DISSENTING REPORT BY THE AUSTRALIAN DEMOCRATS AND THE AUSTRALIAN GREENS

Introduction

1.1 In considering the recommendations made by the Committee every effort has been made, in the limited time available, to provide constructive comment on these significant legislative changes to family law practice in Australia.

1.2 The report was presented in draft format at 6pm on the 22 March 2006 with advice that minority reports would need to be completed by COB on the following day. This deadline was then extended until 1pm on the 24 March. A thirty-six hour period is an inadequate timeframe in which to consider the implications of such a far reaching piece of legislation

1.3 We regret that we have not been afforded more time by the Committee to consider the implications of its recommendations. We support the need for Family Law reform and are generally encouraged by the committee's recommendation 7. However, it is our view that the major recommendations in the report do not go far enough in addressing the major problems with this legislation.

1.4 Specifically we are concerned with the following aspects of the bill:

- the bill privileges parents' rights over parental responsibilities and children's rights;
- the notion of equal shared parenting as it is presented in this bill reflects a commodification of children that fails to address the best interests of the child based on individual need and circumstances;
- the definition of domestic violence adopted in this bill fails to address the complexity and multi-dimensionality and in so doing does not provide adequately for family members at risk of family violence, particularly to women and children; and,
- the budgetary provisions and resource allocations are not extensive enough to facilitate the outcomes and processes contained in this bill. They are not adequate enough to meet the level of service delivery, staff training, geographical dispersion required in complex family circumstances.

Issues of Major Concern

1. Parenting time v parental responsibility and equal parental responsibility v joint parental responsibility

1.5 We note the discussion in the Chair's draft of these two concepts. While 'equal shared parental responsibility' and 'equal time' are not one and the same, they are inter-related in a way that creates an unacceptable formula in the bill.

1.6 We share the concerns of Relationships Australia, who state:

> [We] acknowledge that the concept has moved from a 'presumption of equal time' to a presumption of 'equal shared parental responsibility'. However, we are concerned that with a starting point of a child spending 'equal time' or 'substantial and significant time' with each parent this will be a de facto presumption of equal time.[1]

1.7 The operation of a presumption such as this, de facto or otherwise, is likely to lead to an inappropriate and harmful focus in determining what is best for children. Women's Legal Services Australia submits that:

> the presumption of contact has permeated family law practice and led to a pro-contact culture that promotes the right to contact over safety [which] undermines the child's best interests in that it fails to properly prioritise the adverse effects on children of being exposed to abuse either directly or by witnessing the abuse of a parent.[2]

1.8 We acknowledge that a stable environment encourages healthy child development. However, there has been no conclusive evidence to prove that a presumption of equal time rather than a consideration of the child's unique circumstances in each case would be of any benefit to a child.

1.9 We note the evidence provided by the National Council for Single Mothers and their Children that:

> [There] is a body of research evidence that says attachment is enormously significant to children's healthy development. Children need to feel secure in their attachment and in knowing the circumstances of their environment; they have to have friendship and relationship circles. All of those presume some level of continuity of experience and the younger the child the more critical that is.[3]

1.10 The presumption in this legislation is likely to have significant interaction with a child's attachment. This evidence reinforces the need for individual assessments based on the circumstances and needs of each child.

1.11 This position is supported by evidence, based on experience in family law practice provided by Women's Legal Services Australia to the inquiry that:

> the provisions in sections 65DAA and 63DA, which require consideration or direct attention to specific types of parenting arrangements – namely, equal time or substantially shared time arrangements – derogate from a free and open assessment of what arrangement may be best for children in a specific case.[4]

1.12 Further, we consider that the bill and its effects would benefit from a change in language from reference to an 'equal' distribution of responsibility to one of 'joint' parental responsibility. This still implies a cooperative approach and by removing the potentially divisive elements the focus is more appropriately placed on parental responsibility.

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[1] *Submission* 14, p. 1.

[2] *Submission* 98, p. 3.

[3] *Committee Hansard*, 3 March 2006, p. 20.

[4] *Committee Hansard*, 3 March 2006, p. 25.

