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on the

**Family Law Amendment (Shared Parental Responsibility) Bill  
2005**

to the

**House of Representatives Standing Committee on  
Legal and Constitutional Affairs**

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## 1. Introduction

*The quality of the relationships between mothers and fathers and their children will determine the destiny of Australia.*<sup>1</sup>

The Family Law Amendment (Shared Parental Responsibility) Bill 2005 (the Bill) proposes to amend the *Family Law Act 1975* (Cth) (the FLA) in order to implement a series of the recommendations from the report of the House of Representatives Standing Committee on Family and Community Affairs, entitled *Every Picture Tells A Story* (the Report). This report was released on 29 December 2003, and was intended to begin a cultural shift away from litigation towards cooperative parenting.<sup>2</sup>

On 23 June 2005, the Attorney-General, The Hon Philip Ruddock MP asked the House of Representatives Legal and Constitutional Committee to conduct an inquiry into the provisions of the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005, with the following terms of reference:

*Specifically, the Committee will consider whether these provisions are drafted to implement the measures set out in the Government's response to the House of Representatives Standing Committee on Family and Community Services inquiry into child custody arrangements in the event of family separation, titled Every Picture Tells a Story, namely to:*

- (a) *encourage and assist parents to reach agreement on parenting arrangements after separation outside of the court system where appropriate,*
- (b) *promote the benefit to the child of both parents having a meaningful role in their lives,*
- (c) *recognise the need to protect children from family violence and abuse, and*
- (d) *ensure that the court process is easier to navigate and less traumatic for the parties and children.*

## 2. Mothers and fathers

Underlying any discussion regarding the care of children is the need to provide them with the best environment for their healthy development. That optimal environment cannot be achieved except by ensuring that children have the loving example and instruction of a mother and a father.<sup>3</sup>

### 2.1 The need for a mother

Although most single parent families have only a mother,<sup>4</sup> studies of children who have spent a large amount of time in child care reveal the hazards of separating a child from his or her mother. When infants are placed in daycare for more than twenty hours a week, they are more likely to lack a secure attachment to their mother, and are more likely to be uncooperative, less popular, have poorer grades and study skills, and have lower self-esteem.<sup>5</sup>

But the poorer development of children who spend a lot of time away from their mothers cannot be explained away by the lack of personal attention in daycare centres. A study of affluent families that compared children who were cared for by their mother with children who were cared for by an employed

full time caregiver determined the latter group was more likely to have the same insecure relationship with their mothers.<sup>6</sup>

The effects of the absence of a mother are apparent not only in relation to infants, but also in relation to young children. A study found a higher incidence of hitting, kicking, threatening and arguing among those children between the ages of five and eight who had spent more time in daycare.<sup>7</sup> While children can spend more time away from their mother as they age, being confident in the mother's availability, responsiveness and helpfulness promotes the development of a secure attachment which can positively affect the child as they become an adolescent, young adult and parent.<sup>8</sup>

## **2.2 Need for a father**

The father has an important position in the family, which is illustrated by the damage which results from his absence. The bulk of single parent families have an absent father, and children from such a home, on average, obtain fewer years of education, are more likely to commit delinquent acts, engage in drug and alcohol abuse and have a lower socio-economic status.<sup>9</sup> Criminal activity is higher in a community where the father is generally absent, regardless of the level of poverty in that community.<sup>10</sup>

In Australia, a study concluded children with regular contact with their father were more cooperative and self-reliant in school, and more paternal contact is generally linked with better achievement in the first year of school.<sup>11</sup> A girl who has a good relationship with her father is also less likely to have difficulty relating to men in later life.<sup>12</sup>

In terms of mental health, a study of preschool children admitted to hospitals in New Orleans as psychiatric patients over a period of approximately three years concluded nearly 80 per cent came from fatherless homes. A study on admissions of teenagers to psychiatric hospitals determined only 16 per cent were living with both parents when they were admitted.

### ***Recommendation***

*As the example and instruction of a mother and father is necessary for the optimal development of a child, the court has a duty to maintain a child's contact with both their mother and their father.*

## **3. Parenting arrangements by mutual consent**

The most important arrangement that must be made after a separation is for the care of any children of the relationship. While this may seldom be a pleasant experience, the presence of bitterness and vindictiveness will further damage the relationships between each parent and their children. Ideally, separating mothers and fathers would agree to a fair arrangement guaranteeing that both the mother and the father will spend substantial time with the child, without interference of the court.

