SENATE INQUIRY INTO THE FAMILY LAW LEGISLATION AMENDMENT (FAMILY VIOLENCE AND OTHER MEASURES) BILL 2011

SUBMISSION BY PROFESSOR RICHARD CHISHOLM AM

13 April 2011

MAIN POINTS AT A GLANCE

General	**Support the bill as improving the law, and suggest some amendments to improve its effectiveness.**
Section 4, definition of 'family violence'	Support, but suggest slight modification to avoid over-inclusiveness.
Section 4, definition of 'abuse'	Question the wisdom of new paras (c), and (d).
Section 60CC(2A)(prioritising protection)	Support (not ideal, but an improvement). Suggest the Committee consider removing the requirement of inconsistency.
Section 60CC(3)(c) ('friendly parent')	Support the repeal of this provision.
Section 60CC(3)(k)(family violence orders)	Recommend, instead, the omission of paragraph (k), or alternatively its amendment as proposed in the ALRC/NSWLRC report.
Section 60CH (informing court of child welfare arrangements)	Support.
Section 60CI (informing court of child welfare notifications etc)	Support.
Section S 60D (advisers' obligations)	Support.
Section 67ZBA (obligation to file notice where allegation of violence etc), and 67BB (court to take urgent action)	Support.
Section 69ZQ(1)(aa)(court to ask about abuse and violence)	Support, but suggest slight narrowing of scope, consistently with s 67BA.
Section 117AB repealed (costs)	Support.

INTRODUCTION

I thank the Committee for the opportunity to participate in this important inquiry.

Overall, I support this bill as a cautious but sensible set of measures that can be expected to provide needed protection for children and adults subjected to family violence, without changing the legislative emphasis of 2006 on the value of shared parental involvement after family separation. Although as it stands the bill would improve the law, I believe there are ways in which the bill could be improved and most of this submission is intended to assist in that task.

I strongly support proposals to establish a common knowledge base, and to provide greater funding, education and other support for those struggling to cope with the demands of family law.[1] I also believe it would be very valuable to monitor the effects of this amending bill, so that future decisions in this difficult and important area can as far as possible be based on reliable information about how it has worked. However this submission focuses on the bill itself.

Part 1 comments on particular provisions of the bill.

Part 2 responds to the submission of the *Non-Custodial Parents Party (Equal Parenting)*.[2]

Part 3 deals with some wider issues.

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1 See Chisholm, Family Courts Violence Review (2009), accessible through the AGD website: http://www.ag.gov.au/www/agd/agd.nsf/Page/Families_FamilyCourtsViolenceReview, especially Part 4.

2 Submission No 1, 28 March 2011.

PART 1: PARTICULAR PROVISIONS OF THE BILL

THE NEW DEFINITION OF 'FAMILY VIOLENCE'[3]

The existing definition, introduced in 2006, refers to conduct that "causes [a family member] reasonably to fear for, or reasonably to be apprehensive about, his or her personal wellbeing or safety". The amendments of 2006 added the requirement that the fear must be 'reasonable'.

Merits of the new definition

The bill's definition makes two significant changes. First, it contains a general characterisation of family violence,[4] and then spells out the sort of behaviour that can constitute family violence.[5] I applaud this approach. It is consistent with the increasing provision of legislative guidelines, and with the idea that legislation can serve an educational role. It is consistent with recent domestic violence legislation, and with the recommendations of the Australian and New South Wales Law Reform Commissions,[6] the Family Law Council,[7] and informed commentators such as Professors Parkinson[8] and Rhoades.[9] On the basis of my (limited) reading of the family violence research, I think that the various examples set out in the second part of the definition are generally supported by research findings about the nature of family violence.

As a result of the 2006 amendments, the Act currently has elaborate provisions about the importance of parental involvement, and specific guidance about care arrangements (singling out equal time and 'substantial and significant' time with each parent),[10] but provides no equivalent guidance as to what might constitute family violence, or how the courts should deal with cases

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3 Issues relating to the definition are considered in the *Family Courts Violence Review* (2009), especially at 144-151.

4 New s 4AB (1).

5 New s 4AB (1).

6 *Family Violence – A National Legal Response: Final Report* (ALRC Report 114; NSWLRC Report 128) October 2010, Chapter 5.

7 Family Law Council, Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues (December 2009).

8 See his submission on the Exposure Draft.

9 See her submission on the Exposure Draft.

10 See especially sections 60B, 60CC(2)(a), 61DA, and 65DAA.

involving family violence.[11] The proposed definition goes some way to redress this balance, by spelling out the various forms it can take, and thereby underlining the importance of protecting people against violence, and the seriousness with which the legislature regards it. I fully support this approach.

The second significant change is the omission of the existing requirement that the person must have 'reasonable' fear. I discussed this issue rather tentatively in my report,[12] since I did not have clear evidence about the way the existing definition was operating in practice. Whatever might be thought about the merits of including the 'reasonable' requirement in the older-style brief definition, however, it is unnecessary in a definition of the kind used in the bill. To the extent that the new definition requires that the behaviour be "violent", or "threatening" or behaviour that "coerces or controls" a family member, there is no need to add that the family member must have a reasonable fear. To add a requirement of reasonable fear would mean that the person alleging violence would have to lead additional evidence of a highly personal nature, and this is not necessary if there is evidence of behaviour that is violent, or threatening, or coercive or controlling. The need for such evidence, and concerns about what the court might or might not consider reasonable, would be a disincentive to some people who have been subjected to such behaviour to disclose it to the court.

Room for improvement to remove possible over-inclusiveness

While I therefore support the general character of the definition, it might be arguable that the bill's definition is a little over-inclusive, and the drafting could be improved. Suppose a family member tells another, correctly, that the family house is on fire, and this makes the person fearful. Or suppose a family member accidentally frightens another in the course of a practical joke. On a literal reading, such behaviour - telling the family member, carrying out the joke - could be seen as falling within the definition of 'family violence', because it is behaviour that causes the person to be fearful, and on a literal reading this would be enough to bring it within the definition of family violence. The new definition is (in part) (underlining added):

> For the purposes of this Act, ***family violence*** means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the ***family member***), or causes the family member to be fearful.

