Family Law Legislation Amendment (Family Violence and other Measures) Bill 2011

Submission to the Standing Committee on Legal and Constitutional Affairs by the

Family Law Practitioners' Association of Queensland

The Family Law Practitioners' Association of Queensland (FLPA) was established in 1984 to serve those practising family law in Queensland. FLPA is a non-profit association committed to its primary purpose of providing members (practitioners, academics and social scientists) with professional development and education in family law.

FLPA wishes to thank the Standing Committee on Legal and Constitutional Affairs for its invitation for FLPA to make submissions on the ***Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011.***

Overview

FLPA supports the critical need to protect children from abuse and family violence. FLPA further agrees with the importance of abuse and family violence being disclosed, understood and acted upon. FLPA understands the task of assessing risk to children is extraordinarily difficult for both the Federal Magistrates Court and Family Court of Australia. It has been a task that both Courts have undertaken effectively.

The 2006 amendments to the ***Family Law Act 1975 (Cth)*** ("the Act") undoubtedly gave primacy to the benefit of children having a meaningful relationship with each of their parents.

This primacy comes from the first of the primary considerations, and the Act's Objects and Principles. As is unfortunately the case, the meaningful relationship consideration often conflicts with the other primary consideration of the need to protect children from specific harm.

As the legislation currently stands, the interplay of the Act's two primary considerations (and also in the context of the additional considerations) is central to the determination of orders which are in the best interests of children.

With the twin pillars approach in determining orders which are in the best interests of the child, the pressure of determining the correct balance in making a parenting order will continue. FLPA submits that caution has to be exercised that in reviewing the need to protect children from the risk of harm, the legislation does not become too specific, descriptive, prescriptive or presumptive with respect to the treatment of risk. The Court must retain, and the legislation must allow, effective licence in each individual case to properly assess the content and quality of the risk, the probability of such risks occurring and to be able to deploy measures to mitigate or remove such risks in the orders made. To remove or restrict such licence may deprive a child a meaningful relationship with the child's parents, contrary to their best interests.

Definitions – Section 4

FLPA agrees with the expanded definition of **"abuse**".

While FLPA does not necessary oppose the expanded definition of "**family violence**", it is submitted that the expanded definition may have consequences perhaps not intended by the amendment. For example, under the expanded definition, a court may exempt compulsory dispute resolution if satisfied there are reasonable grounds to believe that a parent has

denied financial autonomy to the other parent. Such act, while proposed to be defined as family violence, may not, as an isolated act, prevent a workable resolution to the party's dispute through family dispute resolution.

Further, it is submitted, the proposed expanded definition runs the risk of categorising family violence at the expense of examining the entire factual matrix of the family to properly place the family violence in context. Such risk is amplified an interim hearing stage when resources, time and ability is either curtailed or not currently available for a detailed examination of the facts to provide such context.

Insertion of (2A) to s.60CC (2)

FLPA does not support the insertion that mandates a Court to give greater weight to the second of the primary considerations in the event of conflict between the two primary considerations.

Such a provision removes the Court's licence to assess in each individual case the degree of risk, its probability or in the case of family violence its context in terms of frequency, intensity and recency in the determination of the weight to be given to such risk or harm.

Professor Chisholm in his report "Family Courts Violence Review" 27 November 2009 (the report") observes that family violence takes many forms[1] and in taking from the Wingspread Conference repeated:

"… The impact of domestic violence depends in large part on the context in which it occurs" and

[1] At page 35

" .. Judicial focus on a single violent incident without consideration of its larger context is misleading and dangerously incomplete"

Writing judicially, some 16 years earlier, as a Judge of the Family Court, Justice Chisholm (as he then was) in ***JG & BG*** (1994) FLC 92-515 emphasized the need to contextualise risk and harm:

"Violence may take many forms and have a quite different significance in different cases. It might be, for example, a single outburst, out of character, caused by a stressful situation, for which the violent person feels immediately regretful and apologetic. It might be the result of mental instability or disease. It might stem from a person's inability to control his or her temper. It might represent a deliberate pattern of conduct through which the violent person exercises a position of dominance and power over the other. It might be associated with a particular situation, and be unlikely to be repeated in different situations, or it might be recurrent pattern of behaviour occurring in many situations. The violent person may deny the violence, or seek to justify it, or alternatively might accept responsibility for it and be willing to take appropriate measures to prevent it happening again.

These and many other aspects of violence may be highly relevant to the court in its task of attempting to determine the relevance of the violence to the children's welfare".

A single act of family violence, separation- instigated, out of character and never repeated again (while not condoned) could be found to be inconsistent in the application of the primary considerations. Such inconsistency would almost certainly apply to a finding of long term systematic control, intimidation and violence and yet, the court would be mandated to give greater weight in each scenario to that of a meaningful relationship.

Such mandated weight, has the potential of unintended consequences of depriving a child's meaningful relationship with one or both their parents when it would ordinarily be in the bests interest of the child to do so.

Adviser's Obligations – Section 60D

FLPA supports the proposed insertion of section 60D. It does not support s.60D (1) (b)(iii).

FLPA is against S.60D (1) (b) (iii) because it mandates advice that may be influenced by misinformation or manipulation with unintended consequences contrary to the best interests of the child.

Costs – repealing s.117AB

FLPA supports the removal of s.117AB.

It is the view of FLPA that s.117AB has only ever applied in circumstances where a person knowingly makes a false allegation or statement. It has never applied where one person makes an allegation and the Court is unable to find that the act complained of actually occurred. S.117AB has only applied where a person makes a malicious allegation that is found to be untrue.

FLPA understands that s.117AB has been misunderstood in that if allegations are made against a person which are not proven in Court an order for costs will be made against the person making the allegation. This is contrary to case law in relation to the section. If this is the view of litigants and/or practitioners, and s.117AB is seen as a major impediment to raising violence in family law proceedings then it should be repealed.

Section 60CCC(3)(c).

FLPA supports the recommendation of Professor Chisholm in the report that rather than repealing the section, s.60CC (3) (c) be amended to read:

(c) The capacity and willingness of each parent to provide for the developmental needs of the child in the circumstances of each case, taking into account, among other things, children's need for safety and the benefits of a close and continuing relationship with both parents.

Section 60CC(4)

This section is appropriate in many situations absent of risk factors or allegations of risk. FLPA recommends that s.60CC (4) remain, but there be an amendment to s.60CC (4A) to read:

s.60CC(4A) If the child's parents have separated, the Court must, in applying subsection (4) have regard, in particular to the protection of the child from abuse, neglect or family violence and to events that have happened, and circumstances that have existed, since separation occurred.

Family Violence Orders – s.60CC(3)(k)

FLPA adopts the recommendation of Professor Chisholm in the report that s.60CC (3) (k) does not deal appropriately with the issue of risk. The sub-section should be repealed. FLPA agrees that it is important for the Court to be aware of any current Domestic Violence Orders

so the Court does not inadvertently make an order contrary to it. The current section 60CF of the Act mandates parties to inform the Court of such orders.

FLPA agrees with Professor Chisholm that what is to be avoided is the impression that the Order itself infers risk. Such impression would encourage litigants to obtain state based Protection or AVO Orders in order to gain some advantage in the Federal family courts. The assessment of risk should be based upon the factual examination by courts exercising family law jurisdiction determining parenting disputes of the circumstances it is alleged gives rise to the risk.

Sections 60CH and 60CI - Information to the Courts

FLPA supports these proposed sections as a method of risk assessment in identifying family violence and abuse issues.

The Executive

Family Law Practitioners' Association of Queensland

27 April 2011