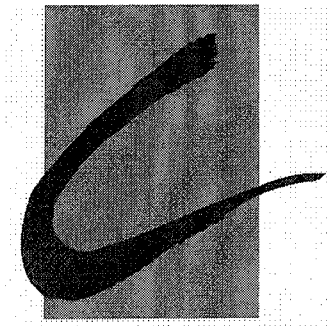

Catholic Welfare Australia

House of Representatives Standing Committee on Legal and Constitutional Affairs

Reference: Exposure Draft of the *Family Law Amendment (Shared Parental Responsibility) Bill 2005*

Appearance by representatives of Catholic Welfare Australia before the Public Hearing of the Committee, held in Canberra on Monday, 25 July 2005.

ANSWERS TO QUESTIONS TAKEN ON NOTICE

Question from Mr Cadman (*Refer to page LCA9*):

Regarding provisions for Indigenous and Torres Strait Islander Children regarding the risk factor.

> In child-related proceedings concerning an Aboriginal or Torres Strait Islander Child, the court may, for the purposes of section 61F:
>
> (a) receive into evidence the transcript of evidence in any other proceedings before:
>
> (i) the court; or
>
> (ii) another court; or
>
> (iii) a tribunal; and draw any conclusions of fact from that transcript that it thinks proper; and
>
> (b) adopt any recommendation, finding, decision or judgement of any court.....

QUESTION: Shouldn't that relate to others as well? One of the things we constantly hear is the court's inability to get real facts. Everybody makes assertions and none of them are ever tested. So it is a matter of building the best story and hoping the court hears you. We are hearing that the court lacks facts. One way of getting facts is to allow the court to look at what other tribunals have decided based on facts. They then use the state jurisdiction.

ANSWER: Catholic Welfare Australia supports the extension of provisions to facilitate child safety for all children including Indigenous and Torres Strait Islanders, by enabling access to the most relevant information required to make an assessment of risk. Of particular interest would be the evidence presented in those cases in which an AVO had been granted. Whilst evidence in the amendments as outlined in this section is restricted to information obtained via court and tribunal proceedings, if this legislation is to provide the necessary means for assessing potential risk for children then the court should also have the power to call on medical records.

Question from Mr Kerr: (*Refer to LCA9*)

QUESTION: I take you to the point you raised about privilege. The first issue I raise is about your concern that the provision in 10D is not sufficiently broad to cover all courts. Is there any experiential base that leads you to that concern? The words, on their face, seem to cover not only federal courts but state courts, royal commission even and other commissions of inquiry.

Further:
Could you refer me to that case law? I do not mean now – but.....

ANSWER: Over recent years 'privilege' as stipulated in Family Law has had repeated scrutiny by the Courts. A great deal of time, effort and money is spent by providers who have continued to function on the premise that 'immunity' as defined in the Act still exists. However, rulings in case law have not been consistent.

Responding to this inconsistency, Catholic Welfare Australia approached the Attorney General's Department appointed Legal Community Liaison Officer, who arranged for the Law Council of Australia to provide the sector with the attached Subpoena Kit. This advice is attached as **Appendix A**. The Kit was made available early in 2004 and there have been more challenges that have further muddied the waters since that time.

Catholic Welfare Australia draws the Committee's attention to paragraph 12-22 which discusses immunity. The service providing sector now generally accepts that "privilege" sections of Family Law only relate to the Family Court and to no other court. Therefore our agencies present evidence and records when subpoenaed by other courts. The framework proposed in these amendments is in keeping with the 1975 Act but also proposes that there are some exclusions eg. in cases of alleged or potential child abuse 10L(2). Practitioners would welcome clarity around this matter. However by referring to 'any' court, Catholic Welfare Australia is concerned that the sector will be forced to revisit the difficulties of clarifying in which situations and in which courts privilege is to apply.

Questions from Mrs Hull: (*Refer to LCA 11&12*).

3 QUESTIONS.

1. How does Catholic Welfare Australia suggest the Committee create a better interface between the Commonwealth (Family Law) and State structures. "One suggestion – or something that was raised in the hearings last week – was about an inquiry of the last committee. They recommended having a tribunal with an arm to investigate issues of domestic violence, abuse et cetera. Because the tribunal idea was not accepted and recommended, would you give consideration to having an investigative arm not replicating the current state service providers such as DOCS and others but utilising some other services?

ANSWER: It has been suggested that for families where allegations of abuse are made the court should have an investigative arm. In the interests of child safety, Catholic Welfare Australia would see some advantages in Courts or Tribunals being able to fully investigate such claims as well as having access to medical and departmental records relating to the children, where such allegations are made. The role and powers of the investigative body/investigator should be clearly defined. In order to monitor and support this flow of information, government should establish a body that is representative of the legal, statutory bodies and the community sector that deals with policy, procedure and complaints.

