Our Ref:TB:lawreform.familylawamendment(sharedresponsibility)bill2005

18 July 2005

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

Also by email: laca.reps@aph.gov.au

Dear Sir/Madam,

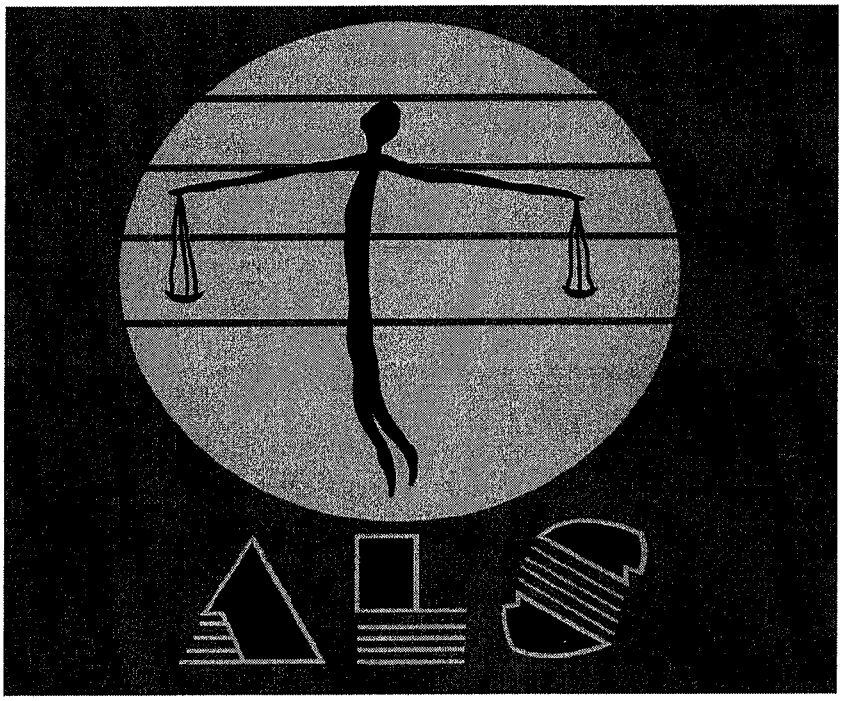
SUBMISSION: EXPOSURE DRAFT OF THE FAMILY LAW AMENDMENT (SHARED PARENTAL RESPONSIBILITY) BILL 2005

I refer to your invitation dated 27 June 2005 for this organization to provide feedback on the exposure draft of this legislation.

I am pleased to enclose our submission and thank you for the opportunity to have our views considered.

Yours faithfully,

DENNIS EGGINGTON
Chief Executive Officer
enc



Family Law Amendment (Shared Parental Responsibility) Bill 2005

Submissions on the Exposure Draft by the Aboriginal Legal Service of
Western Australia (Inc).

18July 2005

SUBMISSIONS OF THE ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA (INC) IN RELATION TO EXPOSURE DRAFT OF THE FAMILY LAW AMENDMENT (SHARED PARENTAL RESPONSIBILITY) BILL 2005

Introduction

The federal Attorney General has asked the House of Representatives Standing Committee on Legal and Constitutional Affairs to review an exposure draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005.

By letter dated 27 June 2005 the Committee has invited the Aboriginal Legal Service of Western Australia (Inc), hereinafter referred to as ALSWA, to comment on the Bill. Comments are required to be limited to the issue of whether the Bill implements the measures listed below, and not to re-open discussions on policy issues:

1. To encourage and assist parents to reach agreement on parenting arrangements after separation outside of the court system where appropriate

2. To promote the benefit to the child of both parents having a meaningful role in their lives

3. To recognize the need to protect children from family violence and abuse, and

4. To ensure that the court process is easier to navigate and less traumatic for the parties and children.

The deadline for comments is 15 July 2005.

The Aboriginal Legal Service of Western Australia (Inc)

ALSWA was established in 1973. It is a community based organization that provides legal advice and representation to Aboriginal and Torres Strait Islander individuals and groups in a wide range of areas including family law. Its service extends throughout Western Australia via 16 regional offices and one metropolitan office.

