



Bringa

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Submission No. 43

Date Received.....

NA
The Secretariat,
House of Representatives Standing Committee,
On Legal and Constitutional Affairs,
Parliament House Canberra ACT 2006.

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BY: LACA

Dear Secretariat,

Pleased find attached the submission prepared by the Manly Warringah Women's Resource Centre to the Inquiry into the provisions of the Family Law Amendment Bill 2005.

The Manly Warringah Women's Resource Centre is an Organisation for women and children who are victims of domestic violence and child abuse. Under the auspice of the Board of Directors we operate various programs to assist women and children before and after Family Breakdown. We are funded through the Supported Assistance Accommodation Program, (SAAP) Community Services Grants Program (CSGP) and Legal Aid.

This Organisation is also a member of the N.S.W. Women's Refuge Movement
The N.S.W. Violence Against Women's Network
The National Abuse Free Contact Campaign
The N.S.W. Domestic Violence Court Assistance Scheme

PROGRAMS

- Bringa Women's Refuge
- Manly Warringah Pittwater Family Support Service
- Young Pregnant Women's Outreach Service
- Manly Warringah Court Assistance Scheme
- Contact Passover Centre
- Child Therapist
- Women's Resource Centre

We are concerned that there is no capacity in the proposed Family Law Amendments to provide specific guidelines for women and children who are victims of domestic/family violence. This oversight needs to be addressed and integrated with the recommendations of the Family Law Council in its 2002 Family Law and Child Protection Report and its 2004 Letter of Advice on Family Violence should be implemented.

Yours faithfully,

Barbara Kilpatrick

Barbara Kilpatrick OAM,
Principal Executive Officer.

Background of the Bill

In 2003 the House of Representatives Standing Committee on Family and Community Affairs conducted an inquiry into child custody arrangements after family separation. The Committee's report, *Every Picture Tells A Story*, tabled on 29th December 2003, had a strong focus on the importance of reducing conflict between separated parents and on separated fathers having greater involvement with their children.

On the 24th June 2005 The Attorney General's Department released the Government's response to *Every Picture Tells a Story*, an exposure draft of proposed legislation and explanatory statement. In addition to the introduction of the Family Relationship Centres and the more prominent use of Family dispute resolution in Family Law matters, the proposed changes to the Family Law Act could be the most significant changes to the family law system since 1975.

On the 29th July 2004 the Prime Minister released a statement responding to the Committee's report and proposing major reforms to the Family Law system. The announcement centred on the introduction of 65 Family Relationship Centres across the country. We now know that there are plans for these centres to be introduced over a number of years.

The exposure draft has been referred to the House of Representatives Legal and Constitutional Affairs Committee for consideration. Any comments are to be submitted to the committee by the 15th July 2005. The Committee is due to report by the 11th August 2005.

Schedule 1 – Shared Parental Responsibility

Content

Item 2 of the Schedule amends the objects provision of Part VII of the Act to provide that, subject to safety issues, children have the right to know and be cared for by both parents.

Comment

I agree with Item 2 in principle, I believe (subject to safety issues) it is not explanatory enough. This part of the statement needs to be expanded.

Recommendation

The child's right to safety has to be paramount, it needs to be expressed as a basic human right.

Family Dispute Resolution (FDR)

Content

Item 9 provides that people applying for a parenting order will be required to first attempt to resolve their dispute using family dispute resolution services. A court cannot hear an application for a parenting order unless the applicant provides a certificate of attendance at family dispute resolution or that failure to do so has been caused by the other party's refusal or non-attendance.

Comment

I am fully conversant with the exemptions set out in Item 9. My concerns were seriously raised when the Attorney General Philip Ruddock detailed the Government's Family Law Agenda at the Lone Fathers Association National Conference at Parliament House, he stated *"Mothers, who usually retain custody of their children after separation will also be required to prove allegations of abuse. Responsibility for investigating those allegations would fall to the States". "You've got to ask yourself why allegations are made". "It doesn't provide for jailing the mother, but that doesn't mean to say that in appropriate cases... a range of other remedies wouldn't be available"*. Those words make it very clear that women who are victims of Domestic Violence will have to have proof from Police or Courts to show they have been mistreated or abused in the relationship. Most of the research into victims of abuse shows they rarely tell anyone about the abuse until they are forced to leave the home, or there has been outside intervention. I note in the preamble it is stated a report from a family counsellor or family dispute resolution practitioner will suffice in most cases. This needs to be clarified as the Attorney General does not appear support that decision.

