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Submission 81

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Inquiry into the Family Law Amendment (Shared Parental Responsibility) Bill 2005

Submission to the Standing Committee on Family & Community Affairs

By the Family Issues Committee

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The Law Society of New South Wales

Family Issues Committee

Submission to the House of Representatives Standing Committee Inquiry into the Family Law Amendment (Shared Parental Responsibility) Bill 2005

Introduction

It has not been possible within the timeframe for comment to give detailed consideration to the Bill and any possible unintended consequences. The members of the Family Issues Committee of the Law Society of New South Wales who are solicitors with extensive and varied experience in the practice of family law have attempted, in the short time available, to identify their principal concerns about the practical application of the draft legislation.

The Family Issues Committee does not oppose the policy objectives behind this Bill. The Committee believes, however, it is important that the initiative, (which in many respects codifies general practice by the Family Court and the Federal Magistrates Court), retains the acknowledged paramountcy of the best interests of children while at the same time having regard to the rights of their parents and practical considerations.

The Committee has considered the exposure draft which outlines the proposed provisions and is concerned that they are complex, are likely to have unintended consequences, including promoting adversarial behaviour, and in some respects, are difficult to understand.

The Family Issues Committee believes that an example of well-intended law reform that had unintended consequences is the *Family Law Reform Act* 1995. The 1995 *Family Law Reform Act* may have failed to achieve many of its stated objectives because it was not motivated by an empirically based reform agenda. Indeed, some commentators have suggested that it was reform for reform's sake. Of even greater concern, however, were the unintended consequences of the 1995 Reform Act. The matters were extensively examined in two major research reports: "*The Family Law Reform Act 1995": Can Changing Legislation Change Legal Culture, Legal Practice and Community Expectations*?"[1] and "*Parenting, Planning and Partnership: The Impact of the New Part V11 of the Family Law Act 1975*"[2]. The Family Issues Committee strongly urges the Standing Committee to have regard to the findings of these important research reports, both of which have potentially much to say about the current reform process, and the capacity for law reform to effect meaningful and constructive change.

The Family Issues Committee outlines specific issues it has identified in the drafting of particular sections of the Bill in the following comment.

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1 H Rhoades, R Graycar & M. Harrison. University of Sydney and Family Court of Australia, September 2000;

2 J Dewar and S Parker. Family Law Research Unit, Working Paper No 3, March 1999.

Schedule 1 – Shared parenting responsibility

Section 60B (2) (b) – Objects of part and principles underlying it

The principle needs to be broader to cover the protection of children from all forms of harm, not just physical or psychological harm and should include sexual abuse.

Section 60B (3) and 60D and 61F

The inclusion of specific references to Aboriginal and Torres Strait Island children and their cultural needs is supported.

Section 60I - Attending Family Dispute Resolution before applying for Part VII Order

This section refers to situations where a certificate by a family dispute resolution practitioner is required. Section 60I (7) provides that a court may not hear an application for a Part V11 order unless the applicant files in court a certificate by a family dispute resolution practitioner.

Subsection (8) states that subsection (7) does not apply in an application for consent orders or in response to an application by another party.

It also does not apply if:

(b) the court is satisfied that there are reasonable grounds to believe that:
- *(i) there has been abuse of the child by one of the parties to the proceedings; or*
- *(ii) there would be a risk of abuse of the child if there were to be a delay in applying for the order; or*
- *(iii) there has been family violence by one of the parties to the proceedings; or*
- *(iv) there is a risk of family violence by one of the parties to the proceedings;*

The "abuse" exception

The stage in the proceedings where the court would need to be satisfied on reasonable grounds that there has been abuse is unclear. This is unlikely to occur at the first court listing. Allegation of abuse or risk of abuse are almost always contested, and usually require significant evidence to be placed before a court and usually require some type of report by an independent expert. The Family Issues Committee questions whether there will be a two-step process with a consequence of more court appearances and possible costs, that is, one hearing so that the court can be satisfied about the abuse/family violence grounds and a subsequent hearing of the substantive application.

All of the sub-paragraphs in s60I (8)(b), with the exception of (ii), refer to "*one of the parties to the proceedings*" as possible perpetrators of abuse and/or violence. The Family Issues Committee's collective experience indicates that perpetrators can include parties not involved in the proceedings. Accordingly, it is suggested that the references to "*one of the parties to the proceedings*" be removed, thus focussing the concerns on abuse and violence, irrespective of whether the perpetrator is involved in the proceedings.

S60J - Family Dispute Resolution not attended because of child abuse or family violence

This section applies to applications made on or after 1 July 2006. It is applicable where a court is satisfied on certain grounds that an upfront certificate is not required, but where a certificate is required before the court can hear the substantive application.

