Submission No. 29

Date Received

THE UNIVERSITY OF MELBOURNE

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

15 July 2005

Dear Ms Towner

Review of exposure draft of the *Family Law Amendment (Shared Parental Responsibility) Bill 2005*

We write in response to your invitation for submissions on the above exposure draft.

We have limited ourselves to specific comments on key issues of concern that we have identified in the three weeks available for preparation of submissions. Given the short (and we would argue, inadequate) time available for consideration of the significant and complex range of changes contained in the Bill, the fact that we have not mentioned a particular provision should not necessarily be viewed as an indication of our support of it.

Most of the points made in our submission relate to our concern that the Bill's incorporation of improved provisions related to 'safety' will be overwhelmed by the 'equal parenting' message in the overall scheme. A number of the changes we suggest are aimed at ensuring that this does not occur.

Schedule 1

S60B Objects of Part and principles underlying it

S60B(1)

The proposed changes to s60B(1) do not include the object of 'ensuring that children are protected from physical or psychological harm'. As a result, the emphasis is entirely on the importance of parental involvement in their children's lives. This is inconsistent with the proposal to attach dual primacy to parental involvement AND protecting children from harm, set out in both s60B(2) and s68F(1A).

We consider that it is critical that the reforms do not operate to compromise children's safety or continue their abuse, and to this end suggest that the legislation should clearly convey (including in its ordering of potentially competing principles) the priority to be given to ensuring children's safety.

We recommend:

- **S60B(1) be amended to provide, as the first object, '(a) to ensure that children are protected from physical or psychological harm'.**

S60B(2)

We strongly support the inclusion of protection from harm caused by family violence or child abuse in the principles in s60B(2) although, as just discussed, we consider that a more appropriate ordering would be to list the matters in s60B(2)(b) first, and the matters set out in s60B(2)(a) second.

We are also concerned that s60B(2)(b) uses the concept of 'abuse', which is now defined in s4(1) of the Act rather than s60D (which contains the definition of 'family violence') (see Schedule 4). The definition of 'abuse' has not changed, but the word 'abuse' now carries much more weight than it did previously. In our view, the existing definition of 'abuse' is too narrow for its new role, and therefore has the effect of narrowing the scope of the principle in s60B(2)(b) (as well as the operation of other important provisions in which it appears, including s60I(8), s61DA(2)(a), and s68F(1A)). Most notably, the definition does not extend to neglect, or ill treatment (which, in contrast, does appear in s68F(1A)). The limited *FLA* definition of 'abuse' is in contrast to the harms from which children are to be protected under the various state child protection regimes, which typically include abuse and neglect.[1] Reference in s60B(2)(b)(i) to 'other behaviour' is not sufficiently clear to cover these harms.

We recommend:

- **That the ordering of s60B(2) be changed, so that matters currently in s60B(2)(b) appear first, and the matters currently set out in s 60B(2)(a) appear second.**
- **That, along with family violence and abuse, neglect and other ill-treatment of children be included in s s60B(2)(b).**

S60I(8)(b) and s60J(1) Family dispute resolution in cases of child abuse and family violence

We have a number of broader concerns about the introduction of compulsory Family Dispute Resolution (FDR). However, assuming that the government does not propose to reopen this issue, our suggestions relate to improving the procedure for assessing whether FDR should take place.

The Bill provides that if under s60I(8)(b) the court is satisfied that there are reasonable grounds to believe that a party has committed child abuse or family violence, it still must not hear the

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[1] Leah Broomfield and Daryl Higgins, 'National Comparisons of Child Protection Systems' (2005) *Child Abuse Prevention Issues* (No 22) at 4-5 (published by the Australian Institute of Family Studies, Melbourne).

application unless the applicant files a certificate that they have obtained information about the issues in dispute from a family counsellor or family dispute resolution practitioner (s60J(1)) unless (once again) the court is satisfied that there are reasonable grounds (etc) for not requiring this. We are particularly concerned that these provisions create significant obstacles (including delay), increase the risk (especially in cases involving allegations of child sexual abuse) for systems abuse (meaning 'the preventable harm [that] is done to children in the context of policies and programmes which are designed to provide adequate care and protection',[2] and will further discourage victims of violence from raising these issues at all, and thus to inappropriately enter the FDR process. The reluctance of victims of violence to disclose this[3] was also discussed in the submission made by a number of us on the *New Approach* Discussion Paper (copy available on request).

