Response to Questions on Notice

Presentation by Chief Justice Bryant, Justice O'Ryan and The Hon. Richard Chisholm to the House of Representatives Standing Committee on Legal and Constitutional Affairs *Inquiry into the Family Law Amendment (Shared Parental Responsibility) Bill 2005*, 26 July 2005

Question 1: Richard Foster's presentation to the Lone Fathers Association Annual Conference 2005 (LCA 19)

Excerpt from transcript:

Mr MURPHY—*Finally, yesterday the Lone Fathers Association came before us. Amongst their exhibits was a letter written by their adviser, Mr JB Carter, on Monday, 18 July to Mr Richard Foster, the Chief Executive of the Family Court of Australia, following his address to the Lone Fathers Association's national conference on family law on 22 June 2005. They were fairly critical of Mr Foster and they cited his claim in his speech that women are almost always the victims of domestic violence. They made the link that if this is a view also held by judges of the Family Court there is a major credibility gap between the Family Court and many fathers. They raised a number of issues in that paper in relation to the family violence professional development program, saying that if the court has such a program in place it will be bound to seriously distort the court judgments and hurt families, particularly fathers and their children.... Bearing in mind that in this paper they argued that women are not almost always the victims of domestic violence, I am interested in whether you have had a chance to see that paper and whether you have any comments to put on the record for the purposes of this inquiry.*

Response:

The correspondence from Mr Carter, referred to above, was sent to Mr Foster at an address where it was not possible to reach him. Mr Foster has therefore been unable to respond to the issues raised by Mr Carter.

A copy of the paper presented by Mr Foster at the Lone Fathers Association National Conference in Canberra on 22 June 2000 is enclosed. In the section entitled 'Family Violence Strategy', Mr Foster said (with reference to the background work undertaken to develop the Court's Family Violence Strategy):

"It notes that family violence is largely a gendered phenomenon. However, although the statistics demonstrate that women are almost always the victims1, it is also the case that abuse may sometimes be instigated by the female partner and in some cases both partners claim to have been subjected to violence. The screening could arguably

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be directed at women only. But the court acknowledges that as a court that must be seen to be treating all its clients fairly and that applies the rules of natural justice to all its processes it is concerned that men not be discriminated against." The paper cites statistical data prepared by Access Economics, which found that of the 408,100 reported victims of domestic violence in 2002-03, 87% were women.

Mr Foster's paper clearly states that the Family Court recognises that men may also be victims of violence and that violence can also be instigated by both partners. The paper further emphasises the Court's commitment to treating its clients fairly and states that the screening and assessment procedures being developed as part of the strategy will not be confined to women only.

The Committee may also wish to note that, following Mr Foster's presentation, the National President of the Lone Fathers Association, Mr Barry Williams, wrote to Mr Foster thanking him for presenting at the Conference and congratulating Mr Foster on his expertise and willingness to respond to questions. A copy of that correspondence is also enclosed.

Question 2: Evaluation of the proposed reforms to the family law system (LCA 34)

Excerpt from transcript:

Mr PRICE—*I guess the legislation is not through, but, given that this is a draft, there will be some tweaking and changes. How are parliament and the people to assess the success of these changes? How will we be able to say in 12 months, two years or whenever that the establishment of these family relationship centres, the compulsory mediation associated with it and the changes to the act and the way it impacts on the Family Court have or have not been successful?*

Response:

The Court believes that evaluation of the various reforms to the family law system is integral to their success. Evaluation is a critical tool in measuring outcomes (both short and long-term), assessing the impact of legislative and non-legislative change and identifying opportunities for improvement. In the Court's view, it is essential that an evaluative component is built in to the law reform project, and that an evaluation (or series of evaluations) commence at an early stage of implementation. It is also considered vital that any evaluation be qualitative rather than quantitative in nature. This will enable identified positive outcomes to be built upon and negative outcomes to be addressed. Further, evaluation assists in articulating what is sought to be achieved through the development of objective measures of success. Importantly, evaluation assists Government to develop and maintain an evidence based law reform program. A number of organisations, including the Australian Institute of Family Studies, would be well-positioned to evaluate the proposed family law reforms, provided that adequate resourcing was made available.

