

THE AUSTRALIAN INSTITUTE OF FAMILY STUDIES (AIFS)

Supplementary submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into The Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011

On July 8 2011, the Committee requested that AIFS prepare a supplementary submission to the above inquiry in order to address a supplementary submission by Professor Richard Chisholm. Professor Chisholm's submission concerns a provision in the list of considerations that guide courts' decision making as to what orders will be in the 'best interests' of the child. This provision directs the court to consider family violence orders. The present submission sets out the current position, the proposed provision in the draft Family Law Legislation Amendment (Family Violence and Other Matters) Bill 2011 (Cth) (the Bill) and Professor Chisholm's proposed provision. It then summarises some of the relevant research findings to aid the Committee in its consideration of the options.

This submission has two attachments. The first is the report on Wave 2 of the Longitudinal Study of Separated Families (Lixia Qu and Ruth Weston, (2010) Parenting Dynamics After Separation: A follow-up study of parents who separated after the 2006 family law reforms). The second is a PDF version of a copy of an article summarizing the findings of the Evaluation of the 2006 family law reforms on family violence (Kaspiew et al 2009) that appeared in Family Matters No 85.

1. Current, proposed and alternative provisions

Current position: Family Law Act 1975 (Cth), s60CC(3)(k)

any family violence order that applies to the child or a member of the child's family, if:

- (i) the order is a final order; or
- (ii) the making of the order was contested by a person;

Proposed position in the Bill (item 19)

'Repeal the paragraph, substitute:

(k) any family violence order that applies to the child or a member of the child's family';

Professor Chisholm's suggestion

(k) any relevant inferences that can be drawn from any family violence order that applies, or has applied, to the child or a member of the child's family, taking into account the nature of the order, the circumstances in which it was made, any evidence admitted and any findings made by the court that made the order, and any other relevant matter (Chisholm, 2011).

It should also be noted that *FLA* s60CC(3)(j) requires the court to consider any family violence involving the child or a member of the child's family and that this provision is left untouched by the proposed amendments. The need to protect children from harm resulting from their being subjected or exposed to abuse, neglect or family violence is referred to in a number of other provisions in the existing legislation and in the Bill. Notably, the Bill would also amend s60CC(2) to require courts to 'give greater weight to the consideration set out in paragraph (2)(b)' (i.e., the need to protect children from harm) where this principle is in conflict with the other 'primary consideration', namely the benefit to the child of having a meaningful relationship with both parents (Item 17).

2. Relevant research findings

As the primary submission and supporting documentation provided by the Institute indicates, a history of family violence is more common than not among separated families, with 65% of mothers and 53% of fathers reporting either physical hurt before separation (26% of mothers and 17% of fathers) or emotional abuse before or during separation (64% of mothers and 52% of fathers) (LSSF wave 1 – parents were interviewed some 15 months after separation). In LSSF wave 2 (in which 70% of parents were re-interviewed some 28 months after separation), 4–5% of mothers and fathers reported experiencing physical hurt at the hands of the former partner in the previous 12 months, with 53% of mothers and 45% of fathers reporting emotional abuse in the same time frame. The parents who reported physical hurt in the preceding twelve months were asked if their children had witnessed violence or abuse in this timeframe. Affirmative responses were given by 81% of fathers and 79% of mothers.

While 4–5% may seem to reflect a low rate of abuse entailing physical harm, it is worth noting that, each year, between 40,000 and 50,000 children experience the divorce of their parents and some children born of cohabiting relationships will also experience the separation of their parents. If 4% of these children had a parent who was a victim of such physical abuse, then a new cohort of 1,600 to 2,000 children would be in this position each year.

In addition in LSSF wave 1, 21% of mothers and 17% of fathers reported holding safety concerns for their children and/or themselves as a result of the child's ongoing contact with the other parent. By LSSF wave 2, a similar proportion of the sample reported holding safety concerns, with a core group of 10% holding the concerns through both LSSF waves. For 10% of parents, concerns held in Wave 1 had dissipated by Wave 2 while newly arising concerns were reported by 7% of parents in Wave 2.

