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From: Roger Debois [planetary@online.fr]
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To: Committee, LACA (REPS)
Subject: Re: our submission

...a écrit: ''If you have any specific comments on the draft legislation, the Committee would be pleased to accept them as a submission. Please note that the Committee is to report by 11 August and is currently drafting its report.''

here is our input:

Submission by

Planetary Alliance for Fathers in Exile

in response to the Family Law Amendment

(Shared Parental Responsibility) Bill 2005

Planetary Alliance for Fathers in Exile is a support and advocacy group based in Europe and has operated for 10 years now to bring about equality and nature justice from a male's perspective. Incorporating both male and female members, many of whom have been personally involved in disputes within the Family Court of Australia (the Court); we hope to offer an analysis of the proposed Family Law Amendment (Shared Parental Responsibility) Bill 2005 (the Bill) which is both insightful and relevant to the House of Representatives Standing Committee on Legal and Constitutional Affairs.

We note in the governments Explanatory Statement of the Bill, it is described as 'the Government's bold new reform agenda in family law.' Sadly, after reading the Bill we can not agree with this statement.

The problem with the current reforms is that the language keeps changing, but the reality stays the same. Over the years many changes have been made to the Family Law Act 1975 (the
Act) which specifically sought to change the terminology used; such as 'custody' to 'residence' and 'access' to 'contact.' The purpose of this was to change the mindset of the aggrieved parties, to assist and facilitate greater shared parenting outcomes from the Court. In reality we have seen a substantial decrease in the number of shared parenting outcomes from the Court and this should be a flashing red light for anyone involved in the current attempts to further revise the Act.

Whilst acknowledging the Bills attempts to reword the Act to encourage shared parenting outcomes, we feel these changes are not the bold new reforms that the Government hopes them to be because whilst wording the Act to recognise the importance of both parents in the raising of children after separation or divorce, they do not fundamentally change the law to force the Court to view parents as equals.

We note that there are numerous changes to numerous Acts including the Family Law Act 1975, Federal Magistrates Act 1999, Income Tax Assessment Act 1997 and the Marriage Act 1961, with the specific amendment of: 'Omit "contact with", substitute "care of".' We also note other changes to the Child Support (Assessment) Act 1989 to substitute in new words such as 'substantial care' and 'major care'. Whilst we acknowledge these changes as being substantial in the way the law views and defines care arrangements after separation or divorce, in essence these changes are merely superficial and will not be extensive enough to change the outcome for many separated parents, as proven by the 1995 amendments to the Act.

Much of the acrimony over the preposed rebuttable presumption of shared parenting (the

presumption) which the House of Representatives Standing Committee on Family and Community Affairs inquired into was that a 50/50 time share arrangement between separated parents would not be ideal in a considerable number of cases. Whilst this is true, the Committee failed to see the relevance of the presumption in fundamentally changing the way the Act legislates to enshrine parent's and children's rights. The purpose of the presumption was not to force a 50/50 time share arrangement on everyone who separates, but to recognise under law that both parents are equal and are entitled to have equal time should they be able to.

This presumption would have a major effect on shared parenting outcomes when allied with the new Family Relationship Centres which are also to be set up under the Governments family law reforms. No amount of counselling or mediation is going to solve disputes over care arrangements of children when one parent has more negotiating power then the other. The trend towards viewing the primary care giver during a relationship as the appropriate primary care giver after a relationship is fundamentally flawed and discriminatory. It is the cause of much of the angst felt be separate parents who sacrificed their caring opportunities to be the primary financial provider. The proposed changes to the Act do not address this issue because under the proposals contained within the Bill, the primary care giver will still be viewed by the Court as being able to best serve the best interests of the child. This notion of the primary care giver is also ill-informed and discriminatory to the other parent and the child.

