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The Secretary
House of Representatives
Standing Committee on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

Dear Secretary

Thank you for the opportunity to response to your enquiry into the exposure draft of the Family Law Amendment (Shared Parental Responsibility) Bill. Our Family Law Section has looked at the draft and my comments are based on the Section's commentary.

Our Family Law Section remains concerned that the Act is undergoing a significant and substantial amendment because of the view of a few vocal groups who perceive that there should be a presumption of shared time and shared parental responsibility. In any society no two family's needs will ever be completely the same as the next separated family and to fetter the discretion of the Judge who has to ultimately decide what is in the best interest of the child or children in that family will lead to disaffected children and other groups who will voice their disapproval of the family law system in the years to come.

I remain concerned that history has shown that whenever the Government has sought to amend the Family Law Act in the past in significant ways, such as in 1996, it led to an increased number of contested applications being filed. I am concerned that this legislation will result in an increase in litigation over parental responsibility where, at present, this is rarely the case. Many parents are happy that the Act currently provides that each party has parental responsibility and that this remains the case even where the parties are separating. This Bill may even lead to an increase in the number of matters being litigated where allegations of abuse or violence are made.

Turning to the specific provisions of the Bill:

Section Numbering

It was the unanimous view our Family Law Section that the numbering system used by the draftsmen of the Bill leads to a very complex piece of legislation. The current complexity will make it difficult not just for lawyers and Judges to interpret but will make it virtually impossible for litigants in person and persons such as family dispute resolution practitioners and family and child specialists to understand and interpret the Act.

It was our view that if the Act is to be substantially amended then now would be an ideal time to completely renumber the Act as well.

Definitions and Interpretation

The Bill amends substantially a number of definitions including those in section 4 of the Act. It also introduces new definitions throughout different divisions of the Act. The difficulty is that many definitions are now cross-referred to other sections of the Act (for example, the definition of "family counselling" is referred to in section 4 as "the meaning given by section 10A", and there are numerous other examples.

This complicates the interpretation of the Act as a whole and the new amendments significantly. The drafters should give consideration, in my submission, to a complete dictionary to the Act or a section setting out all definitions used throughout the legislation.

Turning to some specific definitions, one that was raised by our Section was that of "family violence". It was the Section's view that the definition of family violence is too narrow. It restricts violence as being towards a person or property of that person who is a member of the perpetrator's family. "Member of the family" is defined as "for the purposes of section 68F(2)(i) and (j) and section 68J" as "the meaning given by subsection (2)". In subsection (2) a "member of the family" is someone to whom the perpetrator was married or in a de facto relationship or is or was a relative of the second person, or a person who regularly resided with the second person or the first person is or has been a member of the family of a child of the second person or a person who has a parenting order in relation to a child and then continues to deal with guardianship orders under State legislation.

This definition is not wide enough to cover all the possible scenarios and situations in which a child may witness or be exposed to violence. I submit that the definition should not be restricted to violence towards a family member but should be violence towards any person or the property of any person.

Section 60KB Principles for conducting child related proceedings

Whilst the subsections set out that the proceedings are to be conducted in a way which will promote child focussed parenting, the principles regarding how proceedings are to be conducted do not seem to state that one of the principles is that the proceedings should be conducted in a way that promotes the best interest of the child or children and I would urge you to include such a principle.

Section 60KE General Duties

Whilst I applaud the attempts in the Bill to make proceedings less adversarial, I am nonetheless concerned that subsection (1) could be interpreted in ways which lead to more appearances at Court and, consequently, greater costs for parties. The Court has always had the power to control the manner in which proceedings are heard and which issues to hear at particular times. The same situation has always applied as to directions in relation to what evidence is to be filed.

Section 60KG Evidence

In my submission, these sections are of great concern. To remove the requirements for Court proceedings to be conducted according to the Rules of Evidence is fraught with potential danger and difficulties. The public must have confidence about the outcome of court proceedings. If Rules of Evidence are not to apply then this will lessen that public confidence. It will create a whole host of further

difficulties for the Judge in determining which evidence is to be given weight, in composing Judgments and potentially in appeals. It will cause there to be even greater wasted time during trials having to sort through argument about which evidence can be relied on and admitted into evidence and which can not. Worse, in my submission, it will create an expectation in those vocal sections of the community who now complain about the family law system, that they can now adduce any "evidence" they please and have the Judge rely upon it, potentially to the detriment of the child.

I do not believe it is necessary to restrict the rules of evidence to make proceedings less formal or less adversarial and I would urge you to delete section 60KG and section 60KH in favour of retaining the current rules about evidence in the Family Court of Australia.

Presumption of Joint Parental Responsibility – Section 61DA

This section is unduly restrictive. It is my view that the Government should not attempt to fetter the discretion of the Judge as to when and in what circumstances the presumption is not to apply. I would suggest that subsection (2), in particular, is unduly restrictive in limiting the situations in which the presumption should not apply to those involving abuse or family violence. The manner in which this section is drafted means that where one party has serious psychiatric problems or drug problems or other serious antisocial behaviours then the presumption of joint parental responsibility still applies.

Subsection (4) of this section does not assist. If it was intended that the presumption could be rebutted whenever it was not in the best interests of the child then such should in fact be stated in subsection (2) as a further subparagraph (c).

However, given the rules in relation to statutory interpretation, I suggest that the Bill should delete Section 61DA(2)(a) and (b) and replace it with one exception that the presumption should not apply where the Judge determines that it is not in the best interests of the child for there to be joint parental responsibility.

