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Standing Committee on Legal and
Constitutional Affairs,
Parliament House,
Canberra ACT 2600

Via email to: laca.reps@aph.gov.au

Dear Committee Members,

Response to the Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005

Firstly let me express my dismay that the Government sees fit to allow only 2 weeks or less to respond to this important document when they themselves took 18 months to respond to the Committee report, *Every picture tells a story (EPTS Report)*. The timing of the release of the Government response and the Draft Bill has allowed the Government response to escape scrutiny and in fact they have compounded their duplicity in avoiding criticism by decreeing that your Committee ***"should not reopen discussion on policy issues such as the rejection of the proposal of 50/50 custody in favour of the approach of sharing of parental responsibility".*** That is exactly the place where this discussion should be at the moment.

I am further dismayed as I believe you should be also, that the Government expects you to be able to review and make recommendations to this crucial legislation in a matter of six weeks.

The Government may believe they have handled the matter well, but I would have to advise that few men and women have been convinced the recommendations will result in any meaningful change for them as parents. Most are aware of the process used to derail the inquiry from the moment it was announced by the Prime Minister as an "Inquiry into Joint Custody 50/50 – a term bound to be rejected because of its seeming rigidity.

The wording used to describe a perfectly normal circumstance of both parents being regarded as being equally essential in their children's lives, and both parents, as individuals and the children having equal rights to share in each others' lives, whether still living together or not has been distorted by the use of joint custody 50/50, instead of referring to "shared and equal parenting". The mention of 50/50 allowed the opponents of shared parenting to claim the proposal was too rigid and unworkable, because the assumption became that shared parenting was all about equally sharing the time with the children. This was never the case, but people such as the retired Chief Justice of the Family Court, Alastair Nicholson and others were able to make emotive statements ridiculing the proposal by using examples where the children spending equal time with each parent was clearly impractical and impossible logistically. Shared and equal parenting is about far more than just time - it is about being regarded as equally important and essential in the children's lives. It is about the joys and duties, responsibilities and rights to be regarded as equally as much a parent as the other. To be consulted, informed and have input into the children's lives and to spend time with the children as much as can be arranged up to 50 per cent.

The inquiry chaired by Mrs Kay Hull seemed to be mainly receptive and positive in response to the problems experienced by fathers when it came to the difficulties associated in trying to have reasonable contact with their children and the inequities of the child support scheme. This Agency and others came away with the hope that positive change, whereby both parents would at last be regarded as equally important in their children's lives was going to be recognised, but on reading their recommendations contained in the EPTS Report, one would be hard put to believe the report had been written by anyone who was present during the hearings. The author[s] of the EPTS Report confused shared parental responsibility into a blending of issues that used to be described under guardianship (now spoken of as special interest clauses) and parental responsibility, which is already present in the Family Law Act. The addition of the word "shared" seems to have been the crucial element which enabled the Government to announce it favoured "shared parental responsibility" as if this would deliver "shared and equal parenting". For many fathers the initial response was praise for the recommendations as expected, because they did not understand the terminology. Neither did the carefully worded media releases dispel the deception.

The response to the release of the EPTS Report reminds me of the FL Amendment Bill 2005 and the 'big deal' announcement made by the Attorney General to the effect that fathers who found they were no longer the biological father via DNA testing would be able to reclaim the money paid to support the child. Forgetting to mention that this amendment only related to child maintenance orders that had been made by a court and only applied to a small number of men who once they found they were not the parent of a child were prevented from making an application under the Family Law Act.

Making the most of publicity about positive moves is an acceptable political practice, but to be condemned when the announcement misleads a significant proportion of the electorate and raises false hopes.

This is exactly what has taken place since the delivery of the Committee's EPTS Report.

From that report stems the corrupted terminology of ***shared parental responsibility*** and various other terms used in the draft bill, none of which mention ***shared*** or ***sharing*** apart from in the heading. Commonly used is the term ***parental responsibility***. There are only two mentions of *"jointly" ..... parents jointly sharing duties and responsibilities* (60B (2)(C)(iv); or parents *to have parental responsibility for the child jointly* 61DA(1). Yet, the accompanying 'Note' clearly tells us that ***joint parental responsibility*** does not "involve or imply the child spending an equal amount of time or a substantial amount of time, with each parent". So we must presume that it means nothing more than it already implies for the distribution of the duties in providing support for the child, whereby mother has the day to day care of the child and the father the responsibility for paying child support and any other bills that can be loaded onto his shoulders, with the allocation of minimal time with his children.

