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Review of Exposure Draft of the *Family Law Ammendment (Shared Parental Responsibility) Bill 2005.*

General comments.

Any attempt to draft legislation that seeks to define and enforce social values is fraught. The *Family Law Act* is deliberately and necessarily framed in terms which allow a judicial officer a wide ranging discretion based upon his or her subjective impression on the parties and a pre-conception of what constitutes "the best interests of the child".

No legislative process can defeat a judicial culture determined to thwart the legislature and impose its own values.

The hearings conducted by the House committee with the former Chief Justice of the Family Court of Australia, Alastair Nicholson, bear eloquent testimony to this proposition. Mr Nicholson professed to be unaware that one of the aims of the *FLA* was to implement shared parenting, despite clear statements to that effect in Second Reading speeches for both the original Act and the 1995 amendments. Other statements by the former Chief Justice, such as his claim that there was no "cookie cutter" approach to child issues demonstrated either that he was completely out of touch with his own court, or that he possessed a breathtaking talent for self-deception. I would never accuse a Chief Justice of a Superior Federal Court of Record of giving false testimony to a Parliamentary Committee, but others have not been so circumspect.

False Allegations – the "get out" clause in the legislation.

A recent decision by Nicholson CJ sitting as a single judge at first instance was reviewed by the Full Court after his retirement. In *Re W (Sex Abuse: Standard of Proof) [2004] FamCA 768 (24 August 2004)* the Full Court found that Nicholson CJ had made the most basic errors in denying a father contact with his child based upon allegations of sexual abuse which had later been retracted.

The case is instructive as to how a court deals with allegations of sexual abuse and violence. In essence, an accused party is guilty until proven innocent. In such cases, demonstration of innocence is almost impossible, and the stain of the allegation remains throughout the court process. I commend study of this case to the Committee to enable the members to appreciate the practical difficulties faced by an accused person in the Family Court.

In this submission, I will focus entirely upon the issue of allegations of abuse and violence, and how such allegations hijack both the court process and the presumption of innocence. This specifically addresses item c) in the Terms of Reference.

Family Violence

Just what constitutes "Family Violence"?

If we take the very recent case of the *Family Violence Act 2004* (Tas.) the definition is very broad:-

7. Family violence

In this Act –

***"family violence"** means –*

***(a)** any of the following types of conduct committed by a person, directly or indirectly, against that person's spouse or partner:*

***(i)** assault, including sexual assault;*

***(ii)** threats, coercion, intimidation or verbal abuse;*

***(iii)** abduction;*

***(iv)** stalking within the meaning of section 192 of the Criminal Code;*

***(v)** attempting or threatening to commit conduct referred to in subparagraph (i), (ii), (iii) or (iv); or*

***(b)** any of the following:*

***(i)** economic abuse;*

***(ii)** emotional abuse or intimidation;*

***(iii)** contravening an external family violence order, an interim FVO, an FVO or a PFVO.*

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8. Economic abuse

A person must not, with intent to unreasonably control or intimidate his or her spouse or partner or cause his or her spouse or partner mental harm, apprehension or fear, pursue a course of conduct made up of one or more of the following actions:

***(a)** coercing his or her spouse or partner to relinquish control over assets or income;*

(b) disposing of property owned –

(i) jointly by the person and his or her spouse or partner; or

(ii) by his or her spouse or partner; or

(iii) by an affected child –

without the consent of the spouse or partner or affected child;

(c) preventing his or her spouse or partner from participating in decisions over household expenditure or the disposition of joint property;

(d) preventing his or her spouse or partner from accessing joint financial assets for the purposes of meeting normal household expenses;

(e) withholding, or threatening to withhold, the financial support reasonably necessary for the maintenance of his or her spouse or partner or an affected child.

Penalty:

Fine not exceeding 40 penalty units or imprisonment for a term not exceeding 2 years.

