



THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: SW:MAP:FIC

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5 May 2011

Committee Secretary
Senate Legal and Constitutional Committees
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

E-mail: legcon.Sen@aph.gov.au

Dear Ms Dennett

Re: Inquiry into the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011

I refer to your invitation to make a submission to this parliamentary inquiry and thank you for the extension of time within which to respond.

The Bill was referred to expert practitioner representatives on the Law Society's Family Issues Committee which has previously made submissions in respect of parts of the *Family Law Amendment (Family Violence) Bill 2010*.

Those comments are reaffirmed and I attach for your consideration a copy of that submission.

The Committee does not wish to add anything further.

Yours sincerely

Stuart Westgarth
President

Encl



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OF NEW SOUTH WALES

COPY

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17 January 2011

Public Consultation: Family Violence Bill
Family Law Branch
Attorney-General's Department
3-5 National Circuit
Barton ACT 2600

E-mail: familyviolencebill@ag.gov.au

Dear Sirs

Re: Family Law Amendment (Family Violence) Bill 2010

I refer to the *Family Law Amendment (Family Violence) Bill 2010* Consultation paper which was referred to expert practitioner representatives on the Law Society's Family Issues Committee for consideration.

The Committee's comments are as follows.

Item 1 – Subsection 4(1) – New definition of abuse

This amendment is supported as the new definition makes it clear that the abuse in relation to a child does not need to constitute a crime under State or Territory law. The Committee agrees that having to make such an enquiry should be unnecessary and is potentially detrimental to the issue of protecting the child.

Item 2 – Subsection 4(1) – New definition of exposed in relation to family violence

This amendment is supported by the Committee.

Item 3 – Subsection 4(1) – New definition of family violence

In general terms, the Committee supports the proposed definition of family violence.

The Committee notes that the new definition makes reference to family violence including, in sub-paragraph (e), a reference to financial control. The Committee considers this specific inclusion may have unintended consequences and, for example, could be said to apply where a child support payer makes application to the Child Support Agency (or the Courts) to reduce the level of child support payable, in circumstances where the payer is properly exercising his/her rights under the *Child Support Act 1989*.

The Committee is acutely aware of the problems surrounding family violence and does not seek to minimise those problems. However the Committee expresses concern that the extension of the definition to include financial manipulation could in fact cause family violence (as it is more generally understood to apply to physical/psychological issues) to be treated less seriously rather than more seriously.

This inclusion takes the issue of violence beyond 'safety' (physical or psychological) and into the realms of legitimate argument between the parties.

Whilst the Committee acknowledges that the definition of family violence is not meant to be exhaustive, it could be considered that one of the regular incidents of family violence includes the manipulation of the children in terms of the time they are "allowed" to spend with the other party. This situation, arguably, is abusive of the children in any event (although not currently treated as such) and could be considered as much "family violence" as financial manipulation.

Item 4 – Subsection 4(1) – New definition of *member of the family*

This amendment is supported by the Committee.

Item 5 – Subsection 4(1) – Revised definition of *Registry Manager*

This amendment is supported by the Committee.

Item 6 and 7 – Paragraphs 4(1AD)(a)(c) – Revised definition of *member of the family*

This amendment is supported by the Committee.

Item 8 – Paragraphs 4(1AB)(c) – New definition of *exposed*

This amendment is supported by the Committee.

Item 9 – Subsection 12E(3) – Revised obligations on legal practitioners

The Committee makes no comment on this discrete issue. Reference however should be made to the comments in Items 23 and 24 as they relate to section 63DA.

Item 10 – Subsection 12G(1) – Revised obligations on family counsellors, FDR practitioners and arbitrators

The Committee makes no comment on this discrete issue. Reference however should be made to the comments in Items 23 and 24 as they relate to section 63DA.

Item 11 – Paragraph 43(1)(ca) – Revised principles to be applied by courts

The replacement of the word 'safety' with 'protection' in section 43(1)(ca) is supported.

This amendment may assist in clarifying the broader nature of what is required to ensure the best interests of children. It also ensures a consistency of terminology in the Act.

Item 12 – Section 60CA – What Division 1 of Part V11 does- Revision

This amendment is supported by the Committee.

Item 13 – Section 60B – Revised objects of Part V11

The proposed amendments to these provisions are supported, however it is strongly suggested that the words "...is to give effect to..." be changed to "...is to have regard to..." in section 60B(4).

The Committee is concerned that the subsection as presently drafted may require the Court to effectively 'import' the entirety of the Convention and elevate it to legislative effect. If this is the intention, then greater time will be required to properly analyse the Convention, assess how it may interact with the current legislation and try and perceive any unintended consequences.

Item 14 and 15 – Revised section 60C – Divisions and coverage

This is a consequential amendment and is supported.

Item 16 – Revised subdivision BA of Division 1 of Part V11 – Best interests of the child: Court proceedings

The proposed change relates to the heading only of the subdivision and no objection is raised to that change as such.

The Committee considers that the statement within the Note 16.2 that:

"Advisers communicate with parents and other people about their children, and these communications may occur before, during or after court proceedings. Accordingly, matters relating to courts and advisers warrant separate treatment."

is misleading and that advisers should be subject to the same considerations whether communications occur before or during the court process.

Item 17 – New subsection 60CC(2A) – Determining a child's best interest

This provision is generally supported. However the Committee points out that there is a probable consequence in that, in any case in which family violence is alleged at the time of an interim hearing (ie before the issues can be ventilated, challenged and determined on the evidence) then the possibility, or the terms, of an interim order will be restricted. At one level this is presumably intended by the Bill, but it may well lead to increasing levels of claims of family violence, thereby in fact creating a "cry wolf" disbelief of those claims.

