in relation to maintenance agreements that have been approved under section 87.

89 Overseas maintenance agreements

The regulations may make provision for and in relation to:

- (a) the application of sections 86 and 87, with such additions, exceptions and modifications as are prescribed, to overseas maintenance agreements; and
- (b) the transmission to appropriate courts or authorities of prescribed overseas jurisdictions of, or of copies of, maintenance agreements and of agreements for maintenance of ex-nuptial children for the purpose of securing the enforcement of those agreements in those jurisdictions.

89A Institution of spousal maintenance proceedings by authority or person

The regulations may make provision for and in relation to the authorizing of a prescribed authority of the Commonwealth, of a State or of a Territory, or the person for the time being holding a prescribed office under a law of the Commonwealth, of a State or of a Territory, in the discretion of the authority or person, to institute and prosecute proceedings with respect to the maintenance of a party to a marriage, on behalf of that party.

90 Certain instruments not liable to duty

- (1) The following agreements, deeds and other instruments are not subject to any duty or charge under any law of a State or Territory or any law of the Commonwealth that applies only to or in relation to a Territory:

Section 90

- (a) a deed or other instrument executed by a person for the purposes of, or in accordance with, an order made under this Part;
 - (b) a relevant maintenance agreement that confers a benefit upon a party to, or a child of, the marriage to which the maintenance agreement relates, to the extent that the maintenance agreement confers that benefit;
 - (c) a deed or other instrument executed by a person for the purposes of, or in accordance with, a relevant maintenance agreement, being a deed or other instrument that confers a benefit upon a party to, or a child of, the marriage to which the maintenance agreement relates, to the extent that the deed or other instrument confers that benefit.
- (2) The following maintenance agreements are relevant maintenance agreements for the purposes of this section:
- (a) a registered maintenance agreement made in connection with the dissolution or annulment of the marriage to which the maintenance agreement relates;
 - (b) a registered maintenance agreement (other than a maintenance agreement referred to in paragraph (a)) made in contemplation of the dissolution or annulment of the marriage to which the maintenance agreement relates;
 - (c) a registered maintenance agreement (other than a maintenance agreement referred to in paragraph (a) or (b)) made in connection with the breakdown of the marriage to which the maintenance agreement relates;
 - (d) an approved maintenance agreement made in connection with the dissolution or annulment of the marriage to which the maintenance agreement relates;
 - (e) an approved maintenance agreement (other than a maintenance agreement referred to in paragraph (d)) made in contemplation of the dissolution or annulment of the marriage to which the maintenance agreement relates;
 - (f) an approved maintenance agreement (other than a maintenance agreement referred to in paragraph (d) or (e)) made in connection with the breakdown of the marriage to which the maintenance agreement relates.

- (3) For the purposes of this section, a maintenance agreement, deed or other instrument that confers an entitlement to property on a person may be taken to confer a benefit upon the person notwithstanding that the maintenance agreement, deed or other instrument also deprives the person of an entitlement to other property of an equal or greater value.
- (4) In this section:
- (a) ***approved maintenance agreement*** means a maintenance agreement approved by a court by order under section 87;
 - (b) ***registered maintenance agreement*** means a maintenance agreement registered in a court under section 86 or a maintenance agreement that is registered in a court under regulations made pursuant to section 89; and
 - (c) a reference to the marriage to which a maintenance agreement relates is a reference to the marriage the parties to which are parties to the maintenance agreement.

Part VIII A A—Orders and injunctions binding third parties

Division 1—Preliminary

Subdivision A—Scope of this Part

90 A A Object of this Part

The object of this Part is to allow the court, in relation to the property of a party to a marriage, to:

- (a) make an order under section 79 or 114; or
- (b) grant an injunction under section 114;

that is directed to, or alters the rights, liabilities or property interests of a third party.

90 A B Definitions

In this Part:

marriage includes a void marriage.

third party, in relation to a marriage, means a person who is not a party to the marriage.

90 A C This Part overrides other laws, trust deeds etc.

- (1) This Part has effect despite anything to the contrary in any of the following (whether made before or after the commencement of this Part):
 - (a) any other law (whether written or unwritten) of the Commonwealth, a State or Territory;
 - (b) anything in a trust deed or other instrument.
- (2) Without limiting subsection (1), nothing done in compliance with this Part by a third party in relation to a marriage is to be treated as resulting in a contravention of a law or instrument referred to in subsection (1).

90AD Extended meaning of *matrimonial cause* and *property*

- (1) For the purposes of this Part, a debt owed by a party to a marriage is to be treated as property for the purposes of paragraph (ca) of the definition of *matrimonial cause* in section 4.
- (2) For the purposes of paragraph 114(1)(e), *property* includes a debt owed by a party to a marriage.

90ADA Other provisions of this Act not affected by this Part

This Part does not affect the operation of any other provision of this Act.

Example: Paragraph 90AE(3)(e) and subsection 90AE(4) do not limit the operation of any other provisions of this Act that require or permit the court to take matters into account in making an order in proceedings under section 79.

Division 2—Orders under section 79

90AE Court may make an order under section 79 binding a third party

- (1) In proceedings under section 79, the court may make any of the following orders:
 - (a) an order directed to a creditor of the parties to the marriage to substitute one party for both parties in relation to the debt owed to the creditor;
 - (b) an order directed to a creditor of one party to a marriage to substitute the other party, or both parties, to the marriage for that party in relation to the debt owed to the creditor;
 - (c) an order directed to a creditor of the parties to the marriage that the parties be liable for a different proportion of the debt owed to the creditor than the proportion the parties are liable to before the order is made;
 - (d) an order directed to a director of a company or to a company to register a transfer of shares from one party to the marriage to the other party.
- (2) In proceedings under section 79, the court may make any other order that:
 - (a) directs a third party to do a thing in relation to the property of a party to the marriage; or
 - (b) alters the rights, liabilities or property interests of a third party in relation to the marriage.
- (3) The court may only make an order under subsection (1) or (2) if:
 - (a) the making of the order is reasonably necessary, or reasonably appropriate and adapted, to effect a division of property between the parties to the marriage; and
 - (b) if the order concerns a debt of a party to the marriage—it is not foreseeable at the time that the order is made that to make the order would result in the debt not being paid in full; and
 - (c) the third party has been accorded procedural fairness in relation to the making of the order; and

- (d) the court is satisfied that, in all the circumstances, it is just and equitable to make the order; and
- (e) the court is satisfied that the order takes into account the matters mentioned in subsection (4).

(4) The matters are as follows:

- (a) the taxation effect (if any) of the order on the parties to the marriage;
- (b) the taxation effect (if any) of the order on the third party;
- (c) the social security effect (if any) of the order on the parties to the marriage;
- (d) the third party's administrative costs in relation to the order;
- (e) if the order concerns a debt of a party to the marriage—the capacity of a party to the marriage to repay the debt after the order is made;

Note: See paragraph (3)(b) for requirements for making the order in these circumstances.

Example: The capacity of a party to the marriage to repay the debt would be affected by that party's ability to repay the debt without undue hardship.

- (f) the economic, legal or other capacity of the third party to comply with the order;

Example: The legal capacity of the third party to comply with the order could be affected by the terms of a trust deed. However, after taking the third party's legal capacity into account, the court may make the order despite the terms of the trust deed. If the court does so, the order will have effect despite those terms (see section 90AC).

- (g) if, as a result of the third party being accorded procedural fairness in relation to the making of the order, the third party raises any other matters—those matters;

Note: See paragraph (3)(c) for the requirement to accord procedural fairness to the third party.

- (h) any other matter that the court considers relevant.

Division 3—Orders or injunctions under section 114

90AF Court may make an order or injunction under section 114 binding a third party

- (1) In proceedings under section 114, the court may:
 - (a) make an order restraining a person from repossessing property of a party to a marriage; or
 - (b) grant an injunction restraining a person from commencing legal proceedings against a party to a marriage.
- (2) In proceedings under section 114, the court may make any other order, or grant any other injunction that:
 - (a) directs a third party to do a thing in relation to the property of a party to the marriage; or
 - (b) alters the rights, liabilities or property interests of a third party in relation to the marriage.
- (3) The court may only make an order or grant an injunction under subsection (1) or (2) if:
 - (a) the making of the order, or the granting of the injunction, is reasonably necessary, or reasonably appropriate and adapted, to effect a division of property between the parties to the marriage; and
 - (b) if the order or injunction concerns a debt of a party to the marriage—it is not foreseeable at the time that the order is made, or the injunction granted, that to make the order or grant the injunction would result in the debt not being paid in full; and
 - (c) the third party has been accorded procedural fairness in relation to the making of the order or injunction; and
 - (d) for an injunction or order under subsection 114(1)—the court is satisfied that, in all the circumstances, it is proper to make the order or grant the injunction; and
 - (e) for an injunction under subsection 114(3)—the court is satisfied that, in all the circumstances, it is just or convenient to grant the injunction; and

(f) the court is satisfied that the order or injunction takes into account the matters mentioned in subsection (4).

(4) The matters are as follows:

- (a) the taxation effect (if any) of the order or injunction on the parties to the marriage;
- (b) the taxation effect (if any) of the order or injunction on the third party;
- (c) the social security effect (if any) of the order or injunction on the parties to the marriage;
- (d) the third party's administrative costs in relation to the order or injunction;
- (e) if the order or injunction concerns a debt of a party to the marriage—the capacity of a party to the marriage to repay the debt after the order is made or the injunction is granted;

Note: See paragraph (3)(b) for requirements for making the order or granting the injunction in these circumstances.

Example: The capacity of a party to the marriage to repay the debt would be affected by that party's ability to repay the debt without undue hardship.

(f) the economic, legal or other capacity of the third party to comply with the order or injunction;

Example: The legal capacity of the third party to comply with the order or injunction could be affected by the terms of a trust deed. However, after taking the third party's legal capacity into account, the court may make the order or grant the injunction despite the terms of the trust deed. If the court does so, the order or injunction will have effect despite those terms (see section 90AC).

(g) if, as a result of the third party being accorded procedural fairness in relation to the making of the order or the granting of the injunction, the third party raises any other matters—those matters;

Note: See paragraph (3)(c) for the requirement to accord procedural fairness to the third party.

(h) any other matter that the court considers relevant.

Division 4—Other matters

90AG Orders and injunctions binding on trustees

If an order or injunction binds a person in the capacity of trustee in relation to property, then the order or injunction is also binding (by force of this section) on any person who subsequently becomes the trustee.

90AH Protection for a third party

A third party in relation to a marriage is not liable for loss or damage suffered by any person because of things done (or not done) by the third party in good faith in reliance on an order or injunction made or granted by a court in accordance with this Part.

90AI Service of documents on a third party

- (1) If a document is required or permitted to be served for the purposes of this Part on a third party in relation to a marriage, the document may be served in any of the ways in which a document may be served under the applicable Rules of Court.
- (2) Subsection (1) is in addition to any other method of service permitted by law.

90AJ Expenses of third party

- (1) Subsection (2) applies if:
 - (a) the court has made an order or granted an injunction in accordance with this Part in relation to a marriage; and
 - (b) a third party in relation to the marriage has incurred expense as a necessary result of the order or injunction.
- (2) The court may make such order as it considers just for the payment of the reasonable expenses of the third party incurred as a necessary result of the order or injunction.
- (3) In deciding whether to make an order under subsection (2), subject to what the court considers just, the court must take into account

the principle that the parties to the marriage should bear the reasonable expenses of the third party equally.

- (4) The regulations may provide, in situations where the court has not made an order under subsection (2):
- (a) for the charging by the third party of reasonable fees to cover the reasonable expenses of the third party incurred as a necessary result of the order or injunction; and
 - (b) if such fees are charged—that each of the parties to the marriage is separately liable to pay the third party an amount equal to half of those fees; and
 - (c) for conferring jurisdiction on a particular court or courts in relation to the collection or recovery of such fees.

90AK Acquisition of property

- (1) The court must not make an order or grant an injunction in accordance with this Part if the order or injunction would:
- (a) result in the acquisition of property from a person otherwise than on just terms; and
 - (b) be invalid because of paragraph 51(xxxi) of the Constitution.
- (2) In this section:

acquisition of property has the same meaning as in paragraph 51(xxxi) of the Constitution.

just terms has the same meaning as in paragraph 51(xxxi) of the Constitution.

Part VIII A—Financial agreements

90A Definitions

In this Part:

dealt with includes the meaning given by subsection 90F(2).

marriage includes a void marriage.

90B Financial agreements before marriage

- (1) If:
 - (a) people who are contemplating entering into a marriage with each other make a written agreement with respect to any of the matters mentioned in subsection (2); and
 - (aa) at the time of the making of the agreement, no other agreement (whether made under this section or section 90C or 90D) is in force between the parties with respect to any of those matters; and
 - (b) the agreement is expressed to be made under this section; the agreement is a *financial agreement*.
- (2) The matters referred to in paragraph (1)(a) are the following:
 - (a) how, in the event of the breakdown of the marriage, all or any of the property or financial resources of either or both of them at the time when the agreement is made, or at a later time and before the dissolution of the marriage, is to be dealt with;
 - (b) the maintenance of either of them:
 - (i) during the marriage; or
 - (ii) after the dissolution of the marriage; or
 - (iii) both during, and after the dissolution of, the marriage.
- (3) A financial agreement made as mentioned in subsection (1) may contain matters incidental or ancillary to those mentioned in subsection (2).

- (4) A financial agreement made as mentioned in subsection (1) may terminate a previous financial agreement made as mentioned in that subsection between the same parties.

90C Financial agreements during marriage

- (1) If:
- (a) the parties to a marriage make a written agreement with respect to any of the matters mentioned in subsection (2); and
 - (aa) at the time of the making of the agreement, no other agreement (whether made under this section or section 90B or 90D) is in force between the parties with respect to any of those matters; and
 - (b) the agreement is expressed to be made under this section; the agreement is a *financial agreement*.
- (2) The matters referred to in paragraph (1)(a) are the following:
- (a) how, in the event of the breakdown of the marriage, all or any of the property or financial resources of either or both of them at the time when the agreement is made, or at a later time and during the marriage, is to be dealt with;
 - (b) the maintenance of either of them:
 - (i) during the marriage; or
 - (ii) after the dissolution of the marriage; or
 - (iii) both during, and after the dissolution of, the marriage.
- (2A) For the avoidance of doubt, a financial agreement under this section may be made before or after the marriage has broken down.
- (3) A financial agreement made as mentioned in subsection (1) may contain matters incidental or ancillary to those mentioned in subsection (2).
- (4) A financial agreement made as mentioned in subsection (1) may terminate a previous financial agreement made as mentioned in that subsection, or a financial agreement made as mentioned in subsection 90B(1), between the same parties.

90D Financial agreements after dissolution of marriage

- (1) If:
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Section 90E

- (a) after a decree nisi dissolving a marriage is made, the parties to the former marriage make a written agreement with respect to any of the matters mentioned in subsection (2); and
 - (aa) at the time of the making of the agreement, no other agreement (whether made under this section or section 90B or 90C) is in force between the parties with respect to any of those matters; and
 - (b) the agreement is expressed to be made under this section; the agreement is a *financial agreement*.
- (2) The matters referred to in paragraph (1)(a) are the following:
- (a) how all or any of the property or financial resources that either or both of them had or acquired during the former marriage is to be dealt with;
 - (b) the maintenance of either of them.
- (3) A financial agreement made as mentioned in subsection (1) may contain matters incidental or ancillary to those mentioned in subsection (2).
- (4) A financial agreement made as mentioned in subsection (1) may terminate a previous financial agreement made as mentioned in that subsection, or a financial agreement made as mentioned in subsection 90B(1) or 90C(1), between the same parties.

90E Requirements with respect to provisions in financial agreements relating to the maintenance of a party or a child or children

A provision of a financial agreement that relates to the maintenance of a party to the agreement or a child or children is void unless the provision specifies:

- (a) the party, or the child or children, for whose maintenance provision is made; and
- (b) the amount provided for, or the value of the portion of the relevant property attributable to, the maintenance of the party, or of the child or each child, as the case may be.

90F Certain provisions in agreements

- (1) No provision of a financial agreement excludes or limits the power of a court to make an order in relation to the maintenance of a party to a marriage if subsection (1A) applies.
- (1A) This subsection applies if the court is satisfied that, when the agreement came into effect, the circumstances of the party were such that, taking into account the terms and effect of the agreement, the party was unable to support himself or herself without an income tested pension, allowance or benefit.
- (2) To avoid doubt, a provision in an agreement made as mentioned in subsection 90C(1) or 90D(1) that provides for property or financial resources owned by a party to the agreement to continue in the ownership of that party is taken, for the purposes of that section, to be a provision with respect to how the property or financial resources are to be dealt with.

90G When financial agreements are binding

- (1) A financial agreement is binding on the parties to the agreement if, and only if:
 - (a) the agreement is signed by both parties; and
 - (b) the agreement contains, in relation to each party to the agreement, a statement to the effect that the party to whom the statement relates has been provided, before the agreement was signed by him or her, as certified in an annexure to the agreement, with independent legal advice from a legal practitioner as to the following matters:
 - (i) the effect of the agreement on the rights of that party;
 - (ii) the advantages and disadvantages, at the time that the advice was provided, to the party of making the agreement; and
 - (c) the annexure to the agreement contains a certificate signed by the person providing the independent legal advice stating that the advice was provided; and
 - (d) the agreement has not been terminated and has not been set aside by a court; and

Section 90H

- (e) after the agreement is signed, the original agreement is given to one of the parties and a copy is given to the other.

Note: For the manner in which the contents of a financial agreement may be proved, see section 48 of the *Evidence Act 1995*.

- (2) A court may make such orders for the enforcement of a financial agreement that is binding on the parties to the agreement as it thinks necessary.

90H Effect of death of party to financial agreement

A financial agreement that is binding on the parties to the agreement continues to operate despite the death of a party to the agreement and operates in favour of, and is binding on, the legal personal representative of that party.

90J Termination of financial agreement

- (1) The parties to a financial agreement may terminate the agreement only by:
 - (a) including a provision to that effect in another financial agreement as mentioned in subsection 90B(4), 90C(4) or 90D(4); or
 - (b) making a written agreement (a *termination agreement*) to that effect.
- (2) A termination agreement is binding on the parties if, and only if:
 - (a) the agreement is signed by both parties to the agreement; and
 - (b) the agreement contains, in relation to each party to the agreement, a statement to the effect that the party to whom the statement relates has been provided, before the agreement was signed by him or her, as certified in an annexure to the agreement, with independent legal advice from a legal practitioner as to the following matters:
 - (i) the effect of the agreement on the rights of that party;
 - (ii) the advantages and disadvantages, at the time that the advice was provided, to the party of making the agreement; and

- (c) the annexure to the agreement contains a certificate signed by the person providing the independent legal advice stating that the advice was provided; and
 - (d) the agreement has not been set aside by a court; and
 - (e) after the agreement is signed, the original agreement is given to one of the parties and a copy is given to the other.
- (3) A court may, on an application by a person who was a party to the financial agreement that has been terminated, or by any other interested person, make such order or orders (including an order for the transfer of property) as it considers just and equitable for the purpose of preserving or adjusting the rights of persons who were parties to that financial agreement and any other interested persons.

Note: For the manner in which the contents of a financial agreement may be proved, see section 48 of the *Evidence Act 1995*.

90K Circumstances in which court may set aside a financial agreement or termination agreement

- (1) A court may make an order setting aside a financial agreement or a termination agreement if, and only if, the court is satisfied that:
- (a) the agreement was obtained by fraud (including non-disclosure of a material matter); or
 - (aa) either party to the agreement entered into the agreement:
 - (i) for the purpose, or for purposes that included the purpose, of defrauding or defeating a creditor or creditors of the party; or
 - (ii) with reckless disregard of the interests of a creditor or creditors of the party; or
 - (b) the agreement is void, voidable or unenforceable; or
 - (c) in the circumstances that have arisen since the agreement was made it is impracticable for the agreement or a part of the agreement to be carried out; or
 - (d) since the making of the agreement, a material change in circumstances has occurred (being circumstances relating to the care, welfare and development of a child of the marriage) and, as a result of the change, the child or, if the applicant has caring responsibility for the child (as defined in

Section 90K

- subsection (2)), a party to the agreement will suffer hardship if the court does not set the agreement aside; or
- (e) in respect of the making of a financial agreement—a party to the agreement engaged in conduct that was, in all the circumstances, unconscionable; or
 - (f) a payment flag is operating under Part VIII B on a superannuation interest covered by the agreement and there is no reasonable likelihood that the operation of the flag will be terminated by a flag lifting agreement under that Part; or
 - (g) the agreement covers at least one superannuation interest that is an unsplitable interest for the purposes of Part VIII B.
- (1A) For the purposes of paragraph (1)(aa), **creditor**, in relation to a party to the agreement, includes a person who could reasonably have been foreseen by the party as being reasonably likely to become a creditor of the party.
- (2) For the purposes of paragraph (1)(d), a person has **caring responsibility** for a child if:
- (a) the person is a parent of the child with whom the child lives; or
 - (b) the person has a residence order in relation to the child; or
 - (c) the person has a specific issues order in relation to the child under which the person is responsible for the child's long-term or day-to-day care, welfare and development.
- (3) A court may, on an application by a person who was a party to the financial agreement that has been set aside, or by any other interested person, make such order or orders (including an order for the transfer of property) as it considers just and equitable for the purpose of preserving or adjusting the rights of persons who were parties to that financial agreement and any other interested persons.
- (4) An order under subsection (1) or (3) may, after the death of a party to the proceedings in which the order was made, be enforced on behalf of, or against, as the case may be, the estate of the deceased party.
- (5) If a party to proceedings under this section dies before the proceedings are completed:

- (a) the proceedings may be continued by or against, as the case may be, the legal personal representative of the deceased party and the applicable Rules of Court may make provision in relation to the substitution of the legal personal representative as a party to the proceedings; and
 - (b) if the court is of the opinion:
 - (i) that it would have exercised its powers under this section if the deceased party had not died; and
 - (ii) that it is still appropriate to exercise those powers; the court may make any order that it could have made under subsection (1) or (3); and
 - (c) an order under paragraph (b) may be enforced on behalf of, or against, as the case may be, the estate of the deceased party.
- (6) The court must not make an order under this section if the order would:
- (a) result in the acquisition of property from a person otherwise than on just terms; and
 - (b) be invalid because of paragraph 51(xxxi) of the Constitution.
- For this purpose, *acquisition of property* and *just terms* have the same meanings as in paragraph 51(xxxi) of the Constitution.

90KA Validity, enforceability and effect of financial agreements and termination agreements

The question whether a financial agreement or a termination agreement is valid, enforceable or effective is to be determined by the court according to the principles of law and equity that are applicable in determining the validity, enforceability and effect of contracts and purported contracts, and, in proceedings relating to such an agreement, the court:

- (a) subject to paragraph (b), has the same powers, may grant the same remedies and must have the same regard to the rights of third parties as the High Court has, may grant and is required to have in proceedings in connection with contracts or purported contracts, being proceedings in which the High Court has original jurisdiction; and

Section 90L

- (b) has power to make an order for the payment, by a party to the agreement to another party to the agreement, of interest on an amount payable under the agreement, from the time when the amount became or becomes due and payable, at a rate not exceeding the rate prescribed by the applicable Rules of Court; and
- (c) in addition to, or instead of, making an order or orders under paragraph (a) or (b), may order that the agreement, or a specified part of the agreement, be enforced as if it were an order of the court.

90L Financial and other agreements etc. not liable to duty

None of the following is subject to any duty or charge under any law of a State or Territory or any law of the Commonwealth that applies only in relation to a Territory:

- (a) a financial agreement;
- (b) a termination agreement;
- (c) a deed or other instrument executed by a person for the purposes of, or in accordance with, an order or financial agreement made under this Part.

90M Notification of proceeds of crime orders etc.

- (1) If:
 - (a) a person makes an application for an order, under this Part, with respect to:
 - (i) the property of the parties to a marriage or either or them; or
 - (ii) the maintenance of a party to a marriage; and
 - (b) the person knows that the property of the parties to the marriage or either of them is covered by:
 - (i) a proceeds of crime order; or
 - (ii) a forfeiture application;
- the person must:
- (c) disclose in the application the proceeds of crime order or forfeiture application; and
 - (d) give to the court a sealed copy of that order or application.

- (2) A person who does not comply with subsection (1) commits an offence punishable, on conviction, by a fine not exceeding 50 penalty units.
- (3) If:
- (a) a person is a party to property settlement or spousal maintenance proceedings under this Part; and
 - (b) the person is notified by the DPP that the property of the parties to the marriage or either of them is covered by:
 - (i) a proceeds of crime order; or
 - (ii) a forfeiture application;
- the person must notify the Registry Manager in writing of the proceeds of crime order or forfeiture application.
- (4) A person who does not comply with subsection (3) commits an offence punishable, on conviction, by a fine not exceeding 50 penalty units.

90N Court to stay property or spousal maintenance proceedings affected by proceeds of crime orders etc.

- (1) A court in which property settlement or spousal maintenance proceedings are pending must stay those proceedings if notified under section 90M in relation to the proceedings.
- (1A) The court may, before staying proceedings under subsection (1), invite or require the DPP to make submissions relating to staying the proceedings.
- (2) A court must, on the application of the DPP, stay property settlement or spousal maintenance proceedings under this Part if the property of the parties to the marriage or either of them is covered by:
- (a) a proceeds of crime order; or
 - (b) a forfeiture application.
- (3) A court must notify the DPP if the court stays property settlement or spousal maintenance proceedings under subsection (1) or (2).
- (4) The DPP must notify the Registry Manager if:
- (a) a proceeds of crime order ceases to be in force; or

Section 90P

- (b) a forfeiture application is finally determined.
- (5) For the purposes of subsection (4), a forfeiture application is taken to be finally determined when:
 - (a) the application is withdrawn; or
 - (b) if the application is successful—the resulting forfeiture order comes into force; or
 - (c) if the application is unsuccessful—the time within which an appeal can be made has expired and any appeals have been finally determined or otherwise disposed of.

90P Lifting a stay

- (1) A court that stayed the property settlement or spousal maintenance proceedings under section 90N must wholly or partially lift the stay if:
 - (a) either party to the proceedings makes an application for the stay to be lifted and the DPP consents to such an application; or
 - (b) the DPP makes an application for the stay to be lifted.
- (2) A court that stayed the property settlement or spousal maintenance proceedings under section 90N may, on its own motion, wholly or partially lift the stay if the DPP consents to such a motion.
- (3) Giving the Registry Manager written notice of the DPP's consent under this section is taken to be the giving of that consent, unless the court requires the DPP to appear in the proceedings. The notice may be given by the DPP or by a party to the proceedings.

90Q Intervention by DPP

- (1) The DPP may intervene in any property settlement or spousal maintenance proceedings in relation to which a court is notified under section 90M, or in any proceedings under section 90N or 90P in which the DPP is not already a party.
- (2) If the DPP intervenes, the DPP is taken to be a party to the proceedings with all the rights, duties and liabilities of a party.

Part VIII B—Superannuation interests

Division 1—Preliminary

Subdivision A—Scope of this Part

90MA Object of this Part

The object of this Part is to allow certain payments (splittable payments) in respect of a superannuation interest to be allocated between the parties to a marriage, either by agreement or by court order.

90MB This Part overrides other laws, trust deeds etc.

- (1) Subject to subsection (3), this Part has effect despite anything to the contrary in any of the following instruments (whether made before or after the commencement of this Part):
 - (a) any other law of the Commonwealth;
 - (b) any law of a State or Territory;
 - (c) anything in a trust deed or other instrument.
- (2) Without limiting subsection (1), nothing done in compliance with this Part by the trustee of an eligible superannuation plan is to be treated as resulting in a contravention of a law or instrument referred to in subsection (1).
- (3) This Part has effect subject to the *Superannuation (Unclaimed Money and Lost Members) Act 1999*.

90MC Extended meaning of *matrimonial cause*

A superannuation interest is to be treated as property for the purposes of paragraph (ca) of the definition of *matrimonial cause* in section 4.

Subdivision B—Interpretation

90MD Definitions

In this Part, unless the contrary intention appears:

approved deposit fund has the same meaning as in the SIS Act.

business day means any day except:

- (a) a Saturday or Sunday; or
- (b) a day that is a public holiday in the place concerned.

declaration time means the time when the declaration was signed by a spouse (or last signed by a spouse, if both spouses have signed).

eligible superannuation plan means any of the following:

- (a) a superannuation fund within the meaning of the SIS Act;
- (b) an approved deposit fund;
- (c) an RSA;
- (d) an account within the meaning of the *Small Superannuation Accounts Act 1995*.

flagging order means an order mentioned in subsection 90MU(1).

flag lifting agreement has the meaning given by section 90MN.

in force, in relation to an agreement, has the meaning given by section 90MG.

interest includes a prospective or contingent interest, and also includes an expectancy.

marriage includes a void marriage.

member, in relation to an eligible superannuation plan, includes a beneficiary (including a contingent or prospective beneficiary).

member spouse, in relation to a superannuation interest, means the spouse who has the superannuation interest.

non-member spouse, in relation to a superannuation interest, means the spouse who is not the member spouse in relation to that interest.

operative time:

- (a) in relation to a payment split under a superannuation agreement or flag lifting agreement—has the meaning given by section 90MI; or
- (b) in relation to a payment flag under a superannuation agreement—has the meaning given by section 90MK or paragraph 90MLA(2)(c) as appropriate; or
- (c) in relation to a payment split under a court order—means the time specified in the order.

payment flag means:

- (a) the application of section 90ML in relation to a superannuation interest; or
- (b) the application of a flagging order in relation to a superannuation interest.

payment split means:

- (a) the application of section 90MJ in relation to a splittable payment; or
- (b) the application of a splitting order in relation to a splittable payment.

percentage-only interest means a superannuation interest prescribed by the regulations for the purposes of this definition.

regulated superannuation fund has the same meaning as in the SIS Act.

reversionary beneficiary means a person who becomes entitled to a benefit in respect of a superannuation interest of a spouse, after the spouse dies.

reversionary interest has the meaning given by section 90MF.

RSA means a retirement savings account within the meaning of the *Retirement Savings Accounts Act 1997*.

secondary government trustee means a trustee that:

Section 90MD

- (a) is the Commonwealth, a State or Territory; and
- (b) is a trustee only because of the operation of section 90MDA.

separation declaration has the meaning given by section 90MP.

SIS Act means the *Superannuation Industry (Supervision) Act 1993*.

splittable payment has the meaning given by section 90ME.

splitting order means an order mentioned in subsection 90MT(1).

spouse means a party to a marriage.

superannuation agreement has the meaning given by section 90MH.

superannuation interest means an interest that a person has as a member of an eligible superannuation plan, but does not include a reversionary interest.

trustee, in relation to an eligible superannuation plan, means:

- (a) if the plan is a fund that has a trustee (within the ordinary meaning of that word)—the trustee of the plan; or
- (b) if paragraph (a) does not apply and a person is identified in accordance with the regulations as the trustee of the plan for the purposes of this definition—the person identified in accordance with the regulations; or
- (c) in any other case—the person who manages the plan.

unflaggable interest means a superannuation interest prescribed by the regulations for the purposes of this definition.

unsplittable interest means a superannuation interest prescribed by the regulations for the purposes of this definition.

90MDA Extended meaning of trustee

If a person who is not the trustee of an eligible superannuation plan nevertheless has the power to make payments to members of the plan, then references in this Part to the trustee of the plan include references to that person.

90ME Splittable payments

- (1) Each of the following payments in respect of a superannuation interest of a spouse is a *splittable payment*:
 - (a) a payment to the spouse;
 - (b) a payment to another person for the benefit of the spouse;
 - (c) a payment to the legal personal representative of the spouse, after the death of the spouse;
 - (d) a payment to a reversionary beneficiary, after the death of the spouse;
 - (e) a payment to the legal personal representative of a reversionary beneficiary covered by paragraph (d), after the death of the reversionary beneficiary.
- (2) A payment is not a splittable payment if it is prescribed by the regulations for the purposes of this subsection. The regulations may prescribe a payment either:
 - (a) generally (that is, for the purposes of all payment splits in respect of a superannuation interest); or
 - (b) only for the purposes of applying this Part to a particular payment split in respect of a superannuation interest.
- (3) If a payment is made to another person for the benefit of 2 or more persons who include the spouse, then the payment is nevertheless a splittable payment, to the extent to which it is paid for the benefit of the spouse.

Section 90MF

90MF Reversionary interest

For the purposes of this Part, a person's interest in an eligible superannuation plan is a *reversionary interest* at any time while the person's entitlement to benefits in respect of the interest is conditional on the death of another person who is still living.

90MG Meaning of *in force*

- (1) A financial agreement is *in force* at any time when it is binding on the parties in accordance with section 90G.
- (2) A superannuation agreement is *in force* at any time when the relevant financial agreement is in force.
- (3) A flag lifting agreement is *in force* if, and only if:
 - (a) it meets the requirements set out in subsection 90MN(3); and
 - (b) it has not been set aside by a court and has not been terminated.

Division 2—Payment splitting or flagging by agreement

Subdivision A—Superannuation agreements

90MH Superannuation agreement to be included in financial agreement

- (1) A financial agreement under Part VIIIA may include an agreement that deals with superannuation interests of either or both of the parties to the agreement as if those interests were property. It does not matter whether or not the superannuation interests are in existence at the time the agreement is made.
- (2) The part of the financial agreement that deals with superannuation interests is a *superannuation agreement* for the purposes of this Part.
- (3) A superannuation agreement has effect only in accordance with this Part. In particular, it cannot be enforced under Part VIIIA.
- (4) A superannuation agreement that is included in a financial agreement under section 90B (in contemplation of marriage) has no effect unless and until the parties marry.
- (5) In applying sections 90B, 90C and 90D for the purposes of this Division, a superannuation interest of a party to a financial agreement is treated as being acquired at the time when that party first becomes a member of the eligible superannuation plan in respect of that interest.

Subdivision B—Payment splitting

90MI Operative time for payment split

The *operative time* for a payment split under a superannuation agreement or flag lifting agreement is the beginning of the fourth business day after the day on which a copy of the agreement is served on the trustee, accompanied by:

- (a) either:
 - (i) a copy of the decree absolute dissolving the marriage; or

Part VIII B Superannuation interests

Division 2 Payment splitting or flagging by agreement

Section 90MJ

- (ii) a separation declaration with a declaration time that is not more than 28 days before the service on the trustee; and
- (b) if the agreement specifies a method for calculating a base amount—a document setting out the amount calculated using that method; and
- (c) if a form of declaration is prescribed for the purposes of this paragraph—a declaration in that form.

Note: The base amount is used to calculate the entitlement of the non-member spouse under the regulations.

90MJ Payment split under superannuation agreement or flag lifting agreement

- (1) This section applies to a superannuation interest if:
 - (a) the interest is identified in a superannuation agreement or flag lifting agreement; and
 - (b) if the interest is a percentage-only interest—the agreement does one of the following:
 - (i) it specifies a percentage that is to apply for the purposes of this sub-paragraph;
 - (ii) it specifies a percentage that is to apply to all splittable payments in respect of the interest; and
 - (c) if the interest is not a percentage-only interest—the agreement does one of the following:
 - (i) it specifies an amount as a base amount in relation to the interest for the purposes of this Part;
 - (ii) it specifies a method by which such a base amount can be calculated at the time when the agreement is served on the trustee under section 90MI;
 - (iii) it specifies a percentage that is to apply to all splittable payments in respect of the interest; and
 - (d) the agreement is in force at the operative time; and
 - (e) the interest is not an unsplitable interest.

Note: The base amount is used to calculate the entitlement of the non-member spouse under the regulations.

- (2) The following provisions begin to apply to the interest at the operative time.

- (3) Whenever a splittable payment becomes payable in respect of the interest:
 - (a) the non-member spouse is entitled to be paid the amount (if any) that is calculated under subsection (4); and
 - (b) there is a corresponding reduction in the entitlement of the person to whom the splittable payment would have been made but for the payment split.
- (4) The amount is calculated as follows:
 - (a) if the agreement specifies a percentage as mentioned in subparagraph (1)(b)(ii) or subparagraph (1)(c)(iii)—the amount is calculated by applying the specified percentage to the splittable payment; or
 - (b) otherwise—the amount is calculated in accordance with the regulations.
- (5) Subject to section 90MV, this section continues to apply to the superannuation interest even if the agreement referred to in subsection (1) later ceases to be in force.

Subdivision C—Payment flagging

90MK Operative time for payment flag

- (1) The *operative time* for a payment flag under a superannuation agreement is:
 - (a) the service time, if the eligible superannuation plan is a self-managed superannuation fund; or
 - (b) otherwise, the beginning of the fourth business day after the day on which the service time occurs.

- (2) In this section:

self-managed superannuation fund has the same meaning as in the SIS Act.

service time means the time when a copy of the agreement is served on the trustee, accompanied by:

- (a) either:
 - (i) a copy of the decree absolute dissolving the marriage; or

Part VIII B Superannuation interests

Division 2 Payment splitting or flagging by agreement

Section 90ML

- (ii) a separation declaration with a declaration time that is not more than 28 days before the service on the trustee; and
- (b) if a form of declaration is prescribed for the purposes of this paragraph—a declaration in that form.

90ML Payment flag

- (1) This section applies to a superannuation interest if:
 - (a) the interest is identified in a superannuation agreement; and
 - (b) the agreement provides that the interest is to be subject to a payment flag under this Part; and
 - (c) the agreement is in force at the operative time; and
 - (d) the interest is not an unflaggable interest.
- (2) A payment flag starts to operate on the superannuation interest at the operative time and continues to operate until either:
 - (a) a court terminates the operation of the payment flag by an order mentioned in section 90MM; or
 - (b) a flag lifting agreement is served on the trustee as mentioned in section 90MI in respect of the superannuation interest.
- (3) If a payment flag ceases to operate because of paragraph (2)(b), the cessation is not affected by a later termination of the flag lifting agreement.
- (4) While a payment flag is operating on a superannuation interest, the trustee must not make any splittable payment to any person in respect of the interest.

Penalty: 50 penalty units.

Note: The penalty for a body corporate is 250 penalty units. See subsection 4B(3) of the *Crimes Act 1914*.

- (4A) Subsection (4) does not apply if the splittable payment is made in circumstances in which section 90MLA applies.

Note: A defendant bears an evidential burden in relation to the matter in subsection (4A) (see subsection 13.3(3) of the *Criminal Code*).

- (5) If a splittable payment becomes payable in respect of a superannuation interest while a payment flag is operating, the

trustee must, within 14 days after it became payable, give written notice to the member spouse and the non-member spouse.

Penalty: 50 penalty units.

Note: The penalty for a body corporate is 250 penalty units. See subsection 4B(3) of the *Crimes Act 1914*.

- (6) Subsection (5) does not apply if the trustee has previously given a notice under that subsection, for an earlier splittable payment, in respect of the payment flag.
- (7) If either spouse dies while a payment flag is operating:
 - (a) the payment flag nevertheless continues to operate; and
 - (b) the legal personal representative of the deceased spouse has all the rights the deceased spouse would have had in respect of the payment flag.

Note: The rights of the legal personal representative under paragraph (b) include the right to enter into a flag lifting agreement under section 90MN.

90MLA Some splittable payments payable if payment flag operating

- (1) This section applies if:
 - (a) a superannuation interest (*original interest*) a person has in an eligible superannuation plan (*old ESP*) is identified in a superannuation agreement; and
 - (b) a payment flag under section 90ML is operating on the original interest; and
 - (c) a splittable payment is made by the trustee of the old ESP to the trustee of another eligible superannuation plan (*new ESP*) in respect of the original interest as part of a successor fund transfer.
- (2) If this section applies, then:
 - (a) the new interest in the new ESP is taken to be the original interest identified in the superannuation agreement; and
 - (b) the payment flag operates on the new interest; and
 - (c) despite section 90MK, the operative time for the payment flag in respect of the new interest is the time that the payment to the trustee of the new ESP is made.

Section 90MM

(3) In this section:

successor fund transfer means the transfer of a person's superannuation interest in the old ESP in circumstances where:

- (a) the new ESP confers on the person, in relation to the new interest, equivalent rights to the rights the person had in relation to the original interest; and
- (b) before the transfer, the trustee of the new ESP had agreed with the trustee of the old ESP to the conferral of such rights.

90MM Payment flag may be terminated by court

If a court makes an order under section 90K setting aside a financial agreement in respect of which a payment flag is operating, the court may also make an order terminating the operation of the flag.

Note: Under section 90MH, a superannuation agreement must be part of a financial agreement. Therefore, setting aside the financial agreement also has the effect of setting aside the superannuation agreement.

90MN Flag lifting agreement etc.

- (1) At any time when a payment flag is operating on a superannuation interest, the spouses may make an agreement (a *flag lifting agreement*) that either:
 - (a) provides that the flag is to cease operating without any payment split; or
 - (b) specifies an amount, method or percentage in accordance with subsection 90MJ(1).
- (2) If the flag lifting agreement provides for a payment split, the spouses may at any time make an agreement (a *termination agreement*) that terminates the flag lifting agreement.
- (3) A flag lifting agreement or termination agreement has no effect unless it complies with the following requirements:
 - (a) the agreement must be signed by both spouses;
 - (b) for each spouse, the agreement must contain a statement that the spouse has been provided with independent legal advice from a legal practitioner as to the legal effect of the agreement;

- (c) a certificate must be attached to the agreement, signed by the person who provided the legal advice and stating that the advice was provided;
 - (d) after the agreement is signed by the spouses, each spouse must be provided with a copy of the agreement.
- (4) A court may make an order setting aside a flag lifting agreement or termination agreement if, and only if, the court is satisfied as to any of the grounds set out in subsection 90K(1) (other than paragraph 90K(1)(f)).
 - (5) An order setting aside a flag lifting agreement also operates to set aside the related financial agreement.
 - (6) An order under section 90K setting aside a financial agreement also operates to set aside the related flag lifting agreement.

Subdivision D—Miscellaneous

90MO Limitation on section 79 order

- (1) A court cannot make an order under section 79 with respect to a superannuation interest if:
 - (a) the superannuation interest is covered by a superannuation agreement that is in force; or
 - (b) the non-member spouse has served a waiver notice on the trustee under section 90MZA in respect of the interest; or
 - (c) a payment flag is operating on the superannuation interest.

Note: Under section 90MM, the court can terminate the operation of a payment flag in certain circumstances.

- (2) Subsection (1) does not prevent the court taking superannuation interests into account when making an order with respect to other property of the spouses.

90MP Separation declaration

- (1) A *separation declaration* is a written declaration that complies with this section.
- (2) The declaration must be signed by at least one of the spouses.

Section 90MQ

- (3) If section 90MQ applies to the declaration, then the declaration must state that:
 - (a) the spouses are married; and
 - (b) the spouses separated and thereafter lived separately and apart for a continuous period of at least 12 months immediately before the declaration time; and
 - (c) in the opinion of the spouse (or spouses) making the declaration, there is no reasonable likelihood of cohabitation being resumed.
- (4) If section 90MQ does not apply to the declaration, then the declaration must state that the spouses are married, but are separated, at the declaration time.
- (5) For the purposes of this section, the question whether spouses lived separately and apart for a continuous period of not less than 12 months before a particular date is to be determined in the same way as it is under section 48.
- (6) In this section:

separated has the same meaning as in section 48 (as affected by sections 49 and 50).

90MQ Superannuation interests in excess of ETP threshold

- (1) This section applies to a declaration if, at the declaration time, the total withdrawal value for all the superannuation interests of the member spouse is more than the ETP threshold.
- (2) This section does not apply in the circumstances (if any) prescribed by the regulations.
- (3) In this section:

ETP threshold means the upper limit that applies under section 159SG of the *Income Tax Assessment Act 1936* for the financial year in which the declaration time occurs.

total withdrawal value means the amount determined in accordance with the regulations.

90MR Enforcement by court order

- (1) A court may make such orders as it thinks necessary for the enforcement of a payment split or payment flag under this Division.
- (2) The question whether a superannuation agreement or flag lifting agreement is valid, enforceable or effective is to be determined by the court according to the principles of law and equity that are applicable in determining the validity, enforceability and effect of contracts and purported contracts.
- (3) Without limiting subsection (2), in proceedings relating to a superannuation agreement or flag lifting agreement, the court has the same powers, may grant the same remedies and must have the same regard to the rights of third parties as the High Court has, may grant and is required to have in proceedings in connection with contracts or purported contracts, being proceedings in which the High Court has original jurisdiction.

Division 3—Payment splitting or flagging by court order

90MS Order under section 79 may include orders in relation to superannuation interests

- (1) In proceedings under section 79 with respect to the property of spouses, the court may, in accordance with this Division, also make orders in relation to superannuation interests of the spouses.

Note 1: Although the orders are made *in accordance with* this Division, they will be made *under* section 79. Therefore they will be generally subject to all the same provisions as other section 79 orders.

Note 2: Sections 71A and 90MO limit the scope of section 79.

- (2) A court cannot make an order under section 79 in relation to a superannuation interest except in accordance with this Part.

90MT Splitting order

- (1) A court, in accordance with section 90MS, may make the following orders in relation to a superannuation interest (other than an unsplitable interest):

- (a) if the interest is not a percentage-only interest—an order to the effect that, whenever a splittable payment becomes payable in respect of the interest:

- (i) the non-member spouse is entitled to be paid the amount (if any) calculated in accordance with the regulations; and
(ii) there is a corresponding reduction in the entitlement of the person to whom the splittable payment would have been made but for the order;

- (b) an order to the effect that, whenever a splittable payment becomes payable in respect of the interest:

- (i) the non-member spouse is entitled to be paid a specified percentage of the splittable payment; and
(ii) there is a corresponding reduction in the entitlement of the person to whom the splittable payment would have been made but for the order;

- (c) if the interest is a percentage-only interest—an order to the effect that, whenever a splittable payment becomes payable in respect of the interest:
 - (i) the non-member spouse is entitled to be paid the amount (if any) calculated in accordance with the regulations by reference to the percentage specified in the order;
 - (ii) there is a corresponding reduction in the entitlement of the person to whom the splittable payment would have been made but for the order;
 - (d) such other orders as the court thinks necessary for the enforcement of an order under paragraph (a), (b) or (c).
- (2) Before making an order referred to in subsection (1), the court must make a determination under paragraph (a) or (b) as follows:
- (a) if the regulations provide for the determination of an amount in relation to the interest, the court must determine the amount in accordance with the regulations;
 - (b) otherwise, the court must determine the value of the interest by such method as the court considers appropriate.
- (2A) The amount determined under paragraph (2)(a) is taken to be the value of the interest.
- (3) Regulations for the purposes of paragraph (2)(a) may provide for the amount to be determined wholly or partly by reference to methods or factors that are approved in writing by the Minister for the purposes of the regulations.
- (4) Before making an order referred to in paragraph (1)(a), the court must allocate a base amount to the non-member spouse, not exceeding the value determined under subsection (2).
- Note: The base amount is used to calculate the entitlement of the non-member spouse under the regulations.

90MU Flagging order

- (1) A court, in accordance with section 90MS, may make an order in relation to a superannuation interest (other than an unflaggable interest):
- (a) directing the trustee not to make any splittable payment in respect of the interest without the leave of the court; and

Section 90MUA

- (b) requiring the trustee to notify the court, within a period specified in the order, of the next occasion when a splittable payment becomes payable in respect of the interest.
- (2) In deciding whether to make an order in accordance with this section, the court may take into account such matters as it considers relevant and, in particular, may take into account the likelihood that a splittable payment will soon become payable in respect of the superannuation interest.

90MUA Some splittable payments may be made without leave of court

- (1) A flagging order made under subsection 90MU(1) in relation to a superannuation interest (*original interest*) a person has in an eligible superannuation plan (*old ESP*) does not apply to a splittable payment if the splittable payment is made by the trustee of the old ESP to the trustee of another eligible superannuation plan (*new ESP*) in respect of the original interest as part of a successor fund transfer.
- (2) If the splittable payment is made, then the flagging order is taken to be made in relation to the new interest from the time that the payment to the trustee of the new ESP is made.
- (3) In this section:
successor fund transfer means the transfer of a person's superannuation interest in the old ESP in circumstances where:
 - (a) the new ESP confers on the person, in relation to the new interest, equivalent rights to the rights the person had in relation to the original interest; and
 - (b) before the transfer, the trustee of the new ESP had agreed with the trustee of the old ESP to the conferral of such rights.

Division 4—General provisions about payment splitting

90MV Court may cancel payment split

- (1) A court may, under section 79, make an order terminating the operation of a payment split if:
 - (a) the superannuation agreement in respect of the payment split has ceased to be in force; and
 - (b) the non-member spouse has not served a waiver notice on the trustee under section 90MZA in respect of the payment split.
- (2) The termination has effect for splittable payments that become payable after the date specified in the order.

90MW Deductions from splittable payment before calculating payment split

Any deduction that the trustee is entitled to make from a splittable payment is to be deducted from the splittable payment before calculating any payment split and before applying section 90MX.

90MX Multiple payment splits applying to the same splittable payment

- (1) This section applies if 2 or more payment splits apply to the same splittable payment.
- (2) The payments splits are to be calculated in order of their operative times, starting with the earliest time.
- (3) For the purpose of calculating each of those payment splits (other than the one with the earliest operative time), the amount of the splittable payment is taken to be reduced by the amount to which a person other than the member spouse is entitled under the payment split with the next earlier operative time.

Example: W has a superannuation interest that is subject to 3 payment splits in respect of W's marriages to X, Y and Z (in that order). The operative times of the payment splits are in the same order as the marriages. Assume each payment split provides for a 50% share to the non-member spouse. W becomes entitled to a splittable payment of

Part VIII B Superannuation interests

Division 4 General provisions about payment splitting

Section 90MY

\$100. The final payment entitlements are as follows: X gets \$50. Y gets \$25. Z gets \$12.50. W gets the remaining \$12.50.

90MY Fees payable to trustee

- (1) The regulations may:
 - (a) allow trustees to charge reasonable fees:
 - (i) in respect of a payment split; or
 - (ii) otherwise in respect of the operation of this Part in relation to a superannuation interest; and
 - (b) prescribe the person or persons liable to pay those fees.
- (2) If any such fee remains unpaid after the time it is due for payment, then the trustee may recover any unpaid amount by deduction from amounts that would otherwise become payable by the trustee, in respect of the superannuation interest, to the person who is liable to pay the fee.

90MZ Superannuation preservation requirements

- (1) If the eligible superannuation plan for a payment split is a regulated superannuation fund or approved deposit fund, then the entitlement of the non-member spouse is subject to any regulations made under the SIS Act that provide for payment of that entitlement to a regulated superannuation fund, approved deposit fund, RSA or exempt public sector superannuation scheme within the meaning of the SIS Act for the benefit of the non-member spouse.
- (2) If the eligible superannuation plan for a payment split is an RSA, then the entitlement of the non-member spouse is subject to any regulations made under the *Retirement Savings Accounts Act 1997* that provide for payment of that entitlement to a regulated superannuation fund, approved deposit fund, RSA or exempt public sector superannuation scheme within the meaning of the SIS Act for the benefit of the non-member spouse.
- (3) If the eligible superannuation plan for a payment split is a constitutionally protected fund within the meaning of section 267 of the *Income Tax Assessment Act 1936* or an exempt public sector superannuation scheme within the meaning of the SIS Act, then the

entitlement of the non-member spouse is subject to any law or other instrument that provides for payment of that entitlement to a regulated superannuation fund, approved deposit fund, RSA or exempt public sector superannuation scheme within the meaning of the SIS Act for the benefit of the non-member spouse.

90MZA Waiver of rights under payment split

- (1) If the non-member spouse serves a waiver notice on the trustee in respect of a payment split, then the following provisions apply for each splittable payment that becomes payable after the date specified in the waiver notice:
 - (a) the non-member spouse is not entitled to be paid any amount under the payment split in respect of the splittable payment;
 - (b) the entitlement of the person to whom the splittable payment would have been made but for the payment split continues to be reduced in the same way as it would have been reduced if the entitlement of the non-member spouse had not been terminated.

Example: X has a superannuation interest that is subject to a 50:50 payment split in favour of Y. Y serves a waiver notice on the trustee, in exchange for a lump sum payment made by the trustee to another fund for the benefit of Y. The effect is that X's payments will continue to be reduced by half, but Y will receive no further payments under the payment split.

- (2) To be effective for the purposes of this section, a waiver notice must be in the prescribed form and must be accompanied by:
 - (a) a statement to the effect that the non-member spouse has been provided with independent financial advice from a prescribed financial adviser as to the financial effect of the waiver notice; and
 - (b) a certificate signed by the person who provided the financial advice, stating that the advice was provided.

90MZB Trustee to provide information

- (1) An eligible person may make an application to the trustee of an eligible superannuation plan for information about a superannuation interest of a member of the plan.
- (2) The application must be accompanied by:

Section 90M ZB

- (a) a declaration, in the prescribed form, stating that the applicant requires the information for either or both of the following purposes:
 - (i) to assist the applicant to properly negotiate a superannuation agreement;
 - (ii) to assist the applicant in connection with the operation of this Part in relation to the applicant; and
 - (b) the fee (if any) payable under regulations made for the purposes of section 90M Y.
- (3) If the trustee receives an application that complies with this section, the trustee must, in accordance with the regulations, provide information about the superannuation interest to the applicant.

Penalty: 50 penalty units.

Note: The penalty for a body corporate is 250 penalty units. See subsection 4B(3) of the *Crimes Act 1914*.

- (4) Regulations for the purposes of subsection (3) may specify circumstances in which the trustee is not required to provide information.

Example: The regulations might provide that a secondary government trustee is not required to provide information where there is another trustee of the eligible superannuation plan who is better able to provide the information.

- (5) The trustee must not, in response to an application under this section by a spouse of the member, provide the spouse with any address of the member. For this purpose, **address** includes a postal address.

Penalty: 50 penalty units.

Note: The penalty for a body corporate is 250 penalty units. See subsection 4B(3) of the *Crimes Act 1914*.

- (6) If the trustee receives an application under this section from a person other than the member, the trustee must not inform the member that the application has been received.

Penalty: 50 penalty units.

Note: The penalty for a body corporate is 250 penalty units. See subsection 4B(3) of the *Crimes Act 1914*.

(7) The regulations may require the trustee of an eligible superannuation plan, after the operative time for a payment split, to provide information to the non-member spouse about the superannuation interest concerned. Such regulations may prescribe penalties for contravention, not exceeding 10 penalty units.

(8) In this section:

eligible person, in relation to a superannuation interest of a member of an eligible superannuation plan, means:

- (a) the member; or
- (b) a spouse of the member; or
- (c) a person who intends to enter into a superannuation agreement with the member.

90MZC Death of non-member spouse

If the non-member spouse dies after the operative time for a payment split:

- (a) the payment split nevertheless continues to operate; and
- (b) the payment split then operates in favour of the legal personal representative of the deceased spouse and is binding on that legal personal representative; and
- (c) the legal personal representative has all the rights the deceased spouse would have had in respect of the payment split, including the right to serve a waiver notice under section 90MZA.

Division 5—Miscellaneous

90MZD Orders binding on trustee

- (1) An order under this Part in relation to a superannuation interest may be expressed to bind the person who is the trustee of the eligible superannuation plan at the time when the order takes effect. However:
 - (a) in the case of a trustee who is not a secondary government trustee—the court cannot make such an order unless the trustee has been accorded procedural fairness in relation to the making of the order; and
 - (b) in the case of a secondary government trustee:
 - (i) the court cannot make such an order unless another trustee of the eligible superannuation plan has been accorded procedural fairness in relation to the making of the order; and
 - (ii) the court may, if it thinks fit, require that the secondary government trustee also be accorded procedural fairness.
- (2) If an order is binding on the person who is the trustee of an eligible superannuation plan at the time when the order takes effect, then the order is also binding (by force of this subsection) on:
 - (a) any person who subsequently becomes the trustee of that eligible superannuation plan; or
 - (b) in a case where section 90MUA applies—a person who is the trustee, or any person who subsequently becomes the trustee, of the new ESP.

90MZE Protection for trustee

The trustee of an eligible superannuation plan is not liable for loss or damage suffered by any person because of things done (or not done) by the trustee in good faith in reliance on:

- (a) any document served on the trustee for the purposes of this Part; or
- (b) an order made by a court in accordance with this Part.

90MZF Service of documents on trustee

- (1) If a document is required or permitted to be served for the purposes of this Part on the trustee of an eligible superannuation plan, the document may be served in any of the ways in which a document may be served under the Rules of Court.
- (2) Subsection (1) is in addition to any other method of service permitted by law.

90MZG False declarations

- (1) A person is guilty of an offence if:
 - (a) the person makes a statement in a declaration, knowing that the statement is false or misleading; and
 - (b) the declaration is served on the trustee of an eligible superannuation plan for the purposes of this Part.
- (2) An offence against subsection (1) is punishable by imprisonment for a period of up to 12 months.
- (3) Subsection (1) does not apply if the statement is not false or misleading in a material particular.

90MZH Terminating employment because of payment flag etc.

A person must not terminate the employment of an employee on either of the following grounds:

- (a) a payment flag is operating in respect of a superannuation interest of the employee;
- (b) a superannuation agreement or splitting order is in force in respect of a superannuation interest of the employee.

Penalty: 100 penalty units.

Note: The penalty for a body corporate is 500 penalty units. See subsection 4B(3) of the *Crimes Act 1914*.

Part IX—Intervention

91 Intervention by Attorney-General

- (1) The Attorney-General may intervene in, and contest or argue any question arising in:
 - (a) any proceedings under this Act where the court requests the Attorney-General to do so or a matter arises that affects the public interest; or
 - (b) any proceedings under this Act for or in relation to:
 - (i) a residence order, a contact order or a specific issues order; or
 - (ii) an order under section 67ZC.
- (1A) At any time after a decree *nisi* has been made in any proceedings and before it has become absolute, the Attorney-General may intervene in the proceedings for the purpose of bringing to the notice of the court matters relevant to the exercise of its powers under section 58.
- (2) Where the Attorney-General intervenes in any proceedings, the Attorney-General shall be deemed to be a party to the proceedings with all the rights, duties and liabilities of a party.

91A Delegation by Attorney-General

- (1) Where, in a State, there is a Family Court of the State, the Attorney-General may, either generally or as otherwise provided by the instrument of delegation, by writing, delegate all or any of his or her powers and functions under section 91 in respect of intervention in proceedings in the Family Court of that State and in other courts of that State to the person occupying from time to time, while the delegation is in force, the office of Attorney-General of that State.
- (2) A power or function so delegated may be exercised or performed by the delegate in accordance with the instrument of delegation.

- (3) A delegation under this section does not prevent the exercise of a power or the performance of a function by the Attorney-General.
- (4) Where the Attorney-General of a State intervenes in any proceedings in accordance with a delegation under this section, the Attorney-General of the State shall be deemed to be a party to the proceedings with all the rights, duties and liabilities of a party.

91B Intervention by child welfare officer

- (1) In any proceedings under this Act that affect, or may affect, the welfare of a child, the court may request the intervention in the proceedings of an officer of a State, of a Territory or of the Commonwealth, being the officer who is responsible for the administration of the laws of the State or Territory in which the proceedings are being heard that relate to child welfare.
- (2) Where the court has, under subsection (1), requested an officer to intervene in proceedings:
 - (a) the officer may intervene in those proceedings; and
 - (b) where the officer so intervenes, the officer shall be deemed to be a party to the proceedings with all the rights, duties and liabilities of a party.

92 Intervention by other persons

- (1) In proceedings other than proceedings for principal relief, any person may apply for leave to intervene in the proceedings, and the court may make an order entitling that person to intervene in the proceedings.
- (1A) In proceedings for principal relief, a person in relation to whom an order has been made under subsection 69W(1) requiring a parentage testing procedure (within the meaning of Part VII) to be carried out may apply for leave to intervene in the proceedings, and the court may make an order entitling the person to intervene in the proceedings.
- (2) An order under this section may be made upon such conditions as the court considers appropriate.

Section 92A

- (3) Where a person intervenes in any proceedings by leave of the court the person shall, unless the court otherwise orders, be deemed to be a party to the proceedings with all the rights, duties and liabilities of a party.

92A Intervention in child abuse cases

- (1) This section applies to proceedings under this Act in which it has been alleged that a child has been abused or is at risk of being abused.
- (2) Each of the following persons is entitled to intervene in the proceedings:
- (a) a guardian of the child;
 - (b) a parent of the child with whom the child lives;
 - (ba) a person who has a residence order in relation to the child;
 - (bb) a person who has a specific issues order in relation to the child under which the person is responsible for the child's long-term or day-to-day care, welfare and development;
 - (c) any other person responsible for the care, welfare or development of the child;
 - (d) a prescribed child welfare authority;
 - (e) a person who is alleged to have abused the child or from whom the child is alleged to be at risk of abuse.
- (3) Where a person intervenes in proceedings pursuant to this section, the person is, unless the court otherwise orders, to be taken to be a party to the proceedings with all the rights, duties and liabilities of a party.

Part X—Appeals

93 No appeal after decree absolute

An appeal does not lie from a decree of dissolution of marriage after the decree has become absolute.

93A Appellate jurisdiction of Family Court

- (1) The Family Court has jurisdiction with respect to matters arising under this Act or under any other law made by the Parliament in respect of which:
 - (a) appeals referred to in section 94 are instituted; or
 - (aa) appeals referred to in subsection 94AAA(1) are instituted; or
 - (b) appeals referred to in section 96 are instituted.
- (2) Subject to section 96, in an appeal the Family Court shall have regard to the evidence given in the proceedings out of which the appeal arose and has power to draw inferences of fact and, in its discretion, to receive further evidence upon questions of fact, which evidence may be given:
 - (a) by affidavit; or
 - (b) by oral examination before the Family Court or a Judge; or
 - (c) as provided for in Division 2 of Part XI.

94 Appeals to Family Court from courts other than the Federal Magistrates Court

- (1) Subject to sections 94AAA and 94AA, an appeal lies to a Full Court of the Family Court from:
 - (a) a decree of the Family Court, constituted otherwise than as a Full Court, exercising original or appellate jurisdiction:
 - (i) under this Act; or
 - (ii) under any other law; or
 - (b) a decree of:
 - (i) a Family Court of a State; or

Section 94

- (ii) a Supreme Court of a State or Territory constituted by a single Judge;
exercising original or appellate jurisdiction under this Act or in proceedings continued in accordance with any of the provisions of section 9.
- (1AA) An appeal lies to a Full Court of the Family Court from a decree or decision of a Judge exercising original or appellate jurisdiction under this Act rejecting an application that he or she disqualify himself or herself from further hearing a matter.
- (1A) An appeal under subsection (1) or (1AA) shall be instituted within the time prescribed by the standard Rules of Court or within such further time as is allowed in accordance with the standard Rules of Court.
- (2) Upon such an appeal, the Full Court may affirm, reverse or vary the decree or decision the subject of the appeal and may make such decree or decision as, in the opinion of the court, ought to have been made in the first instance, or may, if he considers appropriate, order a re-hearing, on such terms and conditions, if any, as it considers appropriate.
- (2A) If, in dismissing an appeal under subsection (1) or (1AA), the Full Court is of the opinion that the appeal does not raise any question of general principle, it may give reasons for its decision in short form.
- (2B) A Full Court of the Family Court, or a Judge of the Appeal Division or other Judge if there is no Judge of the Appeal Division available, may:
 - (a) join or remove a party to an appeal under subsection (1) or (1AA); or
 - (b) make an order by consent disposing of an appeal under subsection (1) or (1AA) (including an order for costs); or
 - (c) give directions about the conduct of an appeal under subsection (1) or (1AA), including directions about the use of written submissions and limiting the time for oral argument.
- (2C) The standard Rules of Court may make provision enabling matters of the kind mentioned in subsection (2B) to be dealt with, subject

to conditions prescribed by the standard Rules of Court, without an oral hearing.

- (2D) Applications:
- (a) for an extension of time within which to institute an appeal under subsection (1) or (1AA); or
 - (b) for leave to amend the grounds of an appeal under subsection (1) or (1AA); or
 - (c) to reinstate an appeal under subsection (1) or (1AA) that, because of the standard Rules of Court, was taken to have been abandoned; or
 - (d) to stay an order of a Full Court of the Family Court made in connection with an appeal under subsection (1) or (1AA);
- may be heard and determined by a Judge of the Appeal Division or other Judge if there is no Judge of the Appeal Division available, or by a Full Court of the Family Court.
- (2E) The standard Rules of Court may make provision enabling applications of a kind mentioned in subsection (2D) to be dealt with, subject to conditions prescribed by the standard Rules of Court, without an oral hearing.
- (2F) No appeal lies under this section from an order or decision made under subsection (2B) or (2D).
- (3) This section does not apply in relation to a proceeding that is transferred to the Court from the Federal Court of Australia.

