Chambers of the Hon. Diana Bryant
Chief Justice, Family Court of Australia

Submission to the Senate Legal and Constitutional Affairs Legislation Committee's Inquiry into the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011

28 April 2011

I welcome the opportunity to make a submission to the Senate Legal and Constitutional Affairs Legislation Committee's ("the Committee") Inquiry into the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011, which was referred to the Committee on 25 March 2011 for inquiry and report. This submission is made by me in my role as Chief Justice of the Family Court of Australia ("the Court"), in consultation with and on the advice of the Court's Law Reform Committee. The views contained in this submission are my own and do not reflect those of the Family Court more broadly.

I am generally supportive of the amendments contained in the Bill, which seek to provide better protection for children and families at risk of violence or abuse. However, there are aspects of the Bill that I believe could be improved.

Rather than comment on the various clauses of the Bill as they arise sequentially, my submission addresses what I consider to be the major issues of concern in Schedule 1. I do not intend to make any comment about the technical amendments in Schedule 2 of the Bill.

Application and transitional provisions

The Committee will note that all of the substantive provisions of the Bill, including the procedural and definitional changes, apply to proceedings whether instituted before, on or after commencement. The Committee may wish to note clause 45 in this regard. This means that, as of the day of commencement, the amendments will apply to proceedings that are part heard and where a hearing has concluded and judgment has been reserved but not delivered. I am troubled that litigants in such proceedings will be put to additional cost and be subject to delay as a result.

I say this because it seems to me that the requirements of procedural fairness dictate that the parties, the Independent Children's Lawyer ("ICL") where one has been appointed, and any interveners (for example, a state child welfare agency) would need to be given the opportunity to consider and make submissions as to the effect of the amendments on the proceedings and the implications for determining what arrangements are in the best interests of the child. In the ordinary course of events I would think that parties, any ICL, and any intervener would need to be permitted to amend the orders sought and to file further evidence. Updated family reports and other expert evidence could also be required. In part-heard matters, this would

necessitate applications for adjournments and I would have thought such applications would be granted. Parties to proceedings where judgment is reserved presumably would need to have the same opportunities afforded to them, or at the very least be able to make submissions about the effect of the amendments. On this issue the Committee may be assisted by the Full Court of the Family Court's decision in *Newlands & Newlands* (2007) 37 Fam LR 103.

Self evidently, this has the potential to put the parties to considerable expense in obtaining legal advice about the effect of the amendments and in the preparation and presentation of updating evidence. Should part-heard matters need to be adjourned, or concluded trials re-opened, that would obviously extend the length of trials and occasion delay in the delivery of reasons for judgment. Cases involving actual violence or abuse or the risk of harm to children are precisely those cases that need to be brought on quickly, heard in a timely manner and finalised so that appropriate protective arrangements can be put in place. It would be most unfortunate indeed if a consequence of the amendments, which are designed to improve responsiveness to family violence, was to place vulnerable children at risk of harm through delay in the court process.

Where parenting cases involving allegations of violence or abuse (or risk of same) are being appealed, I would anticipate that applications to adduce further evidence would be commonly made, with parties seeking to put material before the Full Court as to the effect of the amendments on their case on appeal. As the Committee would be aware, the Full Court's jurisdiction on appeal is partly appellate and partly original. The Full Court must decide the rights of the parties according to the facts and law as they exist at the date of the appeal. Section 93A of the *Family Law Act 1975* (Cth) ("the Act") provides the Court with discretion to receive further evidence upon the hearing of the appeal. Applications to adduce further evidence increase the time taken to hear the appeal and would add to the workload of the Appeal Division at a time when its numbers are already diminished.

I appreciate that the effect on the Court arising from the proposed application and transitional provisions would dissipate over time. However, I believe that the potential difficulties I have drawn the Committee's attention to could be avoided by the Bill being amended to commence on Royal Assent or by proclamation and to apply only to those applications filed after the commencement date.

I wish to draw the Committee's attention to a drafting error in the heading of clause 45. It omits to say that the amendments apply to proceedings instituted before commencement.