What was needed following the 1995 legislation and what will be needed after this one is an appropriate and on-going public education campaign such as that that followed the passage of the English *Children Act* in 1989. In the UK a standing

committee was set up consisting of appropriate stakeholders and chaired by a High Court Judge of the Family Division to oversee this campaign and report to the Parliament upon problems as they emerged in relation to the Act. It may have been that had such a committee been in place after the 1995 Act, the present legislation in its current form would have been unnecessary as these sorts of problems would have been recognised and addressed. It should also be remembered that the presentation and funding of such education campaigns is a responsibility of Government and not the courts or social welfare agencies

Question 3: Definitions of 'violence' and 'serious violence' (LCA 24)

Excerpt from transcript:

Ms ROXON—*We have had quite a few witnesses talking to us about violence and the interpretation of violence and whether or not the wording in the act is too general or too specific. We got into a rather silly debate yesterday about what was 'serious violence', as opposed to I am not sure what other sort of violence. Could you give me a comment from the court's point of view about whether or not there is any difficulty with the existing interpretation.*

Response:

The discussion with the Honourable Member arose in the context of section 60I, which is the section dealing with attending family dispute resolution before applying for a Part VII order and section 60J, which provides that the Court must not hear an application unless the applicant files in Court a certificate filed by a family counsellor or family dispute resolution practitioner to the effect that the counsellor or practitioner has given the applicant or applicants information about the issues the order would deal with and the exception to that provision where the Court is satisfied there are reasonable grounds to believe:

i. there has been abuse of the child by one of the parties to the proceedings or the risk of abuse if there were to be a delay in applying for the order; or

ii. there has been family violence by one of the parties to the proceedings or there is a risk of family violence by one of the parties to the proceedings.

The Court does not consider that it would be of assistance to use the term "serious family violence" rather than "family violence" (as the Bill now provides). It is suggested there are three reasons for not changing the drafting as it presently reads:

1. To use the term "serious family violence" may suggest it is limited in some way to physical violence whereas violence would not necessarily have to be construed at the moment as mere physical violence. The Court considers this important.

2. To use the term "serious family violence" may suggest there are some forms of violence which are acceptable, which although present would require the parties to negotiate together.

3. It ought not to be forgotten that the ability of a party to approach the Court without having a certificate from a family dispute resolution practitioner or family counsellor and the question of whether there has been family violence will need to be the subject of some preliminary judicial decision. It would be unfortunate indeed if this required a further debate about whether the violence was "serious" or simply "violence." Not only is it likely to make bringing an application to Court even more complex, but it is likely to focus the parties' attentions on a further issue, namely whether or not the violence is serious.

Decisions concerning violence have to be made by Judges every day in proceedings before them and it ought to be a question of the evidentiary basis for the application, not either a semantic argument, or an opportunity for new jurisprudence to arise about the difference between "serious" and "not serious" violence. The Court does not see any difficulty with the existing interpretation.

Question 4: Apprehended Violence Orders and Family Relationship Centres (LCA 30)

Mr PRICE—*I will get back to the point I was making about those AVOs. You are indicating that the court is quite capable of handling it, forming its own judgment and making its own arrangements but, if a rider were put on AVOs for people who are going through a relationship breakdown, then you have something that the family relationship centres are able to act on or not act on and therefore fast track it through the court process. What I am worried about is that if we preclude the whole wash of people with an AVO from going to a family relationship centre, its capacity to make impacts are dramatically diminished. There is really no change. Again, you do not want them handling—and I apologise for the language—the most serious cases either, or cases that should be fast tracked into the court. So it is that impact. That is the area about which I have a concern, and I am wondering whether you might have a response, might wish to take it on notice or might wish to provide any suggestions to the committee.*