94AAA Appeals to Family Court from the Federal Magistrates Court

- (1) An appeal lies to the Family Court from:
- (a) a decree of the Federal Magistrates Court exercising original jurisdiction under this Act; or
 - (b) a decree or decision of a Federal Magistrate exercising original jurisdiction under this Act rejecting an application that he or she disqualify himself or herself from further hearing a matter.
- (2) Subsection (1) has effect subject to section 94AA.

Section 94AAA

- (3) The jurisdiction of the Family Court in relation to an appeal under subsection (1) is to be exercised by a Full Court unless the Chief Judge considers that it is appropriate for the jurisdiction of the Family Court in relation to the appeal to be exercised by a single Judge.
- (4) Subsection (3) has effect subject to subsections (8) and (10).
- (5) An appeal under subsection (1) is to be instituted within:
 - (a) the time prescribed by the standard Rules of Court; or
 - (b) such further time as is allowed in accordance with the standard Rules of Court.
- (6) On an appeal under subsection (1), the Family Court may affirm, reverse or vary the decree or decision the subject of the appeal and may make such decree or decision as, in the opinion of the court, ought to have been made in the first instance, or may, if it considers appropriate, order a re-hearing on such terms and conditions, if any, as it considers appropriate.
- (7) If, in dismissing an appeal under subsection (1), the Family Court is of the opinion that the appeal does not raise any question of general principle, it may give reasons for its decision in short form.
- (8) A single Judge or a Full Court may:
 - (a) join or remove a party to an appeal under subsection (1); or
 - (b) make an order by consent disposing of an appeal under subsection (1) (including an order for costs); or
 - (c) give directions about the conduct of an appeal under subsection (1), including directions about:
 - (i) the use of written submissions; and
 - (ii) limiting the time for oral argument.
- (9) The standard Rules of Court may make provision enabling matters of the kind mentioned in subsection (8) to be dealt with, subject to conditions prescribed by the standard Rules of Court, without an oral hearing.
- (10) Applications:
 - (a) for an extension of time within which to institute an appeal under subsection (1); or

- (b) for leave to amend the grounds of an appeal under subsection (1); or
 - (c) to reinstate an appeal under subsection (1) that, because of the standard Rules of Court, was taken to have been abandoned; or
 - (d) to stay an order of the Family Court made in connection with an appeal under subsection (1);
- may be heard and determined by a single Judge or by a Full Court.
- (11) The standard Rules of Court may make provision enabling applications of a kind mentioned in subsection (10) to be dealt with, subject to conditions prescribed by the standard Rules of Court, without an oral hearing.
 - (12) An appeal does not lie to a Full Court from a decision of a single Judge exercising jurisdiction under this section.
 - (13) The single Judge referred to in subsection (3), (8) or (10) need not be a member of the Appeal Division.

94AA Leave to appeal needed in some cases

- (1) An appeal does not lie to a Full Court of the Family Court from a prescribed decree of a court other than the Federal Magistrates Court, except by leave of a Full Court of that Court.
- (2) An application for leave under subsection (1) is to be determined by a Full Court of the Family Court.
- (2A) An appeal does not lie to the Family Court from a prescribed decree of the Federal Magistrates Court, except by leave of the Family Court.
- (2B) An application for leave under subsection (2A) is to be determined by a single Judge or by a Full Court.
- (2C) The single Judge referred to in subsection (2B) need not be a member of the Appeal Division.
- (3) The standard Rules of Court may make provision for enabling applications for leave to be dealt with, subject to conditions prescribed by the Rules, without an oral hearing.

Section 94A

94A Case stated

- (1) If, in proceedings in a court, being proceedings in which a decree or decision to which subsection 94(1) or (1AA) applies could be made, a question of law arises which the Judge and at least one of the parties wish to have determined by a Full Court of the Family Court before the proceedings are further dealt with, the Judge shall state the facts and question in the form of a special case for the opinion of a Full Court, and a Full Court shall hear and determine the question.
- (2) The Full Court may draw from the facts and the documents any inference, whether of fact or of law, which could have been drawn from them by the Judge.
- (3) If, in proceedings in the Federal Magistrates Court, being proceedings in which a decree or decision to which subsection 94AAA(1) applies could be made, a question of law arises which:
 - (a) the Federal Magistrate; and
 - (b) at least one of the parties;wish to have determined by a Full Court of the Family Court before the proceedings are further dealt with:
 - (c) the Federal Magistrate must state the facts and question in the form of a special case for the opinion of a Full Court of the Family Court; and
 - (d) a Full Court of the Family Court must hear and determine the question.
- (4) The Full Court may draw from the facts and the documents any inference, whether of fact or of law, which could have been drawn from them by the Federal Magistrate.

95 Appeals to High Court

Notwithstanding anything contained in any other Act, an appeal does not lie to the High Court from a decree of a court exercising jurisdiction under this Act, whether original or appellate, except:

- (a) by special leave of the High Court; or
- (b) upon a certificate of a Full Court of the Family Court that an important question of law or of public interest is involved.

96 Appeals from courts of summary jurisdiction

- (1) An appeal lies from a decree of a court of summary jurisdiction of a State or Territory exercising jurisdiction under this Act to the Family Court or to the Supreme Court of that State or Territory.
- (1A) An appeal under subsection (1) shall be instituted within the time prescribed by the standard Rules of Court or within such further time as is allowed in accordance with the standard Rules of Court.
- (2) The Supreme Court of each State is invested with federal jurisdiction, and jurisdiction is conferred on the Supreme Court of each Territory, with respect to matters arising under this Act in respect of which appeals are instituted under this section.
- (3) The Governor-General may, by Proclamation, fix a date as the date on or after which appeals to the Supreme Court of a specified State or Territory under this section may not be instituted.
- (4) The court hearing an appeal under this section:
 - (a) shall, subject to subsection (5), proceed by way of a hearing *de novo*, but may receive as evidence any record of evidence given, including any affidavit filed or exhibit received, in the court of summary jurisdiction; and
 - (b) may make such decrees as it considers appropriate, including a decree affirming, reversing or varying the decree the subject of the appeal.
- (5) The court hearing an appeal under this section may, on the application of a party or of its own motion, refer the appeal to a Full Court of the Family Court.
- (6) Where an appeal is referred to a Full Court of the Family Court under subsection (5), the Full Court may:
 - (a) proceed by way of a hearing *de novo*, but may receive as evidence any record of evidence given, including any affidavit filed or exhibit received in the court of summary jurisdiction;
 - (b) order that questions of fact arising in the proceedings be tried by a Judge;

Section 96A

- (c) determine questions of law arising in the proceedings and remit the appeal to a Judge for hearing in accordance with directions given by it; and
- (d) make such other decrees as it considers appropriate, including a decree affirming, reversing or varying the decree the subject of the appeal.

96A Part does not apply to section 111C jurisdiction

This Part does not apply in relation to jurisdiction conferred on a federal court or a court of a Territory, or invested in a court of a State, by regulations made for the purposes of section 111C.

Note: Those regulations may provide for courts to have jurisdiction in respect of appeals arising from matters dealt with by those regulations: see subsection 111C(5).

Part XI—Procedure and evidence

Division 1—General matters concerning procedure and evidence

97 Procedure

- (1) Subject to subsections (1A) and (2), to the regulations and to the applicable Rules of Court, all proceedings in the Family Court, in the Federal Magistrates Court, or in a court of a Territory (other than the Northern Territory) when exercising jurisdiction under this Act, shall be heard in open court.
- (1A) The regulations and the applicable Rules of Court may authorise proceedings to be heard by a Judge, Judicial Registrar, Registrar, Federal Magistrate or magistrate sitting in Chambers.
- (2) In any proceedings in the Family Court, or in another court when exercising jurisdiction under this Act, the court may, of its own motion or on the application of a party to the proceedings, make one or more of the following orders:
 - (a) an order that a specified person is not, or specified persons are not, to be present in court during the proceedings or during a specified part of the proceedings;
 - (b) an order that persons included in a specified class of persons are not to be present in court during the proceedings or during a specified part of the proceedings;
 - (c) an order that only the parties to the proceedings, their legal representatives and such other persons (if any) as are specified by the court may be present in court during the proceedings or during a specified part of the proceedings.
- (3) In proceedings under this Act, the court shall proceed without undue formality and shall endeavour to ensure that the proceedings are not protracted.

Section 98

98 Evidence by affidavit

- (1) The standard Rules of Court may provide for evidence of any material matter to be given on affidavit at the hearing of:
 - (a) proceedings for principal relief that are undefended at the time of hearing; and
 - (b) proceedings other than proceedings for principal relief.
- (2) This section does not apply to proceedings in the Federal Magistrates Court.

Note: For provisions relating to the Federal Magistrates Court, see the *Federal Magistrates Act 1999*.

98A Proceedings in absence of parties

- (1) The applicable Rules of Court may provide that where, at the date fixed for the hearing of proceedings for dissolution of marriage instituted by one party to the marriage:
 - (a) the proceedings are undefended;
 - (b) there are no children of the marriage who have not attained the age of 18 years;
 - (c) the applicant has requested the court to determine the proceedings in the absence of the parties; and
 - (d) the respondent has not requested the court not to determine the proceedings in the absence of the parties;the court may, in its discretion, determine the proceedings notwithstanding that neither the parties to the proceedings nor their legal representatives are present in court.
- (2) The applicable Rules of Court may provide that where, at the date fixed for the hearing of proceedings for dissolution of marriage instituted jointly by the parties to the marriage:
 - (a) one of the parties to the marriage has requested the court to determine the proceedings in the absence of the parties and the other party to the marriage has not requested the court not to determine the proceedings in the absence of the parties; or
 - (b) both parties to the marriage have requested the court to determine the proceedings in the absence of the parties;

the court may, in its discretion, determine the proceedings notwithstanding that neither the parties to the proceedings nor their legal representatives are present in court.

- (2A) The court must not determine proceedings for the dissolution of marriage under subsection (2) if:
- (a) there are any children of the marriage who are under 18; and
 - (b) the court is not satisfied that proper arrangements in all the circumstances have been made for the care, welfare and development of those children.
- (2B) The court may determine proceedings under subsection (1) or (2) in chambers.
- (3) For the purposes of this section, a child (including an ex-nuptial child of either the husband or the wife, a child adopted by either of them or a child who is not a child of either of them) is a child of the marriage if the child was treated by the husband and wife as a child of their family at the relevant time.
- (4) For the purposes of subsection (3), the relevant time is the time immediately before the time when the husband and wife separated or, if they have separated on more than one occasion, the time immediately before the time when they last separated before the institution of the proceedings for dissolution of the marriage.

100 Evidence of husbands and wives

- (1) The parties to proceedings under this Act are competent and compellable witnesses.
- (2) In proceedings under this Act, the parties to a marriage are competent and compellable to disclose communications made between them during the marriage.
- (3) Subsection (2) applies to communications made before, as well as to communications made after, the date of commencement of this Act.

Section 100A

100A Evidence of children

- (1) 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 proceedings under Part VII.
- (2) A court may give such weight (if any) as it thinks fit to evidence admitted pursuant to subsection (1).
- (3) This section applies in spite of any other Act or rule of law.
- (4) In this section:

child means a child under 18 years of age.

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

100B Children swearing affidavits, being called as witnesses or being present in court

- (1) A child, other than a child who is or is seeking to become a party to proceedings, must not swear an affidavit for the purposes of proceedings, unless the court makes an order allowing the child to do so.
- (2) A child must not be called as a witness in, or be present during, proceedings in the Family Court, or in another court when exercising jurisdiction under this Act, unless the court makes an order allowing the child to be called as a witness or to be present (as the case may be).
- (3) In this section:

child means a child under 18 years of age.

101 Protection of witnesses

- (1) The court shall forbid the asking of, or excuse a witness from answering, a question that it regards as offensive, scandalous,
-

insulting, abusive or humiliating, unless the court is satisfied that it is essential in the interests of justice that the question be answered.

- (2) The court must forbid an examination of a witness that it regards as oppressive, repetitive or hectoring, or excuse a witness from answering questions asked during such an examination, unless the court is satisfied that it is essential in the interests of justice for the examination to continue or for the questions to be answered.

102 Proof of birth, parentage, death or marriage

In proceedings under this Act, the court may receive as evidence of the facts stated in it a document purporting to be either the original or a certified copy of:

- (a) a certificate, entry or record of a birth, death or marriage alleged to have taken place, whether in Australia or elsewhere; or
(b) an entry in a register of parentage information kept under the law of the Commonwealth or of a State, Territory or prescribed overseas jurisdiction.

102A Restrictions on examination of children

- (1) Subject to this section, where a child is examined without the leave of the court, the evidence resulting from the examination which relates to the abuse of, or the risk of abuse of, the child is not admissible in proceedings under this Act.
- (2) Where a person causes a child to be examined for the purpose of deciding:
- (a) to bring proceedings under this Act involving an allegation that the child has been abused or is at risk of being abused; or
(b) to make an allegation in proceedings under this Act that the child has been abused or is at risk of being abused;
- subsection (1) does not apply in relation to evidence resulting from the first examination which the person caused the child to undergo.
- (3) In considering whether to give leave for a child to be examined, the court must have regard to the following matters:
- (a) whether the proposed examination is likely to provide relevant information that is unlikely to be obtained otherwise;

Section 102B

- (b) the qualifications of the person who proposes to conduct the examination to conduct that examination;
 - (c) whether any distress likely to be caused to the child by the examination will be outweighed by the value of the information that might be obtained from the examination;
 - (d) any distress already caused to the child by any previous examination associated with the proceedings or with related proceedings;
 - (e) any other matter that the court thinks is relevant.
- (4) In proceedings under this Act, a court may admit evidence which is otherwise inadmissible under this section where it is satisfied that:
- (a) the evidence relates to relevant matters on which the evidence already before the court is inadequate; and
 - (b) the court will not be able to determine the proceedings properly unless the evidence is admitted; and
 - (c) the welfare of the child concerned is likely to be served by the admission of the evidence.
- (5) In this section:
- examined*, in relation to a child, means:
- (a) subjected to a medical procedure; or
 - (b) examined or assessed by a psychiatrist or psychologist (other than by a family and child counsellor or welfare officer).

102B Assessors

In any proceedings under this Act (other than prescribed proceedings), the court may, in accordance with the applicable Rules of Court, get an assessor to help it in the hearing and determination of the proceedings, or any part of them or any matter arising under them.

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

102C Testimony

- (1) The court or a Judge may, for the purposes of any proceedings, direct or allow testimony to be given by video link, audio link or other appropriate means.

Note: See also section 102F.
- (2) The testimony must be given on oath or affirmation unless:
 - (a) the person giving the testimony is in a foreign country; and
 - (b) either:
 - (i) the law in force in that country does not permit the person to give testimony on oath or affirmation for the purposes of the proceedings; or
 - (ii) the law in force in that country would make it inconvenient for the person to give testimony on oath or affirmation for the purposes of the proceedings; and
 - (c) the court or a Judge is satisfied that it is appropriate for the testimony to be given otherwise than on oath or affirmation.
- (3) If the testimony is given otherwise than on oath or affirmation, the court or a Judge must give the testimony such weight as the court or the Judge thinks fit in the circumstances.
- (4) The power conferred on the court or a Judge by subsection (1) may be exercised:
 - (a) on the application of a party to the proceedings concerned; or
 - (b) on the court's own initiative or on the Judge's own initiative, as the case may be.
- (5) This section applies whether the person giving testimony is in or outside Australia, but does not allow testimony to be given by a person who is in New Zealand.

Note: See the *Evidence and Procedure (New Zealand) Act 1994*.

Part XI Procedure and evidence

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

Section 102D

102D Appearance of persons

- (1) The court or a Judge may, for the purposes of any proceedings, direct or allow a person to appear before the court or the Judge by way of video link, audio link or other appropriate means.

Note: See also section 102F.

- (2) The power conferred on the court or a Judge by subsection (1) may be exercised:

- (a) on the application of a party to the proceedings concerned; or
(b) on the court's own initiative or on the Judge's own initiative, as the case may be.

- (3) This section applies whether the person appearing is in or outside Australia, but does not apply if the person appearing is in New Zealand.

Note: See the *Evidence and Procedure (New Zealand) Act 1994*.

102E Making of submissions

- (1) The court or a Judge may, for the purposes of any proceedings, direct or allow a person to make a submission to the court or the Judge by way of video link, audio link or other appropriate means.

Note: See also section 102F.

- (2) The power conferred on the court or a Judge by subsection (1) may be exercised:

- (a) on the application of a party to the proceedings concerned; or
(b) on the court's own initiative or on the Judge's own initiative, as the case may be.

- (3) This section applies whether the person making the submission is in or outside Australia, but does not apply if the person making the submission is in New Zealand.

Note: See the *Evidence and Procedure (New Zealand) Act 1994*.

102F Conditions for use of links

Video link

- (1) The court or a Judge must not exercise the power conferred by subsection 102C(1), 102D(1) or 102E(1) in relation to a video link unless the court or the Judge is satisfied that the following conditions are met in relation to the video link:
 - (a) the courtroom is equipped with facilities (for example, television monitors) that enable all eligible persons present in that courtroom to see and hear the person (the *remote person*) who is:
 - (i) giving the testimony; or
 - (ii) appearing; or
 - (iii) making the submission;as the case may be, by way of the video link;
 - (b) the place at which the remote person is located is equipped with facilities (for example, television monitors) that enable all eligible persons present in that place to see and hear each eligible person who is present in the courtroom;
 - (c) such other conditions (if any) as are prescribed by the applicable Rules of Court in relation to the video link;
 - (d) such other conditions (if any) as are imposed by the court or a Judge.
- (2) The conditions that may be prescribed by the applicable Rules of Court in accordance with paragraph (1)(c) include conditions relating to:
 - (a) the form of the video link; and
 - (b) the equipment, or class of equipment, used to establish the link; and
 - (c) the layout of cameras; and
 - (d) the standard of transmission; and
 - (e) the speed of transmission; and
 - (f) the quality of communication.

Part XI Procedure and evidence

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

Section 102F

Audio link

- (3) The court or a Judge must not exercise the power conferred by subsection 102C(1), 102D(1) or 102E(1) in relation to an audio link unless the court or a Judge is satisfied that the following conditions are met in relation to the audio link:
- (a) the courtroom is equipped with facilities (for example, loudspeakers) that enable all eligible persons present in that courtroom to hear the person (the *remote person*) who is:
 - (i) giving the testimony; or
 - (ii) appearing; or
 - (iii) making the submission;as the case may be, by way of the audio link;
 - (b) the place at which the remote person is located is equipped with facilities (for example, loudspeakers) that enable all eligible persons present in that place to hear each eligible person who is present in the courtroom or other place where the court or the Judge is sitting;
 - (c) such other conditions (if any) as are prescribed by the applicable Rules of Court in relation to the audio link;
 - (d) such other conditions (if any) as are imposed by the court or a Judge.
- (4) The conditions that may be prescribed by the applicable Rules of Court in accordance with paragraph (3)(c) include conditions relating to:
- (a) the form of the audio link; and
 - (b) the equipment, or class of equipment, used to establish the audio link; and
 - (c) the standard of transmission; and
 - (d) the speed of transmission; and
 - (e) the quality of communication.

Other appropriate means

- (5) The court or a Judge must not exercise the power conferred by subsection 102C(1), 102D(1) or 102E(1) in relation to appropriate means other than video link or audio link unless the court or the

Section 102G

Judge is satisfied that the following conditions are met in relation to that means:

- (a) the conditions (if any) as are prescribed by the applicable Rules of Court in relation to that other appropriate means;
- (b) such other conditions (if any) as are imposed by the court or the Judge.

Eligible persons

- (6) For the purposes of the application of this section to particular proceedings, *eligible persons* are such persons as the court or the Judge considers should be treated as eligible persons for the purposes of the proceedings.

Meaning of courtroom

- (7) In this section:

courtroom means:

- (a) in relation to a Judge or a court that is not a split court—the courtroom or other place where the Judge or court is sitting;
or
- (b) in relation to a split court—each of the courtrooms or places where the Judges of the split court are sitting.

102G Putting documents to a person

- (1) This section applies if, in the course of an examination or appearance of a person by video link, audio link or other appropriate means in accordance with this Division, it is necessary to put a document to the person.
- (2) A court (that is not a split court) or a Judge may direct or allow the document to be put to the person:
 - (a) if the document is physically present in the courtroom or other place where the court or the Judge is sitting:
 - (i) by causing a copy of the document to be transmitted to the place where the person is located; and
 - (ii) by causing the transmitted copy to be put to the person;
 - or

Part XI Procedure and evidence

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

Section 102H

- (b) if the document is physically present in the place where the person is located:
 - (i) by causing the document to be put to the person; and
 - (ii) by causing a copy of the document to be transmitted to the courtroom or other place where the court or the Judge is sitting.
- (3) A split court may direct or allow the document to be put to the person:
 - (a) if the document is physically present in a courtroom or other place where a Judge of the split court is sitting:
 - (i) by causing a copy of the document to be transmitted to the place where the person is located; and
 - (ii) by causing the transmitted copy to be put to the person; or
 - (b) if the document is physically present in the place where the person is located:
 - (i) by causing the document to be put to the person; and
 - (ii) by causing a copy of the document to be transmitted to each of the courtrooms or other places where the Judges of the split court are sitting.

102H Putting documents to a split court

- (1) If proceedings are before a split court and it is necessary or appropriate to put a document to the court, the court may direct or allow the document to be put to the court:
 - (a) if the document is physically present in a courtroom or other place where a Judge of the split court is sitting:
 - (i) by causing the document to be put to the Judge; and
 - (ii) by causing a copy of the document to be transmitted to each courtroom or other place where the other Judge or Judges of the split court are sitting; and
 - (iii) by causing a copy of the document to be transmitted to such other place where an eligible person is located as the court directs; or
 - (b) if the document is not physically present in a courtroom or other place where a Judge of the split court is sitting:

- (i) by causing a copy of the document to be transmitted to each of the courtrooms or other places where the Judges of the split court are sitting; and
- (ii) by causing a copy of the document to be transmitted to such other place where an eligible person is located as the court directs.

Eligible persons

- (2) For the purposes of the application of this section to particular proceedings, *eligible persons* are such persons as the court considers should be treated as eligible persons for the purposes of the proceedings.

102J Administration of oaths and affirmations

- (1) An oath to be sworn, or an affirmation to be made, by a person (the *remote person*) who is to give testimony by video link, audio link or other appropriate means in accordance with this Division may be administered:
 - (a) by means of the video link or audio link, as the case may be, in a way that, as nearly as practicable, corresponds to the way in which the oath or affirmation would be administered if the remote person were to give testimony in the courtroom or other place where the court or the Judge is sitting; or
 - (b) if the court or the Judge allows another person who is present at the place where the remote person is located to administer the oath or affirmation—by that other person.

- (2) In this section:

courtroom or other place where the court or the Judge is sitting, in relation to a split court, means the courtroom or other place where the presiding Judge of the split court is sitting.

102K Expenses

- (1) The court or a Judge may make such orders as the court or the Judge thinks just for the payment of expenses, including the court's expenses, incurred in connection with:

Part XI Procedure and evidence

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

Section 102L

- (a) the giving of testimony by video link, audio link or other appropriate means in accordance with this Division; or
- (b) the appearance of a person by video link, audio link or other appropriate means in accordance with this Division; or
- (c) the making of submissions by video link, audio link or other appropriate means in accordance with this Division; or
- (d) the court sitting as a split court in accordance with this Division and Division 3.

(2) Subsection (1) has effect subject to the regulations.

102L New Zealand proceedings

This Division does not affect the operation of the *Evidence and Procedure (New Zealand) Act 1994*.

Division 3—Split court

102M Determination that there is to be a split court

- (1) If proceedings are to be heard and determined by 2 or more Judges, then a directing Judge may determine:
 - (a) that the Family Court is to be a split court; and
 - (b) which form of electronic communication is to be used to facilitate the proceedings.
- (2) In subsection (1):

directing Judge means:

- (a) the Chief Justice; or
- (b) the Presiding Judge in respect of the proceedings.

electronic communication means:

- (a) video link; or
- (b) audio link; or
- (c) other appropriate means of communication.

102N Conditions for split court

Conditions to be satisfied before direction under section 102M may be given

- (1) A direction must not be made under subsection 102M(1) in respect of facilitating the sitting of a split court by a form of electronic communication unless the directing Judge is satisfied:
 - (a) that each courtroom is equipped with facilities that enable eligible persons present in the courtroom to communicate with eligible persons present in the other courtrooms:
 - (i) using the particular form of electronic communication; and
 - (ii) as required by the proceedings before the court; and
 - (b) that such conditions of a kind referred to in section 102F (if any) as are prescribed by the Rules of Court in relation to the particular form of electronic communication are met.

Section 102N

Judges may impose own conditions

- (2) Each Judge of the split court may, in relation to the Judge's courtroom, impose such other conditions in respect of the form of electronic communication to be used to facilitate the split court as the Judge considers appropriate.

Eligible persons

- (3) For the purposes of the application of this section to particular proceedings, *eligible persons* are such persons as a Judge of the split court considers should be treated as eligible persons for the purposes of the proceedings as facilitated in the Judge's courtroom.

- (4) In this section:

communicate with, in relation to eligible persons, means:

- (a) in the case of video link—seeing and hearing the eligible persons; and
- (b) in the case of audio link—hearing the eligible persons; and
- (c) in the case of other appropriate means of communication—as provided for in the applicable Rules of Court.

courtroom means the courtroom or other place where a Judge of the split court is sitting.

electronic communication means:

- (a) video link; or
- (b) audio link; or
- (c) other appropriate means of communication.

Part XII—Recognition of decrees

103 Decrees under this Act

A decree under this Act has effect throughout Australia and the external Territories.

104 Overseas decrees

(1) In this section:

applicant, in relation to the dissolution or annulment of a marriage or the legal separation of the parties to a marriage, means:

- (a) the party at whose instance the dissolution, annulment or legal separation was effected; or
- (b) where the dissolution, annulment or legal separation was effected at the instance of both the parties—each of the parties.

marriage includes a purported marriage that is void.

relevant date, in relation to the dissolution or annulment of a marriage or the legal separation of the parties to a marriage, means the date of the institution of the proceedings that resulted in the dissolution, annulment or legal separation.

respondent, in relation to the dissolution or annulment of a marriage or the legal separation of the parties to a marriage, means a party to the marriage, not being a party at whose instance the dissolution, annulment or legal separation was effected.

(2) For the purposes of this section, a person who is a national of a country of which an overseas jurisdiction forms part shall be deemed to be a national of that overseas jurisdiction.

Section 104

- (3) A dissolution or annulment of a marriage, or the legal separation of the parties to a marriage, effected in accordance with the law of an overseas jurisdiction shall be recognized as valid in Australia where:
- (a) the respondent was ordinarily resident in the overseas jurisdiction at the relevant date;
 - (b) the applicant or, in a case referred to in paragraph (b) of the definition of *applicant* in subsection (1), one of the applicants, was ordinarily resident in the overseas jurisdiction at the relevant date and either:
 - (i) the ordinary residence of the applicant or of that applicant, as the case may be, had continued for not less than 1 year immediately before the relevant date; or
 - (ii) the last place of cohabitation of the parties to the marriage was in that jurisdiction;
 - (c) the applicant or the respondent or, in a case referred to in paragraph (b) of the definition of *applicant* in subsection (1), one of the applicants, was domiciled in the overseas jurisdiction at the relevant date;
 - (d) the respondent was a national of the overseas jurisdiction at the relevant date;
 - (e) the applicant or, in a case referred to in paragraph (b) of the definition of *applicant* in subsection (1), one of the applicants, was a national of the overseas jurisdiction at the relevant date and either:
 - (i) the applicant or that applicant, as the case may be, was ordinarily resident in that jurisdiction at that date; or
 - (ii) the applicant or that applicant, as the case may be, had been ordinarily resident in that jurisdiction for a continuous period of 1 year falling, at least in part, within the period of 2 years immediately before the relevant date; or
 - (f) the applicant or, in a case referred to in paragraph (b) of the definition of *applicant* in subsection (1), one of the applicants, was a national of, and present in, the overseas jurisdiction at the relevant date and the last place of cohabitation of the parties to the marriage was an overseas jurisdiction the law of which, at the relevant date, did not provide for dissolution of marriage, annulment of marriage or

the legal separation of the parties to a marriage, as the case may be.

- (4) A dissolution or annulment of a marriage, or the legal separation of the parties to a marriage, shall not be recognized as valid by virtue of subsection (3) where:
- (a) under the common law rules of private international law, recognition of its validity would be refused on the ground that a party to the marriage had been denied natural justice; or
 - (b) recognition would manifestly be contrary to public policy.
- (5) Any dissolution or annulment of a marriage, or any legal separation of the parties to a marriage, that would be recognized as valid under the common law rules of private international law but to which none of the preceding provisions of this section applies shall be recognized as valid in Australia, and the operation of this subsection shall not be limited by any implication from those provisions.
- (6) Notwithstanding anything contained in this section, the annulment in accordance with the law of an overseas jurisdiction of a marriage solemnized under Part V of the *Marriage Act 1961*, being an annulment on the ground only of non-compliance with the formalities prescribed by the law of the jurisdiction in which the marriage was solemnized, shall not be recognized as valid in Australia.
- (7) For the purposes of this section, a court in Australia, in considering the validity of a dissolution or annulment of a marriage, or a legal separation of the parties to a marriage, effected under a law of an overseas jurisdiction:
- (a) where the respondent appeared in the proceedings for the dissolution, annulment or separation:
 - (i) is bound by the findings of fact on the basis of which a court of the overseas jurisdiction assumed jurisdiction to grant the dissolution, annulment or separation; and
 - (ii) may treat as proved any other facts found by a court of the overseas jurisdiction or otherwise established for the purposes of the law of the overseas jurisdiction; or

Section 104A

- (b) where the respondent did not appear in the proceedings for the dissolution, annulment or separation—may treat as proved any facts found by a court of the overseas jurisdiction or otherwise established for the purposes of the law of the overseas jurisdiction.
- (8) For the purposes of the preceding provisions of this section but without limiting the operation of those provisions, a dissolution or annulment of a marriage, or the legal separation of the parties to a marriage, shall be deemed to have been effected in accordance with the law of an overseas jurisdiction if it was effected in another overseas jurisdiction in circumstances in which, at the relevant date, it would have been recognized as valid by the law of the first-mentioned overseas jurisdiction.
- (9) Where a dissolution or annulment of a marriage is to be recognized as valid in accordance with this section, the capacity of a party to that marriage to re-marry in accordance with the law of Australia is not affected by the fact that the validity of the dissolution or annulment is not recognized under the law of some other jurisdiction.
- (10) The preceding provisions of this section apply in relation to dissolutions, annulments and legal separations effected whether by decree, legislation or otherwise, whether before or after the commencement of this Act, and, for the purposes of this section, any decree, legislation or other process by which it is established that a purported marriage was or is to become void shall be deemed to be an annulment of the marriage.

104A Recognition in external Territories

- (1) In this section:

external Territory does not include Norfolk Island.

overseas jurisdiction does not include an external Territory.

Section 104A

- (2) A dissolution or annulment of a marriage, or the legal separation of the parties to a marriage, effected in accordance with the law of an overseas jurisdiction that is recognised as valid in Australia shall be recognised as valid in every external Territory.
- (3) A dissolution or annulment of a marriage, or the legal separation of the parties to a marriage, effected in accordance with the law of an external Territory that is recognised as valid in Australia shall be recognised as valid in every other external Territory.

Part XIII—Enforcement of decrees

105 Enforcement generally

- (1) Subject to this Part, to the regulations and to the applicable Rules of Court, all decrees made under this Act may be enforced by any court having jurisdiction under this Act.

Note: For example, the Federal Magistrates Court can enforce decrees made by the Family Court of Australia.

- (2) Except as prescribed, a court shall not entertain a proceeding under this Act for the enforcement of a decree made by another court unless the decree is registered in the first-mentioned court in accordance with the regulations.
- (2A) Subsection (2) does not prevent a court from making an order under paragraph 90KA(c).
- (3) Where a person bound by a decree made under this Act has died, the decree may, by leave of:
- (a) the court by which it was made; or
 - (b) any court in which the decree has been registered in accordance with the regulations (whether the decree was registered before or after the death of the person);
- and on such terms and conditions as the court considers appropriate, be enforced, in respect of liabilities that arose under the decree before the death of that person, against the estate of that person.

106 Maintenance orders—more than 12 months in arrears

In determining whether to make an order enforcing a maintenance order, a court must not require that there be special circumstances that justify enforcing the maintenance order merely because the maintenance payable under it is more than 12 months in arrears.

106A Execution of instruments by order of court

- (1) If:
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Section 106B

- (a) an order under this Act has directed a person to execute a deed or instrument; and
- (b) that person has refused or neglected to comply with the direction or, for any other reason, the court considers it necessary to exercise the powers of the court under this subsection;

the court may appoint an officer of the court or other person to execute the deed or instrument in the name of the person to whom the direction was given and to do all acts and things necessary to give validity and operation to the deed or instrument.

(2) If:

- (a) a provision of a maintenance agreement that has been registered under section 86 or approved by a court under section 87 requires a person to execute a deed or instrument; and
- (b) that person has refused or neglected to comply with that provision of the maintenance agreement or, for any other reason, the court considers it necessary to exercise the powers of the court under this subsection;

the court may appoint an officer of the court or other person to execute the deed or instrument in the name of the person required by that provision of the maintenance agreement to execute the deed or instrument and to do all acts and things necessary to give validity and operation to the deed or instrument.

- (3) The execution of a deed or instrument by a person appointed under this section to execute that deed or instrument has the same force and validity as if the deed or instrument had been executed by the person directed by an order referred to in paragraph (1)(a), or required by a provision of a maintenance agreement referred to in paragraph (2)(a), to execute it.
- (4) The court may make such order as it considers just as to the payment of the costs and expenses of and incidental to the preparation of the deed or instrument and its execution.

106B Transactions to defeat claims

- (1) In proceedings under this Act, the court may set aside or restrain the making of an instrument or disposition by or on behalf of, or by

Section 107

direction or in the interest of, a party, which is made or proposed to be made to defeat an existing or anticipated order in those proceedings or which, irrespective of intention, is likely to defeat any such order.

- (2) The court may order that any money or real or personal property dealt with by any such instrument or disposition may be taken in execution or charged with the payment of such sums for costs or maintenance as the court directs, or that the proceeds of a sale must be paid into court to abide its order.
- (3) The court must have regard to the interests of, and shall make any order proper for the protection of, a bona fide purchaser or other person interested.
- (4) A party or a person acting in collusion with a party may be ordered to pay the costs of any other party or of a bona fide purchaser or other person interested of and incidental to any such instrument or disposition and the setting aside or restraining of the instrument or disposition.
- (4A) In addition to the powers the court has under this section, the court may also do any or all of the things listed in subsection 80(1).
- (5) In this section:

disposition includes a sale and a gift.

107 People not to be imprisoned for failure to comply with certain orders

- (1) A person must not be imprisoned or otherwise placed in custody because of a contravention of an order for the payment of money made in a matrimonial cause.
- (2) This section does not affect the operation of:
 - (a) Division 13A of Part VII; or
 - (b) Part XIII A; or
 - (c) Part XIII B.

109 Inter-State enforcement of child bearing expenses order

- (1) This section applies to the following orders made under the law of a State or Territory:
 - (a) orders of a kind that may be made under section 67D;
 - (b) orders for the payment of an amount in relation to the maintenance of a child.
- (2) The regulations may make provision for and in relation to the enforcement in a State or Territory by a court having jurisdiction under this Act of orders to which this section applies made by a court in another State or Territory.

109A Rules of Court relating to enforcement

- (1) The power of the Judges, or a majority of them, under section 123 to make Rules of Court extends to making Rules of Court for or in relation to, or for or in relation to anything incidental to, the enforcement by the court of:
 - (a) an order under this Act affecting children (within the meaning of Division 13A of Part VII); or
 - (b) an order under this Act (within the meaning of Part XIII A); or
 - (c) the *Child Support (Registration and Collection) Act 1988*; or
 - (d) the *Child Support (Assessment) Act 1989*;and, in particular, for or in relation to any of the specific matters mentioned in subsection (2).
- (2) The specific matters are as follows:
 - (a) requiring a person to do any one or more of the following:
 - (i) to attend before a court or Registrar and answer questions or produce documents;
 - (ii) to deliver a document or article to, or to a person specified by, a court or Registrar;
 - (iii) to transfer the ownership of specified property to another person;
 - (iv) to give another person possession (including exclusive possession) of specified property;
 - (v) to deliver a specified chattel to another person;

Section 109A

- (vi) to do, or abstain from doing, any other act;
 - (b) prescribing the practice and procedure to be followed for a hearing before a court or Registrar for the purpose of giving effect to a requirement made as mentioned in subparagraph (a)(i);
 - (c) taking any one or more of the actions mentioned in subsection (3) in respect of a person who:
 - (i) fails to pay the amount of a fine imposed under Division 13A of Part VII or under Part XIII A; or
 - (ii) fails to pay an amount payable under a bond entered into under Division 13A of Part VII or under Part XIII A; or
 - (iii) fails to pay under section 66L an amount of maintenance for a person over the age of 18 years; or
 - (iv) fails to pay an amount payable under a registered maintenance liability under the *Child Support (Registration and Collection) Act 1988* or the *Child Support (Assessment) Act 1989*; or
 - (v) fails to comply with a requirement made as mentioned in paragraph (a);
 - (d) delegating to a Registrar all or any of the powers conferred on a court under Rules of Court made under this section.
- (3) Subject to subsection (4), the actions in respect of a person the taking of which may be provided for by Rules of Court as mentioned in paragraph (2)(c) are as follows:
- (a) the issue of a warrant for the arrest of the person;
 - (b) the issue of a warrant of execution against property of the person;
 - (c) the making of an order authorising the taking of possession of property of the person;
 - (d) the making of an order for the sequestration, and if necessary the sale, of property of the person;
 - (e) the making of an order for the attachment, by garnishment or attachment of earnings, of debts owed to the person;
 - (f) the appointment of a receiver of property of the person.
- (4) A reference in paragraph (2)(c) to a failure to pay an amount is a reference to any such failure irrespective of the length of the period

Section 109B

during which the failure has continued, and includes a reference to a failure to pay part of an amount.

(5) In this section:

property means real or personal property.

Note: Powers to make Rules of Court are also contained in sections 26B and 37A.

109B Rules of Court relating to enforcement—Federal Magistrates Court

- (1) Section 109A applies to the making of Rules of Court under section 81 of the *Federal Magistrates Act 1999* in a corresponding way to the way in which it applies to the making of Rules of Court under section 123 of this Act.
- (2) For the purposes of the application of section 109A in accordance with subsection (1):
 - (a) the reference in subsection 109A(1) to the court is to be read as a reference to the Federal Magistrates Court; and
 - (b) each reference in subsection 109A(2) to a court is to be read as a reference to the Federal Magistrates Court; and
 - (c) each reference in subsection 109A(2) to a Registrar is to be read as a reference to a Registrar of the Federal Magistrates Court.
- (3) Section 109A has no effect in relation to the Federal Magistrates Court except as provided by subsections (1) and (2) of this section.

Part XIIIAA International conventions, international agreements and international enforcement

Division 1 International maintenance orders and agreements etc.

Section 110

Part XIIIAA—International conventions, international agreements and international enforcement

Division 1—International maintenance orders and agreements etc.

110 Overseas enforcement of maintenance orders etc.

(1) In this section:

jurisdiction with restricted reciprocity means a country, or part of a country, outside Australia declared by the regulations to be a jurisdiction with restricted reciprocity for the purposes of this section.

maintenance order means:

- (a) an order or determination (however described) with respect to the maintenance of a party to a marriage;
- (b) an order or determination (however described) with respect to the maintenance of a child who has not attained the age of 18 years, other than an order or determination of the kind referred to in paragraph (c);
- (c) an order or determination (however described) with respect to the maintenance of a child who has not attained the age of 18 years, being an order or determination that is expressed to continue in force until a day that is later than, or for a period that extends beyond, the day on which the child will attain that age, where the provision of maintenance for the child is necessary to enable the child to complete a course of study, vocational training or an apprenticeship or to continue his education in any other way, or because the child is mentally or physically handicapped;
- (d) an order or determination (however described) with respect to the maintenance of a child who has attained the age of 18 years, being an order or determination that is expressed to continue in force until a day, or for a period, specified in the

order or determination, where the provision of maintenance for the child is necessary to enable the child to complete a course of study, vocational training or an apprenticeship or to continue his education in any other way, or because the child is mentally or physically handicapped; and

- (e) to the extent provided by the regulations, an order made under section 67D, or an order or determination (however described) that deals with matters of a kind in relation to which orders may be made under that section.

reciprocating jurisdiction means a country, or part of a country, outside Australia declared by the regulations to be a reciprocating jurisdiction for the purposes of this section.

- (2) The regulations may make provision for and in relation to:
- (a) the registration in, and enforcement by, courts having jurisdiction under this Act of maintenance orders made by courts or authorities of reciprocating jurisdictions or of jurisdictions with restricted reciprocity;
 - (aa) the institution and prosecution, by an officer of a court having jurisdiction under this Act, a prescribed authority of the Commonwealth, of a State or Territory, or of another country or a part of another country, or a person for the time being holding a prescribed office under a law of the Commonwealth, of a State or of a Territory, in his, her or its discretion, of proceedings:
 - (i) on behalf of the person entitled to moneys payable under a maintenance order made by a court or authority of a reciprocating jurisdiction or of a jurisdiction with restricted reciprocity, for the enforcement by a court having jurisdiction under this Act of that maintenance order; or
 - (ii) for the making of orders for the confirmation of provisional orders made by courts of reciprocating jurisdictions or of jurisdictions with restricted reciprocity, being provisional orders referred to in paragraph (d);
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Section 110

- (ab) the institution and prosecution, by an authority entitled to moneys payable under a maintenance order, in the authority's discretion, of proceedings for the enforcement of that maintenance order by a court having jurisdiction under this Act;
 - (b) the transmission to appropriate courts or authorities of reciprocating jurisdictions or of jurisdictions with restricted reciprocity of maintenance orders made by courts having jurisdiction under this Act for the purpose of securing the enforcement of those orders in those jurisdictions;
 - (ba) the making of provisional maintenance orders, and the transmission of such orders to appropriate courts of reciprocating jurisdictions or jurisdictions with restricted reciprocity, for the purposes of obtaining the confirmation, and securing the enforcement, of those orders in those jurisdictions, and the effect in Australia of those orders;
 - (c) the making of orders (including provisional orders) for the variation, discharge, suspension or revival of maintenance orders registered in accordance with regulations under this section or of maintenance orders or provisional maintenance orders transmitted to other jurisdictions in accordance with regulations under this section, and the effect in Australia of orders under this paragraph;
 - (d) the making of orders for the confirmation of provisional orders made by courts in reciprocating jurisdictions or in jurisdictions with restricted reciprocity, being provisional maintenance orders or provisional orders varying, discharging, suspending or reviving maintenance orders, and the effect in Australia of orders under this paragraph; and
 - (e) the making of orders for giving effect to process certified or approved by a court in the United States of America, being process relating to the provision of maintenance, and the effect in Australia of orders under this paragraph.
- (3) The regulations may make different provision under this section in relation to reciprocating jurisdictions from the provision made in relation to jurisdictions with restricted reciprocity.

110A Registration and enforcement in Australia of overseas maintenance agreements etc.

The regulations may make provision for and in relation to the registration and enforcement in Australia of:

- (a) overseas maintenance agreements; or
- (b) overseas administrative assessments of maintenance liabilities.

110B Transmission of agreements etc. to overseas jurisdictions

The regulations may make provision for and in relation to the transmission, to appropriate courts or authorities of prescribed overseas jurisdictions, of:

- (a) agreements registered under section 86; or
- (b) agreements approved by courts under section 87; or
- (c) financial agreements made as mentioned in subsection 90B(1) that contain matters referred to in paragraph 90B(2)(b); or
- (d) financial agreements made as mentioned in subsection 90C(1) that contain matters referred to in paragraph 90C(2)(b); or
- (e) financial agreements made as mentioned in subsection 90D(1) that contain matters referred to in paragraph 90D(2)(b); or
- (f) administrative assessments of maintenance liabilities;

for the purpose of securing the enforcement of those agreements or assessments in those jurisdictions.

111 Convention on Recovery Abroad of Maintenance

The regulations may make such provision as is necessary or convenient to enable the performance of the obligations of Australia, or to obtain for Australia any advantage or benefit, under the Convention on the Recovery Abroad of Maintenance signed at New York on 20 June 1956 but any such regulations shall not come into operation until the day on which that Convention enters into force for Australia.

Part XIII International conventions, international agreements and international enforcement

Division 1 International maintenance orders and agreements etc.

Section 111A

111A Convention on Recognition and Enforcement of Decisions Relating to Maintenance Obligations

The regulations may make such provision as is necessary or convenient to enable the performance of the obligations of Australia, or to obtain for Australia any advantage or benefit, under the Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations signed at The Hague on 2 October 1973 but any such regulations shall not come into operation until the day on which that Convention enters into force for Australia.

Division 2—International child abduction

111B Convention on the Civil Aspects of International Child Abduction

- (1) The regulations may make such provision as is necessary or convenient to enable the performance of the obligations of Australia, or to obtain for Australia any advantage or benefit, under the Convention on the Civil Aspects of International Child Abduction signed at The Hague on 25 October 1980 (the *Convention*) but any such regulations shall not come into operation until the day on which that Convention enters into force for Australia.
- (1A) In relation to proceedings under regulations made for the purposes of subsection (1), the regulations may make provision:
 - (a) relating to the onus of establishing that a child should not be returned under the Convention; and
 - (b) establishing rebuttable presumptions in favour of returning a child under the Convention; and
 - (c) relating to a Central Authority within the meaning of the regulations applying on behalf of another person for a contact order in relation to a child if the outcome of the proceedings is that the child is not to be returned under the Convention.
- (1B) The regulations made for the purposes of this section must not allow an objection by a child to return under the Convention to be taken into account in proceedings unless the objection imports a strength of feeling beyond the mere expression of a preference or of ordinary wishes.
- (1C) A Central Authority within the meaning of the regulations may arrange to place a child, who has been returned to Australia under the Convention, with an appropriate person, institution or other body to secure the child's welfare until a court exercising jurisdiction under this Act makes an order (including an interim order) for the child's care, welfare or development.
- (1D) A Central Authority may do so despite any orders made by a court before the child's return to Australia.

Section 111B

- (1E) Any regulations made for the purposes of this section to give effect to Article 21 (rights of access) of the Convention may have effect regardless of:
- (a) whether an order or determination (however described) has been made under a law in force in another Convention country (within the meaning of the regulations made for the purposes of this section), with respect to rights of access to the child concerned; or
 - (b) if the child was removed to Australia—when that happened; or
 - (c) whether the child has been wrongfully removed to, or retained in, Australia.
- (2) Because of amendments of this Act made by the *Family Law Reform Act 1995*:
- (a) a parent or guardian of a child is no longer expressly stated to have custody of the child; and
 - (b) a court can no longer make an order under this Act expressed in terms of granting a person custody of, or access to, a child.
- (3) The purpose of subsection (4) is to resolve doubts about the implications of these changes for the Convention. That is the only purpose of the subsection.
- (4) For the purposes of the Convention:
- (a) each of the parents of a child should be regarded as having rights of custody in respect of the child unless the parent has no parental responsibility for the child because of any order of a court for the time being in force; and
 - (b) subject to any order of a court for the time being in force, a person who has a parenting order in relation to a child that is to any extent:
 - (i) a residence order; or
 - (ii) a specific issues order, under which the person is responsible for the day-to-day or long-term care, welfare and development of the child;should be regarded as having rights of custody in respect of the child; and
 - (c) subject to any order of a court for the time being in force, a person who has parental responsibility for a child because of
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Section 111B

the operation of this Act or another Australian law and is responsible for the day-to-day or long-term care, welfare and development of the child should be regarded as having rights of custody in respect of the child; and

- (d) subject to any order of a court for the time being in force, a person who has a contact order in relation to a child should be regarded as having a right of access to the child.

Note: The references in paragraphs (b) and (d) to residence orders, specific issues orders and contact orders also cover provisions of parenting agreements registered under section 63E (see section 63F, in particular subsection (3)).

- (5) Subsection (4) is not intended to be a complete statement of the circumstances in which, under the laws of the Commonwealth, the States and the Territories, a person has, for the purposes of the Convention, custody of, or access to, a child, or a right or rights of custody or access in relation to a child.
- (5A) Subsections (1A) and (2) to (5) do not, by implication, limit subsection (1).
- (6) Expressions used in this section have the same meaning as they have in Part VII.

Part XIII International conventions, international agreements and international enforcement

Division 3 International agreements about adoption etc.

Section 111C

Division 3—International agreements about adoption etc.

111C International agreements about adoption etc.

- (1) The regulations may make such provision as is necessary or convenient to enable the performance of the obligations of Australia, or to obtain for Australia any advantage or benefit, under the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption signed at The Hague on 29 May 1993.
- (2) The regulations do not come into force until the day on which the Convention enters into force for Australia.
- (3) The regulations may make such provision as is necessary or convenient to give effect to any bilateral agreement or arrangement on the adoption of children made between:
 - (a) Australia, or a State or Territory of Australia; and
 - (b) a prescribed overseas jurisdiction.
- (4) Regulations made for the purposes of subsection (3) may, in particular:
 - (a) provide for the recognition of adoptions made under a law of the prescribed overseas jurisdiction; and
 - (b) provide that the regulations do not affect the operation of laws of a State or Territory that relate to adoptions; and
 - (c) if a State or Territory has made such a bilateral agreement or arrangement on behalf of other States or Territories—give effect to the agreement or arrangement so far as it relates to all of those States or Territories, or to such of them as the regulations specify.
- (5) Regulations made for the purposes of this section may:
 - (a) confer jurisdiction on a federal court (other than the High Court) or a court of a Territory; or
 - (b) invest a court of a State with federal jurisdiction.

Such jurisdiction is in addition to any other jurisdiction provided for under this Act.

Section 111C

- (6) Regulations made for the purposes of subsection (5) may make different provision in respect of matters arising in relation to different States or Territories. (This subsection does not, by implication, limit subsection 33(3A) of the *Acts Interpretation Act 1901*.)
- (7) Subsections (4), (5) and (6) of this section do not, by implication, limit subsections (1) and (3) of this section.
- (7A) The power of the Judges, or a majority of them, under section 123 to make Rules of Court extends to making Rules of Court for or in relation to the making of adoption orders.
- (8) In this section, despite subsection 4(1), **Territory** includes each external Territory.

Division 4—International protection of children

Subdivision A—Preliminary

111CA Definitions

- (1) In this Division:

another country means a Convention country or a non-Convention country.

Australia includes the external Territories.

central authority of a Convention country means:

- (a) if there is one central authority of the Convention country under Article 29 of the Child Protection Convention—the Convention country's central authority; or
- (b) otherwise—the central authority designated, under Article 29 of the Child Protection Convention, as the Convention country's central authority to which any communication may be addressed for transmission to the appropriate central authority of the Convention country.

Child Protection Convention means the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children signed at The Hague on 19 October 1996, a copy of the English text of which is set out in Schedule 1.

Commonwealth central authority means the Secretary of the Attorney-General's Department.

Commonwealth personal protection measure relating to a child means a measure (within the meaning of the Child Protection Convention) under this Act that is directed to the protection of the person of the child.

Commonwealth property protection measure relating to a child means a measure (within the meaning of the Child Protection

Convention) under this Act for appointing, or deciding the powers of, a guardian of the child's property.

competent authority:

- (a) **competent authority** of Australia means an entity that has responsibility or authority under the law in force in Australia, or part of Australia, to take measures or make decisions about:
 - (i) protecting the person of a child; or
 - (ii) appointing or deciding the powers of a guardian of a child's property; and
- (b) **competent authority** of a Convention country means an entity that has responsibility or authority under the law in force in the Convention country to take, or make decisions about, a foreign measure relating to a child; and
- (c) **competent authority** of a non-Convention country means an entity that has responsibility or authority under the law in force in the country to take measures or make decisions about:
 - (i) protecting the person of a child; or
 - (ii) appointing or deciding the powers of a guardian of a child's property.

Convention country means a country, other than Australia, for which the Child Protection Convention has entered into force.

country of refuge of a child means a country in which the child is present as a refugee child.

entity includes the following:

- (a) an individual;
- (b) a corporation;
- (c) an unincorporated body;
- (d) a government authority or body;
- (e) a court or tribunal.

foreign measure means:

- (a) a foreign personal protection measure; or
- (b) a foreign property protection measure.

Section 111CB

foreign personal protection measure relating to a child means a measure (within the meaning of the Child Protection Convention) taken by a competent authority of a Convention country for protecting the person of the child.

foreign property protection measure relating to a child means a measure (within the meaning of the Child Protection Convention) taken by a competent authority of a Convention country for appointing, or deciding the powers of, a guardian of the child's property.

non-Convention country means a country for which the Child Protection Convention has not entered into force.

parental responsibility has the same meaning as in the Child Protection Convention.

refugee child means a child:

- (a) who is a refugee; or
- (b) who is internationally displaced due to disturbances occurring in his or her country of habitual residence; or
- (c) whose country of habitual residence cannot be determined.

Territory includes each external Territory.

- (2) Unless the contrary intention appears, expressions used:
 - (a) in this Division; or
 - (b) in regulations made for the purposes of this Division;have the same meaning as they have in the Child Protection Convention.

111CB Relationship between this Division and other provisions

- (1) This Division has effect despite the rest of this Act, except sections 69ZK and 111B and the regulations made for the purposes of section 111B.
- (2) This Division, except section 111CZ, has effect subject to sections 69ZK and 111B and the regulations made for the purposes of section 111B.

- (3) Section 111CZ, and regulations made for the purposes of that section, have effect despite section 69ZK.

Subdivision B—Jurisdiction for the person of a child

111CC Application of this Subdivision

This Subdivision applies only if an issue under this Act is whether a court, as opposed to any of the following authorities, has jurisdiction to take measures directed to the protection of the person of a child:

- (a) a central authority or competent authority of a Convention country;
- (b) a competent authority of a non-Convention country.

111CD Jurisdiction relating to the person of a child

- (1) A court may exercise jurisdiction for a Commonwealth personal protection measure only in relation to:
- (a) a child who is present and habitually resident in Australia; or
 - (b) a child who is present in Australia and habitually resident in a Convention country, if:
 - (i) the child's protection requires taking the measure as a matter of urgency; or
 - (ii) the measure is provisional and limited in its territorial effect to Australia; or
 - (iii) the child is a refugee child; or
 - (iv) a request to assume jurisdiction is made to the court by, or at the invitation of, a competent authority of the country of the child's habitual residence; or
 - (v) a competent authority of the country of the child's habitual residence agrees to the court assuming jurisdiction; or
 - (vi) the court is exercising jurisdiction in proceedings concerning the divorce or separation of the child's parents or the annulment of their marriage (but see subsection (3)); or
 - (c) a child who is present in a Convention country, if:

Section 111CD

- (i) the child is habitually resident in Australia; or
 - (ii) the child has been wrongfully removed from or retained outside Australia and the court keeps jurisdiction under Article 7 of the Child Protection Convention; or
 - (iii) a request to assume jurisdiction is made to the court by, or at the invitation of, a competent authority of the country of the child's habitual residence or country of refuge; or
 - (iv) a competent authority of the country of the child's habitual residence or country of refuge agrees to the court assuming jurisdiction; or
 - (v) the child is habitually resident in a Convention country and the court is exercising jurisdiction in proceedings concerning the divorce or separation of the child's parents or the annulment of their marriage (but see subsection (3)); or
 - (d) a child who is present in Australia and is a refugee child; or
 - (e) a child who is present in a non-Convention country, if:
 - (i) the child is habitually resident in Australia; and
 - (ii) any of paragraphs 69E(1)(b) to (e) applies to the child; or
 - (f) a child who is present in Australia, if:
 - (i) the child is habitually resident in a non-Convention country; and
 - (ii) any of paragraphs 69E(1)(b) to (e) applies to the child.
- (2) A court may only exercise jurisdiction in accordance with subparagraph (1)(b)(ii) if the measure is not incompatible with a foreign measure already taken by a competent authority of a Convention country under Articles 5 to 10 of the Child Protection Convention.
- (3) A court may only exercise jurisdiction in accordance with subparagraph (1)(b)(vi) or (c)(v) for a Commonwealth personal protection measure relating to a child if:
 - (a) one or both of the child's parents are habitually resident in Australia when the proceedings referred to in that subparagraph begin; and

Section 111CE

- (b) one or both of the parents have parental responsibility for the child; and
 - (c) the jurisdiction of the court to take the measure is accepted by the parents and each other person with parental responsibility for the child; and
 - (d) the exercise of jurisdiction to take the measure is in the best interests of the child; and
 - (e) the proceedings on the application for divorce or separation of the child's parents or the annulment of their marriage have not been finalised.
- (4) Paragraphs 111CD(1)(a) to (d) are subject to the limitations in sections 111CE, 111CF and 111CH.

111CE Limitation when a child is wrongfully removed from or retained outside a Convention country

A court must not, other than in a case of urgency, exercise jurisdiction in accordance with paragraph 111CD(1)(a), (b), (c) or (d) to take a Commonwealth personal protection measure relating to a child if:

- (a) the child has been wrongfully removed from or retained outside a Convention country; and
- (b) an authority of the Convention country keeps jurisdiction under Article 7 of the Child Protection Convention.

111CF Limitations when prior proceedings pending in a Convention country

- (1) This section applies to the exercise of jurisdiction by a court in accordance with paragraph 111CD(1)(a), subparagraph 111CD(1)(b)(iii), (iv), (v) or (vi) or paragraph 111CD(1)(c) or (d).
- (2) The court must not exercise that jurisdiction to take a Commonwealth personal protection measure relating to a child if:
 - (a) a corresponding measure has been sought from a competent authority of a Convention country at the time of commencement of the proceedings before the court; and
 - (b) any of the following applies:

Section 111CF

- (i) the child is habitually resident in the Convention country;
 - (ii) the child is present in the Convention country and is a refugee child;
 - (iii) a request to assume jurisdiction is made to the competent authority of the Convention country by, or at the invitation of, a competent authority of the country of the child's habitual residence or country of refuge;
 - (iv) a competent authority of the country of the child's habitual residence or country of refuge agrees to the competent authority of the Convention country assuming jurisdiction;
 - (v) the competent authority of the Convention country is exercising jurisdiction in proceedings concerning the divorce or separation of the child's parents or the annulment of their marriage (but see subsection (3));
 - (vi) the child has been wrongfully removed from or retained outside the Convention country and a competent authority of the Convention country keeps jurisdiction under Article 7 of the Child Protection Convention.
- (3) Subparagraph (2)(b)(v) only applies (subject to subsection (4)) if:
- (a) one or both of the child's parents are habitually resident in the Convention country when the proceedings referred to in that subparagraph commence; and
 - (b) one or both of the parents has parental responsibility for the child; and
 - (c) the jurisdiction of the competent authority of the Convention country to take the measure is accepted by the parents and each other person with parental responsibility for the child; and
 - (d) the exercise of jurisdiction to take the measure is in the best interests of the child; and
 - (e) the proceedings on the application for divorce or separation of the child's parents or the annulment of their marriage have not been finalised.
- (4) Subsection (2) does not apply if the competent authority of the Convention country has declined jurisdiction or is no longer considering taking the measure sought.
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111CG If a court is asked to assume jurisdiction

- (1) A court may, if it considers that it is in the child's best interests, accept or reject a request made under Article 8 of the Child Protection Convention by, or at the invitation of, a competent authority of a Convention country for the court to assume jurisdiction to take a Commonwealth personal protection measure relating to the child.
- (2) A court may order, or invite the parties to proceedings before the court to ask, the Commonwealth central authority to do both of the following in a way that the Commonwealth central authority considers appropriate:
 - (a) to request, under Article 9 of the Child Protection Convention, that a competent authority of a Convention country agree to the court assuming jurisdiction to take a Commonwealth personal protection measure relating to the child;
 - (b) to report to the court about the outcome of the request.
- (3) The court may only make the order or issue the invitation under subsection (2) if it considers that it is better placed than the competent authority to assess the child's best interests.

111CH Limitation if a competent authority of a Convention country is asked to assume jurisdiction

- (1) The court may order, or invite the parties to proceedings before the court to ask the Commonwealth central authority, in a way the Commonwealth central authority considers appropriate, to request a competent authority described in Article 8, paragraph 2, of the Child Protection Convention:
 - (a) to assume jurisdiction under Article 8 of the Convention for protecting the person of the child; and
 - (b) as the competent authority considers necessary, to take measures to protect the person of the child; and
 - (c) to report to the court about the outcome of the request.
- (2) In addition, the court may make any other order it considers necessary for an order under subsection (1).

Section 111CI

- (3) The court may only make the order or issue the invitation under subsection (1) if the court considers that the competent authority is better placed to assess the child's best interests.
- (4) The court may accept or reject a request under Article 9 of the Child Protection Convention made by, or at the invitation of, a competent authority of a Convention country described in Article 8, paragraph 2 of the Convention, for the competent authority to assume jurisdiction to take a measure for protecting the person of the child.
- (5) If the competent authority assumes jurisdiction under the request, a court must not exercise jurisdiction in accordance with paragraph 111CD(1)(a), subparagraphs 111CD(1)(b)(iii) to (vi), or paragraph 111CD(1)(c) or (d), while the competent authority continues to exercise its jurisdiction.

111CI When a certain Commonwealth personal protection measure lapses

- (1) A Commonwealth personal protection measure relating to a child that is taken by a court exercising jurisdiction in accordance with subparagraph 111CD(1)(b)(i) or (ii) lapses if:
 - (a) a foreign personal protection measure relating to the child is taken by a competent authority of a Convention country; and
 - (b) any of the following applies:
 - (i) the child is habitually resident in the Convention country;
 - (ii) the child is present in the Convention country and is a refugee child;
 - (iii) a request to assume jurisdiction is made to the competent authority of the Convention country by, or at the invitation of, a competent authority of the country of the child's habitual residence;
 - (iv) a competent authority of the country of the child's habitual residence agrees to the competent authority of the Convention country assuming jurisdiction;
 - (v) a competent authority of the Convention country is exercising jurisdiction in proceedings concerning the

divorce or separation of the child's parents or the annulment of their marriage (but see subsection (2));

- (vi) the child has been wrongfully removed from or retained outside the Convention country and a competent authority of the Convention country keeps jurisdiction under Article 7 of the Child Protection Convention.

(2) Subparagraph (1)(b)(v) only applies if:

- (a) one or both of the child's parents are habitually resident in the Convention country when the proceedings referred to in that subparagraph are started; and
- (b) one or both of the parents has parental responsibility for the child; and
- (c) the jurisdiction of the competent authority of the Convention country to take the measure is accepted by the parents and each other person with parental responsibility for the child; and
- (d) the exercise of jurisdiction to take the measure is in the best interests of the child; and
- (e) the proceedings on the application for divorce or separation of the child's parents or the annulment of their marriage have not been finalised.

(3) A Commonwealth personal protection measure relating to a child that is taken by a court exercising jurisdiction in a case of urgency, or in the taking of a measure of a provisional character, lapses if:

- (a) a measure required by the situation for protecting the person of the child is taken by a competent authority of a non-Convention country; and
- (b) the measure is registered:
 - (i) in accordance with regulations made for the purposes of section 70G; or
 - (ii) under a law of a State or Territory.

Section 111CJ

Subdivision C—Jurisdiction for decisions about a guardian of a child’s property

111CJ Application of this Subdivision

This Subdivision applies only if an issue under this Act is whether a court, as opposed to any of the following authorities, has jurisdiction to appoint, or determine the powers of, a guardian of a child’s property:

- (a) a central authority or competent authority of a Convention country;
- (b) a competent authority of a non-Convention country.

