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Submission by the Family Law Committee of NSW Young lawyers

The Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005

The Family Law Committee of NSW Young Lawyers is made up of practitioners who are in their first 5 years of practice or under the age of 36, and law students.

Due to the extremely limited time to provide submissions, the Committee is unable to provide a detailed response. However, the Committee wishes to make the following general observations:

1. There are several drafting issues which have the potential to cause confusion and increase, rather than decrease litigation; and
2. There are too many terms that are ambiguous and vague.

The Committee provides specific comments on provisions below.

1. Pursuant to **s60I(7)** parties are required to obtain a certificate by a 'family dispute resolution practitioner'. There is no definition of who this includes and specifically whether this includes family lawyers. Family lawyers already have an important role in helping parties resolve disputes without going to court.

2. Subsection **60I(8)** provides that a certificate from a family dispute resolution practitioner is not required if the court is "satisfied on reasonable grounds" that there has been child abuse or family violence or that there is a risk of child abuse or family violence. This subsection as drafted is likely to lead to further, heated litigation rather than a reduction in litigation as it requires the court to consider and determine highly sensitive issues to a high standard of proof in isolation before parenting proceedings are commenced. Under the current regime those issues would only be explored to that extent in substantive proceedings for interim or final parenting orders.

3. Section **61DA** introduces a new presumption in relation to parental responsibility to be applied when the court is making parenting orders. That presumption is that "it is in the best interests of the child for the child's parents to have parental responsibility for the child jointly." However, the Exposure Draft makes it clear by way of a note to be added at the end of **s61C(1)** that the current

s61C "states the legal position that prevails in relation to parental responsibility to the extent to which it is not displaced by a parenting order made by the court". The current s61C reads as follows:

> "Each parent has parental responsibility (subject to court orders)
>
> (1) Each of the parents of a child who is not 18 has parental responsibility for the child.
>
> (2) Subsection (1) has effect despite any changes in the nature of the relationships of the child's parents. It is not affected, for example, by the parents becoming separated or by either or both of them marrying or re-marrying.
>
> (3) Subsection (1) has effect subject to any order of a court for the time being in force (whether or not made under this Act and whether made before or after the commencement of this section)."

Therefore the proposed legislation will create a presumption in favour of joint parental responsibility which will apply to those engaged in court proceedings but the ordinary law that will continue to apply to those not engaged in court proceedings creates no such presumption. It seems inconsistent for the legislation to presume on the one hand that it is in the best interests of the child for parents to have joint parental responsibility where court orders are sought but, on the other hand, that parental responsibility should be held by each parent separately rather than jointly in all other circumstances. It has already been established in a significant body of case law that "joint" parental responsibility is a very different being from parental responsibility held by each parent as an individual. See for example, the recent case of *D&D [2004] FMCA 148:*

Joint parental responsibility, Federal Magistrate Ryan states, *"imposes a positive obligation upon both parties to consult with each other and agree in relation to long-term issues (see Vlug & Poulos* 1997 FLC92-778). *For example, one party might prefer that the child is reared in a particular faith. Unless the other party agrees, that is a decision that they cannot implement. In those circumstances a court must make the decision."*

This inconsistency in objectives within the proposed legislation – one rule for parents seeking court orders and another rule for other parents may lead to confusion and further litigation particularly as the presumption of joint parental responsibility will arguably require more court intervention to

implement due to the high level of consultation required between parties who are separated and the requirement that, failing agreement, the courts are the ultimate final decision-maker.

4. Section **65DAC** provides that the effect of a parenting order for joint parental responsibility is that, where a decision is to be made about a "major long-term issue in relation to the child" the order requires the decision to be made to persons who have joint parental responsibility, and each person must:

   "(a) consult the other person in relation to the decision to be made about the issue; and

   (b) make a genuine effort to come to a joint decision about that issue."

   "Major long-term issues in relation to a child" is defined in the proposed **ss60D(1)** as "issues about the care, welfare and development of the child of a long-term nature and includes (but is not limited to) issues of that nature about:

   "(a) the child's education (both current and future); and
   (b) the child's religious and cultural upbringing; and
   (c) the child's health; and
   (d) the child's name; and
   (e) significant changes to the child's living arrangements."