1.13 As submitted by Family Services Australia during evidence to this inquiry, use of the term "equal shared parental responsibility" and concepts of "equal and substantial time" in relation to parenting orders prioritises parental rights over child's best interests, leading to time spent with the child becoming an issue of "entitlement".[5]

1.14 We appreciate the Chair's intention in recommending that a definition of "equal shared responsibility" be inserted in the bill. Depending on the content of such a definition it may ameliorate the operation of the de facto presumption referred to above. However, considering the provisions for "equal time" and "substantial shared time" in the bill, we do not agree that such an inclusion would sufficiently address our concerns. Our concerns would only be addressed by the removal of these provisions entirely from the bill.

Recommendation 1

1.15 The language in the bill should be changed to replace all references to "equal shared responsibility" with the term "joint responsibility".

A presumption of equal shared responsibility should not be introduced. The Democrats and the Greens are of the view that each case should be considered on its own merits with references to its unique circumstances.

2. Determining the best interests of the child

1.16 We support the evidence presented in the Chair's Report that was provided by the Family Law Section of the Law Council of Australia and Women's Legal Services of Australia on this point. It is our view that the rejection of the two-tiered approach by these groups and others should be supported.

1.17 It is important to note that the new structure may especially disadvantage children who have previously experienced family violence or abuse. As pointed out by Women's Legal Services Australia:

> The two primary considerations will be in direct conflict with each other wherever violence or abuse is alleged because it is almost impossible to maintain a meaningful relationship with an abusive parent and also protect the child from harm from that person.[6]

1.18 We object particularly to the relegation of children's views to the list of 'additional considerations'. This increases the risk of safety being de-prioritised in decision making.

1.19 We agree with the Law Society of South Australia's position that the bill is:

> extremely parent-centric and in no way support the child or young person in negotiations or proceedings.[7]

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[5] *Committee Hansard*, 3 March 2006, p. 11.

[6] *Submission* 98, p. 5.

1.20 It is essential that these laws do not encourage parents to facilitate an unsafe relationship in circumstances of family violence, abuse or neglect.

1.21 We also note that section 60CC contains two new areas of concern. Subsection 60CC(3)(c) or the "friendly parent provision" and related subsection 60CC(4) are have been criticised extensively during the Committee process. We do not support these inclusions to the bill.

1.22 It must be clearly understood that a 'meaningful relationship' means a relationship in which the child has not been and is not at risk of exposure to family violence, abuse or neglect.

1.23 We do not agree with the Chair's suggestion that a clarification of the relationship between the considerations will alleviate the concerns raised by these new provisions. The evidence presented in favour of retaining the current structure is strong and there is a lack of convincing evidence that the new structure will create positive results for children.

Recommendation 2

1.24 S60CC should not be introduced. The current structure in s68F should be retained. The division of considerations for determining a child's best interests into primary and additional considerations is unnecessary and do not truly reflect an adequate response to this issue.

Recommendation 3

1.25 That the current structure of s68F be retained and used in s60CC such that there is one list of criteria for assessing children's best interests.

That 'meaningful relationship' be explicitly defined within the Bill as a relationship in which the child is not at risk of exposure to family violence, abuse or neglect.

3. Definition of family violence

1.26 We recognise the intention of the Committee in expanding the "reasonableness" test in their recommendation. We consider that this definition is not an adequate response to the issues raised during the inquiry process in relation to family and domestic violence.

1.27 The Family Issues Committee of the Law Society of NSW submits that:

> Family violence is complex. In all but the simple cases family violence is not just an action, it is a course of actions. It is not just an event, it is a progression of events. Family violence often follows a complex cycle. Therefore, to treat family violence in a mono-dimensional manner in legislation is to

[7] *Submission* 30, p. 1.

> treat family violence in an extremely simplistic manner, which is potentially dangerous and disempowering to victims and survivors of violence.[8]

1.28 We are opposed to the application of an objective test such as that proposed by this bill. One of our primary concerns relate to what we believe is a fundamental misunderstanding of the nature of domestic violence.

1.29 Women's Legal Services Australia submitted to the inquiry that victims of family domestic violence have a unique perception of the real threat posed to their safety by an abuser:

> Victims of violence learn to 'read' the perpetrator of violence and know what is coming next. It may appear to an outsider that a specific incident should not 'reasonably' cause the victim to fear for her safety, but her experience tells her otherwise.[9]

1.30 Our other primary concern is over the consequences of applying an objective test in situations of family and domestic violence. According to the submission by the Human Rights and Equal Opportunity Commission:

> …applying an objective test as proposed may dissuade parties from seeking the protection of the Court where they do not have documentary or third party witness evidence, which in many cases of abuse or family violence is not available.[10]

1.31 We support this view and, therefore, must reject the amended definition proposed by the Chair's draft.

1.32 We endorse the Chair's recommendation that the Government's use of the results of research being undertaken by the Australian Institute of Family Studies into family violence but believe it should have recommended a review for the purpose of achieving an improved and consistent definition in all jurisdictions.