Recommendation

A sworn statement or affidavit made by a party that violence or abuse has happened in the relationship should be sufficient to make an exemption from attending mediation, or having counselling together.

Content

"Substantial time with each parent - shared parenting.

Advisers as defined in the Bill and including legal practitioners, FDR practitioners, family counsellors) assisting in the making of a parenting plan are required to inform their client(s) of the possibility of the child spending substantial time with each of the parties if it is practicable and in the best interests of the child.

Comment

We would support it if it were in the best interests of the child. The research and submissions prepared for *Every Picture Tells A Story*, was clear that children need reside with a parent and have a residence they can call home to feel secure and safe. If separated parents live in close proximity and are able to communicate with each other on a reasonable level, the children may be able to divide their time with each parent and be content. In my experience, that is not the norm. Young children especially, need regular routines, structure and continuity. To live in constant confusion contributes to serious problems in later life.

Recommendation

There should be no assumption that children should spend substantial time with each parent. The decisions made for each child should be based on the best outcome for that child. A requirement would be that the parents have the capacity to communicate effectively and that children's safety and emotional wellbeing are the prime considerations.

Content

Changes to the determination of the best interests of children.

The Bill introduces a two tiered system to determine the best interests of children (amending the current S68F(2)). The first tier consists of two primary considerations, which are:

1. The benefit to the child from having a meaningful relationship with both of the child's parents, and
2. The need to protect the child from violence or psychological harm caused, or that may be caused, by being subjected or exposed to abuse, ill treatment, violence or other behaviour; or being directly or indirectly exposed to abuse, ill treatment, violence or other behaviour that is directed towards, or may affect, another person.

Recommendation:

The second consideration above is enough and must stand alone as the primary factor.

The second tier includes the factors that are currently contained in S68F(2) with some changes.

Grandparents and other relatives are now specifically named in some of the factors, rather than the factors just referring to "other persons"

A new factor that the court must consider is the willingness and ability of each of the child's parents to facilitate and encourage a close and continuing relationship between the child and other parent.

Comment

We support the rights of Grandparents and feel in many instances, because of the animosity between their children, their grand children are deprived of their love and concern. We also understand the need for parents to encourage a close and continuing relationship between the child and the other parent. Sometimes the complexities that surround the making and breaching of contact orders are very serious and prevent the "willingness" being enacted.

Any amendments to address the problems associated in the facilitation of a continuing relationship of the child with the other parent must take into account decisions made that relate to issues of violence and abuse rather than unwillingness to facilitate a close relationship with the child.

Recommendation

This is not a factor that should be included in S68F(2)

Presumption of Joint Parental Responsibility:

Item 11 provides a new presumption for the court to consider in making an order, that parents have joint parental responsibility for the child except where there are reasonable grounds for the court to believe that a parent of a child or a person, who lives with a parent of a child, has engaged in child abuse or family violence. The presumption will also be rebutted where the court considers that joint parental responsibility would not be in the best interests of children.

Comment:

The Family Law Act makes it very clear that all Australian parents have joint parental responsibility (that is, decision making) by Law. It is not just a presumption. The Act also makes clear that "children have the right to know and be cared for by both parents" and a "right of contact, on a regular basis" with them. Australian law already endorses the principle of shared parenting.

Recommendation:

It needs to be made very clear in the Act that Joint Parental Responsibility is not Joint Equal Residency of children. In cases of abuse or violence the non-abusive parent will have Full Parental Responsibility (that is decision making) for the children.

Substantial Time with each Parent:

Content:

Item 14 provides that Advisers (as defined in the Bill and including legal practitioners, FDR practitioners, family counsellors) assisting in the making of a parenting plan are required to inform their client/s of the possibility of the child substantial time with each of the parties if it is practicable and in the best interests of the child.

Item 23 provides that the court must consider making an order that a child spend substantial time with each parent, if a parenting order provides parents with joint parental responsibility for the child. The court must consider whether both parents wish to spend substantial time with the child and whether it is reasonably practicable for the child to spend this time with each parent and whether it is in the child's best interests.

