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

We welcome the family violence provisions of the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011. Those provisions are likely to improve responses to family violence and child abuse within the family law system. A substantial body of work now supports the conclusion that law and process responses are currently inadequate and that there is much work to be done (Chisholm 2009, Kaspiew et al 2009, Bagshaw et al 2010). The Bill is a positive first step in addressing the consistent themes across these reports, including:

- The disincentives to disclose family violence and abuse, particularly since the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (the 2006 reforms);
- A general tendency to prioritise maintaining relationships between parents and children over protection of children from harm caused by family violence and abuse; and
- Inconsistency between the approaches and philosophies underlying state domestic violence and child protection legislation and the FLA (including the definitions of relevant conduct).

We begin with some brief points, and then turn to some areas where we have more substantial comments.

1. Brief points

- There is little controversy that the proposed omission of s 117AB is desirable. We support it.
- While we welcome the inclusion of reference to the Convention on the Rights of the Child in section 60B, we note that further legislation is necessary to fully implement that Convention, and also that the practical implications of the proposed reference to the Convention in the FLA are not clear.
- We support the proposed new sections 60CH and 60CI.
- We have some concerns about the appropriateness of prescribing what professional advisers must tell their clients, thus limiting their professional judgement in the diverse circumstances in which they work. We are also concerned about the costs to paying clients of the inclusion of additional factors, on top of the existing factors, about which they must be informed. We are of the view, however, that, if such matters are to be prescribed, they should include reference to protection from harm. To that extent we welcome s 60D.
- We support the proposed amendments to sections 43, 67ZBA, 68N, 69ZN, 69ZQ, 91B, and 117.

2. Definitional and conceptual issues

We support the provisions of the Bill which will result in more precise specification of the kinds of behaviour which are harmful within families, the inclusion of neglect in the definition of child abuse, and

the inclusion of a new definition of "exposure to family violence" to assist in the application of s 60CC(2)(b). We have some concerns about the particular wording of the definitions.

Overlap and lack of clarity

We note that exposure to family violence will constitute "child abuse", but only where it causes "serious psychological harm." We note that most, but not all, conduct which can be categorised as child abuse will also constitute "family violence." It may be that this overlap is quite appropriate, but we would submit that more consideration needs to be given as to whether that is so, and why, with a particular emphasis on tailoring the definitions for the different purposes for which they are used. We note that, although there are a considerable number of provisions where conduct is relevant whether it is child abuse or family violence (for example s 60I, 60J, 60CC(2)(b)), there are some different legal consequences which flow from the categorization of the conduct. These include whether the conduct needs to be reported to child protection authorities ("child abuse" only) and whether it is admissible and/or must be kept confidential when disclosed during dispute resolution processes (again, not in the case of child abuse). In addition, there remains uncertainty and confusion about whether and how the "unacceptable risk test" developed in the case law applies beyond child sexual abuse, and beyond child abuse more generally (to conduct which is family violence but not child abuse, and to exposure to family violence which does not have serious psychological consequences and there is not child abuse). In light of the overlap and new definitions, it may be an appropriate time to legislatively clarify that issue. More generally, the point is that the definitions need to be tailored to their purpose, as our colleague Professor Richard Chisholm has pointed out (Chisholm 2010B).

An example of where the Bill may not achieve this is in the proposed definition of "child abuse." That definition, while broader than the existing definition, remains set at a high level of harm. For example, "exposure to family violence" is only "child abuse" if it causes the child to suffer "serious psychological harm." To amount to child abuse, neglect must be "serious neglect", or constitute physical or sexual assault or involvement in a sexual activity.

It is arguable that the proposed definition of child abuse is appropriate for provisions which trigger reporting to child protection authorities, but sets too high a threshold for provisions applying in a broader inquiry into what parenting arrangements will promote children's best interests. In the latter context, a much wider range of conduct should arguably constitute "child abuse".

"Family violence" and "exposure to family violence"

We are of the view that the changes to these definitions from the Exposure Draft of the Bill are a significant improvement, and we welcome them.

3. Amendments to section 60CC

Section 60CC(3)(k)

We support the removal of the qualifications to section 60CC(3)(k) so that a Court can have regard to any family violence order that applies to a child or a member of a child's family in determining the child's best interests. However we are concerned that the reference to any family violence order that "applies" to the child's family would result in exclusion of information about orders that are no longer in place, which may be of relevance in determining possible risk to the child and understanding the type of parenting provided to a child and the nature of the relationship between the child's parents.

