

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
ATTORNEY-GENERAL'S DEPARTMENT

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Question No. 4

Senator Stott Despoja asked the following question at the hearing on 14 February 2006:

a) Can you confirm that s117AB of the *Shared Parental Responsibility Bill* (that requires courts to make costs orders where parties knowingly make a false allegation or statement) will not create additional pressure on women fearing violence or abuse from reporting those concerns in the family law system?

b) As the Attorney has made public statements to the effect that he is equally concerned about 'false denials' of family violence or child abuse as he is about 'false allegations' of family violence or child abuse. Can you explain why this concern is not reflected in s117AB of the Bill or the Explanatory Memoranda?

c) If s117AB is to remain in the Bill, does the Attorney intend to now amend that section to ensure that it can and will be applied to false denials of violence or abuse?

d) Can you explain how an 'objective' definition of family violence is appropriate in the context of what we know about family violence: that it is a pattern of behaviour such that victims of family violence are able to anticipate what the perpetrator of violence is likely to do next? While it may appear to an outsider that a specific incident should not 'reasonably' cause the victim to fear for her safety, her experience may tell her something different.

e) It appears there is a significant intersection between the family law system and state family violence and child protection laws and that the Attorney has proposed that, as part of the Government's new Family Law Violence Strategy, it will work with State Governments to improve investigation and reporting of family violence. Most state family violence legislation defines violence by reference to the conduct of the perpetrator rather than the reaction of the victim and only one state (New South Wales) limits its definition by use of an objective test. Given these facts would it not be appropriate to defer any amendment to the definition of 'family violence' in the *Family Law Act* and instead (as part of the work proposed to be undertaken with State Governments) work towards the development of consistent definitions of the term 'family violence' in relevant Commonwealth and State legislation?

The answer to the honourable senator's question is as follows:

a) The Government does not consider that the cost provision at section 117AB will discourage women from making disclosures about family violence or child abuse.

Deliberately making a false allegation in court is currently actionable as the criminal offence of perjury under section 35 of the *Crimes Act* and could potentially also attract criminal penalties if prosecuted by the Department of Public Prosecutions.

Section 117(2) already provides for the Court to impose costs if it considers that there is circumstances that justify it doing so. The Government considers that situations where a false allegation or statement has been knowingly made should already be the type of situation where

costs are incurred. The new provision makes the Government's intention that the Court should impose costs in this circumstance very clear.

Section 117AB implements recommendation 10 of the House of Representatives Standing Committee on Legal and Constitutional Affairs (the LACA Committee) which makes clear to courts that a penalty should be imposed at the same time as the court determination rather than relying on the possibility of criminal proceedings at a later date.

Section 117AB also requires the court to make such an order only where it is 'satisfied on reasonable grounds that a false allegation has been knowingly made'. This is a very high test. It is much higher than the test that was previously considered and abandoned by the Government in relation to costs provisions for situations where a person falsely relied on an exception to compulsory dispute resolution by claiming family violence.

Given the potential impact of false allegations and false statements on parenting orders it is appropriate that costs be imposed in these circumstances.

b) The Shared Parenting Bill does not refer to false denials explicitly as section 117AB provides for the court to order costs if it is satisfied that a party to the proceedings knowingly made a *false allegation or false statement*. The term false statement would clearly include false denials about family violence. It has been drafted more widely as it may also cover circumstances unrelated to issues about family violence (for example false statements as to income or assets). The Explanatory Memorandum makes clear that the provision is broader than family violence or abuse allegations.

c) The Government does not intend to amend the provision to explicitly refer to false denials. Section 117AB is drafted to cover situations of both false allegations and false denials.

d) The Government considers the amendments to the definition of 'family violence' to be appropriate. The change to the definition directly implements a recommendation of the House of Representatives Legal and Constitutional Affairs Committee.

Under the Shared Parenting Bill, the definition will include a requirement of 'reasonableness' only in relation to a fear or apprehension of violence. Where there has been actual violence, the definition has not changed.

The inclusion of the objective test in the definition is appropriate. It does not mean that the court will consider what would cause an outsider to 'reasonably' fear. It is the reasonable person *in the shoes of the victim* that the court must consider not some notional reasonable person. An objective definition in this context is appropriate.

e) The Family Law Violence Strategy (the Strategy) is aimed at improving the family law system so that allegations of family violence and child abuse are handled quickly, fairly and properly. The primary intention of working with the States and Territories is to ensure that family violence and child abuse allegations are properly investigated once they arise in family law proceedings. The Government primarily wants to improve the coordination between the work done in the Commonwealth family law system and the State and Territory child protection agencies and police forces that bear jurisdictional responsibility for the investigations.

The amendment adds a single word to the existing definition in direct response to the largely bi-partisan report of the LACA Committee. There is a great diversity in definitions of family violence used among the States and Territories at the moment. Both South Australia and NSW have objective elements to their existing definitions of family violence. The Government does not

consider it necessary to delay such an amendment while other initiatives relating to the way that allegations of violence are dealt with in the family law system are progressed in accordance with the Family Law Violence Strategy.