Limited Exceptions
The exceptions to the requirement for a certificate that the applicant has attended family dispute resolution with the other party to the proceedings are perhaps too limited. Other exclusionary factors might include *'entrenched conflict'* and *'substance abuse'*. The Standing Committee is also referred to the exclusionary factors referred to in the pre action procedures under the Family Law Rules.

Provider of "Information"
The Family Issues Committee interprets this section to mean that the exception applies because the court is satisfied that there are reasonable grounds to believe that there has been abuse of the child by one of the parties to the proceedings or there has been family violence by one of the parties to the proceedings. This implies that there has been one hearing which has determined that there has been abuse or family violence.

Regardless of this determination, the hearing of the substantive application, presumably seeking orders that would have the effect of promoting the welfare of a child after such a finding had been made, cannot take place until *"the applicant files in court a certificate by a family court counsellor or family dispute resolution practitioner"* to the effect that the counsellor or practitioner has given the applicant information about the issue or issues that the order would deal with.

It is difficult to understand the reason for not proceeding with a hearing on the substantive application when there has been a determination about such serious matters.

It is also likely that there would already have been contact with state welfare authorities and the police and that relevant information would have been given by these authorities.

The Family Issues Committee is also concerned about the presumption that the applicant needs this information more than the respondent.

It is most likely in cases where the court is satisfied about these grave matters that a child and family specialist would have been involved. Given that the parties are already involved in court proceedings, it is likely to be more logical and effective if the family specialist was to provide the information. Alternatively, the solicitor for the applicant could give this information.

Extension of abuse/family violence criteria
Again, as noted in the abuse and family violence exceptions, it is difficult to see why reference to the relevant behaviour which threatens the welfare of a child is not extended in this section to persons associated with a party who brings the child into contact with the "perpetrator" of abuse or family violence.

Clarification of Terminology: "here"
The meaning of "here" in subsection 1 is unclear, for example, it could mean an interim or a final hearing.

Additional Determination/Urgency & Overlapping Grounds/Past Abuse
The requirement set out in the comment re Subsection 1 does not apply if the court is satisfied on reasonable grounds of the matters set out in (a) and (b). The Family Issues Committee notes:

(1) Effectively the court may be asked to make this further determination. It is unclear why this further complication is added to matters when they are in the litigation stream.

(2) In situations where risk of abuse or family violence is likely it is also likely that there would be some urgency about the need to obtain orders which would promote the welfare of a child and so there would be overlapping grounds which would add to the complexity of the applicability of these provisions in proceedings.

(3) The subsection does not overcome the problem that there is often insufficient or inadequate evidence to determine whether, on the balance of probabilities, there has been past abuse. Therefore, the determination of whether there would "be a risk of abuse of the child" on an interim basis may often be difficult to decide in the affirmative. The joint effect of a non-attendance at formal dispute resolution with the subsection 2 test could delay the judicial decision and may disadvantage those litigants and children who require protection in the context of family violence.

For the reasons outlined, the Family Issues Committee submits it is likely that the provisions of section 60I are likely to add complexity and expense to proceedings and at the same time leave gaps in the protection of children.

Section 61DA – Presumption of joint parental responsibility when making parenting orders

The interaction between s61DA and s61C may create confusion and in fact generate disputes. Section 61C means that <u>each</u> parent has parental responsibility for a child, which can be exercised independently of the other parent. This applies to all parents in Australia, whether separated or not, and the only thing that can change this is a court order. Section 61DA provides, however, that if a parenting order is sought, there is a presumption in favour of joint parental responsibility, meaning that parental responsibility cannot be exercised independently of the other parent. A positive obligation to consult is created. The Family Issues Committee believes that this will be unworkable for most parents who are litigating about their children, and so litigation will focus on displacing the presumption by attempting to establish the exemptions.

There is, in any event, no evidence to demonstrate that a presumption of joint parental responsibility will lead to more co-parenting after separation. Those parents for whom joint parental responsibility is a practical reality (probably because that is how they parented before separation) don't need a legal presumption in this regard after separation – joint parenting is their natural inclination anyway. But to impose joint parental responsibility on parents who did not parent in this fashion before separation, is a recipe for conflict. It is also potentially de-stabilising for a child. Moreover, there is no guarantee that an uninvolved parent will become involved just because of the presumptions. The presumption places the committed parent in a position where he or she is subject to the power of the uncommitted parent. The presumption will, however, work best for committed parents who can communicate with each other and who are able to satisfactorily manage their conflict.

Section 63DA (3)

Officers performing child protection activities may be caught inadvertently by the definition of "adviser" as they may have discussions with parents when investigating the options for protecting their child and avoiding further intervention by the State. If the definition extends to them, the Bill should be amended to ensure that these officers are excluded from that scheme when performing a child protection role.