Also, it is not at all clear how these sections would work in practice. For example, how can the court be satisfied that there are reasonable grounds to believe (etc) unless is actually hears the application? It seems that the burden of proof to establish 'reasonable grounds' will be on the victim, but what will suffice to discharge it? What is the basis for the distinction drawn between commission of abuse or family violence (s60I(8)(b)(i)) and risk thereof (s60I(8)(b)(ii))?

We are also concerned that the proposed system set out in s60I(7) and (8) for determining whether FDR should take place centres around the judge (or registrar or magistrate – our subsequent references are just to judges), and does not impose any obligation on FDR practitioners to consider the appropriateness for FDR of clients presenting to them for this purpose. Under the provisions, the judge determines suitability for FDR, and whether an exception to the requirement to attend FDR has been made out. Parties must make a case and provide evidence to the judge to be exempted from the FDR attendance requirement. All FDR practitioners need do is provide certificates for those who have attended. There appears to be no requirement in the Bill for FDR practitioners to make an assessment of suitability for mediation nor the ability for FDR practitioners to reject a case for dispute resolution if they feel it is inappropriate.

The proposed changes are in marked contrast to the present primary dispute resolution system, which centres around the mediator. Presently, the mediator (the forerunner of the FDR practitioner) is required under Reg 62 of the *Family Law Regulations 1985* to make an assessment of the suitability of each case for mediation before dispute resolution can take place. The matters taken into account by the mediator in making this assessment are broader than the exceptions listed in proposed s60I(8) and include the safety of the parties, the risk of abuse to a child, the equality of bargaining power between the parties and the psychological and physical health of the parties. Assessment sessions are conducted separately with each party and usually take around an hour each. The mediator, who must have a background in social work, psychology, counselling or law, makes his or her assessment of the case for mediation after spending time with each party and by drawing upon his or her experience and training. If the mediator decides that mediation is inappropriate, he or she must not conduct the mediation.

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[2] J Cashmore, J Dolby and D Brennan, 'Systems Abuse: Problems and Solutions' (NSW Child Protection Council: Sydney, 1994) 11, cited in ALRC and HREOC, *Seen and Heard: Priority for Children in the Legal Process*, (Canberra:AGPS, 1997).

[3] [3]For example, Miranda Kaye, Julie Stubbs and Julia Tolmie, 'Negotiating Child Residence and Contact Arrangements Against a Background of Domestic Violence' (Brisbane: Griffith University Research Report 1, 2003).

Finally, s60I(8), unlike the present Reg 62, does not ask judges to consider whether an inequality of bargaining power would make FDR inappropriate. Section 60I(8)(e) requires a judge to consider whether parties are able to participate effectively in FDR, but this provision is narrower than the terms of the present Reg 62(2) and the other examples given in the subsection focus on more superficial issues than bargaining power, such as the inability to attend dispute resolution because of physical remoteness and disability. The narrow wording of s60I(8)(e) and the limited examples provided militate against any consideration of the important issue of power imbalance between the parties when determining whether FDR is appropriate. This means that FDR may take place when it is inappropriate and is unlikely to be fair.

We recommend:

- **S60I(7) be amended to include an additional provision that allows for FDR practitioners to certify that the dispute was not suitable for FDR.**

- **S60I(8) be amended to include the requirement for judges to consider inequality of bargaining power (as is required of mediators under Reg 62).**

- **S60I(9) not be introduced.**

- **Amendment of the *Family Law Regulations* (or the *FLA* see next point) so that FDR practitioners are required to conduct information and assessment sessions for clients in parenting cases, to determine whether FDR would be appropriate.**

- **Reg 62 of the *Family Law Regulations* should remain in place as the basis on which suitability to attend FDR is assessed by FDR practitioners. However, the wording of the Regulation should be adjusted to reflect the change in terminology (eg community and private mediators to FDR practitioners) brought about by the Bill. It is arguable that this critical provision dealing with exclusions from mediation processes should not be placed in the rarely accessed Regulations, but rather should be positioned in Subdivision E of the *FLA* where its relevance and importance is then given greater visibility.**