These data underline the prevalence of concerning issues that are pertinent to separated families. The Evaluation findings that child well-being is adversely affected when there is a history of family violence, or where a parent indicates safety concerns or reports relationships that are 'fearful' or characterized by 'lots of conflict' underline the need to identify families for whom these issues are relevant so that appropriate responses may be provided. While parents reporting these issues were much more likely than other parents to indicate that they had used relationship services, lawyers and courts to sort out their parenting arrangements, it was still a minority of such parents that reported relying on the formal system.

Findings from a study that contributed to the Evaluation that was based on an analysis of 1737 court files (dealing with matters filed and determined after the 2006 reforms), suggest that the presence of a family violence protection order is just one relevant issue, potentially among many, to the court's consideration of an alleged history of family violence or presence of safety concerns (Kaspiew et al 2009, p341). Bearing in mind that these data arise from a legal environment governed by the existing provisions, it is interesting to note that a cluster of issues relating to family violence and concerns about child abuse were the most commonly raised factual considerations in the s60CC 'checklist'. Assertions in relation to family violence of a physical nature, for example, were made in 33% of cases that were judicially determined and 23% of cases that were settled by consent after proceedings were initiated. In contrast, 20% of cases in the former group and 13% of cases in the latter group included arguments and evidence relating to the presence of a family violence protection order. It can therefore be seen that a significantly greater number of cases involved allegations of family violence than referred to the existence of a family violence protection order. The existing evidence suggests that in only a minority of cases where family violence occurs is a family violence protection order obtained. Of the women who reported experiencing violence (applying a narrow definition¹) at the hands of a previous partner in the Australian Bureau of Statistics Personal Safety Survey, only 25% reported obtaining an intervention order (ABS 2005).

The Evaluation of the 2006 family law reforms also reported a range of concerns expressed by lawyers relating to state protection orders. In some instances, these were contradictory, reflecting a range of relevant concerns held by practitioners with differing views. These were simply concerns expressed by practitioners based on their subjective views. Some lawyers suggested some family violence protection orders were being used tactically in some instances. Other lawyers suggested that people against whom orders were being obtained were consenting to the making of the order to avoid it being considered under *FLA* s60CC(3)(k) (Kaspiew et al 2009 p252).

In this context, it is important to appreciate that the Evaluation findings as a whole indicate that the family law system has a way to go in finding an effective way to deal with family violence and child abuse and that there are a range of problems that need to be addressed (see attachment B). The following findings demonstrate this point:

- parents with a shared care-time arrangements were as likely, and in some instances, more likely to report the experience of family violence than parents with other arrangements. For example, 70% of mothers with shared care time reported having experienced physical or emotional abuse compared with 64% of mothers who cared for their child for 66-99% of nights (Kaspiew et al 2009 Figure 7.30);
- ongoing safety concerns were reported by 16-20% of parents with a shared care-time arrangement compared with between 13% and 19% of parents with an arrangement involving 66-99% of nights with the mother (Kaspiew et al Figure

¹ Any incident of physical assault, attempt or threat. (ABS 2005, p.59).

- 7.31);
- parents who reported a history of family violence or ongoing safety concerns were taking longer to sort out their arrangements and using more services than parents without these concerns (Kaspiew et al 2009 Tables 4.12–4.14);
 - 29% of a sample of 2335 clients of family relationships services indicated that they had felt afraid of the person about whom they attended the service: of these, 35% said their fears had not been addressed (it is unclear whether their fears had been conveyed to the professionals at the service) (Kaspiew et al 2009 Table 10.3);
 - 92% of FRC professionals, 89% of FDR professionals and 86% of lawyers responded affirmatively to the proposition that the system “gives adequate priority” to the “meaningful involvement” principle (see Kaspiew et al 2009, Section 10.1.2);
 - 65% of FRC professionals, 66% of FDR professionals and 55% of lawyers responded affirmatively to the proposition that the system “gives adequate priority” to the “protection from harm” principle (see Kaspiew et al., 2009, Section 10.1.2).

References

Australian Bureau of Statistics (2005) Personal Safety Survey Catalogue No 4906.0.

Chisholm R, The Inclusion of family violence orders among the factors to be considered in relation to a child: s60CC(3)(k), Supplementary Submission (8 July 2011).

Kaspiew, R, Gray, M, Weston, R, Moloney, L, Hand, K, Qu L and the Family Law Evaluation Team (2009) Evaluation of the 2006 family law reforms, Melbourne: Australian Institute of Family Studies.

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