Submission to Senate Inquiry

on

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

Dear Senators

I welcome the prospect of changes to the Family Law Act, hereafter "the Act", including some changes proposed in the current Bill, and other associated changes not yet proposed to Parliament which I make here.

As a legal practitioner for 10 years working in Family Law, child protection and some criminal matters, I have represented men, women and children in negotiation and in litigation. Such clients have been parents, step parents, grand parents, aunts/uncles, siblings, or persons not a blood relative of a child the subject of proceedings.

Need to give Priority to Protection of a Child

I agree with the addition of section 60CC(2A) in so far as I agree with the idea that the current section 60CC needs to be changed so that that it accords with current section 60B(1)(a) of the Act., and also with the *Convention on the Rights of the Child Article 9 paragraph 3,* which states:

States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

However, I do not agree that the drafting of the current Bill will optimally or even adequately give effect to the desired change.

In my opinion the drafting of Act needs to be changed so that:

1. In determining what Orders would be in the best interests of a child:

   A Court must give priority to the consideration of the need to protect a child from physical or emotional harm, or neglect.

   Therefore: the preliminary phrase in the proposed additional subsection 2A to section 60CC, **"If there is any inconsistency", should be omitted**. It detracts from the clarity of the proposed additional sub section. The word "priority" could be used instead of "greater weight" as it makes clear the importance of trying to protect the child physically and the child's psychological development.

2. Parliament removes from section 60CC(2)(a) the inherent assumption that there is always a benefit to a child to know and have a relationship with parents, siblings and other significant persons. The word 'meaningful' compounds this by suggesting

that a relationship with a parent will be positive, and/or that the time with each parent should be large. The subsection currently does not contain the qualification which is included in section 60B namely the addition of the words "to the extent that is in the best interests of a child".

Therefore: section 60CC(2) should be amended by adding the above qualifying clause and also by omitting the word "meaningful", so it would read:

60CC(2)(a) The benefit to the child of having a relationship with both of the child's parents, to the extent that is in the best interests of the child; and

Alternatively, it should at least be rewritten so as to not contain the unjustified assumption and so that it reads:

60CC(2)(a) Any benefit to the child in having a relationship with both parents, siblings or other members of the child's extended family.

Alternatively, this subsection should be repealed as I propose at page 4 below.

Below at page 4, I propose that the Parliament should take the opportunity to rationalise, consolidate and clarify provisions of the Act closely related to the proposed amendments.

Definition of Family Violence and exposure to family Violence

I agree with the proposed changes to **sections 4** and **4AB**, for the reasons below.

However, I submit that the amendments should clearly include behaviour where a person makes a threat to harm or kill themselves. Such behaviour amounts to serious emotional abuse of a child who hears or reads such a threat.

It is important to acknowledge that:

a. abuse can be more than discrete incidents of physical or emotional abuse. It can be an engulfing **control** of a partner and/or of children;

b. such abuse often continues after separation;

c. abuse can be so powerful that the abused person may be unable to take action to try and end the abuse, because of fear, loss of self esteem or mental well-being as a result of the abuse; see below [1]

d. abuse may result in a victim abusing alcohol or drugs, and having a temporary diminished capacity to care for children;

e. in relationships the predominant aggressor often claims that the real victim is responsible for family violence;

f. sometimes a parent uses a child/children to torment the other parent regardless of the consequences for the child;

g. the emotional development of children is often adversely affected by exposure to family violence whether or not the violence is directed at them or at another person, animal or object. Evidence of such abuse usually shows up years later;

h. women from a Non English Speaking Background, or who have a culture or religion that means that protective action by her would bring shame to herself and her family, are especially vulnerable as are their children

'abuse in relation to a child'

With regard to section 4 on Interpretation of 'abuse in relation to a child' ,the Parliament should consider adding to (c) inserting after "family violence;" the words "or exposed to pornographic materials or adult sexual behaviour"

Unfortunately parents often report this behaviour as a concern about a child spending time with the other parent. An inclusion in the Act would make clear that such behaviour is unacceptable.

The harsh Realities of Family Violence

People with little or no experience of family violence often have no understanding of family violence especially as to why a victim may do little or nothing for years to escape when the prison door appears open. This lack of understanding applies too many lawmakers, judicial officers and lawyers. Please listen to the excellent BBC interview at the link below at [1] to help you or others to gain some insight into the problem.

I also draw to your attention Australia's obligations under the *Universal Declaration of Human Rights*, the *Convention on the Elimination of All Forms of Discrimination against Women*, the UN *Declaration to End Violence Against Women* and the Beijing Declaration and Platform for Action.

Many mens rights groups decry any Report or Plan which focuses on violence against women. However, I note that such obligations to protect women and children do not detract from our obligations to try and reduce violence towards boys and adult males of all ages. Indeed, I submit that additional and varying strategies are needed for the latter.

Evidence of Family Violence

Because of its private nature, much family violence happens behind closed doors. It is often hard to satisfy a Court that there has been family violence because of a lack of independent evidence.

Due to many factors, including those referred to above, family violence may not be reported..

Where young or disabled children are physically abused, whether sexually or otherwise, victims often are incapable of providing adequate evidence for police to lay charges against a perpetrator.