- **That s60J should not be introduced.**

S63DA Obligations of advisers

This provision omits any necessity to inquire about a history of family violence, and child abuse, neglect, and ill-treatment, in the relationship. If advisers are to do their jobs in a manner consistent with the increasing emphasis being given in the *FLA* to protecting children from harm (including the introduction of a two-track system in which matters involving the risk of harm to a child should be referred straight to court), the obligation on advisers to inquire about a history of family violence and child abuse, neglect and ill-treatment should be part of the screening process. This is particularly important given that, as noted earlier, victims are reluctant to spontaneously reveal such issues.

Further, the Bill does not appear to contain any provision to ensure that FDR practitioners (s10J) or advisers providing information about making parenting plans (s63DA(3)), have the requisite training and expertise that would enable the ready appreciation and recognition of the existence and impact of past or potential family violence and child abuse, neglect or ill-treatment. The appropriate recognition of past or potential harm of this nature is particularly important in light of empirical research indicating that family violence is not a rare phenomenon[4], that there is evidence of the coexistence of family violence and child abuse[5], and that victims of family violence are reluctant to notify practitioners or courts of the existence or severity of family violence.

More generally, we would question the fragmented approach apparently being taken in relation to the introduction of the changes related to FDR – for example, obligations of advisers are set out in s63DA, but the requirements to be complied with by FDR practitioners are being left to the Regulations (s10R). We would support requirements regarding the training, qualifications and obligations of the key decision makers in all non-court services being set out in one place, either in the Regulations (as is currently the case) or preferably, in the *FLA* (see earlier).

We recommend:

- **That the *FLA* (or the Family Law Regulations 1985), be amended to cover requirements regarding the training, qualification, and obligations of key decision makers in non-court services as a result of the FDR changes.**
- **At a minimum, amendment of s63DA(1) and (2) to include, as a first requirement, that advisers must consider the risk of family violence, as well as child abuse, neglect, or ill-treatment, and where this risk exists, refer directly to the court.**

S64B(2) Matters with which a parenting order may deal

Regarding the ordering of s64B(2), given that 'time' and 'communication' comprise the central aspects of 'contact', it would be preferable for s64B(2)(b) ('time') to be followed by what is currently s64B(2)(e) ('communication'). It is important that all potential decision-makers are clear about the full range of options available. One of those options is that what is currently understood as a child's 'contact' with one parent be limited to arrangements which do not include physical proximity.

We recommend:

- **That the ordering of s64B(2) be changed, so that the current s60B(2)(b) is followed by what is currently s64B(2)(e).**

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[4] For example, Renata Alexander, *Domestic Violence in Australia* (2002); Maria Eriksson and Marianne Hester, 'Violent Men as Good-Enough Fathers?' (2001) *Violence Against Women* 779.

[5] For example, Miranda Kaye, Julie Stubbs and Julia Tolmie, 'Negotiating Child Residence and Contact Arrangements Against a Background of Domestic Violence' (Brisbane: Griffith University Research Report 1 (2003); Amanda Shea Hart, 'Children Exposed to Domestic Violence: Undifferentiated Needs in Australian Family Law' (2004) 18 *Australian Journal of Family Law* 170; Kathryn Rendell, Zoe Rathus and Angela Lynch, *An Unacceptable Risk: A Report on Child Contact Arrangements Where There is Violence in the Family* (2000); Thea Brown, Margarita Frederico, Lesley Hewitt and Rosemary Sheehan, *Violence in Families. The Management of Child Abuse Allegations in Custody and Access Disputes before the Family Court of Australia* (1998).

S65DAA Court to consider child spending substantial time with each parent in certain circumstances

S65DAA(1)(a) is intended to ensure that cases involving family violence or abuse are excluded. However, the simple exclusion of cases where joint parental responsibility has not been granted does not provide an adequate legislative framework for what is likely to be one of the most contentious provisions of the Bill. The factors which militate against joint parental responsibility are not identical to the factors which militate against the very different notion of shared time.