ALSWA currently has 3 legal practitioners dedicated to family law matters. ALSWA's other staff are regularly but not solely involved in family law matters.

ALSWA is the preferred legal service provider for Aboriginal and Torres Strait Islander peoples living in Western Australia, and makes submissions on that basis.

ALSWA has previously made the following submissions relevant to the Bill's contents:

1. 8 August 2003 – written submissions to the House of Representatives Standing Committee on Family and Community Affairs re inquiry into child custody arrangements in the event of family separation

2. 26 September 2003 – oral evidence to said inquiry (public hearing)

3. 2 June 2004 – written submissions to the Family Law Council Paramountcy Principle Committee and Indigenous Children Committee

4. 7 December 2004 – participation in stakeholder meeting conducted by the Commonwealth Attorney General's Department re discussion paper "A New Approach to the Family Law System Implementation of Reforms"

5. 14 January 2005 – written submissions to the Commonwealth Attorney General's Department re said discussion paper.

Due to time constraints, these submissions are largely confined to issues of particular relevance to Aboriginal and Torres Strait Islander peoples living in Western Australia. ALSWA leaves it to other organizations including the Family Law Practitioners Association of Western Australia to comment on general legal aspects.

Response to first measure: To encourage and assist parents to reach agreement on parenting arrangements after separation outside of the court system where appropriate

To achieve this goal the Bill relies heavily on the information and programs being made available to parents. The main sources will be family counselling organizations and family dispute resolution organizations.

The information and programs provided will not encourage or assist Aboriginal and Torres Strait Islander parents to reach agreement outside the court system unless packaged in a way they can easily access.

Relevant considerations here include:

1. Language differences. Aboriginal and Torres Strait Islander peoples speak many different languages. These may or may not include English. There are language issues even for many Aboriginal and Torres Strait Islander speakers of English, because Aboriginal English and Kriol are different from Standard Australian English;

2. Literacy issues. Many Aboriginal and Torres Strait Islander individuals cannot read well enough to access written information;

3. Health issues. As a group, Aboriginal and Torres Strait Islander peoples experience poorer health than other Western Australians. This includes sight problems due to diabetes and glaucoma, and hearing problems due to otitis medea;

4. Poverty. As a group, Aboriginal and Torres Strait Islander individuals are poorer than other Western Australians. Many parents have limited access or no access to a working telephone, computer or video/DVD player. Parents may live in a remote area and be unable to afford to travel to a place where information and programs are available. A parent may also lack a fixed address, which leads to them missing material sent to them by post;

5. Issues associated with documentation. Many Aboriginal and Torres Strait Islander individuals feel intimidated by bundles of written information, and therefore dispose of it unread. This has been an issue with the standard written information provided by the Family Court of Western Australia. Another issue is that many Aboriginal and Torres Strait Islander families do not have a safe place at home for documentation. Documents get lost, used by the kids as drawing paper and so on;

6. Cultural considerations. Aboriginal and Torres Strait Islander peoples come from many different cultures. Issues may include: a parent can only access information on this subject from a person of the same gender (men's business/women's business), a parent should not access the information directly but only via an elder or particular relative, communication mores relevant to the particular culture;

7. Historical considerations. As a result of past Australian and Western Australian government policies, including the assimilation policy, many Aboriginal and Torres Strait Islander individuals will not access information or programs from services or locations that are associated with those policies, for example services located at or near police stations or the Department for Community Development.

Means that have been used successfully to deliver information/programs in these circumstances include: face to face in the relevant language and applying local cultural mores (involving local service providers or otherwise interpreters, field officers or liaison officers), Aboriginal media (especially radio), two way radio, community meetings, men's camps and women's camps, comics, and cartoons and videos shown on public/community television facilities.

However notwithstanding the availability of these options, ALSWA submits that most existing family law services in Western Australia, especially those that are community based rather than court-based, are strongly mainstream and are inaccessible for many Aboriginal and Torres Strait Islander parents. ALSWA has begun advocating for change with Relationships Australia (the organization ALSWA understands is the most likely to service Western Australia's Family Relationship Centres) but this is still in the early stages.