Section 64D – Parenting Orders subject to later parenting plans

This reform would benefit from further thought in relation to parenting plans. The importance of parenting plans is emphasised in this section, as in several others. The Family Issues Committee feels that it is somewhat incongruous, however, that parents cannot enter into legally enforceable agreements about their property and child support without some form of institutional scrutiny (eg registration of a child support agreement; the making of consent orders by a Registrar of the Family Court; obtaining of a s90G certificate in relation to a financial agreement) but can do so in relation to their children without any scrutiny. In the absence of even cursory scrutiny, the Act may end up endorsing arrangements for children that are clearly not in their best interests.

Sections 65D and 65DAA

Clarification is needed about the principles the court will apply in those cases where the child remains under the parental responsibility of both parents even though there are child protection concerns. The Family Issues Committee is particularly concerned that section 65DAA may be used to facilitate contact regimes which are not in the best interests of a child who might be at risk. It is unclear whether this presumption will displace the "unacceptable risk" test in child abuse cases. The Family Issues Committee suggests that the simplest solution may be to explicitly state that s65DAA is subject always to the best interests of the child.

Section 65G (2) (a)

This proposal is not supported. It may allow "back door" adoptions. The Act should retain the existing provisions which require the court to consider reports about proposed parenting orders in favour of third parties.

Section 68F – How a court determines what is in a child's best interests

Effectively this section lessens the significance of the wishes of children. While the court in determining what is in a child's best interests must consider the matters set out in subsections (1A) (new) and (2), subsection 1A comprises two "primary considerations".

Important matters specifically relating to children have been included in the "additional considerations" eg. *"children's views"* – (no longer wishes) -- and the relationship of children with their parents.

Use of the word *"views"* rather than *"wishes'* reduces the significance of what children say. If there is a good reason to use the word *"views"*, for example, because it might be seen to cover broader areas, the expression should be *"wishes and views"*.

In addition, the structure of the section with the views/wishes of children listed as additional considerations implies that less weight will be given to them.

The approach of differentiating between "primary considerations" and "additional considerations" is not explained in any note to the section. This new approach appears to introduce a hierarchy which will make an assessment of the relative significance of the factors uncertain and open to contention. A hierarchical division is likely to result in substantial litigation, including appeal proceedings to clarify:

(a) the interrelationship between the subsection (1A) and the subsection (2) factors;

(b) factors relevant to a definition of or proper consideration of "meaningful relationship" in subsection (1A)(a).

There appears to be a typographical error at subsection 3 where, at the end, it refers to "the matters set out in subsection (2)". Presumably, this is meant to read "subsection (1A) and subsection (2).

Alternatively, if there is no typographical error here, it would mean that in some consent situations the Court would not be able to make consent orders in chambers because it may require further information or evidence about the "primary considerations" under subsection (1A).

The creation of a hierarchy of factors is problematic. As drafted, a Court may need to subsume the strongly articulated views of a 14 year old child not to have contact, to a parent's argument that there is benefit in having a meaningful relationship. This is because the child's view is an *additional consideration* only, but the parent's argument relates to a *primary consideration.* A child may be required to endure extensive travel for contact purposes on a frequent basis in order to meet the parent's need for a meaningful relationship (a primary consideration) even though the child may resent this, may have a poor relationship with the parent, and finds it practically difficult (all secondary considerations). All of the stated considerations, primary and secondary, are relevant and important. The Family Issues Committee believes, however, that none are necessarily more important than the other, and that the relative importance of these factors should be determined having regard to the individual facts of the case.

Section 68F (1A)

The reference to physical and psychological harm should be broadened to cover all forms of child abuse, including sexual abuse. Refer comment in relation to section 60B (2) (b).

Section 68F(2)(ba)

This new additional consideration focuses attention on the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the child and the other parent. This new factor seems reasonable on the surface, but experience in the United States suggests that similar provisions have actually increased litigation and conflict and worked against the interests of children. See MK Dore *"The Friendly Parent Concept: A Flawed Factor for Child Custody"* (2004) 6 Loyola Journal of Public Interest Law 41.

Section 68F(2)(j)

This additional consideration relates to family violence orders but only ones which are final or contested. The intent seems to be to exclude from consideration interim, *exparte* or consent orders, presumably on the assumption that this category of orders lacks forensic weight having regard to the circumstances in which they were made. This may well serve the interests of the defendant in family violence applications, but it will also motivate the applicant *not to* agree to consent orders in cases where family violence could become an important factor in a parenting application. Indeed paragraph (j) could easily become an incentive to more litigation in the courts dealing with family violence orders. This is surely not intended. The Family Issues Committee believes that paragraph (i) clearly covers the issue and that (j) is not needed.