Such investigations will require clear protocols between State and Federal jurisdictions in regard to child protection and a mechanism whereby information can flow between the relevant bodies. The limitations imposed by State jurisdictions in matters of reports and investigations of child abuse, and the potential for movement across State boundaries particularly in families that are undergoing the changes caused by separations, creates an operational limitation that leaves children exposed. Given that the constitution divides child protection and family law, it is hard to see how legislation can resolve the operational difficulties. At a minimum, legislation should provide for a mechanism that allows for the timely flow of information from relevant sources to the approved investigative authority, whilst maintaining adequate protection of privacy.

Once such a family is in the court system, the Family Court of Australia's own Magellan Project may provide some insight into the types of structures required so as to achieve this end. The project was a pilot program that sought to deliver better outcomes for children and parents suffering from serious child abuse and domestic violence. It recognised that good outcomes depended upon coordination and cooperation between all of the organisations and government agencies that deal with families in crisis.

To achieve this coordination, formal agreements were reached between five key Commonwealth and State agencies. The agreements were critical to formalising cooperation and they ensured that children and parents who were being abused were dealt with in the most effective, sensitive and collaborative way by the family law system.

The Family Court of Australia has made a decision to adopt the Magellan project framework – however, it does appear to be a rather slow process. Catholic Welfare Australia suggests the Magellan Project be implemented into the Family Court system as a matter of priority.

It must also be acknowledged that the unintended consequence of reserving referral to the Family Court to cases involving life & death situations and/or cases in which violence and/or abuse is suspected/alleged will mean that families referred to the Family Court will automatically attract a negative label. Therefore, the Court must ensure that every effort is made to protect the children and secondly to clear up any residual damage done by false allegations.

2. "What do you think is required to establish effective family relationship centres to cover off the concerns that you have raised about channeling domestic violence and other issues through to a Family Court area if it were assessed that a family were not able to effectively utilize the beneficial services of a family relationship centre? How do you think that should be put in place, and what structure should be utilized in order to ensure the very best outcomes for all families?

ANSWER: Whilst more a revision of policy than revision of the current Exposure Draft, serious re-consideration should be given as to whether or not automatic transfer of cases to the Family Court where abuse and/or domestic violence are evident is the best mode of practice.

Family Relationship Centres will require comprehensive intake procedures which appropriately stream clients across with complex needs. In some domestic violence/abuse cases, referral directly to the Court could escalate the violence/abuse rather than resolve the issue.

In addition, unless a thorough screening/referral process occurs, the proposed system could provide a loophole by which allegations of violence/abuse can be made falsely to avoid mediation. Alternatively, inappropriate streaming could falsely attribute labels of violent and/or abusive to some families. It is essential, therefore, that experienced practitioners from the courts and the community sector devise and monitor the essential elements of the required screening process. Government proposals must support mechanisms to support this consultation.

The success of the Family Relationship Centres will inevitably depend upon this streaming process. Catholic Welfare Australia therefore reiterates that the staff who are the first point of contact for clients entering a Family Relationships Centre must be highly skilled and experienced in the counselling/mediation field. The recruitment of these experienced workers is likely to strain existing family services.

3. "How do we deliver the best outcomes to the majority of children in families without them being frustrated by legislation that is of course

necessary and that is designed to protect victims of family violence, domestic abuse or abuse of children? How do we least frustrate the majority to bring about a good outcome for the children of all families rather than just in the violence area? I am quite concerned with this. We are becoming so prescriptive again and we need to have clear and concise directions for everybody.

ANSWER: The emphasis of Family Relationship Centres should not be just *helping a family through a divorce* – rather, it should help families to move through post divorce/separation by *helping them to develop healthy relationships within the changed family* (where ever possible). This requires families to understand the new family dynamic rather than just attaining new skills.

It is therefore essential that the FRCs have:

- Good screening processes;
- Education on both parenting skills and relationship skills. The legislation is strong on parenting but weak on broader relationship matters. The research tells us it is entrenched conflict that does most damage to children. Therefore, conflict resolution and family relationship management is also an essential part of the family recovery mix.
- A decision making mechanism that enables parents to negotiate what is in the best interests of their children and their family in its changed state.
- Age appropriate programs for children that allow them to have a voice and explore the emotions and issues that are affecting their lives.

In responding to these questions on notice – there are a number of other points made during the public hearing which Catholic Welfare Australia has taken the liberty of elaborating – with the intent of clarifying the point for the Committee.