111CK Jurisdiction to appoint, or determine the powers of, a guardian for a child’s property

- (1) A court may exercise jurisdiction for a Commonwealth property protection measure only in relation to:
 - (a) a child who is habitually resident in Australia; or
 - (b) a child who is habitually resident in a Convention country, if:
 - (i) the protection of the child’s property in Australia requires taking the measure as a matter of urgency; or
 - (ii) the measure is provisional and limited in its territorial effect to property in Australia; or
 - (iii) a request to assume jurisdiction is made to the court by, or at the invitation of, a competent authority of the country of the child’s habitual residence or country of refuge; or
 - (iv) a competent authority of the country of the child’s habitual residence or country of refuge agrees to the court assuming jurisdiction; or
 - (v) the child has been wrongfully removed from or retained outside Australia and the court keeps jurisdiction under Article 7 of the Child Protection Convention; or
 - (vi) the court is exercising jurisdiction in proceedings concerning the divorce or separation of the child’s parents or the annulment of their marriage (but see subsection (3)); or

Section 111CK

- (c) a child who is present in Australia and is a refugee child; or
 - (d) a child who is present in a non-Convention country, if:
 - (i) the child is habitually resident in Australia; and
 - (ii) any of paragraphs 69E(1)(b) to (e) applies to the child; or
 - (e) a child who is present in Australia, if:
 - (i) the child is habitually resident in a non-Convention country; and
 - (ii) any of paragraphs 69E(1)(b) to (e) applies to the child.
- (2) A court may only exercise jurisdiction in accordance with subparagraph (1)(b)(ii) if the measure is not incompatible with a foreign measure already taken by a competent authority of a Convention country under Articles 5 to 10 of the Child Protection Convention.
- (3) A court may only exercise jurisdiction in accordance with subparagraph (1)(b)(vi) for a Commonwealth property protection measure relating to a child if:
- (a) one or both of the child's parents are habitually resident in Australia when the proceedings referred to in that subparagraph begin; and
 - (b) one or both of the parents have parental responsibility for the child; and
 - (c) the jurisdiction of the court to take the measure is accepted by the parents and each other person with parental responsibility for the child; and
 - (d) the exercise of jurisdiction to take the measure is in the best interests of the child; and
 - (e) the proceedings on the application for divorce or separation of the child's parents or the annulment of their marriage have not been finalised.
- (4) Paragraphs (1)(a) to (c) are subject to the limitations in sections 111CL, 111CM and 111CO.

Section 111CL

111CL Limitation when a child is wrongfully removed from or retained outside a Convention country

A court must not, other than in a case of urgency, exercise jurisdiction in accordance with paragraph 111CK(1)(a), (b) or (c) to take a Commonwealth property protection measure relating to a child if:

- (a) the child has been wrongfully removed from or retained outside a Convention country; and
- (b) an authority of the Convention country keeps jurisdiction under Article 7 of the Child Protection Convention.

111CM Limitations when prior proceedings pending in a Convention country

- (1) This section applies to the exercise of jurisdiction by a court in accordance with paragraph 111CK(1)(a), subparagraph 111CK(1)(b)(iii), (iv), (v) or (vi) or paragraph 111CK(1)(c).
- (2) The court must not exercise that jurisdiction to take a Commonwealth property protection measure relating to a child if:
 - (a) a corresponding measure has been sought from a competent authority of a Convention country at the time of commencement of proceedings before the court; and
 - (b) any of the following applies:
 - (i) the child is habitually resident in the Convention country;
 - (ii) the child is present in the Convention country and is a refugee child;
 - (iii) a request to assume jurisdiction is made to a competent authority of the country of the child's habitual residence or country of refuge;
 - (iv) a competent authority of the country of the child's habitual residence or country of refuge agrees to the competent authority assuming jurisdiction;
 - (v) the competent authority of the Convention country is exercising jurisdiction in proceedings concerning the divorce or separation of the child's parents or the annulment of their marriage (but see subsection (3));

Section 111CN

- (vi) the child has been wrongfully removed from or retained outside the Convention country and a competent authority of the Convention country keeps jurisdiction under Article 7 of the Child Protection Convention.
- (3) Subparagraph (2)(b)(v) only applies (subject to subsection (4)) if:
 - (a) one or both of the child's parents are habitually resident in the Convention country when the proceedings referred to in that subparagraph are commenced; and
 - (b) one or both of the parents have parental responsibility for the child; and
 - (c) the jurisdiction of the competent authority of the Convention country to take the measure is accepted by the parents and each other person with parental responsibility for the child; and
 - (d) the exercise of jurisdiction to take the measure is in the best interests of the child; and
 - (e) the proceedings on the application for divorce or separation of the child's parents or the annulment of their marriage have not been finalised.
- (4) Subsection (2) does not apply if the competent authority of the Convention country has declined jurisdiction or is no longer considering taking the measure sought.

111CN If a court is asked to assume jurisdiction

- (1) A court may, if it considers that it is in the child's best interests, accept or reject a request made under Article 8 of the Child Protection Convention by, or at the invitation of, a competent authority of a Convention country for the court to assume jurisdiction to take a Commonwealth property protection measure relating to the child.
- (2) A court may order, or invite the parties to proceedings before the court to ask, the Commonwealth central authority to do both of the following in a way that the Commonwealth central authority considers appropriate:
 - (a) to request, under Article 9 of the Child Protection Convention, that a competent authority of a Convention

Section 111CO

country agree to the court assuming jurisdiction to take a Commonwealth property protection measure relating to the child;

- (b) to report to the court about the outcome of the request.
- (3) The court may only make the order or issue the invitation under subsection (2) if it considers that it is better placed than the competent authority to assess the child's best interests.

111CO Limitation if a competent authority of a Convention country is asked to assume jurisdiction

- (1) The court may order, or invite the parties to proceedings before the court to ask the Commonwealth central authority, in a way the Commonwealth central authority considers appropriate, to request a competent authority described in Article 8, paragraph 2, of the Child Protection Convention:
 - (a) to assume jurisdiction under Article 8 of the Convention for appointing, or deciding the powers of, a guardian of the child's property; and
 - (b) as the competent authority considers necessary, to take a measure appointing, or deciding the powers of, a guardian of the child's property; and
 - (c) to report to the court about the outcome of the request.
- (2) In addition, the court may make any other order it considers necessary for an order under subsection (1).
- (3) The court may only make the order or issue the invitation under subsection (1) if the court considers that the competent authority is better placed to assess the child's best interests.
- (4) The court may accept or reject a request under Article 9 of the Child Protection Convention made by, or at the invitation of, a competent authority of a Convention country described in Article 8, paragraph 2 of the Convention, for the competent authority to assume jurisdiction to take a measure for the protection of the child's property.
- (5) If the competent authority assumes jurisdiction under the request, a court must not exercise jurisdiction in accordance with paragraph

111CK(a) or subparagraphs 111CK(1)(b)(iii) to (vi) or paragraph 111CK(1)(c), while the competent authority continues to exercise its jurisdiction.

111CP When a certain Commonwealth property protection measure lapses

- (1) A Commonwealth property protection measure relating to a child that is taken by a court exercising jurisdiction in accordance with subparagraph 111CK(1)(b)(i) or (ii) lapses if:
 - (a) a foreign property protection measure relating to the child is taken by a competent authority of a Convention country; and
 - (b) any of the following applies:
 - (i) the child is habitually resident in the Convention country;
 - (ii) the child is present in the Convention country and is a refugee child;
 - (iii) a request to assume jurisdiction is made to the competent authority of the Convention country by, or at the invitation of, a competent authority of the country of the child's habitual residence;
 - (iv) a competent authority of the country of the child's habitual residence agrees to the competent authority of the Convention country assuming jurisdiction;
 - (v) a competent authority of the Convention country is exercising jurisdiction in proceedings concerning the divorce or separation of the child's parents or the annulment of their marriage (but see subsection (2));
 - (vi) the child has been wrongfully removed from or retained outside the Convention country and a competent authority of the Convention country keeps jurisdiction under Article 7 of the Child Protection Convention.
 - (2) Subparagraph (1)(b)(v) only applies if:
 - (a) one or both of the child's parents are habitually resident in the Convention country when the proceedings referred to in that subparagraph are started; and
 - (b) one or both of the parents have parental responsibility for the child; and
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Section 111CQ

- (c) the jurisdiction of the competent authority of the Convention country to take the measure is accepted by the parents and each other person with parental responsibility for the child; and
 - (d) the exercise of jurisdiction to take the measure is in the best interests of the child; and
 - (e) the proceedings on the application for divorce or separation of the child's parents or the annulment of their marriage have not been finalised.
- (3) A Commonwealth property protection measure relating to a child that is taken by a court exercising jurisdiction in a case of urgency, or in the taking of a measure of a provisional character, lapses if:
- (a) a measure required by the situation for the appointment, or the determination of the powers, of a guardian for a child's property is taken by a competent authority of a non-Convention country; and
 - (b) the measure is registered:
 - (i) in accordance with regulations made for the purposes of section 70G; or
 - (ii) under a law of a State or Territory.

Subdivision D—Applicable law

111CQ Meaning of *law*

In this Subdivision:

law does not include choice of law rules.

111CR Applicable law generally

- (1) This section applies to a court exercising jurisdiction in accordance with Subdivision B or C.
- (2) The court must apply the law of Australia in exercising that jurisdiction.
- (3) However, the court may in exceptional circumstances apply or take into account the law of another country with which:

- (a) a child has a substantial connection; or
 - (b) a child's property is substantially connected;
- if the court considers the protection of the person of the child, or the child's property, requires the court to do so.
- (4) In subsection (2):
- law of Australia* means:
- (a) law in force throughout Australia; or
 - (b) law in force in a part of Australia;
- and includes the principles and rules of the common law and of equity as so in force.

111CS Applicable law concerning parental responsibility

- (1) The principles set out in this section apply despite anything in this Act.
- (2) The circumstances in which parental responsibility for a child is attributed to a person, or extinguished, by operation of law (without the intervention of a court or appropriate authority) are governed by the law that applies in the country of the child's habitual residence.
- (3) The circumstances in which parental responsibility for a child is attributed to a person, or extinguished, by an agreement or a unilateral act (without the intervention of a court or appropriate authority) are governed by the law that applies in the country of the child's habitual residence when the agreement or act takes effect.
- (4) The exercise of parental responsibility for a child is governed by the law applying in the country of the child's habitual residence.
- (5) If a child's country of habitual residence changes to another country:
 - (a) parental responsibility for the child that exists under the law applying in the country in which the child was habitually resident continues to exist; and
 - (b) the circumstances in which parental responsibility for the child is attributed by operation of law to a person who does

Section 111CT

- not already have such responsibility are governed by the law applying in the country of the new habitual residence; and
- (c) the exercise of parental responsibility for the child is governed by the law applying in the country of the new habitual residence.
- (6) Despite subsections (2) to (5), if:
- (a) the law that applies because of this section is the law of a non-Convention country; and
- (b) the choice of law rules of that non-Convention country designate that the law of another non-Convention country applies; and
- (c) the other non-Convention country would apply its own law; the law of that other non-Convention country applies instead.
- (7) The parental responsibility referred to in subsection (2), (3), (4) or (5) may be ended, or the conditions of its exercise changed, by a measure taken in accordance with section 111CD or 111CK.
- (8) A court need not apply a principle set out in subsection (2), (3), (4) or (5) if, on the application of an interested person, the court considers that doing so would be manifestly contrary to public policy having regard to the best interests of the child concerned.

Subdivision E—Recognition of foreign measures

111CT Effect of registered foreign measures

- (1) This section applies to a foreign measure that is registered in a court in accordance with regulations made for the purposes of section 111CZ.
- (2) The foreign measure:
- (a) has the same force and effect as a Commonwealth personal protection measure or a Commonwealth property protection measure (as appropriate); and
- (b) prevails over any earlier inconsistent measure in force in Australia, including:
- (i) an order registered under section 70D or 70G; or

- (ii) any other order made, or agreement registered, under this Act.

Subdivision F—Co-operation

111CU Obligation to obtain consent to place child

- (1) A court must obtain the consent of a competent authority of a Convention country before placing a child in a foster family, or in institutional care, in the Convention country.
- (2) Before placing a child, the court may order, or invite the parties to proceedings before the court to ask, the Commonwealth central authority to consult a competent authority of the Convention country concerned.
- (3) If the court orders the Commonwealth central authority to consult, then the court must provide the Commonwealth central authority with a report on the child and the reasons for the proposed placement.

111CV Obligation to inform competent authority about serious danger to a child

- (1) A court must inform a competent authority of another country about any information the court may have about any serious danger to a child:
 - (a) whose residence has moved from Australia to the other country; or
 - (b) who is present in the other country.
- (2) Subsection (1) has effect despite any obligation of confidentiality imposed on the court or a person by this Act, any other law or anything else (including a contract or professional ethics).
- (3) A person is not liable in civil or criminal proceedings, and is not to be considered to have breached any professional ethics, in respect of the provision of information under subsection (1).
- (4) Evidence of the provision of information under subsection (1) is not admissible in any:

Part XIII International conventions, international agreements and international enforcement

Division 4 International protection of children

Section 111CW

- (a) court (whether or not exercising jurisdiction under this Act);
or
 - (b) tribunal or other body concerned with professional ethics;
except where that evidence is given by the person who provided the information.
- (5) In this section:
- court* includes a person carrying out duties, performing functions or exercising powers as:
- (a) a member of the court personnel; or
 - (b) a family and child counsellor; or
 - (c) a family and child mediator; or
 - (d) an arbitrator.

111CW Court proceedings for contact

- (1) A court hearing proceedings under Part VII (Children) or regulations made for the purposes of section 111B concerning contact with a child must admit into evidence and consider the findings (if any) of a competent authority of a Convention country on the suitability of a parent to have contact with the child.
- (2) A court may adjourn the proceedings concerning contact with a child pending the outcome of a request by a parent of the child to a competent authority of a Convention country for a finding on the suitability of the parent to have contact with the child.
- (3) On the application of a parent who is an Australian resident seeking to obtain or keep contact with a child, a court may:
 - (a) admit evidence; and
 - (b) make a finding on the suitability of that parent to have contact with the child; and
 - (c) specify conditions on which the contact is to be given.

111CX Jurisdiction for a location order or a Commonwealth information order

A court may make a location order under section 67M or a Commonwealth information order under section 67N for the purposes of the Child Protection Convention.

111CY Giving information to central authorities and competent authorities in Convention countries

- (1) This section applies to:
 - (a) a court; and
 - (b) the Commonwealth central authority; and
 - (c) central authorities of Australia appointed as mentioned in Article 29, paragraph 2, of the Child Protection Convention; and
 - (d) other competent authorities of Australia.
- (2) If it would be consistent with this Division or the Child Protection Convention to do so, the court or authority may give information to:
 - (a) a court or an authority of Australia to which this section applies; or
 - (b) a central authority or other competent authority of a Convention country.

Subdivision G—Regulations

111CZ Regulations to implement the Convention

- (1) The regulations may make such provision as is necessary or convenient to enable the performance of the obligations of Australia, or to obtain for Australia any advantage or benefit, under the Child Protection Convention.
- (2) Regulations made for the purposes of this section may, in particular:
 - (a) provide that the regulations do not affect the operation of laws of a State or Territory that relate to the implementation of the Child Protection Convention; and

Part XIII International conventions, international agreements and international enforcement

Division 4 International protection of children

Section 111CZ

- (b) provide that specified provisions of the Child Protection Convention have the force of law in Australia; and
 - (c) include a list of Convention countries or territorial units of Convention countries.
- (3) Regulations made for the purposes of this section may:
- (a) confer jurisdiction on a federal court (other than the High Court) or a court of a Territory; or
 - (b) invest a court of a State with federal jurisdiction.
- Such jurisdiction is in addition to any other jurisdiction provided for under this Act.
- (4) Regulations made for the purposes of subsection (3) may make different provision in respect of matters arising in relation to different States or Territories. This subsection does not, by implication, limit subsection 33(3A) of the *Acts Interpretation Act 1901*.
- (5) Subsections (2), (3) and (4) do not, by implication, limit subsection (1).

Division 5—Other matters

111D Regulations may provide for rules of evidence

- (1) Regulations made for the purposes of Part XIII A may make provision in relation to the rules of evidence that are to apply in proceedings under those regulations.
- (2) Such provisions have effect despite any inconsistency with the *Evidence Act 1995* or with any other law about evidence.

Part XIII A Sanctions for failure to comply with orders, and other obligations, that do not affect children

Division 1 Interpretation

Section 112AA

Part XIII A—Sanctions for failure to comply with orders, and other obligations, that do not affect children

Division 1—Interpretation

112AA Interpretation

In this Part:

applicable Rules of Court means:

- (a) in the case of the Federal Magistrates Court—Rules of Court made under the *Federal Magistrates Act 1999* to the extent to which those Rules of Court relate to this Act; or
- (b) in any other case—Rules of Court made under this Act.

applied provisions, in relation to a sentence passed or an order made pursuant to paragraph 112AD(2)(b), means the provisions of the laws of a State or Territory, as modified by regulations under subsection 112AG(5), that, because of regulations under that subsection, apply in relation to the sentence or order.

court enforceable agreement means:

- (b) so much of a maintenance agreement as a court has, pursuant to paragraph 87(11)(c), ordered may be enforced as if it were an order of the court; or
- (c) a maintenance agreement registered in a court under subsection 86(1), or deemed, by subsection 87(6), to be registered in a court.

maintenance order, in relation to a court, means an order made by the court under this Act that deals with the maintenance of a person other than a child.

order under this Act, in relation to a court, means:

- (a) an order (however described) made by the court under this Act (other than a parenting order); or

Section 112AB

- (b) an injunction granted by the court under section 114 except in so far as the injunction is for the protection of a child; or
 - (c) an undertaking given to, and accepted by, the court in proceedings under this Act other than proceedings that relate wholly or partly to, or to the making of, a parenting order; or
 - (d) a subpoena issued under the applicable Rules of Court in proceedings under this Act other than a subpoena issued in, and so issued to a party to, proceedings that relate wholly or partly to, or to the making of, a parenting order; or
 - (e) a court enforceable agreement; or
 - (f) a bond:
 - (i) entered into under an order of a court under this Act other than an order under Division 13A of Part VII; or
 - (ii) entered into for the purposes of subsection 112AE(5);
- and includes an order, injunction, agreement or bond that:
- (g) is an order under this Act made by another court because of paragraph (a), (b), (e) or (f); and
 - (h) has been registered in the first-mentioned court.

112AB Meaning of *contravene an order*

- (1) A person shall be taken for the purposes of this Part to have contravened an order under this Act if, and only if:
 - (a) where the person is bound by the order—he or she has:
 - (i) intentionally failed to comply with the order; or
 - (ii) made no reasonable attempt to comply with the order;or
 - (b) in any other case—he or she has:
 - (i) intentionally prevented compliance with the order by a person who is bound by it; or
 - (ii) aided or abetted a contravention of the order by a person who is bound by it.

112AC Meaning of *reasonable excuse for contravening an order*

- (1) The circumstances in which a person may be taken to have had, for the purposes of this Part, a reasonable excuse for contravening an

Part XIII Sanctions for failure to comply with orders, and other obligations, that do not affect children

Division 1 Interpretation

Section 112AC

order under this Act include, but are not limited to, the circumstances set out in subsection (2).

- (2) A person (in this subsection called the *respondent*) shall be taken to have had a reasonable excuse for contravening an order under this Act if:
- (a) the respondent contravened the order because, or substantially because, he or she did not, at the time of the contravention, understand the obligations imposed by the order on the person who was bound by it; and
 - (b) the court is satisfied that the respondent ought to be excused in respect of the contravention.

Division 2—Sanctions for failure to comply with orders

112AD Sanctions for failure to comply with orders

- (1) If a court having jurisdiction under this Act is satisfied that a person has, without reasonable excuse, contravened an order under this Act, the court may make an order for the imposing, in respect of the person, of one or more of the sanctions available to be imposed under subsection (2), being a sanction or sanctions that the court considers to be the most appropriate in the circumstances.
- (1A) The power given to the court under subsection (1) in respect of a contravention of a maintenance order applies even if the order has been complied with before the matter of the contravention comes before the court.
- (2) The sanctions that are available to be imposed by the court are:
 - (a) to require the person to enter into a bond in accordance with section 112AF; or
 - (b) to impose a sentence by order on the person, or make an order directed to the person, in accordance with section 112AG; or
 - (c) to fine the person not more than 60 penalty units; or
 - (d) subject to subsection (2A), to impose a sentence of imprisonment on the person in accordance with section 112AE.
- (2A) The court must not impose a sentence of imprisonment on the person under paragraph (2)(d) in respect of a contravention of a maintenance order unless the court is satisfied that the contravention was intentional or fraudulent.
- (3) An order under subsection (1) may be expressed to take effect immediately, or at the end of a specified period or on the occurrence of a specified event.
- (4) Where a court makes an order under subsection (1), the court may make such other orders as the court considers necessary to ensure compliance with the order that was contravened.

Part XIII A Sanctions for failure to comply with orders, and other obligations, that do not affect children

Division 2 Sanctions for failure to comply with orders

Section 112AE

112AE Sentences of imprisonment

- (1) A sentence of imprisonment imposed on a person pursuant to paragraph 112AD(2)(d) shall be expressed to be:
 - (a) for a specified period of 12 months or less; or
 - (b) for a period ending when the person:
 - (i) complies with the order concerned; or
 - (ii) has been imprisoned pursuant to the sentence for 12 months or such lesser period as is specified by the court; whichever happens first.
- (2) A court shall not sentence a person to imprisonment pursuant to paragraph 112AD(2)(d) unless the court is satisfied that, in all the circumstances of the case, it would not be appropriate for the court to deal with the contravention pursuant to any of the other paragraphs of subsection 112AD(2).
- (3) If a court sentences a person to imprisonment pursuant to paragraph 112AD(2)(d), the court shall:
 - (a) state the reasons why it is satisfied as mentioned in subsection (2); and
 - (b) cause those reasons to be entered in the records of the court.
- (4) The failure of a court to comply with subsection (3) does not invalidate a sentence.
- (5) A court, when sentencing a person to imprisonment under paragraph 112AD(2)(d) may, if it considers it appropriate to do so, direct that the person be released upon the person entering into a bond described in subsection (6) after he or she has served a specified part of the term of imprisonment.
- (6) A bond for the purposes of subsection (5) is a bond (with or without surety or security) that the person will be of good behaviour for a specified period of up to 2 years.
- (7) Without limiting the circumstances in which a court may discharge an order under section 112AK, a court that has sentenced a person to imprisonment for a period expressed as provided by paragraph (1)(b) may order the release of the person if it is satisfied

that the person will, if he or she is released, comply with the order concerned.

- (8) To avoid doubt, the serving by a person of a period of imprisonment under a sentence imposed on the person under paragraph 112AD(2)(d) for a failure to make a payment under a maintenance order does not affect the person's liability to make the payment.

112AF Bonds

- (1) This section provides for bonds that a court may require a person to enter into under paragraph 112AD(2)(a).
- (2) A bond is to be for a specified period of up to 2 years.
- (3) A bond may be:
- (a) with or without surety; and
 - (b) with or without security.
- (4) The conditions that may be imposed on a person by a bond include a condition requiring the person to be of good behaviour.
- (5) If a court proposes to require a person to enter into a bond, it must, before making the requirement, explain to the person, in language likely to be readily understood by the person:
- (a) the purpose and effect of the proposed requirement; and
 - (b) the consequences that may follow if the person fails:
 - (i) to enter into the bond; or
 - (ii) having entered into the bond—to act in accordance with the bond.

112AG Additional sentencing alternatives

- (1) Subject to this section, where:
- (a) under the law of a participating State or a participating Territory, a court is empowered (whether generally or in particular cases) to impose a sentence by order or make an order of a kind to which subsection (3) applies in respect of a person convicted of an offence against the law of the State or Territory; and

Part XIII A Sanctions for failure to comply with orders, and other obligations, that do not affect children

Division 2 Sanctions for failure to comply with orders

Section 112AG

- (b) an arrangement under section 112AN in respect of the State or Territory makes provision for and in relation to the carrying out of sentences imposed, or orders made, of that kind under this Division;
- a court exercising jurisdiction in the State or Territory may, pursuant to paragraph 112AD(2)(b), impose a sentence or make an order of that kind.
- (2) A sentence imposed on a person, or an order directed to a person, pursuant to paragraph 112AD(2)(b):
- (a) shall be such that the total number of hours during which the sentence or order regulates the conduct of the person does not exceed the maximum period in relation to the State or Territory in which the sentence is imposed or the order is made; and
 - (b) ceases to have effect 2 years after it was made, or after such lesser period as is specified in the order.
- (3) This subsection applies to sentences or orders of the following kinds:
- (a) a sentence or order known as:
 - (i) a community service order;
 - (ii) a work order;
 - (iii) a sentence of periodic detention;
 - (iv) an attendance centre order;
 - (v) a sentence of weekend detention;
 - (vi) an attendance order; or
 - (vii) a community based order;
 - (b) a sentence or order that is similar to a sentence or order referred to in paragraph (a);
 - (c) a sentence or order prescribed for the purposes of this subsection.
- (4) Where a court proposes to impose a sentence on a person, or make an order directed to a person, pursuant to paragraph 112AD(2)(b), it shall, before doing so, explain or cause to be explained to the person, in language likely to be readily understood by the person:
- (a) the purpose and effect of the proposed sentence or order;

Section 112AH

- (b) the consequences that may follow if the person fails to comply with the proposed sentence or order or with any requirements made in relation to the proposed sentence or order by or under the applied provisions; and
 - (c) if the proposed sentence or order may be revoked or varied under the applied provisions—that the proposed sentence or order may be so revoked or varied.
- (5) Where a court exercising jurisdiction under section 112AD in a particular State or Territory imposes a sentence or makes an order pursuant to paragraph 112AD(2)(b), the provisions of the laws of the State or Territory with respect to a sentence or order of that kind that is imposed or made under those laws shall, to the extent provided by the regulations and subject to such modifications as are specified in the regulations, apply in relation to the sentence or order.
- (6) In this section:

maximum period, in relation to a State or Territory, means 500 hours or such lesser period as is prescribed in relation to the State or Territory.

participating State means a State in relation to which an agreement under section 112AN is in force.

participating Territory means a Territory in relation to which an agreement under section 112AN is in force.

112AH Failure to comply with sentence passed, or order made, pursuant to paragraph 112AD(2)(b)

- (1) This section applies where a court has, pursuant to paragraph 112AD(2)(b):
- (a) imposed a sentence on a person; or
 - (b) made an order directed to a person.
- (2) If an information is laid before a magistrate, whether before or after the end of the period for which the sentence or order is to operate, or operated, alleging that the person has, without reasonable excuse, failed to comply with the sentence or order, or

Part XIII A Sanctions for failure to comply with orders, and other obligations, that do not affect children

Division 2 Sanctions for failure to comply with orders

Section 112AH

with any requirements made in relation to the sentence or order by or under the applied provisions, the magistrate may:

- (a) issue a summons directing the person to appear, on a date, at a time and at a place fixed in the summons, before the court; or
 - (b) if the information is laid on oath and the magistrate thinks that proceedings against the person by summons might not be effective—issue a warrant for the arrest of the person.
- (3) If:
- (a) the person is served with a summons issued under subsection (2); and
 - (b) the person fails to attend before the court as required by the summons;
- the court may, on proof of the service of the summons, issue a warrant for the arrest of the person.
- (4) If:
- (a) the person is arrested pursuant to a warrant issued under subsection (2), (3) or (6); and
 - (b) the court is not sitting at the time of the arrest;
- the person shall be brought before a magistrate who may deal with the person under subsection (5).
- (5) The magistrate may:
- (a) order that the person is to be released from custody on his or her entering into a bond (with or without surety or security) that he or she will attend before the court on a date, at a time and at a place specified by the magistrate; or
 - (b) direct that the person be kept in custody in accordance with the warrant.
- (6) If:
- (a) on entering into a bond, the person is released pursuant to an order made by a magistrate under paragraph (5)(a); and
 - (b) the person fails to attend before the court as required by the bond;
- the court may, on proof of the entering into of the bond, issue a warrant for the arrest of the person.

- (7) If:
- (a) in accordance with this section, the person is brought before the court; and
 - (b) the court (whether or not constituted by the judge or magistrate who imposed the sentence or made the order) is satisfied that the person has, without reasonable excuse, failed to comply with the sentence or order or with any requirements made in relation to the sentence or order by or under the applied provisions;
- the court may take action under subsection (8).
- (8) The court may:
- (a) without prejudice to the continuance of the sentence or order, impose a fine not exceeding 10 penalty units on the person; or
 - (b) revoke the sentence or order and, subject to subsection (9), deal with the person, for the contravention in respect of which the sentence was passed or the order was made, in any manner in which he or she could have been dealt with for that contravention if:
 - (i) the sentence had not been imposed, or the order had not been made; and
 - (ii) the person was before the court under section 112AD in respect of the contravention.
- Note: For the value of a penalty unit, see subsection 4AA(1) of the *Crimes Act 1914*.
- (9) In dealing with the person as mentioned in paragraph (8)(b), the court shall, in addition to any other matters that it considers should be taken into account, take into account:
- (a) the fact that the sentence was imposed or the order was made;
 - (b) anything done under the sentence or order; and
 - (c) any fine imposed, and any other order made, for or in respect of the contravention.
- (10) A warrant issued under subsection (2), (3) or (6) in relation to the person shall authorise:
- (a) the arrest of the person;

Part XIII A Sanctions for failure to comply with orders, and other obligations, that do not affect children

Division 2 Sanctions for failure to comply with orders

Section 112AK

- (b) the bringing of the person before the court as soon as practicable after his or her arrest; and
- (c) the detention of the person in custody until he or she is released by order of the court, or in accordance with subsection (5).

112AK Variation and discharge of orders

- (1) Subject to this section, an order made under section 112AD may be varied or discharged:
 - (a) if the court that made the order is the Family Court—by the Family Court; or
 - (b) in any other case—by the court that made the order or the Family Court.
- (2) A variation of an order under section 112AD shall be such that the order, as varied, is an order that could have been made under that section in respect of the contravention in respect of which the first-mentioned order was made.
- (3) If a court discharges an order under section 112AD it may, subject to this Division, make another order under that section in respect of the contravention in respect of which the first-mentioned order was made.
- (4) Where a court varies or discharges an order made under section 112AD, the court may give such directions as to the effect of the variation or discharge as the court considers appropriate.

112AM Relationship between Division and other laws

- (1) This section applies where an act or omission by a person:
 - (a) constitutes a contravention of an order under this Act; and
 - (b) is also an offence against any law.
- (2) If the person is prosecuted in respect of the offence, a court in which proceedings have been brought under section 112AD in respect of the contravention of the order shall either:
 - (a) adjourn those proceedings until the prosecution has been completed; or
 - (b) dismiss those proceedings.

- (3) The person may be prosecuted for, and convicted of, the offence.
- (4) Nothing in this section renders the person liable to be punished twice in respect of the same act or omission.

112AN Arrangements with States and Territories for carrying out of sentences and orders

- (1) The Governor-General may make arrangements with the relevant authority of a State or a Territory for:
 - (a) the exercise of powers, and the performance of functions, by officers of the State or Territory; and
 - (b) the making available of facilities of the State or Territory; for and in relation to the carrying out of sentences imposed, and orders made, under this Division.

- (2) In this section:

relevant authority means:

- (a) in relation to a State—the Governor of the State;
- (b) in relation to the Australian Capital Territory—the Chief Minister of the Australian Capital Territory;
- (c) in relation to the Northern Territory—the Administrator of the Northern Territory; and
- (d) in relation to Norfolk Island—the Administrator of Norfolk Island.

112AO Division does not limit operation of section 105

Nothing in this Division is intended to limit the operation of section 105.

Part XIII B—Contempt of court

112AP Contempt

- (1) Subject to subsection (1A), this section applies to a contempt of a court that:
 - (a) does not constitute a contravention of an order under this Act; or
 - (b) constitutes a contravention of an order under this Act and involves a flagrant challenge to the authority of the court.
- (1A) This section does not apply to a contempt that constitutes a contravention of a maintenance order if the order has been complied with before the matter of the contravention comes before the court.
- (2) In spite of any other law, a court having jurisdiction under this Act may punish a person for contempt of that court.
- (3) The applicable Rules of Court may provide for practice and procedure as to charging with contempt and the hearing of the charge.
- (4) Where a natural person is in contempt, the court may punish the contempt by committal to prison or fine or both.
- (5) Where a corporation is in contempt, the court may punish the contempt by sequestration or fine or both.
- (6) The court may make an order for:
 - (a) punishment on terms;
 - (b) suspension of punishment; or
 - (c) the giving of security for good behaviour.
- (7) Where a person is committed to prison for a term for contempt, the court may order the person's discharge before the expiry of that term.
- (8) To avoid doubt, the serving by a person of a period of imprisonment as a result of a contempt of a court arising out of a

Section 112AP

failure by the person to make a payment in respect of the maintenance of another person does not affect the first-mentioned person's liability to make the payment.

(9) In this section:

order under this Act means an order under this Act affecting children within the meaning of Division 13A of Part VII or an order under this Act within the meaning of Part XIII A.

Part XIV—Declarations and injunctions

112A Interpretation

In this Part, *marriage* includes a void marriage.

113 Proceedings for declarations

In proceedings of the kind referred to in paragraph (b) of the definition of *matrimonial cause* in subsection 4(1), the court may make such declaration as is justified.

114 Injunctions

- (1) In proceedings of the kind referred to in paragraph (e) of the definition of *matrimonial cause* in subsection 4(1), the court may make such order or grant such injunction as it considers proper with respect to the matter to which the proceedings relate, including:
 - (a) an injunction for the personal protection of a party to the marriage;
 - (b) an injunction restraining a party to the marriage from entering or remaining in the matrimonial home or the premises in which the other party to the marriage resides, or restraining a party to the marriage from entering or remaining in a specified area, being an area in which the matrimonial home is, or the premises in which the other party to the marriage resides are, situated;
 - (c) an injunction restraining a party to the marriage from entering the place of work of the other party to the marriage;
 - (d) an injunction for the protection of the marital relationship;
 - (e) an injunction in relation to the property of a party to the marriage; or
 - (f) an injunction relating to the use or occupancy of the matrimonial home.

- (2) In exercising its powers under subsection (1), the court may make an order relieving a party to a marriage from any obligation to perform marital services or render conjugal rights.
- (3) A court exercising jurisdiction under this Act in proceedings other than proceedings to which subsection (1) applies may grant an injunction, by interlocutory order or otherwise (including an injunction in aid of the enforcement of a decree), in any case in which it appears to the court to be just or convenient to do so and either unconditionally or upon such terms and conditions as the court considers appropriate.

114AA Powers of arrest

- (1) Where:
 - (a) an injunction is in force under section 114 for the personal protection of a person; and
 - (b) a police officer believes, on reasonable grounds, that the person against whom the injunction is directed (in this section called the *respondent*) has, since the injunction was granted, breached the injunction by:
 - (i) causing, or threatening to cause, bodily harm to the person referred to in paragraph (a); or
 - (ii) harassing, molesting or stalking that person;the police officer may arrest the respondent without warrant.

Note: Section 122AA authorises the use of reasonable force in making an arrest.

- (3) Where a police officer arrests a person pursuant to subsection (1):
 - (a) the police officer shall:
 - (i) ensure that the person is brought before the court that granted the injunction, or another court having jurisdiction under this Act, before the expiration of the relevant period; and
 - (ii) take all reasonable steps to ensure that, before the person is so brought before a court, the person on whose application the injunction under section 114 was granted is aware that the first-mentioned person has been arrested and of the court before which the person is to be brought; and

Section 114AA

(b) the person shall not be released before the expiration of the relevant period except pursuant to an order of the court that granted the injunction or another court having jurisdiction under this Act;

but nothing in this subsection authorizes the keeping of the person in custody after the expiration of the relevant period.

- (4) Where a person is brought before a court in accordance with subsection (3), the court shall:
- (a) if there is an application before the court for the person to be dealt with for breach of the injunction—forthwith proceed to hear and determine that application; or
 - (b) if there is no application before the court as mentioned in paragraph (a)—order that the person be released forthwith.

- (5) Where:
- (a) a person is brought before a court in accordance with subsection (3);
 - (b) the court proceeds to hear and determine an application for the person to be dealt with for breach of an injunction as mentioned in paragraph (4)(a); and
 - (c) at the expiration of the relevant period the proceedings have not been determined;

the person may be kept in custody after the expiration of the relevant period until:

- (d) the court gives its decision on the proceedings;
- (e) the court orders that the person be released; or
- (f) the court adjourns the hearing for a period of more than 24 hours;

whichever happens first.

- (7) In this section:

relevant period, in relation to a person's arrest, means the period starting when the person is arrested and ending at the close of business on the next day that is not a Saturday, Sunday or public holiday.

114AB Operation of State and Territory laws

- (1) Sections 68B, 68C, 114 and 114AA are not intended to exclude or limit the operation of a prescribed law of a State or Territory that is capable of operating concurrently with those sections.
- (2) Where a person has instituted a proceeding or taken any other action under a prescribed law of a State or Territory in respect of a matter in respect of which the person would, but for this subsection, have been entitled to institute a proceeding under section 68B or 114, the person is not entitled to institute a proceeding under section 68B or 114 in respect of that matter, unless:
 - (a) where the person instituted a proceeding:
 - (i) the proceeding has lapsed, been discontinued, or been dismissed; or
 - (ii) the orders (if any) made as a result of the institution of the proceeding have been set aside or are no longer in force; and
 - (b) where the person took other action—neither that person nor any other person is required, at the time that the person institutes a proceeding under section 68B or 114, to do an act, or to refrain from doing an act.

Part XIVA—The Australian Institute of Family Studies

114A Interpretation

In this Part, unless the contrary intention appears:

Board means the Board of Management of the Institute.

Director means the Director of the Institute.

Institute means the Australian Institute of Family Studies established by this Part.

member means a member of the Board, and includes the Director.

114B Establishment of Institute

- (1) There is established by this Part an Institute by the name of the Australian Institute of Family Studies.
- (2) The functions of the Institute are:
 - (a) to promote, by the conduct, encouragement and co-ordination of research and other appropriate means, the identification of, and development of understanding of, the factors affecting marital and family stability in Australia, with the object of promoting the protection of the family as the natural and fundamental group unit in society; and
 - (b) to advise and assist the Minister in relation to the making of grants, and with the approval of the Minister to make grants, out of moneys available under appropriations made by the Parliament, for purposes related to the functions of the Institute and the supervising of the employment of grants so made.
- (3) The Minister may:
 - (a) request the Board to arrange for the Institute to engage in a particular activity (whether research or otherwise) in relation

- to a particular matter that is within the functions of the Institute; and
- (b) after consultation with the Board, specify the priority that is to be given to the activity.
- (4) Each report on the Institute under section 9 of the *Commonwealth Authorities and Companies Act 1997* must specify any requests made by the Minister under this section in the year to which the report relates, the priorities accorded to the matters to which the requests relate and the progress made by the Institute in that year in giving effect to any requests made by the Minister under this section in that year or a previous year.

114BA Institute to be a body corporate

- (1) The Institute:
- (a) is a body corporate;
- (b) shall have a seal; and
- (c) may sue and be sued.

Note: The *Commonwealth Authorities and Companies Act 1997* applies to the Institute. That Act deals with matters relating to Commonwealth authorities, including reporting and accountability, banking and investment, and conduct of officers.

- (2) The seal of the Institute shall be kept in such custody as the Board directs and shall not be used except as authorised by the Board.
- (3) All courts, judges and persons acting judicially shall take judicial notice of the imprint of the seal of the Institute appearing on a document and shall presume that the document was duly sealed.

114BB Powers of Institute

The Institute has power to do all things that are necessary or convenient to be done in connection with the performance of its functions and, in particular, has power:

- (a) to acquire, hold and dispose of real and personal property;
- (b) to enter into contracts; and
- (c) to accept gifts, devises and bequests made to the Institute.

Section 114C

114C Director and Board of Management

- (1) There shall be a Director of the Institute and a Board of Management of the Institute.
- (2) The Board shall consist of the Director and 4 or more other members.
- (3) The members shall be appointed by the Governor-General.
- (4) The Director shall be appointed as a full-time member and the other members shall be appointed as part-time members.
- (5) A member holds office on such terms and conditions (if any) in respect of matters not provided for by this Act as are determined by the Governor-General.
- (6) The performance of the functions or the exercise of the powers of the Board is not affected by reason of there being a vacancy or vacancies in the membership of the Board.

114D Management of Institute

- (1) The Board is charged with the general direction of the Institute.
- (2) Subject to the general direction of the Board, the Director shall manage the affairs of the Institute.

114E Term of office of members

- (1) Subject to this Part, a member holds office for such period, not exceeding 7 years, as is specified in the instrument of appointment, but is eligible for re-appointment.

114F Remuneration and allowances

- (1) A member shall be paid such remuneration as is determined by the Remuneration Tribunal, but, if no determination of that remuneration by the Tribunal is in operation, the member shall be paid such remuneration as is prescribed.
- (2) A member shall be paid such allowances as are prescribed.

- (3) This section has effect subject to the *Remuneration Tribunal Act 1973*.

114G Leave of absence

- (1) The Director has such recreation leave entitlements as are determined by the Remuneration Tribunal.
- (2) The Minister may:
- (a) grant the Director leave of absence, other than recreation leave, on such terms and conditions as to remuneration or otherwise as the Minister determines; and
 - (b) grant a member other than the Director leave to be absent from a meeting or meetings of the Board.

114H Resignation of members

A member may resign by writing signed and delivered to the Governor-General.

114J Termination of appointments

- (1) The Governor-General may terminate the appointment of a member by reason of the misbehaviour, or physical or mental incapacity, of the member.
- (2) If a member:
- (a) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefit; or
 - (b) being the Director:
 - (i) engages in paid employment outside the duties of his or her office without the approval of the Minister; or
 - (ii) is absent from duty, except on leave of absence, for 14 consecutive days or for 28 days in any 12 months; or
 - (c) being a member other than the Director—is absent, except on leave of absence, from 3 consecutive meetings of the Board; or

Section 114K

(d) without reasonable excuse contravenes section 27F or 27J of the *Commonwealth Authorities and Companies Act 1997*; the Governor-General shall remove the member from office.

114K Acting Director

- (1) The Minister may appoint a person (whether a member or not) to act as Director:
 - (a) during a vacancy in the office of Director (whether or not the office has previously been filled); or
 - (b) during any period, or during all periods, when the Director is absent from duty or from Australia or is, for any reason, unable to perform the functions of the office;but a person appointed to act during a vacancy shall not continue so to act for more than 12 months.
- (2) The Minister may:
 - (a) determine the terms and conditions of appointment, including remuneration and allowances, of a person acting as Director; and
 - (b) at any time terminate such an appointment.
- (3) Where a person is acting as Director in accordance with paragraph (1)(b) and the office of Director becomes vacant while that person is so acting, that person may continue so to act until the Minister otherwise directs, the vacancy is filled, or a period of 12 months from the day on which the vacancy occurred expires, whichever first happens.
- (4) The appointment of a person to act as Director ceases to have effect if the person resigns the appointment by writing delivered to the Minister.
- (5) While a person is acting as Director, the person has, and may exercise, all the powers and shall perform all the functions of the Director.

114L Meetings etc.

The regulations may prescribe matters that are necessary or convenient to be prescribed in connexion with the conduct of the

affairs of the Institute, including matters relating to the conduct of, and the quorum and voting at, meetings of the Board.

114M Staff

- (1) The staff of the Institute are to be persons engaged under the *Public Service Act 1999*.
- (2) For the purposes of the *Public Service Act 1999*:
 - (a) the Director and the APS employees assisting the Director together constitute a Statutory Agency; and
 - (b) the Director is the Head of that Statutory Agency.
- (3) The Director may, on behalf of the Institute and with the approval of the Minister, engage persons to assist the Institute as consultants or otherwise.
- (4) The terms and conditions of engagement of persons under subsection (3) are as determined by the Director from time to time.

114MA Money payable to Institute

- (1) There is payable to the Institute such money as is appropriated by the Parliament for the purposes of the Institute.
- (2) The Minister for Finance may give directions as to the amounts in which, and the times at which, money referred to in subsection (1) is to be paid to the Institute.

114MC Contracts

The Institute shall not, except with the approval of the Minister, enter into a contract involving the payment by the Institute of an amount exceeding:

- (a) subject to paragraph (b)—\$100,000; or
- (b) if a higher amount is prescribed—that higher amount.

114MD Application of money

- (1) The money of the Institute shall be applied only:

Section 114MF

- (a) in payment or discharge of the expenses, charges, obligations and liabilities incurred or undertaken by the Institute in the performance of its functions and the exercise of its powers; and
 - (b) in payment of remuneration and allowances payable under this Part.
- (2) Subsection (1) does not prevent investment of surplus money of the Institute under section 18 of the *Commonwealth Authorities and Companies Act 1997*.

114MF Exemption from taxation

The Institute is not subject to taxation under any law of the Commonwealth, of a State or of a Territory.

Part XV—Miscellaneous**115 Family Law Council**

- (1) The Attorney-General may establish a Family Law Council consisting of persons appointed by the Attorney-General in accordance with subsection (2).
- (2) The Council shall consist of a Judge of the Family Court and such other judges, persons appointed or engaged under the *Public Service Act 1999*, officers of the Public Service of a State, representatives of organisations that provide family and child counselling and other persons as the Attorney-General thinks fit.
- (3) It is the function of the Council to advise and make recommendations to the Attorney-General, either of its own motion or upon request made to it by the Attorney-General, concerning:
 - (a) the working of this Act and other legislation relating to family law;
 - (b) the working of legal aid in relation to family law; and
 - (c) any other matters relating to family law.
- (4) The Attorney-General shall appoint one of its members to be Chairperson of the Council.
- (5) A member of the Council shall be paid such remuneration as is determined by the Remuneration Tribunal, but, if no determination of that remuneration by the Tribunal is in operation, the member shall be paid such remuneration as is prescribed.
- (5A) A member of the Council shall be paid such allowances as are prescribed.
- (5B) Subsections (5) and (5A) have effect subject to the *Remuneration Tribunal Act 1973*.
- (5C) Subject to this section, a member of the Council holds office for such period, not exceeding 3 years, as is specified in the instrument of appointment, but is eligible for re-appointment.

Section 116C

- (6) A member (including the Chairperson) may resign by writing signed and delivered to the Attorney-General.
- (6A) The Attorney-General may terminate the appointment of a member by reason of the misbehaviour, or physical or mental incapacity, of the member.
- (6B) If a member becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefit, the Attorney-General shall terminate the appointment of that member.
- (7) Meetings of the Council shall be convened by the Chairperson or the Attorney-General.
- (8) The Council shall cause records to be kept of its meetings.
- (9) The Council shall, as soon as practicable after 30 June in each year, prepare and furnish to the Attorney-General a report of the operations of the Council during the year that ended on that 30 June.
- (10) The Attorney-General shall cause a copy of a report furnished under subsection (9) to be laid before each House of the Parliament within 15 sitting days of that House after the receipt of the report by the Attorney-General.
- (11) For the purposes of this section, a Federal Magistrate is taken to be a judge.

116C Payments to legal practitioners by legal aid bodies

- (1) The regulations may, in relation to matters included in a class of matters arising under this Act, under the regulations or under the applicable Rules of Court, fix or limit, or provide for the fixing or limiting of, the amounts that may be paid by relevant authorities to legal practitioners acting in such matters.
- (2) A relevant authority that pays, to a legal practitioner acting in a matter arising under this Act, an amount that exceeds the amount that the relevant authority is permitted, by regulations made under subsection (1), to pay to that legal practitioner in respect of that

matter is, if the Minister so determines by instrument in writing, liable to pay to the Commonwealth such amount as the Minister specifies in the instrument, not being an amount greater than the amount of the excess.

- (3) An amount payable by a relevant authority to the Commonwealth in accordance with a determination of the Minister under subsection (2) is a debt due by the relevant authority to the Commonwealth.
- (4) This section, and regulations made under subsection (1), bind the Crown in right of the Commonwealth, of each of the States, of the Northern Territory and of Norfolk Island.
- (5) In this section:

relevant authority means a person, authority or body (including an authority or body established by or under a law of a State or Territory) that, from time to time, receives relevant funding.

relevant funding, in relation to a person, authority or body, means funding received, whether directly or indirectly, by the person, authority or body from the Commonwealth for the purposes of, or in connection with, the provision of legal assistance by the person, authority or body in connection with matters arising under this Act.

117 Costs

- (1) Subject to subsection (2) and sections 117AA and 118, each party to proceedings under this Act shall bear his or her own costs.
- (2) If, in proceedings under this Act, the court is of opinion that there are circumstances that justify it in doing so, the court may, subject to subsections (2A), (4) and (5) and the applicable Rules of Court, make such order as to costs and security for costs, whether by way of interlocutory order or otherwise, as the court considers just.
- (2A) In considering what order (if any) should be made under subsection (2), the court shall have regard to:
 - (a) the financial circumstances of each of the parties to the proceedings;

Section 117

- (b) whether any party to the proceedings is in receipt of assistance by way of legal aid and, if so, the terms of the grant of that assistance to that party;
 - (c) the conduct of the parties to the proceedings in relation to the proceedings including, without limiting the generality of the foregoing, the conduct of the parties in relation to pleadings, particulars, discovery, inspection, directions to answer questions, admissions of facts, production of documents and similar matters;
 - (d) whether the proceedings were necessitated by the failure of a party to the proceedings to comply with previous orders of the court;
 - (e) whether any party to the proceedings has been wholly unsuccessful in the proceedings;
 - (f) whether either party to the proceedings has, in accordance with section 117C or otherwise, made an offer in writing to the other party to the proceedings to settle the proceedings and the terms of any such offer; and
 - (g) such other matters as the court considers relevant.
- (3) To avoid doubt, in proceedings in which a child representative has been appointed, the court may make an order under subsection (2) as to costs or security for costs, whether by way of interlocutory order or otherwise, to the effect that each party to the proceedings bears, in such proportion as the court considers just, the costs of the child representative in respect of the proceedings.
- (4) However, in proceedings in which a child representative has been appointed, if:
- (a) a party to the proceedings has received legal aid in respect of the proceedings; or
 - (b) the court considers that a party to the proceedings would suffer financial hardship if the party had to bear a proportion of the costs of the child representative;
- the court must not make an order under subsection (2) against that party in relation to the costs of the child representative.
- (5) In considering what order (if any) should be made under subsection (2) in proceedings in which a child representative has been appointed, the court must disregard the fact that the child representative is funded under a legal aid scheme or service
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established under a Commonwealth, State or Territory law or approved by the Attorney-General.

117AA Costs in proceedings relating to overseas enforcement and international Conventions

- (1) In proceedings under regulations made for the purposes of Part XIII AA, the court can only make an order as to costs (other than orders as to security for costs):
 - (a) in favour of a party who has been substantially successful in the proceedings; and
 - (b) against a person or body who holds or held an office or appointment under those regulations and is a party to the proceedings in that capacity.

Note: For another case where the court can also make an order as to costs, see subsection (3).
- (2) However, the order can only be made in respect of a part of the proceedings if, during that part, the party against whom the order is to be made asserted a meaning or operation of this Act or those regulations that the court considers:
 - (a) is not reasonable given the terms of the Act or regulations; or
 - (b) is not convenient to give effect to Australia's obligations under the Convention concerned, or to obtain for Australia the benefits of that Convention.
- (3) In proceedings under regulations made for the purposes of section 111B, the court can also make an order as to costs that is:
 - (a) against a party who has wrongfully removed or retained a child, or wrongfully prevented the exercise of rights of access (within the meaning of the Convention referred to in that section) to a child; and
 - (b) in respect of the necessary expenses incurred by the person who made the application, under that Convention, concerning the child.

117A Reparation for certain losses and expenses relating to children

- (1) Where:
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Section 117A

- (a) a court has found, for the purposes of Division 13A of Part VII, that a person has, by taking a child away from another person or by refusing or failing to deliver a child to another person, contravened:
 - (i) a residence order; or
 - (ii) a contact order;
 - (b) a person has been convicted of an offence against section 65Y or 65Z in respect of a child;
 - (c) a court has found, for the purposes of Division 13A of Part VII, that a person has, by taking a child away from another person or by refusing or failing to deliver a child to another person, contravened an injunction granted, or an order made, under section 114; or
 - (d) a person has been found to be in contempt of a court exercising jurisdiction under this Act by reason of having taken a child away from another person or having refused or failed to deliver a child to another person;
- a court having jurisdiction under this Act may, subject to subsection (2):
- (e) on the application of the Commonwealth—order the person to make reparation to the Commonwealth or to a Commonwealth instrumentality, by way of money payment or otherwise, in respect of any loss suffered, or any expense incurred, by the Commonwealth or the Commonwealth instrumentality, as the case may be, in recovering the child and returning the child to a person; or
 - (f) on the application of any other person—order the first-mentioned person to make reparation to that other person, by way of money payment or otherwise, in respect of any loss suffered, or expense incurred, by that other person in recovering the child and, if applicable, returning the child to a person.
- (2) Nothing in subsection (1) empowers a court to order a person to make reparation to the Commonwealth, to a Commonwealth instrumentality or to another person in respect of any loss suffered, or any expense incurred, where a court has, under section 21B of the *Crimes Act 1914*, ordered the first-mentioned person to make reparation to the Commonwealth, to the Commonwealth

instrumentality or to that other person, as the case may be, in respect of the same loss suffered or expense incurred.

117B Interest on moneys ordered to be paid

- (1) Subject to any order made by the court under subsection (2), where, in proceedings under this Act, a court makes an order for the payment of money (other than an order for the payment by way of maintenance of a periodic sum), interest is payable, at the rate prescribed by the applicable Rules of Court, from:
 - (a) the date on which the order is made; or
 - (b) the date on which the order takes effect;whichever is later, on so much of the money as is from time to time unpaid.
- (2) A court that makes an order for the payment of money as mentioned in subsection (1) may order that interest is not payable on the money payable under the first-mentioned order or may order:
 - (a) that interest is payable at a rate specified in the order, being a rate other than the rate prescribed by the applicable Rules of Court; or
 - (b) that interest is payable from a date specified in the order, being a date other than the date from which the interest would be payable under subsection (1).

117C Offers of settlement

- (1) Where a party to proceedings under this Act (other than proceedings under Part VI or Division 6, 9 or 13 of Part VII or proceedings to enforce a decree or injunction made under Division 6, 9 or 13 of Part VII) has made an offer in the form prescribed by the applicable Rules of Court to the other party to the proceedings to settle the proceedings on terms specified in the offer, the first-mentioned party may file, in the court in which the proceedings are being heard, a copy of the offer.
 - (2) If a party to proceedings withdraws an offer a copy of which has been filed as mentioned in subsection (1), that party shall file, in the court referred to in subsection (1), notice that the offer has been withdrawn.
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Section 118

- (3) The fact that an offer has been made as mentioned in subsection (1), or the terms of such an offer, shall not be disclosed to the court except for the purposes of the consideration by the court of whether it should make an order as to costs under subsection 117(2) and the terms of any such order.
- (4) A judge of the court mentioned in subsection (1) is not disqualified from sitting in the proceedings only because the fact that an offer has been made is, contrary to subsection (3), disclosed to the court.

118 Frivolous or vexatious proceedings

- (1) The court may, at any stage of proceedings under this Act, if it is satisfied that the proceedings are frivolous or vexatious:
 - (a) dismiss the proceedings;
 - (b) make such order as to costs as the court considers just; and
 - (c) if the court considers appropriate, on the application of a party to the proceedings—order that the person who instituted the proceedings shall not, without leave of a court having jurisdiction under this Act, institute proceedings under this Act of the kind or kinds specified in the order; and an order made by a court under paragraph (c) has effect notwithstanding any other provision of this Act.
- (2) A court may discharge or vary an order made by that court under paragraph (1)(c).

119 Married persons may sue each other

Either party to a marriage may bring proceedings in contract or in tort against the other party.

120 Criminal conversation, adultery and enticement

After the commencement of this Act, no action lies for criminal conversation, damages for adultery, or for enticement of a party to a marriage.

121 Restriction on publication of court proceedings

- (1) A person who publishes in a newspaper or periodical publication, by radio broadcast or television or by other electronic means, or otherwise disseminates to the public or to a section of the public by any means, any account of any proceedings, or of any part of any proceedings, under this Act that identifies:
- (a) a party to the proceedings;
 - (b) a person who is related to, or associated with, a party to the proceedings or is, or is alleged to be, in any other way concerned in the matter to which the proceedings relate; or
 - (c) a witness in the proceedings;
- is guilty of an offence punishable, upon conviction by imprisonment for a period not exceeding one year.
- (2) A person who, except as permitted by the applicable Rules of Court, publishes in a newspaper or periodical publication, by radio broadcast or television or by other electronic means, or otherwise disseminates to the public or to a section of the public by any means (otherwise than by the display of a notice in the premises of the court), a list of proceedings under this Act, identified by reference to the names of the parties to the proceedings, that are to be dealt with by a court is guilty of an offence punishable, upon conviction by imprisonment for a period not exceeding one year.
- (3) Without limiting the generality of subsection (1), an account of proceedings, or of any part of proceedings, referred to in that subsection shall be taken to identify a person if:
- (a) it contains any particulars of:
 - (i) the name, title, pseudonym or alias of the person;
 - (ii) the address of any premises at which the person resides or works, or the locality in which any such premises are situated;
 - (iii) the physical description or the style of dress of the person;
 - (iv) any employment or occupation engaged in, profession practised or calling pursued, by the person or any official or honorary position held by the person;
 - (v) the relationship of the person to identified relatives of the person or the association of the person with

Section 121

- identified friends or identified business, official or professional acquaintances of the person;
- (vi) the recreational interests, or the political, philosophical or religious beliefs or interests, of the person; or
 - (vii) any real or personal property in which the person has an interest or with which the person is otherwise associated;
- being particulars that are sufficient to identify that person to a member of the public, or to a member of the section of the public to which the account is disseminated, as the case requires;
- (b) in the case of a written or televised account or an account by other electronic means—it is accompanied by a picture of the person; or
 - (c) in the case of a broadcast or televised account or an account by other electronic means—it is spoken in whole or in part by the person and the person's voice is sufficient to identify that person to a member of the public, or to a member of the section of the public to which the account is disseminated, as the case requires.
- (4) A reference in subsection (1) or (2) to proceedings shall be construed as including a reference to proceedings commenced before the commencement of section 72 of the *Family Law Amendment Act 1983*.
 - (5) An offence against this section is an indictable offence.
 - (8) Proceedings for an offence against this section shall not be commenced except by, or with the written consent of, the Director of Public Prosecutions.
 - (9) The preceding provisions of this section do not apply to or in relation to:
 - (a) the communication, to persons concerned in proceedings in any court, of any pleading, transcript of evidence or other document for use in connection with those proceedings; or
 - (b) the communication of any pleading, transcript of evidence or other document to:
 - (i) a body that is responsible for disciplining members of the legal profession in a State or Territory; or

- (ii) persons concerned in disciplinary proceedings against a member of the legal profession of a State or Territory, being proceedings before a body that is responsible for disciplining members of the legal profession in that State or Territory; or
 - (c) the communication, to a body that grants assistance by way of legal aid, of any pleading, transcript of evidence or other document for the purpose of facilitating the making of a decision as to whether assistance by way of legal aid should be granted, continued or provided in a particular case; or
 - (d) the publishing of a notice or report in pursuance of the direction of a court; or
 - (da) the publication by the court of lists of proceedings under this Act, identified by reference to the names of the parties, that are to be dealt with by the court; or
 - (e) the publishing of any publication *bona fide* intended primarily for use by the members of any profession, being:
 - (i) a separate volume or part of a series of law reports; or
 - (ii) any other publication of a technical character; or
 - (f) the publication or other dissemination of an account of proceedings or of any part of proceedings:
 - (i) to a person who is a member of a profession, in connection with the practice by that person of that profession or in the course of any form of professional training in which that person is involved; or
 - (ia) to an individual who is a party to any proceedings under this Act, in connection with the conduct of those proceedings; or
 - (ii) to a person who is a student, in connection with the studies of that person; or
 - (g) publication of accounts of proceedings, where those accounts have been approved by the court.
- (10) Applicable Rules of Court made for the purposes of subsection (2) may be of general or specially limited application or may differ according to differences in time, locality, place or circumstance.

Note: Powers to make Rules of Court are also contained in sections 26B, 37A, 109A and 123.

Section 122

(11) In this section:

court includes:

- (a) an officer of a court investigating or dealing with a matter in accordance with this Act, the regulations or the Rules of Court; and
- (b) a tribunal established by or under a law of the Commonwealth, of a State or of a Territory.

electronic means includes:

- (a) in the form of data, text or images by means of guided and/or unguided electromagnetic energy; or
- (b) in the form of speech by means of guided and/or unguided electromagnetic energy, where the speech is processed at its destination by an automated voice recognition system.

122 Rights of legal practitioners

A person who is, under Part VIIIA of the *Judiciary Act 1903*, entitled to practise in any federal court as a barrister or solicitor, or as both, has the like right to practise in any State court exercising jurisdiction under this Act.

122AA Use of reasonable force in arresting persons

A person who is authorised or directed by a provision of this Act, or by a warrant issued under a provision of this Act, to arrest another person may use such reasonable force as is necessary to make the arrest or to prevent the escape of that person after the arrest.

122A Powers of entry and search for purposes of arresting persons

(1) Where:

- (a) a person (in this subsection called the *authorised person*) is, by a provision of this Act, or by a warrant issued under a provision of this Act, authorised to arrest another person; and

- (b) the authorised person reasonably believes that the other person is in or on a particular searchable place;
the authorised person may, without warrant, enter and search the searchable place.
- (2) Where a person may enter and search a vehicle, vessel or aircraft under subsection (1), the person may, for the purposes of effecting the entry and search, stop and detain the vehicle, vessel or aircraft.
- (3) In exercising powers under this section, a person may use such force and assistance as is necessary and reasonable to enable the exercise of the powers.
- (4) In this section:
- searchable place* means:
- (a) premises or a place; or
 - (b) a vehicle, vessel or aircraft.

122B Arrangements with States and Territories

- (1) The Governor-General may make an arrangement with the relevant authority of a State or internal Territory for the performance by an officer of the State or Territory of a function under this Act.
- (2) In this section:
- officer* includes the holder of a judicial office.
- relevant authority* means:
- (a) in relation to a State—the Governor of the State; or
 - (b) in relation to the Australian Capital Territory—the Chief Minister for the Australian Capital Territory; or
 - (c) in relation to the Northern Territory—the Administrator of the Northern Territory.