The fundamental flaw with the current Act is that it does not view parents as equal. Parents are judged by the Court on who can best serve the interests of the child and this almost always means the primary care giver during the relationship is favoured. This is a discriminatory policy because it not only judges parents outside a relationship based upon the negotiated dynamics within that relationship, but imposes that relationship upon the parents after they have separated. People who work full time do so for the benefit of the other parent and the child/children of the relationship. This is a sacrifice which is completely ignored by the Bill because it treats this parent as the lesser parent. It treats them as less able to provide primary care and less important to the ongoing welfare and development of their children. When these parents separate, the negotiated division of caring duties is no longer valid, yet the Court uses it to determine future care arrangements.

There is growing consensus amongst research that children are better adjusted and less emotionally distressed by separation when they are able to maintain a meaningful relationship with both of their parents. Whilst this seems to be recognised by the proposed changes, it is recognised in theory only. There is no requirement of the Court to implement a shared parenting time arrangement. A parent who worked full time can still be robbed of their involvement with their children and vice versa on the foundation that it is not in the child's best interests, something the Court already does on a regular basis. A parent who works full time during a relationship is no less capable of caring for their children then the other parent. All they lacked was the time to do so.

Imagine a new mother having given birth to her first child, is told she can't care for her child because she has had a full time job up until the birth. She must make an application to the Court first and justify why she should be given the chance to give primary care to this child. That is exactly how the Court treats fathers who have been working full time. The only difference is that fathers who have been working full time have usually spent years caring and parenting their children each morning, evening and weekends. They have far more experience caring for their children then a new mother, but we would not dream of subjecting a new mother to the indignity of proving their worth before we allow them to care for their own children.

Under the current legislation one parent is always going to be favoured and the Bill does not change this. The presumption would alleviate this situation to a greater extent because parents unable or unwilling to have 50/50 time share arrangement would be able to declare themselves able to have 20%, 30%, or 40%. Without a presumption in law which says that both parents are equal, you will still have one parent having to go cap in hand to the Court begging to see their

children. This is not a fundamental change; this is merely a rewording of the current flawed system. It is a parent's natural right to care for their own children without the interference of the State. The division of caring duties which existed within that relationship should be of no effect, because under different circumstances, such as when they separate, that division will be completely different. Parents deserve the right to say they can only have 30% care, because of their work commitments, not have to go to the Court and beg for it. If a parent thinks the other is unfit or incapable it should be up to them to show a Court why, not the other way around.

The reason the Family Relationship Centres need the implementation of a presumption in law that both parents are equal, is because they will not be able to operate effectively when one parent knows they can fall back on the shadow of the law when negotiating. When one parent knows that the Court will favour them if they don't concede to a reasonable care arrangement they will be encouraged not to negotiate fairly and to fall back on the Court to get what they want. It makes a mockery of the intention of proposed changes not to give these Family Relationship Centres the ability to achieve what they are intended to achieve.

Outlined below are a few minor changes to the wording of the Bill which we feel would be of great benefit. Whilst the changes are small, they would go a long way towards re-enforcing the notion that children need to spend equal or substantial time with each parent after separation or divorce in order to ensure their emotional and mental wellbeing. They also would help to remove the ambiguity which we feel exists, allowing for lawyers to argue and debate the interpretation of the amendments away from the intended purpose of these reforms.

The purpose of a number of these changes, whilst not being fully explained in our preface should be self explanatory. Should you have any questions regarding our proposed changes then please feel free to contact Planetary Alliance for Fathers in Exile at any time.

Suggested amendments: Amendments are in bold.

60B Objects of Part and principles underlying it

(1) The objects of this Part are:

(a) to ensure that children receive adequate and proper parenting to help them achieve their full potential; and

(b) to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children; and

(c) to ensure that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child.

(2) The principles underlying these objects are first and foremost that the best interests of the child are best served by an equal or substantial amount of time with each
parent:

(a) except when it is or would be contrary to a child's best interests:

(i) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and

(ii) children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development; and

(iii) parents jointly share duties and responsibilities concerning the care, welfare and development of their children; and

(iv) parents should agree about the future parenting of their children; and

(v) children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture); and

(b) children need to be protected from physical or psychological harm caused, or that may be caused, by:

(i) being subjected or exposed to abuse or family violence or other behaviour; or

(ii) being directly or indirectly exposed to abuse or family violence or other behaviour that is directed towards, or may affect, another person.