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Schedule 2 – Compliance Regime

Section 70NJ (2A) (b) – Powers of court

This subsection seems to require an order that the contravening party pay all the costs of the other parties to the proceedings. It is not immediately clear whether this refers to party/party costs, solicitor/client costs or indemnity costs. The Court should have a discretion in relation to costs.

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Schedule 3 – Amendments relating to conduct of child-related proceedings

Section 60KC

While the section infers that hearings in chambers will be an ordinary part of child-related proceedings, there is no guidance as to which matters would be appropriate.

The Family Issues Committee is concerned about practices that have occurred in relation to the Children's Cases Program where evidence has been heard in chambers in the absence of the parties who are then not fully aware of what the court has heard and taken into account. A Committee member has reported that in a recent matter a parent's evidence was heard in chambers in the absence of any of the other parties including the child representative and child protection officers. Denial of natural justice in this manner may result in poor and improper decisions with aggrieved parties having limited recourse to appeal.

It is submitted that the Act should specify those matters which are appropriate and/or inappropriate for hearing in chambers.

Section 60KG – Rules of evidence not to apply unless court decides

The Sydney and Parramatta Registries of the Family Court have established Children's Cases Programs ("CCP"). However, there is diversity of opinion amongst the relevant Judges as to how the CCP should operate. There needs to be some uniformity of understanding of the procedure to be followed.

This section appears to provide for the rules of evidence to be abandoned to a considerable degree. Given that there will be no requirement for consent, as is currently the position with the CCP, the Family Issues Committee questions whether the provision is appropriate.

Section 60KH – Evidence of children

The intention of this section in regard to the giving of evidence by children in the proceedings needs clarification. It appears to be limited to evidence of third parties on behalf of a child (such as a child protection officer giving evidence about an interview with the child) but could also extend, in conjunction with section 60KC, to empowering the court to hear evidence from a child directly and in chambers. This raises issues of natural justice and concerns about the appropriateness of children giving evidence in proceedings about them.

Section 68KI (3) – Court's general duties and powers relating to evidence
This provision could be expanded to include all children, not just Aboriginal and Torres Strait Island children so that no parties to proceedings are denied the use of information from other proceedings. It is unclear why the procedure is limited to issues relevant to Section 61F.

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Schedule 4 - Changes to Dispute Resolution

Section 4 (1) – Definition of "abuse"

Part (a) of the existing definition, which is largely linked to the commission of criminal offences of assault, should be broader to include, for example, child pornography or cases of ill treatment which may not amount to an assault.

Sections 10C (3), 10D (2), 10K (3), 10L (2), 11C (3)

The Family Issues Committee welcomes the opportunity for family counsellors, family dispute resolution practitioners and family and child specialists to discuss issues relating to the abuse and protection of children with child welfare officers.

However, because the definition of "abuse" in section 4 is limited, they may refuse to discuss child protection concerns which fall outside the specific areas mentioned because they lack clear statutory authority to do so. It is recommended that this authority be clarified.

Section 67Z (1)

The Family Issues Committee submits that child and family specialists should have an obligation to report child protection matters to State child protection agencies. If they are included in the term "court personnel" in subclause (a), this should be clarified so that the requirements of section 67ZA to report child protection matters to State child welfare agencies apply to this group.

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Schedule 5 - Removal of references to residence and contact

Removal of references to residence and contact

The Family Issues Committee submits that the new language is cumbersome and will not assist in changing people's attitudes.

However, replacing these terms with another set of terms will cause confusion and difficulty in applying laws based on these terms or terms such as "custody" and "guardianship". An example is the *Passports Act* 1938 where technical difficulties have arisen about the interpretation of the meaning of "caring responsibility" in Section 7A (8) (section 11(5) of the *Australian Passports Act* 2005, which replaces section 7A(8) of the *Passports Act* 1938, is one of the provisions referred for amendment in Schedule 5 of the draft Bill).

It will be difficult to equate the proposed terminology with terms like "custody" and "access" which are used in other national and international jurisdictions. The terminology may also affect the internal cohesion of the new Act, for example, application of the Child Abduction Hague Convention which forms part of the Family Law Act 1975. It is also noteworthy that the government, media and general community still commonly refer to "custody" and "access".

Consideration should also be given to the implications for State and Territory legislation which was amended previously to incorporate terms like "residence" and "contact" so that it aligns with the *Family Law Act*. Use of the term "care" instead of "contact" is particularly likely to cause confusion, given that in many jurisdictions the term "care" is also used to describe "day-to-day care". The term "care" is also used in this context in provisions like section 69ZK (1), and that provision will become particularly difficult to interpret because it may now capture contact orders where previously it didn't. It should be noted that section 69ZK comes into operation whenever the child is "under the care (however described) of a person under a child welfare law. . . ".

Section 60D – *De facto* relationship

This is a narrower definition to that in some State legislation, in that it does not cover same sex couples.

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