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11 Section 60K does create an obligation on the courts to act promptly when the3re are allegations of family violence or child abuse.

12 Family Courts Violence Review (2009), at 147.

Obviously, it is not intended to include such behaviour, and it is possible that the court might feel able to interpret the definition in a narrow way to give it a sensible operation. But it would be useful to see if the definition could be amended to preserve its substance, but to eliminate the problem of over-inclusion. Getting this definition right is both important and difficult, and although the definition is much improved since the Exposure Draft, perhaps it could be further improved. I note, for example, the way the idea of fear is linked to *the intention behind* the behaviour by the the National Council to Reduce Violence Against Women and their Children when it refers to "an ongoing pattern of behaviour aimed at controlling one's partner through fear, for example by using behaviour which is violent and threatening. .."[13]

One possibility might be to omit the reference to behaviour that causes fear. On this approach, the definition could read:

> For the purposes of this Act, family violence means behaviour by a person towards a member of the person's family that is violent,[14] threatening, coercive or controlling.

If it were thought desirable to include the idea of fear, the definition could perhaps read:

> For the purposes of this Act, family violence means behaviour by a person towards a member of the person's family that is violent, threatening, coercive or controlling, or is intended to cause the family member to be fearful.

I do not press for the adoption of either of these definitions. Others have more expertise than I in this area. I simply offer them as examples of possible ways to avoid the slight over-inclusiveness in the bill's definition. I would add that Professor Parkinson's formula ("aggressive, threatening or other such behaviour") might also solve the problem, the word "such" neatly excluding the sort of situations I mentioned above.

NEW DEFINITION OF 'ABUSE' OF A CHILD

The new bill has the following definition:

> ***abuse***, in relation to a child, means:
> (a) an assault, including a sexual assault, of the child; or

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13 See Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009-2021 (under heading 'Terminology and key concepts') (available on the FaHCSIA website); quoted in Family Courts Violence Review 2009, 33.

14 I note the force of Professor Parkinson's suggestion, in his submission, that it is inappropriate to use a term being defined ('violence') in the definition; the Committee might well consider dropping this word.

(b) a person (the ***first person***) involving the child in a sexual activity with the first person or another person in which the child is used, directly or indirectly, as a sexual object by the first person or the other person, and where there is unequal power in the relationship between the child and the first person; or

(c) causing the child to suffer serious psychological harm, including (but not limited to) when that harm is caused by the child being subjected to, or exposed to, family violence; or

(d) serious neglect of the child.

In substance, paragraphs (c) and (d) are new: the change is the addition of causing children to suffer serious psychological harm by exposure to family violence, and 'serious neglect'. The concept of *exposure* to family violence is spelled out in new s 4AB(3) and (4). It includes, for example, hearing threats of death or serious injury, and providing assistance to a family member who has been assaulted by another family member. This expanded definition is obviously intended to reflect current understandings about the diverse ways in which children can be damaged by violence.

New paragraph (c)

While I have sympathy with the intention behind paragraph (c), I have some misgivings about it. The term 'abuse' has consequences in terms of the operation of various provisions in the Act, so it matters whether something is or is not 'abuse'. In relation to family violence, the word is somewhat narrowly defined: exposure to family violence will constitute abuse only if it causes the child "to suffer serious psychological harm". Determining this issue in practice will involve difficult legal and evidential issues, for example: Was the harm "serious"? Was it 'caused' by the violence if it resulted from a number of other circumstances as well? For that reason, this drafting approach seems likely to multiply difficult technical legal issues, and this is surely to be avoided if possible.

Further, it seems odd that in some circumstances exposing children to family violence constitutes "abuse", a very serious and shaming proposition, whereas exposing children to persistent conflict, which child development experts consider potentially damaging for children, is not explicitly recognised among the numerous considerations mentioned in s 60CC.

Next, given the extreme hostility that unfortunately occurs from time to time in family law litigation, it is not impossible that some litigants might seek to conduct their case in a way that punishes the other party, by achieving a finding that the other party 'abused' a child. This would add fuel to the fire, and distract attention from discovering what would be best for the child.

Finally, there is always a potential problem in having such definitions in the Act. This is the danger that people might assume that circumstances falling *outside* that definition are unimportant. In this instance, for example, it might be thought that exposing a child to family violence might be treated as of little importance where there is no evidence of serious harm to the child, because it does not constitute 'abuse'.

While I completely agree that exposure to family violence can be damaging to children, and have sympathy with the view that this insight should be reflected somehow in the Act, I am, therefore, worried that paragraph (c) might prove more troublesome than helpful.

I would be inclined to omit paragraph (c), but instead consider the possibility of referring in s 60CC to the distress and possible damage for children when exposed to family violence. I would take the opportunity to include in such a provision reference to exposure to conflict between parents and other adults, especially for young children.[15] If this approach interests the Committee, I would urge that child development experts be included in the drafting; and, of course, I would assist if invited to do so.

New paragraph (d)

I also have reservations about the new paragraph (d), which includes "serious neglect of the child" in the definition of "abuse". I am not aware of the reasons for this proposed change, and there may be arguments in its favour that have not occurred to me. But there seems to be an intelligible and useful distinction between neglect and abuse. It is quite possible to take neglect seriously without calling it 'abuse'. Neglect is already appropriately included in the Act, for example in s 60B and s 60CC (physical or psychological harm from being subjected to, or exposed to, abuse, *neglect* or family violence.) Again, whether something is 'abuse' may have legal significance, and I wonder whether anything is achieved by this new definition that would outweigh the additional legal complexity it entails. If paragraph (d) is to remain, it will be necessary to consider its effect on other provisions that refer to abuse and neglect as separate matters.[16]

PRIORITY FOR SAFETY WHEN THE COURT MAKES ARRANGEMENTS FOR THE CARE OF CHILDREN: NEW S 60CC(2A).