Section 60CC(2A)

We welcome the prioritisation of protection from harm over the preservation of parent-child relationships. We have concerns, however, about the way in which the sub-section is drafted. It appears that, in order for the provision to operate, an inconsistency has to be found between the two primary considerations. The need to establish an inconsistency suggests that violent and abusive relationships can be meaningful and that children can benefit from them. In our view, a preferable approach would be to indicate in section 60CC that the *overriding* consideration in determining children's best interests is the protection of children from harm caused by family violence, neglect and abuse.

Section 60CC(3)(c), (4) and (4A)

We support the repealing of paragraph 60CC(3)(c). As Professor Richard Chisholm's report indicated, it has been a major contributor to the "victim's dilemma" and thus has contributed to under-reporting and disclosure of family violence and abuse (Chisholm 2010A).

We were pleased to see the inclusion of some of what was formerly in sub-sections 60CC(4) and (4A) in the new paragraph 60CC(3)(c). In our view, it is important that Courts are directed to consider past parenting behavior, which research suggests is the best predictor of children's parental attachments and relationships as well as future parenting behavior and hence is vitally relevant to children's best interests (Behrens and Smyth 2010). The new paragraph 60CC(3)(c) will do this.

4.Issues still to be addressed

Simplification of Part VII

One of the most consistent findings of reports dealing with the operation of the 2006 reforms is that users of the system find the provisions in Part VII complex, confusing and conflicting (Chisholm 2009, Kaspiew et al 2009, Fehlberg et al 2009). These features are most likely to disadvantage the vulnerable

and those least able to access legal advice. The victims of family violence are likely to be overrepresented in those groups. For these reasons we are disappointed that the Government has not taken the opportunity to simplify Part VII in accordance with the recommendations of Professor Richard Chisholm (Chisholm 2010A). Indeed it is strongly arguable that the proposed amendments will make the decision-making process even more complicated than it already is.

Need for additional reforms to address problems arising from the presumption of ESPR and the shared time provisions

In our view, review, evaluation and research so far on the 2006 changes presents a compelling case for legislative reform to address the circumstances in which shared parenting is not appropriate. It may be that the Bill if enacted will make it less likely that Equal Shared Parental Responsibility (ESPR) and shared time will be ordered in cases involving family violence and child abuse. But it is also likely that they will further entrench what Professor Richard Chisholm has referred to as the tendency to interpret the legislation as presuming shared care except in cases of family violence and abuse (Chisholm 2010A). The research shows that it is not only family violence and abuse which damage children, but also exposure to high levels of conflict, particularly unresolved conflict (McIntosh & Long 2006; McIntosh 2010). As a result of growing awareness about this research, there is increasing recognition within the family law system that ESPR and shared care will often not be in children's best interests in high conflict cases. However, there is a danger that the Government's failure to act in the light of such clear findings and reform proposals will reverse or slow down this trend. The result may be orders for ESPR and shared time in circumstances which the evidence consistently suggests are not in children's best interests.

The 'so what?' question: the implications of a finding of violence or abuse – or an unacceptable risk thereof – for parenting orders

We note that there continues to be virtually no guidance given in the legislation about the implications of a finding of family violence or abuse (or an unacceptable risk thereof) for outcomes of parenting proceedings. If protection from harm is to be prioritised, consideration should be given to whether it might be possible to indicate in the legislation the range of outcomes that are and are not appropriate following a finding of family violence, child abuse or unacceptable risk. For example, the legislation might indicate that in cases at the most serious end of the spectrum of such behavior, a recovery order should not be made, a relocation proposal should be allowed, a reversal of primary care to the perpetrator will be excluded, orders for ESPR should not be made and orders for shared time should not be made in favour of the perpetrator.

Process and professional development

While the 2006 changes have shown us that legislative reform does influence understandings, attitudes and behaviours of separating parents, they also illustrate the over-simplified messages that can be drawn from complex legislation. We are concerned that in the area of family violence and abuse legislative amendment is not enough of itself to achieve change and that there is a need to address broader community and professional understandings of family violence. We note that procedural and professional development initiatives have been proposed by Professor Richard Chisholm, the Family Law

Council and the ALRC/NSWLRC and would strongly recommend that, as in 2006, any legislative amendment is accompanied by process-related and professional development initiatives, along with on-going research and evaluation.

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