Comments:

It was our understanding that research presented to the Inquiry Into Child Custody Arrangements, made it very clear that equal time arrangements are not necessarily in the best interests of all children. It is making the assumption that most parents can equally manage to care for the children. That is not what happens in the majority of families. Parents still tend to have set tasks. Mothers organise working around the children's needs, frequently working part-time and close to home, while fathers tend to invest more in the workplace. It is very unusual to alter these patterns after separation. A presumption of equal time could mean that many women who are victims of abuse are pressured into arrangements that are not in the best interests of the children. Professor Patrick Parkinson has stated: "Equal time parenting requires the parents to have adequate housing, to provide two homes for the children, they need to be in close proximity to each other. As time goes on, repartnering, job demands and other life circumstances may well pull parents in different directions. Young children need a stable environment to ensure secure attachments. This usually means having a primary home and caregiver."

Recommendation:

Adequate flexibility is already provided in the Act. There should be no assumption that children should spend substantial time with each parent and the circumstances of each child should be taken into account in determining his/her best interests, consideration must be given to the capacity of the parents to communicate effectively.

Changes to the Family Law Act:

Proposed Changes to S60B: Objects of Part and Principles underlying it.

Comment:

We agree with these Objects and Principles. We also believe the right to live in a safe environment free from abuse should be incorporated:

Recommendation:

The Objects and Principles should include: to ensure that children have the right to live in safety, free from abuse.

Schedule 2 – Compliance Regime**Content:**

The Bill proposes amendments reflecting the changes to the Object in S60B – that children have a meaningful relationship with both of their parents to the greatest extent possible. Make up contact can be ordered and the Bill provides directions about when the court must consider making a costs order and/or ordering compensation for costs incurred in relation to contact that did not take place because of the breach. The court is also given broader powers to impose bonds. The Bill clarifies that there is a low standard of proof for compliance matters at the 1st and 2nd stages on the basis that the sanctions are not criminal. If the matter is a stage 3-contravention matter – there is a presumption that the court will order costs against the party in breach unless it is not in the child's best interests.

Comment:

Research by Rhoades (2002) shows very clearly that the most common reasons for contravention proceedings are against mothers who have serious concerns about the safety of their children. Breaches tend to occur when mothers err on the side of caution and refuse to allow contact because they believe the contact parent is not responsible at that time. A punitive response to parent's protecting their children from violence and abuses are unnecessary and not warranted.

Persons filing such applications should have to establish that contact was not provided and face penalties for frivolous or not-meritorious applications. The ability to withhold contact to protect children needs to be available to parents.

Recommendation:

Any proposed changes must take into account that sometimes parents need to withhold contact to protect their children from exposure to violence or abuse.

Schedule 3 – The Conduct of Child Related Matters:**Content:**

The Bill provides for changes in the way child related matters are conducted. These changes are based on the Children Cases Program that has been piloted by the Family Court in N.S.W. They allow for the Court to act in a more inquisitorial manner. Principles are set out in the Bill to guide the Court in a less adversarial approach. These Principles include:-

- Ensure the proceedings are focussed on the child
- The Judicial Officer must control the conduct of the hearing
- Ensure that the proceedings are conducted in such a way to encourage the parents to focus on the children and on their ongoing relationship as parents
- The proceedings should be conducted as expeditiously and with as little formality as possible

The proposed new s60KE provides a number of general duties that the Court must carry out to give effect to the principles. This includes considering whether the likely benefits in taking a step in the proceedings justify the costs of taking it,

Significant changes are proposed in relation to the rules of evidence. Even where the rules of evidence in relation to hearsay evidence are applied, a representation made by a child about a matter that is relevant to the welfare of that or another child is admissible.

Comment:

It is necessary for judges and other participants have appropriate training and acquire the necessary skills to understand the complexities of domestic/family violence situations. We support the Family Law Councils recommendation that a national approach to child protection needs to be implemented.

Recommendation:

That the recommendation for a National Investigation Unit be set up to thoroughly and professionally investigate cases where children are alleged to be at risk of violence and abuse. Made by the report "Every Picture Tells a Story".

Conclusion:

The proposals advanced by Government contain a number of flaws. They do not represent any attempt to address the very real problem of domestic/family violence in our community much more work and more constructive solutions need to be advanced if real progress is to be made. The Government needs to acknowledge that Australian Research shows very clearly that the difficult matters presented at the Family Court are matters where family violence is the basis of a multi faceted complex problem.