Section 67ZBA and "interested persons"

The Bill proposes the repeal of section 60K and its substitution by sections 67ZBA and 67ZBB. However, if a Form 4 Notice of Child Abuse or Family Violence ("Form 4") is filed in accordance with section 60K prior to the commencement date, section

60K continues to have effect. That means that for an appreciable period of time, there will be two processes involving 'special procedures' running in tandem. I anticipate that this will cause confusion for Court users.

The effect of clause 46 of the Bill is to ensure that the obligations placed on the Court by section 60K to act promptly will continue to apply to any document filed in the Court in accordance with section 60K prior to the commencement of Schedule 1 of the Bill. However, it is unclear whether a party to an application to which section 60K applies initiated prior to the commencement date and who has therefore made an allegation will, in addition to having filed a Form 4, also be required to file a prescribed notice under section 67ZBA in respect of the same allegation. To avoid confusion and to ensure that there remains appropriate delineation between section 60K matters and section 67ZBA matters, I suggest that the transitional provisions be amended to state that section 67ZBA does not apply to ongoing section 60K proceedings. Section 67ZBA should be expressed to apply only to those proceedings initiated on or after the commencement date. This would seem to mean that if fresh allegations were made in the course of ongoing section 60K proceedings, a Form 4 rather than a prescribed notice would need to be filed.

I also note that the proposed new 67ZBA (and section 67Z, which is being amended to be expressed in similar terms) applies when an "interested person" in proceedings for an order makes an allegation of violence or risk of violence. The Bill defines an "interested person" as a party to the proceedings, an ICL representing the interests of a child in the proceedings or any other person prescribed by the regulations. An "interested person" who makes an allegation must file a notice in the prescribed form. Currently, section 60K only applies where a party makes the allegation but rule 2.04B of the Family Law Rules 2004 (Cth) extends the requirement for the filing of a Form 4 to an ICL and an intervener. The Bill picks up the requirement for an ICL to file a Form 4 but arguably goes further than requiring interveners to file a Form 4.

The explanatory memorandum accompanying the Bill provides no illumination as to who the Government may be intending to prescribe by regulation as an "interested person." Conceivably it could be as broad as a member of the public, which raises the issue of how the fact that proceedings are on foot could be brought to the attention of the public so that they have the opportunity to engage section 67ZBA. Section 121 of the Act prohibits the publication of identifying information about proceedings to the public or a section of the public and would operate to prevent dissemination of information about pending court cases.

It is possible the Government is contemplating prescribing the Secretary of a State or Territory child welfare agency as an "interested person" and/or a Chief Commissioner of police. It is not clear to me though how prescribing either office will assist in protecting children from harm. Section 91B of the Act already permits the Court to request the intervention of a state or territory child welfare authority in any proceedings that affect or may affect the welfare of a child. Section 91B does not empower the Court to compel the intervention of a State or Territory child welfare

agency but prescription through regulation as an "interested party" would not achieve this end either. In light of the existence of section 91B, prescribing a child welfare authority as an "interested person" appears to me to be otiose. Equally, were it to be suggested that a commissioner of police be prescribed as an "interested person" I fail to see what benefit would accrue from having police initiating a procedure under section 67ZBA. Realistically, I do not anticipate that police would engage the section 67ZBA process even if it was open to them to do so.

It does not seem appropriate to me for community based organisations to have the capacity to initiate the section 67ZBA process and in light of my foregoing comments about child welfare agencies and police, I therefore remain uncertain as to what the proposed expansion of the 'pool' of persons able to file a prescribed notice will actually achieve.

I also perceive some potential problems of interpretation arising from the way in which section 67ZBA is drafted. I understand that it is intended to be a one step process: namely, where an interested person makes an allegation, that allegation is to be contained in a prescribed notice. However, as drafted, another interpretation is that the first step is the making of an allegation in some way, which is followed by the filing of a prescribed notice as the second step. This meaning appears to be supported by the explanatory memorandum. On this interpretation of section 67ZBA, it introduces an unnecessary first stage – that of an 'allegation' preceding an allegation contained in a prescribed notice – which I believe would cause confusion. I suggest that this problem could be overcome by reverting to the language of section 60K, which speaks only of allegations contained in a document.

