Australian Government
Attorney-General's Department

FAMILY COUNSELLORS

IN THE

FAMILY LAW SYSTEM

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Introduction

The following paper has been prepared by the Family Law Branch in the Attorney-General's Department to provide family counsellors, and others involved in the provision of services to families, with general information on their roles and responsibility in the family law system.

A range of other information material about the family law system is also available to assist family relationship professionals and the general public. This information can be obtained by visiting Family Relationship Online at <http://www.familyrelationships.gov.au> or by calling the Family Relationship Advice Line on 1800 050 321.

This material is provided to family counsellors for general information only and should not be relied upon for the purposes of a particular matter.

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1. Terminology

Family Counselling

Under the *Family Law Act 1975* (Family Law Act) 'Family counselling' is defined as a process in which a family counsellor helps one or more people to deal with personal or interpersonal issues relating to marriage, separation or divorce, including issues relating to the care of children.

To address concerns about whether 'family and child counselling' encompassed counselling of a child (as opposed to counselling of others in relation to a child), the definition explicitly states that 'family counselling' includes counselling of children.

The professionals who provide family counselling are termed 'family counsellors'.

Under section 10C(1) of the Family Law Act, a family counsellor is defined as either:

(a) a person who is accredited as a family counsellor under the Accreditation Rules,
(b) a person who is authorized to act on behalf of an organization designated by the Minister, or
(c)-(e) a person authorized to act as a family counsellor by the Family Court of Australia, the Federal Circuit Court of Australia or a Family Court of a State.

Equal Shared Parental Responsibility

When courts make a parenting order they are required to presume that, except in cases where there are issues of family violence or child abuse, it is in the best interests of the child for the parents to have equal shared parental responsibility for the child.

This does not mean that the child should spend equal time with each parent. Rather, it means that both parents have an equal role in making decisions about important long term issues that affect their children, such as schooling and health care.

Equal Time

If a court makes a parenting order that provides that a child's parents have equal shared parental responsibility, the court is required, under section 65DAA of the Family Law Act, to consider whether the child should spend equal time with both parents (if this is reasonably practicable and it is in the best interests of the child).

The factors that the court can take into account in determining what is reasonably practicable are set out at sub-section 65DAA(5) of the Family Law Act and include issues such as how far apart the parents live from each other, the parent's current and future capacity to implement an equal time arrangement and their ability to resolve difficulties that might arise.

If a court decides not to order that the child spend equal time with both parents, the court must consider whether the child spending substantial and significant time with each of the parents is in the child's best interests and is reasonably practicable.

Substantial and significant time

Substantial and significant time is defined at subsection 65DAA(3) of the Family Law Act to include day-to day routine activities and not just weekends and holidays. It includes days that fall on weekends or holidays and on weekdays. It also includes time that a child spends with a parent that allows the child or the parent to be involved in occasions or events that are of significance to the child or the parent.

2. Information provision obligations

2.1 Obligations on family counsellors

2.1.1 Provide information on services that assist reconciliation

Part IIIA of the Family Law Act sets out the obligations of specified individuals to inform people about non-court based family services and other important matters relating to family relationships.

Section 12G of the Family Law Act requires family counsellors, family dispute resolution practitioners and arbitrators who deal with a married person who is considering instituting proceedings for a divorce, or considering going to court in relation to proceedings about their children or their finances under the Family Law Act, to give that person (and, in appropriate cases, that person's spouse) documents containing certain 'prescribed information' about services available to help with a reconciliation between the parties to a marriage.

The 'prescribed information', set out at regulation 8A of the *Family Law Regulations 1984* (the Regulations) must include information on the family counselling and family dispute resolution services that may assist with a reconciliation of the parties to a marriage. This information can be easily obtained by searching Family Relationship Online or by contacting the Family Relationships Advice Line on 1800 050 321.

This prescribed information does not have to be provided if the practitioner has reasonable grounds to believe that the person has already been given these documents (for example, the person may have received the documents from a legal practitioner or from a family law court), or if the practitioner considers that there is no reasonable possibility of a reconciliation between the parties to the marriage.

2.1.2 Provide information about parenting plans

What is a parenting plan?

A parenting plan is an agreement that sets out parenting arrangements for children. A parenting plan may cover the day to day responsibilities of each parent, the practical

considerations of a child's daily life, as well as how parents will agree and consult on important, long-term issues, such as which schools children will attend.

A parenting plan, in itself, is not a legally enforceable agreement, and is different from a parenting order, which is made by a court. Parties to a parenting plan can ask the court to make 'consent orders' in the terms of that plan. The court will only make a consent order if it is satisfied that the terms of the plan are in the best interests of the child. Once made, consent orders are legally binding – they have the same effect as any other order made by a court.