60I Attending family dispute resolution before applying for Part VII order

(8) Subsection (7) does not apply to an application for a Part VII order in relation to a child if:

(a) the applicant is applying for the order:

(i) to be made with the consent of all the parties to the proceedings; or

(ii) in response to an application that another party to the proceedings has made for a Part VII order; or

(b) the court is satisfied that there are proven and substantiated 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; or

(c) all the following conditions are satisfied:

(i) the application is made in relation to a particular issue;

(ii) a Part VII order has been made in relation to that issue within the 6 months before the application is made;

(iii) the application is made in relation to a contravention of the order by a person;

(iv) the person has behaved in a way that showed a serious disregard for his or her obligations under the order; or

(d) the application is made in circumstances of urgency; or

(e) one or more of the parties to the proceedings is unable to participate effectively in family dispute resolution (whether because of an incapacity of

some kind, physical remoteness from dispute resolution services or for some other reason); or

(f) other circumstances specified in the regulations are satisfied.

60J Family dispute resolution not attended because of child abuse or family violence

(1) If:

(a) an application for a Part VII order in relation to a child is made on or after 1 July 2008; and

(b) subsection 60I(7) does not apply to the application because the court is satisfied that there are proven and substantiated grounds to believe that:

(i) there has been abuse of the child by one of the parties to the proceedings; or

(ii) there has been family violence by one of the parties to the proceedings;

a court must not hear the application unless the applicant files in the court a certificate by a family 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.

(2) Subsection (1) does not apply if the court is satisfied that there are proven and substantiated grounds to believe that:

(a) there would be a risk of abuse of the child if there were to be a delay in applying for the order; or

(b) there is a risk of family violence by one of the parties to the proceedings.

61DA Presumption of joint parental responsibility when making parenting orders

(1) When making a parenting order in relation to a child, the court must apply a presumption that it is in the best interests of the child for the child's parents to have parental responsibility for the child jointly.

Note: The presumption provided for in this subsection is a presumption that
relates solely to the allocation of parental responsibility for a child as defined in section 61B. It does not provide for a presumption about the amount of time the child spends with each of the parents (this issue is dealt with in section 65DAA). Joint parental responsibility does not involve or imply the child spending an equal amount of time, or a substantial amount of time, with each parent. (to be omitted)

replaced with:

The Court should however recognise that joint parental responsibility is aided and complemented by the child spending equal or a substantial amount of time with each parent.

(2) The presumption does not apply if there are proven and substantiated grounds to believe that a parent of the child (or a person who lives with a parent of the child) has engaged in:

(a) abuse of the child or another child who, at the time, was a member of the parent's family (or that person's family); or

(b) family violence.

(3) The presumption does not apply if:

(a) the court is making a parenting order that is an interim order; and

(b) the court considers that it is not appropriate to apply the presumption in making that interim order.

(to be omitted)

(4) The presumption may be rebutted by evidence that satisfies the court that it would not be in the best interests of the child for the child's parents to have parental responsibility for the child jointly.

63DA Obligations of advisers

(1) If an adviser gives advice or assistance to people in relation to parental responsibility for a child following the breakdown of the relationship between those people, the adviser must:

(a) inform them that they could consider entering into a parenting plan in relation to the child; and

(b) inform them about where they can get further assistance to develop a parenting plan and the content of the plan.