Section 123

123 Rules of Court

- (1) The Judges, or a majority of them, may make Rules of Court not inconsistent with this Act, providing for or in relation to the practice and procedure to be followed in the Family Court and any other courts exercising jurisdiction under this Act, and for and in relation to all matters and things incidental to any such practice and procedure, or necessary or convenient to be prescribed for the conduct of any business in those courts and, in particular:
 - (a) providing for and in relation to the attendance of witnesses; and
 - (b) providing for and in relation to the manner of service of process of the Family Court or another court exercising jurisdiction under this Act, and for and in relation to dispensing with such service; and
 - (ba) providing for and in relation to trial management; and
 - (c) providing for and in relation to the time and manner of institution of appeals in and to the Family Court; and
 - (d) prescribing the duties of officers of the Family Court; and
 - (f) prescribing the seals and stamps to be used in the Family Court and in any other court exercising jurisdiction under this Act; and
 - (g) prescribing matters relating to the costs of proceedings (including solicitor and client costs and party and party costs) and the assessment or taxation of those costs; and
 - (h) authorizing a court to refer to an officer of the court for investigation, report and recommendation claims or applications for or relating to any matters before the court; and
 - (j) authorizing an officer making an investigation referred to in paragraph (h) to take evidence on oath or affirmation and to obtain and receive in evidence a report from a family and child counsellor or welfare officer, and enabling the summoning of witnesses before an officer making such an investigation for the purpose of giving evidence or producing books and documents; and
 - (k) regulating the procedure of a court upon receiving a report of an officer who has made an investigation referred to in paragraph (h); and

- (m) providing for and in relation to the procedure of a court exercising its powers under section 112AP to deal with a person for contempt of the court; and
- (ma) for the purposes of Divisions 2 and 3 of Part XI, providing for the conditions relating to the use of video links, audio links and other appropriate means of communication; and
- (n) providing for and in relation to the making of applications for dissolution of marriage jointly by both parties to the marriage; and
- (o) providing for and in relation to the appointment, by the Attorney-General, of a guardian *ad litem* for a party to proceedings under this Act; and
- (q) providing for and in relation to:
 - (i) the forfeiture of bonds and recognizances entered into in pursuance of requirements made under this Act; and
 - (ii) the recovery of any money that may be due to the Commonwealth under such bonds and recognizances or from any person who has become a surety under this Act; and
- (r) providing for and in relation to the attachment of moneys payable by the Commonwealth, a State, a Territory or the Administration of a Territory, or by an authority of the Commonwealth, of a State or of a Territory (other than moneys as to which it is provided by any law of the Commonwealth, of a State or of a Territory that they are not liable to attachment); and
- (s) providing for and in relation to:
 - (i) the attendance, by parties to proceedings under this Act, at conferences conducted by family and child counsellors or welfare officers; and
 - (ii) the use by courts exercising jurisdiction under this Act, and by officers of such courts, for the purposes of such proceedings, of reports prepared by family and child counsellors or welfare officers in relation to conferences attended by parties to the proceedings pursuant to Rules of Court made under subparagraph (i), being reports relating to the future conduct of the proceedings; and
- (sa) prescribing the functions and duties of assessors and of court mediators and arbitrators; and

Section 123

- (sb) providing for and in relation to the making of applications under this Act for mediation or arbitration and for orders under section 19E; and
 - (sc) prescribing the disputes, proceedings or matters that may or may not be mediated or arbitrated under this Act; and
 - (sd) providing for and in relation to:
 - (i) the procedures to be followed by a court mediator or an arbitrator in mediating or arbitrating a dispute, proceeding or matter under this Act; and
 - (ii) the attendance by persons at conferences conducted by court mediators and arbitrators for the purposes of mediating or arbitrating a dispute, proceeding or matter under this Act; and
 - (iii) the procedure to be followed when a mediation or arbitration ends, both where it has resulted in an agreement or award and where it has not; and
 - (se) prescribing matters relating to the costs of mediation and arbitration by court mediators and arbitrators and the assessment or taxation of those costs; and
 - (sf) providing for and in relation to:
 - (i) the registration of awards under section 19D or 19E; and
 - (ii) the time and manner of making applications for review of registered awards under section 19F or for orders setting aside registered awards under section 19G; and
 - (sg) providing for and in relation to conciliation conferences; and
 - (t) prescribing matters incidental to the matters specified in the preceding paragraphs; and
 - (u) prescribing penalties not exceeding 50 penalty units for offences against the standard Rules of Court.
- (1A) A reference in subsection (1) to a ***court exercising jurisdiction under this Act*** does not include a reference to the Federal Magistrates Court.
- (2) Sections 48, 48A, 48B, 49 and 50 of the *Acts Interpretation Act 1901* apply in relation to Rules of Court made under this section as if references in those sections of that Act to regulations were references to Rules of Court made under this section.

- (3) In this section, **Judge** means:
- (a) a Judge of the Family Court of Australia; or
 - (b) where the Governor-General has made an arrangement with the Governor of a State under section 112 in relation to the performance, by a Judge of the Family Court of that State, of functions under this section—that Judge.

Note: The power to make Rules of Court conferred by this section is extended by section 109A and subsection 111C(7A). Powers to make Rules of Court are also contained in sections 26B and 37A.

124 Rules Advisory Committee

- (1) There shall be a Rules Advisory Committee consisting of such Judges of the Family Court of Australia, such Judges of Family Courts of States and such other persons as are appointed in accordance with this section.
- (2) The function of the Rules Advisory Committee is to provide to the Judges referred to in section 123 such advice in relation to the making of standard Rules of Court as is requested from time to time by those Judges.
- (3) Members of the Rules Advisory Committee shall be appointed by the Governor-General on the nomination of the Attorney-General made by the Attorney-General after consultation with the Chief Judge of the Family Court of Australia.
- (4) A Judge of a Family Court of a State shall not be appointed as a member of the Rules Advisory Committee unless the Governor-General has made an arrangement with the Governor of the State under section 112 in relation to the performance, by that Judge, of functions as a member of the Rules Advisory Committee.
- (5) The members of the Rules Advisory Committee shall be paid such allowances in respect of expenses in connection with their duties as are prescribed.
- (6) A member of the Rules Advisory Committee may resign by writing signed and delivered to the Governor-General.

Section 124A

124A Regulations in relation to overseas-related maintenance obligations etc.

- (1) The regulations may make provision for, and in relation to, the following matters:
 - (a) giving effect to an international agreement that relates to maintenance obligations arising from family relationship, parentage or marriage;
 - (b) maintenance obligations arising from family relationship, parentage or marriage, where:
 - (i) the maintenance is claimed by or on behalf of a person who is in a reciprocating jurisdiction; or
 - (ii) the person from whom the maintenance is claimed is in a reciprocating jurisdiction.
- (2) Regulations made for the purposes of this section may:
 - (a) confer jurisdiction on a federal court (other than the High Court) or a court of a Territory; or
 - (b) invest a court of a State with federal jurisdiction.
- (3) Regulations made for the purposes of this section:
 - (a) may be inconsistent with this Act; and
 - (b) prevail over this Act (including any other regulations or other instruments made under this Act), to the extent of any inconsistency.
- (4) In this section:

international agreement means an agreement whose parties are:

- (a) Australia and a foreign country; or
- (b) Australia and 2 or more foreign countries.

reciprocating jurisdiction means:

- (a) a foreign country; or
- (b) a part of a foreign country;

that is prescribed by the regulations to be a reciprocating jurisdiction for the purposes of this section.

125 Regulations

- (1) The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters that are required or permitted by this Act to be prescribed or are necessary or convenient to be prescribed for carrying out or giving effect to this Act and, in particular:
- (a) providing for and in relation to the service overseas, pursuant to any convention between Australia and another country, of any documents in proceedings under this Act; and
 - (b) providing for and in relation to the transcription of proceedings under this Act and the making available of copies of transcripts of those proceedings; and
 - (ba) providing for and in relation to the approval of persons as court mediators; and
 - (bb) prescribing requirements for arbitrators; and
 - (bc) prescribing, or providing for or in relation to, anything that may be dealt with in Rules of Court made under paragraph 123(1)(sa), (sb), (sc), (sd) or (se); and
 - (c) prescribing court fees to be payable in respect of proceedings under this Act; and
 - (ca) prescribing fees to be payable in respect of the use of the counselling or mediation facilities of the Family Court in situations other than where a court orders or directs a person to attend the counselling or mediation; and
 - (d) exempting persons included in particular classes of persons from liability to pay court fees prescribed under paragraph (c) and fees prescribed under paragraph (ca); and
 - (e) providing for the refund of court fees prescribed under paragraph (c) and fees prescribed under paragraph (ca) that have been paid in particular circumstances; and

Section 125

- (f) providing for an officer of a court exercising jurisdiction under this Act, a prescribed authority of the Commonwealth, of a State or of a Territory or the person for the time being holding a prescribed office under a law of the Commonwealth, of a State or of a Territory, in his, her or its discretion, to institute and prosecute proceedings, on behalf of the person entitled to moneys payable under a child maintenance order under Part VII or a maintenance order under Part VIII, for the purpose of enforcing payment of those moneys; and
 - (g) providing for and in relation to priority as between the execution of orders made under the regulations, or under the repealed Act, for the attachment of moneys payable by the Commonwealth, a State, a Territory or the Administration of a Territory, or by an authority of the Commonwealth, of a State or of a Territory (other than moneys as to which it is provided by any law of the Commonwealth, of a State or of a Territory that they are not liable to attachment) and the execution of orders made in accordance with the *Maintenance Orders (Commonwealth Officers) Act 1966*.
- (2) Court fees payable in pursuance of regulations made under this section in respect of proceedings in a Family Court of a State are payable to the State.
 - (3) To the extent of any inconsistency between regulations and Rules of Court, the regulations prevail.

Schedule 1—Child Protection Convention

Note: This is the copy of the Child Protection Convention referred to in the definition of *Child Protection Convention* in subsection 111CA(1).

The undersigned, Delegates of the Governments of Argentina, Australia, Austria, Belgium, Canada, China, Croatia, the Czech Republic, Egypt, Finland, The former Yugoslav Republic of Macedonia, France, Germany, Greece, Ireland, Israel, Italy, Japan, Luxembourg, Malta, Mexico, Monaco, Morocco, the Netherlands, Norway, Poland, Portugal, Romania, the Slovak Republic, Spain, Sweden, Switzerland, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Venezuela, Member States, as well as the Representatives of the Governments of Burkina Faso, Colombia, Costa Rica, Ecuador, Georgia, the Holy See, the Republic of Korea, Mauritius, New Zealand, Paraguay, Peru, the Philippines, the Russian Federation, South Africa and Sri Lanka, participating as Observers, convened at The Hague on 30 September 1996, at the invitation of the Government of the Netherlands, in the Eighteenth Session of the Hague Conference on Private International Law.

Following the deliberations laid down in the records of the meetings, have decided to submit to their Governments—

CONVENTION ON JURISDICTION, APPLICABLE LAW, RECOGNITION, ENFORCEMENT AND CO-OPERATION IN RESPECT OF PARENTAL RESPONSIBILITY AND MEASURES FOR THE PROTECTION OF CHILDREN

The States signatory to the present Convention,

Considering the need to improve the protection of children in international situations,

Wishing to avoid conflicts between their legal systems in respect of jurisdiction, applicable law, recognition and enforcement of measures for the protection of children,

Recalling the importance of international co-operation for the protection of children,

Confirming that the best interests of the child are to be a primary consideration,

Noting that the *Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors* is in need of revision,

Desiring to establish common provisions to this effect, taking into account the *United Nations Convention on the Rights of the Child* of 20 November 1989,

Have agreed on the following provisions—

CHAPTER I—SCOPE OF THE CONVENTION

Article 1

1 The objects of the present Convention are—

a to determine the State whose authorities have jurisdiction to take measures directed to the protection of the person or property of the child;

b to determine which law is to be applied by such authorities in exercising their jurisdiction;

c to determine the law applicable to parental responsibility;

d to provide for the recognition and enforcement of such measures of protection in all Contracting States;

e to establish such co-operation between the authorities of the Contracting States as may be necessary in order to achieve the purposes of this Convention.

2 For the purposes of this Convention, the term ‘parental responsibility’ includes parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child.

Article 2

The Convention applies to children from the moment of their birth until they reach the age of 18 years.

Article 3

The measures referred to in Article 1 may deal in particular with—

- a* the attribution, exercise, termination or restriction of parental responsibility, as well as its delegation;
- b* rights of custody, including rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence, as well as rights of access including the right to take a child for a limited period of time to a place other than the child's habitual residence;
- c* guardianship, curatorship and analogous institutions;
- d* the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child;
- e* the placement of the child in a foster family or in institutional care, or the provision of care by *kafala* or an analogous institution;
- f* the supervision by a public authority of the care of a child by any person having charge of the child;
- g* the administration, conservation or disposal of the child's property.

Article 4

The Convention does not apply to—

- a* the establishment or contesting of a parent-child relationship;
- b* decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption;
- c* the name and forenames of the child;

- d* emancipation;
- e* maintenance obligations;
- f* trusts or succession;
- g* social security;
- h* public measures of a general nature in matters of education or health;
- i* measures taken as a result of penal offences committed by children;
- j* decisions on the right of asylum and on immigration.

CHAPTER II—JURISDICTION

Article 5

1 The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property.

2 Subject to Article 7, in case of a change of the child's habitual residence to another Contracting State, the authorities of the State of the new habitual residence have jurisdiction.

Article 6

1 For refugee children and children who, due to disturbances occurring in their country, are internationally displaced, the authorities of the Contracting State on the territory of which these children are present as a result of their displacement have the jurisdiction provided for in paragraph 1 of Article 5.

2 The provisions of the preceding paragraph also apply to children whose habitual residence cannot be established.

Article 7

1 In case of wrongful removal or retention of the child, the authorities of the Contracting State in which the child was habitually resident immediately before the removal or retention keep their jurisdiction until the child has acquired a habitual residence in another State, and

a each person, institution or other body having rights of custody has acquiesced in the removal or retention; or

b the child has resided in that other State for a period of at least one year after the person, institution or other body having rights of custody has or should have had knowledge of the whereabouts of the child, no request for return lodged within that period is still pending, and the child is settled in his or her new environment.

2 The removal or the retention of a child is to be considered wrongful where—

a it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph *a* above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

3 So long as the authorities first mentioned in paragraph 1 keep their jurisdiction, the authorities of the Contracting State to which the child has been removed or in which he or she has been retained can take only such urgent measures under Article 11 as are necessary for the protection of the person or property of the child.

Article 8

1 By way of exception, the authority of a Contracting State having jurisdiction under Article 5 or 6, if it considers that the authority of another Contracting State would be better placed in the particular case to assess the best interests of the child, may either

— request that other authority, directly or with the assistance of the Central Authority of its State, to assume jurisdiction to take such measures of protection as it considers to be necessary, or

— suspend consideration of the case and invite the parties to introduce such a request before the authority of that other State.

2 The Contracting States whose authorities may be addressed as provided in the preceding paragraph are

a a State of which the child is a national,

b a State in which property of the child is located,

c a State whose authorities are seised of an application for divorce or legal separation of the child's parents, or for annulment of their marriage,

d a State with which the child has a substantial connection.

3 The authorities concerned may proceed to an exchange of views.

4 The authority addressed as provided in paragraph 1 may assume jurisdiction, in place of the authority having jurisdiction under Article 5 or 6, if it considers that this is in the child's best interests.

Article 9

1 If the authorities of a Contracting State referred to in Article 8, paragraph 2, consider that they are better placed in the particular case to assess the child's best interests, they may either

— request the competent authority of the Contracting State of the habitual residence of the child, directly or with the assistance of the Central Authority of

that State, that they be authorised to exercise jurisdiction to take the measures of protection which they consider to be necessary, or

— invite the parties to introduce such a request before the authority of the Contracting State of the habitual residence of the child.

2 The authorities concerned may proceed to an exchange of views.

3 The authority initiating the request may exercise jurisdiction in place of the authority of the Contracting State of the habitual residence of the child only if the latter authority has accepted the request.

Article 10

1 Without prejudice to Articles 5 to 9, the authorities of a Contracting State exercising jurisdiction to decide upon an application for divorce or legal separation of the parents of a child habitually resident in another Contracting State, or for annulment of their marriage, may, if the law of their State so provides, take measures directed to the protection of the person or property of such child if

a at the time of commencement of the proceedings, one of his or her parents habitually resides in that State and one of them has parental responsibility in relation to the child, and

b the jurisdiction of these authorities to take such measures has been accepted by the parents, as well as by any other person who has parental responsibility in relation to the child, and is in the best interests of the child.

2 The jurisdiction provided for by paragraph 1 to take measures for the protection of the child ceases as soon as the decision allowing or refusing the application for divorce, legal separation or annulment of the marriage has become final, or the proceedings have come to an end for another reason.

Article 11

1 In all cases of urgency, the authorities of any Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take any necessary measures of protection.

2 The measures taken under the preceding paragraph with regard to a child habitually resident in a Contracting State shall lapse as soon as the authorities which have jurisdiction under Articles 5 to 10 have taken the measures required by the situation.

3 The measures taken under paragraph 1 with regard to a child who is habitually resident in a non-Contracting State shall lapse in each Contracting State as soon as measures required by the situation and taken by the authorities of another State are recognised in the Contracting State in question.

Article 12

1 Subject to Article 7, the authorities of a Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take measures of a provisional character for the protection of the person or property of the child which have a territorial effect limited to the State in question, in so far as such measures are not incompatible with measures already taken by authorities which have jurisdiction under Articles 5 to 10.

2 The measures taken under the preceding paragraph with regard to a child habitually resident in a Contracting State shall lapse as soon as the authorities which have jurisdiction under Articles 5 to 10 have taken a decision in respect of the measures of protection which may be required by the situation.

3 The measures taken under paragraph 1 with regard to a child who is habitually resident in a non-Contracting State shall lapse in the Contracting State where the measures were taken as soon as measures required by the situation and taken by the authorities of another State are recognised in the Contracting State in question.

Article 13

1 The authorities of a Contracting State which have jurisdiction under Articles 5 to 10 to take measures for the protection of the person or property of the child must abstain from exercising this jurisdiction if, at the time of the commencement of the proceedings, corresponding measures have been requested from the authorities of another Contracting State having jurisdiction under Articles 5 to 10 at the time of the request and are still under consideration.

2 The provisions of the preceding paragraph shall not apply if the authorities before whom the request for measures was initially introduced have declined jurisdiction.

Article 14

The measures taken in application of Articles 5 to 10 remain in force according to their terms, even if a change of circumstances has eliminated the basis upon which jurisdiction was founded, so long as the authorities which have jurisdiction under the Convention have not modified, replaced or terminated such measures.

CHAPTER III—APPLICABLE LAW

Article 15

1 In exercising their jurisdiction under the provisions of Chapter II, the authorities of the Contracting States shall apply their own law.

2 However, in so far as the protection of the person or the property of the child requires, they may exceptionally apply or take into consideration the law of another State with which the situation has a substantial connection.

3 If the child's habitual residence changes to another Contracting State, the law of that other State governs, from the time of the change, the conditions of application of the measures taken in the State of the former habitual residence.

Article 16

1 The attribution or extinction of parental responsibility by operation of law, without the intervention of a judicial or administrative authority, is governed by the law of the State of the habitual residence of the child.

2 The attribution or extinction of parental responsibility by an agreement or a unilateral act, without intervention of a judicial or administrative authority, is governed by the law of the State of the child's habitual residence at the time when the agreement or unilateral act takes effect.

3 Parental responsibility which exists under the law of the State of the child's habitual residence subsists after a change of that habitual residence to another State.

4 If the child's habitual residence changes, the attribution of parental responsibility by operation of law to a person who does not already have such responsibility is governed by the law of the State of the new habitual residence.

Article 17

The exercise of parental responsibility is governed by the law of the State of the child's habitual residence. If the child's habitual residence changes, it is governed by the law of the State of the new habitual residence.

Article 18

The parental responsibility referred to in Article 16 may be terminated, or the conditions of its exercise modified, by measures taken under this Convention.

Article 19

1 The validity of a transaction entered into between a third party and another person who would be entitled to act as the child's legal representative under the law of the State where the transaction was concluded cannot be contested, and the third party cannot be held liable, on the sole ground that the other person was not entitled to act as the child's legal representative under the law designated by the provisions of this Chapter, unless the third party knew or should have known that the parental responsibility was governed by the latter law.

2 The preceding paragraph applies only if the transaction was entered into between persons present on the territory of the same State.

Article 20

The provisions of this Chapter apply even if the law designated by them is the law of a non-Contracting State.

Article 21

1 In this Chapter the term "law" means the law in force in a State other than its choice of law rules.

2 However, if the law applicable according to Article 16 is that of a non-Contracting State and if the choice of law rules of that State designate the law of another non-Contracting State which would apply its own law, the law of the latter State applies. If that other non-Contracting State would not apply its own law, the applicable law is that designated by Article 16.

Article 22

The application of the law designated by the provisions of this Chapter can be refused only if this application would be manifestly contrary to public policy, taking into account the best interests of the child.

CHAPTER IV—RECOGNITION AND ENFORCEMENT

Article 23

1 The measures taken by the authorities of a Contracting State shall be recognised by operation of law in all other Contracting States.

2 Recognition may however be refused—

a if the measure was taken by an authority whose jurisdiction was not based on one of the grounds provided for in Chapter II;

b if the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the child having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State;

c on the request of any person claiming that the measure infringes his or her parental responsibility, if such measure was taken, except in a case of urgency, without such person having been given an opportunity to be heard;

d if such recognition is manifestly contrary to public policy of the requested State, taking into account the best interests of the child;

e if the measure is incompatible with a later measure taken in the non-Contracting State of the habitual residence of the child, where this later measure fulfils the requirements for recognition in the requested State;

f if the procedure provided in Article 33 has not been complied with.

Article 24

Without prejudice to Article 23, paragraph 1, any interested person may request from the competent authorities of a Contracting State that they decide on the recognition or non-recognition of a measure taken in another Contracting State. The procedure is governed by the law of the requested State.

Article 25

The authority of the requested State is bound by the findings of fact on which the authority of the State where the measure was taken based its jurisdiction.

Article 26

1 If measures taken in one Contracting State and enforceable there require enforcement in another Contracting State, they shall, upon request by an interested party, be declared enforceable or registered for the purpose of enforcement in that other State according to the procedure provided in the law of the latter State.

2 Each Contracting State shall apply to the declaration of enforceability or registration a simple and rapid procedure.

3 The declaration of enforceability or registration may be refused only for one of the reasons set out in Article 23, paragraph 2.

Article 27

Without prejudice to such review as is necessary in the application of the preceding Articles, there shall be no review of the merits of the measure taken.

Article 28

Measures taken in one Contracting State and declared enforceable, or registered for the purpose of enforcement, in another Contracting State shall be enforced in the latter State as if they had been taken by the authorities of that State. Enforcement takes place in accordance with the law of the requested State to the extent provided by such law, taking into consideration the best interests of the child.

CHAPTER V—CO-OPERATION

Article 29

1 A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention on such authorities.

2 Federal States, States with more than one system of law or States having autonomous territorial units shall be free to appoint more than one Central Authority and to specify the territorial or personal extent of their functions. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which any communication may be addressed for transmission to the appropriate Central Authority within that State.

Article 30

1 Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their States to achieve the purposes of the Convention.

2 They shall, in connection with the application of the Convention, take appropriate steps to provide information as to the laws of, and services available in, their States relating to the protection of children.

Article 31

The Central Authority of a Contracting State, either directly or through public authorities or other bodies, shall take all appropriate steps to—

a facilitate the communications and offer the assistance provided for in Articles 8 and 9 and in this Chapter;

b facilitate, by mediation, conciliation or similar means, agreed solutions for the protection of the person or property of the child in situations to which the Convention applies;

c provide, on the request of a competent authority of another Contracting State, assistance in discovering the whereabouts of a child where it appears that

the child may be present and in need of protection within the territory of the requested State.

Article 32

On a request made with supporting reasons by the Central Authority or other competent authority of any Contracting State with which the child has a substantial connection, the Central Authority of the Contracting State in which the child is habitually resident and present may, directly or through public authorities or other bodies,

- a* provide a report on the situation of the child;
- b* request the competent authority of its State to consider the need to take measures for the protection of the person or property of the child.

Article 33

1 If an authority having jurisdiction under Articles 5 to 10 contemplates the placement of the child in a foster family or institutional care, or the provision of care by *kafala* or an analogous institution, and if such placement or such provision of care is to take place in another Contracting State, it shall first consult with the Central Authority or other competent authority of the latter State. To that effect it shall transmit a report on the child together with the reasons for the proposed placement or provision of care.

2 The decision on the placement or provision of care may be made in the requesting State only if the Central Authority or other competent authority of the requested State has consented to the placement or provision of care, taking into account the child's best interests.

Article 34

1 Where a measure of protection is contemplated, the competent authorities under the Convention, if the situation of the child so requires, may request any authority of another Contracting State which has information relevant to the protection of the child to communicate such information.

2 A Contracting State may declare that requests under paragraph 1 shall be communicated to its authorities only through its Central Authority.

Article 35

1 The competent authorities of a Contracting State may request the authorities of another Contracting State to assist in the implementation of measures of protection taken under this Convention, especially in securing the effective exercise of rights of access as well as of the right to maintain direct contacts on a regular basis.

2 The authorities of a Contracting State in which the child does not habitually reside may, on the request of a parent residing in that State who is seeking to obtain or to maintain access to the child, gather information or evidence and may make a finding on the suitability of that parent to exercise access and on the conditions under which access is to be exercised. An authority exercising jurisdiction under Articles 5 to 10 to determine an application concerning access to the child, shall admit and consider such information, evidence and finding before reaching its decision.

3 An authority having jurisdiction under Articles 5 to 10 to decide on access may adjourn a proceeding pending the outcome of a request made under paragraph 2, in particular, when it is considering an application to restrict or terminate access rights granted in the State of the child's former habitual residence.

4 Nothing in this Article shall prevent an authority having jurisdiction under Articles 5 to 10 from taking provisional measures pending the outcome of the request made under paragraph 2.

Article 36

In any case where the child is exposed to a serious danger, the competent authorities of the Contracting State where measures for the protection of the child have been taken or are under consideration, if they are informed that the child's residence has changed to, or that the child is present in another State, shall inform the authorities of that other State about the danger involved and the measures taken or under consideration.

Article 37

An authority shall not request or transmit any information under this Chapter if to do so would, in its opinion, be likely to place the child's person or property in

danger, or constitute a serious threat to the liberty or life of a member of the child's family.

Article 38

1 Without prejudice to the possibility of imposing reasonable charges for the provision of services, Central Authorities and other public authorities of Contracting States shall bear their own costs in applying the provisions of this Chapter.

2 Any Contracting State may enter into agreements with one or more other Contracting States concerning the allocation of charges.

Article 39

Any Contracting State may enter into agreements with one or more other Contracting States with a view to improving the application of this Chapter in their mutual relations. The States which have concluded such an agreement shall transmit a copy to the depositary of the Convention.

CHAPTER VI—GENERAL PROVISIONS

Article 40

1 The authorities of the Contracting State of the child's habitual residence, or of the Contracting State where a measure of protection has been taken, may deliver to the person having parental responsibility or to the person entrusted with protection of the child's person or property, at his or her request, a certificate indicating the capacity in which that person is entitled to act and the powers conferred upon him or her.

2 The capacity and powers indicated in the certificate are presumed to be vested in that person, in the absence of proof to the contrary.

3 Each Contracting State shall designate the authorities competent to draw up the certificate.

Article 41

Personal data gathered or transmitted under the Convention shall be used only for the purposes for which they were gathered or transmitted.

Article 42

The authorities to whom information is transmitted shall ensure its confidentiality, in accordance with the law of their State.

Article 43

All documents forwarded or delivered under this Convention shall be exempt from legalisation or any analogous formality.

Article 44

Each Contracting State may designate the authorities to which requests under Articles 8, 9 and 33 are to be addressed.

Article 45

1 The designations referred to in Articles 29 and 44 shall be communicated to the Permanent Bureau of the Hague Conference on Private International Law.

2 The declaration referred to in Article 34, paragraph 2, shall be made to the depositary of the Convention.

Article 46

A Contracting State in which different systems of law or sets of rules of law apply to the protection of the child and his or her property shall not be bound to apply the rules of the Convention to conflicts solely between such different systems or sets of rules of law.

Article 47

In relation to a State in which two or more systems of law or sets of rules of law with regard to any matter dealt with in this Convention apply in different territorial units—

- 1 any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit;
- 2 any reference to the presence of the child in that State shall be construed as referring to presence in a territorial unit;
- 3 any reference to the location of property of the child in that State shall be construed as referring to location of property of the child in a territorial unit;
- 4 any reference to the State of which the child is a national shall be construed as referring to the territorial unit designated by the law of that State or, in the absence of relevant rules, to the territorial unit with which the child has the closest connection;
- 5 any reference to the State whose authorities are seized of an application for divorce or legal separation of the child's parents, or for annulment of their marriage, shall be construed as referring to the territorial unit whose authorities are seized of such application;
- 6 any reference to the State with which the child has a substantial connection shall be construed as referring to the territorial unit with which the child has such connection;
- 7 any reference to the State to which the child has been removed or in which he or she has been retained shall be construed as referring to the relevant territorial unit to which the child has been removed or in which he or she has been retained;
- 8 any reference to bodies or authorities of that State, other than Central Authorities, shall be construed as referring to those authorised to act in the relevant territorial unit;
- 9 any reference to the law or procedure or authority of the State in which a measure has been taken shall be construed as referring to the law or procedure or authority of the territorial unit in which such measure was taken;
- 10 any reference to the law or procedure or authority of the requested State shall be construed as referring to the law or procedure or authority of the territorial unit in which recognition or enforcement is sought.

Article 48

For the purpose of identifying the applicable law under Chapter III, in relation to a State which comprises two or more territorial units each of which has its own system of law or set of rules of law in respect of matters covered by this Convention, the following rules apply—

a if there are rules in force in such a State identifying which territorial unit's law is applicable, the law of that unit applies;

b in the absence of such rules, the law of the relevant territorial unit as defined in Article 47 applies.

Article 49

For the purpose of identifying the applicable law under Chapter III, in relation to a State which has two or more systems of law or sets of rules of law applicable to different categories of persons in respect of matters covered by this Convention, the following rules apply—

a if there are rules in force in such a State identifying which among such laws applies, that law applies;

b in the absence of such rules, the law of the system or the set of rules of law with which the child has the closest connection applies.

Article 50

This Convention shall not affect the application of the *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, as between Parties to both Conventions. Nothing, however, precludes provisions of this Convention from being invoked for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organising access rights.

Article 51

In relations between the Contracting States this Convention replaces the *Convention of 5 October 1961 concerning the powers of authorities and the law*

applicable in respect of the protection of minors, and the Convention governing the guardianship of minors, signed at The Hague 12 June 1902, without prejudice to the recognition of measures taken under the Convention of 5 October 1961 mentioned above.

Article 52

1 This Convention does not affect any international instrument to which Contracting States are Parties and which contains provisions on matters governed by the Convention, unless a contrary declaration is made by the States Parties to such instrument.

2 This Convention does not affect the possibility for one or more Contracting States to conclude agreements which contain, in respect of children habitually resident in any of the States Parties to such agreements, provisions on matters governed by this Convention.

3 Agreements to be concluded by one or more Contracting States on matters within the scope of this Convention do not affect, in the relationship of such States with other Contracting States, the application of the provisions of this Convention.

4 The preceding paragraphs also apply to uniform laws based on special ties of a regional or other nature between the States concerned.

Article 53

1 The Convention shall apply to measures only if they are taken in a State after the Convention has entered into force for that State.

2 The Convention shall apply to the recognition and enforcement of measures taken after its entry into force as between the State where the measures have been taken and the requested State.

Article 54

1 Any communication sent to the Central Authority or to another authority of a Contracting State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the other State or, where that is not feasible, a translation into French or English.

2 However, a Contracting State may, by making a reservation in accordance with Article 60, object to the use of either French or English, but not both.

Article 55

1 A Contracting State may, in accordance with Article 60,

a reserve the jurisdiction of its authorities to take measures directed to the protection of property of a child situated on its territory;

b reserve the right not to recognise any parental responsibility or measure in so far as it is incompatible with any measure taken by its authorities in relation to that property.

2 The reservation may be restricted to certain categories of property.

Article 56

The Secretary General of the Hague Conference on Private International Law shall at regular intervals convoke a Special Commission in order to review the practical operation of the Convention.

CHAPTER VII—FINAL CLAUSES

Article 57

1 The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Eighteenth Session.

2 It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

Article 58

- 1 Any other State may accede to the Convention after it has entered into force in accordance with Article 61, paragraph 1.
- 2 The instrument of accession shall be deposited with the depositary.
- 3 Such accession shall have effect only as regards the relations between the acceding State and those Contracting States which have not raised an objection to its accession in the six months after the receipt of the notification referred to in sub-paragraph *b* of Article 63. Such an objection may also be raised by States at the time when they ratify, accept or approve the Convention after an accession. Any such objection shall be notified to the depositary.

Article 59

- 1 If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that the Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.
- 2 Any such declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.
- 3 If a State makes no declaration under this Article, the Convention is to extend to all territorial units of that State.

Article 60

- 1 Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 59, make one or both of the reservations provided for in Articles 54, paragraph 2, and 55. No other reservation shall be permitted.
 - 2 Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the depositary.
 - 3 The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.
-

Article 61

1 The Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the third instrument of ratification, acceptance or approval referred to in Article 57.

2 Thereafter the Convention shall enter into force—

a for each State ratifying, accepting or approving it subsequently, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession;

b for each State acceding, on the first day of the month following the expiration of three months after the expiration of the period of six months provided in Article 58, paragraph 3;

c for a territorial unit to which the Convention has been extended in conformity with Article 59, on the first day of the month following the expiration of three months after the notification referred to in that Article.

Article 62

1 A State Party to the Convention may denounce it by a notification in writing addressed to the depositary. The denunciation may be limited to certain territorial units to which the Convention applies.

2 The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period.

Article 63

The depositary shall notify the States Members of the Hague Conference on Private International Law and the States which have acceded in accordance with Article 58 of the following—

a the signatures, ratifications, acceptances and approvals referred to in Article 57;

- b* the accessions and objections raised to accessions referred to in Article 58;
- c* the date on which the Convention enters into force in accordance with Article 61;
- d* the declarations referred to in Articles 34, paragraph 2, and 59;
- e* the agreements referred to in Article 39;
- f* the reservations referred to in Articles 54, paragraph 2, and 55 and the withdrawals referred to in Article 60, paragraph 2;
- g* the denunciations referred to in Article 62.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

[Signatures omitted]

Done at The Hague, on the 19th day of October 1996, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Eighteenth Session.

Table of Acts**Notes to the *Family Law Act 1975*****Note 1**

The *Family Law Act 1975* as shown in this compilation comprises Act No. 53, 1975 amended as indicated in the Tables below.

All relevant information pertaining to application, saving or transitional provisions prior to 29 November 2000 is not included in this compilation. For subsequent information *see* Table A.

Table of Acts

Act	Number and year	Date of Assent	Date of commencement	Application, saving or transitional provisions
<i>Family Law Act 1975</i>	53, 1975	12 June 1975	5 Jan 1976 (see <i>Gazette</i> 1975, No. G35, p. 2)	
<i>Family Law Amendment Act 1976</i>	63, 1976	8 June 1976	Ss. 1, 2, 17, 18 and 39: Royal Assent Ss. 29 and 30: 5 Jan 1976 Remainder: 1 July 1976	S. 19(2)
<i>Family Law Amendment Act (No. 2) 1976</i>	95, 1976	28 Sept 1976	28 Sept 1976	—
<i>Marriage Amendment Act 1976</i>	209, 1976	20 Dec 1976	Ss. 1, 2 and 30: Royal Assent Ss. 14 and 31: 1 July 1976 Remainder: 20 June 1977 (see <i>Gazette</i> 1977, No. S93)	—
<i>Family Law Amendment Act 1977</i>	102, 1977	11 Oct 1977	11 Oct 1977	—
<i>Family Law Amendment Act 1979</i>	23, 1979	5 Apr 1979	Ss. 4, 10, 11, 12(a), 17 and 23: 1 Aug 1979 (see <i>Gazette</i> 1979, No. S154) Remainder: Royal Assent	Ss. 18(2), 19(2) and 22(2)
<i>Domicile (Consequential Amendments) Act 1982</i>	2, 1982	4 Mar 1982	1 July 1982 (see s. 2 and <i>Gazette</i> 1982, No. G26, p. 2)	—
<i>Family Law Amendment (Legal Aid Costs) Act 1983</i>	67, 1983	20 Oct 1983	20 Oct 1983	—

Table of Acts

Act	Number and year	Date of Assent	Date of commencement	Application, saving or transitional provisions
<i>Family Law Amendment Act 1983</i>	72, 1983	28 Oct 1983	Part I (ss. 1, 2): Royal Assent Part II (ss. 3–72): 25 Nov 1983 Part III (ss. 73–76): 2 Jan 1985 (see <i>Gazette</i> 1984, No. S532)	Ss. 3(2), 18(2), (3), 19(2), 44(2), (3), 51(2) and 68(2)
<i>Public Service Reform Act 1984</i>	63, 1984	25 June 1984	S. 152(1): 20 July 1984 (see <i>Gazette</i> 1984, No. S276) (a)	—
<i>Statute Law (Miscellaneous Provisions) Act (No. 1) 1984</i>	72, 1984	25 June 1984	S. 3: (b)	Ss. 2(24) and 5(1)
<i>Statute Law (Miscellaneous Provisions) Act (No. 2) 1984</i>	165, 1984	25 Oct 1984	S. 3: (c)	S. 6(1)
<i>Statute Law (Miscellaneous Provisions) Act (No. 1) 1985</i>	65, 1985	5 June 1985	S. 3: 3 July 1985 (d)	—
<i>Public Service and Statutory Authorities Amendment Act 1985</i>	166, 1985	11 Dec 1985	S. 45: 8 Jan 1986 (e)	S. 45(2)
<i>Statute Law (Miscellaneous Provisions) Act (No. 2) 1985</i>	193, 1985	16 Dec 1985	S. 3: Royal Assent (f)	Ss. 10 and 16
<i>Statute Law (Miscellaneous Provisions) Act (No. 1) 1986</i>	76, 1986	24 June 1986	S. 3: Royal Assent (g)	S. 9
<i>Statute Law (Miscellaneous Provisions) Act (No. 2) 1986</i>	168, 1986	18 Dec 1986	S. 3: Royal Assent (h)	S. 5(1)
<i>Statute Law (Miscellaneous Provisions) Act 1987</i>	141, 1987	18 Dec 1987	S. 3: Royal Assent (i)	S. 5(1)
<i>Family Law Amendment Act 1987</i>	181, 1987	26 Dec 1987	1 Apr 1988 (see <i>Gazette</i> 1988, No. S83)	Ss. 64 and 66–68 S. 65 (am. by 8, 1988, s. 45)
as amended by <i>Family Court of Australia (Additional Jurisdiction and Exercise of Powers) Act 1988</i>	8, 1988	5 Apr 1988	(see 8, 1988 below)	—

Table of Acts

Act	Number and year	Date of Assent	Date of commencement	Application, saving or transitional provisions
<i>Family Court of Australia (Additional Jurisdiction and Exercise of Powers) Act 1988</i>	8, 1988	5 Apr 1988	Ss. 1–11, 12(b), (c), (e), (f), 13–21, 27, 29 and 30: Royal Assent S. 12(a) and (d): 1 Jan 1990 Remainder: 1 July 1988 (see <i>Gazette</i> 1988, No. S191)	—
as amended by				
<i>Law and Justice Legislation Amendment Act 1988</i>	120, 1988	14 Dec 1988	Part XI (ss. 34, 35): 5 Apr 1988 (j)	—
<i>Statutory Instruments (Tabling and Disallowance) Legislation Amendment Act 1988</i>	99, 1988	2 Dec 1988	2 Dec 1988	—
<i>Law and Justice Legislation Amendment Act 1988</i>	120, 1988	14 Dec 1988	Part XII (ss. 36–39): Royal Assent (k)	Ss. 37(2), 38(2) and 39(2)
<i>Child Support (Assessment) Act 1989</i>	124, 1989	21 Sept 1989	1 Oct 1989 (see <i>Gazette</i> 1989, No. S314)	—
<i>Courts and Tribunals Administration Amendment Act 1989</i>	157, 1989	5 Dec 1989	Part 1 (ss. 1, 2) and Part 6 (ss. 17, 18): Royal Assent Remainder: 1 Jan 1990 (see <i>Gazette</i> 1989, No. S398)	S. 23
<i>Family Law Amendment Act 1989</i>	182, 1989	28 Dec 1989	25 Jan 1990	Ss. 21(2) and 23(2)
<i>Law and Justice Legislation Amendment Act 1990</i>	115, 1990	21 Dec 1990	Ss. 1, 2 and 40–49: Royal Assent Ss. 3, 5, 6, 8, 9, 16, 17, 20–23, 28, 30, 32, 33, 38 and 39: 4 Feb 1991 (see <i>Gazette</i> 1991, No. GN3, p. 278) Remainder: 21 June 1991	—
<i>Child Support Legislation Amendment Act 1990</i>	138, 1990	28 Dec 1990	28 Dec 1990	—
<i>Family Law Amendment Act 1991</i>	37, 1991	27 Mar 1991	24 Apr 1991	—
<i>Courts (Mediation and Arbitration) Act 1991</i>	113, 1991	27 June 1991	Ss. 1 and 2: Royal Assent Remainder: 27 Dec 1991	—

Table of Acts

Act	Number and year	Date of Assent	Date of commencement	Application, saving or transitional provisions
<i>Industrial Relations Legislation Amendment Act 1991</i>	122, 1991	27 June 1991	Ss. 4(1), 10(b) and 15–20: 1 Dec 1988 Ss. 28(b)–(e), 30 and 31: 10 Dec 1991 (see <i>Gazette</i> 1991, No. S332) Remainder: Royal Assent	S. 31(2)
<i>Law and Justice Legislation Amendment Act 1991</i>	136, 1991	12 Sept 1991	Schedule: 10 Oct 1991 (l)	—
<i>Family Law Amendment Act (No. 2) 1991</i>	159, 1991	25 Oct 1991	25 Oct 1991	—
<i>Prime Minister and Cabinet Legislation Amendment Act 1991</i>	199, 1991	18 Dec 1991	18 Dec 1991	—
<i>Law and Justice Legislation Amendment Act 1992</i>	22, 1992	13 Apr 1992	S. 3: Royal Assent (m)	—
<i>Law and Justice Legislation Amendment Act (No. 2) 1992</i>	23, 1992	6 May 1992	6 May 1992	—
<i>Superannuation Legislation (Consequential Amendments and Transitional Provisions) Act 1992</i>	94, 1992	30 June 1992	S. 3: 1 July 1990 Remainder: Royal Assent	—
<i>Territories Law Reform Act 1992</i>	104, 1992	30 June 1992	Ss. 1, 2, 25 and 26: Royal Assent Ss. 9, 10, 19, 21 and 22: 29 June 1993 (see <i>Gazette</i> 1993, No. S196) Remainder: 1 July 1992	—
<i>Law and Justice Legislation Amendment Act (No. 4) 1992</i>	143, 1992	7 Dec 1992	S. 3: (n)	—
<i>Social Security Legislation Amendment Act (No. 2) 1992</i>	229, 1992	24 Dec 1992	Schedule 4 (items 1–3): Royal Assent (o)	—
<i>Law and Justice Legislation Amendment Act 1994</i>	84, 1994	23 June 1994	Part 5 (s. 35): (p)	—
<i>Family Law Reform Act 1995</i>	167, 1995	16 Dec 1995	Ss. 1, 2 and 54: Royal Assent S. 52: 25 Jan 1996 (see <i>Gazette</i> 1996, No. S27) Remainder: 11 June 1996 (see <i>Gazette</i> 1996, No. GN5)	Ss. 52(2) and 59
<i>Statute Law Revision Act 1996</i>	43, 1996	25 Oct 1996	Schedule 4 (items 72–74): Royal Assent (q)	—

Table of Acts

Act	Number and year	Date of Assent	Date of commencement	Application, saving or transitional provisions
<i>Family Law Amendment Act 1997</i>	25, 1997	10 Apr 1997	10 Apr 1997	—
<i>Law and Justice Legislation Amendment Act 1997</i>	34, 1997	17 Apr 1997	Schedule 7: Royal Assent (<i>r</i>)	—
<i>Child Support Legislation Amendment Act (No. 1) 1997</i>	84, 1997	23 June 1997	Schedule 1 (items 40, 41): 21 July 1997 (<i>s</i>)	—
<i>Audit (Transitional and Miscellaneous) Amendment Act 1997</i>	152, 1997	24 Oct 1997	Schedule 2 (items 751–759): 1 Jan 1998 (see <i>Gazette</i> 1997, No. GN49) (<i>t</i>)	—
<i>Family Law Amendment Act (No. 1) 1998</i>	89, 1998	14 July 1998	14 July 1998	—
<i>Statute Stocktake Act 1999</i>	118, 1999	22 Sept 1999	22 Sept 1999	—
<i>Public Employment (Consequential and Transitional) Amendment Act 1999</i>	146, 1999	11 Nov 1999	Schedule 1 (items 439–454): 5 Dec 1999 (see <i>Gazette</i> 1999, No. S584) (<i>u</i>)	—
<i>Corporate Law Economic Reform Program Act 1999</i>	156, 1999	24 Nov 1999	Schedule 10 (item 83): 13 Mar 2000 (see <i>Gazette</i> 2000, No. S114) (<i>v</i>)	—
<i>Federal Magistrates (Consequential Amendments) Act 1999</i>	194, 1999	23 Dec 1999	Schedule 11: 23 Dec 1999 (<i>w</i>)	—
<i>Child Support Legislation Amendment Act 2000</i>	49, 2000	3 May 2000	3 May 2000	—
<i>Family Law Amendment Act 2000</i>	143, 2000	29 Nov 2000	Schedule 3 (items 31A, 117): Royal Assent Schedule 3 (item 41): (<i>x</i>) Remainder: 27 Dec 2000	Sch. 1 (item 31) and Sch. 3 (items 20, 24, 40, 56, 56B, 75, 83) [see Table A]
<i>Jurisdiction of Courts (Miscellaneous Amendments) Act 2000</i>	161, 2000	21 Dec 2000	21 Dec 2000	Sch. 1 (item 16) [see Table A]
<i>Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001</i>	24, 2001	6 Apr 2001	S. 4(1), (2) and Schedule 27: (<i>y</i>)	S. 4(1) and (2) [see Table A]
<i>Family Law Legislation Amendment (Superannuation) Act 2001</i>	61, 2001	28 June 2001	28 Dec 2002	S. 4 S. 5 (as am. by 86, 2002, Sch. 5 [item 10]) [see Table A]

Table of Acts

Act	Number and year	Date of Assent	Date of commencement	Application, saving or transitional provisions
as amended by				
<i>Proceeds of Crime (Consequential Amendments and Transitional Provisions) Act 2002</i>	86, 2002	11 Oct 2002	(see 86, 2002 below)	—
<i>Family Law Legislation Amendment (Superannuation) (Consequential Provisions) Act 2001</i>	114, 2001	18 Sept 2001	(z)	—
<i>Abolition of Compulsory Age Retirement (Statutory Officeholders) Act 2001</i>	159, 2001	1 Oct 2001	29 Oct 2001	Sch. 1 (item 97) [see Table A]
<i>Family Law Amendment (Child Protection Convention) Act 2002</i>	69, 2002	3 Sept 2002	Schedule 1: 1 Aug 2003 (see s. 2(1)) Remainder: Royal Assent	—
<i>Proceeds of Crime (Consequential Amendments and Transitional Provisions) Act 2002</i>	86, 2002	11 Oct 2002	Ss. 1–3: Royal Assent Remainder: 1 Jan 2003 (see s. 2(1) and <i>Gazette</i> 2002, No. GN44)	—
<i>Family Law Legislation Amendment (Superannuation) (Consequential Provisions) Act 2002</i>	121, 2002	2 Dec 2002	Schedules 1–4: (za) Remainder: Royal Assent	—
<i>Family Law Amendment Act 2003</i>	138, 2003	17 Dec 2003	Schedules 1–3, Schedule 4 (items 1, 3, 6–8, 14–19, 23, 24), Schedule 5 (items 2, 3) and Schedule 7 (items 1–19, 21–24, 27–29A, 32–35): 14 Jan 2004 Schedule 4 (items 2, 4, 5, 9–13, 20–22, 25–27), Schedule 5 (items 1A, 1, 4) and Schedule 7 (items 20, 25, 26, 30, 31): (zb) Schedule 6: 17 Dec 2004 Remainder: Royal Assent	Sch. 2 (item 9), Sch. 3 (item 29), Sch. 4A (item 6), Sch. 6 (item 2) and Sch. 7 (item 35) [see Table A]

Table of Acts

Act	Number and year	Date of Assent	Date of commencement	Application, saving or transitional provisions
<i>Legislative Instruments (Transitional Provisions and Consequential Amendments) Act 2003</i>	140, 2003	17 Dec 2003	Schedule 1 (items 19–22): [see (zc) and Note 2]	—

Act Notes

- (a) The *Family Law Act 1975* was amended by subsection 152(1) only of the *Public Service Reform Act 1984*, subsection 2(4) of which provides as follows:
- (4) The remaining provisions of this Act shall come into operation on such day as is, or on such respective days as are, fixed by Proclamation.
- (b) The *Family Law Act 1975* was amended by section 3 only of the *Statute Law (Miscellaneous Provisions) Act (No. 1) 1984*, subsection 2(12) of which provides as follows:
- (12) The amendments of the *Family Law Act 1975* made by this Act shall:
- (a) in the case of the amendment of section 37A of that Act—come into operation, or be deemed to have come into operation, as the case requires, on the commencement of Part III of the *Family Law Amendment Act 1983*; and
- (b) in the case of the amendments of sections 44 and 87 of that Act—be deemed to have come into operation on 25 November 1983; and
- (c) in the case of the other amendments of that Act—come into operation on a day to be fixed by Proclamation.

Part III commenced on 2 January 1985 (see *Gazette* 1984, No. S532).

The remainder of the amendments commenced on 2 January 1985 (see *Gazette* 1984, No. S532).

- (c) The *Family Law Act 1975* was amended by section 3 only of the *Statute Law (Miscellaneous Provisions) Act (No. 2) 1984*, subsection 2(10) of which provides as follows:
- (10) The amendments of the *Family Law Act 1975* made by this Act shall come into operation, or be deemed to have come into operation, as the case requires, on the commencement of Part III of the *Family Law Amendment Act 1983*.

Part III commenced on 2 January 1985 (see *Gazette* 1984, No. S532).

- (d) The *Family Law Act 1975* was amended by section 3 only of the *Statute Law (Miscellaneous Provisions) Act (No. 1) 1985*, subsection 2(1) of which provides as follows:
- (1) Subject to this section, this Act shall come into operation on the twenty-eighth day after the day on which it receives the Royal Assent.
- (e) The *Family Law Act 1975* was amended by section 45 only of the *Public Service and Statutory Authorities Amendment Act 1985*, subsection 2(7) of which provides as follows:
- (7) The remaining provisions of this Act shall come into operation on the twenty-eighth day after the day on which this Act receives the Royal Assent.
- (f) The *Family Law Act 1975* was amended by section 3 only of the *Statute Law (Miscellaneous Provisions) Act (No. 2) 1985*, subsection 2(1) of which provides as follows:
- (1) Subject to this section, this Act shall come into operation on the day on which it receives the Royal Assent.
- (g) The *Family Law Act 1975* was amended by section 3 only of the *Statute Law (Miscellaneous Provisions) Act (No. 1) 1986*, subsection 2(1) of which provides as follows:
- (1) Subject to this section, this Act shall come into operation on the day on which it receives the Royal Assent.
- (h) The *Family Law Act 1975* was amended by section 3 only of the *Statute Law (Miscellaneous Provisions) Act (No. 2) 1986*, subsection 2(1) of which provides as follows:
- (1) Subject to this section, this Act shall come into operation on the day on which it receives the Royal Assent.
- (i) The *Family Law Act 1975* was amended by section 3 only of the *Statute Law (Miscellaneous Provisions) Act 1987*, subsection 2(1) of which provides as follows:
- (1) Subject to this section, this Act shall come into operation on the day on which it receives the Royal Assent.
- (j) The *Family Court of Australia (Additional Jurisdiction and Exercise of Powers) Act 1988* was amended by Part XI (sections 34 and 35) only of the *Law and Justice Legislation Amendment Act 1988*, subsection 2(6) of which provides as follows:
- (6) Part XI shall be taken to have commenced on 5 April 1988.

Act Notes

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- (k) The *Family Law Act 1975* was amended by Part XII (sections 36–39) only of the *Law and Justice Legislation Amendment Act 1988*, subsection 2(1) of which provides as follows:
- (1) Subject to this section, this Act commences on the day on which it receives the Royal Assent.
- (l) The *Family Law Act 1975* was amended by the Schedule only of the *Law and Justice Legislation Amendment Act 1991*, subsection 2(1) of which provides as follows:
- (1) Subject to this section, this Act commences on the 28th day after the day on which it receives the Royal Assent.
- (m) The *Family Law Act 1975* was amended by section 3 only of the *Law and Justice Legislation Amendment Act 1992*, subsection 2(1) of which provides as follows:
- (1) Subject to this section, this Act commences on the day on which it receives the Royal Assent.
- (n) The *Family Law Act 1975* was amended by section 3 only of the *Law and Justice Legislation Amendment Act (No. 4) 1992*, subsections 2(1) and (3) of which provide as follows:
- (1) Subject to this section, this Act commences on the day on which it receives the Royal Assent.
 - (3) The amendments of the *Family Law Act 1975* (other than the amendment inserting a new section 37C of that Act), and the amendments of the *Judges (Long Leave Payments) Act 1979* and the *Judges' Pensions Act 1968*, made by this Act are taken to have commenced on 1 November 1991.
- (o) The *Family Law Act 1975* was amended by Schedule 4 (items 1–3) only of the *Social Security Legislation Amendment Act (No. 2) 1992*, subsection 2(1)(g) of which provides as follows:
- (1) The following provisions commence on the day on which this Act receives the Royal Assent:
 - (g) Part 1 of Schedule 4;
- (p) The *Family Law Act 1975* was amended by Part 5 (section 35) only of the *Law and Justice Legislation Amendment Act 1994*, subsection 2(5) of which provides as follows:
- (5) The amendment made by Part 5 is taken to have commenced on 1 November 1991.
- (q) The *Family Law Act 1975* was amended by Schedule 4 (items 72–74) only of the *Statute Law Revision Act 1996*, subsection 2(1) of which provides as follows:
- (1) Subject to subsections (2) and (3), this Act commences on the day on which it receives the Royal Assent.
- (r) The *Family Law Act 1975* was amended by Schedule 7 only of the *Law and Justice Legislation Amendment Act 1997*, subsection 2(1) of which provides as follows:
- (1) Subject to this section, this Act commences on the day on which it receives the Royal Assent.
- (s) The *Family Law Act 1975* was amended by Schedule 1 (items 40 and 41) only of the *Child Support Legislation Amendment Act (No. 1) 1997*, subsection 2(1) of which provides as follows:
- (1) Subject to subsection (2), this Act commences on the 28th day after the day on which it receives the Royal Assent.
- (t) The *Family Law Act 1975* was amended by Schedule 2 (items 751–759) only of the *Audit (Transitional and Miscellaneous) Amendment Act 1997*, subsection 2(2) of which provides as follows:
- (2) Schedules 1, 2 and 4 commence on the same day as the *Financial Management and Accountability Act 1997*.
- (u) The *Family Law Act 1975* was amended by Schedule 1 (items 439–454) only of the *Public Employment (Consequential and Transitional) Amendment Act 1999*, subsections 2(1) and (2) of which provide as follows:
- (1) In this Act, **commencing time** means the time when the *Public Service Act 1999* commences.
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Act Notes

- (2) Subject to this section, this Act commences at the commencing time.
- (v) The *Family Law Act 1975* was amended by Schedule 10 (item 83) only of the *Corporate Law Economic Reform Program Act 1999*, subsection 2(2) of which provides as follows:
- (2) The following provisions commence on a day or days to be fixed by Proclamation:
- (a) section 3;
 - (b) the items in Schedules 1 to 7 (other than item 18 of Schedule 7);
 - (c) the items in Schedules 10, 11 and 12.
- (w) The *Family Law Act 1975* was amended by Schedule 11 only of the *Federal Magistrates (Consequential Amendments) Act 1999*, subsection 2(1) of which provides as follows:
- (1) Subject to this section, this Act commences on the commencement of the *Federal Magistrates Act 1999*.
- (x) Subsection 2(2) of the *Family Law Amendment Act 2000* provides as follows:
- (2) Item 41 of Schedule 3 is taken to have commenced immediately after the commencement of section 26 of the *Family Court of Australia (Additional Jurisdiction and Exercise of Powers) Act 1988*.
- Section 26 commenced on 1 July 1988 (see *Gazette* 1988, No. S191).
- (y) The *Family Law Act 1975* was amended by Schedule 27 only of the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001*, subsection 2(1)(a) of which provides as follows:
- (1) Subject to this section, this Act commences at the later of the following times:
- (a) immediately after the commencement of item 15 of Schedule 1 to the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000*;
- Item 15 commenced on 24 May 2001.
- (z) Section 2 of the *Family Law Legislation Amendment (Superannuation) (Consequential Provisions) Act 2001* provides as follows:
- 2 This Act commences immediately after the commencement of the *Family Law Legislation Amendment (Superannuation) Act 2001*.
- The *Family Law Legislation Amendment (Superannuation) Act 2001* came into operation on 28 December 2002.
- (za) Subsection 2(1) (item 2) of the *Family Law Legislation Amendment (Superannuation) (Consequential Provisions) Act 2002* provides as follows:
- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, on the day or at the time specified in column 2 of the table.

Commencement information

Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
2. Schedules 1 to 4	Immediately after the commencement of the <i>Family Law Legislation Amendment (Superannuation) Act 2001</i>	28 December 2002

- (zb) Subsection 2(1) (items 6, 8, 10, 12, 14, 15, 17, 20, 22 and 24) of the *Family Law Amendment Act 2003* provide as follows:

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, on the day or at the time specified in column 2 of the table.

Provision(s)	Commencement	Date/Details
6. Schedule 4, item 2	Immediately after the commencement of Schedule 2 to the <i>Family Law Amendment Act 2000</i>	27 December 2000

Act Notes

Provision(s)	Commencement	Date/Details
8. Schedule 4, items 4 and 5	Immediately after the commencement of Schedule 2 to the <i>Family Law Amendment Act 2000</i>	27 December 2000
10. Schedule 4, items 9 to 13	Immediately after the commencement of Schedule 2 to the <i>Family Law Amendment Act 2000</i>	27 December 2000
12. Schedule 4, items 20 to 22	Immediately after the commencement of Schedule 2 to the <i>Family Law Amendment Act 2000</i>	27 December 2000
14. Schedule 4, items 25 to 27	Immediately after the commencement of Schedule 2 to the <i>Family Law Amendment Act 2000</i>	27 December 2000
15. Schedule 5, items 1A and 1	Immediately after the commencement of Schedule 2 to the <i>Family Law Amendment Act 2000</i>	27 December 2000
17. Schedule 5, item 4	Immediately after the commencement of Schedule 2 to the <i>Family Law Amendment Act 2000</i>	27 December 2000
20. Schedule 7, item 20	Immediately after the commencement of Schedule 2 to the <i>Family Law Amendment Act 2000</i>	27 December 2000
22. Schedule 7, items 25 and 26	Immediately after the commencement of Schedule 2 to the <i>Family Law Amendment Act 2000</i>	27 December 2000
24. Schedule 7, items 30 and 31	Immediately after the commencement of Schedule 2 to the <i>Family Law Amendment Act 2000</i>	27 December 2000

(zc) Subsection 2(1) (item 3) of the *Legislative Instruments (Transitional Provisions and Consequential Amendments) Act 2003* provides as follows:

- (1) Each provision of this Act specified in column 1 of the table commences on the day or at the time specified in column 2 of the table.