   Federal Magistrate Ryan's decision of D & D [2004] FMCAfam 148 referred to above can provide some insight into how joint parental responsibility orders may be viewed by a court faced with a relocation case. In that matter, the applicant father sought an injunction to restrain the respondent mother from changing their daughter's place of residence further away from Wollongong than Kiama without the father's consent. The parties had agreed to terms of settlement providing that the father would have certain contact with the child and the parties would have joint parental responsibility for making decisions about their daughter's long-term care, welfare and development. However, the mother refused to consent to the injunction. Federal Magistrate Ryan followed *B & B Family Law Reform Act 1975* (1997) FLC 92-755 and stated that *"a decision to relocate the child's home in a substantial way must be made by the parties jointly*". She went on to say:

   "It will be insufficient for the mother, having conceded the joint parental responsibility order, to move further away and simply say that she will still make [the daughter] available for

contact in accordance with the orders. Not only must the mother be in a position whereby the contact arrangements can be implemented in a way that is comfortable for the child, but also if there is to be a substantial change in residence, this is a decision that the mother and father will make together. I do not mean that if the mother wishes to change house and move closer back to Wollongong she cannot do so. That is a decision within her parental authority. However, should she wish to move further away, I have no doubt that any court considering the effect of [the joint parental responsibility order] would conclude that this is a long-term issue that the father must be advised of and participate in."

The Federal Magistrate concluded that *"[t]he mother by virtue of these orders, has a positive obligation in the absence of the father's consent to obtain an appropriate order from the court [if she wishes to make a substantial change in residence with the child]."* Therefore her Honour declined to make the injunction sought by the father in order to restrain the mother from relocating. This decision was made on the grounds that her Honour *"did not accept that the formulation of orders proposed by the mother shifts the onus of taking pre-emptive action to the father."*

5. The proposed **s61DA** provides that an exception to the application of the presumption of joint parental responsibility will include situations where "there are reasonable grounds to believe a parent of the child (or a person who lives with a parent of the child) has engaged in:
   (a) abuse of the child or another child who, at the time, was a member of the parent's family (or that person's family); or
   (b) family violence."

The different treatment of child abuse and family violence in s61DA(2) is of concern. If the parent or a person living with the parent has engaged in child abuse against a child who is not within the parent's family, the presumption still applies. The presumption could therefore apply to a parent who has been convicted of paedophilia against the neighbour's child or who uses child pornography within the home. Family violence is not qualified so the presumption might not apply the in a case where, for example, the parent's new partner has at some point been involved in family violence, regardless of when it happened or whether it involved anyone the child lives with.

The Explanatory Statement is silent on why child abuse should be so qualified and family violence should not. The only comments made in the Explanatory Statement are as follows (at p.4):

> *"The presumption will not apply if there are reasonable grounds for the court to believe that a parent of a child, or a person who lives with a parent of the child, has engaged in child abuse or family violence. This exception recognises the impact that violence and abuse in the home of wither parent can have on the ability to exercise joint parental responsibility."*

This inconsistency in the proposed legislation potentially creates loopholes and anomalies. Further confusion may created by the fact that the current **s60D** defines "family violence" as "conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person's family that causes that or any other member of the person's family to fear for, or to be apprehensive about, his or her personal well being or safety".

The definitions of child abuse and violence should be clarified and confined to a definition section such as s60D to ensure that conflicting definitions do not appear at other places in the Act.

6. The current s 60D defines "family violence order" as "an order (including an interim order) made under a prescribed law of a State or Territory to protect a person from family violence." The Exposure Draft proposes that **ss68F(2)(j)** be amended to exclude uncontested or interim family violence orders. One consequence could be that respondents to allegations of violence will be discouraged from contesting - it seems to bring in a new consideration for people who might otherwise contest, and is an influence which is not directly related to the violence proceedings themselves. It can be assumed that in many cases violence orders are not contested simply because the allegations are true and the perpetrator would gain nothing from contesting, so even though the orders are properly made for very good reason, they are specifically excluded from consideration as an "additional consideration". The amended additional consideration creates a perception that unless a family violence order is proven by contest, it is based on dubious grounds in circumstances in which the person making the allegations has no control over whether the respondent contests and therefore whether the allegations are "proven".

However, since the need to protect the child from violence is a primary consideration pursuant to **s68F(1)(b)** – which does not require that any order be made contested, interim or otherwise and presumably carries greater weight than the additional considerations – then why have the provision at 68F(2)(j) at all?