The bill would retain the existing distinction between 'primary' and 'additional' considerations in s 60CC (and the similar provisions in s 60B), but would add the new subsection (2A):

> (2A) If there is any inconsistency in applying the considerations set out in subsection (2), the court is to give greater weight to the consideration set out in paragraph (2)(b).

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15 It is significant that the original Hull Committee (2003) gave great emphasis to the effect on conflict on children, recommending that there be a legal presumption against shared parental responsibility in "cases where there is entrenched conflict, family violence, substance abuse or established child abuse…". This was based on expert evidence, but the Government of the day did not accept this recommendation. The legislative history is considered in Chisholm, "Making it work: The Family Law Amendment (Shared Parental Responsibility) Act 2006", (2007) 21 AJFL 143.

16 For example, in the proposed s 69ZQ(1)(aa).

In my view this amendment would significantly improve the law, but the approach has some disadvantages.

First, it does not entirely solve the imbalance between the Act's support for parental involvement and its support for protection against violence. Even under this bill, the law would spell out ways of encouraging parental involvement, and pointing the courts towards equal time with each parent – without quite containing a presumption to that effect – but would offer no equivalent guidance in relation to protecting people, especially children, who might be at risk of violence.

Second, there may be problems in applying the proposed subsection (2A). In one sense, it builds yet another technical complication. The decision-maker still needs to decide whether a consideration is 'primary' or merely 'additional', and decide what special weight, if any, should be given to the former. With the new (2A), the decision-maker will also have to decide whether there is an inconsistency between (2)(a) and (2)(b). If there is, 'greater weight' must be given to paragraph (b) – but how much greater? These may not be insuperable difficulties, but the proposed (2A) seems certain, unfortunately, to increase the amount of complication and technicality relating to determining what is best for children.

Donna Cooper has recently suggested[17], in the course of a thoughtful discussion, that a better formulation would be as follows:

> (2A) That when applying the considerations set out in subsection (2), the court is to give greater weight to the consideration set out in paragraph (2)(b).

That would reduce the complexity a little, by removing the need to determine if there is an 'inconsistency', and if something like the proposed (2A) is to remain, this suggestion merits careful consideration.

My own view is that the problems in Part VII are too pervasive to be entirely solved by a single adjustment such as (2A).[18] They can only be solved by a more thorough revision: I return to this topic briefly in Part 3.

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17 Donna Cooper, "Continuing the critical analysis of 'meaningful relationships'", (2011) 16 *Australian Journal of Family Law* 33-53, especially at 49.

18 My own recommendations in the 2009 report were to revise a number of provisions, removing the distinction between 'primary' and 'additional' considerations and emphasizing the need to choose whatever arrangement would be best for the child, rather than specifically identify any particular outcome, such as equal time with each parent, and the Act now does.

In the end, however, although I do not consider the proposed (2A) as entirely satisfactory, if the other provisions of Part VII are to be left as they are, I would support (2A) as a definite improvement on the present law. It would certainly help to avoid the risk that decision-makers might put the safety of children at risk in seeking to implement the legislative emphasis on parental involvement. Doing this would be a valuable measure to increase the safety of family members, especially children.

ADVISERS' OBLIGATIONS IN RELATION TO BEST INTERESTS OF THE CHILD: SECTION 60D

This section brings the advisers' obligations into line with the key provisions such as s 60CC and s 60B. My own preference would be to greatly simplify such provisions, but I support this amendment because it fixes the obvious problem in the existing provision, namely that it says much about parental involvement but nothing at all about protection from violence and abuse.

NEW PROVISIONS ENCOURAGING PEOPLE TO TELL THE COURT ABOUT FAMILY VIOLENCE ISSUES, AND CHILD PROTECTION ARRANGEMENTS ETC: NEW SS 60CH, 60CI, 67ZBA, 67ZBB, AND 69ZQ

It is important that the system should not discourage people from disclosing a relevant history of violence, or current fears for safety. In general, these provisions seem to have considerable merit in this regard. I see no reason to think that they will encourage people to make false allegations. The provisions give no special status to such allegations, and of course it remains open to the other party to cross-examine the maker of the allegations, and lead evidence related to them. A report in 2007 showed that generalised allegations of violence, unsupported by specific evidence, had minimal impact on courts' decisions in parenting cases.[19] I add the following comments on some particular sections in this group.

Section 60CI

I have considered whether the new s 60CI should be amended so that it requires parties to notify the court about child protection inquiries, investigations and assessments, but not *notifications*.[20] There are very many notifications, and the mere making of a notification is no guarantee that there is a proper basis for it. On the other hand, the making of a notification may well be important, even if the evidence shows, for example, that a party made it maliciously. The section does not suggest that the court should draw any particular inference from these matters. It is directed only to making

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19 Moloney, et al, Allegations of family violence and child abuse in family law children's proceedings: a pre-reform exploratory study; Australian Institute of Family Studies, 2007 Research report No. 15.

20 I refer to Professor Parkinson's submission on this topic.

the court aware of them. On the whole, therefore, I would support this provision, which is consistent with one of the themes of my 2009 Report, that the court should have as much information as possible that is relevant to issues of family violence (and, of course, child abuse). It would be desirable, however, to monitor the operation of this provision, in case it does indeed cause more trouble than it is worth in relation to mere notifications.

Sections 67ZBA and 67ZBB

In my view, it is clearly a good idea to lift the obligation to file the notice from the obscurity of the Family Law Rules into the Act itself, as s 67ZBA does. I hope that this will have the desired effect that people will file such notices when they are obliged to do so – which would be a striking change from the non-compliance that seems to be the present norm.[21]

I note that this provision differs from the Exposure Draft in an important way. In relation to allegations of past family violence, the obligation to file the notice arises only if it is alleged "as a consideration that is relevant to whether the court should make or refuse to make the order". This modification means that there is no obligation to file the notice where there are old allegations of violence that are not seen as presently relevant.