Provision(s)	Commencement	Date/Details
3. Schedule 1	Immediately after the commencement of sections 3 to 62 of the <i>Legislative Instruments Act 2003</i>	[see Note 2]

Table of Amendments**Table of Amendments**

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
Title	am. No. 181, 1987; No. 167, 1995
Part I	
S. 3	am. No. 23, 1979; No. 118, 1999
S. 4	am. No. 63, 1976; No. 23, 1979; No. 2, 1982; No. 72, 1983; Nos. 63 and 72, 1984; No. 181, 1987; Nos. 157 and 182, 1989; No. 113, 1991; No. 104, 1992; No. 167, 1995; Nos. 146 and 194, 1999; No. 143, 2000; No. 86, 2002; No. 138, 2003
S. 4A	ad. No. 138, 2003
S. 5	rs. No. 63, 1976; No. 72, 1983 rep. No. 181, 1987
S. 5A	ad. No. 72, 1983 rep. No. 181, 1987
S. 7	rs. No. 104, 1992
S. 7A	ad. No. 24, 2001
S. 9	am. No. 63, 1976; No. 23, 1979; No. 181, 1987
S. 10	am. Nos. 63 and 95, 1976; No. 72, 1983 rep. No. 181, 1987
Part II	
Part II	rs. No. 167, 1995
Division 1	
S. 11	am. No. 181, 1987; No. 37, 1991 rs. No. 167, 1995
Division 2	
Ss. 12, 13	am. No. 181, 1987; No. 37, 1991 rs. No. 167, 1995
Ss. 13A–13C	ad. No. 167, 1995
S. 13D	ad. No. 167, 1995 am. No. 194, 1999
S. 13E	ad. No. 167, 1995
Division 3	
Ss. 13F, 13G	ad. No. 167, 1995
Division 4	
S. 13H	ad. No. 167, 1995
Part III	
Heading to Part III	rs. No. 167, 1995
Division 1	
Heading to Div. 1	ad. No. 167, 1995 of Part III
S. 14	am. No. 63, 1976; No. 72, 1983; No. 181, 1987; No. 182, 1989 rs. No. 167, 1995
S. 14A	ad. No. 167, 1995

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
Division 2	
Div. 2 of Part III	ad. No. 167, 1995
S. 14B	ad. No. 167, 1995 am. No. 194, 1999
S. 14C	ad. No. 167, 1995 am. No. 138, 2003
S. 14D	ad. No. 167, 1995
Division 3	
Div. 3 of Part III	ad. No. 167, 1995
S. 14E	ad. No. 167, 1995 am. No. 143, 2000
Ss. 14F, 14G	ad. No. 167, 1995
Division 4	
Heading to Div. 4 of Part III	ad. No. 167, 1995
S. 14H	ad. No. 167, 1995
S. 15	am. No. 63, 1976; No. 72, 1983; No. 181, 1987; No. 167, 1995; No. 138, 2003
S. 15A	ad. No. 194, 1999
S. 16	rs. No. 63, 1976 am. No. 72, 1983; No. 181, 1987; No. 138, 2003
S. 16A	ad. No. 72, 1983 am. No. 181, 1987 rs. No. 167, 1995
Ss. 16B, 16C	ad. No. 167, 1995
S. 17	am. No. 72, 1983; No. 181, 1987; No. 167, 1995; No. 194, 1999; No. 138, 2003
S. 18	am. No. 63, 1976; No. 72, 1983 rep. No. 167, 1995
S. 19	am. No. 63, 1976; No. 181, 1987; No. 167, 1995
Heading to Part IIIA	rep. No. 167, 1995
Part IIIA	ad. No. 113, 1991 rep. No. 167, 1995
Heading to Div. 1 of Part IIIA	rep. No. 167, 1995
Division 5	
Heading to Div. 5 of Part III	ad. No. 167, 1995
Subdivision A	
Heading to Subdiv. A of Div. 5 of Part III	ad. No. 167, 1995
Heading to s. 19A	am. No. 194, 1999
S. 19A	ad. No. 113, 1991 am. No. 167, 1995; No. 194, 1999; No. 138, 2003
S. 19AAA	ad. No. 194, 1999
S. 19AA	ad. No. 167, 1995

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
Heading to s. 19B	am. No. 194, 1999
S. 19B	ad. No. 113, 1991 am. No. 167, 1995; No. 194, 1999; No. 138, 2003
S. 19BAA	ad. No. 194, 1999
S. 19BA	ad. No. 167, 1995
S. 19C	ad. No. 113, 1991 rep. No. 167, 1995
Heading to Div. 2 of Part IIIA	rep. No. 167, 1995
Subdivision B	
Heading to Subdiv. B of Div. 5 of Part III	ad. No. 167, 1995
Ss. 19D, 19E	ad. No. 113, 1991 am. No. 194, 1999; No. 143, 2000
Ss. 19EA, 19EB	ad. No. 143, 2000
Heading to s. 19F	am. No. 143, 2000
S. 19F	ad. No. 113, 1991 am. No. 143, 2000
Note to s. 19F(1)	ad. No. 143, 2000
S. 19FA	ad. No. 143, 2000
S. 19G	ad. No. 113, 1991 rs. No. 143, 2000
S. 19GA	ad. No. 143, 2000
S. 19H	ad. No. 113, 1991 rep. No. 167, 1995 ad. No. 143, 2000
Heading to Div. 3 of Part IIIA	rep. No. 167, 1995
Subdivision C	
Heading to Subdiv. C of Div. 5 of Part III	ad. No. 167, 1995
S. 19J	ad. No. 113, 1991 am. No. 167, 1995; No. 194, 1999; No. 138, 2003
S. 19K	ad. No. 113, 1991 am. No. 167, 1995
Heading to s. 19L	am. No. 143, 2000
S. 19L	ad. No. 113, 1991 am. No. 143, 2000
S. 19M	ad. No. 113, 1991 am. No. 167, 1995; No. 143, 2000
Division 6	
Div. 6 of Part III	ad. No. 167, 1995
S. 19N	ad. No. 167, 1995 am. No. 138, 2003

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
Heading to s. 19P	am. No. 143, 2000
Ss. 19P, 19Q	ad. No. 167, 1995 am. No. 143, 2000
Part IV	
Division 1	
Heading to Div. 1 of Part IV	ad. No. 8, 1988
S. 20	am. No. 72, 1983; No. 8, 1988; No. 138, 2003
Division 2	
Heading to Div. 2 of Part IV	ad. No. 8, 1988
S. 21	am. No. 8, 1988
S. 21A	ad. No. 72, 1983
S. 21B	ad. No. 72, 1983 am. No. 8, 1988
Division 3	
Heading to Div. 3 of Part IV	ad. No. 8, 1988
S. 22	am. No. 63, 1976; No. 102, 1977; No. 72, 1983; No. 181, 1987; No. 8, 1988; No. 143, 1992; No. 84, 1994; No. 143, 2000
S. 23	am. No. 8, 1988; No. 143, 1992
S. 23A	ad. No. 102, 1977 rep. No. 159, 1991
S. 24	am. No. 8, 1988
S. 25	rs. No. 63, 1976 am. No. 8, 1988
S. 26	am. No. 181, 1987; No. 8, 1988
Division 4	
Div. 4 of Part IV	ad. No. 8, 1988
S. 26A	ad. No. 8, 1988
S. 26B	ad. No. 8, 1988 am. No. 167, 1995; No. 194, 1999; No. 143, 2000
Note to s. 26B	ad. No. 143, 2000
Ss. 26C, 26D	ad. No. 8, 1988
S. 26E	ad. No. 8, 1988 am. No. 99, 1988
Ss. 26F, 26G	ad. No. 8, 1988
Ss. 26H, 26I	ad. No. 8, 1988 am. No. 159, 2001
S. 26J	ad. No. 8, 1988 am. No. 43, 1996
S. 26JA	ad. No. 122, 1991 am. No. 146, 1999
S. 26K	ad. No. 8, 1988 rs. No. 143, 1992

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
Ss. 26L–26N	ad. No. 8, 1988
Division 5	
Heading to Div. 5 of Part IV	ad. No. 8, 1988
S. 27	rs. No. 138, 2003
S. 28	am. No. 63, 1976; No. 102, 1977; No. 72, 1983; No. 181, 1987
S. 29	am. No. 63, 1976 rep. No. 72, 1983
S. 30	am. No. 63, 1976
S. 31	am. No. 72, 1983; No. 181, 1987; No. 120, 1988; No. 194, 1999
Note to s. 31(2)	ad. No. 69, 2002
S. 32	rep. No. 209, 1976
S. 33A	ad. No. 194, 1999 am. No. 143, 2000
Ss. 33B, 33C	ad. No. 194, 1999
S. 34	am. No. 72, 1983; No. 181, 1987; No. 194, 1999; No. 138, 2003
Division 6	
Heading to Div. 6 of Part IV	ad. No. 8, 1988
S. 36	am. No. 181, 1987
S. 37	am. No. 63, 1976; No. 23, 1979; No. 72, 1983; No. 181, 1987 rs. No. 157, 1989 am. No. 194, 1999
S. 37A	ad. No. 72, 1983 am. No. 72, 1984 rs. No. 193, 1985 am. No. 181, 1987; Nos. 8 and 99, 1988; No. 167, 1995; Nos. 146 and 194, 1999; No. 143, 2000; No. 138, 2003
Note to s. 37A	ad. No. 143, 2000
S. 37B	ad. No. 72, 1983 am. No. 193, 1985; No. 181, 1987; Nos. 146 and 194, 1999
S. 37C	ad. No. 143, 1992
Division 7	
Heading to Div. 7 of Part IV	ad. No. 8, 1988
S. 38	am. No. 72, 1983; No. 8, 1988; No. 194, 1999
Part IVA	
Part IVA	ad. No. 157, 1989
Division 1	
Ss. 38A, 38B	ad. No. 157, 1989
Division 2	
Ss. 38C–38E	ad. No. 157, 1989
S. 38F	ad. No. 157, 1989 am. No. 159, 2001

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
S. 38G	ad. No. 157, 1989 rs. No. 122, 1991 am. No. 146, 1999
Ss. 38H, 38J	ad. No. 157, 1989
S. 38K	ad. No. 157, 1989 am. No. 122, 1991; No. 94, 1992
Ss. 38L, 38M	ad. No. 157, 1989
Division 3	
S. 38N	ad. No. 157, 1989 am. No. 113, 1991; Nos. 146 and 194, 1999; No. 143, 2000; No. 138, 2003
S. 38P	ad. No. 157, 1989
S. 38Q	ad. No. 157, 1989 rs. No. 146, 1999
S. 38R	ad. No. 157, 1989
Division 4	
S. 38S	ad. No. 157, 1989 rs. No. 152, 1997
Ss. 38T, 38U	ad. No. 157, 1989 rep. No. 152, 1997
S. 38V	ad. No. 157, 1989 rep. No. 136, 1991
Ss. 38W, 38X	ad. No. 157, 1989
Part V	
S. 39	am. No. 63, 1976; No. 23, 1979; No. 72, 1983; No. 181, 1987; No. 8, 1988; No. 34, 1997; No. 89, 1998; No. 194, 1999; No. 161, 2000; No. 69, 2002
S. 40	am. No. 72, 1983; No. 181, 1987; No. 89, 1998; No. 194, 1999
S. 40A	ad. No. 194, 1999
S. 41	am. No. 63, 1976; No. 181, 1987; No. 159, 1991; No. 194, 1999
S. 42	am. No. 72, 1983; No. 194, 1999
Note to s. 42(2)	ad. No. 69, 2002
S. 43	am. No. 181, 1987; No. 167, 1995
S. 44	am. No. 63, 1976; No. 72, 1983; No. 72, 1984; No. 181, 1987; No. 167, 1995; No. 194, 1999; No. 143, 2000; No. 138, 2003
S. 44A	ad. No. 8, 1988
S. 45	am. No. 63, 1976 rs. No. 23, 1979 am. No. 72, 1983; No. 181, 1987; No. 8, 1988; No. 194, 1999; No. 143, 2000
S. 45A	ad. No. 194, 1999 am. No. 143, 2000
S. 46	am. No. 72, 1983; No. 181, 1987 (as am. by No. 8, 1988); No. 8, 1988; No. 194, 1999; No. 143, 2000
Part VI	
S. 48	am. No. 72, 1983

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
S. 51	rs. No. 209, 1976
S. 55	am. No. 181, 1987
S. 55A	ad. No. 181, 1987 am. No. 167, 1995
S. 56	am. No. 138, 2003
Part VII	
Heading to Part VII	rs. No. 181, 1987; No. 167, 1995
Part VII	rs. No. 167, 1995
Division 1	
Div. 1 of Part VII	ad. No. 181, 1987 rs. No. 167, 1995
Subdivision A	
S. 60	am. No. 72, 1983; No. 72, 1984 rs. No. 181, 1987 am. No. 182, 1989; Nos. 37 and 113, 1991; No. 22, 1992 rep. No. 167, 1995
S. 60A	ad. No. 72, 1983 rs. No. 181, 1987 am. No. 37, 1991 rs. No. 167, 1995
S. 60AA	ad. No. 37, 1991 rep. No. 167, 1995
Subdivision B	
S. 60B	ad. No. 181, 1987 rs. No. 167, 1995
S. 60C	ad. No. 181, 1987 rs. No. 167, 1995 am. No. 143, 2000; No. 138, 2003
Subdivision C	
S. 60D	ad. No. 181, 1987 rep. No. 37, 1991 ad. No. 167, 1995 am. No. 194, 1999; No. 143, 2000
S. 60E	ad. No. 181, 1987 am. No. 22, 1992 rs. No. 167, 1995
Subdivision D	
S. 60F	ad. No. 181, 1987 rs. No. 167, 1995 am. No. 194, 1999
S. 60G	ad. No. 181, 1987 rs. No. 167, 1995
S. 60H	ad. No. 181, 1987 am. No. 22, 1992 rs. No. 167, 1995 am. No. 194, 1999

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
Division 2	
Div. 2 of Part VII	ad. No. 181, 1987 rs. No. 167, 1995
S. 61	am. No. 63, 1976; No. 23, 1979 rs. No. 181, 1987 rep. No. 167, 1995
Ss. 61A– 61C	ad. No. 181, 1987 rs. No. 167, 1995
Note to s. 61C	ad. No. 69, 2002
Ss. 61D, 61E	ad. No. 167, 1995
Division 3	
Heading to Div. 3 of Part VII	ad. No. 181, 1987 rs. No. 167, 1995
Div. 3 of Part VII	rs. No. 167, 1995
S. 62	am. No. 63, 1976; No. 23, 1979; No. 72, 1983 rep. No. 167, 1995
S. 62A	ad. No. 72, 1983 rs. No. 167, 1995
S. 62B	ad. No. 167, 1995
Heading to s. 62C.....	am. No. 194, 1999
S. 62C.....	ad. No. 167, 1995 am. No. 138, 2003
S. 62CA.....	ad. No. 194, 1999
S. 62D	ad. No. 167, 1995
Ss. 62E, 62F	ad. No. 167, 1995 am. No. 138, 2003
S. 62G	ad. No. 167, 1995
S. 62H	ad. No. 167, 1995 am. No. 194, 1999; No. 138, 2003
Division 4	
Div. 4 of Part VII	ad. No. 181, 1987 rs. No. 167, 1995
S. 63	am. No. 23, 1979 rs. No. 181, 1987 am. No. 37, 1991 rep. No. 167, 1995
S. 63A	ad. No. 181, 1987 am. No. 124, 1989 rs. No. 167, 1995 am. No. 138, 2003
S. 63B	ad. No. 181, 1987 rs. No. 167, 1995; No. 138, 2003
S. 63C	ad. No. 181, 1987 rs. No. 167, 1995 am. No. 138, 2003
Notes to s. 63C(2), (3)	am. No. 34, 1997
S. 63CAA	ad. No. 34, 1997

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
S. 63D	ad. No. 181, 1987 rs. No. 167, 1995 am. No. 194, 1999 rs. No. 138, 2003
S. 63DA	ad. No. 143, 2000 rs. No. 138, 2003
S. 63DB	ad. No. 138, 2003
S. 63E	ad. No. 181, 1987 rs. No. 167, 1995 am. No. 194, 1999; No. 143, 2000 rs. No. 138, 2003
Note to s. 63E	ad. No. 69, 2002 rep. No. 138, 2003
S. 63F	ad. No. 181, 1987 am. No. 37, 1991 rs. No. 167, 1995 am. No. 138, 2003
Note to s. 63F(1)	ad. No. 69, 2002 rep. No. 138, 2003
Note to s. 63F(3)	am. No. 143, 2000
S. 63G	ad. No. 167, 1995 am. No. 138, 2003
Note to s. 63G(5)	am. No. 34, 1997
S. 63H	ad. No. 167, 1995 am. No. 138, 2003
Division 5	
Heading to Div. 5 of Part VII	ad. No. 181, 1983 rs. No. 167, 1995
S. 64	am. No. 63, 1976; No. 23, 1979; No. 72, 1983; No. 72, 1984; No. 181, 1987; No. 8, 1988; No. 182, 1989; No. 37, 1991 rep. No. 167, 1995
S. 64A	ad. No. 182, 1989 am. No. 37, 1991 rs. No. 167, 1995
S. 64B	ad. No. 167, 1995 am. No. 194, 1999
S. 64C	ad. No. 167, 1995
S. 65	am. No. 72, 1983; No. 181, 1987 rep. No. 167, 1995
Division 6	
Div. 6 of Part VII	ad. No. 181, 1983 rs. No. 167, 1995
Subdivision A	
S. 65A	ad. No. 120, 1988 rs. No. 167, 1995
S. 65AA	ad. No. 143, 2000
S. 65B	ad. No. 167, 1995

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
Subdivision B	
S. 65C	ad. No. 167, 1995 am. No. 143, 2000
S. 65D	ad. No. 167, 1995 am. No. 143, 2000
Note to s. 65D(1)	ad. No. 69, 2002
S. 65DA	ad. No. 143, 2000
Ss. 65E–65H	ad. No. 167, 1995
Ss. 65J–65L	ad. No. 167, 1995
S. 65LA	ad. No. 138, 2003
Subdivision C	
Ss. 65M, 65N	ad. No. 167, 1995
S. 65P	ad. No. 167, 1995
S. 65Q	ad. No. 167, 1995 am. No. 143, 2000
Subdivision D	
Ss. 65R, 65S	ad. No. 167, 1995
S. 65T	ad. No. 167, 1995 am. No. 138, 2003
Ss. 65U, 65V	ad. No. 167, 1995 am. No. 143, 2000
S. 65W	ad. No. 167, 1995
Subdivision E	
S. 65X	ad. No. 167, 1995
S. 65Y	ad. No. 167, 1995 am. No. 24, 2001
Note to s. 65Y(1), (2)	ad. No. 24, 2001
S. 65Z	ad. No. 167, 1995 am. No. 24, 2001
Note to s. 65Z(1), (2)	ad. No. 24, 2001
S. 65ZA	ad. No. 167, 1995 am. No. 24, 2001
Note to s. 65ZA(3)	ad. No. 24, 2001
S. 65ZB	ad. No. 167, 1995 am. No. 24, 2001
Note to s. 65ZB(3)	ad. No. 24, 2001
Ss. 65ZC, 65ZD	ad. No. 167, 1995
S. 66	rep. No. 167, 1995
Division 7	
Div. 7 of Part VII	ad. No. 181, 1987 rs. No. 167, 1995
Subdivision A	
S. 66A	ad. No. 181, 1987 rs. No. 167, 1995 am. No. 143, 2000

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
Subdivision B	
S. 66B	ad. No. 181, 1987 rs. No. 167, 1995
S. 66BA	ad. No. 124, 1989 rs. No. 138, 1990 rep. No. 167, 1995
S. 66C	ad. No. 181, 1987 rs. No. 167, 1995
S. 66D	ad. No. 181, 1987 am. No. 37, 1991 rs. No. 167, 1995
Subdivision C	
S. 66E	ad. No. 181, 1987 am. No. 37, 1991 rs. No. 167, 1995 am. No. 143, 2000
Subdivision D	
S. 66F	ad. No. 181, 1987 rs. No. 167, 1995 am. No. 143, 2000
S. 66FA	ad. No. 22, 1992 rep. No. 167, 1995
Ss. 66G, 66H	ad. No. 181, 1987 rs. No. 167, 1995
Ss. 66J, 66K	ad. No. 181, 1987 rs. No. 167, 1995
S. 66L	ad. No. 181, 1987 rs. No. 167, 1995 am. No. 143, 2000
S. 66M	ad. No. 181, 1987 am. No. 138, 1990 rs. No. 167, 1995 am. No. 34, 1997
S. 66N	ad. No. 181, 1987 am. No. 37, 1991 rs. No. 167, 1995
Subdivision E	
S. 66P	ad. No. 181, 1987 rs. No. 167, 1995 am. No. 194, 1999
Ss. 66Q, 66R	ad. No. 181, 1987 rs. No. 167, 1995
S. 66S	ad. No. 181, 1987 rs. No. 167, 1995 am. No. 194, 1999; No. 143, 2000; No. 138, 2003
Subdivision EA	
Subdiv. EA of Div. 7 of Part VII	ad. No. 143, 2000
S. 66SA	ad. No. 143, 2000

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
Subdivision F	
Ss. 66T–66V	ad. No. 181, 1987 rs. No. 167, 1995
S. 66VA	ad. No. 143, 2000
S. 66W	ad. No. 181, 1987 rs. No. 167, 1995; No. 143, 2000
Ss. 66X–66Z	ad. No. 181, 1987 rep. No. 167, 1995
Ss. 66ZA– 66ZC	ad. No. 181, 1987 rep. No. 167, 1995
S. 66ZD	ad. No. 181, 1987 am. No. 182, 1989; No. 37, 1991 rep. No. 167, 1995
S. 66ZDA	ad. No. 182, 1989 am. No. 37, 1991 rep. No. 167, 1995
S. 66ZE	ad. No. 181, 1987 am. No. 37, 1991 rep. No. 167, 1995
S. 67	am. No. 63, 1976; No. 72, 1983; No. 181, 1987 rep. No. 167, 1995
Division 8	
Div. 8 of Part VII	ad. No. 181, 1987 rs. No. 167, 1995
Subdivision A	
S. 67A	ad. No. 167, 1995
Subdivision B	
Ss. 67B, 67C	ad. No. 167, 1995
S. 67D	ad. No. 167, 1995 am. No. 194, 1999
Ss. 67E–67G	ad. No. 167, 1995
Subdivision C	
S. 67H	ad. No. 167, 1995 am. No. 146, 1999; No. 138, 2003
S. 67J	ad. No. 167, 1995 am. No. 138, 2003
S. 67K	ad. No. 167, 1995 am. No. 143, 2000; No. 69, 2002
S. 67L	ad. No. 167, 1995
S. 67M	ad. No. 167, 1995 am. No. 143, 2000; No. 69, 2002
S. 67N	ad. No. 167, 1995 am. No. 194, 1999; No. 143, 2000; No. 69, 2002
S. 67P	ad. No. 167, 1995 am. No. 24, 2001; No. 69, 2002; No. 138, 2003
S. 67Q	ad. No. 167, 1995 am. No. 143, 2000

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
Note to s. 67Q	rep. No. 143, 2000
Notes 1, 2 to s. 67Q	ad. No. 143, 2000
Ss. 67R, 67S	ad. No. 167, 1995
S. 67T	ad. No. 167, 1995 am. No. 143, 2000
Ss. 67U, 67V	ad. No. 167, 1995
S. 67W	ad. No. 167, 1995 am. No. 194, 1999; No. 143, 2000; No. 138, 2003
S. 67X	ad. No. 167, 1995 am. No. 143, 2000
Note to s. 67X(3)	ad. No. 143, 2000
S. 67Y	ad. No. 167, 1995 am. No. 138, 2003
Subdivision D	
S. 67Z	ad. No. 167, 1995 am. No. 194, 1999; No. 138, 2003
Heading to s. 67ZA	am. No. 143, 2000
S. 67ZA	ad. No. 167, 1995 am. No. 143, 2000
S. 67ZB	ad. No. 167, 1995
Subdivision E	
S. 67ZC	ad. No. 167, 1995
Note to s. 67ZC(1)	ad. No. 69, 2002
S. 67ZD	ad. No. 167, 1995
S. 68	am. No. 72, 1983; No. 181, 1987 rep. No. 167, 1995
Division 9	
Div. 9 of Part VII	ad. No. 181, 1987 rs. No. 167, 1995
Ss. 68A, 68B	ad. No. 167, 1995
S. 68C	ad. No. 167, 1995 am. No. 143, 2000
Note to s. 68C(1)	ad. No. 143, 2000
Division 10	
Div. 10 of Part VII	ad. No. 181, 1987 rs. No. 167, 1995
Subdivision A	
S. 68D	ad. No. 167, 1995
Subdivision B	
Ss. 68E, 68F	ad. No. 167, 1995
S. 68G	ad. No. 167, 1995 am. No. 194, 1999
S. 68H	ad. No. 167, 1995
S. 68J	ad. No. 167, 1995 am. No. 194, 1999; No. 138, 2003

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
S. 68K	ad. No. 167, 1995
Subdivision C	
S. 68L	ad. No. 167, 1995 am. No. 143, 2000
S. 68M	ad. No. 167, 1995
Division 11	
Heading to Div. 11 of Part VII	ad. No. 181, 1987 rs. No. 167, 1995
S. 68N	ad. No. 167, 1995
S. 68P	ad. No. 167, 1995 am. No. 138, 2003
S. 68Q	ad. No. 167, 1995
S. 68R	ad. No. 167, 1995 am. No. 138, 2003
S. 68S	ad. No. 167, 1995
S. 68T	ad. No. 167, 1995 am. No. 194, 1999
S. 69	am. No. 72, 1984 rep. No. 167, 1995
Division 12	
Heading to Div. 12 of Part VII	ad. No. 181, 1987 rs. No. 182, 1989; No. 167, 1995
Div. 12 of Part VII	rs. No. 167, 1995
Subdivision A	
S. 69A	ad. No. 167, 1995
Subdivision B	
Ss. 69B–69E	ad. No. 167, 1995
Note to s. 69E	ad. No. 69, 2002
S. 69F	ad. No. 167, 1995
Subdivision C	
S. 69G	ad. No. 167, 1995
Heading to s. 69H	am. No. 194, 1999
S. 69H	ad. No. 167, 1995 am. No. 194, 1999
Ss. 69J–69M	ad. No. 167, 1995
S. 69MA	ad. No. 194, 1999 rep. No. 143, 2000
S. 69N	ad. No. 167, 1995 am. No. 34, 1997
Subdivision D	
Ss. 69P–69U	ad. No. 167, 1995
Subdivision E	
S. 69V	ad. No. 167, 1995
S. 69VA	ad. No. 143, 2000

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
Ss. 69W–69Z	ad. No. 167, 1995
Ss. 69ZA–69ZD	ad. No. 167, 1995
Subdivision F	
Ss. 69ZE–69ZH	ad. No. 167, 1995
Ss. 69ZJ, 69ZK	ad. No. 167, 1995
S. 70	am. No. 72, 1983; No. 181, 1987; No. 182, 1989 rep. No. 167, 1995
S. 70AA	ad. No. 182, 1989 am. No. 37, 1991 rep. No. 167, 1995
Div. 12A of Part VII	ad. No. 37, 1991 rep. No. 167, 1995
Division 13	
Div. 13 of Part VII	ad. No. 181, 1987 rs. No. 167, 1995
Subdivision A	
S. 70A	ad. No. 72, 1983 am. No. 181, 1987; No. 37, 1991 rs. No. 167, 1995
Subdivision B	
S. 70B	ad. No. 72, 1983 am. No. 181, 1987; No. 37, 1991 rs. No. 167, 1995
Ss. 70BA–70BC	ad. No. 37, 1991 rep. No. 167, 1995
S. 70C	ad. No. 181, 1987 am. No. 182, 1989 rs. No. 167, 1995 am. No. 194, 1999
S. 70D	ad. No. 181, 1987 rs. No. 182, 1989; No. 167, 1995 am. No. 194, 1999
S. 70E	ad. No. 181, 1987 rs. No. 167, 1995
Subdivision C	
S. 70F	ad. No. 37, 1991 rs. No. 167, 1995 am. No. 143, 2000
Ss. 70G, 70H	ad. No. 167, 1995
Note to s. 70H	ad. No. 69, 2002
Ss. 70J–70L	ad. No. 167, 1995
Subdivision D	
S. 70M	ad. No. 167, 1995 am. No. 143, 2000; No. 138, 2003
S. 70N	ad. No. 167, 1995 am. No. 143, 2000

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
Division 13A	
Div. 13A of Part VII	ad. No. 143, 2000
Subdivision A	
S. 70NB	ad. No. 143, 2000 am. No. 138, 2003
S. 70NBA	ad. No. 143, 2000
Ss. 70NC–70NE	ad. No. 143, 2000
S. 70NEA	ad. No. 143, 2000
Subdivision B	
Ss. 70NF, 70NG	ad. No. 143, 2000 am. No. 138, 2003
S. 70NH	ad. No. 143, 2000
S. 70NI	ad. No. 143, 2000 am. No. 138, 2003
S. 70NIA	ad. No. 143, 2000 rs. No. 138, 2003
Heading to s. 70NIB	am. No. 138, 2003
S. 70NIB	ad. No. 143, 2000 am. No. 138, 2003
Subdivision C	
Ss. 70NJ, 70NK	ad. No. 143, 2000 am. No. 138, 2003
Ss. 70NL–70NN	ad. No. 143, 2000
S. 70NO	ad. No. 143, 2000 am. No. 138, 2003
S. 70NP	ad. No. 143, 2000
S. 70NQ	ad. No. 143, 2000 rs. No. 138, 2003
S. 70NR	ad. No. 143, 2000
Division 14	
Div. 14 of Part VII	ad. No. 181, 1987 rs. No. 167, 1995
S. 70P	ad. No. 167, 1995
S. 70Q	ad. No. 167, 1995 am. No. 138, 2003
Part VIII	
Heading to Part VIII	rs. No. 181, 1987
S. 71A	ad. No. 143, 2000
S. 72	rs. No. 72, 1983
S. 73	rep. No. 181, 1987
S. 74	am. No. 181, 1987
S. 75	am. No. 63, 1976; No. 72, 1983; No. 181, 1987; No. 124, 1989; No. 84, 1997; No. 143, 2000
S. 76	rep. No. 181, 1987
S. 77	am. No. 181, 1987

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
S. 77A	ad. No. 181, 1987
S. 78	am. No. 120, 1988
S. 79	am. No. 63, 1976; No. 72, 1983; No. 181, 1987; No. 124, 1989; No. 84, 1997; No. 194, 1999
S. 79A	ad. No. 63, 1976 am. No. 23, 1979; No. 72, 1983; No. 181, 1987; No. 167, 1995; No. 194, 1999; No. 143, 2000; No. 86, 2002
Ss. 79B–79E	ad. No. 86, 2002
S. 80	am. No. 181, 1987; No. 194, 1999
S. 82	am. No. 72, 1983; No. 181, 1987
S. 83	am. No. 63, 1976; No. 23, 1979; No. 72, 1983; No. 181, 1987; No. 194, 1999
S. 84	am. No. 72, 1983; No. 181, 1987 rep. No. 143, 2000
S. 85	am. No. 72, 1983 rep. No. 143, 2000
S. 85A	ad. No. 72, 1983 am. No. 143, 2000
S. 86A	ad. No. 143, 2000
S. 86	am. No. 72, 1983; No. 181, 1987; No. 124, 1989; No. 167, 1995; No. 194, 1999; No. 143, 2000
S. 87	am. No. 23, 1979 rs. No. 72, 1983 am. No. 72, 1983; No. 72, 1984; No. 181, 1987; No. 124, 1989; No. 167, 1995; No. 194, 1999; No. 143, 2000
S. 87A	ad. No. 181, 1987
S. 88	am. No. 72, 1983
S. 89	am. No. 72, 1984
S. 89A	ad. No. 63, 1976 am. No. 181, 1987
S. 90	am. No. 63, 1976 rs. No. 72, 1983 am. No. 181, 1987; No. 37, 1991
Part VIII A A	
Part VIII A A	ad. No. 138, 2003
Division 1	
Subdivision A	
Ss. 90AA–90AD	ad. No. 138, 2003
S. 90ADA	ad. No. 138, 2003
Division 2	
S. 90AE	ad. No. 138, 2003
Division 3	
S. 90AF	ad. No. 138, 2003
Division 4	
Ss. 90AG–90AK	ad. No. 138, 2003

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
Part VIIIA	
Part VIIIA	ad. No. 143, 2000
Ss. 90A, 90B	ad. No. 143, 2000
S. 90C	ad. No. 143, 2000 am. No. 138, 2003
Ss. 90D, 90E	ad. No. 143, 2000
Ss. 90F, 90G	ad. No. 143, 2000 am. No. 138, 2003
S. 90H	ad. No. 143, 2000
S. 90J	ad. No. 143, 2000 am. No. 138, 2003
S. 90K	ad. No. 143, 2000 am. No. 61, 2001; No. 138, 2003
S. 90KA	ad. No. 143, 2000
S. 90L	ad. No. 143, 2000 rs. No. 138, 2003
Ss. 90M, 90N	ad. No. 86, 2002
Ss. 90P, 90Q	ad. No. 86, 2002
Part VIIIB	
Part VIIIB	ad. No. 61, 2001
Division 1	
Subdivision A	
S. 90MA	ad. No. 61, 2001
S. 90MB	ad. No. 61, 2001 am. No. 114, 2001
S. 90MC	ad. No. 61, 2001
Subdivision B	
S. 90MD	ad. No. 61, 2001 am. No. 121, 2002
S. 90MDA	ad. No. 61, 2001
S. 90ME	ad. No. 61, 2001 am. No. 114, 2001
Ss. 90MF, 90MG	ad. No. 61, 2001
Division 2	
Subdivision A	
S. 90MH	ad. No. 61, 2001
Subdivision B	
Ss. 90MI, 90MJ	ad. No. 61, 2001
Subdivision C	
S. 90MK	ad. No. 61, 2001
S. 90ML	ad. No. 61, 2001 am. No. 121, 2002
S. 90MLA	ad. No. 121, 2002
Ss. 90MM, 90MN	ad. No. 61, 2001

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
Subdivision D	
Ss. 90MO–90MR	ad. No. 61, 2001
Division 3	
S. 90MS	ad. No. 61, 2001
S. 90MT	ad. No. 61, 2001 am. No. 121, 2002
S. 90MU	ad. No. 61, 2001
S. 90MUA	ad. No. 121, 2002
Division 4	
Ss. 90MV, 90MW	ad. No. 61, 2001
S. 90MX	ad. No. 61, 2001 am. No. 121, 2002
S. 90MY	ad. No. 61, 2001
S. 90MZ	ad. No. 61, 2001 am. No. 121, 2002
Ss. 90MZA, 90MZB	ad. No. 61, 2001
S. 90MZC	ad. No. 61, 2001 am. No. 121, 2002
Division 5	
S. 90MZD	ad. No. 61, 2001 am. No. 121, 2002
Ss. 90MZE–90MZH	ad. No. 61, 2001
Part IX	
S. 91	am. No. 95, 1976; No. 181, 1987; No. 167, 1995
S. 91A	ad. No. 95, 1976 am. No. 181, 1987
S. 91B	ad. No. 72, 1983
S. 92	am. No. 72, 1983; No. 181, 1987; No. 167, 1995
S. 92A	ad. No. 37, 1991 am. No. 167, 1995
Part X	
S. 93A	ad. No. 72, 1983 am. No. 194, 1999; No. 138, 2003
Heading to s. 94	am. No. 194, 1999
S. 94	am. No. 63, 1976; No. 23, 1979; No. 72, 1983; Nos. 141 and 181, 1987; No. 8, 1988; No. 115, 1990; No. 194, 1999; No. 143, 2000; No. 138, 2003
Note to s. 94(2A)	rep. No. 138, 2003
S. 94AAA	ad. No. 194, 1999 am. No. 138, 2003
S. 94AA	ad. No. 115, 1990 am. No. 167, 1995; No. 194, 1999; No. 143, 2000
S. 94A	ad. No. 63, 1976 am. No. 23, 1979; No. 141, 1987; No. 194, 1999
S. 95	am. No. 63, 1976

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
S. 96	am. No. 63, 1976; No. 23, 1979; No. 72, 1983; No. 181, 1987; No. 8, 1988; No. 194, 1999
S. 96A	ad. No. 89, 1998
Part XI	
Division 1	
Heading to Div. 1 of Part XI	ad. No. 138, 2003
S. 97	am. No. 72, 1983; No. 8, 1988; No. 194, 1999; No. 138, 2003
S. 98	am. No. 72, 1983; No. 194, 1999
S. 98A	ad. No. 72, 1983 am. No. 72, 1983; No. 181, 1987; No. 194, 1999; No. 143, 2000
S. 99	rep. No. 181, 1987
S. 99A	ad. No. 72, 1983 rep. No. 181, 1987
S. 100A	ad. No. 37, 1991
S. 100B	ad. No. 143, 2000
S. 101	am. No. 37, 1991
S. 102	rs. No. 181, 1987
S. 102A	ad. No. 37, 1991 am. No. 167, 1995
S. 102B	ad. No. 167, 1995 am. No. 194, 1999
Division 2	
Div. 2 of Part XI	ad. No. 138, 2003
Ss. 102C–102H	ad. No. 138, 2003
Ss. 102J–102L	ad. No. 138, 2003
Division 3	
Div. 3 of Part XI	ad. No. 138, 2003
Ss. 102M, 102N	ad. No. 138, 2003
Part XII	
S. 103	am. No. 63, 1976
S. 104	am. No. 72, 1983; No. 72, 1984; No. 181, 1987
S. 104A	ad. No. 76, 1986
Part XIII	
S. 105	am. No. 95, 1976; No. 72, 1983; No. 181, 1987; No. 194, 1999; No. 143, 2000
Note to s. 105(1)	ad. No. 194, 1999
S. 106	am. No. 63, 1976; No. 23, 1979 rep. No. 72, 1983 ad. No. 143, 2000
S. 106A	ad. No. 143, 2000
S. 106B	ad. No. 143, 2000 am. No. 138, 2003

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
S. 107	am. No. 72, 1983; No. 181, 1987; No. 182, 1989 rs. No. 143, 2000 am. No. 138, 2003
S. 108	am. No. 63, 1976; No. 23, 1979; No. 72, 1983; No. 181, 1987 rep. No. 182, 1989
S. 109	am. No. 181, 1987; No. 167, 1995
S. 109A	ad. No. 143, 2000
S. 109B	ad. No. 194, 1999
Part XIII AA	
Heading to Part XIII AA	ad. No. 143, 2000
Division 1	
Heading to Div. 1	ad. No. 69, 2002 of Part XIII AA
S. 110	am. No. 63, 1976; No. 72, 1983; No. 72, 1984; No. 168, 1986; No. 181, 1987; No. 182, 1989; No. 34, 1997
Ss. 110A, 110B	ad. No. 143, 2000
S. 111	am. No. 72, 1983; No. 143, 2000
S. 111A	ad. No. 72, 1983 am. No. 143, 2000
Division 2	
Heading to Div. 2	ad. No. 69, 2002 of Part XIII AA
S. 111B	ad. No. 72, 1983 am. No. 167, 1995; No. 143, 2000
Division 3	
Heading to Div. 3	ad. No. 69, 2002 of Part XIII AA
Heading to s. 111C.....	rs. No. 89, 1998
S. 111C	ad. No. 167, 1995 am. No. 89, 1998; No. 143, 2000
Division 4	
Div. 4 of Part XIII AA	ad. No. 69, 2002
Subdivision A	
Ss. 111CA, 111CB	ad. No. 69, 2002
Subdivision B	
Ss. 111CC–111CI	ad. No. 69, 2002
Subdivision C	
Ss. 111CJ–111CP.....	ad. No. 69, 2002
Subdivision D	
Ss. 111CQ–111CS.....	ad. No. 69, 2002
Subdivision E	
S. 111CT.....	ad. No. 69, 2002
Subdivision F	
Ss. 111CU–111CY	ad. No. 69, 2002

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
Subdivision G	
S. 111CZ.....	ad. No. 69, 2002
Division 5	
Heading to Div. 5 of Part XIII A A	ad. No. 69, 2002
S. 111D	ad. No. 143, 2000
S. 112	am. No. 63, 1976 rs. No. 72, 1983 am. No. 72, 1983; No. 181, 1987 rep. No. 143, 2000
Part XIII A	
Heading to Part XIII A.....	rs. No. 143, 2000
Part XIII A	ad. No. 182, 1989
Division 1	
S. 112AA	ad. No. 182, 1989 am. No. 23, 1992; No. 167, 1995; No. 143, 2000
Ss. 112AB, 112AC	ad. No. 182, 1989 am. No. 167, 1995; No. 143, 2000
Division 2	
S. 112AD	ad. No. 182, 1989 am. No. 37, 1991; No. 167, 1995; No. 34, 1997; No. 143, 2000; No. 138, 2003
S. 112AE	ad. No. 182, 1989 am. No. 143, 2000
S. 112AF	ad. No. 182, 1989 am. No. 167, 1995 rs. No. 143, 2000
S. 112AG	ad. No. 182, 1989 am. No. 143, 2000; No. 138, 2003
Heading to s. 112AH	am. No. 143, 2000
S. 112AH	ad. No. 182, 1989 am. No. 143, 2000
Note to s. 112AH(8)	ad. No. 143, 2000
S. 112AJ	ad. No. 182, 1989 rep. No. 167, 1995
S. 112AK	ad. No. 182, 1989
S. 112AL	ad. No. 182, 1989 am. No. 37, 1991 rep. No. 167, 1995
S. 112AM	ad. No. 182, 1989 am. No. 143, 2000
Ss. 112AN, 112AO	ad. No. 182, 1989
Heading to Div. 3 of Part XIII A	rep. No. 143, 2000
Part XIII B	
Heading to Part XIII B	ad. No. 143, 2000

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
S. 112AP	ad. No. 182, 1989 am. No. 194, 1999; No. 143, 2000
Part XIV	
S. 112A	ad. No. 72, 1983
S. 114	am. No. 72, 1983; No. 72, 1984; No. 181, 1987; No. 182, 1989
S. 114AA	ad. No. 72, 1983 am. No. 181, 1987; No. 182, 1989; No. 143, 2000
Note to s. 114AA(1)	ad. No. 143, 2000
S. 114AB	ad. No. 72, 1983 am. No. 181, 1987; No. 37, 1991; No. 167, 1995
Part XIVA	
Heading to Part XIVA	am. No. 76, 1986
Part XIVA	ad. No. 23, 1979
S. 114A	ad. No. 23, 1979 am. No. 76, 1986
S. 114B	ad. No. 23, 1979 am. No. 72, 1983; No. 76, 1986; No. 182, 1989; No. 152, 1997
S. 114BA	ad. No. 76, 1986
Note to s. 114BA(1)	ad. No. 152, 1997
S. 114BB	ad. No. 76, 1986
Ss. 114C, 114D	ad. No. 23, 1979
S. 114E	ad. No. 23, 1979 am. No. 181, 1987; No. 159, 2001
S. 114F	ad. No. 23, 1979 am. No. 181, 1987; No. 43, 1996
S. 114G	ad. No. 23, 1979 am. No. 182, 1989 rs. No. 229, 1992 am. No. 146, 1999
S. 114H	ad. No. 23, 1979 am. No. 181, 1987
S. 114J	ad. No. 23, 1979 am. No. 229, 1992; No. 152, 1997; No. 156, 1999
S. 114K	ad. No. 23, 1979 am. No. 181, 1987; No. 182, 1989
S. 114L	ad. No. 23, 1979
S. 114M	ad. No. 23, 1979 am. Nos. 65 and 166, 1985; No. 182, 1989; No. 199, 1991 rs. No. 167, 1995 am. No. 146, 1999
S. 114MA	ad. No. 76, 1986
S. 114MB	ad. No. 76, 1986 am. No. 182, 1989 rep. No. 152, 1997
S. 114MC	ad. No. 76, 1986 am. No. 182, 1989

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
S. 114MD	ad. No. 76, 1986 am. No. 152, 1997
S. 114ME	ad. No. 76, 1986 rep. No. 152, 1997
S. 114MF	ad. No. 76, 1986
S. 114N	ad. No. 72, 1983 rs. No. 76, 1986 rep. No. 152, 1997
Part XV	
S. 115	am. No. 63, 1976; No. 72, 1983; No. 181, 1987; No. 182, 1989; No. 167, 1995; No. 43, 1996; Nos. 146 and 194, 1999
S. 116	am. No. 63, 1976 rep. No. 23, 1979
Ss. 116A, 116B	ad. No. 67, 1973 rep. No. 23, 1992
S. 116C	ad. No. 67, 1983 am. No. 165, 1984; No. 181, 1987; No. 194, 1999
S. 117	am. No. 72, 1983; No. 181, 1987; No. 167, 1995; No. 194, 1999; No. 143, 2000; No. 138, 2003
S. 117AA	ad. No. 143, 2000
S. 117A	ad. No. 72, 1983 am. No. 182, 1989; No. 167, 1995; No. 138, 2003
S. 117B	ad. No. 72, 1983 am. No. 72, 1983; No. 194, 1999
S. 117C	ad. No. 72, 1983 am. No. 72, 1983; No. 181, 1987; No. 22, 1992; No. 167, 1995; No. 194, 1999; No. 143, 2000; No. 138, 2003
S. 118	rs. No. 72, 1983 am. No. 181, 1987
S. 121	rs. No. 72, 1983 am. No. 72, 1983; No. 37, 1991; No. 194, 1999; No. 143, 2000; No. 138, 2003
Note to s. 121(10)	ad. No. 143, 2000
S. 122	am. No. 181, 1987
S. 122AA	ad. No. 143, 2000
S. 122A	ad. No. 37, 1991
S. 122B	ad. No. 143, 2000
S. 123	am. Nos. 63 and 95, 1976; No. 23, 1979 rs. No. 72, 1983 am. No. 193, 1985; No. 99, 1988; No. 182, 1989; No. 113, 1991; No. 23, 1992; No. 167, 1995; No. 34, 1997; No. 194, 1999; No. 143, 2000; No. 138, 2003
Note to s. 123	ad. No. 143, 2000
S. 124	ad. No. 72, 1983 am. No. 181, 1987; No. 194, 1999
S. 124A	ad. No. 49, 2000

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
S. 125	ad. No. 72, 1983 am. No. 181, 1987; No. 113, 1991; No. 167, 1995; No. 25, 1997; No. 143, 2000
Schedule 1	
Schedule 1	ad. No. 69, 2002

Note 2

Note 2

Legislative Instruments (Transitional Provisions and Consequential Amendments) Act 2003 (No. 140, 2003)

The following amendments commence on 1 January 2005 unless proclaimed earlier:

Schedule 1

19 Section 26E

Repeal the section, substitute:

26E Application of the *Legislative Instruments Act 2003* to rules of court

The *Legislative Instruments Act 2003* (other than sections 5, 6, 7, 10, 11 and 16 of that Act) applies in relation to rules of court made under sections 26B and 26C of this Act:

- (a) as if a reference to a legislative instrument were a reference to a rule of court; and
- (b) as if a reference to a rule-maker were a reference to the Chief Judge acting on behalf of the Judges; and
- (c) subject to such further modifications or adaptations as are provided for in regulations made under paragraph 125(1)(baa) of this Act.

20 Subsection 37A(14)

Repeal the subsection, substitute:

- (14) The *Legislative Instruments Act 2003* (other than sections 5, 6, 7, 10, 11 and 16 of that Act) applies in relation to rules of court made under this section:
 - (a) as if a reference to a legislative instrument were a reference to a rule of court; and
 - (b) as if a reference to a rule-maker were a reference to the Chief Judge acting on behalf of the Judges; and

Note 2

- (c) subject to such further modifications or adaptations as are provided for in regulations made under paragraph 125(1)(baa) of this Act.

21 Subsection 123(2)

Repeal the subsection, substitute:

- (2) The *Legislative Instruments Act 2003* (other than sections 5, 6, 7, 10, 11 and 16 of that Act) applies in relation to rules of court made under this section:
 - (a) as if a reference to a legislative instrument were a reference to a rule of court; and
 - (b) as if a reference to a rule-maker were a reference to the Chief Judge acting on behalf of the Judges; and
 - (c) subject to such further modifications or adaptations as are provided for in regulations made under paragraph 125(1)(baa) of this Act.
- (2A) Despite the fact that section 16 of the *Legislative Instruments Act 2003* does not apply in relation to rules of court made under this Act, the Department may provide assistance in the drafting of any of those Rules if the Chief Judge so desires.

22 After paragraph 125(1)(ba)

Insert:

- (baa) modifying or adapting the provisions of the *Legislative Instruments Act 2003* (other than the provisions of Part 5 of that Act or any other provisions whose modification or adaptation would affect the operation of that Part) in their application to the Family Court and any other court exercising jurisdiction under this Act; and

As at 17 December 2004 the amendments are not incorporated in this compilation.

Table A

Table A

Application, saving or transitional provisions

Family Law Amendment Act 2000 (No. 143, 2000)

Schedule 1

31 Saving

The amendments made by the previous items in this Schedule do not affect any act or thing done by a court under Division 2 of Part XIII A of the *Family Law Act 1975* before the commencement of this Schedule, and any such act or thing continues to have effect according to its terms after that commencement as if those amendments had not been made.

Schedule 3

20 Application of amendments

The amendments of section 19F of the *Family Law Act 1975* made by this Schedule apply in relation to applications for review that are made after the commencement of this item (even if the award concerned was registered before that time).

24 Application of amendment

The amendment made by item 23 applies to arbitration that begins after the commencement of that item.

40 Validation of past transfers

To avoid doubt, a purported transfer of proceedings under subsection 45(2) of the *Family Law Act 1975* before the commencement of item 39 is taken not to have been invalid or ineffective merely because it was done on the court's own initiative.

56 Application of amendment

The amendment made by item 55 applies to child maintenance orders made after the commencement of that item.

Table A**56B Application of amendment**

Section 66W of the *Family Law Act 1975*, as amended by item 56A, applies to arrears that are outstanding on or after the commencement of that item.

75 Transitional

After the commencement of this item:

- (a) anything done before that commencement under section 84 or 85 of the *Family Law Act 1975* is taken to have been done under section 106A or 106B respectively of that Act; and
- (b) a reference in an order made under that Act to section 84 or 85 of that Act is taken to be a reference to section 106A or 106B respectively of that Act.

83 Saving

Any regulations made for the purposes of paragraph 89(b) of the *Family Law Act 1975* and in force immediately before the commencement of item 82 have effect as if they were made for the purposes of section 110B inserted in that Act by that item.

Jurisdiction of Courts (Miscellaneous Amendments) Act 2000 (No. 161, 2000)

Schedule 1**16 Pre-commencement jurisdiction of the Federal Magistrates Court**

The enactment of this Schedule does not imply that the Parliament did not intend that the Federal Magistrates Court was to have jurisdiction, at a time before the commencement of this item, to hear and determine:

- (a) a proceeding arising under the *Administrative Decisions (Judicial Review) Act 1977* that was transferred to the Federal Magistrates Court under section 32AB of the *Federal Court of Australia Act 1976*; or
- (b) a proceeding arising under the *Family Law Act 1975* that was transferred to the Federal Magistrates Court under section 33B of the *Family Law Act 1975*.

Table A

Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001 (No. 24, 2001)

4 Application of amendments

- (1) Subject to subsection (3), each amendment made by this Act applies to acts and omissions that take place after the amendment commences.
- (2) For the purposes of this section, if an act or omission is alleged to have taken place between 2 dates, one before and one on or after the day on which a particular amendment commences, the act or omission is alleged to have taken place before the amendment commences.

Family Law Legislation Amendment (Superannuation) Act 2001 (No. 61, 2001)

4 Definitions

In this Act, unless the contrary intention appears:

Family Law Act means the *Family Law Act 1975*.

marriage includes a void marriage.

section 79 order means an order (other than an interim order) made under section 79 of the Family Law Act.

section 87 agreement means an agreement approved under section 87 of the Family Law Act.

startup time means the time when Schedule 1 commences.

superannuation amendments means the amendments made by Schedule 1.

Table A**5 Application of superannuation amendments**

- (1) Subject to this section, the superannuation amendments apply to all marriages, including those that were dissolved before the startup time.
- (2) Subject to subsections (3) and (4), the superannuation amendments do not apply to a marriage if a section 79 order, or a section 87 agreement, is in force in relation to the marriage at the startup time.
- (3) If a section 79 order that is in force at the startup time is later set aside under paragraph 79A(1)(a), (b), (c), (d) or (e) of the Family Law Act, then the superannuation amendments apply to the marriage from the time the order is set aside.
- (4) If an approval of a section 87 agreement that is in force at the startup time is later revoked on a ground specified in paragraph 87(8)(a), (c) or (d) of the Family Law Act, then the superannuation amendments apply to the marriage from the time the approval is revoked.
- (5) Part VIII B of the Family Law Act does not apply in relation to a financial agreement that was made before the startup time.

Abolition of Compulsory Age Retirement (Statutory Officeholders) Act 2001
(No. 159, 2001)

Schedule 1**97 Application of amendments**

The amendments made by this Schedule do not apply to an appointment if the term of the appointment began before the commencement of this item.

Table A

Family Law Amendment Act 2003 (No. 138, 2003)

Schedule 2

9 Application of amendments

- (1) The amendments made by Part 1 of this Schedule, other than the split court amendments, apply in relation to proceedings instituted in the court before, on or after the commencement of this item.
- (2) The split court amendments made by Part 1 of this Schedule apply in relation to proceedings instituted in the Family Court after the commencement of this item.
- (3) In this item:
electronic communication means:
 - (a) video link; or
 - (b) audio link; or
 - (c) other appropriate means of communication.*split court amendments* means the amendments that relate to the use of electronic communication to facilitate:
 - (a) proceedings being heard by a split court; and
 - (b) a split court:
 - (i) hearing testimony; or
 - (ii) taking submissions; or
 - (iii) have persons appear before it; or
 - (iv) having a submission put to a person or to the court.

Schedule 3

29 Regulations

- (1) The Governor-General may make regulations dealing with matters of a transitional or saving nature arising out of the enactment of this Schedule.
- (2) Despite subsection 48(2) of the *Acts Interpretation Act 1901*, regulations made for the purposes of this item may be expressed to take effect from a date before the regulations are notified in the *Gazette*.

Table A**Schedule 4A****6 Application of amendments**

The amendments made by this Schedule apply to financial agreements made at any time, whether before or after the commencement of this Schedule. However, the amendments do not apply to proceedings that were instituted before the commencement of this Schedule.

Schedule 6**2 Application of amendments**

- (1) Subject to this item, the amendments made by Part 1 of this Schedule apply to all marriages, including those that were dissolved before the commencement time.
- (2) Subject to subitems (3) and (4), the amendments made by this Schedule do not apply to a marriage if a section 79 order, or a section 87 agreement, is in force in relation to the marriage at the commencement time.
- (3) If a section 79 order that is in force at the commencement time is later set aside under paragraph 79A(1)(a), (b), (c) or (d) of the Family Law Act, then the amendments made by this Schedule apply to the marriage from the time the order is set aside.
- (4) If an approval of a section 87 agreement that is in force at the commencement time is later revoked on a ground specified in paragraph 87(8)(a), (c) or (d) of the Family Law Act, then the amendments made by this Schedule apply to the marriage from the time the approval is revoked.
- (5) In this item, unless the contrary intention appears:

commencement time means the time when this Schedule commences.

Family Law Act means the *Family Law Act 1975*.

marriage includes a void marriage.

section 79 order means an order (other than an interim order or a partial order) made under section 79 of the Family Law Act.

section 87 agreement means an agreement approved under section 87 of the Family Law Act.

Table A

Schedule 7

35 Application of amendments

- (1) The amendments made by items 7, 13 and 19 of Part 1 of this Schedule apply to admissions or disclosures made after the commencement of this item.
- (2) Items 29 and 29A apply to proceedings instituted in the court after the commencement of this item.



Family Law Amendment (Shared Parental Responsibility) Act 2006

No. 46, 2006

An Act to amend the *Family Law Act 1975*, and for related purposes

Note: An electronic version of this Act is available in ComLaw (<http://www.comlaw.gov.au/>)

Contents

1	Short title	1
2	Commencement	2
3	Schedule(s)	3
Schedule 1—Shared parental responsibility		4
Part 1—Amendments		4
<i>Family Law Act 1975</i>		4
Part 2—Application of amendments		33
Schedule 2—Compliance regime		35
Part 1—Amendments		35
<i>Family Law Act 1975</i>		35
Part 2—Application of amendments and savings		59
Schedule 3—Amendments relating to the conduct of child-related proceedings		60
Part 1—Amendments		60
<i>Evidence Act 1995</i>		60
<i>Family Law Act 1975</i>		60
Part 2—Application of amendments		70
Schedule 4—Changes to dispute resolution		71
Part 1—Changes to approval of organisations		71
<i>Family Law Act 1975</i>		71
Part 2—Protection of names		72
<i>Family Law Act 1975</i>		72
Part 3—Changes to dispute resolution		74
<i>Family Law Act 1975</i>		74
<i>Federal Magistrates Act 1999</i>		111
<i>Income Tax Assessment Act 1997</i>		117
<i>Marriage Act 1961</i>		118

Part 4—Transitional matters relating to family counselling and family dispute resolution	119
Part 5—Application and transitional provisions relating to other changes to dispute resolution	125
Schedule 5—Representation of child’s interests by independent children’s lawyer	129
Part 1—Amendments	129
<i>Family Law Act 1975</i>	129
Part 2—Application of amendments and saving of appointments	135
Schedule 6—Family violence	136
Part 1—Amendments	136
<i>Family Law Act 1975</i>	136
Part 2—Application of amendments and savings	143
Schedule 7—Jurisdiction of courts	144
Part 1—Amendment	144
<i>Family Law Act 1975</i>	144
Part 2—Application of amendment	145
Schedule 8—Removal of references to residence and contact	146
Part 1—Amendments	146
<i>Australian Citizenship Act 1948</i>	146
<i>Australian Citizenship Act 2006</i>	146
<i>Australian Passports Act 2005</i>	146
<i>Child Support (Assessment) Act 1989</i>	147
<i>Family Law Act 1975</i>	151
<i>Migration Act 1958</i>	165
Part 2—Savings	166
Schedule 9—Relocation of defined terms used in Part VII	167
Part 1—Amendments	167

<i>A New Tax System (Family Assistance) Act 1999</i>	167
<i>Australian Passports Act 2005</i>	167
<i>Child Support (Assessment) Act 1989</i>	167
<i>Child Support (Registration and Collection) Act 1988</i>	167
<i>Family Law Act 1975</i>	167
Part 2—Savings	180
Schedule 10—Orders of non-judicial officers of State courts of summary jurisdiction	182
<i>Family Law Act 1975</i>	182



Family Law Amendment (Shared Parental Responsibility) Act 2006

No. 46, 2006

An Act to amend the *Family Law Act 1975*, and for related purposes

[Assented to 22 May 2006]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Family Law Amendment (Shared Parental Responsibility) Act 2006*.

2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day on which this Act receives the Royal Assent.	22 May 2006
2. Schedules 1 and 2	A single day to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 6 months beginning on the day on which this Act receives the Royal Assent, they commence on the first day after the end of that period.	1 July 2006 (see F2006L01775)
3. Schedule 3	1 July 2006.	1 July 2006
4. Schedule 4, items 1 to 8	The day on which this Act receives the Royal Assent.	22 May 2006
5. Schedule 4, items 9 to 139	At the same time as the provision(s) covered by table item 2.	1 July 2006
6. Schedules 5 to 7	At the same time as the provision(s) covered by table item 2.	1 July 2006
7. Schedule 8, item 1	At the same time as the provision(s) covered by table item 2. However, if section 6 of the <i>Australian Citizenship Act 2006</i> commences before that time, the provision does not commence at all.	1 July 2006

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
8. Schedule 8, item 2	The later of: (a) the time that the provision(s) covered by table item 2 commence; and (b) immediately after section 6 of the <i>Australian Citizenship Act 2006</i> commences. However, the provision(s) do not commence at all if the event mentioned in paragraph (b) does not occur.	1 July 2007 (see F2007L01653) (paragraph (b) applies)
9. Schedule 8, items 3 to 104	At the same time as the provision(s) covered by table item 2.	1 July 2006
10. Schedule 9	At the same time as the provision(s) covered by table item 2.	1 July 2006
11. Schedule 10	The day on which this Act receives the Royal Assent.	22 May 2006

Note: This table relates only to the provisions of this Act as originally passed by the Parliament and assented to. It will not be expanded to deal with provisions inserted in this Act after assent.

- (2) Column 3 of the table contains additional information that is not part of this Act. Information in this column may be added to or edited in any published version of this Act.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Shared parental responsibility

Part 1—Amendments

Family Law Act 1975

1 Subsection 4(1)

Insert:

Aboriginal child means a child who is a descendant of the Aboriginal people of Australia.

2 Subsection 4(1)

Insert:

Aboriginal or Torres Strait Islander culture in relation to a child:

- (a) means the culture of the Aboriginal or Torres Strait Islander community or communities to which the child belongs; and
- (b) includes Aboriginal or Torres Strait Islander lifestyle and traditions of that community or communities.

3 Subsection 4(1)

Insert:

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

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

4 Subsection 4(1)

Insert:

major long-term issues, in relation to a child, means issues about the care, welfare and development of the child of a long-term

nature and includes (but is not limited to) issues of that nature about:

- (a) the child's education (both current and future); and
- (b) the child's religious and cultural upbringing; and
- (c) the child's health; and
- (d) the child's name; and
- (e) changes to the child's living arrangements that make it significantly more difficult for the child to spend time with a parent.

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

5 Subsection 4(1)

Insert:

relative of a child:

- (a) in Part VII, means:
 - (i) a step-parent of the child; or
 - (ii) a brother, sister, half-brother, half-sister, step-brother or step-sister of the child; or
 - (iii) a grandparent of the child; or
 - (iv) an uncle or aunt of the child; or
 - (v) a nephew or niece of the child; or
 - (vi) a cousin of the child; and
- (b) in subsection (1AB), has the meaning given by subsection (1AC).

6 Subsection 4(1)

Insert:

Torres Strait Islander child means a child who is a descendant of the Indigenous inhabitants of the Torres Strait Islands.

7 At the end of section 4

Add:

- (4) A reference in this Act to a person who has parental responsibility for a child is a reference to a person who:
 - (a) has some or all of that responsibility solely; or
 - (b) shares some or all of that responsibility with another person.
- (5) A reference in this Act to a person who shares parental responsibility for a child with another person is a reference to a person who shares some or all of the parental responsibility for the child with that other person.

8 Section 60B

Repeal the section, substitute:

60B Objects of Part and principles underlying it

- (1) The objects of this Part are to ensure that the best interests of children are met by:
 - (a) ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and
 - (b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and
 - (c) ensuring that children receive adequate and proper parenting to help them achieve their full potential; and
 - (d) ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.
- (2) The principles underlying these objects are that (except when it is or would be contrary to a child's best interests):
 - (a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and
 - (b) children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents

- and other people significant to their care, welfare and development (such as grandparents and other relatives); and
- (c) parents jointly share duties and responsibilities concerning the care, welfare and development of their children; and
 - (d) parents should agree about the future parenting of their children; and
 - (e) children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).
- (3) For the purposes of subparagraph (2)(e), an Aboriginal child's or Torres Strait Islander child's right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right:
- (a) to maintain a connection with that culture; and
 - (b) to have the support, opportunity and encouragement necessary:
 - (i) to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and
 - (ii) to develop a positive appreciation of that culture.

9 After Subdivision B of Division 1 of Part VII

Insert:

Subdivision BA—Best interests of the child

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

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

60CB Proceedings to which Subdivision applies

- (1) This Subdivision applies to any proceedings under this Part in which the best interests of a child are the paramount consideration.

Note: Division 10 also allows a court to make an order for a child's interests to be independently represented by a lawyer in proceedings under this Part in which the best interests of a child are the paramount consideration.

- (2) This Subdivision also applies to proceedings, in relation to a child, to which subsection 60G(2), 63F(2) or 63F(6) or section 68R applies.

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

Determining child's best interests

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

Primary considerations

- (2) The primary considerations are:
- (a) the benefit to the child of having a meaningful relationship with both of the child's parents; and
 - (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

Note: Making these considerations the primary ones is consistent with the objects of this Part set out in paragraphs 60B(1)(a) and (b).

Additional considerations

- (3) Additional considerations are:
- (a) any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views;
 - (b) the nature of the relationship of the child with:
 - (i) each of the child's parents; and
 - (ii) other persons (including any grandparent or other relative of the child);
 - (c) the willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent;
 - (d) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:
 - (i) either of his or her parents; or

- (ii) any other child, or other person (including any grandparent or other relative of the child), with whom he or she has been living;
- (e) the practical difficulty and expense of a child spending time with and communicating with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;
- (f) the capacity of:
 - (i) each of the child's parents; and
 - (ii) any other person (including any grandparent or other relative of the child);to provide for the needs of the child, including emotional and intellectual needs;
- (g) the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child's parents, and any other characteristics of the child that the court thinks are relevant;
- (h) if the child is an Aboriginal child or a Torres Strait Islander child:
 - (i) the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture); and
 - (ii) the likely impact any proposed parenting order under this Part will have on that right;
- (i) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;
- (j) any family violence involving the child or a member of the child's family;
- (k) any family violence order that applies to the child or a member of the child's family, if:
 - (i) the order is a final order; or
 - (ii) the making of the order was contested by a person;
- (l) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;
- (m) any other fact or circumstance that the court thinks is relevant.

- (4) Without limiting paragraphs (3)(c) and (i), the court must consider the extent to which each of the child's parents has fulfilled, or failed to fulfil, his or her responsibilities as a parent and, in particular, the extent to which each of the child's parents:
- (a) has taken, or failed to take, the opportunity:
 - (i) to participate in making decisions about major long-term issues in relation to the child; and
 - (ii) to spend time with the child; and
 - (iii) to communicate with the child; and
 - (b) has facilitated, or failed to facilitate, the other parent:
 - (i) participating in making decisions about major long-term issues in relation to the child; and
 - (ii) spending time with the child; and
 - (iii) communicating with the child; and
 - (c) has fulfilled, or failed to fulfil, the parent's obligation to maintain the child.
- (4A) If the child's parents have separated, the court must, in applying subsection (4), have regard, in particular, to events that have happened, and circumstances that have existed, since the separation occurred.

Consent orders

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

Right to enjoy Aboriginal or Torres Strait Islander culture

- (6) For the purposes of paragraph (3)(h), an Aboriginal child's or a Torres Strait Islander child's right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right:
- (a) to maintain a connection with that culture; and
 - (b) to have the support, opportunity and encouragement necessary:
 - (i) to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and
 - (ii) to develop a positive appreciation of that culture.

60CD How the views of a child are expressed

- (1) Paragraph 60CC(3)(a) requires the court to consider any views expressed by a child in deciding whether to make a particular parenting order in relation to the child. This section deals with how the court informs itself of views expressed by a child.
- (2) The court may inform itself of views expressed by a child:
 - (a) by having regard to anything contained in a report given to the court under subsection 62G(2); or
 - (b) by making an order under section 68L for the child's interests in the proceedings to be independently represented by a lawyer; or
 - (c) subject to the applicable Rules of Court, by such other means as the court thinks appropriate.

Note 1: Paragraph (a)—subsection 62G(3A) generally requires the person giving the report to ascertain the child's views and include those views in the report.

Note 2: Paragraph (b)—paragraph 68LA(5)(b) requires the independent children's lawyer for the child to ensure that the child's views are fully put before the court.

60CE Children not required to express views

Nothing in this Part permits the court or any person to require the child to express his or her views in relation to any matter.

60CF Informing court of relevant family violence orders

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

60CG Court to consider risk of family violence

- (1) In considering what order to make, the court must, to the extent that it is possible to do so consistently with the child's best interests being the paramount consideration, ensure that the order:
 - (a) is consistent with any family violence order; and
 - (b) does not expose a person to an unacceptable risk of family violence.
- (2) For the purposes of paragraph (1)(b), the court may include in the order any safeguards that it considers necessary for the safety of those affected by the order.

10 Subsection 60G(2) (note)

Omit "Division 10 deals", substitute "Sections 60CB to 60CG deal".

11 At the end of Division 1 of Part VII

Add:

Subdivision E—Family dispute resolution

60I Attending family dispute resolution before applying for Part VII order

Object of this section

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

Phase 1 (from commencement to 30 June 2007)

- (2) The dispute resolution provisions of the *Family Law Rules 2004* impose the requirements for dispute resolution that must be complied with before an application is made to the Family Court of Australia for a parenting order.
- (3) By force of this subsection, the dispute resolution provisions of the *Family Law Rules 2004* also apply to an application to a court (other than the Family Court of Australia) for a parenting order.

Those provisions apply to the application with such modifications as are necessary.

- (4) Subsection (3) applies to an application for a parenting order if the application is made:
- (a) on or after the commencement of this section; and
 - (b) before 1 July 2007.

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

- (5) Subsections (7) to (12) apply to an application for a Part VII order in relation to a child if:
- (a) the application is made on or after 1 July 2007 and before the date fixed by Proclamation for the purposes of this paragraph; and
 - (b) none of the parties to the proceedings on the application has applied, before 1 July 2007, for a Part VII order in relation to the child.

Phase 3 (from second proclaimed date)

- (6) Subsections (7) to (12) apply to all applications for a Part VII order in relation to a child that are made on or after the date fixed by Proclamation for the purposes of this subsection.

