

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

Output 1.1

Question No. 6

Senator Stott-Despoja asked the following question at the hearing on 14 February 2005:

- a) Can you explain how the new Division 11 gives effect to the Family Law Council's recommendation 3 in its letter of advice dated 16 November 2004 that (our emphasis): "the *Family Law Act* be amended to provide a *clearer and more succinct* statement of the principles to be applied by state and Territory Courts when exercising their powers under s68T"? Given that Division 11 would now appear to require a court to consider all four objects and five principles for decision making under Part VII of the Act, as well as the best interests of the children (which appears to require consideration of two primary considerations and 16 additional considerations) and the need to resolve inconsistencies between state family violence orders and federal family law orders.
- b) Can you confirm that new s68R(3)(b) will not operate to undermine a magistrate's consideration of a long history of family violence when determining whether to change a family law order at the same time as making a family violence order?

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

(a) Division 11 deals with the relationship between orders made under the *Family Law Act 1975* (the Act) that provide for a child to spend time with a person, and family violence orders made under a law of a State or Territory to protect a person from family violence. The provisions in the existing Division are complex.

The intention of the amendments to Division 11 is to make the Division as clear and easy to understand as possible by the people who use and implement it, in particular, State and Territory Magistrates making family violence orders. It must be recognised that there will always be some level of complexity to the provisions as they deal with the application and interaction of Commonwealth law with a diverse range of State and Territory laws.

The amendments to Division 11 generally implement recommendations made by the Family Law Council in its letter of advice to the Attorney-General dated 16 November 2004. However, in drafting the amendments it became clear that a different approach to that suggested by the Council was necessary in some instances to ensure that the aim of simplification of the provisions was achieved and to achieve consistency with other reforms in the Bill made since the advice was received.

In its letter of advice, the Family Law Council recommended that the Act be amended to provide a clearer and more succinct statement of the principles to be applied by State and Territory Courts when exercising their powers to vary an order made under the Act. Council suggested that this could be achieved by repealing subsection 68Q(c) and by amending section 68T to include a new provision requiring the court to have regard to the need to protect all family members from violence and the child's right to contact with both parents, provided such contact was not contrary to the best interests of the child. In considering whether an order was in the best interests of a child the court

would have had to consider all of the factors relating to a child's best interests currently set out in subsection 68F(2).

The Government chose to clarify the purposes of Division 11 by a clear statement that the purposes of the Division are to resolve inconsistencies between family violence orders and federal family law orders, and to achieve the objects and principles in section 60B of the Act. The Government considers it valuable to link the purposes of Division 11 back to these objects, the first two of which mirror the primary considerations that must be considered by a court in determining the best interests of the child. The objects include:

- ensuring that the child benefits from a meaningful relationship with both parents
- ensuring that the child is protected from physical or psychological harm
- ensuring that children receive adequate and proper parenting, and
- ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

In the Government's view, these objects, and the principles that underlie them are a clear statement about how the Act can deliver the best outcomes for children and the Government considers it appropriate that they inform the decision making of State Magistrates making decisions under Division 11.

The Government has introduced an amendment in the House of Representatives to clarify that a purpose of Division 11 is also to ensure that the orders addressed under that Division do not expose *any* person to family violence. This is an existing purpose of Division 11. The Government considers it important to include this purpose to ensure consideration of the safety of all parties in the application of the Division.

(b) Paragraph 68R(3)(b) limits the power of magistrates who are considering whether to vary or suspend an order made under the Act to situations where there is material that was not before the court that made the order.

The intention of the amendment is to ensure that family law orders are not circumvented by a retrying of the same matter before a State court. The provision is intended to avoid forum shopping and provide clarity around when the magistrate is expected to exercise the power. The Government considers that, in the absence of new evidence, parties who are seeking to vary family law orders should generally do this via the procedures for variation available in the Act.

The Government does not consider that this provision will restrict the ability of the court to consider evidence of the seriousness or chronic nature of the family violence alleged. The provision does not prevent the court taking pre-existing violence into account so long as the court also has before it material that was not before the court that made the order or injunction. The Government considers it appropriate to prevent parties circumventing family law orders by applying to a State or Territory court where there is no new evidence of violence or abuse.