The current position is that the court must already consider not only the parties' proposals but also any other appropriate arrangements.[6] The practicalities of shared parenting must also already be considered. Section 65E is the touchstone for decisions. Section 65DAA(1), which is parent rather than child focussed, is therefore unnecessary and we would argue inappropriate. Preferably, s65DAA should not be introduced.

However, if the decision is made to implement s65DAA, it is relevant to consider that many jurisdictions which promote shared parenting time set out clear contra-indicators and strong positive features which must be present before an order can be made which entails a child moving regularly between two households for substantial periods of time. For example, the Revised Code of Washington sets out 3 major pre-requisites to such an order being made:[7]

- That there are no contra-indicators, such as abuse and violence[8]
- That the order is in the best interests of the child;[9] and
- A set of logical positive features[10]
    - o That the parties have a satisfactory history of cooperation
    - o A history of shared performance of parenting functions [This can include an examination of the pre-separation roles played by each of the parents]
    - o Geographic proximity

These criteria are consistent with the findings of recent research conducted by the Australian Institute of Family Studies regarding the features of successful shared time arrangements.[11]

We recommend: That s65DAA not be introduced, or at a minimum be amended to provide similar guidance to the Revised Code of Washington as to when it is appropriate.

S65DAC and s60D(1)(e) Requirement that parents decide jointly about 'significant changes to the child's living arrangements'

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[6] *U v U* (2002) 211 CLR 238.

[7] Revised Code of Washington (RCW) can be found at http://www.leg.wa.gov/RCW - particularly Title 26 RCW Domestic Relations.

[8] This refers to restrictions relevant to residential order listed in RCW 26.09.191 factors, an extensive list which tends to relate to abuse and violence.

[9] RCW 26.09.002.

[10] RCW 26.09.187 3(a)(i)-(vii).

[11] Bruce Smyth (ed), *Parent-Child Contact and Post-Separation Parenting Arrangements* (Melbourne: Australian Institute of Family Studies, 2004). Available at: Child Contact - Research report no.9 2004 - Publications - Australian Institute of Family Studies. These factors are found also in the case law (see *Foster and Foster* [1997] FLC 90 281 and *Forck and Thomas* (1993) 16 Fam LR 516.

Read together, ss 60D(1)(e) and 65DAC require parents to take jointly decisions about 'significant changes to the child's living arrangements'. The child's living arrangements are the same as the living arrangements of the parent with whom that child lives. The Explanatory Statement accurately predicts that parents will try to use this section to control relocations by the other parent and says s60D(1)(e) is not intended to cover situations where the child relocates to another residence within the 'same locality' unless this produces 'significant change' (p 5). It is unclear what the words *significant change* and *same locality* might mean and thus the extent to which the ability of mothers to relocate with the children might become more limited.

Currently, if parents have a parenting order, and the move of one parent would impinge on the other parent's right to care for the child under the order, then the order already provides sufficient protection. If there is no order in force, then a parent is perfectly entitled to seek an order to restrain a move. A section requiring a parent to negotiate with the child's other parent as to where and under what conditions they will live is highly intrusive and will provide an opportunity for parents to try to exercise control unreasonably over the other parent of their child. This is particularly so in the case of a broadly worded section such as this, which just refers to significant changes to living arrangements. S60D(1)(e) is unworkable and unnecessary and should not be introduced.

We would also question the utility of creating legal obligations that are in reality fictional, such as s65DAC(3)(b). It is one thing to oblige parents to consult each other, it is another oblige them in the way set out in s 65DAC(3)(b). In our view, exhortations regarding desired parental behaviour should be characterised that way in the Act, not as fictional legal obligations. If this sub-section is intended to create a legal obligation, then in our view it would be inappropriate and too vague.

