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18 AUG 2005

BY: LACA

Submission No.	88
Date Received	8-8-05

Submission on Exposure Draft

Family Law Amendment (Shared Parental Responsibility) Bill, 2005

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August, 2005

Relevance of family violence: A shift in focus?

The purpose of this submission is to comment on one aspect of the *Family Law Amendment (Shared Parental Responsibility) Bill, 2005*, "the Bill". This has been concerning me since I first read the Bill but it has taken until now for me to be able to clearly articulate my concerns.

My concern is the manner in which the proposed sections 60B(2)(b) and 68F(1A) describe what a court must examine in terms of family violence and abuse when deciding the best interests of children. The new wording may well shift the focus from consideration of what has occurred to a prediction of what may occur.

The critical words

Principles - s60B(2)(b)

It is proposed that the new section s60B(2)(b) will read as follows:

Children need to be protected from physical or psychological harm caused ... by being subjected or exposed to abuse or family violence or other behaviour or being directly or indirectly exposed to abuse or family violence or other behaviour that is directed towards ... another person.

Section 68F(1A) outlines the "primary considerations" for determining what is in the best interests of children:

the need to protect the child from physical or psychological harm 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 ... another person.

The proposed wording is likely to operate only in a prospective fashion. It could be said that the question a decision-maker would have to ask themselves is whether or not there is a risk that the relevant child will be abused or exposed to abuse (or certain other matters) by spending time, in any way, with either of their parents.

This means the inquiry is about the likely or possible behaviour of one of the parents while the child is with them. However, the relevance of violence and abuse is not limited to whether or not it is likely to recur. The fact that it has happened in the past is also of critical importance and extremely relevant to determining what post-separation living and parenting arrangements are likely to be in the best interests of a particular child.

In drafting legislation aimed at taking this into account, it is necessary to acknowledge that children experience problems with trust and confidence in their relationship with a parent who been abusive – not just issues of future safety if the parent repeats the abuse. Adults capable of abuse generate fear for those living with them because the victims have learned from past experience that the violence is often sudden and unpredictable.

These notions are well documented in the literature about family violence – hyper-vigilance, the constant fear of attack, watching for the warning signs. Therefore it is imperative that two separate matters concerning violence and abuse be rendered relevant to family law decision-making regarding post-separation arrangements for children on the face of the legislation:

- Will they be safe from further abuse in any arrangements made?
- The impact of past direct or indirect abuse on the child's emotional and psychological well-being and their sense of confidence and trust in the abusive parent.

Need for a clear policy objective

It is difficult to discern the government's intended policy about the relevance of violence. Is it mainly about protection children from future physical and / or sexual harm, or does it include protecting children from the psychological and emotional harm that comes from spending time with an adult whom the child knows is capable of violence? Does the policy also intend to reflect acknowledgment of the links between family violence and child abuse?

Apparent Underlying Attitude

The Committee acknowledged in *Every Picture Tells a Story* that the “negative impact of family violence on children’s emotional stability and future development is widely accepted”¹. This statement implicitly acknowledges that having lived with violence continues to impact on children throughout their development – and throughout the rest of their lives, to some extent.

The Government’s November, 2004 Discussion Paper, *A New Approach to the Family Law System: Implementation of Reforms*, “A New Approach”, states in the commentary about “screening” that “children should not be forced to have contact with an abusive parent”.² To determine whether or not a parent is abusive, it is necessary to study the past, but the prospective wording of the new sections does not invite this examination. Rather it suggests that it is the possible future actions of a parent which must be taken into account.

Again the *Government’s Response to Every Picture Tells a Story* states that:

The government has heard the community concerns about the need to ensure the reforms do not increase the risk of violence or child abuse. These concerns have been taken into account in the drafting of the amendments to the Act.³

The intention of the Government may be clear from this statement, but the pressing question is – what does the Government say is the way they have approached this? What is its policy about how to achieve this end?

Finally the *Explanatory Statement* to the Bill points out that protecting children from abuse includes “the possible psychological harm to a child caused by the child witnessing abuse against another child, or family violence against a member of the child’s family.”⁴ But it does not explain how such matters are to be taken into account when they have already occurred.

Changing Approach to the Shared Parental Responsibility Presumptions

Examining the approach to the shared parental responsibility question does not shed light on the Government’s policy or attitude. The DP clearly promises that there will be a presumption “against equal shared parental responsibility where there is evidence of violence, child abuse or entrenched conflict.

¹ *Every Picture Tells a Story*, December 2003, p 20

² *New Approach*, November 2004, p 6

³ *A New Family Law System: Government Response to Every Picture Tells a Story*, June 2005, p 3

⁴ *Family Law Amendment (Shared Parental Responsibility) Bill*, Explanatory Statement, p 2

Seven months later in June 2005 the Government demonstrated a small shift in policy by indicating that it agreed with recommendation 2 of *Every Picture Tells A Story* in terms of creating "a clear presumption against shared parental responsibility" in relation to "cases involving violence or child abuse" but did not include the committee's other characteristics of entrenched conflict and substance abuse.⁵

But the Exposure Draft, which was released on 23 June, 2005 is inconsistent with this policy. Section 61DA has a presumption in favour of joint parental responsibility. Subsection 61DA(2) states that the presumption "does not apply" where a parent has engaged in abuse of the child or family violence – but this is considerably softer than a presumption against joint parental responsibility in these cases. No explanation for this shift in policy, manifested by the drafting, is provided in the Explanatory Statement.

The making of an order for joint parental responsibility has great significance under the proposed regime. Not only will it greatly influence the practical post-separation parenting arrangements for children and parents; such an order is also one of the two pre-requisites to the court being obliged to "consider making an order to provide ... for the child to spend substantial time with the each of the parents" (s65DAA(1)(a)).

These small unexplained shifts may subtly change the emphasis of the Bill. It is critical to ensure that the provisions relating to the impact of family violence and the need for child protection are not trumped by the understandable desire to encourage the involvement of both parents where possible and appropriate.

Recommendations for changes to the wording

The policy position of the government on this matter, and therefore the interpretation of these sections in the future, may be clearer by the addition of a few words to the existing proposed sections:

Section 60B

Children need to be protected from physical or psychological harm caused ... by being, **or having been**, subjected or exposed to abuse or family violence or other behaviour or being, **or having been**, directly or indirectly exposed to abuse or family violence or other behaviour that is, **or was**, directed towards ... another person.

⁵ A New Family Law System: Government Response to *Every Picture Tells a Story*, June 2005, p 5

Section 68F(1A)

the need to protect the child from physical or psychological harm caused ... by being, **or having been**, subjected or exposed to abuse, ill-treatment, violence or other behaviour or being, **or having been**, directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is, **or was**, directed towards ... another person.

The other possibility is to borrow some words from section 61DA where the fact that a parent of a child "has engaged in" abuse or violence is rendered relevant. The repeat use of these words would also develop a consistency of language around these issues.