The word ***'share'*** seems to be an anathema to the family law legislators, not only is it only mentioned twice in the draft, apart from the heading, as already noted, they have even removed the word in four instances - see Schedule 5 – Removal of references to residence and contact, Paragraph 7B(2)(a), and (c); 7B(2) and 7B(3). The word ***'equal'*** does not appear in relation to parents or parenting at all.

In our opinion the proposed changes to the Objects and Principles underlying the Act fail miserably to initiate Objects that will produce a result in line with the opinions of many Australians who overwhelmingly believe that both parents have a right to share equally in and contribute equally to their children's lives. As West Australian, Janos Paskandy wrote:

> Children are inseparably both a responsibility and a source of joy. The responsibility as well as the joy should be borne and shared equally between the two biological parents.
>
> Responsibility is discharged by fulfilling parental duties, performed primarily by the combined means of financial and personal care. ...
>
> .....It is unjust to deny a parent the joy proportionate to the burden he/she carries.
>
> Children have equal rights to both of their parents. The parent who tries to deny them this basic right should be brought into line by the law.
>
> Anyone unwilling to shape policy in line with these principles has no place in debating children's issues.

Recognition that both parents have equal rights to contribute to and share in the lives of their children is just as important as recognising the rights of children to know and be cared for by both their parents and spend time with their parents. Without this Object being included it will make little difference whether the names of contact and residency are changed or not. Fathers will still enter the court as the parent who is regarded as being less important to the child's well being. The above comments do not imply that the labeling of residency/contact should not be changed (see MRA's recommendation to the Hull Committee), but is a call for recognition that the changes will be as ineffectual as the previous 1995 changes unless the law is altered to recognize the equal importance of both the biological mother and the biological father in their children's lives. One would think legislators would learn from past mistakes, but that it presupposing that there is a genuine intention to keep fathers in their children's lives.

We will address some of the more crucial areas of the Draft Bill in an effort to highlight the problems we see arising. Many of these concern the use of confusing terminology which is being employed we believe, because there is singular and significant lack of commitment by the those in the Attorney General's Department who draft the legislation and politicians to introduce changes that will ensure both parents after separation continue to be as fully involved in their children's lives as possible.

Schedule 1 Shared Parental Responsibility
Objects of Part and Principles (Part VII):

Paragraph 60B (1) (c) has been added to the Objects of Part VII of the Act "to ensure that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child", but contains nothing to suggest any improvement of the 80/20 norm where dad "is allowed" see his child every 2nd weekend and half the school holidays which usually equates to 52 nights. We cannot resist commenting on how fortuitously for some, that this coincides with the recommendation contained in the Parkinson Taskforce Child Support recommendations as the base line requirement of 52 nights contact before a reduction in child support paid "kicks in". Lowering the bar for one part of the legislation affecting children's contact as recommended by Professor Parkinson is a sure way to precipitate action to ensure a reduction in child support does not take place, even if this means making false allegations of domestic violence, and/or child abuse to prevent such contact.

The added reference to family violence and child abuse with the 'presumption against' shared parental responsibility in the Principles of the Part VII at 60B(2)(b)(i) and (ii) seems to usurp the third objective contained in 60B(1)(c) and elevates the issue to be one in conflict with the third objective contained in 60B(1)(c) The reference to family violence and abuse has been included as a direct response to Recommendation 2 in the EPTS Report. The Government response explains that the "Judge or Magistrate will generally start with the presumption that the parents will have joint parental responsibility",….and "the best interest of the child will remain the most important factor to be taken into account with the primary factors in determining the best interests being the benefit to the child of having a meaningful relationship with both parents **and the need to protect the child from physical or psychological harm".**

We contend therefore that it is unnecessary to include the reference to family violence and abuse in 60B (2) (b) (i) and (ii), because the need to protect the child has already been

covered in the response to Recommendation 1 (as stated in Objective 3) and is fully covered in other sections of the Act which specifically deal with violence/abuse.