S68F Changes to the 'best interests' checklist

S68F(1A) Primary 'best interests' considerations

S68F(1A) mirrors the new s60B(2) in making ongoing contact with both parents and protection from violence and abuse equally important (so, once again, we consider that protection from harm should be listed first). However, the wording of s68F(1A)(b) is different from that of s60B(2)(b). S60B(2)(b) refers to protection from harm caused by being subjected or exposed to 'abuse or family violence or other behaviour', while s68F(1A)(b) refers to protection from harm caused by being subjected or exposed to 'abuse, *ill-treatment*, *violence* or other behaviour'. The wording of s68F(1A)(b) is the same as the old s68F(2)(g), but this does not explain why the wording of s60B(2)(b) is different.

We would prefer to see a consistent approach being taken in the legislation when describing the types of harm from which there is a need to protect children. As discussed earlier, we consider that 'ill-treatment' should also be included in s60B(2)(b). Second, the fact that s68F(1A)(b) uses the term 'violence' rather than 'family violence' is problematic, since the term 'family violence' is defined in the Act (s60D), but 'violence' is not. Consequently, s68F(1A)(b) needs to be amended to use the term 'family violence' rather than just 'violence'.

S68F(2)(ba) The 'friendly parent' criteria

We commend the recognition in the 'best interests' checklist of the importance of safeguarding children from abuse by designating the need for protection from violence as a 'primary' consideration in s.68F(1A). However, we are concerned that this protection will be undermined by the inclusion of s.68F(2)(ba) as an 'additional consideration'. This provision contradicts the concern about exposure to family violence in s.60B(2)(b) and is in direct conflict with the 'primary' consideration in s.68F(1A)(b), since a parent who is properly and appropriately seeking to protect a child from the effects of family violence will by definition not be willing to facilitate and encourage a close and continuing relationship between the child and the other parent. It is critical that the reforms do not operate to compromise children's safety or continue their abuse in the aftermath of separation by generating an expectation that parents should attempt to cooperate with a violent spouse or partner.

As discussed in our submission in response to the *New Approach* Discussion Paper (see earlier) recent research[12] shows that attitudes to the other parent are already examined by the court in the context of assessing 'parental attitudes' more widely under *FLA* s68F(2)(h). This provision requires the court to consider 'the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents'. The research suggests that it has become a highly influential consideration under the *Family Law Reform Act 1995 (Cth)* (the *Reform Act*) with adverse consequences for the positioning of mothers and the safety of children in circumstances where the court has been faced with increased applications for contact in cases involving domestic violence.[13] The informal presumption in favour of contact in *FLA* s60B(2)(b), together with the changed bargaining dynamics under the *Reform Act*,[14] mean that it has become tactically dangerous for women to object to contact on the grounds of domestic violence and abuse except in the most extreme circumstances. Kaspiew's study showed that contact was not opposed even in cases where children had been exposed to violence and abuse and fathers had, for example, untreated mental illnesses, poor parenting skills and or inadequate parenting capacity.[15] Details of this study were provided at the request of the Family Pathways Branch when our submission regarding the *New Approach* Discussion Paper was being considered, and can be provided again on request.

S68F(2)(j) Relevance of family violence orders

Proposed s68F(2)(j) also directly contradicts the concerns about family violence expressed in s68B(2) and s68F(1A). If a primary aim is to ensure the child's safety and protection from harm, then there is no basis on which to direct the court to ignore interim *ex parte* family violence orders. All of the available research (as opposed to anecdotal) evidence establishes that the great majority of women applying for family violence orders have been subjected to

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[12] Rae Kaspiew, Mothers, Fathers and Parents: The Construction of Parenthood in Contemporary Australian Family Court Decision Making (2005), PhD Thesis, University of Melbourne.

[13] Amanda Shea Hart, 'Children Exposed to Domestic Violence: Undifferentiated needs in Australian family law' (2004) 18 *Australian Journal of Family Law* 170, Helen Rhoades, Reg Graycar and Margaret Harrison, *The Family Law Reform Act 1995: The First Three Years* (Sydney: University of Sydney and Family Court of Australia, 2000) at 5.24-5.35.

[14] John Dewar and Stephen Parker, *Parenting, Planning and Partnership: The Impact of the New Part VII of the Family Law Act 1975* (Family Law Research Unit Working Paper No 3, Griffith University (*'Parenting Planning and Partnership'*, 1999) at 74.