Therefore in order to implement the Government's policy to encourage and assist Aboriginal and Torres Strait Islander parents living in Western Australia to reach agreement outside the court system where appropriate, ALSWA submits that the Australian Government should:

1. Amend all parts of the Bill that refer to provision of information or programs to state: *"[The information/program] shall be delivered in a language and in a manner that the person is likely to readily understand"*. See the Bill's proposed section 63DA(2)(e) for an example;

2. Amend the Bill and secondary legislation so that approval for family counselling organizations and family dispute resolution organizations is made dependent on the relevant organization meeting and maintaining standards set

by the Australian Government, these standards to include a cultural standard. See ALSWA's contract for the provision of legal services for an example.

Response to second measure: To promote the benefit to the child of both parents having a meaningful role in their lives

ALSWA acknowledges and applauds that notwithstanding the reference here to "parents", the Bill promotes the benefit to the child of extended family and culture having a meaningful role in their lives. This is of particular relevance to Aboriginal and Torres Strait Islander children, both in terms of their cultural needs and their psychological needs, as ALSWA has previously described in its submissions to the Family Law Council (see Aboriginal Legal Service of Western Australia (Inc) above).

To assist the government to implement this measure insofar as it relates to culture and extended family, ALSWA submits that the Australian Government should:

1. Amend the definition in the Bill of "Aboriginal child" to: *"A child who is a descendant of Aboriginal people of Australia"*. This avoids complicated arguments about the meaning of race, both in general and particularly in respect of children born of a Aboriginal parent and a non-Aboriginal parent. The definition ALSWA has proposed is similar to the later definition in the Bill of "Torres Strait Islander child" and is also similar to the definition of "Aboriginal child" contained in the Children and Community Services Act 2004 of Western Australia;

2. Amend the definition in the Bill of "Aboriginal or Torres Strait Islander culture" to: *"...includes the Aboriginal or Torres Strait Islander lifestyle and traditions of the relevant community/communities"*. Like Asian peoples, African peoples, and European peoples, Aboriginal and Torres Strait Islander peoples comprise many different groups, each with distinct lifestyle and traditions. In family law proceedings it is only the lifestyle and traditions of the community or communities to which the child belongs that are relevant, for example Noongar, Yamitji, Bardi, Wongai;

3. Amend the definition in the Bill of "relative" to add: *"(b) in the case of an Aboriginal child, a person regarded under the customary law or tradition of the child's community as the equivalent of a person mentioned in paragraph (a);*
(c) in the case of a Torres Strait Islander child, a person regarded under the customary law or tradition of the Torres Strait Islands as the equivalent of a person mentioned in paragraph (a)". Though the later sections in the Bill about children's right to share their culture with others of that culture are noted, this change is to include people who are no less significant to Aboriginal and Torres Strait Islander children than those relatives currently contained in the Bill's definition. The proposed wording comes from the definition of "relative" contained in the Children and Community Services Act 2004 of Western Australia;

3. Delete from the Bill sections 60B(3)(b)(i) and section 68F(4) the words *"and the child's views"*. These words reflect a popular but erroneous mainstream

notion that culture equals products (for example language, law, religion, music, art) about which one can have a view and can therefore accept or reject, "have" or "lose". This is incorrect, and dehumanising for Aboriginal and Torres Strait Islander peoples (and presumably also for other non-mainstream Australians). Culture is not products, it is a way of living. Products are the outcome of culture, not the other way around. Culture is not concrete; one therefore cannot hold a view in respect of it. (See discussion contained at pages 20-21 of Fran Crawford's "Jalinardi Ways", Curtin University of Technology Western Australia, 1989 and the anthropological studies to which she refers.)

4. Amend section 61F of the Bill to refer to "...child-rearing practices, of *the relevant* Aboriginal or Torres Strait Islander culture that are relevant to the child." The reasons for this submission are the same as for 2 above.

In addition to the above, ALSWA raises a policy issue for the Australian Government to consider. The content of customary family law of Aboriginal and Torres Strait Islander peoples in Western Australia varies depending on the particular culture under consideration. However for some communities, customary family law conflicts with the Government's shared parental responsibility policy. For example:

1. For some cultures, the law is that following separation of the parents the child has no contact with the father;

2. For some cultures, the law is that following separation of the parents the child has no contact with the father save that upon a male child reaching the age of initiation he goes from his mother's/female relatives' care to live with his father/ male relatives.