Especially with regard to emotional/psychological abuse of a child by a parent, partner or relative of a parent is difficult to produce independent evidence. Yet, we see countless reports speaking of an adult or older child, who as a young child was abused, or exposed to violence or adult sexual behaviour.

Legal advisors reasonably advise protective parents of the risks of alleging family violence where there is no independent evidence of it.

Where there is no independent evidence, a protective parent may because of the current provisions of the Act, reasonably choose to:

- remain silent about the abuse in any litigation under the Act; or to
- acquiesce in a degree of current abuse of child, and not initiate proceedings because of the risk of worse outcomes like Orders the child spend more time or live with an abusive parent. A protective parent may be found to be simply hostile to the child having a relationship with the other parent. A protective parent may also be deterred by the risk of a costs order being made against them.

Costs Provisions regarding Unproved Allegations

I support repeal of section1117AB for the reasons below:

Section 117 already provides adequately for dealing with any false allegations or denials of disputed facts.

Currently Section 117AB is likely to deter some parties from seeking Orders in the best interests of a child where the party has no independent evidence of family violence.

Proposed changes to sections that may deter a protective parent from seeking orders in the best interest of a child

I support removal of sections 60CC(3)(c) and (k) and section 60CC (4) (b). It is unnecessary and undesirable for the Act to elevate such considerations to ones which are provided for in a sections separate from the list of other considerations in section 60CC(3). The degree to which a parent facilitates or fails to facilitate a child having a relationship with another parent or person should be considered with other relevant considerations.

Similarly, I support the proposal that sections 60CC(4)(a) and (c) become considerations under section 60CC(3) namely subsections (3)(c) and (3)(ca).

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Submission for change to sections on Primary and Additional Considerations

The current note in the Act after 60CC(2) claiming the primary considerations are consistent with the objects, is incorrect because 60CC(2)(a) is not qualified as in 60B(1)(a) and (2), and indeed is different in ideology from 60B.

<u>One option for change</u>

I submit that the heading for subsection 60CC(3) should be changed from 'Additional Considerations' to 'Relevant Considerations'. The 60CC(3) factors are not distinct from the so called 'primary considerations', but rather are guidelines to help a Court to decide what Orders would be in the best interests of a child.

Therefore, I submit that Parliament should consider making additional changes to Section 60CC(1) and (2). They should be replaced as follows:

- 60CC(1) be written :

> Subject to subsection (5), in determining what Orders would be in the best interests of a child, the court must consider the objects of the Act as set out in section 60B, and also the matters set out in subsection (3).

- the current 60CC(2) be replaced with a section containing a variation of the drafted Bill's proposed additional subsection 2A, namely, omission of its first phrase as proposed above, and such replacement subsection also contain references to the Objects of the Act so that:

60CC(2) become:

> In having regard to the objects of the Act set out in Section 60B, and to the considerations set out in subsection (3), the Court is to give priority to the need to protect the child from physical or psychological harm, and to the need to protect the child from being subjected to, or exposed to, abuse, neglect or family violence.

Such changes would remove the current redundancy and inconsistency in the Act which modifies and restates in section 60CC as 'Primary Considerations' some of the principles in section 60B. Some considerations relevant to the current 60CC(2) are referred to in the current 60CC(3) at (b), (f), (i), (j) and (k). It is noted that any other matter relevant to the Objects of the Act or the child's best interest can be considered under section 60CC(3)(m)

References to a presumption of 'equal shared parental responsibility', to 'Equal time' and to 'Substantial and significant time'.

The current section 60DAA creates an expectation that there is a presumption a child should spend equal amounts of time with each parent. Even though it is not expressed to be a presumption about the living arrangements of the child, by requiring in a specific section that a Court must consider the scenarios of equal time or substantial and significant time in a specific section, the effect is to elevate those scenarios to having an inherent assumption that they will be in the best interests of children unless otherwise rebutted.

Some children are less resilient that others to changes in their accommodation and routine. The value to a child of known stable accommodation and care arrangements should be acknowledged ahead of the assumption it is OK to experiment with living arrangements.

Although I agree that a Court should be forward looking about the options for arrangements for children it is should not go so far as to assume that a parent who has shown no commitment to caring for or spending time with children will become committed and competent to care of the children.

Often a parent who has shown no commitment to caring for a child will seek Orders the child live with them at least half the time, in order to minimise or avoid paying child support. In such circumstances the care of the child is often left to a new partner or spouse of a parent, where such spouse may resent having to care for the child. Currently, section 60DAA assumes that a parent who has previously provided no care for a child, will in future if they so claim, provide care for a child at a level that makes it in the best interests of the child to spend less time in the care of the parent who has been responsible for the child's care.

Similarly, it is not reasonable to assume it is in the best interests of a child to make orders where with the mere passage of time, there is automatic progression to the child spending increasing time in the household of a parent who has not been a primary caregiver.

Provisions requiring persons to inform the Court about any investigations, proceedings or Orders made under state or territory child welfare laws

I agree with the proposed addition of sections 60CH and 60CI

I further propose that the Parliament consider adding to the Act a clear power to a court that in relation to a subject child the relevant State or territory child protection agency become a party to particular proceedings. That is important where a Court forms the view that no party to proceedings has capacity to adequately care for a child.

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http://www.bbc.co.uk/iplayer/episode/p006g30n/The_Interview_06_03_2010_Sophie_Andrews/