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

Dear Madam Secretary

Family Law Amendment (Shared Parental Responsibility) Bill 2005

National Legal Aid wishes to make some brief comments on the draft *Family Law Amendment (Shared Parental Responsibility) Bill* 2005. We note that the terms of reference to the Standing Committee provide that the Committee should not reopen discussions on policy issues. Accordingly, we have restricted our comments to the draft Bill.

Schedule 1-Shared Parental Responsibility

60I Attending family dispute resolution before applying for Part VII order

It is clear from subclause (1) that the object of this clause is to ensure that people attempt to resolve disputes about children before making an application to a court exercising family law jurisdiction. NLA supports that objective. Subclause (8) is designed to screen out the types of matters in which applicants will not be required to obtain a certificate from a family dispute resolution practitioner before a court can hear the application. Again, NLA supports the categories of matters which come within the exception. NLA is concerned, however, that there may be some unintended consequences which flow from subclause (8)(b).

Subclause (8)(b) is intended to screen out matters in which there has been child abuse or family violence so that applicants in those types of matters are not required to obtain the relevant certificate from a family dispute resolution practitioner. The clause has been carefully drafted, presumably to ensure that it is not sufficient for an applicant to simply make allegations of child abuse or family violence. The court will have no jurisdiction to hear an application in

these matters unless it is satisfied there are reasonable grounds to believe there has actually been child abuse, family violence or a risk of either.

On a practical level, NLA sees no major issues in relation to the subclauses dealing with family violence. The party alleging the violence can usually give direct evidence about that violence, any contrary evidence can be given by the other party and the court can then make the necessary determination about whether or not it is sufficiently satisfied about the issue.

The situation in relation to child abuse is much more problematic. Evidence in child abuse cases is often contaminated by leading questions of the child by anxious parents and others, and as a result of the child being questioned at length by doctors, child protection specialists, police and others, well before the matter comes before a court exercising jurisdiction under the Family Law Act. Sometimes a parent has formed a belief that abuse of a child has occurred as a result of behavioural factors in the child or statements made by a young child which are open to more than one interpretation.

If a party files an application and alleges child abuse, the likely response by the other party will be that the allegations are hotly contested. It is unrealistic to think that such matters will not be defended. Given that the court has no jurisdiction to hear the substantive application at all unless satisfied that there are reasonable grounds to believe there has actually been abuse of the child by one of the parties to the proceedings (or a risk of abuse if the application is delayed), the court will have to embark on a fully contested hearing in order to make the necessary determination about whether or not there has been abuse and, consequently, whether or not the applicant is required to obtain the certificate from a family dispute practitioner. This will inevitably add to the complexity and costs of proceedings, both of which run counter to the Government's intentions.

NLA believes that what is sought by the provisions is an effective way of screening out of the requirement for certificates those cases in which there is a genuine issue to be determined in relation to child abuse or risk of abuse.

NLA has tried to think of some practical alternatives to the current wording which would achieve the desired result. Some potential solutions might be:

1. Requiring the court to be satisfied on the documentary evidence of the parties that there are reasonable grounds to believe there is a "justiciable issue" of child abuse in the matter.
2. Introducing the notion of a "prima facie case" of child abuse in which the sworn evidence of the relevant party, taken at its highest, is capable of satisfying the court to the requisite standard.
3. Allowing the application to proceed where the issue of child abuse is raised but giving the court the power to refer the parties at any time to a family dispute resolution practitioner if it becomes clear that the requisite level of satisfaction will not be reached.

4. Consider a more subjective test in which the court must be satisfied that the applicant believes on reasonable grounds that there has been child abuse.

Whatever approach is taken it is important to avoid a major contested hearing up front in order to settle the jurisdictional issue, especially as the substantive hearing is almost certainly going to involve the same issues.

So far as Legal Aid Commissions are concerned, Commissions daily certify matters requiring litigation. They have acknowledged expertise in so doing. To impose on them the proposed bureaucratic accreditation regime is, in the view of Directors, a nonsense.