Where both parents are of the same culture and are willing to follow customary law, no dispute arises. However disputes can and do arise if only one parent holds that view, for example where the parents are of different cultures, or they are of the same culture but one parent chooses to access the extra benefits available to him or her via the mainstream legal system.

Given that Aboriginal and Torres Strait Islander peoples living in Western Australia hold the full range of views as to what should happen in these circumstances, ALSWA considers it inappropriate to make submissions as to how the Bill should deal with this issue. However ALSWA notes that the Law Reform Commission of Western Australia is currently inquiring into the relationship between mainstream law and Aboriginal customary law and that this may provide assistance.

Response to third measure: To recognize the need to protect children from family violence and abuse

ALSWA supports this.

In respect of the Bill's section 68F(2)(j) however, ALSWA submits that the lack of a final restraining order does not necessarily mean that allegations of violence are unsubstantiated, because:

1. Many Aboriginal and Torres Strait Islander victims of domestic violence in Western Australia prefer their restraining orders to last only until the immediate danger to the victim has passed. Many also, like many other Aboriginal and Torres Strait Islander individuals, feel intimidated by court; for this reason they will not attend a final restraining order hearing. For these reasons they are less likely than other victims in the same situation to seek a final order;

2. Due to poverty, many Aboriginal and Torres Strait Islander victims of domestic violence are dependent on public transport to get to and from court. This exposes them to being harmed anew by the perpetrator on restraining order court dates, and is a disincentive for them to attend court;

3. Due to poverty and social issues, many Aboriginal and Torres Strait Islander perpetrators of domestic violence have no fixed address and so police are unable to locate them to serve restraining orders on them.

ALSWA also submits that included in the first tier of factors to be considered under section 68F(1A) should be: *"the nature of the relationship of the child with each of the child's parents and with other persons"*, that is the current section 68F(2)(b). This is because as currently drafted, the Bill's section 68F(1A)(b) does not take into account the need to protect the child from psychological harm caused or aggravated, or that may be caused or aggravated, if the child is exposed to a person who the child has previously experienced as violent or abusive, even though the person is not likely to behave that way again. A child already suffering post traumatic stress syndrome or depression directly caused by the past violence is the obvious example, but even a child who has demonstrated psychological resilience in the past may be unable to cope if he or she is to continue being exposed to the past perpetrator.

In respect of Aboriginal and Torres Strait Islander children in particular, ALSWA refers to Volume 2 of the Western Australian Aboriginal Child Health Survey published this year by the Telethon Institute for Child Health Research. This report indicates that overall 24% of Aboriginal children compared with 15% of non-Aboriginal children are at high risk of clinically significant emotional or behavioural problems, particularly males and young children. Based on these figures, ALSWA submits that the court must be vigilant as to the psychological state of all children, but especially Aboriginal and Torres Strait Islander children, who are the subject of proceedings.

Response to fourth measure: To ensure that the court process is easier to navigate and less traumatic for the parties and children.

ALSWA supports and applauds the Bill's section 60KI(3), which has potential to be of great assistance to the court and parties in proceedings as well as saving a great deal of time and cost in establishing relevant facts.

ALSWA also supports and applauds the move towards court procedures tailor-made to the circumstances. This also saves time and cost in establishing relevant facts, and opens the door to the court developing more culturally-appropriate processes for its Aboriginal and Torres Strait Islander clients. In this regard ALSWA refers to and

repeats its response to the first measure, much of which is equally relevant under this heading.

ALSWA's one reservation to this is a concern that the Bill goes a little too far. It is necessary that natural justice considerations apply, that the court applies appropriate weight to the evidence it receives, and that decisions occur within a framework that permits individual decisions to be evaluated and reviewed where appropriate. ALSWA therefore submits that Division 1A, particularly the fourth principle contained in section 60KB, should be amended to delete references to the proceedings being as informal "*as possible*" to instead read: *"as is consistent with:*

a. *natural justice being afforded to all parties, and*
b. *the parties' right that all decisions made by the court be capable of independent evaluation, and review where appropriate".*