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

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

Certificate by family dispute resolution practitioner

- (8) A family dispute resolution practitioner may give one of these kinds of certificates to a person:
- (a) a certificate to the effect that the person did not attend family dispute resolution with the practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with, but the person's failure to do

so was due to the refusal, or the failure, of the other party or parties to the proceedings to attend;

- (aa) a certificate to the effect that the person did not attend family dispute resolution with the practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with, because the practitioner considers, having regard to the matters prescribed by the regulations for the purposes of this paragraph, that it would not be appropriate to conduct the proposed family dispute resolution;
- (b) a certificate to the effect that the person attended family dispute resolution with the practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with, and that all attendees made a genuine effort to resolve the issue or issues;
- (c) a certificate to the effect that the person attended family dispute resolution with the practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with, but that the person, the other party or another of the parties did not make a genuine effort to resolve the issue or issues.

Note: When an applicant files one of these certificates under subsection (7), the court may take the kind of certificate into account in considering whether to make an order referring to parties to family dispute resolution (see section 13C) and in determining whether to award costs against a party (see section 117).

Exception

- (9) Subsection (7) does not apply to an application for a Part VII order in relation to a child if:
 - (a) the applicant is applying for the order:
 - (i) to be made with the consent of all the parties to the proceedings; or
 - (ii) in response to an application that another party to the proceedings has made for a Part VII order; or
 - (b) the court is satisfied that there are reasonable grounds to believe that:
 - (i) there has been abuse of the child by one of the parties to the proceedings; or

- (ii) there would be a risk of abuse of the child if there were to be a delay in applying for the order; or
- (iii) there has been family violence by one of the parties to the proceedings; or
- (iv) there is a risk of family violence by one of the parties to the proceedings; or
- (c) all the following conditions are satisfied:
 - (i) the application is made in relation to a particular issue;
 - (ii) a Part VII order has been made in relation to that issue within the period of 12 months before the application is made;
 - (iii) the application is made in relation to a contravention of the order by a person;
 - (iv) the court is satisfied that there are reasonable grounds to believe that the person has behaved in a way that shows a serious disregard for his or her obligations under the order; or
- (d) the application is made in circumstances of urgency; or
- (e) one or more of the parties to the proceedings is unable to participate effectively in family dispute resolution (whether because of an incapacity of some kind, physical remoteness from dispute resolution services or for some other reason); or
- (f) other circumstances specified in the regulations are satisfied.

Referral to family dispute resolution when exception applies

- (10) If:
- (a) a person applies for a Part VII order; and
 - (b) the person does not, before applying for the order, attend family dispute resolution with a family dispute resolution practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with; and
 - (c) subsection (7) does not apply to the application because of subsection (9);
- the court must consider making an order that the person attend family dispute resolution with a family dispute resolution practitioner and the other party or parties to the proceedings in relation to that issue or those issues.

- (11) The validity of:
- (a) proceedings on an application for a Part VII order; or
 - (b) any order made in those proceedings;
- is not affected by a failure to comply with subsection (7) in relation to those proceedings.
- (12) In this section:
- dispute resolution provisions* of the *Family Law Rules 2004* means:
- (a) Rule 1.05 of those Rules; and
 - (b) Part 2 of Schedule 1 to those Rules;
- to the extent to which they deal with dispute resolution.

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

- (1) If:
- (a) subsections 60I(7) to (12) apply to an application for a Part VII order (see subsections 60I(5) and (6)); and
 - (b) subsection 60I(7) does not apply to the application because the court is satisfied that there are reasonable grounds to believe that:
 - (i) there has been abuse of the child by one of the parties to the proceedings; or
 - (ii) there has been family violence by one of the parties to the proceedings;
- a court must not hear the application unless the applicant has indicated in writing that the applicant has received information from a family counsellor or family dispute resolution practitioner about the services and options (including alternatives to court action) available in circumstances of abuse or violence.
- (2) Subsection (1) does not apply if the court is satisfied that there are reasonable grounds to believe that:
- (a) there would be a risk of abuse of the child if there were to be a delay in applying for the order; or
 - (b) there is a risk of family violence by one of the parties to the proceedings.
- (3) The validity of:

- (a) proceedings on an application for a Part VII order; or
- (b) any order made in those proceedings;

is not affected by a failure to comply with subsection (1) in relation to those proceedings.

(4) If:

- (a) the applicant indicates in writing that the applicant has not received information about the services and options (including alternatives to court action) available in circumstances of abuse or violence; and
- (b) subsection (2) does not apply;

the principal executive officer of the court concerned must ensure that the applicant is referred to a family counsellor or family dispute resolution practitioner in order to obtain information about those matters.

60K Court to take prompt action in relation to allegations of child abuse or family violence

(1) This section applies if:

- (a) an application is made to a court for a Part VII order in relation to a child; and
- (b) a document is filed in the court, on or after the commencement of this section, in relation to the proceedings for the order; and
- (c) the document alleges, as a consideration that is relevant to whether the court should grant or refuse the application, that:
 - (i) there has been abuse of the child by one of the parties to the proceedings; or
 - (ii) there would be a risk of abuse of the child if there were to be a delay in applying for the order; or
 - (iii) there has been family violence by one of the parties to the proceedings; or
 - (iv) there is a risk of family violence by one of the parties to the proceedings; and
- (d) the document is a document of the kind prescribed by the applicable Rules of Court for the purposes of this paragraph.

(2) The court must:

- (a) consider what interim or procedural orders (if any) should be made:
 - (i) to enable appropriate evidence about the allegation to be obtained as expeditiously as possible; and
 - (ii) to protect the child or any of the parties to the proceedings; and
 - (b) make such orders of that kind as the court considers appropriate; and
 - (c) deal with the issues raised by the allegation as expeditiously as possible.
- (2A) The court must take the action required by paragraphs (2)(a) and (b):
- (a) as soon as practicable after the document is filed; and
 - (b) if it is appropriate having regard to the circumstances of the case—within 8 weeks after the document is filed.
- (3) Without limiting subparagraph (2)(a)(i), the court must consider whether orders should be made under section 69ZW to obtain reports from State and Territory agencies in relation to the allegations.
- (4) Without limiting paragraph (2)(a)(ii), the court must consider whether orders should be made, or an injunction granted, under section 68B.
- (5) A failure to comply with a provision of this section in relation to an application does not affect the validity of any order made in the proceedings in relation to the application.

12 At the end of subsection 61C(1)

Add:

- Note 1: This section states the legal position that prevails in relation to parental responsibility to the extent to which it is not displaced by a parenting order made by the court. See subsection (3) of this section and subsection 61D(2) for the effect of a parenting order.
- Note 2: This section does not establish a presumption to be applied by the court when making a parenting order. See section 61DA for the presumption that the court does apply when making a parenting order.
- Note 3: Under section 63C, the parents of a child may make a parenting plan that deals with the allocation of parental responsibility for the child.

13 After section 61D

Insert:

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

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

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

- (2) The presumption does not apply if there are reasonable grounds to believe that a parent of the child (or a person who lives with a parent of the child) has engaged in:
 - (a) abuse of the child or another child who, at the time, was a member of the parent's family (or that other person's family); or
 - (b) family violence.
- (3) When the court is making an interim order, the presumption applies unless the court considers that it would not be appropriate in the circumstances for the presumption to be applied when making that order.
- (4) The presumption may be rebutted by evidence that satisfies the court that it would not be in the best interests of the child for the child's parents to have equal shared parental responsibility for the child.

61DB Application of presumption of equal shared parental responsibility after interim parenting order made

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

14 At the end of Division 2 of Part VII

Add:

61F Application to Aboriginal or Torres Strait Islander children

In:

- (a) applying this Part to the circumstances of an Aboriginal or Torres Strait Islander child; or
- (b) identifying a person or persons who have exercised, or who may exercise, parental responsibility for such a child;

the court must have regard to any kinship obligations, and child-rearing practices, of the child's Aboriginal or Torres Strait Islander culture.

15 After subsection 62G(3)

Insert:

(3A) A family consultant who is directed to give the court a report on a matter under subsection (2) must:

- (a) ascertain the views of the child in relation to that matter; and
- (b) include the views of the child on that matter in the report.

Note: A person cannot require a child to express his or her views in relation to any matter (see section 60CE).

(3B) Subsection (3A) does not apply if complying with that subsection would be inappropriate because of:

- (a) the child's age or maturity; or
- (b) some other special circumstance.

16 After paragraph 63C(1)(b)

Insert:

- (ba) is signed by the parents of the child; and
- (bb) is dated; and

16A After subsection 63C(1)

Insert:

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

17 Subsection 63C(2)

Repeal the subsection, substitute:

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

Note: Paragraph (f)—if the *Child Support (Assessment) Act 1989* applies, provisions in a parenting plan dealing with the maintenance of a child (as distinct from child support under that Act) are unenforceable and of no effect unless the provisions in the plan are a child support agreement (see section 63CAA and subsection 63G(5) of this Act).

- (2A) The person referred to in subsection (2) may be, or the persons referred to in that subsection may include, either a parent of the child or a person other than the parent of the child (including a grandparent or other relative of the child).
- (2B) Without limiting paragraph (2)(c), the plan may deal with the allocation of responsibility for making decisions about major long-term issues in relation to the child.
- (2C) The communication referred to in paragraph (2)(e) includes (but is not limited to) communication by:
- (a) letter; and
 - (b) telephone, email or any other electronic means.

18 Section 63DA

Repeal the section, substitute:

63DA Obligations of advisers

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

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

Note: Paragraphs (a) and (b) only require the adviser to inform the people that they could consider the option of the child spending equal time, or substantial and significant time, with each of them. The adviser may, but is not obliged to, advise them as to whether that option would be appropriate in their particular circumstances.

- (3) For the purposes of paragraph (2)(b), a child will be taken to spend **substantial and significant time** with a parent only if:
- (a) the time the child spends with the parent includes both:
 - (i) days that fall on weekends and holidays; and
 - (ii) days that do not fall on weekends or holidays; and
 - (b) the time the child spends with the parent allows the parent to be involved in:
 - (i) the child's daily routine; and
 - (ii) occasions and events that are of particular significance to the child; and
 - (c) the time the child spends with the parent allows the child to be involved in occasions and events that are of special significance to the parent.

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

(5) In this section:

adviser means a person who is:

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

19 Paragraph 63E(3)(b)

Omit “subsection 68F(2)”, substitute “subsections 60CC(2) and (3)”.

20 Subsection 63F(6) (note)

Omit “Division 10 deals”, substitute “Sections 60CB to 60CG deal”.

21 Subsection 63H(2) (note)

Omit “Division 10 deals”, substitute “Sections 60CB to 60CG deal”.

22 Subsections 64B(2) to (4)

Repeal the subsections, substitute:

- (2) A parenting order may deal with one or more of the following:
- (a) the person or persons with whom a child is to live;
 - (b) the time a child is to spend with another person or other persons;
 - (c) the allocation of parental responsibility for a child;
 - (d) if 2 or more persons are to share parental responsibility for a child—the form of consultations those persons are to have with one another about decisions to be made in the exercise of that responsibility;
 - (e) the communication a child is to have with another person or other persons;
 - (f) maintenance of a child;
 - (g) the steps to be taken before an application is made to a court for a variation of the order to take account of the changing needs or circumstances of:
 - (i) a child to whom the order relates; or

- (ii) the parties to the proceedings in which the order is made;
- (h) the process to be used for resolving disputes about the terms or operation of the order;
- (i) any aspect of the care, welfare or development of the child or any other aspect of parental responsibility for a child.

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

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

- (3) Without limiting paragraph (2)(c), the order may deal with the allocation of responsibility for making decisions about major long-term issues in relation to the child.
- (4) The communication referred to in paragraph (2)(e) includes (but is not limited to) communication by:
 - (a) letter; and
 - (b) telephone, email or any other electronic means.
- (4A) Without limiting paragraphs (2)(g) and (h), the parenting order may provide that the parties to the proceedings must consult with a family dispute resolution practitioner to assist with:
 - (a) resolving any dispute about the terms or operation of the order; or
 - (b) reaching agreement about changes to be made to the order.

23 Subsection 64B(5)

Omit “(c)”, substitute “(f)”.

24 Subsections 64B(6) to (8)

Repeal the subsections, substitute:

- (6) For the purposes of this Act:
 - (a) a parenting order that provides that a child is to live with a person is *made in favour* of that person; and
 - (b) a parenting order that provides that a child is to spend time with a person is *made in favour* of that person; and

- (c) a parenting order that provides that a child is to have communication with a person is *made in favour* of that person; and
- (d) a parenting order that:
 - (i) allocates parental responsibility for a child to a person; or
 - (ii) provides that a person is to share parental responsibility for a child with another person; is *made in favour* of that person.

25 At the end of Division 5 of Part VII

Add:

64D Parenting orders subject to later parenting plans

- (1) Subject to subsection (2), a parenting order in relation to a child is taken to include a provision that the order is subject to a parenting plan that is:
 - (a) entered into subsequently by the child's parents; and
 - (b) agreed to, in writing, by any other person (other than the child) to whom the parenting order applies.
- (2) The court may, in exceptional circumstances, include in a parenting order a provision that the parenting order, or a specified provision of the parenting order, may only be varied by a subsequent order of the court (and not by a parenting plan).
- (3) Without limiting subsection (2), exceptional circumstances for the purposes of that subsection include the following:
 - (a) circumstances that give rise to a need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence;
 - (b) the existence of substantial evidence that one of the child's parents is likely to seek to use coercion or duress to gain the agreement of the other parent to a parenting plan.

26 Section 65A

Before "This", insert "(1)".

27 At the end of section 65A

Add:

Note: Paragraph (a)—section 60I provides that people with disputes about matters that may be dealt with in a Part VII order (which includes a parenting order) should generally make use of family dispute resolution before applying for the order.

- (2) Measures designed to improve communication between separated parents and to educate parents about their respective responsibilities in relation to their children are contained in this Division (see section 65DA).

Note: Division 13A provides for the compliance regime for dealing with contraventions, and alleged contraventions, of parenting orders.

28 Section 65AA

Repeal the section, substitute:

65AA Child’s best interests paramount consideration in making a parenting order

Section 60CA provides that in deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.

29 Subsection 65D(1)

After “subject to”, insert “sections 61DA (presumption of equal shared parental responsibility when making parenting orders) and 65DAB (parenting plans) and”.

30 Subsection 65D(2)

After “subject to”, insert “section 61DA (presumption of equal shared parental responsibility when making parenting orders) and 65DAB (parenting plans) and”.

31 After section 65D

Insert:

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

Equal time

- (1) If a parenting order provides (or is to provide) that a child's parents are to have equal shared parental responsibility for the child, the court must:
- (a) consider whether the child spending equal time with each of the parents would be in the best interests of the child; and
 - (b) consider whether the child spending equal time with each of the parents is reasonably practicable; and
 - (c) if it is, consider making an order to provide (or including a provision in the order) for the child to spend equal time with each of the parents.

Note 1: The effect of section 60CA is that in deciding whether to go on to make a parenting order for the child to spend equal time with each of the parents, the court will regard the best interests of the child as the paramount consideration.

Note 2: See subsection (5) for the factors the court takes into account in determining what is reasonably practicable.

Substantial and significant time

- (2) If:
- (a) a parenting order provides (or is to provide) that a child's parents are to have equal shared parental responsibility for the child; and
 - (b) the court does not make an order (or include a provision in the order) for the child to spend equal time with each of the parents; and
- the court must:
- (c) consider whether the child spending substantial and significant time with each of the parents would be in the best interests of the child; and
 - (d) consider whether the child spending substantial and significant time with each of the parents is reasonably practicable; and

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

Note 1: The effect of section 60CA is that in deciding whether to go on to make a parenting order for the child to spend substantial time with each of the parents, the court will regard the best interests of the child as the paramount consideration.

Note 2: See subsection (5) for the factors the court takes into account in determining what is reasonably practicable.

- (3) For the purposes of subsection (2), a child will be taken to spend **substantial and significant time** with a parent only if:
- (a) the time the child spends with the parent includes both:
 - (i) days that fall on weekends and holidays; and
 - (ii) days that do not fall on weekends or holidays; and
 - (b) the time the child spends with the parent allows the parent to be involved in:
 - (i) the child's daily routine; and
 - (ii) occasions and events that are of particular significance to the child; and
 - (c) the time the child spends with the parent allows the child to be involved in occasions and events that are of special significance to the parent.
- (4) Subsection (3) does not limit the other matters to which a court can have regard in determining whether the time a child spends with a parent would be substantial and significant.

Reasonable practicality

- (5) In determining for the purposes of subsections (1) and (2) whether it is reasonably practicable for a child to spend equal time, or substantial and significant time, with each of the child's parents, the court must have regard to:
- (a) how far apart the parents live from each other; and
 - (b) the parents' current and future capacity to implement an arrangement for the child spending equal time, or substantial and significant time, with each of the parents; and
 - (c) the parents' current and future capacity to communicate with each other and resolve difficulties that might arise in implementing an arrangement of that kind; and

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

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

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

- (a) the willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent (paragraph 60CC(3)(c));
- (b) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents (paragraph 60CC(3)(i)).

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

65DAB Court to have regard to parenting plans

When making a parenting order in relation to a child, the court is to have regard to the terms of the most recent parenting plan (if any) that has been entered into between the child's parents (to the extent to which that plan relates to the child) if doing so would be in the best interests of the child.

65DAC Effect of parenting order that provides for shared parental responsibility

- (1) This section applies if, under a parenting order:
 - (a) 2 or more persons are to share parental responsibility for a child; and
 - (b) the exercise of that parental responsibility involves making a decision about a major long-term issue in relation to the child.
- (2) The order is taken to require the decision to be made jointly by those persons.

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

- (3) The order is taken to require each of those persons:
 - (a) to consult the other person in relation to the decision to be made about that issue; and
 - (b) to make a genuine effort to come to a joint decision about that issue.
- (4) To avoid doubt, this section does not require any other person to establish, before acting on a decision about the child communicated by one of those persons, that the decision has been made jointly.

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

- (1) If a child is spending time with a person at a particular time under a parenting order, the order is taken not to require the person to consult a person who:
 - (a) has parental responsibility for the child; or
 - (b) shares parental responsibility for the child with another person;about decisions that are made in relation to the child during that time on issues that are not major-long term issues.

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

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

32 Section 65E

Repeal the section.

33 Paragraph 65G(2)(a)

Repeal the paragraph, substitute:

- (a) the parties to the proceedings have attended a conference with a family consultant to discuss the matter to be determined by the proposed order; or

34 Subsection 65L(2) (note)

Omit “Division 10 deals”, substitute “Sections 60CB to 60CG deal”.

35 Subsection 65LA(2) (note)

Omit “Division 10 deals”, substitute “Sections 60CB to 60CG deal”.

36 Section 67L (note)

Omit “Division 10 deals”, substitute “Sections 60CB to 60CG deal”.

37 Section 67V (note)

Omit “Division 10 deals”, substitute “Sections 60CB to 60CG deal”.

38 Subsection 67ZC(2) (note)

Omit “Division 10 deals”, substitute “Sections 60CB to 60CG deal”.

39 Subsection 69ZH(2)

After “subsection,”, insert “Subdivision BA of Division 1,”.

40 Subsection 117(1)

After “sections 117AA”, insert “, 117AB”.

41 After section 117AA

Insert:

117AB Costs where false allegation or statement made

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

Part 2—Application of amendments

42 Definitions

In this Part:

commencement means the commencement of this Schedule.

new Act means the *Family Law Act 1975* as in force after commencement.

old Act means the *Family Law Act 1975* as in force immediately before commencement.

43 Application

- (1) Section 60CC of the new Act applies to orders made on or after commencement.
- (2) The amendments made by items 13, 29 and 30 of this Schedule apply to parenting orders made on or after commencement.
- (3) The amendment made by item 14 of this Schedule applies to proceedings under Part VII, whether or not the proceedings were initiated before commencement.
- (4) The amendment made by item 15 of this Schedule applies to directions given under subsection 62G(2) of the new Act on or after commencement.
- (5) The amendments made by items 16 and 16A of this Schedule apply to parenting plans made on or after commencement.
- (6) The amendment made by item 22 of this Schedule applies to parenting orders made on or after commencement.
- (7) The amendment made by item 25 of this Schedule applies to parenting orders made on or after commencement. This includes, without limitation, a parenting order that varies an earlier parenting order, whether the earlier parenting order was made before or after commencement.
- (8) Sections 65DAA, 65DAB, 65DAC and 65DAE of the new Act apply to parenting orders made on or after commencement.

- (9) The amendment made by item 33 of this Schedule applies to a court proposing to make an order mentioned in subsection 65G(1) of the new Act, whether or not the proceedings to which the order relates were initiated before commencement.

44 Grounds for discharging or varying parenting orders

The amendments made by this Schedule are taken not to constitute changed circumstances that would justify making an order to discharge or vary, or to suspend or revive the operation of, some or all of a parenting order that was made before commencement.

Note: For the need for changed circumstances, see *Rice and Asplund* (1979) FLC 90-725.

Schedule 2—Compliance regime

Part 1—Amendments

Family Law Act 1975

1 Section 60C (table item 6)

Omit “—stage 1 of parenting compliance regime”.

2 Section 60C (table item 13A)

Omit “—stage 2 of parenting compliance regime”.

3 Section 60C (table item 13A)

Omit “—stage 3 of parenting compliance regime”.

4 Subsection 65D(3)

Omit “paragraph 70NG(1)(c) of proceedings under Subdivision B”, substitute “paragraph 70NEB(1)(c) of proceedings under Subdivision E”.

5 Subsection 65D(3) (note)

Omit “Subdivision B”, substitute “Subdivision E”.

Note: The heading to section 65DA is altered by omitting “: stage 1 of parenting compliance regime”.

6 Division 13A of Part VII

Repeal the Division, substitute:

Division 13A—Consequences of failure to comply with orders, and other obligations, that affect children

Subdivision A—Preliminary

70NAA Simplified outline of Division

- (1) This Division deals with the powers that a court with jurisdiction under this Act has to make orders to enforce compliance with orders under this Act affecting children.

- (2) The court always has the power to vary the order under Subdivision B. In doing so, the court will have regard to any parenting plan that has been entered into since the order was made (see section 70NBB).
- (3) The other orders that the court can make depend on whether:
 - (a) a contravention is alleged to have occurred but is not established (Subdivision C); or
 - (b) the court finds that a contravention has occurred but there is a reasonable excuse for the contravention (Subdivision D); or
 - (c) the court finds that there was a contravention and there is no reasonable excuse for the contravention (Subdivision E for less serious contraventions and Subdivision F for more serious contraventions).

70NAB Application of Division

Despite anything contained in any other provision of this Division, this Division does not apply in respect of a contravention, committed before this Division commences, of an order under this Act affecting children if a court made an order, in respect of that contravention before this Division commences, under this Act as previously in force.

70NAC Meaning of *contravened* an order

A person is taken for the purposes of this Division to have *contravened* an order under this Act affecting children if, and only if:

- (a) where the person is bound by the order—he or she has:
 - (i) intentionally failed to comply with the order; or
 - (ii) made no reasonable attempt to comply with the order;or
- (b) otherwise—he or she has:
 - (i) intentionally prevented compliance with the order by a person who is bound by it; or
 - (ii) aided or abetted a contravention of the order by a person who is bound by it.

Note: Parenting orders may be subject to any subsequent parenting plan (see section 64D). This means that an action that would otherwise contravene a parenting order may not be a contravention, because of a

subsequent inconsistent parenting plan. Whether this is the case or not depends on the terms of the parenting order.

70NAD Requirements taken to be included in certain orders

For the purposes of this Division:

- (a) a parenting order that deals with whom a child is to live with is taken to include a requirement that people act in accordance with section 65M in relation to the order; and
- (b) a parenting order that deals with whom a child is to spend time with is taken to include a requirement that people act in accordance with section 65N in relation to the order; and
- (c) a parenting order that deals with whom a child is to communicate with is taken to include a requirement that people act in accordance with section 65NA in relation to the order; and
- (d) a parenting order to which section 65P applies is taken to include a requirement that people act in accordance with that section in relation to the order.

70NAE Meaning of *reasonable excuse for contravening an order*

- (1) The circumstances in which a person may be taken to have had, for the purposes of this Division, a ***reasonable excuse for contravening*** an order under this Act affecting children include, but are not limited to, the circumstances set out in subsections (2), (4), (5), (6) and (7).
- (2) A person (the ***respondent***) is taken to have had a ***reasonable excuse for contravening*** an order under this Act affecting children if:
 - (a) the respondent contravened the order because, or substantially because, he or she did not, at the time of the contravention, understand the obligations imposed by the order on the person who was bound by it; and
 - (b) the court is satisfied that the respondent ought to be excused in respect of the contravention.
- (3) If a court decides that a person had a reasonable excuse for contravening an order under this Act for the reason referred to in paragraph (2)(a), it is the duty of the court to explain to the person, in language likely to be readily understood by the person, the

obligations imposed on him or her by the order and the consequences that may follow if he or she again contravenes the order.

- (4) A person (the *respondent*) is taken to have had a reasonable excuse for contravening a parenting order to the extent to which it deals with whom a child is to live with in a way that resulted in the child not living with a person in whose favour the order was made if:
- (a) the respondent believed on reasonable grounds that the actions constituting the contravention were necessary to protect the health or safety of a person (including the respondent or the child); and
 - (b) the period during which, because of the contravention, the child did not live with the person in whose favour the order was made was not longer than was necessary to protect the health or safety of the person referred to in paragraph (a).
- (5) A person (the *respondent*) is taken to have had a reasonable excuse for contravening a parenting order to the extent to which it deals with whom a child is to spend time with in a way that resulted in a person and a child not spending time together as provided for in the order if:
- (a) the respondent believed on reasonable grounds that not allowing the child and the person to spend time together was necessary to protect the health or safety of a person (including the respondent or the child); and
 - (b) the period during which, because of the contravention, the child and the person did not spend time together was not longer than was necessary to protect the health or safety of the person referred to in paragraph (a).
- (6) A person (the *respondent*) is taken to have had a reasonable excuse for contravening a parenting order to the extent to which it deals with whom a child is to communicate with in a way that resulted in a person and a child not having the communication provided for under the order if:
- (a) the respondent believed on reasonable grounds that not allowing the child and the person to communicate together was necessary to protect the health or safety of a person (including the respondent or the child); and
 - (b) the period during which, because of the contravention, the child and the person did not communicate was not longer

than was necessary to protect the health or safety of the person referred to in paragraph (a).

- (7) A person (the *respondent*) is taken to have had a reasonable excuse for contravening a parenting order to which section 65P applies by acting contrary to section 65P if:
- (a) the respondent believed on reasonable grounds that the action constituting the contravention was necessary to protect the health or safety of a person (including the respondent or the child); and
 - (b) the period during which, because of that action, a person in whose favour the order was made was hindered in or prevented from discharging responsibilities under the order was not for longer than was necessary to protect the health or safety of the person referred to in paragraph (a).

70NAF Standard of proof

- (1) Subject to subsection (3), the standard of proof to be applied in determining matters in proceedings under this Division is proof on the balance of probabilities.
- (2) Without limiting subsection (1), that subsection applies to the determination of whether a person who contravened an order under this Act affecting children had a reasonable excuse for the contravention.
- (3) The court may only make an order under:
 - (a) paragraph 70NFB(2)(a), (d) or (e); or
 - (b) paragraph 70NFF(3)(a);if the court is satisfied beyond reasonable doubt that the grounds for making the order exist.

Subdivision B—Court’s power to vary parenting order

70NBA Variation of parenting order

- (1) A court having jurisdiction under this Act may make an order varying a primary order if:
 - (a) proceedings in relation to the primary order are brought before a court having jurisdiction under this Act; and

- (b) it is alleged in those proceedings that a person committed a contravention of the primary order and either:
 - (i) the court does not find that the person committed a contravention of the primary order; or
 - (ii) the court finds that the person committed a contravention of the primary order.
- (2) If Subdivision F applies to the contravention, when making an order under subsection (1) varying a primary order, the court, in addition to regarding, under section 60CA, the best interests of the child as the paramount consideration, must, if any of the following considerations is relevant, take that consideration into account:
 - (a) the person who contravened the primary order did so after having attended, after having refused or failed to attend, or after having been found to be unsuitable to take any further part in, a post-separation parenting program or a part of such a program;
 - (b) there was no post-separation parenting program that the person who contravened the primary order could attend;
 - (c) because of the behaviour of the person who contravened the primary order, it was not appropriate, in the court's opinion, for the person to attend a post-separation parenting program, or a part of such a program;
 - (d) the primary order was a compensatory parenting order made under paragraph 70NEB(1)(b) or 70NFB(2)(c) after the person had contravened a previous order under this Act affecting children.
- (3) This section does not limit the circumstances in which a court having jurisdiction under this Act may vary a primary order.

70NBB Effect of parenting plan

- (1) This section applies if:
 - (a) a parenting order has been made in relation to a child (whether before or after the commencement of this section); and
 - (b) after the parenting order was made, the parents of the child made a parenting plan that dealt with a matter (the **relevant matter**) that was dealt with in the parenting order.
- (2) If:

- (a) section 70NBA applies to proceedings brought in relation to the parenting order in relation to the relevant matter; and
- (b) the parenting plan was in force when the contravention of the parenting order:
 - (i) is alleged to have been committed; or
 - (ii) occurred;

the court must, in exercising its powers under section 70NBA:

- (c) have regard to the terms of the parenting plan; and
- (d) consider whether to exercise its powers under section 70NBA to make an order varying the parenting order to include (with or without modification) some or all of the provisions of the parenting plan.

Note: An action that would otherwise contravene a parenting order may not be a contravention because of a subsequent inconsistent parenting plan. Whether this is the case or not depends on the terms of the parenting order (see section 64D).

Subdivision C—Contravention alleged but not established

70NCA Application of Subdivision

This Subdivision applies if:

- (a) a primary order has been made, whether before or after the commencement of this Subdivision; and
- (b) proceedings in relation to the primary order are brought before a court having jurisdiction under this Act; and
- (c) it is alleged in those proceedings that a person (the *respondent*) committed a contravention of the primary order; and
- (d) the court does not find that the respondent committed a contravention of the primary order.

Note: The court may also vary the primary order under Subdivision B.

70NCB Costs

- (1) The court may make an order that the person who brought the proceedings (the *applicant*) pay some or all of the costs of another party, or other parties, to the proceedings.
- (2) The court must consider making an order under subsection (1) if:

- (a) the applicant has previously brought proceedings in relation to the primary order or another primary order in which the applicant alleged that the respondent committed a contravention of the primary order or that other primary order; and
- (b) on the most recent occasion on which the applicant brought proceedings of the kind referred to in paragraph (a), the court before which the proceedings were brought:
 - (i) was not satisfied that the respondent had committed a contravention of the primary order or that other primary order; or
 - (ii) was satisfied that the respondent had committed a contravention of the primary order or that other primary order but did not make an order under section 70NBA, 70NDB, 70NDC, 70NEB or 70NFB in relation to the contravention.

Subdivision D—Contravention established but reasonable excuse for contravention

70NDA Application of Subdivision

This Subdivision applies if:

- (a) a primary order has been made, whether before or after the commencement of this Subdivision; and
- (b) a court having jurisdiction under this Act is satisfied that a person (the *respondent*) has, whether before or after the commencement, committed a contravention (the *current contravention*) of the primary order; and
- (c) the respondent proves that he or she had a reasonable excuse for the current contravention.

Note: The court may also vary the primary order under Subdivision B.

70NDB Order compensating person for time lost

- (1) If:
 - (a) the primary order is a parenting order in relation to a child; and

- (b) the current contravention resulted in a person not spending time with the child (or the child not living with a person for a particular period);

the court:

- (c) may make a further parenting order that compensates the person for time the person did not spend with the child (or the time the child did not live with the person) as a result of the current contravention; and
- (d) must consider making that kind of order.

Note: If the person does not have a reasonable excuse for a contravention, the court has the power to make an order compensating a person for time lost under paragraph 70NEB(1)(b) or 70NFB(2)(c).

- (2) The court must not make an order under paragraph (1)(c) if it would not be in the best interests of the child for the court to do so.

70NDC Costs

- (1) If the court does not make an order under section 70NDB in relation to the current contravention, the court may make an order that the person who brought the proceedings (the *applicant*) pay some or all of the costs of another party, or other parties, to the proceedings.
- (2) The court must consider making an order under subsection (1) if:
 - (a) the applicant has previously brought proceedings in relation to the primary order or another primary order in which the applicant alleged that the respondent committed a contravention of the primary order or that other primary order; and
 - (b) on the most recent occasion on which the applicant brought proceedings of the kind referred to in paragraph (a), the court before which the proceedings were brought:
 - (i) was not satisfied that the respondent had committed a contravention of the primary order or that other primary order; or
 - (ii) was satisfied that the respondent had committed a contravention of the primary order or that other primary order but did not make an order under section 70NBA, 70NDB, 70NEB or 70NFB in relation to the contravention.

Subdivision E—Contravention without reasonable excuse (less serious contravention)

70NEA Application of Subdivision

- (1) Subject to subsection (4), this Subdivision applies if:
 - (a) a primary order has been made, whether before or after the commencement of this Division; and
 - (b) a court having jurisdiction under this Act is satisfied that a person has, whether before or after that commencement, committed a contravention (the *current contravention*) of the primary order; and
 - (c) the person does not prove that he or she had a reasonable excuse for the current contravention; and
 - (d) either subsection (2) or (3) applies;and, if the primary order is an order for the maintenance of a child, this Subdivision applies irrespective of the period since the current contravention occurred.
- (2) For the purposes of paragraph (1)(d), this subsection applies if no court has previously:
 - (a) made an order imposing a sanction or taking an action in respect of a contravention by the person of the primary order; or
 - (b) under paragraph 70NEB(1)(c), adjourned proceedings in respect of a contravention by the person of the primary order.
- (3) For the purposes of paragraph (1)(d), this subsection applies if:
 - (a) a court has previously:
 - (i) made an order imposing a sanction or taking an action in respect of a contravention by the person of the primary order; or
 - (ii) under paragraph 70NEB(1)(c), adjourned proceedings in respect of a contravention by the person of the primary order; and
 - (b) the court, in dealing with the current contravention, is satisfied that it is more appropriate for that contravention to be dealt with under this Subdivision.
- (4) This Subdivision does not apply if, in circumstances mentioned in subsection (2), the court dealing with the current contravention 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.

70NEB Powers of court

- (1) If this Subdivision applies, the court may do any or all of the following:
 - (a) make an order directing:
 - (i) the person who committed the current contravention; or
 - (ii) that person and another specified person;to attend a post-separation parenting program;
 - (b) if the current contravention is a contravention of a parenting order in relation to a child—make a further parenting order that compensates a person for time the person did not spend with the child (or time the child did not live with the person) as a result of the current contravention;
 - (c) adjourn the proceedings to allow either or both of the parties to the primary order to apply for a further parenting order under Division 6 of Part VII that discharges, varies or suspends the primary order or revives some or all of an earlier parenting order;
 - (d) make an order requiring the person who committed the current contravention to enter into a bond in accordance with section 70NEC;
 - (e) if:
 - (i) the current contravention is a contravention of a parenting order in relation to a child; and
 - (ii) the current contravention resulted in a person not spending time with the child (or the child not living with a person for a particular period); and
 - (iii) the person referred to in subparagraph (ii) reasonably incurs expenses as a result of the contravention;make an order requiring the person who committed the current contravention to compensate the person referred to in subparagraph (ii) for some or all of the expenses referred to in subparagraph (iii);
 - (f) make an order that the person who committed the current contravention pay some or all of the costs of another party, or other parties, to the proceedings under this Division; and

- (g) if the court makes no other orders in relation to the current contravention—order that the person who brought the proceedings in relation to the current contravention pay some or all of the costs of the person who committed the current contravention.

Note 1: The court may also vary the primary order under Subdivision B.

Note 2: Paragraph (1)(a)—before making an order under this paragraph, the court must consider seeking the advice of a family consultant about the services appropriate to the person’s needs (see section 11E).

- (2) The court must not make an order under paragraph (1)(a) directed to a person other than the person who committed the current contravention unless:
- (a) the person brought the proceedings before the court in relation to the current contravention or is otherwise a party to those proceedings; and
 - (b) the court is satisfied that it is appropriate to direct the order to the person because of the connection between the current contravention and the carrying out by the person of his or her parental responsibilities in relation to the child or children to whom the primary order relates.
- (3) If the court makes an order under paragraph (1)(a), the principal executive officer of the court must ensure that the provider of the program concerned is notified of the making of the order.
- (4) If:
- (a) the current contravention is a contravention of a parenting order in relation to a child; and
 - (b) the contravention resulted in a person not spending time with the child (or the child not living with a person for a particular period);
- the court must consider making an order under paragraph (1)(b) to compensate the person for the time the person did not spend with the child (or the time the child did not live with the person) as a result of the contravention.
- (5) The court must not make an order under paragraph (1)(b) if it would not be in the best interests of the child for the court to do so.
- (6) In deciding whether to adjourn the proceedings as mentioned in paragraph (1)(c), the court must have regard to the following:

- (a) whether the primary order was made by consent;
 - (b) whether either or both of the parties to the proceedings in which the primary order was made were represented in those proceedings by a legal practitioner;
 - (c) the length of the period between the making of the primary order and the occurrence of the current contravention;
 - (d) any other matters that the court thinks relevant.
- (7) The court must consider making an order under paragraph (1)(g) if:
- (a) the person (the **applicant**) who brought the proceedings in relation to the current contravention has previously brought proceedings in relation to the primary order or another primary order in which the applicant alleged that the person (the **respondent**) who committed the current contravention committed a contravention of the primary order or that other primary order; and
 - (b) on the most recent occasion on which the applicant brought proceedings of the kind referred to in paragraph (a), the court before which the proceedings were brought:
 - (i) was not satisfied that the respondent had committed a contravention of the primary order or that other primary order; or
 - (ii) was satisfied that the respondent had committed a contravention of the primary order or that other primary order but did not make an order under section 70NDB, 70NDC, 70NEB, 70NFB or 70NBA in relation to the contravention.

70NEC Bonds

- (1) This section provides for bonds that a court may require a person to enter into under paragraph 70NEB(1)(d).
- (2) A bond is to be for a specified period of up to 2 years.
- (3) A bond may be:
 - (a) with or without surety; and
 - (b) with or without security.
- (4) The conditions that may be imposed on a person by a bond include (without limitation) conditions that require the person:

- (a) to attend an appointment (or a series of appointments) with a family consultant; or
 - (b) to attend family counselling; or
 - (c) to attend family dispute resolution; or
 - (d) to be of good behaviour.
- (5) If a court proposes to require a person to enter into a bond, it must, before making the requirement, explain to the person, in language likely to be readily understood by the person:
- (a) the purpose and effect of the proposed requirement; and
 - (b) the consequences that may follow if the person:
 - (i) fails to enter into the bond; or
 - (ii) having entered into the bond—fails to act in accordance with the bond.

70NED Duties of provider of post-separation parenting program

The provider of a post-separation parenting program must inform the court if:

- (a) the provider considers that a person ordered to attend the program under paragraph 70NEB(1)(a) is unsuitable to attend the program, or to continue attending the program; or
- (b) a person ordered to attend the program under paragraph 70NEB(1)(a) fails to attend the program, or a part of it.

70NEF Evidence

- (1) Evidence of anything said, or of any admission made, by a person attending a post-separation parenting program is not admissible:
- (a) in any court (whether exercising federal jurisdiction or not); or
 - (b) in any proceedings before a person authorised by a law of the Commonwealth, of a State or of a Territory, or by the consent of the parties, to hear evidence.
- (2) Subsection (1) does not apply to the following:
- (a) an admission by an adult that indicates that a child under 18 has been abused or is at risk of abuse;
 - (b) a disclosure by a child under 18 that indicates that the child has been abused or is at risk of abuse;

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

70NEG Court may make further orders in relation to attendance at program

The court may make such orders as it considers appropriate, other than the orders referred to in subsection 70NFB(2), in respect of a person, if:

- (a) it appears to the court that the person has not attended a post-separation parenting program that the person was ordered to attend; or
- (b) the person was assessed as unsuitable to attend a program.

Subdivision F—Contravention without reasonable excuse (more serious contravention)

70NFA Application of Subdivision

- (1) Subject to subsection (2), this Subdivision applies if:
 - (a) a primary order has been made, whether before or after the commencement of this Division; and
 - (b) a court having jurisdiction under this Act is satisfied that a person has, whether before or after that commencement, committed a contravention (the *current contravention*) of the primary order; and
 - (c) the person does not prove that he or she had a reasonable excuse for the current contravention; and
 - (d) either subsection (2) or (3) applies.

Note: For the standard of proof to be applied in determining whether a contravention of the primary order has been committed, see section 70NAF.

- (2) For the purposes of paragraph (1)(d), this subsection applies if:
 - (a) no court has previously:
 - (i) made an order imposing a sanction or taking an action in respect of a contravention by the person of the primary order; or

- (ii) under paragraph 70NEB(1)(c), adjourned proceedings in respect of a contravention by the person of the primary order; and
 - (b) the court dealing with the current contravention is satisfied that the person has behaved in a way that showed a serious disregard of his or her obligations under the primary order.
- (3) For the purposes of paragraph (1)(d), this subsection applies if a court has previously:
 - (a) made an order imposing a sanction or taking an action in respect of a contravention by the person of the primary order; or
 - (b) under paragraph 70NEB(1)(c), adjourned proceedings in respect of a contravention by the person of the primary order.
- (4) This Subdivision does not apply if the court dealing with the current contravention is satisfied that it is more appropriate for that contravention to be dealt with under Subdivision E.
- (5) This Subdivision applies whether the primary order was made, and whether the current contravention occurred, before or after the commencement of this Division.

70NFB Powers of court

- (1) If this Subdivision applies, the court must, in relation to the person who committed the current contravention:
 - (a) make an order under paragraph (2)(g), unless the court is satisfied that it would not be in the best interests of the child concerned to make that order; and
 - (b) if the court makes an order under paragraph (2)(g)—consider making another order (or other orders) under subsection (2) that the court considers to be the most appropriate of the orders under subsection (2) in the circumstances; and
 - (c) if the court does not make an order under paragraph (2)(g)—make at least one order under subsection (2), being the order (or orders) that the court considers to be the most appropriate of the orders under subsection (2) in the circumstances.
- (2) The orders that are available to be made by the court are:
 - (a) if the court is empowered under section 70NFC to make a community service order—to make such an order; or

- (b) to make an order requiring the person to enter into a bond in accordance with section 70NFE; or
- (c) if the current contravention is a contravention of a parenting order in relation to a child—to make a further parenting order that compensates a person for time the person did not spend with the child (or the time the child did not live with the person) as a result of the current contravention, unless it would not be in the best interests of the child concerned to make that order; or
- (d) to fine the person not more than 60 penalty units; or
- (e) subject to subsection (7), to impose a sentence of imprisonment on the person in accordance with section 70NFG; or
- (f) if:
 - (i) the current contravention is a contravention of a parenting order in relation to a child; and
 - (ii) the current contravention resulted in a person not spending time with the child (or the child not living with a person for a particular period); and
 - (iii) the person referred to in subparagraph (ii) reasonably incurs expenses as a result of the contravention;to make an order requiring the person who committed the current contravention to compensate the person referred to in subparagraph (ii) for some or all of the expenses referred to in subparagraph (iii); or
- (g) to make an order that the person who committed the current contravention pay all of the costs of another party, or other parties, to the proceedings under this Division; or
- (h) to make an order that the person who committed the current contravention pay some of the costs of another party, or other parties, to the proceedings under this Division.

Note: The court may also vary the primary order under Subdivision B.

- (3) If a court varies or discharges under section 70NFD a community service order made under paragraph (2)(a), the court may give any directions as to the effect of the variation or discharge that the court considers appropriate.
- (4) The court must not make an order imposing a sentence of imprisonment on a person under this section in respect of a contravention of a child maintenance order made under this Act

unless the court is satisfied that the contravention was intentional or fraudulent.

- (5) The court must not make an order imposing a sentence of imprisonment on a person under this section in respect of:
 - (a) a contravention of an administrative assessment of child support made under the *Child Support (Assessment) Act 1989*; or
 - (b) a breach of a child support agreement made under that Act; or
 - (c) a contravention of an order made by a court under Division 4 of Part 7 of that Act for a departure from such an assessment (including such an order that contains matters mentioned in section 141 of that Act).
- (6) An order under this section may be expressed to take effect immediately, at the end of a specified period or on the occurrence of a specified event.
- (7) When a court makes an order under this section, the court may make any other orders that the court considers necessary to ensure compliance with the order that was contravened.

70NFC When court is empowered to make a community service order

- (1) Subject to this section, if, under the law of a participating State or a participating Territory, a court is empowered (whether generally or in particular cases) to make a community service order in respect of a person convicted of an offence against the law of the State or Territory, a court exercising jurisdiction in the State or Territory may, under paragraph 70NFB(2)(a) make a community service order.
- (2) A community service order made under paragraph 70NFB(2)(a):
 - (a) is to be such that the total number of hours during which the order regulates the conduct of the person in respect of whom it is made does not exceed the maximum period in relation to the State or Territory in which the order is made; and
 - (b) ceases to have effect 2 years after it was made, or after such lesser period as is specified in the order.

- (3) A community service order may be an order of any of the following kinds:
- (a) an order known as:
 - (i) a community service order; or
 - (ii) a work order; or
 - (iii) an attendance centre order; or
 - (iv) an attendance order; or
 - (v) a community based order;
 - (b) an order that is similar to an order referred to in paragraph (a);
 - (c) an order prescribed for the purposes of this paragraph.
- (4) If a court exercising jurisdiction under section 70NFB in a particular State or Territory makes a community service order under paragraph 70NFB(2)(a), the provisions of the laws of the State or Territory with respect to a community service order that is made under those laws are, to the extent provided by the regulations and subject to such modifications as are specified in the regulations, to apply in relation to the order.
- (5) If a court proposes to make a community service order under paragraph 70NFB(2)(a), it must, before doing so, explain to the person in respect of whom it is made, in language likely to be readily understood by the person:
- (a) the purpose and effect of the proposed order; and
 - (b) the consequences that may follow if the person fails to comply with the proposed order or with any requirements made in relation to the order by or under the applied provisions; and
 - (c) if the proposed order may be revoked or varied under the applied provisions—that the proposed order may be so revoked or varied.
- (6) In this section:
- maximum period***, in relation to a State or Territory, means 500 hours or such lesser period as is prescribed in relation to the State or Territory.
- participating State*** means a State in relation to which an agreement under section 70NFI is in force.

participating Territory means a Territory in relation to which an agreement under section 70NFI is in force.

70NFD Variation and discharge of community service orders

A community service order made under paragraph 70NFB(2)(a) may be varied or discharged:

- (a) if the court that made the order is the Family Court or the Federal Magistrates Court—by either of those Courts; or
- (b) otherwise—by the court that made the order or the Family Court.

70NFE Bonds

- (1) This section provides for bonds that a court may require a person to enter into under paragraph 70NFB(2)(b).
- (2) A bond is to be for a specified period of up to 2 years.
- (3) A bond may be:
 - (a) with or without surety; and
 - (b) with or without security.
- (4) The conditions that may be imposed on a person by a bond include (without limitation) conditions that require the person:
 - (a) to attend an appointment (or a series of appointments) with a family consultant; or
 - (b) to attend family counselling; or
 - (c) to attend family dispute resolution; or
 - (d) to be of good behaviour.

Note: Before imposing a condition under this subsection, the court must consider seeking the advice of a family consultant about the services appropriate to the person's needs (see section 11E).

- (5) If a court proposes to require a person to enter into a bond, it must, before making the requirement, explain to the person, in language likely to be readily understood by the person:
 - (a) the purpose and effect of the proposed requirement; and
 - (b) the consequences that may follow if the person:
 - (i) fails to enter into the bond; or

- (ii) having entered into the bond—fails to act in accordance with the bond.

70NFF Procedure for enforcing community service orders or bonds

- (1) If a court makes a community service order under paragraph 70NFB(2)(a) in respect of a person, or an order under paragraph 70NFB(2)(b) requiring a person to enter into a bond in accordance with section 70NFE, the following provisions have effect.
- (2) If the court (whether or not constituted by the judge or magistrate who made the community service order or required the bond to be entered into in accordance with section 70NFE) is satisfied that the person has, without reasonable excuse, failed to comply with the order or bond, the court may take action under subsection (3).
- (3) The court may:
 - (a) without prejudice to the continuance of the community service order or the bond entered into in accordance with section 70NFE, impose a fine not exceeding 10 penalty units on the person; or
 - (b) revoke the community service order or the bond entered into in accordance with section 70NFE and, subject to subsection (4), deal with the person, for the contravention in respect of which the community service order was made or the bond was entered into, in any manner in which the person could have been dealt with for the contravention if:
 - (i) the community service order had not been made or the bond had not been entered into; and
 - (ii) the person was before the court under section 70NFB in respect of the contravention.
- (4) In dealing with the person as mentioned in paragraph (3)(b), the court must, in addition to any other matters that it considers should be taken into account, take into account:
 - (a) the fact that the community service order was made or the bond was entered into; and
 - (b) anything done under the community service order or pursuant to the bond; and
 - (c) any fine imposed, and any other order made, for or in respect of the contravention.

70NFG Sentences of imprisonment

- (1) A sentence of imprisonment imposed on a person under paragraph 70NFB(2)(e) is to be expressed to be:
 - (a) for a specified period of 12 months or less; or
 - (b) for a period ending when the person:
 - (i) complies with the order concerned; or
 - (ii) has been imprisoned under the sentence for 12 months or such lesser period as is specified by the court;whichever happens first.
- (2) A court must not sentence a person to imprisonment under paragraph 70NFB(2)(e) unless the court is satisfied that, in all the circumstances of the case, it would not be appropriate for the court to deal with the contravention under any of the other paragraphs of subsection 70NFB(2).
- (3) If a court sentences a person to imprisonment under paragraph 70NFB(2)(e), the court must:
 - (a) state the reasons why it is satisfied as mentioned in subsection (2); and
 - (b) cause those reasons to be entered in the records of the court.
- (4) The failure of a court to comply with subsection (3) does not invalidate a sentence.
- (5) A court that sentences a person to imprisonment under paragraph 70NFB(2)(e) may:
 - (a) suspend the sentence upon the terms and conditions determined by the court; and
 - (b) terminate a suspension made under paragraph (a).
- (6) A court, when sentencing a person to imprisonment under paragraph 70NFB(2)(e), may, if it considers it appropriate to do so, direct that the person be released upon the person entering into a bond described in subsection (7) after he or she has served a specified part of the term of imprisonment.
- (7) A bond for the purposes of subsection (6) is a bond (with or without surety or security) that the person will be of good behaviour for a specified period of up to 2 years.

- (8) A court that has sentenced a person to imprisonment for a period expressed as provided by paragraph (1)(b) may order the release of the person if it is satisfied that the person will, if he or she is released, comply with the order concerned.
- (9) To avoid doubt, the serving by a person of a period of imprisonment under a sentence imposed on the person under paragraph 70NFB(2)(e) for failure to make a payment under a child maintenance order does not affect the person's liability to make the payment.

70NFH Relationship between Subdivision and other laws

- (1) This section applies where an act or omission by a person:
 - (a) constitutes a contravention of an order under this Act affecting children; and
 - (b) is also an offence against any law.
- (2) If the person is prosecuted in respect of the offence, a court in which proceedings have been brought under section 70NFB in respect of the contravention of the order must:
 - (a) adjourn those proceedings until the prosecution has been completed; or
 - (b) dismiss those proceedings.
- (3) The person may be prosecuted for, and convicted of, the offence.
- (4) Nothing in this section renders the person liable to be punished twice in respect of the same act or omission.

70NFI Arrangements with States and Territories for carrying out of sentences and orders

An arrangement made under section 112AN for or in relation to the carrying out of sentences imposed, or orders made, under Division 2 of Part XIII A is taken to extend to the carrying out of sentences imposed, or orders made, under this Subdivision.

70NFJ Subdivision does not limit operation of section 105

Nothing in this Subdivision is intended to limit the operation of section 105.

7 Subsection 117(1)

After “subsection (2)”, insert “, subsection 70NFB(1)”.

Part 2—Application of amendments and savings

8 Definitions

In this Part:

commencement means the commencement of this Schedule.

new Act means the *Family Law Act 1975* as in force after commencement.

old Act means the *Family Law Act 1975* as in force immediately before commencement.

9 Application

The amendments made by this Schedule apply to a contravention or alleged contravention of a parenting order, if the contravention occurs, or the alleged contravention is alleged to occur, on or after commencement.

10 Saving of regulations

Despite the repeal of a provision of the old Act specified in the following table, regulations that:

- (a) were made for the purposes of that provision of the old Act; and
- (b) were in force immediately before commencement;

continue to have effect on and after commencement as if those regulations had been made for the purposes of the corresponding provision of the new Act that is specified in the table in relation to that provision of the old Act:

Saving regulations made under provisions of old Act		
Item	Provision of old Act	Corresponding provision of new Act
1	paragraph 70NK(2A)(c)	paragraph 70NFC(3)(c)
2	subsection 70NK(3)	subsection 70NFC(4)
3	definition of maximum period in subsection 70NK(5)	definition of maximum period in subsection 70NFC(6)

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

Part 1—Amendments

Evidence Act 1995

1 At the end of subsection 190(1)

Add:

Note: Matters related to evidence in child-related proceedings (within the meaning of section 69ZM of the *Family Law Act 1975*) are dealt with by that Act.

Family Law Act 1975

2 Subsection 4(1)

Insert:

child-related proceedings has the meaning given by section 69ZM.

3 Section 60C (after table item 12)

Insert:

12A **Division 12A—Principles for conducting child-related proceedings**
principles for conducting proceedings under this Part and certain other incidental proceedings
duties and powers of the court related to giving effect to the principles

4 After Division 12 of Part VII

Insert:

Division 12A—Principles for conducting child-related proceedings

Subdivision A—Proceedings to which this Division applies

69ZM Proceedings to which this Division applies

- (1) This Division applies to proceedings that are wholly under this Part.
- (2) This Division also applies to proceedings that are partly under this Part:
 - (a) to the extent that they are proceedings under this Part; and
 - (b) if the parties to the proceedings consent—to the extent that they are not proceedings under this Part.
- (3) This Division also applies to any other proceedings between the parties that involve the court exercising jurisdiction under this Act and that arise from the breakdown of the parties' marital relationship, if the parties to the proceedings consent.
- (4) Proceedings to which this Division applies are *child-related proceedings*.
- (5) Consent given for the purposes of paragraph (2)(b) or subsection (3) must be:
 - (a) free from coercion; and
 - (b) given in the form prescribed by the applicable Rules of Court.
- (6) A party to proceedings may, with the leave of the court, revoke a consent given for the purposes of paragraph (2)(b) or subsection (3).

Subdivision B—Principles for conducting child-related proceedings

69ZN Principles for conducting child-related proceedings

Application of the principles

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

- (a) in performing duties and exercising powers (whether under this Division or otherwise) in relation to child-related proceedings; and
- (b) in making other decisions about the conduct of child-related proceedings.

Failure to do so does not invalidate the proceedings or any order made in them.

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

Principle 1

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

Principle 2

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

Principle 3

- (5) The third principle is that the proceedings are to be conducted in a way that will safeguard:
 - (a) the child concerned against family violence, child abuse and child neglect; and
 - (b) the parties to the proceedings against family violence.

Principle 4

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

Principle 5

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

69ZO This Division also applies to proceedings in Chambers

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

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

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

The court may exercise a power under this Division:

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

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

69ZQ General duties

- (1) In giving effect to the principles in section 69ZN, the court must:
 - (a) decide which of the issues in the proceedings require full investigation and hearing and which may be disposed of summarily; and
 - (b) decide the order in which the issues are to be decided; and
 - (c) give directions or make orders about the timing of steps that are to be taken in the proceedings; and
 - (d) in deciding whether a particular step is to be taken—consider whether the likely benefits of taking the step justify the costs of taking it; and
 - (e) make appropriate use of technology; and
 - (f) if the court considers it appropriate—encourage the parties to use family dispute resolution or family counselling; and
 - (g) deal with as many aspects of the matter as it can on a single occasion; and
 - (h) deal with the matter, where appropriate, without requiring the parties' physical attendance at court.
- (2) Subsection (1) does not limit subsection 69ZN(1).

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

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

- (1) If, at any time after the commencement of child-related proceedings and before making final orders, the court considers that it may assist in the determination of the dispute between the parties, the court may do any or all of the following:
- (a) make a finding of fact in relation to the proceedings;
 - (b) determine a matter arising out of the proceedings;
 - (c) make an order in relation to an issue arising out of the proceedings.

Note: For example, the court may choose to use this power if the court considers that making a finding of fact at a particular point in the proceedings will help to focus the proceedings.

- (2) Subsection (1) does not prevent the court doing something mentioned in paragraph (1)(a), (b) or (c) at the same time as making final orders.
- (3) To avoid doubt, a judge, Judicial Registrar, Registrar, Federal Magistrate or magistrate who exercises a power under subsection (1) in relation to proceedings is not, merely because of having exercised the power, required to disqualify himself or herself from a further hearing of the proceedings.

69ZS Use of family consultants

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

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

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

Subdivision D—Matters relating to evidence

69ZT Rules of evidence not to apply unless court decides

- (1) These provisions of the *Evidence Act 1995* do not apply to child-related proceedings:
 - (a) Divisions 3, 4 and 5 of Part 2.1 (which deal with general rules about giving evidence, examination in chief, re-examination and cross-examination), other than sections 26, 30, 36 and 41;

Note: Section 26 is about the court's control over questioning of witnesses. Section 30 is about interpreters. Section 36 relates to examination of a person without subpoena or other process. Section 41 is about improper questions.
 - (b) Parts 2.2 and 2.3 (which deal with documents and other evidence including demonstrations, experiments and inspections);
 - (c) Parts 3.2 to 3.8 (which deal with hearsay, opinion, admissions, evidence of judgments and convictions, tendency and coincidence, credibility and character).
- (2) The court may give such weight (if any) as it thinks fit to evidence admitted as a consequence of a provision of the *Evidence Act 1995* not applying because of subsection (1).
- (3) Despite subsection (1), the court may decide to apply one or more of the provisions of a Division or Part mentioned in that subsection to an issue in the proceedings, if:
 - (a) the court is satisfied that the circumstances are exceptional; and
 - (b) the court has taken into account (in addition to any other matters the court thinks relevant):
 - (i) the importance of the evidence in the proceedings; and
 - (ii) the nature of the subject matter of the proceedings; and
 - (iii) the probative value of the evidence; and
 - (iv) the powers of the court (if any) to adjourn the hearing, to make another order or to give a direction in relation to the evidence.
- (4) If the court decides to apply a provision of a Division or Part mentioned in subsection (1) to an issue in the proceedings, the

court may give such weight (if any) as it thinks fit to evidence admitted as a consequence of the provision applying.

- (5) Subsection (1) does not revive the operation of:
- (a) a rule of common law; or
 - (b) a law of a State or a Territory;
- that, but for subsection (1), would have been prevented from operating because of a provision of a Division or Part mentioned in that subsection.

69ZU Evidence of family consultants

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

69ZV Evidence of children

- (1) This section applies if the court applies the law against hearsay under subsection 69ZT(2) to child-related proceedings.
- (2) Evidence of a representation made by a child about a matter that is relevant to the welfare of the child or another child, which would not otherwise be admissible as evidence because of the law against hearsay, is not inadmissible in the proceedings solely because of the law against hearsay.
- (3) The court may give such weight (if any) as it thinks fit to evidence admitted under subsection (2).
- (4) This section applies despite any other Act or rule of law.
- (5) In this section:

child means a person under 18.

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

69ZW Evidence relating to child abuse or family violence

- (1) The court may make an order in child-related proceedings requiring a prescribed State or Territory agency to provide the court with the documents or information specified in the order.
- (2) The documents or information specified in the order must be documents recording, or information about, one or more of these:
 - (a) any notifications to the agency of suspected abuse of a child to whom the proceedings relate or of suspected family violence affecting the child;
 - (b) any assessments by the agency of investigations into a notification of that kind or the findings or outcomes of those investigations;
 - (c) any reports commissioned by the agency in the course of investigating a notification.
- (3) Nothing in the order is to be taken to require the agency to provide the court with:
 - (a) documents or information not in the possession or control of the agency; or
 - (b) documents or information that include the identity of the person who made a notification.
- (4) A law of a State or Territory has no effect to the extent that it would, apart from this subsection, hinder or prevent an agency complying with the order.
- (5) The court must admit into evidence any documents or information, provided in response to the order, on which the court intends to rely.
- (6) Despite subsection (5), the court must not disclose the identity of the person who made a notification, or information that could identify that person, unless:
 - (a) the person consents to the disclosure; or
 - (b) the court is satisfied that the identity or information is critically important to the proceedings and that failure to make the disclosure would prejudice the proper administration of justice.

- (7) Before making a disclosure for the reasons in paragraph (6)(b), the court must ensure that the agency that provided the identity or information:
- (a) is notified about the intended disclosure; and
 - (b) is given an opportunity to respond.

69ZX Court's general duties and powers relating to evidence

- (1) In giving effect to the principles in section 69ZN, the court may:
- (a) give directions or make orders about the matters in relation to which the parties are to present evidence; and
 - (b) give directions or make orders about who is to give evidence in relation to each remaining issue; and
 - (c) give directions or make orders about how particular evidence is to be given; and
 - (d) if the court considers that expert evidence is required—give directions or make orders about:
 - (i) the matters in relation to which an expert is to provide evidence; and
 - (ii) the number of experts who may provide evidence in relation to a matter; and
 - (iii) how an expert is to provide the expert's evidence; and
 - (e) ask questions of, and seek evidence or the production of documents or other things from, parties, witnesses and experts on matters relevant to the proceedings.
- (2) Without limiting subsection (1) or section 69ZR, the court may give directions or make orders:
- (a) about the use of written submissions; or
 - (b) about the length of written submissions; or
 - (c) limiting the time for oral argument; or
 - (d) limiting the time for the giving of evidence; or
 - (e) that particular evidence is to be given orally; or
 - (f) that particular evidence is to be given by affidavit; or
 - (g) that evidence in relation to a particular matter not be presented by a party; or
 - (h) that evidence of a particular kind not be presented by a party; or

- (i) limiting, or not allowing, cross-examination of a particular witness; or
 - (j) limiting the number of witnesses who are to give evidence in the proceedings.
- (3) The court may, in child-related proceedings:
- (a) receive into evidence the transcript of evidence in any other proceedings before:
 - (i) the court; or
 - (ii) another court; or
 - (iii) a tribunal;and draw any conclusions of fact from that transcript that it thinks proper; and
 - (b) adopt any recommendation, finding, decision or judgment of any court, person or body of a kind mentioned in any of subparagraphs (a)(i) to (iii).

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

5 Section 100A

Repeal the section.

6 At the end of section 102A

Add:

Note: Section 69ZV is relevant to evidence of a representation by a child, if the admissibility of the evidence would otherwise be affected by the law against hearsay.

7 Part XI (heading)

Repeal the heading, substitute:

Part XI—Procedure and evidence

Note: Division 12A of Part VII has provisions about procedure and evidence that apply to child-related proceedings (within the meaning of Part VII).

Part 2—Application of amendments

8 Application of amendments

The amendments made by Part 1 of this Schedule apply:

- (a) to proceedings commenced by an application filed on or after 1 July 2006; and
- (b) to proceedings commenced by an application filed before 1 July 2006, if the parties to the proceedings consent and the court grants leave.

Schedule 4—Changes to dispute resolution

Part 1—Changes to approval of organisations

Family Law Act 1975

1 Subsection 4(1) (definition of *voluntary organization*)

Repeal the definition.

2 Subsection 13A(1)

Repeal the subsection.

3 Subsection 13A(2)

Omit “the organisation” (first occurring), substitute “an organisation”.

4 Paragraph 13A2(b)

Repeal the paragraph, substitute:

- (b) the organisation’s activities include, or will include, family and child counselling.

5 Subsection 13B(1)

Repeal the subsection.

6 Subsection 13B(2)

Omit “the organisation” (first occurring), substitute “an organisation”.

7 Paragraph 13B(2)(b)

Repeal the paragraph, substitute:

- (b) the organisation’s activities include, or will include, family and child mediation.