In my submission on the Exposure Bill, I drew attention to the wide scope of the original provision and suggested narrowing the provision to cases involving apprehended risk. However this modification has the merit of including the important category of cases where a person alleges past violence and says that it is relevant to making orders about the children, but does not necessarily say there is a risk of future violence. It is, therefore, narrower and more manageable than the Exposure Bill, but not as narrow as it would have been if limited to cases where there is a perceived risk.

This is a very reasonable approach, and may well be an improvement on my suggestion. I support the provision in its revised and improved form, but, as with other measures in the bill, urge that there be some monitoring to determine how the new provision operates.

Section 69ZQ(1)(aa)

This new provision would require the court to ask the parties about child abuse and family violence.[22] I think there is merit in the idea of requiring the court to ask about these matters; it is consistent with Division 12A. But in its present form the provision requires the court to ask about every act of *past* abuse or family violence. This provision may prompt parties to bring up all sorts

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21 The evidence is discussed in the *Family Courts Violence Review* (2009).

of old complaints that they might otherwise have decided not to raise, perhaps for good reasons. Raising such matters could increase the hostility and acrimony and length of the proceedings, and reduce the chances of settlement.

One possibility would be to amend s 69ZQ(1)(aa) so that it requires the court to ask the parties only about their fear of *future* violence or abuse.[23] But it could also be amended in a way that would be consistent with the change to s 67ZBA, limiting it to matters that are relevant to the child. If so, it might be amended as follows:

Existing provision of the bill

[The court must] ask each party to the proceedings:

(i) whether the party considers that the child concerned has been, or is at risk of being, subjected to, or exposed to, abuse, neglect or family violence; and

(ii) whether the party considers that he or she, or another party to the proceedings, has been, or is at risk of being, subjected to family violence; and

Possible revision of the provision (retaining the current drafting style)

[The court must] ask each party to the proceedings:

(i) whether the party considers that the child concerned is at risk of being subjected to, or exposed to, abuse, neglect or family violence; and

(ii) whether the party considers that he or she, or another party to the proceedings, is at risk of being subjected to family violence; and

(iii) whether the party alleges, as a consideration that is relevant to whether the court should make or refuse to make an order relating to the child, that the child or another person has been subjected to, or exposed to, abuse, neglect or family violence.

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22 New proposed s 69ZQ(1)(aa).

23 The amendment giving effect to this view would be simple, eg "~~has been, or~~ is at risk of being subjected to…"

THE REPEAL OF THE MANDATORY COSTS PROVISION (S 117AB)

The repeal of s 117AB has been widely supported, and I consider it clearly desirable.[24] The section seems to have operated as a disincentive to disclosing family violence, and does not appear to have had any beneficial effect. As the Consultation Paper to the 2010 Exposure Draft pointed out, the ordinary power to make costs orders is 'adequate to deal with false allegations of family violence as well as false denials of family violence', and the reported cases do not indicate that s 117AB has achieved anything positive.[25]

THE REMOVAL OF THE SO-CALLED 'FRIENDLY PARENT' PROVISION (S 60CC(3)(c))

The Act now lists, among the 'additional' considerations, each parent's willingness and ability to facilitate and encourage a close and continuing relationship between the child and the other parent.[26] The Consultation Paper notes that it is 'important that legislation does not create barriers to raising concerns about these issues', and says that recent reports 'indicate that some lawyers caution parents against alleging family violence or abuse where there is limited evidence, to ensure that victims of family violence are not characterised as an 'unfriendly parent'.[27] I agree with this.

The bill deals with this issue by repealing paragraph 60CC(3)(c). My own preference was a little different, namely to retain the idea of facilitating the child's relationship with the other parent in the context of greatly simplifying the whole set of provisions about determining children's best interests.[28] There could be a risk that this amendment will mean that this factor might be given slightly diminished weight in cases where parents should be encouraging the children's relationship with the other parent. But it is likely to achieve a significant increase in safety for children, and overall I believe that the positives will outweigh the possible negatives.

In short, the repeal of paragraph 60CC(3)(c) would improve the law, and (my preferred approach having been rejected), I therefore support it.

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24 For the reasons set out in *Family Courts Violence Review* 2009, at 110-122.

25 Family Courts Violence Review (2009) at xx

26 Section 60CC(3)(c), see also sub-s (4), discussed below.

27 Paragraphs 15, 16.

28 See the discussion in *Family Courts Violence Review* (2009) at 103-106, and Recommendation 3.5.

THE INCLUSION OF FAMILY VIOLENCE ORDERS AMONG THE FACTORS TO BE CONSIDERED IN RELATION TO CHILD: S 60CC(3)(k)

Section 60CC(3) sets out the 'additional considerations' that the courts must consider in determining what parenting orders will be most likely to be in the child's interests. The existing paragraph (k) refers, in substance, to any family violence order that applies to the child or a member of the child's family, if it was a final order (rather than an interim order) or made in contested proceedings (rather than by consent). The amendment would remove the two qualifications, so that the court would need to consider 'any family violence order that applies to the child or a member of the child's family'. Family violence orders are orders made by state and territory magistrates under special domestic violence legislation.

In my view it is inappropriate to refer to family violence orders at all as a factor relevant to determining the best interests of children. I would therefore omit paragraph (k) altogether. The reasons are essentially as follows.[29]

Family violence orders are of various kinds and can be made in various circumstances.[30] In some cases, they may be made as a result of solid evidence of serious violence, and they may provide needed protection to children and other family members. In others, notably where parties consent to have mutual orders made against each other, without any admissions, the court may have had no idea what the facts were: it would simply make the order by consent. In some cases, no doubt, there will be false allegations, in others, false denials. In some cases the application for the domestic violence order may reflect lawyers' advice that having the order would benefit a party's family law case. The order itself (which does not include the court's reasons, or the evidence) will normally cast little or no light on these questions.

