

Drafting issues

- 7.1 In examining the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005 a number of issues relating to the technical drafting of the legislation emerged. These are detailed below.

Use of 'etc' in headings

- 7.2 The Committee notes the use of 'etc' in headings in the proposed new sections, specifically in sections 10C, 10D, 10K and 10L. The Committee agrees with the Family Court of Australia submission that 'etc' should not be used in the headings as it can lead to confusion.¹

Recommendation 51

- 7.3 **The Committee recommends that the headings to proposed sections 10C, 10D, 10K and 10L be amended to delete 'etc'.**

Formulation of section headings

- 7.4 Former Justice of the Family Court of Australia, the Hon Richard Chisholm in evidence to the Committee made a number of suggestions regarding proposed section titles.

When I was looking at the headings, or the section titles, it seemed to me that some of them were written in a curious way. I have tried to indicate what the problem is. It is, I suggest, that section titles should not attempt to actually state

1 Family Court of Australia, *Submission 53*, p.3.

the law but indicate the subject matter or general import of the section. For example, section 10C says, 'Communications in family counselling et cetera are confidential'. That is the statement, which is like a statement of law. Then of course if you look at the section itself you find that they are only sometimes confidential, or confidential to some extent. ... There is a series of section titles which are in the form of actually stating the law rather than telling you what the section is about. ... there could be a problem of competition between the section title and the section itself to determine its meaning.²

7.5 The section headings specifically identified were 10C, 10D, 10K, 10L, 10M, 11C and 11D.

7.6 In addition, former Justice Chisholm was critical of complicated expressions in a further four section headings: 61C, 62B, 65K and 70NEAB. To illustrate his concerns, the proposed heading to 65K in the Exposure Draft is as follows:

65K What happens when parenting order that deals with who a child lives with does not make provision in relation to death of parent with whom child lives

While the original text of the heading in the Act is little better and just as convoluted, the Committee does agree with former Justice Chisholm that a better formulation in this case might be:

65K Death of parent with whom child lives pursuant to order

or words of similar effect.

7.7 Committee Members acknowledge that they are not legal drafters, but believe that simplification wherever possible will make the Act more comprehensible for all users.

Recommendation 52

7.8 **The Committee recommends that the headings to sections 10C, 10D, 10K, 10L, 10M, 11C, 11D, 61C, 62B, 65K and 70NEAB be redrafted to ensure that they indicate the subject matter of the section rather than state the law, and to make them as clear as possible.**

2 Hon Richard Chisholm, *Proof transcript of evidence*, 26 July 2005, p.4.

7.9 In Schedule 2, item 3 of the Exposure Draft proposes the insertion of a new Subdivision AAA in the Act, immediately following existing Subdivision A. The Family Law Section of the Law Council of Australia (FLS) recommended that:

...Subdivision AAA be renumbered. The *FLA (SPR) Bill 2005* proposes that Subdivision AAA be inserted into the Family Law Act to follow the existing Subdivision A. FLS submits that this numbering sequence which starts with Subdivision A, followed by Subdivision AAA and then followed by Subdivision AA is unnecessarily confusing.³

7.10 The FLS also recommended that:

...Subdivision AA be renamed '*Subdivision AA- Court's powers where contravention or contravention without reasonable excuse not established*'. This is on the basis that paragraph 70NEB(1)(b) provides that the court may vary a parenting order if the court is not satisfied that the respondent has committed a contravention (subparagraph 70NEB(1)(b)(i)) or that a contravention has been committed but the respondent proves a reasonable excuse (subparagraph 70NEB(1)(b)(ii)).⁴

7.11 This matter was discussed earlier in Chapter 5.

Recommendation 53

7.12 The Committee recommends that:

- (a) proposed subdivision AAA and subdivision AA be renumbered, to be subdivisions AA and AAA respectively; and
- (b) the heading to existing AA be amended to '*Court's powers where contravention or contravention without reasonable excuse not established*'.

Other minor technical amendments

7.13 Schedule 2, Part 1, after line 3, of the Exposure Draft, a heading *Family Law Act 1975* should be inserted for consistency (see Schedule 1 of the Bill).

3 FLS, *Submission 47*, p.21.

4 FLS, *Submission 47*, p.22.

- 7.14 Schedule 5, item 72 amends paragraph 67K(1) to delete subparagraphs (a) to (c) and replace them with paragraphs (a) to (ca). However, subsection 67K(1) already contains an existing paragraph (ca). The material to be inserted should be renumbered to reflect this.
- 7.15 Schedule 5, item 75 amends section 67T to delete paragraphs (a) to (c) and replace them with paragraphs (a) to (ca). However, section 67T already contains an existing paragraph (ca). The material to be inserted should be renumbered to reflect this.
- 7.16 Schedule 1, item 26 amends section 68F of the Act, to insert a new subsection (1A) which sets out primary considerations to be considered in deciding what is in a child's best interests. Subsection (3) currently states that 'If the court is considering whether to make an order with the consent of all parties to the proceedings, the court may, but is not required to, have regard to all or any of the matters set out in subsection (2)'. It appears to be an oversight that there is no reference to subsection (1A) also being considered. The Committee believes that subsection (3) should be amended to read 'have regard to all or any of the matters set out in *subsections (1A) and (2)*.'
- 7.17 The new paragraph 70NJA(2)(b) (inserted by Schedule 2, item 12 of the Exposure Draft) currently reads:
- (b) consider whether to exercise its powers under paragraph 70NG(3)(c) to make an order varying the parenting order to include (with or without modification) some or all of the provisions of the parenting plan.
- 7.18 There is no paragraph 70NG(3)(c) and the reference should be to paragraph 70NJ(3)(c).

Recommendation 54

- 7.19 **The Committee recommends that the following minor technical amendments to the Family Law Amendment (Shared Parental Responsibility) Bill 2005, be made:**
- (a) **schedule 2, Part 1, after line 3, of the Exposure Draft, insert a heading *Family Law Act 1975*;**
- (b) **items 72 and 75 of Schedule 5 be amended to clarify if the existing paragraphs (ca) in sections 67K(1) and 67T are to be deleted or remain;**
- (c) **a new item be inserted in Schedule 1, amending subsection**

68F(3) of the Act, to delete 'in subsection (2)' and insert 'in subsections (1A) and (2)'; and

- (d) delete the reference to paragraph 70NG(3)(c) in proposed paragraph 70NJA(2)(b) (in Schedule 2, item 12), and replace with 70NJ(3)(c).