Part 2—Protection of names

Family Law Act 1975

8 After Part I

Insert:

Part IA—Protection of names

9A Use of protected names and symbols

- (1) A person must not, without the Minister's written consent:
- (a) use in relation to a business, trade, profession or occupation;
or
 - (b) use as the name, or as part of the name, of any firm, body corporate, institution, premises, vehicle, ship, aircraft or other craft; or
 - (c) apply, as a trade mark or otherwise, to goods imported, manufactured, produced, sold, offered for sale or let for hire;
or
 - (d) use in relation to:
 - (i) goods or services; or
 - (ii) the promotion, by any means, of the supply or use of goods or services:
- either:
- (e) a protected name, or a name so closely resembling a protected name as to be likely to be mistaken for it; or
 - (f) a protected symbol, or a symbol so closely resembling a protected symbol as to be likely to be mistaken for it.

Penalty: 30 penalty units.

- (2) Subsection (1), so far as it applies in relation to a particular protected name or protected symbol, does not affect rights conferred by law on a person in relation to:
- (a) a trade mark that is a registered trade mark for the purposes of the *Trade Marks Act 1995*; or

- (b) a design registered under the *Designs Act 2003*;
that was so registered, or was registered under the *Designs Act 1906*, at the protection time in relation to the name or symbol.
- (3) This section, so far as it applies in relation to a particular protected name or protected symbol, does not affect the use, or rights conferred by law relating to the use, of a name or symbol (the ***relevant name or symbol***) by a person in a particular manner if, at the protection time in relation to the protected name or protected symbol, the person:
- (a) was using the relevant name or symbol in good faith in that manner; or
 - (b) would have been entitled to prevent another person from passing off, by means of the use of the relevant name or symbol or a similar name or symbol, goods or services as the goods or services of the first-mentioned person.
- (4) In this section:

protected name means a name prescribed for the purposes of this definition.

protected symbol means a symbol whose design is set out in the regulations.

protection time means:

- (a) in relation to a protected name—the time immediately before the commencement of the regulation prescribing the name; or
- (b) in relation to a protected symbol—the time immediately before the commencement of the regulation setting out the design of the symbol.

Part 3—Changes to dispute resolution

Family Law Act 1975

9 Subsection 4(1)

Insert:

abuse, in relation to a child, means:

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

10 Subsection 4(1)

Insert:

Accreditation Rules means regulations made under section 10A.

11 Subsection 4(1) (definition of *approved counselling organisation*)

Repeal the definition.

12 Subsection 4(1) (definition of *approved mediation organisation*)

Repeal the definition.

13 Subsection 4(1)

Insert:

arbitration has the meaning given by section 10L.

14 Subsection 4(1) (definition of *arbitrator*)

Repeal the definition, substitute:

arbitrator has the meaning given by section 10M.

15 Subsection 4(1) (definition of *child counselling*)

Repeal the definition.

16 Subsection 4(1) (definition of *community mediator*)

Repeal the definition.

17 Subsection 4(1) (definition of *court counsellor*)

Repeal the definition.

18 Subsection 4(1) (definition of *court mediator*)

Repeal the definition.

19 Subsection 4(1) (definition of *family and child counselling*)

Repeal the definition.

20 Subsection 4(1) (definition of *family and child counsellor*)

Repeal the definition.

21 Subsection 4(1) (definition of *family and child mediation*)

Repeal the definition.

22 Subsection 4(1) (definition of *family and child mediator*)

Repeal the definition.

23 Subsection 4(1)

Insert:

family consultant has the meaning given by section 11B.

24 Subsection 4(1)

Insert:

family counselling has the meaning given by section 10B.

25 Subsection 4(1)

Insert:

family counsellor has the meaning given by section 10C.

26 Subsection 4(1)

Insert:

family dispute resolution has the meaning given by section 10F.

27 Subsection 4(1)

Insert:

family dispute resolution practitioner has the meaning given by section 10G.

28 Subsection 4(1) (definition of *marriage counselling*)

Repeal the definition.

29 Subsection 4(1)

Insert:

post-separation parenting program means a program:

- (a) that is designed to help people to resolve problems that adversely affect the carrying out of their parenting responsibilities (including by providing counselling services or by teaching techniques to resolve disputes); and
- (b) that consists of lectures, discussions (including group discussions) or other activities; and
- (c) that is provided by an organisation that meets the conditions in section 65LB.

30 Subsection 4(1) (definition of *private arbitration*)

Repeal the definition.

31 Subsection 4(1) (definition of *private mediator*)

Repeal the definition.

32 Subsection 4(1)

Insert:

relevant property or financial arbitration has the meaning given by subsection 10L(2).

33 Subsection 4(1)

Insert:

section 13E arbitration has the meaning given by subsection 10L(2).

34 Subsection 4(1) (definition of *welfare officer*)

Repeal the definition.

35 After subsection 4(1)

Insert:

- (1AA) A reference in this Act to a person or people involved in proceedings is a reference to:
- (a) any of the parties to the proceedings; and
 - (b) any child whose interests are considered in, or affected by, the proceedings; and
 - (c) any person whose conduct is having an effect on the proceedings.

36 Parts II and III

Repeal the Parts, substitute:

Part II—Non-court based family services

Division 1—Accreditation of family counsellors, family dispute resolution practitioners and other family service providers

10A Accreditation Rules

- (1) The regulations may prescribe Accreditation Rules. These are rules relating to:
- (a) the accreditation of persons as family counsellors; and
 - (b) the accreditation of persons as family dispute resolution practitioners; and
 - (c) the accreditation of persons to perform other roles prescribed by regulations made for the purposes of this paragraph.

- (2) Examples of matters that the Accreditation Rules may deal with are:
- (a) the standards that are to be met by persons who seek to be accredited; and
 - (b) who is responsible for determining whether a person meets the Accreditation Rules; and
 - (c) how accreditation is to be recognised (for example, by establishment of a register or other method); and
 - (d) the standards and other obligations that accredited persons must continue to meet to remain accredited; and
 - (e) who is responsible for monitoring compliance with ongoing requirements in the Rules; and
 - (f) the consequences of accredited persons failing to comply with the provisions of this Act and the Rules; and
 - (g) the obligations of accredited persons in relation to the monitoring of their compliance; and
 - (h) how and by whom an accredited person may have his or her accreditation (or recognition of that accreditation) suspended or cancelled; and
 - (i) review of decisions to refuse, suspend or cancel accreditation (or recognition of accreditation); and
 - (j) the process for handling complaints involving accredited persons; and
 - (k) who may deliver recognised training to accredited persons, and
 - (l) dealing with individuals or other persons who make false or misleading representations about a person's status as an accredited person.

Division 2—Family counselling

10B Definition of *family counselling*

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

- (a) one or more persons to deal with personal and interpersonal issues in relation to marriage; or
 - (b) one or more persons (including children) who are affected, or likely to be affected, by separation or divorce to deal with either or both of the following:
-

- (i) personal and interpersonal issues;
- (ii) issues relating to the care of children.

10C Definition of *family counsellor*

- (1) A *family counsellor* is:
 - (a) a person who is accredited as a family counsellor under the Accreditation Rules; or
 - (b) a person who is authorised to act on behalf of an organisation designated by the Minister for the purposes of this paragraph; or
 - (c) a person who is authorised to act under section 38BD, or engaged under subsection 38R(1A), as a family counsellor; or
 - (d) a person who is authorised to act under section 93D of the *Federal Magistrates Act 1999*, or engaged under subsection 115(1A) of that Act, as a family counsellor; or
 - (e) a person who is authorised by a Family Court of a State to act as a family counsellor.
- (2) The Minister must publish, at least annually, a list of organisations designated for the purposes of paragraph (b) of the definition of *family counsellor*.
- (3) An instrument under this section is not a legislative instrument.

10D Confidentiality of communications in family counselling

- (1) A family counsellor must not disclose a communication made to the counsellor while the counsellor is conducting family counselling, unless the disclosure is required or authorised by this section.
- (2) A family counsellor must disclose a communication if the counsellor reasonably believes the disclosure is necessary for the purpose of complying with a law of the Commonwealth, a State or a Territory.
- (3) A family counsellor may disclose a communication if consent to the disclosure is given by:
 - (a) if the person who made the communication is 18 or over—that person; or

- (b) if the person who made the communication is a child under 18:
 - (i) each person who has parental responsibility (within the meaning of Part VII) for the child; or
 - (ii) a court.
 - (4) A family counsellor may disclose a communication if the counsellor reasonably believes that the disclosure is necessary for the purpose of:
 - (a) protecting a child from the risk of harm (whether physical or psychological); or
 - (b) preventing or lessening a serious and imminent threat to the life or health of a person; or
 - (c) reporting the commission, or preventing the likely commission, of an offence involving violence or a threat of violence to a person; or
 - (d) preventing or lessening a serious and imminent threat to the property of a person; or
 - (e) reporting the commission, or preventing the likely commission, of an offence involving intentional damage to property of a person or a threat of damage to property; or
 - (f) if a lawyer independently represents a child's interests under an order under section 68L—assisting the lawyer to do so properly.
 - (5) A family counsellor may disclose a communication in order to provide information (other than personal information within the meaning of section 6 of the *Privacy Act 1988*) for research relevant to families.
 - (6) Evidence that would be inadmissible because of section 10E is not admissible merely because this section requires or authorises its disclosure.

Note: This means that the counsellor's evidence is inadmissible in court, even if subsection (2), (3), (4) or (5) allows the counsellor to disclose it in other circumstances.
 - (7) Nothing in this section prevents a family counsellor from disclosing information necessary for the counsellor to give a certificate of the kind mentioned in paragraph 16(2A)(a) of the *Marriage Act 1961*.
-

(8) In this section:

communication includes admission.

10E Admissibility of communications in family counselling and in referrals from family counselling

- (1) Evidence of anything said, or any admission made, by or in the company of:
- (a) a family counsellor conducting family counselling; or
 - (b) a person (the *professional*) to whom a family counsellor refers a person for medical or other professional consultation, while the professional is carrying out professional services for the person;
- is not admissible:
- (c) in any court (whether or not exercising federal jurisdiction); or
 - (d) in any proceedings before a person authorised to hear evidence (whether the person is authorised by a law of the Commonwealth, a State or a Territory, or by the consent of the parties).
- (2) Subsection (1) does not apply to:
- (a) an admission by an adult that indicates that a child under 18 has been abused or is at risk of abuse; or
 - (b) a disclosure by a child under 18 that indicates that the child has been abused or is at risk of abuse;
- unless, in the opinion of the court, there is sufficient evidence of the admission or disclosure available to the court from other sources.
- (3) Nothing in this section prevents a family counsellor from disclosing information necessary for the counsellor to give a certificate of the kind mentioned in paragraph 16(2A)(a) of the *Marriage Act 1961*.
- (4) A family counsellor who refers a person to a professional (within the meaning of paragraph (1)(b)) must inform the professional of the effect of this section.

Division 3—Family dispute resolution

10F Definition of *family dispute resolution*

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

- (a) in which a family dispute resolution practitioner helps people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other; and
- (b) in which the practitioner is independent of all of the parties involved in the process.

10G Definition of *family dispute resolution practitioner*

A *family dispute resolution practitioner* is:

- (a) a person who is accredited as a family dispute resolution practitioner under the Accreditation Rules; or
 - (b) a person who is authorised to act on behalf of an organisation designated by the Minister for the purposes of this paragraph; or
 - (c) a person who is authorised to act under section 38BD, or engaged under subsection 38R(1A), as a family dispute resolution practitioner; or
 - (d) a person who is authorised to act under section 93D of the *Federal Magistrates Act 1999*, or engaged under subsection 115(1A) of that Act, as a family dispute resolution practitioner; or
 - (e) a person who is authorised by a Family Court of a State to act as a family dispute resolution practitioner.
- (2) The Minister must publish, at least annually, a list of organisations designated for the purposes of paragraph (b) of the definition of *family dispute resolution practitioner*.
- (3) An instrument under this section is not a legislative instrument.

10H Confidentiality of communications in family dispute resolution

- (1) A family dispute resolution practitioner must not disclose a communication made to the practitioner while the practitioner is

conducting family dispute resolution, unless the disclosure is required or authorised by this section.

- (2) A family dispute resolution practitioner must disclose a communication if the practitioner reasonably believes the disclosure is necessary for the purpose of complying with a law of the Commonwealth, a State or a Territory.
- (3) A family dispute resolution practitioner may disclose a communication if consent to the disclosure is given by:
 - (a) if the person who made the communication is 18 or over—that person; or
 - (b) if the person who made the communication is a child under 18:
 - (i) each person who has parental responsibility (within the meaning of Part VII) for the child; or
 - (ii) a court.
- (4) A family dispute resolution practitioner may disclose a communication if the practitioner reasonably believes that the disclosure is necessary for the purpose of:
 - (a) protecting a child from the risk of harm (whether physical or psychological); or
 - (b) preventing or lessening a serious and imminent threat to the life or health of a person; or
 - (c) reporting the commission, or preventing the likely commission, of an offence involving violence or a threat of violence to a person; or
 - (d) preventing or lessening a serious and imminent threat to the property of a person; or
 - (e) reporting the commission, or preventing the likely commission, of an offence involving intentional damage to property of a person or a threat of damage to property; or
 - (f) if a lawyer independently represents a child's interests under an order under section 68L—assisting the lawyer to do so properly.
- (5) A family dispute resolution practitioner may disclose a communication in order to provide information (other than personal information within the meaning of section 6 of the *Privacy Act 1988*) for research relevant to families.

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

(7) Evidence that would be inadmissible because of section 10J is not admissible merely because this section requires or authorises its disclosure.

Note: This means that the practitioner's evidence is inadmissible in court, even if subsection (2), (3), (4), (5) or (6) allows the practitioner to disclose it in other circumstances.

(8) In this section:

communication includes admission.

10J Admissibility of communications in family dispute resolution and in referrals from family dispute resolution

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

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

is not admissible:

- (c) in any court (whether or not exercising federal jurisdiction); or
- (d) in any proceedings before a person authorised to hear evidence (whether the person is authorised by a law of the Commonwealth, a State or a Territory, or by the consent of the parties).

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

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

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

- (3) Subsection (1) does not apply to information necessary for the practitioner to give a certificate under subsection 60I(8).
- (4) A family dispute resolution practitioner who refers a person to a professional (within the meaning of paragraph (1)(b)) must inform the professional of the effect of this section.

10K Family dispute resolution practitioners must comply with regulations

- (1) The regulations may prescribe requirements to be complied with by family dispute resolution practitioners in relation to the family dispute resolution services they provide.
- (2) The regulations may prescribe penalties not exceeding 10 penalty units in respect of offences against regulations made for the purposes of subsection (1).

Division 4—Arbitration

10L Definition of *arbitration*

- (1) ***Arbitration*** is a process (other than the judicial process) in which parties to a dispute present arguments and evidence to an arbitrator, who makes a determination to resolve the dispute.
- (2) Arbitration may be either:
 - (a) ***section 13E arbitration***—which is arbitration of Part VIII proceedings carried out as a result of an order made under section 13E; or
 - (b) ***relevant property or financial arbitration***—which is arbitration (other than section 13E arbitration) of:
 - (i) Part VIII proceedings, Part VIIIA proceedings, Part VIIIB proceedings or section 106A proceedings; or
 - (ii) any part of such proceedings; or
 - (iii) any matter arising in such proceedings; or
 - (iv) a dispute about a matter with respect to which such proceedings could be instituted.

10M Definition of *arbitrator*

An *arbitrator* is a person who meets the requirements prescribed in the regulations to be an arbitrator.

10N Arbitrators may charge fees for their services

- (1) An arbitrator conducting arbitration may charge the parties to the arbitration fees for conducting it.
- (2) The arbitrator must give written information about those fees to the parties before the arbitration starts.

Note: There may be Rules of Court or regulations relating to the costs of arbitration and how they are assessed or taxed (see paragraphs 123(1)(se) and 125(1)(bc)).

10P Immunity of arbitrators

An arbitrator has, in performing his or her functions as an arbitrator, the same protection and immunity as a Judge of the Family Court has in performing the functions of a Judge.

Note: Communications with arbitrators are not confidential, and may be admissible in court.

Part III—Family consultants

Division 1—About family consultants

11A Functions of family consultants

The functions of family consultants are to provide services in relation to proceedings under this Act, including:

- (a) assisting and advising people involved in the proceedings; and
- (b) assisting and advising courts, and giving evidence, in relation to the proceedings; and
- (c) helping people involved in the proceedings to resolve disputes that are the subject of the proceedings; and
- (d) reporting to the court under sections 55A and 62G; and
- (e) advising the court about appropriate family counsellors, family dispute resolution practitioners and courses, programs

and services to which the court can refer the parties to the proceedings.

Note: See subsection 4(1AA) for people who are taken to be involved in proceedings.

11B Definition of *family consultant*

A *family consultant* is a person who is:

- (a) appointed as a family consultant under section 38N; or
- (b) appointed as a family consultant in relation to the Federal Magistrates Court under the *Federal Magistrates Act 1999*; or
- or
- (c) appointed as a family consultant under the regulations; or
- (d) appointed under a law of a State as a family consultant in relation to a Family Court of that State.

Note: The Chief Executive Officers of the Family Court and the Federal Magistrates Court have all of the functions and powers of family consultants, and may direct consultants in the performance of their functions. See Division 1A of Part IVA of this Act and Division 1A of Part 7 of the *Federal Magistrates Act 1999*.

11C Admissibility of communications with family consultants and referrals from family consultants

- (1) Evidence of anything said, or any admission made, by or in the company of:
 - (a) a family consultant performing the functions of a family consultant; or
 - (b) a person (the *professional*) to whom a family consultant refers a person for medical or other professional consultation, while the professional is carrying out professional services for the person;

is admissible in proceedings under this Act.

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

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

- (2) Subsection (1) does not apply to a thing said or an admission made by a person who, at the time of saying the thing or making the admission, had not been informed of the effect of subsection (1).
- (3) Despite subsection (2), a thing said or admission made is admissible even if the person who said the thing or made the admission had not been informed of the effect of subsection (1), if:
 - (a) it is an admission by an adult that indicates that a child under 18 has been abused or is at risk of abuse; or
 - (b) it is a disclosure by a child under 18 that indicates that the child has been abused or is at risk of abuse;unless, in the opinion of the court, there is sufficient evidence of the admission or disclosure available to the court from other sources.

11D Immunity of family consultants

A family consultant has, in performing his or her functions as a family consultant, the same protection and immunity as a Judge of the Family Court has in performing the functions of a Judge.

Division 2—Courts' use of family consultants

11E Courts to consider seeking advice from family consultants

- (1) If, under this Act, a court has the power to:
 - (a) order a person to attend family counselling or family dispute resolution; or
 - (b) order a person to participate in a course, program or other service (other than arbitration); or
 - (c) order a person to attend appointments with a family consultant; or
 - (d) advise or inform a person about family counselling, family dispute resolution or other courses, programs or services;the court:
 - (e) may, before exercising the power, seek the advice of:
 - (i) if the court is the Family Court or the Federal Magistrates Court—a family consultant nominated by the Chief Executive Officer of that court; or

- (ii) if the court is the Family Court of a State—a family consultant of that court; or
 - (iii) if the court is not mentioned in subparagraph (i) or (ii)—an appropriately qualified person (whether or not an officer of the court);
- as to the services appropriate to the needs of the person and the most appropriate provider of those services; and
- (f) must, before exercising the power, consider seeking that advice.
- (2) If the court seeks advice under subsection (1), the court must inform the person in relation to whom the advice is sought:
- (a) whom the court is seeking advice from; and
 - (b) the nature of the advice the court is seeking.

11F Court may order parties to attend appointments with a family consultant

- (1) A court exercising jurisdiction in proceedings under this Act may order one or more parties to the proceedings to attend an appointment (or a series of appointments) with a family consultant.

Note: Before exercising this power, the court must consider seeking the advice of a family consultant about the services appropriate to the parties' needs (see section 11E).

- (2) When making an order under subsection (1), the court must inform the parties of the effect of section 11G (consequences of failure to comply with order).
- (3) The court may make orders under this section:
- (a) on its own initiative; or
 - (b) on the application of:
 - (i) a party to the proceedings; or
 - (ii) a lawyer independently representing a child's interests under an order made under section 68L.

11G Consequences of failure to comply with order under section 11F

- (1) If a person who is ordered to attend an appointment with a family consultant under section 11F fails to comply with:
- (a) the order made by the court; or

- (b) any instruction the consultant gives to the person; the consultant must report the failure to the court.
- (2) On receiving the report, the court may make any further orders it considers appropriate.
- (3) The court may make orders under subsection (2):
 - (a) on its own initiative; or
 - (b) on the application of:
 - (i) a party to the proceedings; or
 - (ii) a lawyer independently representing a child's interests under an order made under section 68L.

Part IIIA—Obligations to inform people about non-court based family services and about court's processes and services

Division 1—Introduction

12A Objects of this Part

- (1) The objects of this Part are:
 - (a) to ensure that married couples considering separation or divorce are informed about the services available to help with a possible reconciliation, in situations where a reconciliation between the couple seems a reasonable possibility; and
 - (b) to ensure that people affected, or likely to be affected, by separation or divorce are informed about the services available to help them adjust to:
 - (i) separation or divorce; and
 - (ii) orders made under this Act; and
 - (c) to ensure that people affected, or likely to be affected, by separation or divorce are informed about ways of resolving disputes other than by applying for orders under this Act.

Division 2—Kind of information to be provided

12B Prescribed information about non-court based family services and court's processes and services

- (1) The regulations may prescribe information that is to be included in documents provided to persons under this Part, relating to non-court based family services and court's processes and services.
- (2) Without limitation, information prescribed under this section must include information about:
 - (a) the legal and possible social effects of the proposed proceedings (including the consequences for children whose care, welfare or development is likely to be affected by the proceedings); and
 - (b) the services provided by family counsellors and family dispute resolution practitioners to help people affected by separation or divorce; and
 - (c) the steps involved in the proposed proceedings; and
 - (d) the role of family consultants; and
 - (e) the arbitration facilities available to arbitrate disputes in relation to separation and divorce.

12C Prescribed information about reconciliation

The regulations may prescribe information that is to be included in documents provided to persons under this Part, relating to services available to help with a reconciliation between the parties to a marriage.

12D Prescribed information about Part VII proceedings

- (1) The regulations may prescribe information that is to be included in documents provided under this Part to persons involved in proceedings under Part VII.
- (2) Without limitation, the information must include information about the family counselling services available to assist the parties, and the child or children concerned, to adjust to the consequences of orders under that Part.

Division 3—Who must provide information, and when

12E Obligations on legal practitioners

- (1) A legal practitioner who is consulted by a person considering instituting proceedings under this Act must give the person documents containing the information prescribed under section 12B (about non-court based family services and court's processes and services).
- (2) A legal practitioner who is consulted by, or who is representing, a married person who is a party to:
 - (a) proceedings for a divorce order in relation to the marriage; or
 - (b) financial or Part VII proceedings in relation to the marriage;must give the person documents containing the information prescribed under section 12C (about reconciliation).
- (3) A legal practitioner representing a party in proceedings under Part VII must give the party documents containing the information prescribed under section 12D (about Part VII proceedings).

Note: Section 63DA also imposes information-giving obligations on legal practitioners dealing with people involved in Part VII proceedings.
- (4) A legal practitioner does not have to comply with subsection (1), (2) or (3) if the practitioner has reasonable grounds to believe that the person has already been given documents containing the prescribed information mentioned in that subsection.
- (5) A legal practitioner does not have to comply with subsection (2) if the practitioner considers that there is no reasonable possibility of a reconciliation between the parties to the marriage.

12F Obligations on principal executive officers of courts

Obligation to give prescribed information

- (1) The principal executive officer of a court that has jurisdiction under this Act must ensure that any person who is considering instituting proceedings under this Act is, on the first occasion the person deals with a registry of the court, given documents containing the information prescribed under:

- (a) section 12B (about non-court based family services and court's processes and services); and
- (b) section 12C (about reconciliation).

Obligation to respond to requests for information

- (2) The principal executive officer of a court that has jurisdiction under this Act must ensure that, if a person involved in proceedings under this Act requests an officer or staff member of the court for information about family counselling services or family dispute resolution services, the person is given documents containing information about those services.

Note: See subsection 4(1AA) for people who are taken to be involved in proceedings.

12G Obligations on family counsellors, family dispute resolution practitioners and arbitrators

- (1) A family counsellor, family dispute resolution practitioner or arbitrator who deals with a married person considering instituting:
 - (a) proceedings for a divorce order in relation to the marriage; or
 - (b) financial or Part VII proceedings in relation to the marriage;must give the married person (and in appropriate cases, that person's spouse) documents containing the information prescribed under 12C (about reconciliation).

Note: Section 63DA also imposes information-giving obligations on family counsellors and family dispute resolution practitioners (not arbitrators) dealing with people involved in Part VII proceedings.

- (2) A family counsellor, family dispute resolution practitioner or arbitrator does not have to comply with subsection (1), if he or she:
 - (a) has reasonable grounds to believe that the person has already been given documents containing the prescribed information or
 - (b) considers that there is no reasonable possibility of a reconciliation between the parties to the marriage.

Part IIIB—Court’s powers in relation to court and non-court based family services

Division 1—Introduction

13A Objects of this Part

- (1) The objects of this Part are:
 - (a) to facilitate access to family counselling:
 - (i) to help married couples considering separation or divorce to reconcile; and
 - (ii) to help people adjust to separation or divorce; and
 - (iii) to help people adjust to court orders under this Act; and
 - (b) to encourage people to use dispute resolution mechanisms (other than judicial ones) to resolve matters in which a court order might otherwise be made under this Act, provided the mechanisms are appropriate in the circumstances and proper procedures are followed; and
 - (c) to encourage people to use, in appropriate circumstances, arbitration to resolve matters in which a court order might otherwise be made, and to provide ways of facilitating that use; and
 - (d) to give the court the power to require parties to proceedings under this Act to make use of court or non-court based family services appropriate to the needs of the parties.
- (2) The object mentioned in paragraph (1)(b) also lies behind the general requirement in section 60I for family dispute resolution services to be used before applications for orders under Part VII are made.

Division 2—Help with reconciliation

13B Court to accommodate possible reconciliations

- (1) A court exercising jurisdiction in:
 - (a) proceedings for a divorce order; or
 - (b) financial or part VII proceedings instituted by a party to a subsisting marriage;

must consider, from time to time, the possibility of a reconciliation between the parties to the marriage.

- (2) If, during the proceedings, the court considers, from the evidence in the proceedings or the attitude of the parties to the marriage, that there is a reasonable possibility of a reconciliation between the parties, the court may adjourn the proceedings to give the parties the opportunity to consider a reconciliation.
- (3) If the court adjourns the proceedings under subsection (2), the court must advise the parties to attend family counselling, or use the services of another appropriate person or organisation.

Note: Before advising the parties, the court must consider seeking the advice of a family consultant about the services appropriate to the parties' needs (see section 11E).
- (4) If, after an adjournment under subsection (2), either of the parties requests that the proceedings resume, the court must resume the proceedings as soon as practicable.

Division 3—Referrals to family counselling, family dispute resolution and other family services

13C Court may refer parties to family counselling, family dispute resolution and other family services

- (1) A court exercising jurisdiction in proceedings under this Act may, at any stage in the proceedings, make one or more of the following orders:
 - (a) that one or more of the parties to the proceedings attend family counselling;
 - (b) that the parties to the proceedings attend family dispute resolution;
 - (c) that one or more of the parties to the proceedings participate in an appropriate course, program or other service.

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

Note 2: The court can also order parties to attend appointments with a family consultant (see section 11F).

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

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

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

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

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

(a) on its own initiative; or

(b) on the application of:

(i) a party to the proceedings; or

(ii) a lawyer independently representing a child's interests under an order made under section 68L.

13D Consequences of failure to comply with order under section 13C

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

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

(3) The court may make orders under subsection (2):

(a) on its own initiative; or

(b) on the application of:

(i) a party to the proceedings; or

(ii) a lawyer independently representing a child's interests under an order made under section 68L.

Division 4—Court’s role in relation to arbitration of disputes

13E Court may refer Part VIII proceedings to arbitration

- (1) With the consent of all of the parties to the proceedings, a court exercising jurisdiction in Part VIII proceedings may make an order referring the proceedings, or any part of them, or any matter arising in them, to an arbitrator for arbitration.
- (2) If the court makes an order under subsection (1), it may, if necessary, adjourn the proceedings and may make any additional orders as it thinks appropriate to facilitate the effective conduct of the arbitration.

13F Court may make orders to facilitate arbitration of certain disputes

A court that has jurisdiction under this Act may, on application by a party to relevant property or financial arbitration, make orders the court thinks appropriate to facilitate the effective conduct of the arbitration.

13G Family Court and Federal Magistrates Court may determine questions of law referred by arbitrator

- (1) An arbitrator of section 13E arbitration or relevant property or financial arbitration may, at any time before making an award in the arbitration, refer a question of law arising in relation to the arbitration for determination by:
 - (a) a single judge of the Family Court; or
 - (b) a single judge of the Family Court of a State; or
 - (c) the Federal Magistrates Court.
- (2) The arbitrator may do so:
 - (a) on his or her own initiative; or
 - (b) at the request of one or more of the parties to the arbitration if the arbitrator considers it appropriate to do so.
- (3) The arbitrator must not make an award in the arbitration before the judge or Federal Magistrates Court has either:

- (a) determined the question of law; or
- (b) remitted the matter to the arbitrator having found that no question of law arises.

13H Awards made in arbitration may be registered in court

- (1) A party to an award made in section 13E arbitration or in relevant property or financial arbitration may register the award:
 - (a) in the case of section 13E arbitration—in the court that ordered the arbitration; or
 - (b) otherwise—in a court that has jurisdiction under this Act.
- (2) An award registered under subsection (1) has effect as if it were a decree made by that court.

13J Family Court or Federal Magistrates Court can review registered awards

- (1) A party to a registered award made in section 13E arbitration or relevant property or financial arbitration may apply for review of the award, on questions of law, by:
 - (a) a single judge of the Family Court; or
 - (b) a single judge of the Family Court of a State; or
 - (c) the Federal Magistrates Court.

Note: There may be Rules of Court providing for when, and how, an application for review of the award can be made (see paragraph 123(1)(sf)).

- (2) On a review of an award under this section, the judge or Federal Magistrates Court may:
 - (a) determine all questions of law arising in relation to the arbitration; and
 - (b) make such decrees as the judge or Federal Magistrates Court thinks appropriate, including a decree affirming, reversing or varying the award.

13K Family Court and Federal Magistrates Court may set aside registered awards

- (1) If an award made in section 13E arbitration or relevant property or financial arbitration, or an agreement made as a result of such arbitration, is registered in:
 - (a) the Family Court; or
 - (b) the Federal Magistrates Court; or
 - (c) a Family Court of a State;the court in which the award is registered may make a decree affirming, reversing or varying the award or agreement.
- (2) The court may only make a decree under subsection (1) if the court is satisfied that:
 - (a) the award or agreement was obtained by fraud (including non-disclosure of a material matter); or
 - (b) the award or agreement is void, voidable or unenforceable; or
 - (c) in the circumstances that have arisen since the award or agreement was made it is impracticable for some or all of it to be carried out; or
 - (d) the arbitration was affected by bias, or there was a lack of procedural fairness in the way in which the arbitration process, as agreed between the parties and the arbitrator, was conducted.

37 Subsection 26B(1)

Omit "19G", substitute "13K".

38 Subsection 37(2)

Omit "(other than the court counsellors)".

39 At the end of section 37

Add:

- (3) Despite subsection (2), the Principal Registrar must not give directions that relate to an officer's functions as a family consultant, family counsellor or family dispute resolution practitioner.

40 Paragraph 37A(1)(e)

Repeal the paragraph, substitute:

- (e) the power to make orders under:
 - (i) sections 11F and 11G; and
 - (ii) sections 13C and 13D; and
 - (iii) subsection 65LA(1); and
 - (iv) paragraph 70NEB(1)(a);
- (ea) the power to direct a family consultant to give a report under section 62G;

41 Paragraph 37A(2)(e)

Omit “19G”, substitute “13K”.

42 After Division 1 of Part IVA

Insert:

Division 1A—Administration of Court’s family services

38BA Chief Executive Officer has functions of family consultants

- (1) The Chief Executive Officer has all of the functions conferred on family consultants by section 11A, and any associated powers and duties.
- (2) Without limiting subsection (1), sections 11C (admissibility of communications with family consultants) and 11D (immunity of family consultants) apply to the Chief Executive Officer while the Chief Executive Officer is performing those functions.
- (3) The Chief Executive Officer is responsible for administering the functions of family consultants.

38BB Chief Executive Officer may delegate powers and functions that relate to family consultants

- (1) The Chief Executive Officer may, in writing, delegate to a family consultant any of the Chief Executive Officer’s powers, functions and duties in relation to the functions of family consultants mentioned in section 11A.
- (2) A delegate is, in the exercise of a delegated power, function or duty, subject to the directions of the Chief Executive Officer.

38BC Chief Executive Officer may give directions that relate to family services functions

The Chief Executive Officer may give directions that relate to:

- (a) a Court officer's functions as a family consultant; or
- (b) a Court officer's or staff member's functions as a family counsellor or family dispute resolution practitioner.

38BD Chief Executive Officer may authorise officer or staff member to act as family counsellor or family dispute resolution practitioner

- (1) The Chief Executive Officer may authorise an officer or staff member of the Family Court to provide family counselling under this Act.
- (2) The Chief Executive Officer may authorise an officer or staff member of the Family Court to provide family dispute resolution under this Act.
- (3) If an officer who is a family consultant also becomes a family counsellor, or family dispute resolution practitioner, because of an authorisation under this section:
 - (a) section 11C (admissibility of communications with family consultants) does not apply to the officer at any time while the officer is acting as a family counsellor or family dispute resolution practitioner; and
 - (b) the officer must not perform the functions of a family consultant in relation to particular proceedings, if the officer has conducted family counselling or family dispute resolution with a person involved in those proceedings.

43 Paragraphs 38N(1)(d), (da), (daa) and (db)

Repeal the paragraphs, substitute:

- (d) such family consultants as are necessary;

44 After subsection 38R(1)

Insert:

- (1A) The Chief Executive Officer may engage persons to perform:
 - (a) family counselling services under this Act; or

(b) family dispute resolution services under this Act.

45 Subsection 38R(2)

After “subsection (1)”, insert “or (1A)”.

46 Paragraph 41(4)(c)

Omit “counselling facilities”, substitute “appropriate family counselling and family dispute resolution services, and family consultants”.

47 Paragraph 44(1B)(a)

Repeal the paragraph, substitute:

- (a) stating that the parties to the marriage have considered a reconciliation with the assistance of a specified person, who is:
 - (i) a family counsellor; or
 - (ii) if the court is the Family Court, the Federal Magistrates Court or the Family Court of a State—an individual or an organisation nominated for the parties by a family consultant; or
 - (iii) if the court is not the Family Court, the Federal Magistrates Court or the Family Court of a State—an individual or an organisation nominated for the parties by an appropriately qualified officer of the court; and

48 Subsection 55A(2)

Omit “a family and child counsellor or welfare officer”, substitute “a family consultant”.

49 Section 60C (table item 3)

Repeal the table item, substitute:

- | | |
|---|--|
| 3 | Division 3—Reports relating to children under 18
preparation of reports for use in proceedings relating to children under 18 |
|---|--|

50 Division 3 of Part VII (heading)

Repeal the heading, substitute:

Division 3—Reports relating to children under 18

51 Section 62A

Repeal the section, substitute:

62A What this Division does

This Division deals with the preparation of reports for use in proceedings relating to children who are under 18.

52 Sections 62B, 62C, 62CA, 62D, 62E and 62F

Repeal the sections, substitute:

62B Court’s obligation to inform people to whom Part VII orders apply about family counselling, family dispute resolution and other family services

If a court makes an order in proceedings under this Part, the court must inform the parties to the proceedings about the family counselling services, family dispute resolution services and other courses, programs and services available to help the parties adjust to the consequences of that order.

Note: Before informing the parties, the court must consider seeking the advice of a family consultant about the services appropriate to the parties’ needs (see section 11E).

53 Subsection 62G(2)

Omit “a family and child counsellor or welfare officer”, substitute “a family consultant”.

Note: The heading to section 62G is altered by omitting “**family and child counsellors and welfare officers**” and substituting “**family consultants**”.

54 Subsections 62G(4) and (5)

Repeal the subsections, substitute:

- (4) The family consultant may include in the report, in addition to the matters required to be included in it, any other matters that relate to the care, welfare or development of the child.
- (5) For the purposes of the preparation of the report, the court may make any other orders, or give any other directions, that the court

considers appropriate (including orders or directions that a party to proceedings, or the child, attend an appointment or a series of appointments with a family consultant).

Note: Before making orders under this section, the court must consider seeking the advice of a family consultant about the services appropriate to the parties' needs (see section 11E).

55 Subsection 62G(6)

Omit "counsellor or welfare officer", substitute "family consultant".

56 Section 62H

Repeal the section.

57 Subsection 65F(1)

Repeal the subsection.

58 Paragraph 65F(2)(a)

Omit "a conference with a family and child counsellor or a welfare officer", substitute "family counselling".

59 Paragraph 65L(1)(a)

Omit "a family and child counsellor or a welfare officer", substitute "a family consultant".

Note: The heading to section 65L is altered by omitting "Counsellors" and substituting "Family consultants".

60 Paragraph 65L(1)(b)

Omit "a family and child counsellor or a welfare officer", substitute "a family consultant".

61 Subsection 65LA(1)

Repeal the subsection, substitute:

- (1) In proceedings for a parenting order, the court may make an order directing a party to the proceedings to attend a post-separation parenting program.

Note: Before making an order under this section, the court must consider seeking the advice of a family consultant about the services appropriate to the party's needs (see section 11E).

62 Subsection 65LA(3) (definition of *post-separation parenting program or program*)

Repeal the definition.

63 Subsection 65LA(3) (definition of *post-separation parenting program provider or provider*)

Repeal the definition.

64 After section 65LA

Insert:

65LB Conditions for providers of post-separation parenting programs

- (1) An organisation meets the conditions in this section if:
 - (a) it is a recipient organisation (see subsection (2)); or
 - (b) there is a recipient organisation in relation to the organisation (see subsection (3)).
- (2) An organisation is a recipient organisation for the purposes of paragraph (1)(a) if it receives, or has been approved to receive, funding under a program or a part of a program designated by the Minister under subsection (4) in order to provide services that include post-separation parenting programs.
- (3) An organisation is a recipient organisation in relation to another organisation for the purposes of paragraph (1)(b) if:
 - (a) both:
 - (i) the other organisation is a member of the organisation; and
 - (ii) the organisation receives, or has been approved to receive, funding under a program or a part of a program designated by the Minister under subsection (4) in order that the organisation's members may provide services that include post-separation parenting programs; or
 - (b) both:
 - (i) the organisation acts on behalf of a group of organisations that includes the other organisation; and
 - (ii) the organisation receives, or has been approved to receive, funding under a program or a part of a program

designated by the Minister under subsection (4) in order that the organisations on whose behalf it acts may provide services that include post-separation parenting programs.

- (4) The Minister may, in writing, designate for the purposes of this section:
- (a) a program; or
 - (b) part of a program;
- administered by or on behalf of the Commonwealth Government under which money appropriated by the Parliament is provided to organisations for the purposes of making post-separation parenting programs available.
- (5) An instrument under this section is not a legislative instrument.

65 Subsection 67ZA(1)

Repeal the subsection, substitute:

- (1) This section applies to a person in the course of performing duties or functions, or exercising powers, as:
- (a) the Registrar or a Deputy Registrar of a Registry of the Family Court of Australia; or
 - (b) the Registrar or a Deputy Registrar of the Family Court of Western Australia; or
 - (c) a Registrar of the Federal Magistrates Court; or
 - (d) a family consultant; or
 - (e) a family counsellor; or
 - (f) a family dispute resolution practitioner; or
 - (g) an arbitrator; or
 - (h) a lawyer independently representing a child's interests.

Note: The heading to section 67ZA is altered by omitting “**counsellor, mediator**” and substituting “**family counsellor, family dispute resolution practitioner**”.

66 Subsection 102A(5) (paragraph (b) of the definition of *examined*)

Omit “family and child counsellor or welfare officer”, substitute “family counsellor or family consultant”.

67 Before subsection 111CV(1)

Insert:

(1A) This section covers:

- (a) a court; and
- (b) the Registrar or a Deputy Registrar of a Registry of the Family Court of Australia; and
- (c) the Registrar or a Deputy Registrar of a Registry of the Family Court of a State; and
- (d) a Registrar of the Federal Magistrates Court; and
- (e) a family consultant; and
- (f) a family counsellor; and
- (g) a family dispute resolution practitioner; and
- (h) an arbitrator; and
- (i) the provider of a course, program or service which a person is ordered to participate in under this Act.

68 Subsection 111CV(1)

Omit “A court must inform a competent authority of another country about any information the court”, substitute “A court or person covered by this section must inform a competent authority of another country about any information the court or person”.

69 Subsection 111CV(5)

Repeal the subsection.

70 Subsection 115(2)

Omit “representatives of organisations that provide family and child counselling”, substitute “family counsellors, family dispute resolution practitioners”.

71 Paragraph 123(1)(j)

Repeal the paragraph, substitute:

- (j) authorising an officer making an investigation mentioned in paragraph (h) to:
 - (i) take evidence on oath or affirmation; and
 - (ii) receive in evidence a report from a family consultant under section 55A or 62G; and

- (iii) receive in evidence a report from a person who has had dealings with a party to the matter under investigation under section 65F, 65L, 65LA, 70NEB or 70NEG; and
- (ja) enabling the summoning of witnesses before an officer making an investigation mentioned in paragraph (h) for the purposes of giving evidence or producing books or documents; and

72 Paragraph 123(1)(s)

Repeal the paragraph, substitute:

- (s) providing for and in relation to:
 - (i) the attendance at family counselling by parties to proceedings under this Act; and
 - (ii) the attendance at family dispute resolution by parties to proceedings under this Act; and
 - (iii) the giving of advice and assistance by family consultants to people involved in proceedings under this Act; and
 - (iv) the participation by parties to proceedings under this Act in courses, programs and other services (other than those mentioned in subparagraph (i), (ii) or (iii)) that the parties are ordered by the court to participate in; and
 - (v) the use, for the purposes of proceedings under this Act, by courts exercising jurisdiction under this Act and officers of such courts, of reports about the future conduct of the proceedings that have been prepared by persons who dealt with the parties in accordance with Rules of Court made under subparagraphs (i), (ii), (iii) or (iv); and

73 Paragraph 123(1)(sa)

Omit “court mediators”, substitute “family consultants”.

74 Paragraph 123(1)(sb)

Omit “mediation or”.

75 Paragraph 123(1)(sb)

Omit “section 19E”, substitute “sections 13E and 13F”.

76 Paragraph 123(1)(sc)

Omit “mediated or”.

77 After paragraph 123(1)(sc)

Insert:

- (sca) prescribing the disputes, proceedings or matters in relation to which family consultants may, or must not, perform their functions; and

78 Paragraph 123(1)(sd)

Repeal the paragraph, substitute:

- (sd) providing for and in relation to:
 - (i) the functions to be performed by family consultants; and
 - (ii) the procedures to be followed in performing those functions; and
 - (iii) the procedures to be followed by persons involved in proceedings in relation to which a family consultant is performing functions; and
 - (iv) the procedures to be followed when a family consultant ceases performing functions in relation to a dispute, proceeding or matter; and
- (sda) providing for and in relation to:
 - (i) the procedures to be followed by a family counsellor authorised under subsection 38BD(1) or engaged under subsection 38R(1A); and
 - (ii) the procedures to be followed by persons attending family counselling with such a counsellor; and
 - (iii) the procedures to be followed when family counselling with such a counsellor ends; and
- (sdb) providing for and in relation to:
 - (i) the procedures to be followed by a family dispute resolution practitioner authorised under subsection 38BD(2) or engaged under subsection 38R(1A); and
 - (ii) the procedures to be followed by persons attending family dispute resolution with such a practitioner; and
 - (iii) the procedures to be followed when family dispute resolution with such a practitioner ends; and
- (sdc) providing for and in relation to:
 - (i) the procedures to be followed by an arbitrator in relation to a dispute, proceeding or matter under this Act; and

- (ii) the attendance by persons at conferences conducted by arbitrators for the purpose of arbitrating a dispute, proceeding or matter under this Act; and
- (iii) the procedure to be followed when arbitration ends, both where it has resulted in an agreement or award and where it has not; and

79 Paragraph 123(1)(se)

Repeal the paragraph, substitute:

- (se) prescribing matters relating to the costs of arbitration by arbitrators, and the assessment or taxation of those costs; and
- (sea) prescribing matters relating to the costs of family counselling by family counsellors authorised under subsection 38BD(1) or engaged under subsection 38R(1A); and
- (seb) prescribing matters relating to the costs of family dispute resolution by family dispute resolution practitioners authorised under subsection 38BD(2) or engaged under subsection 38R(1A); and

80 Subparagraph 123(1)(sf)(i)

Omit “19D or 19E”, substitute “13H”.

81 Subparagraph 123(1)(sf)(ii)

Omit “19F”, substitute “13J”.

82 Subparagraph 123(1)(sf)(ii)

Omit “19G”, substitute “13K”.

83 Paragraph 125(1)(ba)

Repeal the paragraph, substitute:

- (ba) providing for and in relation to the authorisation of:
 - (i) officers or staff members of the Family Court as family counsellors under subsection 38BD(1); and
 - (ii) officers or staff members of the Family Court as family dispute resolution practitioners under subsection 38BD(2); and

84 After paragraph 125(1)(bb)

Insert:

(bba) the registration of awards made in section 13E arbitration and relevant property or financial arbitration; and

85 Paragraph 125(1)(bc)

Omit “(sc), (sd) or (se)”, substitute “(sc), (sca), (sd), (sda), (sdb), (sdc), (se), (sea) or (seb)”.

86 Paragraph 125(1)(ca)

Repeal the paragraph, substitute:

(ca) prescribing fees payable for services provided by the Family Court in circumstances other than where a court orders or directs the provision of the services; and

Federal Magistrates Act 1999

87 Section 4

Omit “promote the use of primary dispute resolution”, substitute “promote the use of dispute resolution”.

88 Section 5

Insert:

Accreditation Rules means regulations made under section 10A of the *Family Law Act 1975*.

89 Section 5 (definition of *Family and child counsellor*)

Repeal the definition.

90 Section 5

Insert:

family consultant means a family consultant within the meaning of the *Family Law Act 1975*.

91 Section 5 (definition of *Welfare officer*)

Repeal the definition.

92 Part 4 (heading)

Repeal the heading, substitute:

Part 4—Dispute resolution for proceedings other than proceedings under the Family Law Act 1975

93 Before section 21

Insert:

20A This Part does not apply to proceedings under the *Family Law Act 1975*

This Part applies to proceedings in the Federal Magistrates Court other than proceedings under the *Family Law Act 1975*.

Note 1: For proceedings under the *Family Law Act 1975*, see in particular Parts II, III, IIIA and IIIB of that Act, which contain provisions dealing with family counselling, family dispute resolution and other processes that apply to the Federal Magistrates Court in relation to proceedings under that Act.

Note 2: This Part (other than Division 2: see section 33) applies to proceedings under the *Child Support (Assessment) Act 1989* and the *Child Support (Registration and Collection) Act 1988*.

94 Section 21 (definition of *primary dispute resolution processes*)

Repeal the definition.

95 Section 21

Insert:

dispute resolution processes means procedures and services for the resolution of disputes otherwise than by way of the exercise of the judicial power of the Commonwealth, and includes:

- (a) counselling; and
- (b) mediation; and
- (c) arbitration; and
- (d) neutral evaluation; and
- (e) case appraisal; and
- (f) conciliation.

Note: The heading to section 21 is altered by omitting “**Primary dispute**” and substituting “**Dispute**”.

96 Section 22

Omit “primary”.

Note: The heading to section 22 is altered by omitting “**primary**”.

97 Section 23 (including the note)

Omit “primary” (wherever occurring).

Note: The heading to section 23 is altered by omitting “**primary**”.

98 Section 24

Omit “primary”.

Note: The heading to section 24 is altered by omitting “**primary**”.

99 Subsection 25(1)

Omit “primary”.

Note: The heading to section 25 is altered by omitting “**primary**”.

100 Subsection 27(1)

Omit “primary” (wherever occurring).

Note: The heading to section 27 is altered by omitting “**primary**”.

101 Subsections 27(2), 28(1) and (2) and 29(1)

Omit “primary”.

Note: The headings to sections 28 and 29 are altered by omitting “**primary**”.

102 Paragraph 29(2)(a)

Omit “primary”.

103 Subparagraphs 29(2)(b)(i) and (ii)

Omit “primary”.

104 Paragraph 29(2)(c)

Omit “primary”.

105 Section 30

Omit “primary” (wherever occurring).

Note: The headings to sections 30 and 31 are altered by omitting “**primary**”.

106 After Division 1 of Part 7

Insert:

**Division 1A—Administration of Federal Magistrates
Court’s family services**

93A Chief Executive Officer has functions of family consultants

- (1) The Chief Executive Officer has all of the functions conferred on family consultants by section 11A of the *Family Law Act 1975*, and any associated powers and duties.
- (2) Without limiting subsection (1), sections 11C (admissibility of communications with family consultants) and 11D (immunity of family consultants) of that Act apply to the Chief Executive Officer while the Chief Executive Officer is performing the functions of a family consultant.
- (3) The Chief Executive Officer is responsible for administering the functions of family consultants appointed by the Chief Executive Officer.

93B Chief Executive Officer may delegate powers and functions that relate to family consultants

- (1) The Chief Executive Officer may, in writing, delegate to a family consultant any of the Chief Executive Officer’s powers, functions and duties in relation to the functions of family consultants mentioned in section 11A of the *Family Law Act 1975*.
- (2) A delegate is, in the exercise of a delegated power, function or duty, subject to the directions of the Chief Executive Officer.

93C Chief Executive Officer may give directions that relate to family services functions

The Chief Executive Officer may give directions that relate to:

- (a) a Court officer’s functions as a family consultant; or
- (b) a Court officer’s or staff member’s functions as a family counsellor or family dispute resolution practitioner.

93D Chief Executive Officer may authorise officer or staff member to act as family counsellor or family dispute resolution practitioner

- (1) The Chief Executive Officer may authorise an officer or staff member of the Family Court to provide family counselling under *Family Law Act 1975*.
- (2) The Chief Executive Officer may authorise an officer or staff member of the Federal Magistrates Court to provide family dispute resolution under the *Family Law Act 1975*.
- (3) If an officer who is a family consultant also becomes a family counsellor, or family dispute resolution practitioner, because of an authorisation under this section:
 - (a) section 11C of the *Family Law Act 1975* (admissibility of communications with family consultants) does not apply to the officer at any time while the officer is acting as a family counsellor or family dispute resolution practitioner; and
 - (b) the officer must not perform the functions of a family consultant in relation to particular proceedings, if the officer has conducted family counselling or family dispute resolution with a party to those proceedings.

107 Paragraph 87(1)(f)

Repeal the paragraph, substitute:

- (f) authorising an officer making an investigation mentioned in paragraph (e) to:
 - (i) take evidence on oath or affirmation; and
 - (ii) receive in evidence a report from a family consultant under section 55A or 62G of the *Family Law Act 1975*; and
 - (iii) receive in evidence a report from a person who has had dealings with a party to a matter under investigation under section 65F, 65L, 65LA, 70NEB or 70NEG of the *Family Law Act 1975*; and
- (fa) enabling the summoning of witnesses before an officer making an investigation mentioned in paragraph (e) for the purposes of giving evidence or producing books or documents; and

108 Subsection 87(2)

Repeal the subsection, substitute:

- (2) The Rules of Court may make provision for or in relation to:
- (a) attendance at family counselling by parties to proceedings under the *Family Law Act 1975*; and
 - (b) attendance at family dispute resolution by parties to proceedings under the *Family Law Act 1975*; and
 - (c) the giving of advice and assistance by family consultants to people involved in proceedings under the *Family Law Act 1975*; and
 - (d) the participation by parties to proceedings under the *Family Law Act 1975* in courses, programs and other services that the parties are ordered by the court to participate in; and
 - (e) the use, for the purposes of proceedings under the *Family Law Act 1975*, by the Federal Magistrates Court and officers of the Court in family law and child support proceedings, of reports about the future conduct of the proceedings that have been prepared by persons who dealt with the parties in accordance with Rules of Court made under paragraphs (a), (b), (c) or (d).

109 At the end of subsection 99(1)

Add:

- ; (f) such family consultants as are necessary.

110 Paragraph 102(2)(k)

Repeal the paragraph, substitute:

- (k) the power to make orders under the following provisions of the *Family Law Act 1975*:
 - (i) sections 11F and 11G;
 - (ii) sections 13C and 13D;
 - (iii) subsection 65LA(1);
 - (iv) paragraph 70NEB(1)(a);
- (ka) the power to direct a family consultant to give a report under section 62G of the *Family Law Act 1975*;

111 After section 111

Insert:

111A Family consultants

Family consultants who are officers of the Federal Magistrates Court are to be persons engaged under the *Public Service Act 1999*.

Note: Family consultants who are not officers of the Federal Magistrates Court may be appointed under regulations made under the *Family Law Act 1975*. See paragraph 11B(b) of the *Family Law Act 1975*.

112 After subsection 115(1)

Insert:

(1A) The Chief Executive Officer may engage persons to perform:

- (a) family counselling services under the *Family Law Act 1975*;
or
- (b) family dispute resolution services under the *Family Law Act 1975*.

113 Subsection 115(2)

After “subsection (1)”, insert “or (1A)”.

Income Tax Assessment Act 1997

113A Subsection 30-70(1) (table item 8.1.1)

Repeal the item, substitute:

- 8.1.1 a public fund established and maintained by a see section 30-75
*non-profit company solely for the purpose
of providing money to be used in giving or
providing marriage education under the
Marriage Act 1961 to individuals in Australia

Schedule 4 Changes to dispute resolution

Part 3 Changes to dispute resolution

8.1.2	a public fund:	none
	(a) that is established and maintained by a *non-profit company which receives funding from the Commonwealth to provide family counselling or family dispute resolution within the meaning of the <i>Family Law Act 1975</i> ; and	
	(b) that is established and maintained solely for the purpose of providing money to be used in providing family counselling or family dispute resolution within the meaning of the <i>Family Law Act 1975</i> to individuals in Australia	

113B Section 30-75

Repeal the section, substitute:

30-75 Marriage education organisations must be approved

You can deduct a gift that you make to a public fund covered by item 8.1.1 of the table in subsection 30-70(1) only if the company has been approved by the Minister under section 9C of the *Marriage Act 1961*.

Marriage Act 1961

114 Section 9D

Repeal the section.

115 Paragraph 16(2A)(a)

Omit “and child” (wherever occurring).

116 Paragraph 16(2A)(b)

Omit “and child”.

117 Subsection 16(7)

Omit “*and child*”.

Part 4—Transitional matters relating to family counselling and family dispute resolution

118 Definitions

- (1) Terms used in this Part that are defined in the *Family Law Act 1975* have the same meaning in this Part as they have in that Act.
- (2) In this Part:
- approved family counselling organisation*** means:
- (a) an organisation in respect of which an approval is in force under item 120; or
 - (b) an organisation that is taken to be an approved family counselling organisation because of item 123.
- approved family dispute resolution organisation*** means:
- (a) an organisation in respect of which an approval is in force under item 125; or
 - (b) an organisation that is taken to be an approved family dispute resolution organisation because of item 128.
- commencement*** means the time at which Part 3 of this Schedule commences.
- transition period*** means the period:
- (a) commencing at commencement; and
 - (b) ending on the day prescribed by regulations made for the purposes of this definition.

119 Persons who are taken to be family counsellors during the transition period

During the transition period, a person who is authorised by an approved family counselling organisation to offer family counselling on behalf of the organisation is taken to be a ***family counsellor*** within the meaning of section 10C of the *Family Law Act 1975*.

120 Approval of family counselling organisations

- (1) During the transition period, the Minister may, by notice in writing to an organisation, approve the organisation as a family counselling organisation if, and only if, the Minister is satisfied that:

Schedule 4 Changes to dispute resolution

Part 4 Transitional matters relating to family counselling and family dispute resolution

- (a) the organisation is a recipient organisation (see subitem (2));
or
- (b) there is a recipient organisation in relation to the organisation (see subitem (3)).

Note: If an organisation meets the requirements for approval under both this item and item 125, the Minister may approve the organisation as both a family counselling organisation and a family dispute resolution organisation.

- (2) An organisation is a recipient organisation for the purposes of paragraph (1)(a) if it receives, or has been approved to receive, funding under a program or a part of a program designated by the Minister under subitem (4) in order to provide services that include family counselling.
- (3) An organisation is a recipient organisation in relation to another organisation for the purposes of paragraph (1)(b) if:
 - (a) both:
 - (i) the other organisation is a member of the organisation; and
 - (ii) the organisation receives, or has been approved to receive, funding under a program or a part of a program designated by the Minister under subitem (4) in order that the organisation's members may provide services that include family counselling; or
 - (b) both:
 - (i) the organisation acts on behalf of a group of organisations that includes the other organisation; and
 - (ii) the organisation receives, or has been approved to receive, funding under a program or a part of a program designated by the Minister under subitem (4) in order that the organisations on whose behalf it acts may provide services that include family counselling.
- (4) The Minister may, in writing, designate for the purposes of subitem (1):
 - (a) a program; or
 - (b) part of a program;administered by or on behalf of the Commonwealth Government under which money appropriated by the Parliament is provided to organisations for the purposes of making family counselling and family dispute resolution services available.

- (5) An instrument under this item is not a legislative instrument.

121 Termination and revocation of approvals

- (1) An organisation ceases to be approved under item 120 if:
- (a) the organisation; or
 - (b) if the organisation is not the recipient organisation within the meaning of subitem 120(2)—the recipient organisation in relation to the organisation within the meaning of subitem 120(3);
- either:
- (c) ceases to receive; or
 - (d) ceases to be approved to receive;
- funding under a program or part of a program designated by the Minister under subitem 120(4).
- (2) The Minister must revoke the approval of an organisation under item 120 if the organisation requests the revocation.
- (3) The Minister's power to revoke an approval must be exercised by notice in writing to the organisation concerned.

122 Minister to publish lists of approved family counselling organisations

The Minister must publish annually, in such manner as the Minister thinks appropriate, a list of all approved family counselling organisations.

123 Approved counselling organisations become approved family counselling organisations

- (1) If, immediately before commencement, there is in force in respect of an organisation an approval under section 13A of the *Family Law Act 1975*, the organisation is, during the transition period, taken to be approved as a family counselling organisation under item 120 of this Schedule.

Note: An organisation may be approved before commencement under both section 13A and section 13B of the *Family Law Act 1975*. If that is the case, then both this item and item 128 will apply to the organisation.

- (2) Subitem (1) does not prevent:
- (a) the organisation's approval from being terminated; or

(b) the Minister from revoking the organisation's approval;
under item 121.

124 Persons who are taken to be family dispute resolution practitioners during the transition period

During the transition period, these persons are taken to be *family dispute resolution practitioners* within the meaning of section 10G of the *Family Law Act 1975*:

- (a) a person who is authorised by an approved family dispute resolution organisation to offer family dispute resolution on behalf of the organisation;
- (b) a person, other than a person mentioned in paragraph (a), who:
 - (i) on commencement; or
 - (ii) by the end of the period of 12 months starting on commencement;meets the requirements specified in regulations made for the purposes of this paragraph.

125 Approval of family dispute resolution organisations

- (1) During the transition period, the Minister may, by notice in writing to an organisation, approve the organisation as a family dispute resolution organisation if, and only if, the Minister is satisfied that:
 - (a) the organisation is a recipient organisation (see subitem (2)); or
 - (b) there is a recipient organisation in relation to the organisation (see subitem (3)).

Note: If an organisation meets the requirements for approval under both this item and item 120, the Minister may approve the organisation as both a family counselling organisation and a family dispute resolution organisation.

- (2) An organisation is a recipient organisation for the purposes of paragraph (1)(a) if it receives, or has been approved to receive, funding under a program or a part of a program designated by the Minister under subitem (4) in order to provide services that include family dispute resolution.
- (3) An organisation is a recipient organisation in relation to another organisation for the purposes of paragraph (1)(b) if:
 - (a) both:

- (i) the other organisation is a member of the organisation;
and
 - (ii) the organisation receives, or has been approved to receive, funding under a program or a part of a program designated by the Minister under subsection (4) in order that the organisation's members may provide services that include family dispute resolution; or
 - (b) both:
 - (i) the organisation acts on behalf of a group of organisations that includes the other organisation; and
 - (ii) the organisation receives, or has been approved to receive, funding under a program or a part of a program designated by the Minister under subsection (4) in order that the organisations on whose behalf it acts may provide services that include family dispute resolution.
- (4) The Minister may, in writing, designate for the purposes of subitem (1):
- (a) a program; or
 - (b) part of a program;
- administered by or on behalf of the Commonwealth Government under which money appropriated by the Parliament is provided to organisations for the purposes of making family counselling and family dispute resolution services available.
- (5) An instrument under this item is not a legislative instrument.

126 Termination and revocation of approvals

- (1) An organisation ceases to be approved under item 125 if:
- (a) the organisation; or
 - (b) if the organisation is not the recipient organisation within the meaning of subitem 125(2)—the recipient organisation in relation to the organisation within the meaning of subitem 125(3);
- either:
- (c) ceases to receive; or
 - (d) ceases to be approved to receive;
- funding under a program or part of a program designated by the Minister under subitem 125(4).

Schedule 4 Changes to dispute resolution

Part 4 Transitional matters relating to family counselling and family dispute resolution

- (2) The Minister must revoke the approval of an organisation under item 125 if the organisation requests the revocation.
- (3) The Minister's power to revoke an approval must be exercised by notice in writing to the organisation concerned.

127 Minister to publish lists of approved family dispute resolution organisations

The Minister must publish annually, in such manner as the Minister thinks appropriate, a list of all approved family dispute resolution organisations.

128 Approved mediation organisations become approved family dispute resolution organisations

- (1) If, immediately before commencement, there is in force in respect of an organisation an approval under section 13B of the *Family Law Act 1975*, the organisation is, on and from commencement, taken to be approved as a family dispute resolution organisation under item 125.

Note: An organisation may be approved before commencement under both section 13A and section 13B of the *Family Law Act 1975*. If that is the case, then both this item and item 123 will apply to the organisation.

- (2) Subitem (1) does not prevent:
 - (a) the organisation's approval from being terminated; or
 - (b) the Minister from revoking the organisation's approval; under item 126.

Part 5—Application and transitional provisions relating to other changes to dispute resolution

129 Definition of commencement

In this Part:

commencement means the time at which Part 3 of this Schedule commences.

130 Notices filed under section 15

If, at commencement, a notice filed under section 15 of the *Family Law Act 1975* as in force at any time before commencement has not been acted on, an appropriate officer of the court in which the notice is filed must arrange for the parties to the marriage to which the notice relates to be interviewed by a family counsellor for the purpose of assisting the parties to reconcile or to improve their relationship with each other or any of their children.

131 Arbitration awards registered under section 19D or 19E are taken to be registered under section 13H

If:

- (a) at any time before commencement, an award in an arbitration had been registered under section 19D or 19E of the *Family Law Act 1975*; and
- (b) the award is still registered immediately before commencement;

the registration of the award continues to have effect after commencement as if it had been done under section 13H of that Act.

132 Powers under Division 4 of Part IIIB of the *Family Law Act 1975* may be exercised in relation to section 19D arbitration and private arbitration

For the purposes of section 13G, 13H, 13J and 13K:

- (a) a reference to section 13E arbitration includes a reference to section 19D arbitration (within the meaning of the *Family Law Act 1975* as in force immediately before commencement); and

Schedule 4 Changes to dispute resolution

Part 5 Application and transitional provisions relating to other changes to dispute resolution

- (b) a reference to relevant property or financial arbitration includes a reference to private arbitration of a dispute (within the meaning of the *Family Law Act 1975* as in force immediately before commencement).

133 Subsection 44(1B) certificates

A certificate in relation to the parties to a marriage, signed before commencement by a person mentioned in subparagraph 44(1B)(a)(i) or (ii) of the *Family Law Act 1975* (as in force immediately before commencement), may be filed in relation to an application for a divorce order in relation to the marriage in satisfaction of the requirement in subsection 44(1B) of that Act as amended by this Schedule.