[15] Kaspiew at 102-114.

repeated incidents of violence before they approach the court for an order.[16] Consequently, an interim *ex parte* order is in fact *good evidence* that violence has occurred in the family over a period of time. Further, the criteria to be satisfied before either a temporary or final protection order can be made vary from state to state. This lack of uniformity makes it dangerous to distinguish between the different categories of order. For these reasons, we consider that it should be left to the discretion of the court to give such weight to any family violence order as it considers appropriate.

The history of care for the child

We consider that the 'best interests' checklist should include as a relevant factor the need to consider 'the history of care for the child'. This factor was recommended for inclusion in Canada's *Divorce Act* by the Canadian government's *Final Report on Custody and Access* in 2002, which followed several years of consultations and government-commissioned research.[17] This consideration recognises the importance to children in the post-separation period of minimising, as far as practicable, disruption to the routines with which they are familiar.

We recommend:

- **The ordering in s68F(1A) should be changed, so that the need to protect the child from harm is stated as the first rather than the second principle.**
- **The relevant forms of harm from which children are acknowledged to be in need of protection should be stated consistently across s68F(1A) and s60B(2)(b).**
- **The relevant forms of harm from which children need to be protected should include family violence, and child abuse, neglect, and ill-treatment.**
- **S68F(2)(j) not be amended.**
- **The s68F(2) 'best interests' checklist include as a relevant factor the need to consider 'the history of care for the child'.**

Schedule 3

We are concerned by the decision to mandate less adversarial processes for dealing with child-related proceedings in court. According to the Explanatory Statement, this approach 'largely reflects that taken by the Family Court of Australia in its pilot of the Children's Cases Program' (CCP). This decision is premature, given that evaluations of the Children's Cases Program (currently being conducted by Dr Jenn McIntosh and Professor Rosemary Hunter) are not complete, and that it is as yet unclear whether this model is appropriate for separating families who use the court system. We are also mindful of recent English research on parenting disputes in court, which has raised a concern that the emphasis on diverting parents from court hearings might mean that the service needs of those parents

[16] Eg, Julie Stubbs and Diane Powell, *Domestic Violence: Impact of Legal Reform in NSW* (Sydney: NSW Bureau of Crime Statistics and Research, 1989), at 83; Rosemary Wearing, *Monitoring the Impact of the Crimes (Family Violence) Act 1987* (Melbourne: LaTrobe University, 1992); Lily Trimboli and Roseanne Bonney, *An Evaluation of the NSW Apprehended Violence Order Scheme* (Sydney: NSW Bureau of Crime Statistics and Research, 1997) at 31.

[17] Canada, *Putting Children First: Final Federal-Provincial-Territorial Report on Custody and Access and Child Support* (Ottawa: Department of Justice, November 2002).

who need the security of a full court process may be compromised.[18] In light of this concern and the lack of knowledge about the impact of the CCP, we recommend that consideration of the implementation of Schedule 3 be postponed pending the outcome of the CCP evaluations.

We recommend:

- **That proposals in the Bill to mandate less adversarial proceedings be deferred until the evaluation of the Children's Cases Program has been completed and the findings carefully considered.**

S60KB Principles for conducting child-related proceedings

Schedule 3 of the Exposure Draft introduces changes aimed at promoting less adversarial conduct of child related matters in the court system. Section 60KB directs the court to give effect to four principles when dealing with child related matters. As it stands, this list of principles is inconsistent with those enunciated in s60B(2) as there is no equivalent concern with the effects of family violence and child abuse in s60KB. Consequently, proceedings conducted in accordance with Principle 3, which provides that proceedings should be conducted, as far as possible, in a way that will promote cooperative parenting, will be in direct conflict with one of the key underlying principles in s60B(2) and one of the two 'primary' considerations in the s.68F(1A) 'best interests' checklist - that children need to protected from family violence and abuse. We are concerned about the potential effect of Principle 3, with its emphasis on cooperative parenting, particularly given that the Bill as a whole seeks to divert the majority of parenting disputes away from the court system so that the courts will largely be faced with matters involving a history of violence or abuse. Principle 3 is inappropriate to the conduct of these kinds of proceedings, and we recommend that at a minimum, an additional Principle must be added to s60KB(2) to provide that 'proceedings are to be conducted in a way that will ensure that children and their parents are safeguarded against [potential harms as set out in s60B(2) and s 68F(2) – see earlier]'. We would also recommend that s60KB(1) provide that the court 'must have regard' to these principles, rather than it 'must give effect' to them, given the importance of children's safety and the likely prominence of cases involving family violence and abuse in the court system.