Recommendation 4

1.33 The definition of family violence should not be amended. The proposed tests are not adequate.

Upon completion of the Australian Institute of Family Studies review; the Government should work closely with State and Territory Governments to formulate a comprehensive, effective and uniform definition of family violence.

4. Costs order for false allegations

1.34 We endorse the Chair's recommendation that s117AB be removed from the bill.

1.35 We seek to add to the comments supporting the removal of this provision.

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[8] *Submission* 23, p. 1.

[9] *Submission* 98, p. 11.

[10] *Submission* 13, p. 8.

1.36 In its submission to the inquiry the Family Issues Committee of the Law Society of NSW stated that it:

> …believes that section 117AB will have the unintended consequence of generating far more disputation about costs.[11]

1.37 We believe that given the evidence submitted to the inquiry, the current definition and the difficulty posed to victims in defending a charge of making a false allegation, let alone facing it in the first place, perpetrators will be more likely to use this as an avenue to gain advantage in proceedings.

1.38 Additionally, we consider it important to note the evidence provided by the National Council for Single Mothers and their Children in relation to the use of false allegations that exist in the system currently.

1.39 In evidence to the inquiry, Ms Jacqueline Taylor on behalf of the Council, stated:

> I want to particularly address the notion that raising allegations of violence and abuse gives you a tactical advantage in court processes. The reality is quite contrary to that; it is a disadvantage. Every day we hear women and grandparents being told by their lawyer not to raise domestic violence or child abuse issues because they will be seen as hostile and will risk losing residency.[12]

1.40 This evidence presents a chilling picture about the current state of proceedings relating to the custody of children where family violence is a real and present issue. The prohibitive nature of cost orders would only compound this problem.

5. Compulsory Mediation

1.41 While we support the concept of alternative dispute resolution mechanisms and a less adversarial approach, we are concerned that in circumstances of family violence, these proposals introducing compulsory mediation will be problematic.

1.42 We are concerned that compulsory mediation could push parents into potentially unsafe situations. The requirements to satisfy a court that there are 'reasonable grounds' for believing that violence or abuse has occurred will mean that parents will be even more reluctant to disclose violence or abuse. Further, the screening tools may continue to be ineffective and result in inappropriate cases being pushed through the system.

1.43 The need to certify 'genuine effort' has been made to resolve issues places great responsibility onto the mediator. When combined with performance measures focused on ensuring that agreements are reached, the requirement to certify a participant's 'genuine effort' may pressure mediators into continuing with dispute resolution in situations where they consider it inappropriate, or acquiescing to agreements which are unlikely to lead to safe or satisfactory outcomes.

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[11] *Submission* 23, p. 7.

[12] *Committee Hansard,* 3 March 2006, p. 19.

1.44 The requirement that parties make a 'genuine effort' is particularly problematic in the context of the provisions relating to 'false allegations'. The current exemptions for violence and abuse are too narrow and the obstacles to making allegations are too great. This may force more inappropriate cases into mediation, and discourage victims from speaking up in circumstances where they are concerned that they are unable to substantiate their allegations fully.

1.45 Compulsory mediation could lead to increasing numbers of difficult clients and cases, particularly where clients are unwilling or intransigent clients and are not looking for a mediated solution and seek to use it as an opportunity for confrontation, dispute or intimidation.

1.46 We are also concerned about an increased demand for mediation services where sufficient well-trained and highly experienced mediators are unlikely to be available. The sector has given evidence that it does not have the capacity to cope with this increased demand, and it will take time to develop this capacity.

Recommendation 5

1.47 A sworn statement by a parent that violence or abuse has occurred should be accepted as grounds for a modified mediation process or use of the court system.

Mediators should have the ability to certify that a dispute is not suitable for mediation; the obligation to certify that a 'genuine effort' has been made under these circumstances should be removed.

The screening processes for family violence must be improved

6. Quality of Family Dispute Resolution Services

1.48 We are also concerned about the impact of a move to compulsory mediation on the capacity of the sector to provide the necessary quantity and quality of family dispute resolution services.

