



THE FAMILY LAW  
PRACTITIONERS  
ASSOCIATION OF WA (INC)

The Secretary

Australian Senate

Standing Committee on Legal

And Constitutional Affairs

**FAMILY LAW AMENDMENT (FAMILY VIOLENCE) BILL 2010**

In response to your invitation received 28 March 2011 in relation to the above Bill, we make the submissions below but note the following before doing so:

- A. The Family Law Act advocates, where possible, a “no fault” jurisdiction and provides a broad discretion to the Judiciary in its decision-making to enable cases to be dealt with on their individual merits. The ongoing erosion of judicial discretion by particular amendment to the Act is contrary to the principle of, and adversely affects the ability of the Court to deliver, individual justice.
- B. A focus on Family violence, particularly where the definition of the same is as broad as proposed, will effectively introduce concepts of fault in child welfare cases.
- C. When phrases such as “child abuse”, “domestic violence”, “and domestic abuse” are introduced in legislation, they tend to become terms of art and attract a definition. Usually the definition is more inclusive than prescriptive. The inclusions often display an attempt by the draftsman to widen the scope of the phrase beyond its usual application in everyday language. This is of concern. We refer you to our comments below in relation to the proposed expanded definition of family violence.
- D. If Government is genuinely concerned to have the Court effectively deal with the scourge of family violence, then the Court system should be adequately financially resourced and equipped to aid prompt enquiry and determination and not be an agent for possibly

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perpetuating the effect of the family violence as a consequence of lengthy delays in the Court system and restricted access to legal advice.

- E. Family Violence affects all aspects of a family and not simply the arrangements for children. As the proposed amendments make plain, it can have a financial aspect. Victims of Family Violence may suffer from one or more of depression, poverty, lack of ability to obtain comprehensive legal advice, lack of ability to clearly express themselves and a lack of ability to address the longer term needs of themselves and their children.
- F. In more recent times the tendency has been to take particular aspects of family breakdown and deal with those as separate and discrete issues. Child support is now directed away from the Court. Current Court procedures often seek to have child welfare matters dealt with separately to financial matters. Violence restraining orders are dealt with in courts separate to the Family Court.
- G. Matters arising out of the breakdown of a domestic relationship should all be able to be dealt with in one Court and in one set of proceedings. This is particularly the case for victims of domestic violence whom should not be required to conduct 3 or more separate cases often without access to appropriate legal advice and support.

#### **The proposed amendment to the definition of family violence (Subsection 4AB)**

- 1. The amendment is not supported. The existing definition is sufficient for the purpose. As the definition of “abuse” in subsection 4(1) is linked to the definition of Family Violence that definition is also far too wide if the proposed definition of Family Violence is maintained.
- 2. The proposed definition is simply too wide and captures behaviour that goes well beyond that which most members of the community would define as “violence”. The types of behaviour captured by the proposed definition are, in our experience, engaged in to a greater or lesser degree by one or both of the parties in the majority of relationship breakdowns and in almost every matter before the Court.
- 3. We have concerns that the inclusion of examples expands the definition of family violence out of all context and reasonableness and that it may encourage exaggerated allegations. We are concerned that the amended definition attempts to fetter the

Judiciary's ultimate discretion as to how behaviour in the particular circumstance of each case should be taken into account in arriving at a result.

4. If it is the case that "financial" violence is to be addressed then why is it that there is no application of the definition to Part VIII concerning financial settlements?
5. Just because a parent has a parsimonious attitude towards the financial needs of the other parent, is it appropriate to restrict the role that parent would otherwise have had in the upbringing of their children?
6. Should a parent who deliberately sets out to undermine or destroy the relationship between a child and the other parent be seen to have committed "Family Violence"?
7. The primary "penalty" for engaging in Family Violence is the rebuttal of the presumption of equal shared parental responsibility. This is a presumption which should have never been introduced into the Act and which was totally misconceived in purpose. However, if it is thought that arithmetically equal time is desirable in the interests of children, then why should children suffer the loss of care by an otherwise good parent whom, for example, has committed the singular sin of writing the word "adulterer" on the side of their partner's car?

#### **The deletion of the "friendly parent provision" in section 60CC (3) (c) and section 60CC (4)**

8. Whilst we repeat that the removal of the "friendly parent provision" is not supported, we note that the proposed amendment does not take into account the potential, and capacity, of one parent to thwart the other's ability to take up the opportunities outlined in the proposed new s60CC(3)(c). Accordingly, and in the event that the "friendly parent provision" is removed, then we propose the following amendment to the new clause:

(c) "the extent to which each of the child's parents has facilitated the other taking, and has themselves taken, or failed to take, the opportunity....."

#### **The proposed amendment to Subdivision BA - s 60CC (2) (2A)**

9. This amendment is not supported.

10. We do not support the potential limiting of the discretionary power of the Judiciary by legislating the prioritising of one limb of the primary considerations over the other.
11. We maintain that the safeguard contained in s60CG, whereby the Court is required to consider the risk of family violence, is sufficient.

#### **The proposed inclusion of s60CC (3) (k)**

12. The amendment has the effect of including interim orders which have been obtained on an ex parte basis. It also discourages parties consenting to Violence Restraining Orders.
13. We reiterate our concern that the inclusion of family violence orders in this section may result in a serious injustice, given that:
  - a. interim, short-term family violence orders can be issued by the police;
  - b. interim Orders can be issued by Justices of the Peace and Magistrates on an ex-parte basis and with no opportunity for the other party to be heard;
  - c. interim Orders can be over-turned or withdrawn; and
  - d. Interim Family Violence Orders can be obtained by one party against another with malicious intent and so as to obtain and certain a certain outcome to their own benefit in the Court system.

#### **Proposed Section 60D**

14. This amendment is not supported. This places upon advisers a mandatory obligation to advise in a particular way. The adviser is required to make a series of personal value judgments as to whether certain behaviour is or is not Family Violence as defined and then whether there is any conflict between that and the other relevant considerations.

#### **Proposed new section 69ZQ (1) (aa)**

15. This amendment is not supported.
16. It is our view that legislating what the Judiciary should ask each party to the proceedings:
  - a. has the potential to create a ground of appeal if the question is not asked;

- b. provides an unduly overt focus on the issue of family violence, potentially to the detriment of resolving the issues in a non-adversarial way;
- c. may create an opportunity for one party to manufacture/exaggerate a family violence scenario for their own gain or purpose; and
- d. removes Judicial discretion to consider what is relevant to each particular case.

Yours sincerely

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