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Submission

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on the

**Family Law Amendment
(Shared Parental Responsibility)
Bill 2005**

to the

**House of Representatives Standing Committee
on Legal and Constitutional Affairs**

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Introduction

The Shared Parenting Council of Australia welcomes the opportunity to make this submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs ("**The Committee**") in relation to the Family Law (Shared Parental Responsibility) Bill 2005 ("**The Bill**") and direct our submission to the Committee's terms of reference:

"Specifically, the Committee will consider whether these provisions are drafted to implement the measures set out in the Government's response to the House of Representatives Standing Committee on Family and Community Services inquiry into child custody arrangements in the event of family separation, titled Every Picture Tells a Story"

The Shared Parenting Council fully supported the report of the House of Representatives Standing Committee on Family and Community Affairs, entitled *Every Picture Tells A Story* ("**the Report**") and whilst we were disappointed that a presumptive equal parenting arrangement was not accepted by that committee, we did however agree with the overwhelming majority of its findings and recommendations and congratulate the members on their patience and endurance through the overwhelming public response to their inquiry and also for their clear demonstration of an extensive understanding of the circumstances that may befall everyday Australians who end up in the family court system.

Fortunately, the Government has accepted the vast majority of those recommendations as detailed in the "Every Picture Tells a Story – Government Response ("**the Government's Response**") and has accepted all the key recommendations that the Shared Parenting Council has also agreed with.

Our view is that the potential legislation resulting from the Government's agreed policy position will create a 'World Class' family law system.

The Shared Parenting Council believes that the Government's stated policy will provide greater flexibility in post-separation parental arrangements, and will also provide an effective child safety and protective mechanism that meets community standards. Most importantly, the report also provides for a genuine cultural shift in the operation of Family Law, which:-

1. Will more effectively focus on the child's rights and enhance and protect those rights;
2. Will further protect children from abuse by designing new protective arrangements;
3. Will provide a family breakdown system based on true equality of parents before the law and provide the least adversarial process available to deal with disputes;
4. Will reduce conflict and resolve disputes more effectively and equitably.

It is with great hope that Australia looks forward to a new era of administering family breakdown that is sensitive to parents and to the relationships affected, and also a system which acts fairly and equitably when considering proposed post-separation parenting arrangements.

The Draft Legislation

The Shared Parenting Council of Australia has had limited time to fully analyse all of the implications of the draft legislation, however, having taken legal advice and having the Bill reviewed by our affiliate members, the SPCA has formed a view that particularly in the Children's Issues provisions (Part VII), the Bill fails to fairly or adequately implement the Government's policy.

The Bill has proposed amendments that will implement several of the Report's key findings well and we detail those provisions later in this report, however in the areas of most significant reform, we believe there are numerous structural defects or omissions that will cause the Bill to fail the government's policy and be potentially harmful to achieving the stated policy position. Accordingly we have highlighted these issues and provide specific recommendations in detail below:-

A. The Bill fails to clearly signify the primary policy of the Government that Shared Parenting outcomes are to be considered a legitimate and desirable method of dealing with a child's living arrangements after their parent's separation or divorce.

The language of Part VII amendments in the Bill is couched in the negative.

In particular the numerous interspersed notes are often in the negative context *S61DA(1)*, the presumption of joint parental responsibility, is well crafted and clear. However, the insertion of the cautionary note is unnecessarily negative and restrictive: *"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."*

It is not adequate to use words "meaningful involvement" 60B (c) or "maximum extent consistent with the best interests of the child" see (ii) The reference to "substantial" is not adequate and equal time or substantially equal time is more appropriate in the context of the intent of this Bill to comply with the Government's policy.