We recommend:

- **That s60KB(1) be amended to state that the court 'must consider' rather than 'must give effect' to the principles set out in s60KB(2).**
- **That s60KB(2) be amended to include as Principle 1, 'The first principle is that the proceedings are to be conducted in a way that will ensure that children and their parents are safeguarded against family violence, and child abuse, neglect and ill-treatment'.**

S60KE General duties

We consider that the powers set out in this section should be permissive, not mandatory; ie 'the court may' rather than 'the court must'

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[18] Carol Smart, Vanessa May, Amanda Wade and Clare Furniss, *Residence and Contact Disputes in Court, Volume 2* (Department of Constitutional Affairs, June 2005) at 89.

We recommend:

- **S60KE be amended to state that the court 'may' rather than 'must'.**

S60KG Rules of evidence do not apply unless court decides

The suspension of provisions of the Evidence Act is problematic for reasons related to why some cases are considered to be unsuitable for CCP. That is, it is thought that some issues require proper testing by means of admissible evidence and cross-examination. This is particularly the case with serious allegations of child abuse or domestic violence. A father accused of abusing his child does not want to have the allegations determined in a context in which hearsay, tendency and character evidence may be admitted. It is also problematic that any criminal changes, such as allegations of child sexual abuse, will be dealt with under relevant state or territory criminal legislation, and therefore possibly under different evidentiary laws (in states that have not yet adopted the Uniform Evidence Act that applies in the Family Court).

On the other hand, giving the court the discretion to apply the rules of evidence to an issue in the proceedings is also problematic, as it will create scope for greater adversarialism as parties seek to put arguments to the trial judge as to whether or not the rules of evidence should be applied to a particular issue. This same tendency has been observed in other contexts where the rules of evidence *prima facie* do not apply.[19]

The only obvious solution to this dilemma is to make procedural options available rather than mandating a single type of procedure.

We recommend: That S60KG not be introduced.

Schedule 5

The proposal to remove references to 'residence' and 'contact' underlines a conflict between the government's desire to emphasise parental responsibility and the *practical reality* that children's arrangements often need to be thought about in terms of *time*, eg when contact agreements/orders, and child support liabilities (modifications to the formula and departure orders), are being worked out. In the context of child support, the proposal to use the term 'care' when it is often 'time' that is being described is confusing. Replacing 'contact' with 'care' also has the potential to further undermine the position of women who have been primary carers of their children, and to give fathers greater acknowledgement than may be warranted, especially in its assumption that 'contact' is always the same as 'care' – a proposition manifestly unsupported by the empirical evidence.

'Contact' and 'residence' are neutral terms which describe the matters they refer to in a more accurate and less confusing way than do the proposed changes. The existing terminology should not be changed in the hope that changing language can change the way people think –

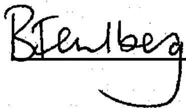
[19] See eg Rosemary Hunter, 'Evidentiary Harassment: The Use of the Rules of Evidence in an Informal Tribunal', in Mary Childs and Louise Ellison (eds), *Feminist Perspectives on Evidence* (Cavendish Press, 2000) at 105.

especially given that, as acknowledged in the Explanatory Statement, this was so clearly not achieved following changes to the Act in 1996.[20]

We recommend: That Schedule 5 not be introduced.

Please let us know if you would like us to provide further information in support of our comments and recommendations. We would be happy to do so.

Yours sincerely



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[20] Stephen Parker and John Dewar, 'The Impact of the New Part VII Family Law Act 1975' (1999) 13 *Australian Journal of Family Law* 96; Helen Rhoades, Reg Graycar and Margaret Harrison, *The Family Law Reform Act 1995: the first three years* (Sydney: University of Sydney and Family Court of Australia, 2000).