It should not be necessary to remind the Committee as one barrister mentioned to me, "that this is the Family Law Act, not a manifesto for a women's domestic violence service". No doubt the inclusion has occurred as a result of heavy lobbying from women's groups who tend to advise their members to apply for an easily gained domestic violence order and to make false allegations of child abuse to give them an advantage before the Family Court. It is a known, but a closely guarded secret that mothers are the main perpetrators of abuse of children; murder their child far more often than biological fathers and mothers' defacto boyfriends, step/half siblings or other relatives contribute to the majority of sexual abuse of children. Biological fathers are involved in less than 1% of child sexual abuse. MRA fathers are not seeking for this reference to be included in the preamble even though they might have far more reason than mothers to seek its inclusion, because we believe the issues are adequately dealt with in other parts of the act and in other State based legislation.

It should be recognized that recommendation No 2 in the EPTS Report also rested on the suggestion contained in Rec. 15 and 16, whereby the proposed family tribunals would have a separate investigative arm to ensure false allegations could not be used to remove a parent from a child's live and controversially to ensure a proper response to proven instances of abuse/violence.

If the principle is allowed to remain based as it is on ***a clear presumption against shared parental responsibility*** on the basis of 'evidence of violence or child abuse', then we are concerned that the common law expectation to regard people as *being innocent until proven guilty* would be in significant jeopardy as there is already a proclivity for the Family Court to make decisions based on unsubstantiated allegations or 'lingering doubt". Any amendments to the FL Act should be seen to be protecting innocent parties from false allegations.

We note the Government's discomfort in applying the presumption against shared parental responsibility when a case involves substance abuse or entrenched conflict.

In making Recommendation 2 it would appear that the Hull Committee ignored the advice given by Family Law Council legal experts, who explained when a rebuttable presumption in law is usually relevant and how it works. The explanation on page 34 of the EPTS Report under the heading of ***Ways of increasing shared parenting*** is as follows:

> *Typically a legal presumption is applied where a fact is to be established and rather than impose the costs of proving this fact when it is almost certainly the case, the law says 'take this fact as a given, subject to proof of facts to the contrary which rebut the presumption'.*

The Attorney General's Department was concerned that "should an equal time presumption be introduced into the Family Law Act, one possible outcome of its operation could be that it would effectively replace the principle that the best interests of the child are the paramount consideration…".

This same principle must apply throughout the Act.

We submit therefore that *the presumption against shared parental responsibility* 60B(2)(b)is directly in conflict with Object 3, 60B(1)(c) which applies the best interest of the child principle to any decision making. Using the same principle as quoted above the *presumption against shared parental responsibility* should therefore be removed.

A further section at (2)(a)(v) has been added, with an explanation under section (3) to cover the circumstances relating to Aboriginal or Torres Strait Islander children's right to 'explore the full extent of their culture'. How do we determine if a child qualifies if he is born in a mixed marriage? Are children born to other mixed marriages to be treated similarly?

Subdivision E - Family Dispute Resolution
Family Relationship Centres:

The centerpiece of the Government's response is the creation of 65 Family Relationship

Centres, where separating parents will be able to avail themselves of three, free one-hour mediation sessions in an attempt to resolve their problems.

We feel it would be preferable for attendance at the FRCs to be an optional choice rather than mandated for the reason that willing participation is more likely to produce a satisfactory result. (S60I(2) and (7)

We also suggest FRCs may become complacent and continue the current bias against fathers which is currently displayed by many in the Family Court and amongst associated service providers - social workers, psychologists, family report writers and children's representatives, especially if they have no reason to monitor the standard of service as would be required if people had a choice to attend or not attend or a choice of other service providers. MRA is not opposed to mediation as a process to resolve problems, but it would be far better for the mediation program to rely on its own success to generate new clients instead of the steady supply guaranteed by the forced attendance of clients. Forcing clients into a process they are unsure of or have had a previously unsatisfactory experience with, is unlikely to generate an atmosphere conducive to resolution of the problems.

It has been suggested to us that the tender for all 65 Family Relationship Centres is to go to Relationships Australia. Perhaps the committee can verify this as true or not?