Recommendation:

1. That the Bill include a primary policy statement whereby it states *"The Parliament of Australia in recognising the fundamental right of every child to experience the love, guidance and companionship of both parents after their separation or divorce declares that it is the public policy of the Commonwealth to assure minor children of an equal opportunity and relationship with both parents, after the parents have separated or dissolved their marriage and to require parents to share the rights, duties and responsibilities of child rearing to affect this policy."*
2. That the notes are re written into the positive affirmation placing emphasis on equal or substantially equal parenting time and or the notes are removed.
3. That the six uses of the word "etc" throughout the Bill are either defined or removed.
4. That the words "and other behaviour" is defined in s60(2)(b)1 and s60(2)(b)(2)

B. The Bill has failed to implement a significant reform identified in Recommendation 3 of the Report.

Specifically, the Bill does not *"clarify that each parent may exercise parental responsibility in relation to the day-to-day care of the child when the child is actually in his or her care subject to any orders of the court/tribunal necessary to protect the child and without the duty to consult with the other parent"*.

This is a fundamental reform that is also linked to the intention of Recommendations 4 and 5 of the Report (see later in this submission). Failure to ensure that all aspects of these recommendations are enshrined in law, will not achieve the desired outcomes sought by the report's recommendations.

Recommendation:

5. That the terminology identifying the responsibilities of parents clearly be defined in a direct manner that eliminates any difference between parents notwithstanding that there may be a differential between the parenting time of each parent.

C. The Bill has failed to implement the spirit of Recommendation 4 of the Report.

Recommendation 4 of the Report was accepted by the Government but has not been adequately delivered in the legislation as currently drafted.

The purpose of Recommendation 4 is to ensure that there is no further distinction between parents as to their parenting capacity, duties or responsibilities or to their roles as parents in their children's lives, for those parents that have shared parental responsibility.

The Change from 'Residence' to 'Lives with' and the change of 'Contact' to 'Spends time with' are simply redefining the prejudicial difference of the previous terminology and do not deliver the change intended.

Recommendation:

6. That the terms "Lives with" and "Spends time with" are defined into a single use term that does not differentiate the status between the parents but which reflects the intention of recommendation 4 to remove the language of "residence" and "contact" in making orders between the parents and replace it with family friendly terms such as 'parenting time'. (Para 2.85).

D. The Bill has failed to protect the child's right to an equal opportunity and relationship with their mother and father.

Recommendation 5 of the Report, was a fundamental and key recommendation arrived at after extensive community and departmental consultation, which has been accepted by the Government. The Committee did not reject the "notion" of 50/50 shared time in certain circumstances. It rejected the idea of a *presumption* of equal shared custody.

"It has concluded that the goal for the majority of families should be one of equality of care and responsibility along with substantially shared parenting time. They should start with an expectation of equal care." Report 2.35

"The objective is that in the majority of families, parents would consider the appropriateness of a 50/50 arrangement in their particular circumstances taking into account the wishes of their child/children and that each parent should have an equal say as to where the children reside." Report 2.43

Implementation of this fundamental recommendation has not been implemented in the following areas:-

- (a) The Report has not provided a process that the Court (or counsellors, mediators and arbitrators) are to follow to ensure that equal parenting time orders are considered in the first instance.

NOTE: This is not describing a presumption that a 50/50 shared parenting Order will be the likely Order in a majority of circumstances, but providing that this is the first

style of Order that a Court (or counsellors, mediators and arbitrators) will consider when it is reasonably practicable to do so after a shared parental responsibility outcome has been arrived at.

- (b) The legislation has not directly provided for a Court to make equal or substantially equal parenting time orders in appropriate circumstances notwithstanding these may be opposed by one or both of the parents.

Recommendation:

7. The Bill be amended to include in the Objects section of the Act (Section 60B) the following words:-

As an Object:

The child has a right to be parented by and cared for by both parents on an equal or substantially equal basis.

As a Principle underlying the Object:

The child has a right to and the parents have a responsibility to jointly parent and provide for the child to share equally or substantially equally the responsibility for the child's day to day care.