Response:

The Court notes that parties who are subject to an Apprehended Violence Order (or similar) are not precluded from using services offered by Family Relationship Centres if they so choose. The Court reiterates its comments to the Committee that the circumstances surrounding the making of the Apprehended Violence Order (or similar) will be taken into account where possible.. In any event, it is important to note that section 60I(9) requires the Court to consider making an order that a party attend family dispute resolution, notwithstanding that the Court is satisfied there are reasonable grounds to believe there has been abuse or violence, or risk of abuse or violence. Thus in a particular case the Court, notwithstanding that the Court is satisfied there are reasonable grounds to believe there has been abuse or violence, or risk of same, nevertheless must consider whether in the circumstances of the case it would be appropriate for the parties to have some form of mediation. This allows flexibility to require the parties to attend mediation and the Court would not recommend that there be any specific reference to Apprehended Violence Orders.

Question 5: Presumption of shared parental responsibility and interim orders (LCA 38-40)

Excerpt from transcript:

Mr CADMAN—*Because there are often inordinate delays between the interim order and final settlement and there is no presumption available in the interim order process as proposed here, to ignore the interim decision seems a logical process to reinsert the presumption. Is that right?*

Response:

The Court reiterates the comments made in its submission (paras 60-65). In discussions with the Committee, it appeared to the Court that one of the reasons for the inclusion of section 61DB may be that the drafter was concerned to ensure that where the presumption of joint parental responsibility did not apply because the Court was making an interim order (see section 61DA(3)(a)), the inclusion of section 61DB would ensure that if there was an interim order, then in making a final order the Court would not have regard to it because the presumption had not been applied.

If this is was the intention of section 61DB then, in the Court's view, the present draft of section 61DB goes much further and creates the problem the Court has alluded to in paragraphs 60-64.

In accordance with the discussion with the Committee, if the problem which section 61DB seeks to overcome is that the Court does not apply the presumption when making an interim order, the Court suggests that the problem could be solved by removing sub-paragraph (3)(a) from section 61DA, which would now read:

> "(3) the presumption does not apply if the Court considers that it is not appropriate to apply the presumption in making that interim order."

and deleting section 61DB.

It is anticipated that in most cases the Court would apply the presumption on an interim basis but there may be some orders made urgently on an ex parte basis where the presumption could not be applied. By re-framing the section the Court would have discretion in those cases but in most interim proceedings the presumption would still apply. If the section were amended in that way, then section 61DB would not be required to overcome the presumption of joint parental responsibility not applying in all interim applications and could be omitted

Question 6: The enforceability of parenting plans in contract (LCA 42)

Excerpt from transcript:

Mr PRICE—*You are talking about the status of it, which is worrying. Is a parenting plan not effectively a contract between two parties and therefore would have status?*

Response:

The Court does not wish to add anything further to its response.

Question 7: A presumption of equal parenting time (LCA 45)

Excerpt from transcript:

Mr CADMAN—*I think you are right in every case. The 50-50 presumption that is negotiated starts from a point of equality rather than from a supposition of the starting point. I would suggest that, in practical circumstances, the number of 80-20 cases would change very little. But the starting point indicates an equality in the process of settlement. I think what we are hearing is the community saying, 'What we would like to have is an understanding that both parents have an equal responsibility right at the beginning.' The practical ramifications may be at settlement and it is most likely to be in many instances an 80-20 settlement.*

Response:

The Court wishes to confirm its response that it believes there would be significant difficulties in starting from a point of equality. The Court apprehends that the issue arises under section 65DAA, which reads as follows:

> (1) If:
> (a) a parenting order provides (or is to provide) that a child's parents are to have parental responsibility for the child jointly; and
> (b) both parents wish to spend substantial time with the child;
> **the court must consider making an order to provide (or including provision in the order) for the child to spend substantial time with each of the parents.** (emphasis added)
>
> Note: The effect of section 65E is that in deciding whether to go on to make a parenting order for the child to spend substantial time with each of the parents, the court will regard the best interests of the child as the paramount consideration.
>
> (2) Subsection (1) does not apply if it is not reasonably practicable for the child to spend substantial time with each of the parents.