60J Family dispute resolution not attended because of child abuse or family violence

A similar concern arises in relation to clause 60J which provides that where a court is satisfied there are reasonable grounds to believe there has been child abuse or family violence (and therefore the requirement to obtain a certificate does not apply), the court still has no jurisdiction to hear the substantive application "unless the applicant files in court a certificate by a family counsellor or family dispute resolution practitioner to the effect that the counsellor or practitioner has given the applicant information about the issue or issues that the order would deal with." NLA is concerned at this additional jurisdictional hurdle. If the court is satisfied that there has been family violence or child abuse, surely the relevant information can be provided by the court or by a court based family and child specialist? Alternatively, a referral of the party to a counsellor or family dispute resolution practitioner could be made without delaying the proceedings further. In many of these sorts of cases the applicant will have received information from counsellors, child protection specialists, lawyers and others before coming before the court. Many child abuse cases would be streamed into the Magellan program in the Family Court in any event and would have the benefit of the family and child specialists at the Court being involved in the matter.

One further concern in relation to subclauses 60I(8)(b) and 60J(1)(b) is the requirement that the court be satisfied that the relevant family violence or child abuse has been perpetrated by "one of the parties to the proceedings". It is the experience of NLA that in cases in which child abuse or family violence has occurred it has often been perpetrated by someone other than one of the parties, such as a defacto partner, relative, friend, older step sibling or some other person with whom the child has come into contact while in the care of the party. NLA suggests an amendment to add after "the parties" the words "or someone closely associated with one of the parties" in the relevant sub clauses.

60B Objects of Part and principles underlying it

NLA supports the inclusion in the principles of reference to the right of children to enjoy their culture. Many children have parents who each have different

cultural backgrounds. To reflect this we suggest the words "derived from both parents" be inserted after "children have aright to enjoy their culture" in clause 60B(2)(v).

Children's wishes/views

As part of the amendments to s68F(2) the requirement of a court to consider any "wishes" expressed by the child is replaced with the requirement by the court to consider any "views" expressed by the child. It is noted that the explanatory memorandum suggests that views is a more encompassing term than wishes and assists when children may have definite views but prefer not to express a wish in relation to a particular outcome. Some children do, however, have definite wishes and want to express them. NLA suggests that both terms be used so that the provision reads "any views or wishes expressed by the child..."

Schedule 2 – Compliance Regime

70NG and 70NJ Powers of court

The explanatory memorandum indicates that the intention of the draft legislation in instances where contraventions have been found is to award monetary compensation for expenses incurred unnecessarily in preparation for parenting time, for example for costs of airfares and accommodation not used. Clauses 70NG(1)(e)(iii) and 70NJ(3)(f)(iii) do not adequately cover this aspect as they refer only to the situation in which the person "reasonably incurs expenses as a result of the contravention". NLA suggests the wording be amended to read "the person...reasonably incurs expenses in anticipation of spending time with the child or reasonably incurs expenses as a result of the contravention".

Clause 70NJ(2A) provides for a mandatory costs order to be made by a court in particular circumstances of contravention unless the court is satisfied that it is not in the best interests of the child concerned to make that order. NLA expresses some concern about the lack of discretion in this provision and suggests that the wording be amended to provide that "the court must consider" making such an order.

Schedule 4 – Changes to dispute resolution

The definition of family dispute resolution in clause 10H distinguishes between advisory dispute resolution and facilitative dispute resolution. Immunity is provided by clause 10M to a practitioner engaged in facilitative dispute resolution but not advisory dispute resolution.

The definition of facilitative dispute resolution reflects a "pure" mediation model in which the practitioner offers no input (other than procedural) to the

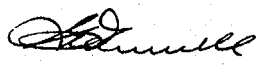
process. Many approved mediation organisations, however, have moved in recent years to incorporate various forms of professional advice into their dispute resolution practices. The functions of family and child mediator under the current legislative framework are expressed to include assisting the parties to develop and consider options to resolve disputes in the best interests of any children involved. Such approved mediation organisations may provide, for example, information and advice about the needs of children at particular stages of development. Parents can use this information and advice to assist them to develop an appropriate child focused resolution of their dispute.

NLA is concerned that, as a result of the proposed changes, many currently approved mediation organisations may not come within the definition of facilitative dispute resolution by virtue of the fact they provide some advice about the needs of children or possible options for discussion. If so, they will lose the statutory immunity which is currently provided under s19M of the *Family Law Act*. This will presumably have consequences for the obtaining of professional indemnity insurance for those practitioners.

NLA strongly urges that the immunity in clause 10M be extended to cover both forms of family dispute resolution.

Thank you for the opportunity to comment on the draft Bill. I hope these comments are useful.

Yours Sincerely



George Turnbull
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