8. The Bill needs to include detailed separate instructions, notations and information that set out the legislation terms in simple language. This will give a clear outline of the intent of the Bill, specifically in respect to the meaning of Shared Parental Responsibility, and in particular s65DAA where following the making of orders for shared parental responsibility the court is to consider equal or substantially equal time.
9. That the legislation includes a clear statement to override existing Case Law precedent, which effectively could prohibit an equal shared parenting order in cases where, for example, the parties have been or are in legal conflict.
10. Section 65DAA be modified to read "The Court must consider the child spending equal or substantially equal time with each parent in certain circumstances.
- (1) If:
- (a) a parenting order provides (or is to provide) that a child's parents are to have parental responsibility for the child jointly; and
 - (b) both parents wish to spend equal time or substantially equal time with the child;
- Then the court must consider making an order to provide (or including provision in the order) for the child to spend equal or substantially equal time with each of the parents.
- (2) Subsection (1) does not apply if it is not reasonably practicable for the child to spend substantial time with each of the parents.

E. The draft Bill is likely to result in a Family Law Act that is unnecessarily complex potentially increasing the costs and length of litigation.

Our assessment is that the Bill would result in amendments to the Act likely to require an increase in the use of legal services.

Recommendation:

11. To ensure parties receive the opportunity to be advised of their rights and further, to understand the more complicated processes now included in this Bill, we believe it essential that explanatory notes, guidance sheets and information is made readily available to all parties.
12. Due to the complexity of the Bill, it will also be necessary to set out clearly in the explanatory notes, notations, and any guidance sheets that accompany the Bill, an outline of what possible processes the Court might follow when:
 - (a) Both parents would have shared parental responsibility for the children;
 - (b) Determining how the parties are to first consider equal parenting time arrangements;
 - (c) If Shared Parenting is Applicable:-
 - (i) How parents would share the parenting time with the children, considering an equal parenting time arrangement in the first instance. (A Parenting time – Parenting time or Residence-Residence Order).
 - (d) If Shared Parenting is Not Applicable
 - (i) How parents or other parties who are granted some contact with the child will develop a contact regime (A Residence-Contact Order).

The draft Bill does not assist to provide certainty for parents in relation to the likely custodial outcomes that would result from litigation in everyday circumstances. Certainty in the process and having an easily defined and identified likely outcome (or range of outcomes) is the single most effective way of reducing the complexity of law for average parents.

It is also necessary to identify the rights and expectations of parents and their children and ensure they are clearly defined to assist the parties when attempting to negotiate a fair child custodial arrangement after parental separation or divorce. This is a critical omission that needs definition to ensure that the operation of mediation services through Family Relationship Centres have the desired effect of settling matters out of court and pivotal to the success or otherwise of mediation outcomes where a strong emphasis is on more equitable parenting time living arrangements for both parents.

F. The draft Bill has failed to deal with the consequence of interim orders that create a 'Status-Quo' circumstance prior to the hearing of a final trial.

The Bill has not provided for a Court to consider the presumption of shared parental responsibility in interim proceeding, and this is unacceptable.

Notwithstanding that the Bill does provide in 61DB that a Court must not rely on that omission in making a final order, it does not specifically provide for the breaking of 'status-quo' circumstances and this contradicts the intention of the Committee to eliminate injustices created by the court process.

Recommendation:

13. That the Bill be amended requiring Courts to consider the presumption of Shared Parental Responsibility when making interim orders.
14. That the Bill be amended to include provisions that notwithstanding that a particular parenting arrangement has been in place prior to the hearing of a final order trial, if the court finds that the conditions for shared parental responsibility do exist, it must not consider previous living arrangements in any way an impediment to further considering an equal or substantially equal parenting time order if practicable.

G. The issue of unjustified relocation has been omitted from the Bill.

To some extent relocation may be addressed in S68F(2)(d), however, there is little indication that the court has adjusted its attitude to allowing custodial parents to live wherever they wish. Although the authorities suggest otherwise, the reality is that a father has great difficulty in establishing a special bond with his child before the court will interfere with a mother's intention to take the child to another part of the country or overseas.

Given the new emphasis on shared parenting in the Bill, and the conclusion of the Committee on the point, this should be addressed at the very least in the legislation by an accompanying note underscoring the importance of children living as close as practicable to both parents.