The Government and the Committees involved in proposing changes to family law have failed to appreciate the full extent of the anti father attitude of many of those associated with family separation and child protection. When we have a situation where 34 specialist psychologists and social workers are registered as service providers for a particular FC Registry, why only 3 or 4 are asked to write family reports, one may ask. A simple answer – the children's representatives know if they select a certain report writer the report will not favour the father at all. In Queensland there are a number of report writers who can be described without doubt, as anti father and if they are appointed to write a family report we know that father is facing alienation from his children for no good reason. Most of these problems stem from Legal Aid – the child rep is appointed by Legal Aid, the child rep then engages the family report writer who is also paid for by Legal aid. One might also ask why over the past 4 years Legal Aid Queensland funding of applications from fathers have dropped by over 35% from 34% of total applications approved to just 22%.

Disturbing Reports on the grapevine are already indicating a mass movement of court associated service providers to the new FRCs and other mediation services.

The Government response to Recommendation 5 is for mediators, counsellors and legal advisers "**to inform parents that they could consider substantially sharing parenting time**" as an option where practicable and in the best interests of the child. However, Section 63DA (2) is poorly worded and tends to be negative rather than positive in approach, convoluted and confusing. The section states:

> 63DA (2) If an adviser gives advice to people in connection with the making by those people of a parenting plan in relation to a child, the adviser must:
>
> (a) inform them that, if the child spending substantial time with each of them is:
>
> (i) practical; and
>
> (ii) in the best interests of the child;
>
> they could consider the option of an arrangement of that kind; and.....etc etc.

The Note: at the bottom of the page says:

> Paragraph (a) only requires the adviser to inform the people that they should consider the option of the child spending substantial time with each of them. The adviser does not have to advise them as to whether that option would be appropriate in their particular circumstance.

As such the "Note" provides the adviser with an 'easy out' against suggesting that parents could look at sharing time with the children.

Imagine an adviser saying "Look I really only have to tell you that you <u>could</u> consider substantially sharing parenting time, but I'm not going to advise you to do that". All sounds perfectly legal to me, but entirely negative!

There is a considerable difference in the statement "**could consider substantially sharing parenting time**" included in the Government response and the expression '**....if the child spending substantial time with each of them is....**" as contained in this section of the Bill. However, we are not sure of the meaning of "substantially sharing parenting time". Is it intended to mean substantial shared parenting (a term understood by most parents to mean 109 nights or does the adverb apply to the previous verb "to consider" which would imply the "consideration should become significant" not the "shared parenting" or is this just another sleight of hand/words to confuse and convince people to believe the government supports shared parenting. We are in considerable doubt that they do!

Certificate of Attendance:
(See previous comments on Page 7 and 8 re mandated attendance)

A section of the FL Act changes apply to the requirement for the parties to obtain a certificate of attendance at the Family Relationship Centres for mediation or other approved mediation service before being able to make an application to the Family or any other Court unless the matter is urgent, a contravention or if there are issues of violence and risk of abuse. We imagine this will trigger an escalation in the number of applications for an easily gained domestic violence order.

Mediation is a process that can work if both parties are prepared to be fair with each other and the mediator does not use their considerable power to influence an outcome favoring one side or the other. With the history of maternal preference, which became primary carer preference and tender years doctrine it is difficult to anticipate an immediate change of attitude for those who will be employed by the centres. We submit there is a strong likelihood that Family Relationship Centres will continue with the same agenda as has been in practice for the past thirty years, whereby fathers are considered to be disposable, apart from their ability to earn and contribute money. These centres will operate in the 'shadow of the law" and unless the law is changed to give both fathers and mothers the same standing and recognition of their importance to their children's lives nothing will change.

Reason for exclusion from requirement for a Certificate:

60I (8)(b) needs to be reworded to ensure the grounds required for the court to be satisfied are *'proven and substantiated'* not just expressed as *'reasonable'.*

(8)(b)(iii) the violence should be specified as being between the parties and not related to a prior relationship for example.

(8)(c) states that *'all the following conditions are satisfied:'.* We suggest the wording should be *'one or more of the following conditions are satisfied:'.*
If the application is to rely on all the conditions it is not inconceivable that a person may be prevented from making application because the Part VII order may be older than 6 months. What is referred to as a particular issue? Most people do not waste their time making application without specifying the reason for the application.

60J(1)) needs to be reworded to ensure the grounds required for the court to be satisfied are *'proven and substantiated'* not just expressed as *'reasonable'.*

60J(1)(b)(ii) the violence should be specified as being between the parties and not related to a prior relationship for example.