When the family law court comes to make parenting orders, what matters is evidence relevant to the child's best interests. The previous making of the family violence order is simply part of the history, and its significance will depend entirely on the circumstances surrounding its making: for example, the nature and degree of the alleged violence, whether it really happened, the motives of each party in bringing or contesting the case, or agreeing to the order. In principle it is similar to other events in the history, such as a parent being admitted to hospital, or re-marrying, or moving

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29 See also the discussion in *Family Courts Violence Review* (2009) at 141-142.

30 There is a considerable literature on family violence orders, but for present purposes it is enough to mention the valuable discussion in Parkinson, Cashmore and Webster, "The views of family lawyers on apprehended violence orders after parental separation" (2010) 24 (3) *Australian Journal of Family Law*, 313-336.

house: these are not factors that the court needs to consider, they are historical episodes which may or may not prove to be relevant in some way, depending on the circumstances.

The family law court needs to know about the family violence orders, and, appropriately, there is a provision requiring parties and others to tell the courts about such orders.[31] There are two reasons why the court needs to know about them, in my view. First, so that it knows whether any parenting order it makes will conflict with the family violence order – as, for example, if the family court were to order that the child spend time with a parent but under the family violence order the parent is not permitted to come within a certain distance of the child.[32] Second, so that inquiries can be made, by the parties and by the court, about the circumstances in which the order was made. Those circumstances might indicate, for example, that someone was violent, or that someone made a mischievous allegation, or denial. It would be those circumstance that would be relevant to determining what is best for the child.

The Act should, of course, make it clear that *evidence* about family violence is relevant to determining what is best for children, but it makes no sense, in my view, to list *the order itself* as a factor relevant to the child's best interests.

The view that the reference to family violence orders should be removed from s 60CC is supported by the ALRC/NSWLRC report[33], which, after a comprehensive analysis, recommended that there should be no reference to family violence orders as such among the relevant factors in determining children's best interests. Instead, 60CC(3)(k)

> should be amended to provide that a court, when determining the best interests of the child, must consider evidence of family violence given, or findings made, in relevant family violence protection order proceedings.[34]

I have no objection in principle to this recommendation. However I wonder if it is necessary. If the Act satisfactorily says that the child's best interests must be paramount, and gives such guidance as the legislature thinks fit about the factors to be taken into account in determining what is best for the child, it should be obvious that any evidence relevant to those factors should be taken into account.

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31 Section 60CF.

32 The relationship between parenting orders and family violence orders is the subject of Division 11.

33 See *Family Violence – A National Legal Response: Final Report* (ALRC Report 114; NSWLRC Report 128) October 2010, especially at 757-768.

34 Id., Recommendation 17-1.

I will not digress to consider technical questions of admissibility of evidence given in prior proceedings in other courts, but I note that Division 12A of Part VII now gives the court greatly increased flexibility in relation to rules of evidence and procedure, and I am not aware of any difficulties in the court taking account of evidence given in previous family violence proceedings.

Finally, if my view is accepted, would the omission of paragraph (k) be taken as indicating that the legislature took a less serious view of violence? So long as the Explanatory Memorandum explained the reason for the omission, and so long as other provisions of the Act properly emphasised the importance of violence in relation to children's interests, I do not think that should be a problem.

To conclude, I suggest that paragraph (k) either be simply omitted, or if it is thought that there is a need for such a provision, amended in the way proposed in the ALRC/NSWLRC report.

PART 2: RESPONSE TO THE SUBMISSION BY THE NON-CUSTODIAL PARENTS PARTY (EQUAL PARENTING)

General

The submission asserts that various negative consequences would flow from the bill. It does not refer at all to the intended *positive* consequences, or the reasons for thinking the bill will achieve them. Nor does it refer to the evidence and argument contained in the various reports that have influenced the bill. The Committee will no doubt assess the reasons for the bill and its intended benefits, as well as possible negative consequences, drawing on the significant evidence now available.

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The submission states:

> It is worth noting that a major architect of the proposed reforms preferred a legal presumption that family violence existed in all cases before The Court. Whilst this extremist view has rightly been rejected, the combination of proposed provisions outlined below will come close to achieving the same effect.

In case I am the 'architect' to whom the first sentence refers,[35] I mention that I have never supported such a presumption, or even heard of such a presumption, and I consider it absurd.

I can see no basis for saying that the combination of the bill's provisions comes close to creating a presumption that family violence existed in all cases before the court. The submission does not explain which of the bill's provisions are supposed to do this, or how. So far as I can see, the bill tries to remove disincentives for victims, so that the court will have the best possible opportunity to know whether there has been family violence in any particular case, and, if there has, to deal with it appropriately.

The definition of 'family violence'

The submission says:

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35 It would be wrong to refer to me as an architect of the bill (though I have seen such a suggestion in the media). Many of my recommendations were rejected; many of the recommendations that were implemented in the bill had also been urged by others; and the bill contains many measures that I had not recommended.

> The definition of "family violence" will not be restricted to physical or mental abuse but will be completely open ended. It will include any behaviour a party claims makes them feel threatened "irrespective of whether that behaviour causes harm", or to feel unsafe. …

The bill's definition does not actually include the words in quotation marks. Nor is it fairly characterised as "completely open ended". Further, the definition is not satisfied if someone *claims* to feel unsafe: it requires the court to find that the behaviour actually caused them to feel unsafe. Claims by litigants to feel unsafe can be, and routinely are, tested by cross-examination and the tendering of inconsistent evidence.

Nevertheless, in my view the definition is possibly over-inclusive, and I have discussed this, and possible solutions, in Part 1, above.

The 'friendly parent' provisions

The submission says that the removal of the "friendly parent provisions" will

> prohibit the Court from giving consideration to the extent the parents have fulfilled their obligation to encourage a healthy relationship between the children and the other parent. The Court should not be placed in this legislative "straightjacket"….
>
> this provision reveals a diminished view of the importance of maintaining a healthy relationship between both parents and the child and exposes the true intent of the amendments.