Similarly, prior to 14 January 2004 it was possible to 'register' a parenting plan with the court. A registered parenting plan also has the same legal effect as a court order.

A parenting plan may be varied or revoked by agreement in writing between the parties to the agreement. A parenting plan may also be entered into altering previous court orders (subject to these court orders not expressly prohibiting this).

If parents proceed to court at any time, the court will be required to consider the terms of the most recent parenting plan when making a parenting order in relation to the child, if it is in the best interests of the child to do so. In order to be recognised by the court, a parenting plan must be in writing, dated and signed by both parents. It must be made free from any threat, duress or coercion.

In addition, when considering the best interests of the child, the court will also consider the extent to which both parents have complied with their obligations in relation to the child, which may include the terms of a parenting plan.

Provision of information on parenting plans

Section 60D, inserted in the Family Law Act by the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011,* sets out the obligations of advisers (that is, family counsellors, legal practitioners, family dispute resolution practitioners and family consultants) when giving advice or assistance to people about matters concerning their child in relation to the best interests of the child. This section places an obligation on advisers to:

- inform the person that the best interests of the child should be regarded as the paramount consideration, and
- encourage the person to act on the basis that the best interests of the child are best met by giving greater weight to the safety of the child than the child having a meaningful relationship with both of the child's parents.

The safety of a child includes the child being protected from physical or psychological harm from being subjected to, or exposed to abuse, neglect or family violence. The *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* inserts new definitions of family violence (section 4AB) and abuse (subsection 4(1)), which reflect a contemporary understanding of what family violence and abuse is by clearly setting out what behaviour is unacceptable, including physical and emotional abuse and the exposure of children to family violence. These changes took effect from 7 June 2012.

Section 63DA of the Family Law Act sets out additional obligations for advisers when giving advice to people in relation to parenting plans. There are two different types of information that must be provided under this section, depending on whether an adviser is advising people generally about arrangements for children after separation or providing specific advice in connection with the making of a parenting plan.

Subsection 63DA(1) places an obligation on advisers assisting or advising people about parental responsibility following the breakdown of a relationship to inform the people they are advising:

- that they could consider entering into a parenting plan, and

- about the services that are available to provide assistance to develop a plan.

Subsection 63DA(2) provides that when advising people about the making of a parenting plan, an adviser must inform the people:

- that where it is in the best interests of the child and reasonably practicable, they could consider as an option an arrangement where they **equally share the time** spent with the child, and
- that if an equal time arrangement is not appropriate, they could consider whether an arrangement where the child spends **substantial and significant time** with each person would be in the best interests of the child and reasonably practicable.

As set out above, '*substantial and significant time*' is defined at subsection 63DA(3). It ensures that the focus is not just on the amount of time that each parent spends with the child but also on the type of time that is spent. The definition encourages people to ensure that there is a mix of holidays, weekends and other days and that both parents are able to participate in the child's daily routine and in events that are significant to the child (like sporting events, birthdays and concerts). It also ensures that the child is able to participate in events significant to the parent such as Mothers' or Fathers' day, extended family weddings or christenings and birthdays.

The note at the end of subsection 63DA(2) makes clear that an adviser must only inform people that they could consider the options of the child spending equal time or substantial and significant time with each person. It does not require the adviser to provide advice as to whether such arrangements are practicable. However, the adviser may provide such advice if that is appropriate.

Subsection 63DA(2) also provides that when advising people about the making of a parenting plan, an adviser must inform the people:

- of the matters that may be dealt with in a parenting plan (these are set out at subsection 63C(2))
- that a parenting order made by a family law court after 1 July 2006 may be subject to a parenting plan that is subsequently made by both parents. This is due to the operation of subsection 64D.[1] Advisers must also inform their clients that the court is required (by section 65DAB) to consider the terms of the most recent parenting plan about a child when making a parenting order about that child, if it is in the best interests of the child to do so
- that it is desirable to include in a parenting plan provisions that deal with the form of consultations between the parties to the plan, the process for resolving disputes about the terms or operation of the plan, and the process to be used for changing the plan, and
- about the programs that are available to help people who experience difficulties in complying with parenting plans.

The intention of these paragraphs is to help people avoid having to take parenting matters to court by ensuring that when making a plan, they consider how they will consult with one another, resolve disputes and make changes to the plan as their child grows older and their needs change.

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[1] Section 64D provides that if a parenting order is made on or after 1 July 2006 setting out parenting arrangements, the parents can agree to change those arrangements by a parenting plan (unless the court order says that the order is not to be changed in this way). This makes it easier for parents to agree on parenting changes, knowing they will not be required to go back to court to change the parenting order each time.

The information relating to parenting plans that advisers are required to provide under this section can be provided in written form such as brochures or fact sheets. The Attorney-General's Department has prepared a brochure that can be used to meet this information provision requirement. It is available from the website.