As the Court understands it, the question from the Honourable Member related to whether sub-section (b) should be amended to provide that the Court must consider making an order for the child to spend "equal" time with each parent rather than "substantial" time with each parent. The Court reiterates the comments it has

previously made and believes this to be an important matter. The Court does not believe it would be of assistance to change the wording from that provided in the Exposure Draft for the following reasons:

i. The parties bring their dispute to the Court so that when a party wants equal time, and made such an application, the Court would in any event be required to consider whether an order for equal time was appropriate. The context in which the parties bring their cases to Court is an important one and should not be lost in the discussion.

ii. *Equal* is a term which of itself is difficult to understand. Equal has a quantitative rather than a qualitative basis. For example, a Court could order that a child spend every weeknight with one parent and every weekday with the other parent. Although the hours spent with each might be equal, there is a vast difference in the quality of time spent. Equal time does not necessarily provide good quality and focuses too much on the hours or nights and days spent with a parent rather than the significance of those periods.

iii. Parties would be encouraged to argue about what equal time meant and what constituted equal time, as well as the more fundamental issues related to the quality of time spent with each parent. The word "substantial" has sufficient meaning and allows greater flexibility in making a decision based on quality rather than quantity in terms of precise division of hours or days.

Question 8: Variations and new applications (LCA 49)

Excerpt from transcript:

Mr CADMAN—*I want to go to the comments on 65DAA in regard to the prospect of people coming back into the system because of the shared parenting process—a flood of reapplications. In considering these changes, the committee that Roger Price and I were members of really felt that some time should expire before that was permissible, and that only new cases should deal with the amendments that are coming through for a period.*

Response:

The Court considers this to be an important issue. There are significant resource implications in the section and the Courts have already noted an increase in applications for revision of orders in advance of the legislation. It is highly likely there will be a significant number of applications made to vary orders simply on the basis of the legislation. The Court agrees with the comments of the Honourable Member for Mitchell, Mr Cadman, that it would be sensible for some time to expire before it would be permissible for people to bring applications based solely on the new legislation and that only new cases should deal with the amendments for a period of time. The Court does not suggest exactly in what terms the amendment could be drafted and leaves that to the Office of Legislative Drafting but the Court reiterates the suggestion that the legislation could be drafted to provide that for a period of time, the effect alone of the amending legislation does not constitute a change in

circumstances that would otherwise enable the case to be re-opened (see *Rice v Asplund* (1978) 6 Fam LR 570; (1979) FLC 90-725, *D v Y* (1995) 18 Fam LR 662; (1995) FLC 92-581, *King v Finneran* (2001) FLC 93-079; [2001] FamCA 344).

Other comments – section 60KG

Section 60KG, which provides that the rules of evidence do not apply but which gives the Court discretion to apply the rules, is consistent with State and Territory legislation, both in relation to care and protection and adoption, and is also consistent with the legislative position in United Kingdom and New Zealand. To the extent that it might be said that the ability to exercise the discretion to apply the rules, as currently drafted, is not entirely consistent with State and Territory legislation, the Court's suggestion is that this could be overcome (if it is a concern) by the amendment suggested at paragraph 54 of the Court's submission that the "best interests" test for the exercise of the discretion be deleted and instead section 60KG(2)(a) read:

> "the Court may apply one or more of the provisions of a Division or Part mentioned in sub-section (1) to an issue in the proceedings if the Court considers it necessary in all the circumstances to do so."

One may wish to add the words: "if the Court considers it necessary in all the circumstances in the interests of justice to do so." This would avoid the problem identified by some with the 'best interests' test that 'best interests' is a conclusion the Court would come to after hearing and admitting the evidence.