This criticism proceeds on the mistaken assumption that the omission of the 'friendly parent' provision would mean that the court is *forbidden* to consider whether a parent has encouraged the children's relationship with the other parent. There is nothing in the bill that limits the court in taking into account anything that is relevant to the child's best interests; it is something the courts have always considered, and will continue to consider.[36]

It may nevertheless be possible, as the submission suggests, that the repeal of the paragraph might suggest to some people that the legislature has taken "a diminished view of the importance of maintaining a healthy relationship between both parents and the child and exposes the true intent of the amendments". Such a risk could be mitigated by appropriate statements in the Explanatory Memorandum, and is in any case probably rather slight. And the importance of parent-child relationships will of course continue to be emphasised by other provisions, notably s 60B and s

60CC(2)(a). In my view, as indicated above, the likely benefits of this amendment outweigh the possible risk to which the submission refers.

Effects of the amendments

Under this heading, the submission claims that the bill is likely to have numerous adverse consequences. It does not refer to any evidence to show that these things are likely. Nor does it refer to the possibility that the bill might have possible positive effects, in which case it would be appropriate to balance these against the possible negative effects.

One of the encouraging features of recent developments in family law has been the amount of government support for research that is relevant to the assessment of the way the family law system is working. In my view it would be unsafe for the Committee to accept that any of these asserted consequences are particularly likely.[37] I hope it will rely on evidence, as contained in the various reports, rather than assertion. The submission's list of possible adverse consequences does not constitute a good reason to reject the bill.

Lack of objective research

Under this heading the submission makes a number of statements that I will consider in turn.

> Although the amendments are claimed to be supported and underpinned by various academic studies etc, such studies are only valid if they are objectively conducted with an open mind and from a non ideological platform.

There seems to be a suggestion here that the studies are ideological rather than objective and open minded. This is a serious charge. But since the submission does not give any reason for it, or even identify the studies to which it refers, I do not think the Committee can reasonably form any such view of the available studies on the basis of this assertion.

> We have seen no reliable statistics or studies which show:
>
> a) Any significant upsurge in actual family violence, supported by police and medical records since the introduction of the 2006 Family Law reforms and which can be reasonably attributed to the 2006 reforms.

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36 Section 60CC(3) will continue to include paragraph (m), 'any other fact or circumstance that the court thinks is relevant'.

37 They are, however, issues that could usefully be assessed by further research. If that research revealed such adverse consequences in the future, and showed that they outweighed the benefits of the legislation, it would be sensible to reconsider the law at that time in the future.

The case for the bill does not depend on any such 'upsurge'. As I understand it, the case for change is that there are features of the law that can mean that the family law courts do not learn about some family violence that should be taken into account when making orders about children, or do not give sufficient weight to children's need for protection. Neither this paragraph nor other parts of the submission address the arguments actually advanced in favour of the bill.

> b) Any explanation of how an inevitable increase in tensions, legal costs, case time and demands on limited resources will reduce family violence.

This comment assumes that there will be an increase in tensions. It gives no reason for this assumption. I suspect that, as with many such matters, the bill might have diverse consequences. There might be a *reduction* in tension for some parents, and some children, if they feel safer as a result of the changes. There might also be an increase in tensions, for example, if parents who feel entitled to equal time meet increased resistance. Unfortunately, family breakdown and litigation normally produce tension, and in cases involving allegations of violence and abuse these tension are likely to be extreme, whatever the details of the law. I don't know of any basis on which we can predict whether there will be an overall increase in tensions.

Secondly, the statement addresses an argument that nobody actually makes. That is, so far as I know nobody has suggested that an increase in tensions will reduce family violence. The argument for the bill is, in substance, that it is likely to lead to greater protection for children and other family members exposed to violence. The paragraph does not address this argument.

> c) Any explanation of how an inevitable increase in the number of cases where parent – child contact is unjustly affected, will reduce family violence.

I would make a similar comment on this statement. It assumes an adverse consequence, and then misleadingly suggests that those in favour of the bill argue that the adverse consequence itself will reduce violence – which they do not.

> d) Any studies on the affect (sic) on children of curtailing contact with a parent who has had a caring, loving relationship with the child but has been subjected to allegations by the other parent.

It is obvious that in ordinary circumstances children benefit from contact with loving parents, and if such contact is curtailed because of false allegations, that would be a tragedy. Nobody supporting the bill, I believe, would suggest the contrary.

The real problem that arises in these cases, I believe, usually takes one of two forms. The first is that one party says that the child would be exposed to the risk of some sort of violence or abuse in the hands of a parent or other person. The task facing the courts - often very difficult – is to try to determine whether there is such a risk, and how severe it is.

The second form is that children can be distressed and sometimes damaged by exposure to violent arguments and hostility between the two people the children love most, the parents. In these cases the challenge is to try to reduce the conflict, or reduce the children's exposure to it, while doing the best one can to preserve the children's relationships with both parents – but not when doing so causes more damage than benefit. The submission's statement in paragraph (d) does not address these difficult issues.

> e) Any studies on the impact on suicide rates and other mental issues in non contact parents, unjustly denied contact with their children.

The critical word here is 'unjustly'. No doubt many parents who have been denied contact with their children will feel deeply distressed, especially if they feel the process has been unjust. Nobody would want children to be unjustly denied contact, and – I imagine – nobody would doubt that it could be devastating for the parent and for other family members, especially the children. I don't know if there are any studies of such cases, or what criteria researchers would use to identify cases in which the outcome is unjust. In any case, I cannot see what an absence of such studies has to do with the merits or otherwise of this bill.

Summary

The first paragraph of the Submission under this heading is this:

> Based on our research and experience, we maintain that the 2006 reforms have worked well and sensibly in encouraging shared parental responsibility while at the same time providing appropriate protective measures for adults and children against family violence. The evil in the amendments is to encourage a presumption that family violence and abuse of children customarily exist in contested matters before the Court.

The submission does not set out or cite the research and experience referred to. Assessing the way the amendments of 2006 have worked is extremely complex, and I suggest that the Committee would be unwise to rely on unsupported statements that they have been a success, or, equally, unsupported statements that they have failed. It will, I have no doubt, turn instead to the evaluation by AIFS and other reports and publications that contain evidence about how the law has worked.