2.1.3 Provide information in cases involving family violence or child abuse

Section 60I of the Family Law Act imposes a general requirement on people to attempt to resolve their disputes about children's matters (that is, matters that are dealt with under Part VII of the Family Law Act) before commencing a court process. The Family Law Act provides a number of exceptions to this requirement to ensure that people are not required to attend family dispute resolution in circumstances where it may not be appropriate, such as:

- where people are applying for a consent order
- where an application has been made for procedural or interim orders while the main proceedings are happening
- where there has been, or there is a risk of, family violence or child abuse
- in cases of contravention within 12 months of a court order. The court must be satisfied that a person has shown serious disregard for his or her obligations under that order
- where the matter is urgent. This may cover an application to give immediate protection to a child, or for the urgent location and recovery of a child, including cases of child abduction, and
- where a party is unable to participate effectively in dispute resolution. This covers circumstances such as incapacity or physical remoteness.

Section 60J of the Family Law Act aims to ensure that people who are not required to attend family dispute resolution due to child abuse or family violence can obtain information about the services and options that are available to them.

This information is to be obtained from family counsellors and family dispute resolution practitioners.

An applicant for an order concerning children will be required to indicate, in writing, whether they have, or have not, received the information.

People are not required to obtain this information where there is a risk of child abuse or family violence if the matter is delayed getting to court.

Information on relevant services can be obtained by searching Family Relationships Online or by contacting the Family Relationship Advice Line on 1800 050 321.

3. Confidentiality and inadmissibility of communications

3.1 Confidentiality

Sections 10D and 10H of the Family Law Act set out the circumstances in which communications made in family counselling (and family dispute resolution) must or may be disclosed.

Family counsellors must not disclose a communication made in family counselling unless the disclosure is required or authorised under the Family Law Act.

A family counsellor ***must*** disclose a communication made in family counselling if he or she reasonably believes that the disclosure is necessary for the purpose of complying with a law of the Commonwealth, a State or a Territory (eg to comply with legislation requiring mandatory disclosure of suspected child abuse).

A family counsellor ***may*** disclose a communication made in family counselling if he or she reasonably believes that the disclosure is necessary for the purpose of:

- protecting a child from the risk of physical or psychological harm
- preventing or lessening a serious and imminent threat to the life or health of a person
- reporting the commission, or preventing the likely commission, of an offence involving violence or a threat of violence to a person
- preventing or lessening a serious and imminent threat to the property of a person
- reporting the commission, or preventing the likely commission, of an offence involving intentional damage to the property of a person or a threat of damage to property
- assisting an independent children's lawyer to properly represent a child's interests.

In addition, a family counsellor may disclose a communication with the consent of the party who made the disclosure, each person who has parental responsibility for the child (usually but not always the parents) where that person is an adult, or, where the disclosure was made by a child who is under 18, if parents or a court consent to the disclosure.

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

The Family Law Act clarifies that the provision of a certificate by a family counsellor under paragraph 16(2A)(a) of the *Marriage Act 1961* is not prevented by the confidentiality requirement. Section 16 of the Marriage Act deals with the ability of judges to consent to the marriage of a minor in circumstances where consent has been refused by the minor's parents. Paragraph 16(2A)(a) provides that the judge must not consider the minor's request for consent unless there is a signed certificate from a family counsellor stating that the minor has received counselling in relation to the proposed marriage.

Information that is inadmissible as evidence due to the effect of sections 10E or 10J (explained below) does not become admissible merely because its disclosure is required or authorised sections 10D or 10H.

3.2 Admissibility

Sections 10E and 10J of the Family Law Act provide that a communication made in family counselling (and family dispute resolution) is not admissible in any court or proceedings, in any jurisdiction.

Additionally, a communication made when a professional consultation is being carried out on referral from a family counsellor is also inadmissible in any court or proceedings, in any jurisdiction.

In order to ensure that professionals to whom family counsellors make referrals are aware of the inadmissible status of communications made to them, family counsellors are required to inform relevant professionals of this fact when making a referral.

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

4. Accreditation of family counsellors

Section 10A of the Family Law Act allows the development of Accreditation Rules of persons as family counsellors. The purpose of accreditation is to ensure the provision of high quality family counselling services, and to recognise the professionalism of the sector.

At this time there are no accreditation rules for family counsellors. A list of designated family counselling organisations is available on the Attorney-General's Department website.

On 24 September 2007 the Ministerial Council on Education, Employment, Training and Youth Affairs endorsed the family relationship qualifications developed by the Community Services and Health Industry Skills Council (CSHISC).

The Graduate Diploma of Relationship Counselling is of particular relevance to counsellors working in agencies or independently who are providing counselling interventions for families and/or couples experiencing relationship issues of a complex nature. This includes those involved in the family law system. For more information please refer to the CSHISC website.