Recommendation:

15. The legislation should include a directive that Shared Parental Responsibility will inevitably mean that relocation of one parent is likely to be more curtailed. (Report 2.48)
16. S68F should also be amended to provide for this circumstance with an additional point:

"Should a parent wish to change the residence of a child in such a way as to substantially affect the child's ability to reside regularly with the other parent and extended family, the court must be satisfied on reasonable grounds that such relocation is in the best interests of the child."

Acceptable provisions in the draft legislation

The SPCA has identified reforms in the draft Bill that are acceptable and do comply with the Government's policy position. These are:-

1. The draft Bill has adequately established the Family Relationship Centres and the process for providing access to the Family Court, however the failures outlined above have the capacity to neutralise the possible success of the Family Relationship Centres;
2. The draft Bill appears to adequately provision the Family court to enable a change to the non adversarial approach and implementation of the Children's "cases" program as the primary means of hearing procedures;
3. The Bill has adequately defined a new Section 68F 'Check-list' in Part VII amendments that the SPCA accepts in its revised form including the recognition of the friendly parent concept 68F(2)(b)
4. The work in items 6 and 7 Subsections 60D(1) should be recognised where the Bill has defined and set out in particular the 5 specifics required to be exercised under the shared parental responsibility provisions, *major long-term issues*, in relation to a child, (6) and the blended family recognised in (7)
5. Changes made to common use of AVO/DVPO in proceedings relating to shared parental responsibility and around the rules of evidence.

Conclusion

It must be acknowledged that the Bill attempts to cover a vast array of changes to Family Law, and in many areas the draft Bill has satisfied some of the Government's stated policy, however the deficiencies in the bill require correction to ensure that the amendments will be successful in practice.

The failures in the bill are summarised as follows:-

1. The draft Bill has not adequately protected every child's fundamental right to an equal opportunity and relationship with both their mother and father.
2. The draft Bill has not legislated to provide for equal or substantially equal shared parenting orders in the ordinary circumstances where practicable, nor has it provided a process whereby equal or substantially equal shared parenting orders are considered by courts in the first instance; and
3. The draft Bill may increase the costs of litigation for parties coming before the courts because of the complex and extended processes that would now need to be considered when making a parenting order; and
4. The draft Bill has not removed distinctions between parents due to different living time arrangements for the child, when they have shared parental responsibility for the child.
5. The draft Bill has not assisted parents by providing a degree of certainty as to the likely parental outcome, or at the least a limited range of possible outcomes, they would receive after having separated.

6. The draft Bill has not adequately legislated to eliminate Case Law precedents that impact negatively against the proposed reforms outlined by the Government's Response.
7. The Draft Bill has not clearly defined the meaning of "family violence" or a "Risk of family violence". It should be noted that this risk of family violence is applied to several sections of the Bill. We have argued and will continue to argue that left unqualified family violence is too wide and vague. We have proposed the addition of the word "serious". Left unqualified "violence" on its own, is capable of a wide definition and interpretation, whereas the reality is that it varies from raised voices to serious injury. Such a loose statement could lead to an enormous amount of litigation, and would prevent many fruitful mediation sessions from taking place.

The SPCA believes it is good public policy that the Government clearly defines its position that the parenting of children is to be shared between both parents to the maximum extent possible, upon parental separation or divorce.

It is fundamental in law, that ordinary people, to whom laws are directly applied, can understand their rights, duties and obligations under that law. Law drafted in simple language, outlining direct processes is the most effective way to achieve this objective.

The SPCA does strongly concur with the Family Law Council in their letter to the Attorney-General, The Hon Philip Ruddock MP, 16 November 2004 which they stated that aspects of the law need to be re-written into precise easy to comprehend language and the SPCA believes that this principle applies to all of Part VII - Children's Issues so that parents can understand and operate effectively within the law.

We believe that by adopting the recommendations in our submission, the legislation can more accurately reflect the intention of the House of Representatives Standing Committee's Report "*Every Picture tells a Story*" and the Government's Response to that report, and also ensure that Australia can proceed with a truly 'World Class' Family Law system.