(2) If an adviser gives advice to people in connection with the making by those people of a parenting plan in relation to a child, the adviser must:

(a) inform them that, if (omitted) the child spending substantial time with each of them
is:

(i) practicable; and

(ii) in the best interests of the child;

and that they should consider the option of an arrangement of that kind; and

(b) inform them of the matters that may be dealt with in a parenting plan in accordance with subsection 63C(2); and

(c) inform them that, if there is a parenting order in force in relation to the child, the order may (because of section 64D) include a provision that the order is subject to a parenting plan they enter into; and

(d) inform them about the desirability of including in the plan:

(i) if they are to have parental responsibility, or a component of parental responsibility, for the child jointly under the plan-provisions of the kind referred to in paragraph 63C(2)(d) (which deals with the form of consultations between the parties to the
plan) as a way of avoiding future conflicts over, or misunderstandings about, the matters covered by that paragraph; and

(ii) provisions of the kind referred to in paragraph 63C(2)(g) (which deals with the process for resolving disputes between the parties to the plan); and

(iii) provisions of the kind referred to in paragraph 63C(2)(h) (which deals with the process for changing the plan to take account of the changing needs or circumstances of the child or the parties to the plan); and

(e) explain to them, in language they are likely to readily understand, the availability of programs to help people who experience difficulties in complying with a parenting plan; and

(f) inform them that section 65DAB requires the court to have regard to the terms of the most recent parenting plan in relation to the child when making a parenting order in relation to the child if it is in the best interests of the child to do so.

Note: Paragraph (a) only requires the adviser to inform the people that they should
consider the option of the child spending substantial time with each of them. The adviser does not have to advise them as to whether that option would be appropriate in their particular circumstances.

65DAA Court to consider child spending substantial time with each parent in certain circumstances (to be omitted)

(1) If:

(a) a parenting order provides (or is to provide) that a child's parents are to have parental responsibility for the child jointly; and

(b) both parents wish to spend substantial time with the child;

the court must make an order to provide (or including provision in the order) for the child to spend substantial time with each of the parents.

Note: The effect of section 65E is that in deciding whether to go on to make a
parenting order for the child to spend substantial time with each of the parents, the court will regard the best interests of the child as the paramount consideration.

(2) Subsection (1) does not apply if it is not reasonably practicable for the child to spend substantial time with each of the parents.

(a) if substantial time with each parent has been made impractical for the child due to one of the parents moving away after the separation, the court must make an order in favour of the other parent.

After subsection 68F(1)

Insert:

(1A) The primary considerations are:

(a) the benefit to the child of having a meaningful relationship and substantial time with both of the child's parents; and

(b) the need to protect the child from physical or psychological harm caused, or that may be caused, by:

(i) being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or

(ii) being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person.

70NEA Standard of proof

(1) Subject to subsection (3), the standard of proof to be applied in determining matters in proceedings under this Division is proof beyond a reasonable doubt.

(2) Without limiting subsection (1), that subsection applies to the determination of whether a person who contravened an order under this Act affecting children had a reasonable excuse for the contravention.

(3) The court may only make an order under:

(a) paragraph 70NJ(3)(a), (d) or (e); or

(b) paragraph 70NN(8)(a);

if the court is satisfied beyond reasonable doubt that the grounds for making the order exist.

Part 1-Amendments

Family Law Act 1975

1 Subsection 4(1)

Insert:

abuse, in relation to a child, means:

(a) an assault, including a sexual assault, of the child which is an offence under a law, written or unwritten, in force in the State or Territory in which the act constituting the assault occurs; or

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

(c) deliberately and intentionally, without just cause, prohibiting the relationship between a child and their parent(s).

(d) knowingly or maliciously making an accusation of abuse, including sexual abuse, against the parent of a child which that person knows to be false.

To summarise we believe the current Bill is a political compromise designed to appease those who would like to see the continuance of the current advantage held by primary care giver within the Court. This appeasement will only perpetuate the turmoil parents currently go through and delay the inevitable change which will come. Sadly, it has taken a generation to see these changes being made to the Act and if the current opportunity to implement real change is missed, then this country may have to endure another generation of fatherless and dysfunctional children before we have the political wherefore all to bring in the changes that are needed now.

Yours sincerely regards, Roger http://www.pafe.human-rights.org/