Items 18, 19 and 20 – Section 60CC – Revised 'friendly parent provisions'

Arguably the 'family friendly' provisions have acted as a disincentive to some litigants making a full disclosure of evidence of family violence and abuse. This was one of the conclusions of the Chisholm Report. However, arguably the proposed amendments to the 'family friendly' provisions, as outlined in items 18 and 20, go beyond the Chisholm Report's recommendation as they do not retain the value of the provisions in situations where family violence and abuse do not exist.

It is suggested that an appropriate alternative would be to amend rather than delete sections 60CC(4) and (4A).

The Committee submits that, in particular, section 60CC(3)(c) is an important concept in assessing the best interests of a child and has been a part of this 'section' (under previous section numbers) and the jurisprudence for some time. This subsection in particular allows the Court to consider aspects of parenting not immediately obvious under other subsections.

Item 21 – New provisions – Subdivision BB and sections 60CH and 60CI

The introduction of these new provisions is generally supported. This requirement will improve the ability of courts to identify any risk of harm to children, and allow an early consideration of whether child protection authorities should be invited to intervene in proceedings.

There is concern however about the proposed inclusion of sections 60CH(2) and 60CI(2)(a) in relation to a party, who is not a party to the proceedings, informing the Court that a child, or another child who is a member of the child's family, is under the care of a child welfare law or subject of a notification report or investigation, inquiry or assessment. It should be the responsibility of a party to the proceedings to inform the Court of this information (and it is noted that pursuant to proposed s60CH(1) and s60CI(1) there is a positive obligation for them to do so). Given this, the necessity to enable third parties to make these notifications is queried and there is concern about the "standing" of these notifiers in the proceedings.

It is not clear what status the "person" or the "information" will take once provided nor how this notification is to be provided to the Court that is, by way of Affidavit and if so, will the veracity of this notification be tested?

Item 22 – New Subdivision BB (after Subdivision BA) – Best interests of the child: adviser's obligations

This proposed amendment is supported.

Items 23 and 24 – Section 63DA including new subsection 63DA(1A) and repeal of paragraph 63 DA (2) (c) – Obligations of advisers

Whilst it is acknowledged that the amendment creates a link to the newly created section 60D, it is submitted that there should be a specific reference within section 63DA to family violence. This is particularly so when both section 60D and 63DA are directed to a wide category of advisers, not just those legally trained, who might perceive a significance to the presence of the caution in one section and its absence in the other.

It is suggested that this section should make specific reference to family violence. For example, similar to the approach used in the drafting of the proposed section 69ZQ(1)(aa), an obligation could be imposed on an adviser to inform a party that a parenting plan is not appropriate if a child has been, or is at risk of being, subjected to, or exposed to, abuse, neglect or family violence.

Items 25 and 26 – Repeal of Note 1 of subsection 65DAA (5) and revision to Note 2 – Court to consider equal time or substantial and significant time in certain circumstances

The proposed amendment to this provision is supported. The Committee notes however that the notation would be relevant if section 60CC(3)(c) were retained consistent with our comments in relation to items 18, 19 and 20 above.

Item 27 – New paragraph 67A (ca) – What Division 8, Part V11 deals with

The proposed amendment to this provision is supported.

Item 28 – New note to subsection 67ZA(3) – Suspicion of abuse

The proposed amendment to this provision is supported.

Item 29 – Subdivision D of Division 8 of Part VII – Allegations of family violence- New

The proposed amendments to these provisions are supported. The Committee recognises the importance of parties filing a Notice of Risk of Family Violence in proceedings. It is noted that it is anticipated that the notice will be in the same form as the current Form 4 – Notice of Child Abuse or Family Violence. Whilst it may be outside the parameters of the current Bill, the Committee recommends that at the same time that these amendments come into force, that there be amendments to the current Form 4 to make the form clearer and more concise. This will particularly be of assistance to self-represented litigants.

In this respect, it is recommended that the current Form 4 be streamlined so that parties do not have to provide duplicate information in Part E, Part F and Part G (unless the facts are different) or the paragraphs of the affidavit to which the allegation/abuse/family violence relates in circumstances where a description of the allegation/abuse/family violence is required to be provided.

The Committee refers however to earlier submissions as to the appropriateness and utility of the present Form 4. It is submitted that the form is inherently complex and challenging to complete and is in itself a 'hurdle' to prompt and reliable reporting.

Item 30 – Note in section 68N – Purposes of Division 11

The proposed repeal of the note is supported.

Item 31 – New paragraph 69ZN(5)(a) – Principles for child related proceedings

The proposed amendment to this provision is supported.

Item 32 – New paragraph 69ZQ(1)(aa) – General duties of the court

The Committee supports the proposed amendment to this provision and refers to the comments in item 21.

Item 33 – New note at end of subsection 91B(2) – Intervention by child welfare office

The proposed new note is supported.

Item 34, 35 and 36 – New subsection 117AB costs

The proposed new provision and revisions are supported. It is suggested that consideration be given to inserting the word "intervening" before the word "engaged" in the last line of section 117(4A) so as to be consistent with the terminology in section 117(4A)(a).

Item 37 – Section 117AB – False allegations and statements- Repealed

The proposed amendment to this provision is supported.

I trust that you have found these comments useful. Should you require anything further, please contact Maryanne Plastiras, Policy Lawyer for the Family Issues Committee on 9926 0212.

Yours sincerely

Stuart Westgarth
President