Nor would the Committee be safe in relying uncritically on statements to the effect that on the basis of an organisation's own research and experience something is the case.[38]

The second sentence of the quoted paragraph returns to the initial suggestion that that the amendments encourage "a presumption that family violence and abuse of children customarily exist in contested matters before the Court". Again, however, the amendments do not create any such presumption expressly; the submission gives no reason for saying that they do so implicitly, and I can see none.

I suggest that what the amendments seek to do is really quite straightforward. First, they try to ensure that the people are not discouraged from bringing allegations of violence or abuse before the court, and that when they do, that the court has the best available evidence on which to judge such allegations. Second, they try to ensure that the guidelines for determining children's cases give appropriate emphasis to children's need for protection against violence and abuse.

The Submission continues:

> We also believe the amendments are an underhand means of sabotaging the 2006 reforms under the guise of preventing family violence. We vigorously oppose the amendments.

I am not aware of anything that has been 'underhand'. The reasons behind the bill are readily available in statements by the Attorney-General, in the Consultation Paper to the Exposure Bill, and in the various publicly available reports that the Attorney-General has mentioned. It is easy to see that people would have different views about how the law should deal with children's cases, especially those involving allegations of violence, and I see no reason to doubt that the various competing views are genuinely held.

Nor do I think it is accurate to say that the bill undermines the 2006 amendments (leaving aside the emotive word 'sabotage'). The bill will retain the existing emphasis on the continuing involvement of parents after separation, including the presumption favouring equal shared parental responsibility, and the existing requirement that courts must consider making orders for children to spend equal time, or substantial and significant time, with both parents.[39] Children's best interests will remain the 'paramount consideration'.[40]

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38 I discuss the status of such material in *Family Courts Violence Review* (2009) at 25-28.

39 Sections 60B; 60CC(2)(a); s 61DA; s 65DAA.

40 Section 60CA.

The submission's comment is particularly surprising, because the Government has in fact rejected a set of proposals contained in my 2009 report that would indeed have modified the 'shared parenting' provisions of 2006. These proposals were not based on any view that parents were unimportant, or that they should not be encouraged to continue active parenting after family breakup. They were based essentially on a technical critique of the provisions of the Act, which I regard as unnecessarily complex and confusing, and distracting both parents and courts from the fundamental task of trying to work out what arrangements are likely to be best for the children. Whatever might be thought about the merits of these proposals, the fact is that the Government has rejected them, deciding instead to make quite limited changes to particular sections, leaving in place the essence of the 2006 parenting provisions.

PART 3: WIDER ISSUES

In this Part I will try to explain briefly why I believe that there needs to be an overhaul of Part VII, especially the provisions introduced in 2006.[41] I realise that it is not the Committee's role to draft a new and different bill, and I only include this discussion in the hope that it might help to set the context for consideration of the bill.

The main problem with the present law is that it is unnecessarily complex and confusing, whatever one might think about the merits of shared parenting. The technical difficulties make it hard for people to focus sensibly on what is best for the children, because they can easily get tangled up in the law. I will mention just a few of many problems.[42]

'Primary' and 'additional' considerations

The first problem is that the matters to be taken into account in making parenting orders are divided into two categories, 'primary' and 'additional' considerations: s 60CC.

This approach was not recommended by the Hull Committee of 2003, or by the Family Law Council, or, so far as I know, by any person or body experienced in family law.

It exhibits a basic misunderstanding of the nature of decisions about children. In deciding what is likely to be best for children – whose interests remain the paramount consideration – the decision-maker has to assess the evidence. The importance of particular things will depend on the circumstances. For example, a parent's mental ill-health will be relevant, but its importance will depend on how ill the parent is, and how the illness impacts on the child. It would make no sense to say that mental ill-health is sufficiently important to be considered a 'primary' factor, or of such limited importance that it should be relegated to the category of 'additional'. In order to carry out the legislature's command to treat the child's best interests as paramount, it is necessary to weigh different things *according to their importance for the particular children in the circumstances of each case*. For decision-makers to give some added significance to certain matters because they fall into one category or another is, in my view, ultimately inconsistent with the requirement to treat the child's interests as paramount.

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41 A more detailed account is contained in my 2009 Report.

42 There is a considerable literature on these issues, in the *Australian Journal of Family Law* and elsewhere, but I will not burden the Committee with a string of citations (though I would happily provide them if requested).

Experience shows that the problem is real. The courts have wrestled with the problem, and, in my view, the decisions sometimes come close to saying that nothing really turns on whether a consideration is 'primary' or 'additional'.[43] There is much to be said for this, but it sits awkwardly with the language the legislature has chosen.

The distinction has led to barren technical arguments. In one case, for example, *Mulvaney v Lane*,[44] a man had assumed he was the father, acted as such, and was accepted by the children as such, but it was discovered just before the hearing that he was not the biological father. It was argued for the mother that the children's relationship with him should be given limited significance because he was not technically a '*parent'*, and the 'primary' consideration in s 60CC(2)(a) refers only to benefits of a child's relationship with '*parents'*.

It is obvious, in my view, that in such a case the relationship will be of great importance, and, equally, that the court should consider what consequences might flow from the discovery that he was not the biological father. Argument about his category, and whether the children's relationship should be treated as 'primary', distracts everyone from the task at hand, and can lead to confusion and added legal costs and delays. In *Mulvany*, the technical problem led to an appeal, no doubt causing the parties great additional distress, delay and costs before the issue was resolved. More generally, published judgements show that the need for judges to thread their way through the complex provisions is a formidable distraction, and one that has led to a number of appeals. It must also confuse parents and their advisers when they are trying to work out arrangements for children.