Question by Mr Murphy: *(Refer to LCA 6&7)*

In relation to Section 60J(2)

Clarifying comment: Definition of Risk – does it need to be more prescriptive?

Clear examples of risk should be itemised in the legislation, eg

- proven physical abuse or neglect;
- allegations or proven sexual abuse;
- life threatening situations (risk of violence and suicide);
- abduction.

There should also be provisions that describe the discretionary powers of the assessor. One of the criteria for this discretion could be the intent of both parents to self determine the outcome for their family. Again a panel of experienced

practitioners should be established to identify criteria such as family dynamics that could inform use of this discretionary power.

Question by Mr Kerr: (*Refer to LCA 10*):

Around the issue of Section 10C(3):

This section provides for a "discretionary basis for disclosure in relation to instances where it might involve protecting a child from harm, preventing or lessening a serious and imminent threat to life or health of a person, reporting the commission of an offence involving violence or intentional damage to property et cetera. Does this impose too great a burden?.....I am just wondering whether it would be clearer if the law were a little more directive as to the circumstances where disclosure is appropriate".

Clarifying comment: Does the discretionary basis for disclosure need to be more prescriptive?

Each family dynamic is different and discretion will be practiced whether it is defined or not. No matter how good the definition, there will always be situations that fall outside of the definition. It is imperative that extremely skilled practitioners are employed to conduct interviews, and that the legislation offers them guidance. It is also essential that a supportive environment is provided for families and practitioners working with such situations when disclosures are made. Agreed standards of good practice should define the context as well as the practice and there must be a monitoring system to ensure compliance with these standards.

Prepared for Catholic Welfare Australia
by Shanna Quinn
Family Law Section, Law Council of Australia
2004

SUBPOENA's and the issue of PRIVILEGE "The Subpoena Kit"

1. Proceedings in relation to parenting orders must be brought under the Family Law Act. The powers given in that Act can be exercised by the Family Court of Australia or the Federal Magistrates Court. Each Court has different rules in relation to subpoenas. It is an Order of the Court.

2. In the **Family Court** the present (2003) rules provide as follows:

   a) There are three types of subpoenas, one to give evidence, one to give evidence and produce documents, and one simply to produce documents.

   b) In each case a person who fails to comply may be guilty of an offence and a warrant for their arrest can issue.

      A subpoena cannot be ignored simply because the recipient believes it asks for evidence or documents which are confidential. The recipient must either personally, or through a lawyer, appear in Court to answer the subpoena and run that argument.

   c) At the time that a person is served with a subpoena they must also receive sufficient money for return travel from their place of residence or employment, and the Court. If a person attends pursuant to a subpoena to give evidence (as distinct from producing documents) then they are entitled to fees and travelling allowances. If a person produces documents and reasonably incurs expenses in connection with that, they can ask the Court to make an order for them to receive those expenses.

   d) A subpoena to produce documents cannot be served less than 7 days before the documents are required to be produced except with the leave of the Court.

   e) Normally the documents can be produced at any time prior to the day and time nominated in the subpoena.

f) The Family Court will not normally permit subpoenas to be issued (except in interim proceedings) until after a Directions Hearing has been completed, and, if the matter is a financial matter, until after a Conciliation Conference has occurred.

g) At the present time there are no limits on the number of subpoenas but that may change under the new Family Court Rules to come into effect from April 2004.

3. In the **Federal Magistrates Court** the present (2003) rules provide as follows:

a) Like the Family Court there are three types of subpoenas, namely to produce documents, give evidence, or do both.

b) Conduct money is required. See 2(c) above.

c) The Court may make an order for any loss or expense incurred in complying with a subpoena.

d) A third party served with a subpoena can give notice to the party issuing the subpoena that "substantial loss or expense would be incurred in properly complying with the subpoena". If that statement is correct then the party issuing the subpoena must pay that sum, unless the Court otherwise orders.

e) Failure to comply with a subpoena may result in a warrant for the arrest of a person and an order that person pay any costs caused by their failure to comply.

f) Subpoenas may not be served less than seven days before attendance or production as required.

4. In both Courts documents produced pursuant to a subpoena are **produced to the Court and not to the parties**. The Court may make an order permitting the parties to inspect or copy the documents. This will be automatic unless the party producing the documents, or the other party in the case (i.e. the one who did not issue the subpoena) objects to the production or inspection.

5. There could be several grounds for objection – for example that the subpoena is too broad and the production of documents in compliance with it would be oppressive. A party to the proceedings may argue that the documents required to be produced are irrelevant to the proceedings. It may be argued that the documents are "privileged" and therefore cannot be evidence in the case and production under subpoena should not be required. It is this point that we now examine.