9. Emotional abuse or intimidation

(1) A person must not pursue a course of conduct that he or she knows, or ought to know, is likely to have the effect of unreasonably controlling or intimidating, or causing mental harm, apprehension or fear in, his or her spouse or partner.

Penalty:

Fine not exceeding 40 penalty units or imprisonment for a term not exceeding 2 years.

(2) In this section –

***"a course of conduct"** includes limiting the freedom of movement of a person's spouse or partner by means of threats or intimidation.*

This legislation was described by the Tasmanian DPP as a "Wholesale abrogation of human rights" and recently received considerable adverse comment from a Tasmanian judge, but it is not untypical of the definitions of violence in State legislation.

Judicial officers enforcing domestic violence legislation do not have the discretion enjoyed by Judges of the Family Court and even technical breaches attract convictions and penalties that would give the complainant a "get out clause" from the provisions of these Amendments.

This by itself is very likely to result in a significant increase in false allegations by parties wishing to bypass the new process entirely, in order to deny contact to the other parent.

Following the High Court decision on cross-vesting in *Re: Wakim*, the Family Court has no jurisdiction to hear or determine matters relating to allegations of family violence. Hence the determination of such matters rests in a State court with attendant delays and inconsistencies.

A more seamless approach to child welfare seems constitutionally difficult.

Proposal by [redacted] to address the problem of false allegations.

It is generally accepted that child are at much greater risk of sexual abuse or family violence from a step-parent than from a natural parent. Figures from the ABS suggest that the risk is up to ten times greater from a non-biological parent. However, whilst the Family Court intensely scrutinizes any allegation made by one former partner against the other, it does not intrude into any new relationships the custodial parent may have.

Sociologists have suggested that it a mother (for example) chose as her marriage partner a man who was likely to be violent towards her or abuse his own children, it is disturbingly likely that her future choice of partner will be a similar type of personality. In this scenario, if a mother makes an allegation of abuse against the father of her child, then it is highly likely that her next partner will not only have the same type of personality, but having no biological connection to the child, is likely to commit further and worse abuses.

This suggests that in every case where abuse is alleged, children are likely to be at greater risk from any subsequent partner. Hence, if protection of the child is the paramount consideration, then intense supervision of both the accused and the accuser by child welfare authorities is required. If the accuser truly has the best interests of the child at heart, then such an intrusion will be no more than an inconvenience. It is recognized that such an approach presents difficulties in liaison with State Government departments charged with child welfare, but such arrangements are currently in place with respect to biological parents and could be expanded as required.

Early and intense scrutiny of the family situation and relationships will deter false allegations and improve child welfare generally.

Conclusion

Implementation of any reform in Family Law requires the cooperation and understanding of the judicial officers charged with implementing the legislation. My personal experience as a self-represented litigant in the Family Court of WA in the late nineties was that the only reference to "parenting plan" was in the *Act*, not in the Court. Other reforms of the 1995 amendments were paid lip service if at all. The word "custody" was heard much more than "residence". In short, it was business as usual, and the legislation had achieved nothing.

Amendments which are permissive rather than prescriptive are likely to be ignored without a culture change within the court. Recent decisions of the Full Court show signs that such a cultural change may well be under way. However a considerable body of case law currently exists to fill the gaps in the legislation, and without Full Court review, such case law will bind judicial decision making for some considerable time.

Any attempt to achieve social change by legislation is, to borrow from Sir Humphrey Appleby "brave". Recently announced changes to the Sole Parents Pension and recommended changes to the *Child Support Acts* are a more pragmatic way to achieve such change. If one reads the transcripts of the Committee's public meetings, the simple message was that single parents preferred to live in frugal comfort than participate in the workforce, entrenching a culture of welfare dependence. As the *IPA* report which led to the changes in the Sole Parent Pension pointed out, living in a welfare-dependent household was detrimental to children not due to economic deprivation, but due to the lack of a culture of self-reliance.

With the reservations outlined above, [redacted] supports the amendments as a first step on a long journey.