Some of the relevant State and Territory legislation is as follows:

VIC - *Children and Young Persons Act 1989*

82. Conduct of proceedings in Family Division

(1) The Family Division—
(a) must conduct proceedings before it in an informal manner; and
(b) must proceed without regard to legal forms; and
(c) must consider evidence on the balance of probabilities; and
(d) may inform itself on a matter in such manner as it thinks fit, despite any rules of evidence to the contrary...

NSW - *Children and Young Persons (Care and Protection) Act 1998*

93 General nature of proceedings

(1) Proceedings before the Children's Court are not to be conducted in an adversarial manner.

(2) Proceedings before the Children's Court are to be conducted with as little formality and legal technicality and form as the circumstances of the case permit.

(3) The Children's Court is not bound by the rules of evidence unless, in relation to particular proceedings or particular parts of proceedings before it, the Children's Court determines that the rules of evidence, or such of those rules as are specified by the Children's Court, are to apply to those proceedings or parts.

QLD - *Child Protection Act 1999*

105 Evidence

(1) In a proceeding, the Childrens Court is not bound by the rules of evidence, but may inform itself in any way it thinks appropriate.

(2) If, on an application for an order, the Childrens Court is to be satisfied of a matter, the court need only be satisfied of the matter on the balance of probabilities.

SA - *Children's Protection Act 1993*

Evidence, etc.

45. (1) In any proceedings under this Act—

(a) the Court is not bound by the rules of evidence but may inform itself as it thinks fit; and

(b) the Court must act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms.

(2) A fact to be proved in proceedings under this Act is sufficiently proved if proved on the balance of probabilities.

ACT - Children and Young People Act 1999

291 Children's Court may inform itself as appropriate

(1) In a proceeding under this part, the Children's Court is not bound by rules of evidence but may inform itself of a matter in any manner that it considers appropriate.

(2) In addition to any other manner of informing itself before making, extending, varying or revoking an order under this part, the Children's Court may—

(a) admit and act on hearsay evidence; and

(b) take submissions from someone who is not a party.

WA - *Children and Community Services Act 2004*

[This Act received assent on 20 Oct 2004 but commencement has yet to be proclaimed]

146. Court not bound by rules of evidence

(1) In this section —

"representation" includes an express or implied representation, whether oral or in writing, and a representation inferred from conduct.

(2) In protection proceedings the Court is not bound by the rules of evidence, but may inform itself on any matter in any manner it considers appropriate.

(3) Without limiting subsection (2), evidence of a representation about a matter that is relevant to the protection proceedings is admissible despite the rule against hearsay.

(4) The Court may give such weight as it thinks fit to evidence admitted under subsection (3).

Section 126 of the Adoption Act (NSW) 2000

> "Except as otherwise provided by this Act or the Regulations, the Court, in the hearing of any proceedings or in determining any application or matter under this Act or the Regulations, may act on any statement, document, information, or matter that may, in its opinion, assist it to deal with the matter of the proceedings or before it for determination whether or not the statement, document, information or matter would be admissible in evidence."

In the United Kingdom the hearsay rule has been abolished in children's proceedings by the *Children (Admissibility of Hearsay Evidence) Order 1993*: The *Children (Admissibility of Hearsay Evidence) Order 1993* is made under subsection (3) of the *Children Act 1989.*

The hearsay rule has also been abolished in the UK in civil proceedings generally by the *Civil Evidence Act (1995).* An order similar to the *Children (Admissibility of Hearsay Evidence) Order 1993* was enshrined in Northern Ireland in 1996. In New Zealand Section 128 of the *Care of Children Act 2004* which commenced on 1 July 2005 provides:

> "In all proceedings under this Act (other than criminal proceedings, but including appeals or any other proceedings), the Court may receive any evidence that it thinks fit, whether or not it is otherwise admissible in a court of law."