### **3.1 The bill proposes...**

The Bill proposes to promote shared parenting by encouraging people to take responsibility for themselves in a non-adversarial manner. The Bill specifically inserts into the objectives of the Act the need "to ensure 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."

The process for achieving these objectives is to prevent a court from hearing an application for a parenting order unless parents

have used a family dispute resolution service, such as mediation. There are exceptions to this rule where there are threats of violence or dangers of psychological harm. The intention is that initially the dispute resolution services will follow the Family Law Rules, and gradually the process will be taken over by the new Family Relationship Centres.

### **3.2 Our response...**

The process of mediation is a better alternative than a degeneration into an entrenched conflict where the mother and father contend against each other for the purpose of winning, regardless of the effect on their children. Ideally, parents should be able to come to agreement regarding the arrangements for parenting of their children, but the nature of the separation may prevent that discussion.

However, the effectiveness of a mediation process depends critically on the likely outcome if mediation fails and the matter is determined by the Family Court. If one party to the dispute believes that a court determination will be more favourable than a mediated settlement, any mediation is likely to be a sham.

For mediation to have a high likelihood of success, the Family Law Act must require the Family Court to ensure the separating father and mother have equal rights to the care, custody and guidance of their children to the maximum extent consistent with the best interests of the child. Furthermore, any departure from the parents having equal rights to the care, custody and guidance of their children should require clear and convincing evidence that such an outcome would not be in the best interests of the child.

#### ***Recommendation***

*The Bill should be amended to ensure that, in the event of mediation failing, the separating father and mother have equal rights to the care, custody and guidance of their children to the maximum extent consistent with the best interests of the child.*

*Furthermore, the Bill should allow any departure from the parents having equal rights to the care, custody and guidance of their children to be imposed by the Family Court only with clear and convincing evidence that such an outcome would not be in the best interests of the child.*

## **4. Maintaining involvement of both mother and father**

Underlying any discussion regarding the care of children is the need to provide them with the best environment for their healthy development. As the optimal environment for a child's development is created by biological parents who are married to each other,<sup>13</sup> the aim in the circumstances of separation or divorce should be to deviate from this ideal as little as possible. Therefore the mother, the father and the court have a duty to ensure that each child maintains contact and involvement of both their mother and their father.

### **4.1 The bill proposes...**

The Bill proposes to institute a presumption of joint parental responsibility, which means that decisions about major long-term issues for the child must be made by both the mother and the father, together. The mother and father are therefore required to consult and make a genuine effort to agree about major decisions, and a party who will not agree can apply to the court for a decision on a matter.

This presumption could be rebutted when the court has reasonable grounds to believe that one parent has committed violence or abuse, or the court deems that it is not in the best interests of the child. The court must also consider an order that a child spends substantial time with both mother and father, while considering the wishes of the parents and the practicality of spending time with each parent.

## 4.2 Our response...

As established above, the mother and father each perform specific and different roles in the development of a child, meaning that both are necessary for the optimal development of a child. While the separation of their mother and father will always have a negative impact on a child, the best situation that can be salvaged after a separation is that a child spends substantial time with both mother and father.

However shared responsibility does not do anything to maintain the involvement of both the mother and the father. The very concept dictates that a parent will have responsibility for their child, but absolutely no guarantee that they will have any contact with that child. The aim to maintain involvement in a child's life is worthless unless it involves contact with that child, for the mother and father can only nurture the healthy development of their children through contact with them.

The presumption of 50/50 shared custody was rejected in the Report in part because it would approach all families in the same manner without regard for individual practicalities. This reason is insufficient however, for the presumption should be only a presumption, not an absolute rule.

While equally shared custody may be impractical in some cases, it is the only fair starting point from which the parties can negotiate. If this presumption were instituted, mothers and fathers, or the courts, would modify the presumption to deal with individual needs. However the presumption is absolutely vital because it is the only way to legislate for reasonable certainty that mothers and fathers will both continue to have a contact with their children. Legislating this presumption would also indicate that the federal government takes seriously the importance of maintaining contact between children and both their mothers and fathers.