Equal shared parental responsibility and equal time – a complex and unnecessary link

Next, as a result of various provisions, there is an intricate connection between equal shared parental responsibility and equal time in making parenting orders.[45] The Act does not create a presumption favouring equal time, but looks like it does, and this confuses people. Further, I'm not sure that the position is clear even when you sort out the tangle of provisions. On one hand it's true that the court only has to 'consider' equal time. On the other hand, equal (and substantial and significant) time is the only outcome that the Act specifically mentions, and it's hard to avoid the idea that it's somehow favoured. On this, as on other matters, I believe that the Act is subtly

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43 *Mulvany v Lane* (2009) 41 Fam LR 418; (2009) FLC 93-404; [2009] FamCAFC 76; discussed in (2010) 24 *Australian Journal of Family Law* 128.

44 *Mulvany v Lane* (2009) 41 Fam LR 418; (2009) FLC 93-404; [2009] FamCAFC 76.

45 There is a detailed discussion in *Family Courts Violence Review* (2009), Part 3.

incoherent, sending out inconsistent messages. Not surprisingly, the AIFS Evaluation and other reports reveal that it has caused considerable misunderstanding.

Lack of congruence between the legislation's guidelines and children's needs

The guidelines and principles in the Act in some ways fail to conform with current evidence about children's developmental needs. I will mention only three of the most obvious.

First, the emphasis on equal time (I have less difficulty with 'substantial and significant' time) resonates with ideas of parental entitlements, and simplistic ideas that the amount of time is what really matters. I believe that child development experts would generally agree with the following statements about the evidence:

> The consistent conclusion emerging from the research on contact and shared parenting is that what matters most to children is the quality of their relationship with their parents, not the amount of time per se.[46]
>
> while quality is more important than quantity of involvement for child wellbeing, there has to be a minimum amount of time available to develop and sustain a quality relationship.[47]

Next, evidence about child development shows that children's developmental needs depend very much on their age and stage of development: there, is for example, a great difference between the needs of a baby and a 5 year or, and again a 12 year old. Yet the Act does not highlight this;[48] and the requirement that in certain circumstances courts must consider equal time arrangements applies indifferently to all children. This may have contributed to equal or near-equal shared outcomes in circumstances where they are likely to be inappropriate, for example when the child is a baby.[49]

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46 Cashmore et al, Social Policy Research Centre, University of New South Wales, Shared Care Parenting Arrangements since the 2006 Family Law Reforms: Report to the Australian Government Attorney-General's Department, Sydney, May 2010, at [5.17] (quoted in Cooper, above, at 45).

47 L Trinder, 'What might children mean by a meaningful relationship?'(2009) 15 *Aust Jnl of Family Studies* 20 at 22 (quoted in Cooper, above, at 44).

48 The child's 'maturity' is included among the additional considerations in s 60CC(3), along with other charistics of the child.

49 A number of relevant articles can conveniently be found in Vol 86 of the Australian Institute of Family Studies' journal *Family Matters*, especially McIntosh, J., Smyth, B., Kelaher, M., Wells, Y., & Long "Post-separation parenting arrangements: Patterns and developmental outcomes: Studies of two risk groups" at pp 40-48; and relevant research is further reviewed in McIntosh, J., & Smyth, B. "Shared-time parenting and risk: An evidence based matrix", in K. Kuehnle & L. Drozd (Eds.), *Parenting plan evaluations: Applied research for the Family Court. New York* (Oxford, University Press, forthcoming.)

Next, I believe there is a great deal of evidence that exposure to parental conflict can be distressing and often damaging for children, especially where it is severe and persistent, and especially when the children are young. Again, this is not emphasised in the Act (despite the efforts of the Hull Committee).[50] In my view, the explicit focus on some factors – parental involvement and protection from violence – can lead parents and decision-makers to underestimate the importance of other considerations.

Size of the Act, and incremental creep in 'reforms'

There is a clear pattern in recent amendments to the Act. There is a determination to increase emphasis on some aspect, and new provisions are added to the Act. Each time, it grows in size. The bigger the Act, the more difficult it is to work with. Drafters have tried valiantly to clarify things with notes and other devices: these can be useful, but the total effect is ever-increasing size. Among family lawyers, its present size and complexity are a matter of constant negative comment.

There are no doubt several reasons for this, but in my view one fundamental reason is that in recent times the legislation has become far too prescriptive. It tries to do too much. Legislation can and should provide basic principles and guidelines, but ultimately the court must weigh up the evidence and decide what is best for the child (because of the paramount consideration principle). Unduly detailed prescriptions are unrealistic, because it is impossible to predict the variety of circumstances that come before the court. Any specific guideline will be inappropriate in some cases; the temptation is to try and spell out situations where it applies and does not apply – and thus size and complexity increases, as new legal categories emerge, with potential new arguments and appeal points. At some point, people might think that undue weight is being given to one consideration, and will urge that additional provisions are inserted to ensure that greater consideration is given to something else. That is what is happening in this bill, for example with the new s 60CC(2A).

This process has no obvious stopping point. Suppose, for example, there were to be pressure to give more prominence to mental health issues. The proponents would point out that they get hardly a mention, and would suggest a new paragraph or section. This would lead to questions about what fell within the new provision, and whether the failure to mention other things meant that they should be given less weight. Others could equally make arguments for greater emphasis on other things: children's age, consistency of parenting styles, and all sorts of other matters. Each time, modifying the Act will make it longer and more complex.

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50 As previously noted, the Hull Committee had recommended in 2003 that special attention be given to the adverse impact of exposure to entrenched conflict.

The ideal, I suggest, would be a much shorter Act, that is far less prescriptive. It would state that the child's best interests are paramount, set out the powers of the courts, and provide succinct and coherent principles. I do not think it is realistic to see legislation as having a major educational role. The ideal system would help decision-makers to have access to the best available research on relevant matters, especially on children and their needs, rather than trying to capture such an understanding in the words of a statute. In such a system, it would be recognised that what matters most in achieving optimal outcomes for children is to set out the basic principles succinctly, appoint good people, and provide them with the resources they need to make wise decisions about the best interests of children.

From this point of view the present bill makes desirable adjustments to fundamentally flawed legislation. It should be passed, ideally with some improvements flowing from the Committee's work. But the major task of simplifying and clarifying Part VII - sadly in my opinion - remains to be addressed.