60J(2)) needs to be reworded to ensure the grounds required for the court to be satisfied are *'proven and substantiated'* not just expressed as *'reasonable'.*

60J(2)(b) the violence should be specified as being between the parties and not related to a prior relationship for example.

61DA(2) and (3) should be omitted.

63DA Obligation of advisers
(See comments on page 8 & 9)

65DAA Court to consider child spending substantial time with each parent in certain circumstances.

(1)(b) states that 'both parents wish to spend substantial time with the children as being a condition to be considered. This does not allow for the situation where one parent wishes to spend considerable time and the other opposes it. How is this to be treated? If one opposes, does that mean the condition is not fulfilled and therefore the court does not need to consider the making of such a substantial time (shared parenting) order?

Note: The accompanying note should not specify the best interests of the children as the paramount situation. In a family rarely is one person's interest elevated above those of the rest of the family. It is a delicate balancing act usually performed by parents who will consider the child's interests together with those of other siblings and their own interest. As courts assume these decisions so must they consider all parties interests rather than just the child's. To isolate one person's interest whether it be a child or not over that of the rest of the family will often result in a child believing they do not need to consider other people at all. Therefore the note should read:
".......the court will regard the best interests of the child together with the interests the parents and other siblings when considering making such an order."

Also add an explanatory note that: Substantial time means up to 50 per cent

65DAA (2) is unnecessary and should be omitted.

26 After subsection 68F(1) and the insertion of (1A)(a), (1A)(b) should be omitted. The conditions are already covered under 68F(2)(g) which states:

"the need to protect the child from physical or psychological harm caused, or that may be caused, by:

(i) being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or
(ii) being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person;

68F(2)(g) leave in place as existing.

68F(2)(j) leave in place as existing.

Schedule 2 – Compliance regime

70NEA Standard of proof:

Should in all cases be expressed as 'beyond a reasonable doubt' rather than "on the balance of probabilities".

In this section there is a great deal of discussion about subsequent 'parenting plans' and how they are to be regarded in relation to 'parenting orders'. There is however, no discussion in the Explanatory Memorandum or the draft bill about the status of a 'parenting plan' where there has been no 'parenting order' issued. Will the need to register a 'parenting plan' with the Court be explained to parents by the FRCs or the government for the orders to have effect under the law and be acted upon in the case of a contravention?

Schedule 3 Amendments relating to the conduct of child-related proceedings:

As we understand these procedures are still under trial and the community in general have not been privy to the success or otherwise of the changes in procedure which increase the power of the judiciary to control the process.

The trial of Children's Cases Program commenced at the Parramatta and Sydney Registries in March 2004. Professor Rosemary Hunter has been appointed to independently assess the outcome of the first 100 cases. We are not aware if her findings are available, but until the process is openly assessed by independent reviewers we should not be endorsing the change.

We hold considerable concern that parents will be denied there right to present evidence which they know is important to their case, especially if the choice of professional assessors (psychologists, psychiatrist etc) is limited to those chosen by the court. Similar concerns apply as those mentioned on page 8 and 9.

Subdivision C - Duties and powers related to giving effect to the principals:

We note there is mention under 60KE(1)(e) General Duties to make appropriate use of technology. This recommendation should be included in the appropriate section to specify that all interviews conducted by specialist assessors and family report writers etc. with children and parents should be videotaped in their entirety and copies of the children's interview should be made available to both parents and the court; the parent's interview, either alone or with the child should be made available to them. This measure would help to overcome the many complaints made that interviews are misinterpreted and information ignored when compiling reports.

Conclusion:

If one wanted to draft a bill that was negative in all aspects, the Attorney General's Department has mastered the art. The proposals are flawed from the suggestions made by the Committee of inquiry into Joint custody 50/50, the Government's as yet unchallenged response and the Draft Bill as presented.

Therefore we reject the Bill and seek further discussions to ensure any changes are ones that will deliver an improved family law system capable of recognising the importance of judicial fairness and equity being granted to both parents, in order to facilitate their ongoing relationship with their children as an equally respected parent, who is considered to be equally important and essential to their children's lives, apart from their ability to provide financial support.

Yours faithfully

Sue Price

Sue Price,
Director