### ***Recommendation***

*The Bill should be amended to affirm that the interests of children, including those of separating or divorced parents, are normally best served by having equal access to the company, love and guidance of both father and mother.*

*The Bill should be amended to ensure that children of separating or divorced parents enjoy equal access to the company, love and guidance of both father and mother unless the parents mutually agree on other arrangements or unless clear and convincing evidence establishes that such an arrangement would not be in the best interests of the child.*

*Furthermore, the Bill should be amended to recognise that depriving a child of access to one of its parents can seriously prejudice the development of the child and should only be imposed if clear and convincing evidence shows that the child would be at risk of harm from such contact.*

## **5. Protection of children from violence and abuse**

Children are the most vulnerable members of our society and deserve to be protected from violence and abuse. The worthy aim of protecting children from violence and abuse has however resulted in a system where the mere suggestion of violence or abuse by one parent can be enough to separate the other parent from his or her children.

Although it might be claimed that such a position is necessary to act in a child's best interests, this argument is seriously flawed. As has been established above, a child develops best when in the household of its married mother and father. The separation of a child from either mother or father will have serious consequences for that child's development, which are obviously not in the best interests of the child.

The mere accusation of an ex-spouse or ex-partner should not be sufficient to separate the other parent from their child. The challenge is to find an appropriate balance between protecting a child from violence and abuse, and protecting a child from unwarranted separation from mother or father.

### **5.1 The bill proposes...**

The Bill would allow the court to remove legal rights and provisions whenever it deems that a parent is a perpetrator of violence or a form of abuse. In particular, clause 61DA of the Bill would allow the court to deny a parent responsibility for his or her child if the court:

- (a) is satisfied that “there are reasonable grounds to believe” the parent has abused a child or been violent,
- (b) is making an interim order, or
- (c) considers it would not be in the best interests of the child.

The standard of proof required is extraordinarily weak, since the court has the practice of applying the test of “lingering doubt”, which is significantly weaker than the civil standard of proof: *on the balance of probabilities*. It is considerably weaker than the criminal standard of proof: *beyond a reasonable doubt*.

Many parents would consider the denial of reasonable contact, care and guidance of their own children to be a more severe punishment than a jail sentence, which can only be imposed if a crime is proved beyond reasonable doubt. It is astounding, therefore that a parent accused of violence or abuse is denied the presumption of innocence and denied the normal requirement to prove the allegation.

### **5.2 Our response...**

Any claim that a child is suffering violence or any form of abuse must be treated seriously, in order to protect children. However an accused parent should also be entitled to the presumption of innocence and only penalised if an accusation is established by an appropriate standard of proof.

One approach would be for the Family Court to take into account an accusation of child abuse if the accused has been convicted of a related offence in another court.

Another approach would be for the Family Court itself to decide whether an accusation is supported by sufficient evidence. The standard of proof required should depend on whether or not the child is the biological offspring of the parent. Evidence is readily available that the incidence of child abuse by biological parents is much lower than by step-parents or other adults.<sup>14</sup> Consequently, the standard of proof required for an allegation of abuse by a biological parent should be higher than that for another adult.

Since the consequence of fracturing the relationship between a child and a biological parent is severe, an allegation of violence or abuse in this case should require the highest standard of proof: *beyond reasonable doubt*.

In the case of an allegation against an unrelated adult, such as a step-parent, the standard of proof should be *on the balance of probabilities*.

The Family Court should be empowered to deny an accused parent access to his or her own children only when the accusation is proved in accordance with the rigorous standards described above.

Furthermore, other unacceptable behaviour by a parent may render them unfit to have custody of their child. Such behaviour could include violence, drug abuse or other addictive behaviour including gambling, or infidelity including engagement homosexual activity or prostitution. Custody of a child may also be unacceptable if the parent is suffering from a mental illness diagnosed by a qualified psychiatrist.

### ***Recommendation***

*The Bill should be amended to allow the Family Court to order the separation of a child from his or her parent only if an allegation of child abuse, violence, drug abuse, infidelity, mental illness or other unacceptable behaviour is established by:*

- (a) a conviction for a related offence in another court,*
- (b) the allegation, in the case of a biological parent, being proved beyond reasonable doubt, or*
- (c) the allegation, in the case of a biologically unrelated adult, being proved on the balance of probabilities.*

## **6. A more navigable and less traumatic court process for everyone**

The end of a relationship is traumatic enough, but when there is significant dispute the parties are then subjected to the Family Court process in order to deal with divorce and arrangements regarding children. The court process in common law countries such as Australia is adversarial by nature and can have the effect of encouraging each parent to focus on winning the contest, rather than seeking the best interests of their children.