Section 65DAE - No Need to Consult on Issues that are not Long Term Issues

With respect to this section, it is naïve in the extreme to think that there are not issues which could be defined as short term issues but about which one or other of the parents should none the less have sole responsibility for those decisions or about which the parents should nonetheless be at least encouraged or otherwise required to consult.

All too frequently since the 1996 amendments, practitioners are reporting instances where one party has had to seek orders for what are termed "specific issues" and what this Bill probably refers to as "a component of parental responsibility". Such examples provided are where one party has had to seek an order can include the basic matter where the parent with whom the children spends less time, not be permitted to have the children's hair cut. In fact, in one case, such an order was sought by the child's representative.

Section 65DAE will be seen, particularly by the vocal groups who all too frequently now complain about the family law system, as their legislated mandate to take some action that should only be taken if both parents have similar beliefs as parents. I would recommend that this section in its entirety be deleted from the Bill.

Section 68F

Whilst I applaud the attempt by this section of the Bill to make it clear that children need to be protected from harm, in my view the subparagraphs of section 68F(1A) are potentially unduly restrictive of the circumstances in which a child may suffer harm.

Family Counselling

Section 10C provides that, as its primary objective, communications to a family counsellor (a defined term) made during family counselling (also a defined term) must not be disclosed, that is, those communications are intended to be confidential. There are, however, a lengthy list of exceptions as to the circumstances in which the counsellor may disclose those communications.

In my submission, the scope of the exceptions to the confidentiality provision is too wide, and beyond that necessary to protect children or the family.

The section does provide that the ability to disclose information does not make the information admissible (sections 10C(5) and 10D), however this, in my submission, does not adequately deal with the loss of confidentiality in a very wide range of circumstances under section 10C(3) of the proposed amendments. A similar issue also arises in respect of the engagement of family resolution practitioners by virtue of section 10K of the Act.

There are lengthy amendments to the proposed manner in which family and child specialists and family dispute resolution is to take place, however much of the workings of these amendments appear to be proposed to be contained in Regulations. The Society would appreciate the ability to make further submissions at the time when the Regulations become available for public consultation.

Contraventions

The legislation proposed in relation to contraventions is too complicated particularly so when there is a growing trend for litigants in person to be the initiator of these types of applications. The Bill provides for a number of possible outcomes including the following:-

1. The contravention is not proven but that there should be compensatory contact.
2. That there is a contravention but it is of only a technical nature.
3. That there has been a contravention proven which is not of a minor nature
4. That there has been a previous contravention or an adjournment of a previous contravention which then gives rise to outcomes.

From a drafting perspective it may be better for there to be one section which specifically refers to compensatory contact where this is to occur regardless of the outcome of a contravention application where the Court determines it is the child's best interests.

Of significant concern is section 70NJ(2A) which provides that the Court **must** make an order for costs unless the Court is satisfied that it would not be in the best interests of the child concerned to make the order. Under section 70NJ(2A)(b), if costs are not ordered then other orders including community service or a bond must be imposed.

All mandating of such costs orders can give rise to serious problems. The wording of the Bill refers only to the child the subject of the contravention application. There could be situations where, whilst it may not affect that particular child, there could be other children or parties involved and an order for costs could have a significant detrimental effect on those other people

Also of concern in relation to the issue of costs is that under the section "the person who committed the current contravention pay all of the costs of another party."

By using these words it could be interpreted that the costs should be on an indemnity basis and could even cover the situation where the party who has obtained a costs order has signed a costs agreement hence any costs order if it is interpreted as being on an indemnity basis will mean that the party ordered to pay costs pay the other parties costs calculated on the fees chargeable under that party's client agreement with their own solicitor where those fees have never been disclosed to the party ordered to pay.

Parenting Plans

The members of our Family Law Section have raised some serious concerns about the Bill's treatment of parenting plans. Under the amendments if an order has been made and a subsequent parenting plan has been entered into between the parties that this parenting plan can affect whether or not a person has contravened the parenting order.

There is however no provision under the Act for enforcement of a parenting plan despite the fact that the Act encourages parties to attend at Relationship Centres and enter into parenting plans.

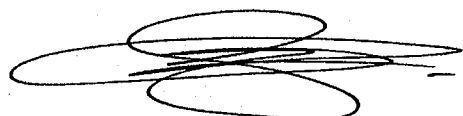
The Court had an earlier system whereby such plans could be registered with the Court and they would then be deemed to be an order of the Court. As a result, the parenting plan could be enforced as if it was an order of the Court. Presently, there are several sections scattered through the Act under which the Court can vary, discharge, amend, etc. a parenting plan but there does not appear to be one section where the totality of the law relating to the enforcement, or variation of parenting plans can be found. It seems that it is anomalous that whilst the Act recognises the parenting plans in relation to the contraventions or otherwise of a Court Order, it does not consider that such parenting plans are enforceable in their own right.

If, however, a parenting plan is to be enforceable then it would need to meet certain basic requirements including that it is signed by the parties and dated and preferably witnessed by a solicitor or counsellor.

Conclusion

The comments set out above are some of the more major concerns expressed by our Family Law Section in the short time available to them for comment. They should be read in conjunction with the submission made by the Family Law Section of The Law Council of Australia as we share any views and comments that organisation may make.

Yours sincerely



Glenn W Ferguson

President