6. The following is not intended to empower people who are served with a subpoena to represent themselves and oppose the subpoena. It is intended to give a broad outline of relevant legal principles. **If a person or organisation is served with a subpoena and wishes to object to attendance or production pursuant to the subpoena they should take legal advice concerning the specific case and circumstances.**

7. Section 19N(2) of the Family Law Act says:

"Evidence of anything said, or any admission made, at a meeting or conference conducted by a person to whom this section applies while the person is acting as such a person is not admissible:

a) In any Court (whether exercising Federal jurisdiction or not); or

b) In any proceedings before a person authorized by a law of the Commonwealth or of a State or Territory, or by the consent of the parties, to hear evidence".

8. Under Section 19N(1) the section applies to:

a) "A family and child counsellor; or

b) A Court mediator; or

c) Subject to the Regulations, a community mediator or a private mediator; or

d) A person nominated, or acting on behalf of an organisation nominated, for the purposes of paragraph 14C(3)(b), or sub paragraph 44(1B)(a)(ii); or

e) A person to whom a party to a marriage has been referred, for medical or other professional consultation, by a person referred to in paragraph (a), (b), (c) or (d)."

9. Family and child counsellor (in Section 19(1)) means:

a) "A Court counsellor; or

b) A person authorized by an approved counselling organisation to offer family and child counselling on behalf of the organisation; or

c) A person authorized under the Regulations to offer family and child counselling."

10. An approved counselling organisation is one that has been approved by the Attorney General under Section 13(A) of the Family Law Act.

"Family and child counselling" means marriage counselling, child counselling, and counselling about any matter that arises out of proceedings under the Family Law Act and involves counselling a parent or adoptive parent, a child or a party to a marriage.

11. A Court mediator is a person employed by the Family Court to provide family and child mediation. A community mediator is a person authorized by an approved mediation organisation to offer family and child mediation. A private mediator is a person other than the above, who offers family and child mediation.

12. It is clear that the section is intended to make anything said at counselling or mediation inadmissible as evidence in Court. It should be distinguished from a "privilege" because it cannot be waived by either party.

13. The section does not make things said to counsellors and mediators confidential, it makes them inadmissible in Court. Separately counsellors and mediators must make an oath for affirmation dealing with confidentiality issues (Regulation 58 for counsellors and Regulation 66 for mediators).

14. It needs to be understood that Section 19N precludes the admission into evidence of any oral evidence by a witness as to what might have been said at a counselling or mediation session, as well as any document which records what was said. Therefore, on the face of it, counsellors and mediators cannot be required to give evidence in Court about those matters, nor to produce their documents concerning them.

15. Issues have arisen in cases about whether Section 19N can in some cases be inconsistent with Section 65(E) which says that:

    a) *"In deciding whether to make a particular parenting order in relation to a child, a Court must regard the best interests of the child as the paramount consideration."*

16. In **Centacare Central Queensland** V "**G**" and "**K**" (1998 Family Law Cases) the Full Court of the Family Court held there is no inconsistency between Section 19N and the paramount principle in Section 65E. This decision was confirmed by the High Court in **Northern Territory** of Australia V **GPAO** (1999 FLC).

17. Some judges wish the law was otherwise. For example in re **W and W: Abuse Allegations** (2001 FLC) the majority of the Full Court said it was unfortunate that Section 19N does not contain any exception to allow evidence of things said to counsellors to be admitted where its non-receipt may impinge on the best interests of children.

18. For the last few years a review of the operation of Section 19N has been on the agenda of the Commonwealth Attorney General's Department.

19. In **R v. Liddy** (2001 South Australian State Reports) the Supreme Court of South Australia held that Section 19N is restricted to Family Law proceedings, and does not preclude the admission of statements to counsellors in other proceedings. Frankly this decision, by judges who are not Family Court judges and who have little familiarity with the Family Law Act, is, in the view of most lawyers, plainly wrong.

20. In **Anglicare WA Department of Family and Children's Services** (2001 FLC) a single judge of the Western Australian Supreme Court held that Section 19N does not apply to proceedings for care and protection in the Children's Court of Western Australia. Once again that decision is hard to reconcile with the plain words of the section. It is expected that the Attorney General's Department, in its review, will seek amendment to the section to put its effect beyond doubt.

21. Section 131(1) of The Commonwealth Evidence Act states:

"Evidence is not to be adduced of:

a) A communication that is made between persons in dispute, or between one or more persons in dispute and a third party, in connection with an attempt to negotiate a settlement of the dispute; or

b) A document (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute"

22. It would seem that were there any doubt about the matter this section makes it plain that negotiations, even if not already protected by Section 19N, are clearly inadmissible under the Evidence Act.