1.49 To this end, we strongly suggest that thought is given to forward planning and transitionary measures, so as to ensure that the sudden increase in demand for family dispute resolution services brought about by compulsory mediation does not result in poor outcomes for families.

1.50 The Committee heard evidence from a number of groups who were concerned that the proposed performance measures for Family Relationship Centres focus on rates of agreement rather than on the quality of outcomes. It is essential to ensure that performance measures ensure that mediation outcomes attempt to deliver the best result for the children involved, and that case loads and funding pressures do not diminish the quality of their lives.

Recommendation 6

1.51 That the following measures are undertaken to ensure quality in family dispute resolution services:

- **Tracking and modelling of the demand for family dispute resolution services.**
- **Forward planning to ensure sufficient training resources.**
- **Increase in specialised training for mediators in family dispute resolution to ensure there are enough qualified mediators**
- **An accreditation system for mediators which ensures they have the knowledge, skills and experience necessary to undertake mediation in a compulsory system and ensures the ongoing quality of their work**
- **An accreditation process for training courses in family dispute resolution that ensures students are being taught these skills.**
- **The Attorney-General's Department should consult with specialised domestic violence resource and training organisations to develop appropriate processes for screening family violence**
- **Research and development be undertaken into more effective screening processes for undisclosed family violence**
- **Further research and development into effective mediation and dispute resolution practices for (i) unwilling, intransigent and confrontational clients; (ii) situations of potential undisclosed family violence**
- **A model of best practice be for mediators dealing with (i) unwilling, intransigent and confrontational clients; (ii) situations of potential undisclosed family violence.**
- **Anyone involved in counselling, screening or mediation should at a minimum be competent to recognised and respond to clients affected by family violence.**
- **Clear guidelines, quality assurance and accreditation systems for FRCs to ensure the safety of clients and staff (see below).**
- **Mediators should have the ability to certify that a dispute is not suitable for mediation.**
- **The obligation for mediators to certify that a 'genuine effort' has been should be removed under circumstances where they certify that the dispute is not suitable for mediation.**
- **That performance measures for FRCs include the need to demonstrate that arrangements for children agreed to in mediation are actually in their best interests.**

7. Resources, particularly for regional and remote communities

1.52 Considerable comment has been made on the unique issues which face families living in rural and remote areas. It is widely acknowledged that the isolation, cost of living and high unemployment rates place additional pressures on families that may already be facing difficulties.

1.53 The changes set out in this legislation also need to take into account the circumstances of families in remote areas. It is important that potential counselling services are provided with additional resources to offset the cost of transportation and service delivery in remote areas. Counselling services also need to be culturally appropriate and counsellors need to be provided with additional training to ensure they are familiar with the issues facing families in regional areas.

1.54 The resourcing of FRCs in regional areas is of critical importance – as adequate resourcing will ensure that people living in regional and remote areas are able to access the services the Government is requiring them to participate in. The cost of service provision in regional areas is higher and the more remote the area the fewer service centres available. To counter this natural disadvantage, greater targeted resourcing needs to be provided to FRCs and there staff operating in regional and remote areas.

1.55 While we support the recommendations made by the Committee – we believe that it should be developed further to include:

- No cost burden to people accessing dispute resolution services in regional areas due to there remote location
- Culturally appropriate community education on the types of services available and what the service is designed to achieve and how it is accessed.
- Wide publication in rural and remote areas that dispute resolution services are available and able to be accessed in remote areas without additional travel costs
- It is imperative that regional and remote communities are properly resourced to provide counselling services with counselling staff who have been specifically trained in the issues facing families living in regional and remote areas
- Exemption from compulsory participation in services for those who may be unable to attend for any of the prohibitive reasons listed above.

1.56 There must be recognition of the disadvantage faced by those forced to access external services where a lack of access to technology prevents the use of services including online and telephone services.

1.57 Recognition should also be given to the issue of the inability of other disadvantaged groups to access services, for reasons other than geographical remoteness. These groups include those on a low income or those with health or mental health issues.

Recommendation 7

1.58 That funding service delivery under the provisions of the bill are appropriate to the particular needs of regional and remote communities

Exemption from compulsory participation in services for those who may be unable to attend for any of the prohibitive reasons listed above.

Senator Andrew Bartlett
Australian Democrats

Senator Natasha Stott Despoja
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Senator Rachel Siewert
Australian Greens