134 Request for counselling under section 62C or 62CA

If, at commencement, a notice filed under section 62C or 62CA of the *Family Law Act 1975* has not been acted on, an appropriate officer of the court in which the notice is filed must arrange for the parties to the proceedings to which the notice relates (and the child and any other persons the officer thinks appropriate) to be interviewed by a family counsellor to assess whether counselling is appropriate in all the circumstances, and, if it is:

- (a) to discuss the care, welfare and development of the child; and
- (b) if there are differences between the parties in relation to matters affecting the care, welfare and development of the child, to try to resolve those differences.

135 Order under subsection 62F(2)

If, at commencement, an order under subsection 62F(2) of the *Family Law Act 1975* has not yet been complied with, the order is taken to have been complied with if the parties to which the order relate attend a conference with a family counsellor (within the meaning of the *Family Law Act 1975* as amended by this Schedule).

136 Reports under section 62G

If, at commencement, a family and child counsellor or welfare officer (within the meaning of the *Family Law Act 1975* as in force immediately before commencement) has been directed to give a report under subsection 62G(2) of that Act and has not yet given that report:

- (a) the person must still provide the report; and

- (b) references in section 62G of that Act (as amended by this Schedule) to a family consultant are taken to be references to the person who provides the report.

137 Pre-parenting order counselling for the purposes of section 65F

If, before commencement, parties to proceedings attended a conference with a family and child counsellor or a welfare officer to discuss the matter to which the proceedings relate, the attendance at that conference is taken to satisfy the requirement in subsection 65F(2) of the *Family Law Act 1975* (as amended by this Schedule) to attend a conference with a family counsellor.

138 Supervision etc. of parenting orders

If:

- (a) under a court order made before commencement under section 65L of the *Family Law Act 1975*, a person is required to do either or both of the following:
- (i) supervise compliance with a parenting order;
 - (ii) give any party to the parenting order such assistance as is reasonably requested by that party in relation to compliance with, and the carrying out of, the parenting order; and
- (b) immediately after commencement, the person is not a family consultant within the meaning of the *Family Law Act 1975* as amended by this Schedule;

then the court may make another order substituting a family consultant for the person.

138A Application of amendments of the *Income Tax Assessment Act 1997*

The amendments made by items 113A and 113B of this Schedule apply to gifts made on or after commencement.

139 Regulations may prescribe matters relating to this Schedule

- (1) The Governor-General may make regulations prescribing matters of a transitional nature (including prescribing any saving or application

Schedule 4 Changes to dispute resolution

Part 5 Application and transitional provisions relating to other changes to dispute resolution

provisions) relating to the amendments or repeals made by this Schedule.

- (2) The Governor-General may make regulations prescribing matters:
- (a) required or permitted by this Schedule to be prescribed; or
 - (b) necessary or convenient to be prescribed for carrying out or giving effect to this Schedule.

Schedule 5—Representation of child's interests by independent children's lawyer

Part 1—Amendments

Family Law Act 1975

1 Subsection 4(1) (definition of *child representative*)

Repeal the definition.

2 Subsection 4(1)

Insert:

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

3 Subsection 4(1)

Insert:

lawyer means a person enrolled as a legal practitioner of:
(a) a federal court; or
(b) the Supreme Court of a State or Territory.

4 Section 60C (table item 10)

Repeal the item, substitute:

10 **Division 10—The representation of the child's interests**
the representation of a child's interests in proceedings by an independent children's lawyer

5 Division 10 of Part VII

Repeal the Division, substitute:

Division 10—Independent representation of child's interests

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

- (1) This section applies to proceedings under this Act in which a child's best interests are, or a child's welfare is, the paramount, or a relevant, consideration.
- (2) If it appears to the court that the child's interests in the proceedings ought to be independently represented by a lawyer, the court:
 - (a) may order that the child's interests in the proceedings are to be independently represented by a lawyer; and
 - (b) may make such other orders as it considers necessary to secure that independent representation of the child's interests.
- (3) However, if the proceedings arise under regulations made for the purposes of section 111B, the court:
 - (a) may order that the child's interests in the proceedings be independently represented by a lawyer only if the court considers there are exceptional circumstances that justify doing so; and
 - (b) must specify those circumstances in making the order.

Note: Section 111B is about the Convention on the Civil Aspects of International Child Abduction.

- (4) A court may make an order for the independent representation of the child's interests in the proceedings by a lawyer:
 - (a) on its own initiative; or
 - (b) on the application of:
 - (i) the child; or
 - (ii) an organisation concerned with the welfare of children; or
 - (iii) any other person.
- (5) Without limiting paragraph (2)(b), the court may make an order under that paragraph for the purpose of allowing the lawyer who is to represent the child's interests to find out what the child's views are on the matters to which the proceedings relate.

Note: A person cannot require a child to express his or her views in relation to any matter, see section 60CE.

- (6) Subsection (5) does not apply if complying with that subsection would be inappropriate because of:
- (a) the child's age or maturity; or
 - (b) some other special circumstance.

68LA Role of independent children's lawyer

When section applies

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

General nature of role of independent children's lawyer

- (2) The independent children's lawyer must:
- (a) form an independent view, based on the evidence available to the independent children's lawyer, of what is in the best interests of the child; and
 - (b) act in relation to the proceedings in what the independent children's lawyer believes to be the best interests of the child.
- (3) The independent children's lawyer must, if satisfied that the adoption of a particular course of action is in the best interests of the child, make a submission to the court suggesting the adoption of that course of action.
- (4) The independent children's lawyer:
- (a) is not the child's legal representative; and
 - (b) is not obliged to act on the child's instructions in relation to the proceedings.

Specific duties of independent children's lawyer

- (5) The independent children's lawyer must:
- (a) act impartially in dealings with the parties to the proceedings; and
 - (b) ensure that any views expressed by the child in relation to the matters to which the proceedings relate are fully put before the court; and
 - (c) if a report or other document that relates to the child is to be used in the proceedings:

- (i) analyse the report or other document to identify those matters in the report or other document that the independent children's lawyer considers to be the most significant ones for determining what is in the best interests of the child; and
- (ii) ensure that those matters are properly drawn to the court's attention; and
- (d) endeavour to minimise the trauma to the child associated with the proceedings; and
- (e) facilitate an agreed resolution of matters at issue in the proceedings to the extent to which doing so is in the best interests of the child.

Disclosure of information

- (6) Subject to subsection (7), the independent children's lawyer:
 - (a) is not under an obligation to disclose to the court;
 - (b) cannot be required to disclose to the court;any information that the child communicates to the independent children's lawyer.
- (7) The independent children's lawyer may disclose to the court any information that the child communicates to the independent children's lawyer if the independent children's lawyer considers the disclosure to be in the best interests of the child.
- (8) Subsection (7) applies even if the disclosure is made against the wishes of the child.

68M Order that child be made available for examination

- (1) This section applies if an independent children's lawyer is appointed to independently represent a child's interests in relation to proceedings under this Act.
- (2) The court may, on application by the independent children's lawyer, order a person mentioned in subsection (3) to make the child available, as specified in the order, for an examination to be made for the purpose of preparing a report about the child for use by the independent children's lawyer in connection with the proceedings.

- (3) The order may be directed to:
- (a) a parent of the child; or
 - (b) a person with whom the child is to live under a parenting order; or
 - (c) a person with whom the child is to spend time under a parenting order; or
 - (d) a person with whom the child is to communicate under a parenting order; or
 - (e) a person who has parental responsibility for the child.

6 Subparagraph 69W(2)(b)(ii)

Omit "a person representing the child", substitute "an independent children's lawyer representing the child's interests".

7 Subparagraph 69ZC(3)(b)(ii)

Omit "a person representing the relevant child", substitute "an independent children's lawyer representing the relevant child's interests".

8 Subsection 117(3)

Omit "a child representative", substitute "an independent children's lawyer for a child".

9 Subsection 117(3)

Omit "the child representative", substitute "the independent children's lawyer".

10 Subsection 117(4)

Omit "a child representative", substitute "an independent children's lawyer for a child".

11 Subsection 117(4)

Omit "the child representative", substitute "the independent children's lawyer" (wherever occurring).

12 Subsection 117(5)

Omit "a child representative", substitute "an independent children's lawyer".

13 Subsection 117(5)

Omit "the child representative", substitute "the independent children's lawyer".

Part 2—Application of amendments and saving of appointments

14 Definitions

In this Part:

commencement means the commencement of this Schedule.

new Act means the *Family Law Act 1975* as in force after commencement.

old Act means the *Family Law Act 1975* as in force immediately before commencement.

15 Application of amendments

The amendments made by this Schedule apply to proceedings initiated under Part VII before, on or after the day on which this Schedule commences.

16 Saving of appointments

- (1) This item applies if:
 - (a) a court made an order under section 68L of the old Act for separate representation of a child; and
 - (b) immediately before commencement, the proceedings in which the order was made have not been concluded.
- (2) The person who was appointed as the child's representative under section 68L of the old Act is taken to be appointed as the independent children's lawyer under section 68L of the new Act.
- (3) The order under section 68L of the old Act for separate representation of the child is taken to be an order under section 68L of the new Act for independent representation of the child's interests.

Schedule 6—Family violence

Part 1—Amendments

Family Law Act 1975

1 Division 11 of Part VII

Repeal the Division, substitute:

Division 11—Family violence

68N Purposes of this Division

The purposes of this Division are:

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

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

68P Obligations of court making an order or granting an injunction under this Act that is inconsistent with an existing family violence order

- (1) This section applies if:
 - (a) a court:
 - (i) makes a parenting order that provides for a child to spend time with a person, or expressly or impliedly

- requires or authorises a person to spend time with a child; or
 - (ii) makes a recovery order (as defined in section 67Q) or any other order under this Act that expressly or impliedly requires or authorises a person to spend time with a child; or
 - (iii) grants an injunction under section 68B or 114 that expressly or impliedly requires or authorises a person to spend time with a child; and
 - (b) the order made or injunction granted is inconsistent with an existing family violence order.
- (2) The court must, to the extent to which the order or injunction provides for the child to spend time with a person, or expressly or impliedly requires or authorises a person to spend time with the child:
- (a) specify in the order or injunction that it is inconsistent with an existing family violence order; and
 - (b) give a detailed explanation in the order or injunction of how the contact that it provides for is to take place; and
 - (c) explain (or arrange for someone else to explain) the order or injunction to:
 - (i) the applicant and respondent in the proceedings for the order or injunction; and
 - (ii) the person against whom the family violence order is directed (if that person is not the applicant or respondent); and
 - (iii) the person protected by the family violence order (if that person is not the applicant or respondent); and
 - (d) include (or arrange to be included) in the explanation, in language those persons are likely to readily understand:
 - (i) the purpose of the order or injunction; and
 - (ii) the obligations created by the order or injunction, including how the contact that it provides for is to take place; and
 - (iii) the consequences that may follow if a person fails to comply with the order or injunction; and
 - (iv) the court's reasons for making an order or granting an injunction that is inconsistent with a family violence order; and

- (v) the circumstances in which a person may apply for variation or revocation of the order or injunction.
- (3) As soon as practicable after making the order or granting the injunction (and no later than 14 days after making or granting it), the court must give a copy to:
 - (a) the applicant and respondent in the proceedings for the order or injunction; and
 - (b) the person against whom the family violence order is directed (if that person is not the applicant or respondent); and
 - (c) the person protected by the family violence order (if that person is not the applicant or respondent); and
 - (d) the Registrar, Principal Officer or other appropriate officer of the court that last made or varied the family violence order; and
 - (e) the Commissioner or head (however described) of the police force of the State or Territory in which the person protected by the family violence order resides; and
 - (f) a child welfare officer in relation to the State or Territory in which the person protected by the family violence order resides.
- (4) Failure to comply with this section does not affect the validity of the order or injunction.

68Q Relationship of order or injunction made under this Act with existing inconsistent family violence order

- (1) To the extent to which:
 - (a) an order or injunction mentioned in paragraph 68P(1)(a) is made or granted that provides for a child to spend time with a person, or expressly or impliedly requires or authorises a person to spend time with a child; and
 - (b) the order or injunction is inconsistent with an existing family violence order;the family violence order is invalid.
- (2) An application for a declaration that the order or injunction is inconsistent with the family violence order may be made, to a court that has jurisdiction under this Part, by:

- (a) the applicant or respondent in the proceedings for the order or injunction mentioned in paragraph 68P(1)(a); or
 - (b) the person against whom the family violence order is directed (if that person is not the applicant or respondent); or
 - (c) the person protected by the family violence order (if that person is not the applicant or respondent).
- (3) The court must hear and determine the application and make such declarations as it considers appropriate.

68R Power of court making a family violence order to revive, vary, discharge or suspend an existing order, injunction or arrangement under this Act

Power

- (1) In proceedings to make or vary a family violence order, a court of a State or Territory that has jurisdiction in relation to this Part may revive, vary, discharge or suspend:
- (a) a parenting order, to the extent to which it provides for a child to spend time with a person, or expressly or impliedly requires or authorises a person to spend time with the child; or
 - (b) a recovery order (as defined in section 67Q) or any other order under this Act, to the extent to which it expressly or impliedly requires or authorises a person to spend time with a child; or
 - (c) an injunction granted under section 68B or 114, to the extent to which it expressly or impliedly requires or authorises a person to spend time with a child; or
 - (d) to the extent to which it expressly or impliedly requires or authorises a person to spend time with a child:
 - (i) an undertaking given to, and accepted by, a court exercising jurisdiction under this Act; or
 - (ii) a registered parenting plan within the meaning of subsection 63C(6); or
 - (iii) a recognisance entered into under an order under this Act.
- (2) The court may do so:
- (a) on its own initiative; or

(b) on application by any person.

Limits on power

- (3) The court must not do so unless:
- (a) it also makes or varies a family violence order in the proceedings (whether or not by interim order); and
 - (b) if the court proposes to revive, vary, discharge or suspend an order or injunction mentioned in paragraph (1)(a), (b) or (c)—the court has before it material that was not before the court that made that order or injunction.
- (4) The court must not exercise its power under subsection (1) to discharge an order, injunction or arrangement in proceedings to make an interim family violence order or an interim variation of a family violence order.

Relevant considerations

- (5) In exercising its power under subsection (1), the court must:
- (a) have regard to the purposes of this Division (stated in section 68N); and
 - (b) have regard to whether contact with both parents is in the best interests of the child concerned; and
 - (c) if varying, discharging or suspending an order or injunction mentioned in paragraph (1)(a), (b) or (c) that, when made or granted, was inconsistent with an existing family violence order—be satisfied that it is appropriate to do so because a person has been exposed, or is likely to be exposed, to family violence as a result of the operation of that order or injunction.

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

Registration of revival, variation, discharge or suspension of orders and other arrangements

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

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

- (1) The following provisions do not apply to a court exercising the power under section 68R:
 - (a) section 65C (who may apply for a parenting order);
 - (b) subsection 65F(2) (parenting order not to be made unless parties attend family counselling);
 - (c) section 60CG (court to consider risk of family violence);
 - (d) section 69N (requirement to transfer certain proceedings);
 - (e) any provisions (for example, section 60CA) that would otherwise make the best interests of the child the paramount consideration;

Note: Even though the best interests of the child are not paramount, they must still be taken into account under paragraph 68R(5)(b).
 - (f) any provisions of this Act or the applicable Rules of Court specified in the regulations.
- (2) If a court is exercising the power under section 68R in proceedings to make an interim family violence order or an interim variation of a family violence order:
 - (a) the court has a discretion about whether to apply paragraph 60CC(3)(a) (about taking into account a child's views etc.); and
 - (b) any provisions of this Act or the applicable Rules of Court specified in the regulations do not apply.
- (3) A court exercising the power under section 68R may, as it thinks appropriate, dispense with any otherwise applicable Rules of Court.

68T Special provisions relating to proceedings to make an interim (or interim variation of) family violence order

- (1) If, in proceedings to make an interim family violence order or an interim variation of a family violence order, the court revives, varies or suspends an order, injunction or arrangement under section 68R, that revival, variation or suspension ceases to have effect at the earlier of:
 - (a) the time the interim order stops being in force; and
 - (b) the end of the period of 21 days starting when the interim order was made.

Schedule 6 Family violence
Part 1 Amendments

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

Part 2—Application of amendments and savings

2 Definitions

In this Part:

commencement means the commencement of this Schedule.

new Act means the *Family Law Act 1975* as in force after commencement.

old Act means the *Family Law Act 1975* as in force immediately before commencement.

3 Application of amendments

The amendments made by Part 1 of this Schedule apply to orders made after commencement, whether the application for the order was made before or after that time.

4 Saving of regulations

Despite the repeal of a provision of the old Act specified in the following table, regulations that:

- (a) were made for the purposes of that provision of the old Act; and
- (b) were in force immediately before commencement;

continue to have effect on and after commencement as if those regulations had been made for the purposes of the corresponding provision of the new Act that is specified in the table in relation to that provision of the old Act:

Saving regulations made under provisions of old Act		
Item	provision of old Act	corresponding provision of new Act
1	subparagraph 68T(3)(a)(iii)	paragraph 68S(1)(f)
2	subparagraph 68T(3)(b)(ii)	paragraph 68S(2)(b)
3	subsection 68T(6)	subsection 68R(6)

Schedule 7—Jurisdiction of courts

Part 1—Amendment

Family Law Act 1975

1 Section 45A

Repeal the section.

Part 2—Application of amendment

2 Application of amendment

The amendment made by item 1 of this Schedule applies to proceedings instituted before or after the commencement of that item.

Schedule 8—Removal of references to residence and contact

Part 1—Amendments

Australian Citizenship Act 1948

1 Paragraphs 5(2)(b) and (c)

Repeal the paragraphs, substitute:

- (b) under a parenting order the child is to live with the person (whether or not the person is a parent of the child); or
- (c) under a parenting order the person has parental responsibility for the child's long-term or day-to-day care, welfare and development (whether or not the person is a parent of the child); or

Australian Citizenship Act 2006

2 Paragraphs 6(1)(b) and (c)

Repeal the paragraphs, substitute:

- (b) under a parenting order the child is to live with the person (whether or not the person is a parent of the child); or
- (c) under a parenting order the person has parental responsibility for the child's long-term or day-to-day care, welfare and development (whether or not the person is a parent of the child); or

Australian Passports Act 2005

3 Paragraphs 11(5)(b) and (c)

Repeal the paragraphs, substitute:

- (b) under a parenting order:
 - (i) the child is to live with the person; or
 - (ii) the child is to spend time with the person; or
 - (iii) the person is responsible for the child's long-term or day-to-day care, welfare and development; or

4 Subsection 11(6)

Repeal the subsection.

Child Support (Assessment) Act 1989

5 Section 5

Insert:

major care has the meaning given by subsections 8(3) and 8A(5).

6 Section 5 (definition of *major contact*)

Repeal the definition.

7 Section 5 (subparagraph (a)(ii) of the definition of *relevant dependent child*)

Omit “contact with”, substitute “care of”.

8 Section 5

Insert:

substantial care has the meaning given by subsections 8(3) and 8A(4).

9 Section 5 (definition of *substantial contact*)

Repeal the definition.

10 Paragraph 7B(1)(b)

Omit “contact with”, substitute “care of”.

11 Paragraph 7B(1)(d)

Omit “contact with”, substitute “care of”.

12 Paragraph 7B(2)(a)

Omit “provides care for a child, shares care of a child or has contact with”, substitute “cares for”.

13 Paragraph 7B(2)(c)

Omit “providing or sharing such care, or having such contact”, substitute “caring for the child”.

14 Subsection 7B(2)

Omit “provide or share such care or have such contact”, substitute “care for the child”.

15 Subsection 7B(3)

Omit “provide care for, share care of or have contact with,”, substitute “care for”.

16 Subparagraph 8(3)(b)(ii)

Omit “contact with”, substitute “care of”.

Note: The heading to section 8 is altered by omitting “**contact**” and substituting “**care**”.

17 Paragraph 8(3)(c)

Omit “*contact* with”, substitute “*care* of”.

18 Paragraph 8(3)(d)

Omit “*contact* with”, substitute “*care* of”.

19 Paragraph 8A(1)(a)

Omit “the contact between a child and”, substitute “the time a child is to spend with”.

Note: The heading to section 8A is altered by omitting “/**contact**”.

20 Paragraph 8A(1)(d)

Repeal the paragraph, substitute:

(d) as a result of the contravention:

- (i) a person (the *first person*) has more care of the child than the first person would have if the order or parenting plan were not being contravened; and
- (ii) another person (the *second person*) has less care of the child than the second person would have if the order or parenting plan were not being contravened.

21 Paragraphs 8A(2)(a) and (b)

Repeal the paragraphs, substitute:

- (a) the first person is taken to have care of the child only to the extent (if any) to which the first person would have care of

the child if the court order or parenting plan (as the case may be) were being complied with; and

- (b) the amount of care that the second person has of the child is to be worked out on the basis of the care (if any) that the person actually has of the child; and

22 Subsection 8A(4)

Omit “*contact* with”, substitute “*care* of”.

23 Subsection 8A(5)

Omit “*contact* with”, substitute “*care* of”.

24 Subsection 8A(6)

Omit “contact with”, substitute “care of”.

25 Paragraph 48(1)(da)

Omit “with whom the parent has substantial contact”, substitute “of whom the parent has substantial care”.

26 Paragraph 48(1)(e)

Omit “with whom a parent has major contact taken to be 0.65, the number attributed to each child with whom a parent has substantial contact”, substitute “of whom a parent has major care taken to be 0.65, the number attributed to each child of whom a parent has substantial care”.

27 Paragraph 54(1)(b) (definition of *number of children in carer’s care*)

Omit “with whom a carer has major contact taken to be 0.65, the number attributed to each child with whom a carer has substantial contact”, substitute “of whom a carer has major care taken to be 0.65, the number attributed to each child of whom a carer has substantial care”.

28 Section 54 (example 2)

Omit “substantial contact”, substitute “substantial care”.

29 Paragraph 54A(1)(a)

Omit “and contact”.

30 Subparagraph 54A(1)(b)(ii)

Omit “contact with”, substitute “care of”.

31 Paragraph 54B(1)(e)

Omit “with whom the parent has substantial contact”, substitute “of whom the parent has substantial care”.

32 Subparagraph 54B(1)(f)(i)

Omit “with whom the carer has major contact”, substitute “of whom the carer has major care”.

33 Subparagraph 54B(1)(f)(ii)

Omit “with whom the carer has substantial contact”, substitute “of whom the carer has substantial care”.

34 Paragraph 98C(2)(b)

Omit “sub-subparagraph 117(2)(b)(i)(C)”, substitute “subparagraph 117(2)(b)(ib)”.

35 Subparagraph 117(2)(a)(iv)

Repeal the subparagraph, substitute:

- (iv) high costs involved in enabling a parent to care for any other child or another person that the parent has a duty to maintain;

36 Subparagraph 117(2)(b)(i)

Repeal the subparagraph, substitute:

- (i) because of high costs involved in enabling a parent to care for the child; or
- (ia) because of special needs of the child; or
- (ib) because of high child care costs in relation to the child; or

37 Subsection 117(3)

Omit “have contact with”, substitute “care for”.

38 Subsection 117(3)

Omit “sub-subparagraph 117(2)(b)(i)(A)”, substitute “subparagraph 117(2)(b)(i)”.

39 Subsections 117A(3A) and (3B)

Omit “sub-subparagraph 117(2)(b)(i)(C)”, substitute “subparagraph 117(2)(b)(ib)”.

Family Law Act 1975

40 Subsection 4(1) (definition of *contact order*)

Repeal the definition.

41 Subsection 4(1) (definition of *has*)

Repeal the definition.

42 Subsection 4(1) (definition of *made in favour*)

Repeal the definition, substitute:

made in favour, in relation to a parenting order (other than a child maintenance order), has the meaning given by subsection 64B(6).

43 Subsection 4(1)

Insert:

overseas child order means:

- (a) an order made by a court of a prescribed overseas jurisdiction that:
 - (i) however it is expressed, has the effect of determining the person or persons with whom a child who is under 18 is to live, or that provides for a person or persons to have custody of a child who is under 18; or
 - (ii) however it is expressed, has the effect of providing for a person or persons to spend time with a child who is under 18; or
 - (iii) however it is expressed, has the effect of providing for contact between a child who is under 18 and another person or persons, or that provides for a person or persons to have access to a child who is under 18; or
 - (iv) varies or discharges an order of the kind referred to in subparagraph (i), (ii) or (iii), including an order of that kind made under this Act; or
- (b) an order made for the purposes of the Convention referred to in section 111B by a judicial or administrative authority of a

convention country (within the meaning of the regulations made for the purposes of that section).

44 Subsection 4(1) (definition of *residence order*)

Repeal the definition.

45 Subsection 4(1) (definition of *specific issues order*)

Repeal the definition.

46 Subsection 4(1)

Insert:

State child order means an order made under the law of a State:

- (a) that (however it is expressed) has the effect of determining the person or persons with whom a child who is under 18 is to live, or that provides for a person or persons to have custody of a child who is under 18; or
- (b) that (however it is expressed) has the effect of providing for a person or persons to spend time with a child who is under 18; or
- (c) that (however it is expressed) has the effect of providing for contact between a child who is under 18 and another person or persons, or that provides for a person or persons to have access to a child who is under 18.

47 Subsection 4(1)

Insert:

Subdivision C parenting order, when used in Division 13 of Part VII, means a parenting order to the extent to which it deals with:

- (a) whom a child is to live with; or
- (b) whom a child is to spend time with; or
- (c) who is to be responsible for a child's day-to-day care, welfare and development.

48 Subsection 26B(1A)

Repeal the subsection, substitute:

(1A) An *excluded child order* is:

- (a) a parenting order to the extent to which it provides that:
 - (i) a child is to live with a person; or
 - (ii) a child is to spend time with a person; or
 - (iii) a child is to communicate with a person; or
 - (iv) a person is to have parental responsibility for a child; or
 - (b) an order in relation to the welfare of a child;
- other than:
- (c) a parenting order made under paragraph 70NEB(1)(b) or an order made under paragraph 70NFB(2)(c) that has the same effect as such a parenting order; or
 - (d) an order until further order; or
 - (e) an order made in undefended proceedings; or
 - (f) an order made with the consent of all the parties to the proceedings.

49 Subsection 37A(2A)

Repeal the subsection, substitute:

- (2A) An *excluded child order* is:
- (a) a parenting order to the extent to which it provides that:
 - (i) a child is to live with a person; or
 - (ii) a child is to spend time with a person; or
 - (iii) a child is to communicate with a person; or
 - (iv) a person is to have parental responsibility for a child; or
 - (b) an order in relation to the welfare of a child;
- other than:
- (c) an order until further order; or
 - (d) an order made in undefended proceedings; or
 - (e) an order made with the consent of all the parties to the proceedings.

50 Section 60C (table item 6)

Omit “, other than child maintenance orders” (first occurring), substitute “(other than child maintenance orders) after attending, if necessary, family dispute resolution (see section 60I)”.

51 Section 60C (table item 6)

Omit “residence orders, contact orders and specific issues orders”, substitute “parenting orders, other than child maintenance orders”.

52 Section 60C (table item 11)

Omit “contact orders etc.”, substitute “parenting orders”.

53 Section 60C (table item 13A)

Omit “for contact forgone”, substitute “a person for time that a child did not spend with the person, or for time that a child did not live with the person,”.

54 Subsection 63C(4)

Repeal the subsection, substitute:

- (4) Provisions of a parenting plan that deal with matters other than the maintenance of a child are *child welfare provisions*.

55 Subsection 63C(5)

Omit “(c)”, substitute “(f)”.

56 Subsection 63F(3)

Repeal the subsection, substitute:

- (3) The child welfare provisions have effect, subject to subsections (5) and (6), as if they were provisions of a parenting order.

Note: Provisions of this Act relevant to the child welfare provisions having effect as provided in this subsection include:

- (a) Subdivisions C, D and E of Division 6 of this Part (dealing with obligations created by parenting orders (other than child maintenance orders)); and
- (b) Division 13A of this Part and Part XIII (dealing generally with enforcement of orders and sanctions for contravening orders); and
- (c) subsection 65D(2) (providing for discharge, variation, suspension and revival of parenting orders other than child maintenance orders); and
- (d) other provisions of this Act (including subsection 64B(6)) that refer to parenting orders.

57 Paragraph 65A(b)

Repeal the paragraph, substitute:

- (b) the general obligations created by parenting orders, other than child maintenance orders (Subdivision C); and

58 Subsection 65G(1)

Repeal the subsection, substitute:

- (1) This section applies if:
 - (a) a court proposes to make a parenting order that deals with whom a child is to live with; and
 - (b) under the order, the child would not live with a parent, grandparent or other relative of the child; and
 - (c) the court proposes to make that order with the consent of all the parties to the proceedings.

- (1A) This section also applies if:
 - (a) a court proposes to make a parenting order that deals with the allocation of parental responsibility for a child; and
 - (b) under the order, no parent, grandparent or other relative of the child would be allocated parental responsibility for the child; and
 - (c) the court proposes to make that order with the consent of all the parties to the proceedings.

Note: The heading to section 65G is altered by omitting “**residence order or specific issues order**” and substituting “**parenting order about whom a child lives with or the allocation of parental responsibility**”.

59 Paragraph 65K(1)(a)

Repeal the paragraph, substitute:

- (a) a parenting order is in force that provides that a child is to live with one of the child’s parents; and

Note: The heading to section 65K is altered by omitting “**that is or includes residence order**” and substituting “**that deals with whom a child lives with**”.

60 Subsection 65K(3)

Repeal the subsection, substitute:

- (3) The surviving parent, or another person (subject to section 65C), may apply for a parenting order that deals with the person or persons with whom the child is to live.

61 Subdivision C of Division 6 of Part VII (heading)

Repeal the heading, substitute:

Subdivision C—General obligations created by certain parenting orders

62 Subsection 65M(1)

Repeal the subsection, substitute:

- (1) This section applies to a parenting order that is in force in relation to a child to the extent to which the order deals with whom the child is to live with.

Note: The heading to section 65M is altered by omitting “**residence order**” and substituting “**parenting order that deals with whom a child lives with**”.

63 Sections 65N and 65P

Repeal the sections, substitute:

65N General obligations created by parenting order that deals with whom a child spends time with

- (1) This section applies to a parenting order that is in force in relation to a child to the extent to which the order deals with whom the child is to spend time with.
- (2) A person must not:
 - (a) hinder or prevent a person and the child from spending time together in accordance with the order; or
 - (b) interfere with a person and the child benefiting from spending time with each other under the order.

65NA General obligations created by parenting order that deals with whom a child communicates with

- (1) This section applies to a parenting order that is in force in relation to a child to the extent to which the order deals with whom the child is to communicate with.
- (2) A person must not:
 - (a) hinder or prevent a person and the child from communicating with each other in accordance with the order; or

- (b) interfere with the communication that a person and the child are supposed to have with each other under the order.

65P General obligations created by parenting order that allocates parental responsibility

- (1) This section applies to a parenting order that is in force in relation to a child to the extent to which the order allocates parental responsibility for the child to a person (the *carer*).
- (2) A person must not hinder the carer in, or prevent the carer from, discharging that responsibility.

64 Paragraphs 65Q(1)(a) and (b)

Repeal the paragraphs, substitute:

- (a) a parenting order provides that:
- (i) a child is to live with a person; or
 - (ii) a child is to spend time with a person; or
 - (iii) a child is to communicate with a person; and
- (b) a court having jurisdiction under this Part is satisfied, on application by the person referred to in paragraph (1)(a), that there are reasonable grounds for believing that a person (the *alleged offender*) has contravened section 65M, 65N or 65NA in relation to the order; and

65 Subsection 65X(1)

Repeal the subsection, substitute:

- (1) In this Subdivision:

parenting order to which this Subdivision applies means a parenting order to the extent to which it provides, or would provide, that:

- (a) a child is to live with a person; or
- (b) a child is to spend time with a person; or
- (c) a child is to communicate with a person; or
- (d) a person is to have parental responsibility for a child.

66 Subsection 65Y(1)

Schedule 8 Removal of references to residence and contact

Part 1 Amendments

Omit “If a residence order, a contact order or a care order (the *Part VII order*)”, substitute “If a parenting order to which this Subdivision applies”.

Note: The heading to section 65Y is altered by omitting “**residence order, contact order or care order has**” and substituting “**certain parenting orders have**”.

67 Paragraph 65Y(2)(a)

Omit “Part VII order”, substitute “order referred to in subsection (1)”.

68 Paragraph 65Y(2)(b)

Omit “Part VII order”, substitute “order referred to in subsection (1)”.

69 Subsection 65Z(1)

Omit “a residence order, a contact order or a care order”, substitute “a parenting order to which this Subdivision applies”.

Note: The heading to section 65Z is altered by omitting “**residence order, contact order or care order**” and substituting “**certain parenting orders**”.

70 Paragraph 65ZA(1)(a)

Repeal the paragraph, substitute:

- (a) a parenting order to which this Subdivision applies is in force; and

Note: The heading to section 65ZA is altered by omitting “**residence order, contact order or care order**” and substituting “**certain parenting orders**”.

71 Paragraph 65ZA(1)(b)

Omit “Part VII”.

72 Subsections 65ZA(3) and (4)

Omit “Part VII”.

73 Paragraph 65ZB(1)(a)

Omit “a residence order, a contact order or a care order”, substitute “a parenting order to which this Subdivision applies”.

Note: The heading to section 65ZB is altered by omitting “**residence order, contact order or care order**” and substituting “**certain parenting orders**”.

74 Paragraphs 67K(1)(a) to (c)

Repeal the paragraphs, substitute:

- (a) a person with whom the child is to live under a parenting order; or
- (b) a person with whom the child is to spend time under a parenting order; or
- (c) a person with whom the child is to communicate under a parenting order; or
- (caa) a person who has parental responsibility for the child under a parenting order; or

75 Subparagraphs 67Q(a)(ii) and (iii)

Repeal the subparagraphs, substitute:

- (ii) a person with whom the child is to live under a parenting order; or
- (iii) a person with whom the child is to spend time under a parenting order; or
- (iv) a person with whom the child is to communicate under a parenting order; or
- (v) a person who has parental responsibility for the child;

76 Subparagraphs 67Q(d)(ii) to (iv)

Repeal the subparagraphs, substitute:

- (ii) a person described in subparagraph (a)(ii), (iii), (iv) or (v); or
- (iii) some other person on behalf of a person described in subparagraph (i) or (ii);

77 Paragraphs 67T(a) to (c)

Repeal the paragraphs, substitute:

- (a) a person with whom the child is to live under a parenting order; or
- (b) a person with whom the child is to spend time under a parenting order; or
- (c) a person with whom the child is to communicate under a parenting order; or
- (caa) a person who has parental responsibility for the child under a parenting order; or

78 Subparagraphs 68B(1)(b)(ii) and (iii)

Repeal the subparagraphs, substitute:

- (ii) a person with whom the child is to live under a parenting order; or
- (iii) a person with whom the child is to spend time under a parenting order; or
- (iv) a person with whom the child is to communicate under a parenting order; or
- (v) a person who has parental responsibility for the child; or

79 Paragraph 69Z(2)(c)

Repeal the paragraph, substitute:

- (c) a person who, under a parenting order, has responsibility for the child's long-term or day-to-day care, welfare and development.

80 Paragraph 69ZA(1)(c)

Repeal the paragraph, substitute:

- (c) a person who, under a parenting order, has responsibility for the child's long-term or day-to-day care, welfare and development.

81 Subparagraph 69ZH(3)(a)(ii)

Repeal the subparagraph, substitute:

- (ii) whom the child lives with, whom the child spends time with and other aspects of the care, welfare and development of the child; and

82 Subsection 70J(1)

Omit "a residence order, a contact order or a care order", substitute "a Subdivision C parenting order".

83 Paragraph 70J(1)(a)

Repeal the paragraph, substitute:

- (a) each person:
 - (i) with whom the child is supposed to live; or
 - (ii) who is to spend time with the child; or
 - (iii) who is to have contact with the child; or
 - (iv) who has rights of custody or access in relation to the child;

under the overseas order consents to the exercise of jurisdiction by the court in the proceedings; or

84 Subsection 70J(2)

Omit “a residence order, a contact order or a care order” (wherever occurring), substitute “a Subdivision C parenting order”.

85 Paragraph 70J(2)(b)

Omit “the residence order, contact order or care order”, substitute “the Subdivision C parenting order”.

86 Paragraph 70K(b)

Omit “a residence order, a contact order or a care order”, substitute “a Subdivision C parenting order”.

Note: The heading to section 70K is altered by omitting “residence order, contact order or care order” and substituting “Subdivision C parenting order”.

87 Subsection 70L(1) (paragraph (a) of the definition of *Australian child order*)

Repeal the paragraph, substitute:

- (a) a Subdivision C parenting order; or

88 Subsection 70L(1) (paragraph (a) of the definition of *responsible person*)

Repeal the paragraph, substitute:

- (a) with whom the child is supposed to live under the order; or
- (aa) whom the child is supposed to spend time with under the order; or
- (ab) whom the child is supposed to have contact with under the order; or

89 Paragraph 70M(1)(a)

Repeal the paragraph, substitute:

- (a) a court in Australia makes, in relation to a child who is under 18:
 - (i) a parenting order, other than a child maintenance order; or
 - (ii) a State child order; and

90 Paragraph 70M(3)(a)

Repeal the paragraph, substitute:

- (a) a person with whom the child is supposed to live under the order; or
- (aa) a person with whom the child is supposed to spend time under the order; or
- (ab) a person with whom the child is supposed to have contact under the order; or

91 Subsection 70N(1)

Repeal the subsection, substitute:

- (1) The regulations may make provision for and in relation to the sending to a prescribed overseas jurisdiction of copies of, and documents relating to:
 - (a) a parenting order, other than a child maintenance order; or
 - (b) a State child order;that relates to a child to whom an overseas child order relates.

92 Paragraphs 79A(1AA)(b) and (c)

Repeal the paragraphs, substitute:

- (b) a parenting order provides that:
 - (i) the child is to live with the person; or
 - (ii) the person has parental responsibility for the child.

93 Paragraphs 90K(2)(b) and (c)

Repeal the paragraphs, substitute:

- (b) a parenting order provides that:
 - (i) the child is to live with the person; or
 - (ii) the person has parental responsibility for the child.

94 Subparagraph 91(1)(b)(i)

Repeal the subparagraph, substitute:

- (i) a parenting order, other than a child maintenance order;
or

95 Paragraphs 92A(2)(ba) and (bb)

Repeal the paragraphs, substitute:

- (ba) a person with whom the child is to live under a parenting order;
- (bb) a person who has parental responsibility for the child under a parenting order;

96 Paragraph 111B(1A)(c)

Repeal the paragraph, substitute:

- (c) relating to a Central Authority within the meaning of the regulations applying on behalf of another person for a parenting order that deals with the person or persons with whom a child is to spend time or communicate if the outcome of the proceedings is that the child is not to be returned under the Convention.

97 Paragraph 111B(4)(b)

Repeal the paragraph, substitute:

- (b) subject to any order of a court for the time being in force, a person:
 - (i) with whom a child is to live under a parenting order; or
 - (ii) who has parental responsibility for a child under a parenting order;should be regarded as having rights of custody in respect of the child; and

98 Paragraph 111B(4)(d)

Repeal the paragraph, substitute:

- (d) subject to any order of a court for the time being in force, a person:
 - (i) with whom a child is to spend time under a parenting order; or
 - (ii) with whom a child is to communicate under a parenting order;should be regarded as having a right of access to the child.

99 Subsection 111B(4) (note)

Repeal the note, substitute:

Note: The references in paragraphs (b) and (d) to parenting orders also cover provisions of parenting agreements registered under section 63E (see section 63F, in particular subsection (3)).

100 Section 111CW

Repeal the section, substitute:

111CW Court proceedings dealing with whom a child spends time with

- (1) A court hearing proceedings under Part VII (Children) or regulations made for the purposes of section 111B dealing with:
 - (a) whom a child is to spend time with; or
 - (b) whom a child is to communicate with;must admit into evidence and consider the findings (if any) of a competent authority of a Convention country on the suitability of a parent as a person for the child to spend time with or communicate with.
- (2) The court may adjourn the proceedings pending the outcome of a request by a parent of the child to a competent authority of a Convention country for a finding on the suitability of the parent as a person for the child to spend time with or communicate with.
- (3) On the application of a parent who is an Australian resident seeking to have, or to continue to have, a child spend time with or communicate with the parent, a court may:
 - (a) admit evidence; and
 - (b) make a finding on the suitability of that parent as a person for the child to spend time with or communicate with; and
 - (c) specify conditions on which the child is to spend time with or communicate with the person.

101 Paragraph 117A(1)(a)

Repeal the paragraph, substitute:

- (a) a court has found, for the purposes of Division 13A of Part VII, that a person has, by taking a child away from another person or by refusing or failing to deliver a child to another person, contravened a parenting order to the extent to which the order provides that:
 - (i) a child is to live with a person; or
 - (ii) a child is to spend time with a person; or
 - (iii) a child is to communicate with a person;

Migration Act 1958

102 Subsection 192(8)

Repeal the subsection, substitute:

- (8) In paragraph (7)(b), ***guardian*** includes a person who is responsible, under a parenting order (within the meaning of the *Family Law Act 1975*), for the detainee's long-term care, welfare and development.

Part 2—Savings

103 Definitions

In this Part:

commencement means the commencement of this item.

new Act means the *Family Law Act 1975* as in force after commencement.

old Act means the *Family Law Act 1975* as in force immediately before commencement.

104 Saving of regulations

Despite the repeal of a provision of the old Act specified in the following table, regulations that:

- (a) were made for the purposes of that provision of the old Act; and
- (b) were in force immediately before commencement;

continue to have effect on and after commencement as if those regulations had been made for the purposes of the corresponding provision of the new Act that is specified in the table in relation to that provision of the old Act:

Saving regulations made under provisions of old Act		
Item	Provision of old Act	Corresponding provision of new Act
1	definition of <i>overseas child order</i> in section 70F	definition of <i>overseas child order</i> in subsection 4(1)
2	subsection 70N(1)	subsection 70N(1)
3	paragraph 111B(1A)(c)	paragraph 111B(1A)(c)

Schedule 9—Relocation of defined terms used in Part VII

Part 1—Amendments

A New Tax System (Family Assistance) Act 1999

1 Subsection 3(1) (paragraph (b) of the definition of *family law order*)

Omit “section 60D”, subsection “section 4”.

Australian Passports Act 2005

2 Subsection 6(2)

Omit “of section 70F”.

Child Support (Assessment) Act 1989

3 Subsection 8A(7) (paragraph (b) of the definition of *court order*)

Omit “section 60D”, subsection “section 4”.

Child Support (Registration and Collection) Act 1988

4 Subsection 4(1) (definition of *child of a marriage*)

Omit “Part VII of”.

5 Subsection 4(1) (definition of *step-parent*)

Omit “Part VII of”.

Family Law Act 1975

6 Subsection 4(1)

Insert:

adopted, in relation to a child, means adopted under the law of any place (whether in or out of Australia) relating to the adoption of children.

7 Subsection 4(1)

Insert:

alleged contravention, in Subdivision D of Division 6 of Part VII, means the alleged contravention because of which the alleged offender is arrested.

8 Subsection 4(1)

Insert:

alleged offender, in Subdivision D of Division 6 of Part VII, means the person who is arrested.

9 Subsection 4(1)

Insert:

applied provisions, when used in Division 13A of Part VII in relation to a community service order made under paragraph 70NFB(2)(a), means the provisions of the laws of a State or Territory (as modified by regulations made under subsection 70NFC(4)), that, because of regulations made under that subsection, apply in relation to the order.

10 Subsection 4(1)

Insert:

appropriate authority, when used in Part VII in relation to a Commonwealth instrumentality, means a person:

- (a) who in, or in relation to, the instrumentality:
 - (i) is an SES employee or acting SES employee; or
 - (ii) holds an office or position that is at a level equivalent to that of an SES employee; or
- (b) who is authorised in writing by the principal officer of the instrumentality to provide information under Commonwealth information orders.

11 Subsection 4(1)

Insert:

arresting person means the person who arrests the alleged offender.

12 Subsection 4(1)

Insert:

artificial conception procedure includes:

- (a) artificial insemination; and
- (b) the implantation of an embryo in the body of a woman.

13 Subsection 4(1)

Insert:

birth includes stillbirth.

14 Subsection 4(1)

Insert:

captain, in relation to an aircraft or vessel, means the person in charge or command of the aircraft or vessel.

15 Subsection 4(1)

Insert:

child:

- (a) in Part VII, includes an adopted child and a stillborn child; and
- (b) in Subdivision E of Division 6 of that Part, means a person who is under 18 (including a person who is an adopted child).

16 Subsection 4(1)

Insert:

childbirth maintenance period, in relation to the birth of a child, means the period that begins on the day mentioned in paragraph (a) or (b) and ends 3 months after the child's birth:

- (a) if the mother:
 - (i) works in paid employment; and

- (ii) is advised by a medical practitioner to stop working for medical reasons related to her pregnancy; and
 - (iii) stops working after being so advised and more than 2 months before the child is due to be born;
- the period begins on the day on which she stops working; or
- (b) in any other case—the period begins on the day that is 2 months before the child is due to be born.

18 Subsection 4(1)

Insert:

child maintenance provisions, in relation to a parenting plan, has the meaning given by subsection 63C(5).

19 Subsection 4(1)

Insert:

child welfare law means a law of a State or Territory prescribed, or included in a class of laws of a State or Territory prescribed, for the purposes of this definition.

20 Subsection 4(1)

Insert:

child welfare officer, in relation to a State or Territory, means:

- (a) a person who, because he or she holds, or performs the duties of, a prescribed office of the State or Territory, has responsibilities in relation to a child welfare law of the State or Territory; or
- (b) a person authorised in writing by such a person for the purposes of Part VII.

21 Subsection 4(1)

Insert:

child welfare provisions, in relation to a parenting plan, has the meaning given by subsection 63C(4).

22 Subsection 4(1)

Insert:

Commonwealth information order has the meaning given by subsection 67J(2).

23 Subsection 4(1)

Insert:

community service order has the meaning given by subsection 70NFC(3).

24 Subsection 4(1)

Insert:

contravened an order, in Division 13A of Part VII, has the meaning given by section 70NAC.

25 Subsection 4(1)

Insert:

de facto relationship means the relationship between a man and a woman who live with each other as spouses on a genuine domestic basis although not legally married to each other.

26 Subsection 4(1)

Insert:

Department, in Subdivision C of Division 8 of Part VII, means a Department of State of the Commonwealth.

27 Subsection 4(1)

Insert:

education includes apprenticeship or vocational training.

28 Subsection 4(1)

Insert:

excluded order means:

- (a) an interim order; or
- (b) an order made in favour of a person where:
 - (i) the order was made on the application of the person; and

- (ii) notice of making the application was not served on any other person; and
- (iii) no other person appeared at the hearing of the application.

29 Subsection 4(1)

Insert:

family violence order means an order (including an interim order) made under a prescribed law of a State or Territory to protect a person from family violence.

30 Subsection 4(1)

Insert:

guardian, when used in Part VII in relation to a child, includes a person who has been granted (whether alone or jointly with another person or other persons) guardianship of the child under the law of the Commonwealth or of a State or Territory.

31 Subsection 4(1)

Insert:

information about the child's location, in the context of a location order made or to be made by a court in relation to a child, means information about:

- (a) where the child is; or
- (b) where a person, who the court has reasonable cause to believe has the child, is.

32 Subsection 4(1)

Insert:

interests, when used in Part VII in relation to a child, includes matters related to the care, welfare or development of the child.

33 Subsection 4(1)

Insert:

location order has the meaning given by subsection 67J(1).

34 Subsection 4(1)

Insert:

medical expenses includes medical, surgical, dental, diagnostic, hospital, nursing, pharmaceutical and physiotherapy expenses.

35 Subsection 4(1)

Insert:

medical practitioner means a person registered or licensed as a medical practitioner under a law of a State or Territory that provides for the registration or licensing of medical practitioners.

36 Subsection 4(1)

Insert:

member of the family, in relation to a person, has, for the purposes of the definition of *step-parent*, paragraphs 60CC(3)(j) and (k) and section 60CF, the meaning given by subsection (1AB) of this section.

37 Subsection 4(1)

Insert:

order under this Act affecting children, in relation to a court, means:

- (a) a parenting order; or
- (b) an injunction granted by the court:
 - (i) under section 68B; or
 - (ii) under section 114 in so far as the injunction is for the protection of a child; or
- (c) an undertaking given to, and accepted by, the court:
 - (i) that relates to, or to the making of, an order or injunction referred to in paragraph (a) or (b) or a community service order referred to in paragraph (f); or
 - (ii) that relates to a bond referred to in paragraph (g); or
- (d) a subpoena issued under the applicable Rules of Court:
 - (i) that relates to, or to the making of, an order or injunction referred to in paragraph (a) or (b) or a community service order referred to in paragraph (f); or

- (ii) that relates to a bond referred to in paragraph (g);
being a subpoena issued to a party to the proceedings for the
order, injunction or bond, as the case may be; or
- (e) a registered parenting plan within the meaning of subsection
63C(6); or
- (f) a community service order made under paragraph
70NFB(2)(a); or
- (g) a bond entered into:
 - (i) under a parenting order; or
 - (ii) under paragraph 70NFB(2)(b); or
 - (iii) for the purposes of subsection 70NFG(6);
and includes an order, injunction, plan or bond that:
- (h) is an order under this Act affecting children made by another
court because of paragraph (a), (b), (e) or (g); and
- (i) has been registered in the first-mentioned court.

38 Subsection 4(1)

Insert:

parent, when used in Part VII in relation to a child who has been
adopted, means an adoptive parent of the child.

39 Subsection 4(1)

Insert:

parentage testing order has the meaning given by subsection
69W(1).

40 Subsection 4(1)

Insert:

parentage testing procedure means a medical procedure
prescribed, or included in a class of medical procedures prescribed,
for the purposes of this definition.

41 Subsection 4(1)

Insert:

parental responsibility, in Part VII, has the meaning given by
section 61B.

43 Subsection 4(1)

Insert:

pending, in Subdivision E of Division 6 of Part VII, has a meaning affected by section 65X.

44 Subsection 4(1)

Insert:

prescribed adopting parent, in relation to a child, means:

- (a) a parent of the child; or
- (b) the spouse of, or a person in a de facto relationship with, a parent of the child; or
- (c) a parent of the child and either his or her spouse or a person in a de facto relationship with the parent.

45 Subsection 4(1)

Insert:

prescribed child welfare authority, in relation to abuse of a child, means:

- (a) if the child is the subject of proceedings under Part VII in a State or Territory—an officer of the State or Territory who is responsible for the administration of the child welfare laws of the State or Territory, or some other prescribed person; or
- (b) if the child is not the subject of proceedings under Part VII—an officer of the State or Territory in which the child is located or is believed to be located who is responsible for the administration of the child welfare laws of the State or Territory, or some other prescribed person.

46 Subsection 4(1)

Insert:

primary order means an order under this Act affecting children and includes such order as varied.

47 Subsection 4(1)

Insert:

principal officer, when used in Subdivision C of Division 8 of Part VII in relation to a Commonwealth instrumentality, means:

- (a) if the regulations declare an office to be the principal office in respect of the instrumentality—the person holding, or performing the duties of, that office; or
- (b) the person who constitutes the instrumentality or who is entitled to preside at any meeting of the instrumentality, or of its governing body, at which the person is present.

48 Subsection 4(1)

Insert:

professional ethics includes:

- (a) rules of professional conduct; and
- (b) rules of professional etiquette; and
- (c) a code of ethics; and
- (d) standards of professional conduct.

49 Subsection 4(1)

Insert:

reasonable excuse for contravening an order includes the meanings given by section 70NAE.

50 Subsection 4(1)

Insert:

recovery order has the meaning given by section 67Q.

51 Subsection 4(1) (definition of *Registry Manager*)

Repeal the definition, substitute:

***Registry Manager*:**

- (a) except in Subdivision C of Division 8 of Part VII and section 67Z, means:
 - (i) in relation to the Family Court—the Registry Manager of a Registry of the Court; and
 - (ii) in relation to a court other than the Family Court—the principal officer of the court or any other appropriate officer of the court; and

- (b) in Subdivision C of Division 8 of Part VII, means:
- (i) in relation to the Family Court—the Registry Manager of the Registry of the Court; and
 - (ii) in relation to the Family Court of Western Australia—the Principal Registrar, a Registrar or a Deputy Registrar, of the court; and
 - (iii) in relation to any other court—the principal officer of the court.

52 Subsection 4(1)

Insert:

State, in Subdivision B of Division 13 of Part VII, includes a Territory.

53 Subsection 4(1)

Insert:

step-parent, in relation to a child, means a person who:

- (a) is not a parent of the child; and
- (b) is or has been married to a parent of the child; and
- (c) treats, or at any time during the marriage treated, the child as a member of the family formed with the parent.

54 After subsection 4(1)

Insert:

(1AB) For the purposes of:

- (a) the definitions of *family violence* and *step-parent* in subsection (1); and
- (b) paragraphs 60CC(3)(j) and (k); and
- (c) section 60CF;

a person (the *first person*) is a *member of the family* of another person (the *second person*) if:

- (d) the first person is or has been married to, or in a de facto relationship with, the second person; or
- (e) the first person is or has been a relative of the second person (as defined in subsection (1AC)); or
- (f) an order under this Act described in subparagraph (i) or (ii) is or was (at any time) in force:

- (i) a parenting order (other than a child maintenance order) that relates to a child who is either the first person or the second person and that is in favour of the other of those persons;
 - (ii) an order providing for the first person or the second person to have custody or guardianship of, or a right of access to, the other of those persons; or
 - (g) an order under a law of a State or Territory described in subparagraph (i) or (ii) is or was (at any time) in force:
 - (i) an order determining that the first person or the second person is or was to live with the other of those persons, or is or was to have custody or guardianship of the other of those persons;
 - (ii) an order providing for contact between the first person and the second person, or for the first person or the second person to have a right of access to the other of those persons; or
 - (h) the first person ordinarily or regularly resides or resided with the second person, or with another member of the family of the second person; or
 - (i) the first person is or has been a member of the family of a child of the second person.
- (1AC) For the purposes of subsection (1AB), a *relative* of a person is:
- (a) a father, mother, grandfather, grandmother, step-father or step-mother of the person; or
 - (b) a son, daughter, grandson, grand-daughter, step-son or step-daughter of the person; or
 - (c) a brother, sister, half-brother, half-sister, step-brother or step-sister of the person; or
 - (d) an uncle or aunt of the person; or
 - (e) a nephew or niece of the person; or
 - (f) a cousin of the person; or
 - (g) if the person is or was married—in addition to paragraphs (a) to (f), a person who is or was a relative, of the kind described in any of those paragraphs, of the person's spouse; or
 - (h) if the person is or was in a de facto relationship with another person—in addition to paragraphs (a) to (f), a person who would be a relative of a kind described in any of those

paragraphs if the persons in that de facto relationship were or had been married to each other.

55 Section 60D

Repeal the section.

56 Subsection 65R(1)

Omit "(1)".

57 Subsection 65R(2)

Repeal the subsection.

58 Section 67H

Repeal the section.

59 Section 70B

Repeal the section.

60 Section 70F

Repeal the section.

61 Subsection 70L(1) (paragraph (b) of the definition of *Australian child order*)

Omit "as defined in section 70B".

62 Subsection 92(1A)

Omit "(within the meaning of Part VII)".

63 Paragraph 109A(1)(a)

Omit "(within the meaning of Division 13A of Part VII)".

64 Subsection 112AP(9) (definition of *order under this Act*)

Omit "within the meaning of Division 13A of Part VII".

Part 2—Savings

65 Definitions

In this Part:

commencement means the commencement of this Schedule.

new Act means the *Family Law Act 1975* as in force after commencement.

old Act means the *Family Law Act 1975* as in force immediately before commencement.

66 Saving of regulations

Despite the repeal of a provision of the old Act specified in the following table, regulations that:

- (a) were made for the purposes of that provision of the old Act; and
- (b) were in force immediately before commencement;

continue to have effect on and after commencement as if those regulations had been made for the purposes of the corresponding provision of the new Act that is specified in the table in relation to that provision of the old Act:

Saving regulations made under provisions of old Act		
Item	Provision of old Act	Corresponding provision of new Act
1	definition of child welfare law in subsection 60D(1)	definition of child welfare law in subsection 4(1)
2	definition of child welfare officer in subsection 60D(1)	definition of child welfare officer in subsection 4(1)
3	definition of family violence order in subsection 60D(1)	definition of family violence order in subsection 4(1)
4	definition of parentage testing procedure in subsection 60D(1)	definition of parentage testing procedure in subsection 4(1)

Saving regulations made under provisions of old Act		
Item	Provision of old Act	Corresponding provision of new Act
5	paragraph (a) or (b) of the definition of <i>prescribed child welfare authority</i> in subsection 60D(1)	paragraph (a) or (b) of the definition of <i>prescribed child welfare authority</i> in subsection 4(1)
6	definition of <i>principal officer</i> in section 67H	definition of <i>principal officer</i> in subsection 4(1)

Schedule 10—Orders of non-judicial officers of State courts of summary jurisdiction

Family Law Act 1975

1 At the end of subsection 39(6)

Add:

Note: Under section 39A of the *Judiciary Act 1903*, the jurisdiction conferred by this subsection on a State court of summary jurisdiction may only be exercised by certain judicial officers of the court.

2 At the end of subsection 69J(1)

Add:

Note: Under section 39A of the *Judiciary Act 1903*, the jurisdiction conferred by this subsection on a State court of summary jurisdiction may only be exercised by certain judicial officers of the court.

3 After Part XIVA

Insert:

Part XIVB—Orders of non-judicial officers of State courts of summary jurisdiction

114MG Definitions

(1) In this Part:

federal family jurisdiction means jurisdiction in relation to matters arising under this Act.

ineffective order has the meaning given by section 114MH.

liability includes a duty or obligation.

non-judicial officer of a court of summary jurisdiction of a State means an officer of the court who is not a magistrate, or arbitrator,

of the kind referred to in paragraph 39(2)(d) of the *Judiciary Act 1903*.

proceedings includes an initiating application.

proceedings for the order in relation to an ineffective order means the proceedings in or in relation to which the order was purportedly made.

right includes an interest or status.

- (2) A reference in this Part to an ineffective order of a court of summary jurisdiction is a reference to an ineffective order that a non-judicial officer of that court purported to make.

114MH Meaning of *ineffective order*

- (1) A reference in this Part to an ***ineffective order*** is a reference to a purported order described in subsection (2). This subsection has effect subject to subsection (3) as it affects the meaning of a reference to an ineffective order in the context of a particular case.
- (2) An order that a non-judicial officer of a court of summary jurisdiction of a State has purported to make is an ***ineffective order*** if:
- (a) the officer purported to make the order before the commencement of this Part; and
 - (b) the order was made in the exercise, or purported exercise, of the court's federal family jurisdiction.
- (3) If a court, or a non-judicial officer of a court of summary jurisdiction of a State, has purported to affirm, vary, revoke, set aside, reverse, revive or suspend an ineffective order, a reference in this Part to the ineffective order is a reference to the order in the form in which, and to the extent to which, it purports or purported to have effect from time to time.

114MI Rights and liabilities declared in certain cases

The rights and liabilities of all persons are, by force of this section, declared to be, and always to have been, the same as if each ineffective order of a court of summary jurisdiction had been an

order made by that court, in the exercise of its federal family jurisdiction, in or in relation to the proceedings for the order.

114MJ Effect of declared rights and liabilities

- (1) A right or liability conferred, imposed or affected by section 114MI in relation to an ineffective order of a court of summary jurisdiction:
 - (a) is exercisable or enforceable; and
 - (b) is to be regarded as always having been exercisable or enforceable;as if it were a right or liability conferred, imposed or affected by an order made by that court, in the exercise of its federal family jurisdiction, in or in relation to the proceedings for the order.
- (2) The rights and liabilities conferred, imposed or affected by section 114MI include (but are not limited to) the right of a person who was a party to the proceeding or purported proceeding in which the ineffective order was made to appeal against that order.
- (3) In this section:

enforceable includes able to be dealt with by proceedings under:

 - (a) Division 13A of Part VII; or
 - (b) Division 2 of Part XIII A;relating to a contravention of an order.

114MK Effect of things done or omitted to be done under or in relation to rights and liabilities

- (1) Any act or thing done or omitted to be done before or after the commencement of this Part under or in relation to a right or liability conferred, imposed or affected by section 114MI in relation to an ineffective order of a court of summary jurisdiction:
 - (a) has the same effect, and gives rise to the same consequences, for the purposes of any written or other law; and
 - (b) is to be regarded as always having had the same effect, and given rise to the same consequences, for the purposes of any written or other law;as if it were done or omitted to be done to give effect to, or under the authority of, or in reliance on, an order made by that court, in

the exercise of its federal family jurisdiction, in or in relation to the proceedings for the order.

- (2) Subject to subsection (3), for the purposes of an enforcement law (see subsection (4)), any act or thing done or omitted to be done before or after the commencement of this Part:
 - (a) gives rise to the same consequences; and
 - (b) is to be regarded as always having given rise to the same consequences;as if each ineffective order of a court of summary jurisdiction were an order made by that court, in the exercise of its federal family jurisdiction, in or in relation to the proceedings for the order.
- (3) If, before the commencement of this Part, a court purported to convict a person of an offence against an enforcement law on the basis that an ineffective order was a valid order, nothing in this section is to be taken to validate or confirm that conviction.
- (4) In this section:

enforcement law means a provision of a law of the Commonwealth, other than a law relating to contempt of court, that sets out a consequence for a person if the person:

- (a) contravenes; or
- (b) acts in a specified way while there is in force; an order, or a particular kind of order, made by a court exercising federal family jurisdiction (whether or not the provision also applies to other orders of courts).

114ML Powers of courts in relation to declared rights and liabilities

- (1) A court may vary, revoke, set aside, revive or suspend a right or liability conferred, imposed or affected by section 114MI in relation to an ineffective order of a court of summary jurisdiction as if it were a right or liability conferred, imposed or affected by an order made by that court of summary jurisdiction, in the exercise of its federal family jurisdiction, in or in relation to the proceedings for the order.
- (2) In addition to its powers under subsection (1), a court (the ***review court***) also has power to make an order achieving any other result that could have been achieved if:

- (a) the ineffective order had been an order made by a court of summary jurisdiction, in the exercise of its federal family jurisdiction, in or in relation to the proceedings for the order; and
- (b) the review court had been considering whether:
 - (i) to vary, revoke, set aside, revive or suspend that order; or
 - (ii) to extend the time for the doing of anything in relation to the proceedings for the order; or
 - (iii) to grant a stay of the proceedings for the order.

114MM Proceedings for contempt

If (whether before, at or after the commencement of this Part) a person has:

- (a) interfered with a right conferred or affected by section 114MI in relation to an ineffective order of a court of summary jurisdiction; or
- (b) failed to satisfy or comply with a liability imposed or affected by section 114MI in relation to an ineffective order of a court of summary jurisdiction;

the interference or failure is, and is taken always to have been, a matter that can be dealt with in the same manner as if the interference or failure had been in relation to a right conferred or affected, or a liability imposed or affected, by a valid judgment of that court.

114MN Evidence

The court record, or a copy of the court record, of an ineffective order may be adduced in evidence to show the existence, nature and extent of each right or liability conferred, imposed or affected by section 114MI.

114MO Part does not apply to certain orders

Nothing in this Part applies to an order declared to be invalid by a court before the commencement of this Part.

114MP Jurisdiction of courts

- (1) Subject to subsection (3):
 - (a) jurisdiction is conferred on the Family Court and the Federal Magistrates Court; and
 - (b) the Family Court of a State is invested with federal jurisdiction;with respect to matters arising under this Part.
- (2) Subject to subsection (3), each court of summary jurisdiction of each State is invested with federal jurisdiction, and jurisdiction is conferred on each court of summary jurisdiction of each Territory, with respect to matters arising under this Part.
- (3) A court has jurisdiction in respect of a matter arising under this Part in relation to an ineffective order that relates to a matter arising under this Act (the *initial matter*) only if the court has jurisdiction in respect of the initial matter. The court's jurisdiction under this Part is subject to the same conditions and limitations as would apply to it in dealing with the initial matter.

*[Minister's second reading speech made in—
House of Representatives on 8 December 2005
Senate on 27 March 2006]*

(196/05)