### **6.1 The bill proposes...**

The Bill proposes to make changes to the court process by instituting a series of principles for the courts to follow. The first principle is that the proceedings are focused on the child and the court may make orders to minimise stress on children, such as limiting lengthy times between hearing dates. The second principle is that the judicial officer controls the proceeding to make the court process more inquisitorial than adversarial, which will move the process away from the traditional adversarial approach of the common law.

The third principle is that the proceedings are to be conducted so that parents are encouraged to focus on their children and their ongoing relationship as parents. The court should act to minimise the level of conflict between parents in order to encourage cooperation between the mother and father. The last principle is that the process will be conducted quickly and informally, thus minimising contact with the court process.

### **6.2 Our response...**

While minimising the harm to children is a worthy goal, children will not be aided by a rapid procedure that denies them contact with their mother or their father. Furthermore, the court process should not be made quick and painless so as to avoid awareness of the grave consequences that flow from a divorce or separation. Lastly, the common law adversarial process has produced a better system of law than anywhere else in the world, and should not be abandoned lightly.

The better approach is therefore to introduce a two stage process for dealing with people who have chosen to go through the Family Court. The first stage is to require mediation between the parties, conducted

by an accredited private mediator, with the mediator's costs to be paid as a part of the settlement. There is no need for the Family Court to have its own rules dealing with mediators, as the concept of mediation is the same. The Supreme Court of Queensland has seen a massive reduction in cases going to trial since actively promoting mediation.<sup>15</sup>

After mediation, there will be three possible results. The first is that the parties have agreed together and the Family Court need only give assent to the agreement. The second is that there is a question of law that needs an answer prior to further mediation, and the third is that the mediator has issued a certificate that the parties are entrenched, and have therefore chosen to undergo the adversarial judicial process to reach a settlement.

### ***Recommendation***

*Concerns for trauma imposed on children and parents in the court process should be dealt with by requiring mediation prior to proceeding in the Family Court. A failed mediation would mean that the parties are entrenched and require a court to impose a settlement upon them. The Bill should be amended accordingly.*

## **7. Further considerations**

The following matters are important considerations in the application of the terms of reference, however they apply to more than one term. Accordingly, it is more convenient to deal with them separately.

### **7.1 Appeals to the high court**

The application of each of the terms of reference requires the court to apply the intent of the legislature, without a liberal interpretation due to bias. One example is that orders to penalise mothers for breaching parenting plans are rarely applied. As the cost of an appeal of such a decision to the High Court is usually prohibitive, the Family Court therefore operates with little supervision as it blatantly ignores the legislative direction to which it is supposed to be beholden.

The appropriate mechanism for the correction of a Family Court order is a High Court decision, and it is in the interest of good government that the highest judicial opinion in the land be available on such important issues. The government should therefore make available financial and legal assistance for an appeal to the High Court of Australia if a decision of the Family Court is apparently in breach of legislative direction.

### ***Recommendation***

*The federal government should make financial and legal assistance available to facilitate an appeal to the High Court, if a decision of the Family Court appears to be unjust and in breach of legislative direction through the Family Law Act.*

### **7.2 Certainty of paternity**

The first two terms of reference deal with the involvement of parents with children, but there have been many reported cases of a purported father discovering through underhanded application of a DNA test that the child for which he has been paying child support is another man's child. Apart from the injustice, the childless man is usually left without capacity to recover the money that he has paid out as a result of fraud.



### ***Recommendation***

*The Bill should be amended to enable a purported father to be able to demand a DNA test at any time in relation to a child in order to establish paternity.*

## **8. Conclusion**

Marriage and relationship breakdown in Australia is devastating our nation and has produced a generation of children who have little or no contact with one parent - usually the father. As both the mother and the father have important and distinct roles to play in the raising of a child, it is important for children to maintain contact with both parents even if they separate or divorce. The current application of family law in this country fails to recognise the importance of children maintaining contact with both parents.

While the federal government has attempted to address some of these concerns, the proposed amendments do not achieve a substantial improvement in the current situation. The chief concerns are that the Bill has not proposed any method of guaranteeing access to children for both mother and father, and that there is no new provision to enforce parenting orders.

Until deficiencies such as these are corrected, the federal government will not have addressed the crisis facing Australian parents and children and our society will continue to suffer the consequences. Members of federal parliament have consistently reported for years that they receive more complains about the unsatisfactory operation of the Family Court than on any other subject. The Commonwealth Government has the clear responsibility to address the contribution of the failed Family Law Act to huge social problems in Australia today and this responsibility should not be ignored.

## **9. References**

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