Section 69ZQ(1)(aa) and the obligation to enquire about family violence and the risk of family violence

The Bill seeks to amend section 69ZQ(1) to insert a new provision, sub-section (aa). The effect of the amendment is to require the Court to ask each party to child-related proceedings about the existence or risk of child abuse or family violence.

Again, I am not sure what end this provision is trying to achieve and the explanatory memorandum provides little assistance. It makes reference to proactive enquiries about other information which might be useful evidence from people or agencies other than the parties but self-evidently an enquiry by the Court under section 69ZQ(1)(aa) would not elicit this information.

The new sub-section seems to contemplate a yes or no answer. The Court's obligation is discharged when a response is received. In the event of an affirmative response to a question such as "is the child at risk of family violence or abuse?", what use is the Court to make of this? The response is not evidence as such. If it is anticipated that the Court will then go on to direct the filing of a Form 4 or make directions as to the filing of affidavits or preparation of other evidence, or the

appointment of an ICL, the Bill should be clear about this. As presently expressed, the Bill and the explanatory memorandum provide no assistance with these issues.

It is also important to articulate when this question is to be asked. As it is obviously procedural, it would seem to arise at the early stages of a hearing and not be something the judge should ask at a final hearing where family violence has not otherwise been raised. However, as there is no discussion of this matter in the explanatory memorandum, it is difficult to discern whether that was the intention.

All that section 69ZQ(1)(aa) appears to me to do is impose an obligation on the Court that is without consequence. I do not consider that the general duties in section 69ZQ, which are designed to give effect to the principles for the conduct of child related proceedings, are strengthened by the inclusion of sub-section (1)(aa) and in my view it could be removed from the Bill with no ill effects.

Resourcing implications

The final issue I want to touch on is the resourcing implications arising from the Bill. Although the explanatory memorandum states that the amendments in the Bill will have negligible financial implications, I am not convinced that is the case.

The Bill considerably expands the definition of 'family violence' and 'abuse of a child'. For example, the proposed definition of 'abuse' now encompasses serious psychological harm and neglect. A new definition of 'exposure to family violence' has also been inserted.

As I have already discussed, the category of people who can file a prescribed notice and activate the 'prompt requirement' processes contained in section 67ZBA is being expanded to include prescribed "interested people". The identity of the individuals who and organisations which may be so prescribed is at present unknown. However, on my reading of the explanatory memorandum the Government appears to be anticipating that a higher number of prescribed notices will be filed than is presently the case with Form 4s. That would in turn mean that the 'prompt action' requirements imposed on the Court by section 67ZBB would be engaged with greater regularity.

I am concerned that the confluence of amendments, by way of expanded definitions and categories of persons who can engage special court processes, will have resource implications for the Court. Section 67ZBB requires the Court to consider what interim or procedural orders should be made to enable appropriate evidence to be gathered expeditiously and to protect the child or parties. The Court must take such action as soon as practicable and, if appropriate, within eight weeks. If these 'special processes' are being used more often, the Court's ability to take action within an eight week time frame will become increasingly compromised.

As I have also alluded to, the way in which the application and transitional provisions are presently framed is likely to result in more court time being required to make directions, grant adjournments and hear submissions.

To the best of my knowledge, no additional funding to assist the Court in managing an increased workload arising from the amendments is being proposed. Certainly the Family Court has not been consulted about the operational effect of the amendments.

In the current financial climate, the Court is not in a position to accommodate an expansion of its workload unless more funding is forthcoming to assist the Court in managing that increase. I believe that further work as to the likely impact on Court resources arising from the family violence amendments is required. I would be happy to provide information to the Government to assist in quantifying those effects.

I am available to discuss any aspect of this submission and can be contacted through my Executive Assistant, Ms Helen Grist, on

Diana Bryant
Chief Justice