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Submission to the Senate Legal and Constitutional Legislation Committee Inquiry into the

FAMILY LAW AMENDMENT (SHARED PARENTAL RESPONSIBILITY) BILL 2005

27 February 2006

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Executive Summary

Family Services Australia (FSA) is the largest national peak body for the family and relationships services sector, with over 80 member organisations located in over 250 sites in city, suburban, regional and rural areas throughout Australia.

The focus of this submission is on those sections of the *Family Law Amendment (Shared Parental Responsibility) Bill* 2005 that have the greatest potential to affect the work of family counsellors and family dispute resolution practitioners, employed in community based organisations.

Overall, the Bill provides some positive directions for supporting parents who are experiencing difficulties in establishing shared parenting arrangements following separation. Reforms that are likely to be welcomed by practitioners include:

- the provisions relating to disclosure and privilege in the Bill that permit the exchange of relevant information between professionals and referring agencies, while maintaining the privilege of information shared with counsellors and dispute resolution practitioners in the courts;
- the provisions that require the court and family law professionals to inform parties of non-court based family services, providing a basis for greater cooperation between the court, the legal profession and community based service providers; and
- the provisions to prescribe accreditation rules for family dispute resolution under the regulations.

There are other aspects of the Bill where FSA urges a closer focus on the child as the central person affected by parental decisions following separation and on the concepts of neutrality and impartiality that underpin the work of family advisers in general. FSA recommends that:

1. Any proposed accreditation rules for family counsellors and family dispute resolution practitioners be developed in consultation with the sector, whose members have been addressing issues of accreditation for some years.

2. The proposed certificate to be provided by family dispute resolution practitioners relating to attendance at family dispute resolution not include a judgment about the genuineness of a party's effort at resolving the dispute.

3. The Bill include a requirement for rigorous assessment of a family's needs, situation, power bases and capacity to negotiate to be undertaken prior to enforcing mandatory participation in family dispute resolution and prior to discussing specific arrangements for the future.

4. Provisions relating to family violence be re-examined in light of advice provided by expert groups including the Family Law Council and Women's Legal Services Australia to prioritise the need to protect all parties from violence in all decision making.

5. Section 61DA relating to a presumption for shared parental responsibility and all other references in the Bill to 'equal shared parental responsibility' be replaced with the term 'joint parental responsibility'.

6. The requirement for family advisers to specifically inform parents about the possibility of their child spending equal or substantial time with each of them be removed from the Bill and a clause relating to information about a range of options, of which equal or substantial time are but two, be inserted.

7. References to orders made in favour of specific adults in Subsections 64B(6) to 64B(8) be removed from the Bill and replaced with a clause that reiterates that any parenting orders focus on the child's best interests rather than the favour of either parent.

8. A comprehensive educational campaign accompany the implementation of the reforms contained in the Bill, including:
   - Strategies to assist those working in the family law system to build confidence and trust in the work of non-court based family services; and
   - Strategies to ensure that the Australian people understand and accept the changes in terminology relating to children proposed by this Bill.

9. A range of safeguards be developed to promote equity of access to services and fairness in the impact of this legislation, including a regime of exemptions to mandatory processes; mechanisms to ensure that appropriate services are available to those with specific needs and a comprehensive approach to evaluating the impact of reforms.

10. Further consultation with relevant sectors be undertaken to build on existing work and promote collaboration between community based counsellors and dispute resolution practitioners and legal practitioners.

Background

Family Services Australia (FSA) is the largest national peak body for the family and relationships services sector, with over 70 member organisations located in over 250 sites in city, suburban, regional and rural areas throughout Australia.

In addition to financial contributions from member organisations, FSA receives funding as an Industry Representative Body through the Family Relationships Services Program (FRSP) which received funding from the Attorney-General's Department and the Department of Family and Community Services and Indigenous Affairs (FACSIA).

FSA member organisations deliver a substantial proportion of the services funded through the FRSP across all sub-program areas including Family Relationships Mediation, Conciliation Services and Primary Dispute Resolution (to be collectively referred to as 'Family Dispute Resolution'); Children's Contact Services and Contact Orders Programs; Family Relationships Counselling; Men and Family Relationships Services; Family Relationships Education and Skills Training; Adolescent Mediation and Family Therapy; and Specialised Family Violence Services. Many FSA members also provide direct services to the Family Court and the Federal Magistrates Service.

In the past, FSA has responded to a number of Inquiries and Government initiatives in relation to family law matters including (but not limited to) the Senate Legal and Constitutional Legislation Committee *Inquiry into the provisions of the Marriage Legislation Amendment Bill 2004;* the House of Representatives Family and Community Affairs Committee *Inquiry into child custody arrangements in the event of family separation (2003)*; and the House of Representatives Committee on *Legal and Constitutional Affairs Inquiry into aspects of family services (1998).*

FSA has a Family Law and Legal Issues Working Group consisting of representatives from member organisations with expertise and interest in this area. In developing this submission we built on the work we have done in the past as well as the combined experience of our working group members. We have also consulted with our members and strategic partners on some key issues, where appropriate.

The preparation of this submission has been substantially assisted by Dr Alan Campbell, Lecturer at Edith Cowan University. Dr Campbell is a family dispute resolution practitioner and a psychologist with 20 years' experience in providing family dispute resolution both within the Family Court and in organisations that operate under funding from the Family Relationship Services Program of the Department of Family and Community Services and Indigenous Affairs. He has worked in Western Australia, Victoria and South Australia and is very familiar with the operation of the *Family Law Act* 1975, the *Family Law Reform Act* 1995 and the various inquiries that have informed the current Family Law Amendment (Shared Parental Responsibility) Bill 2005.

Our submission specifically addresses the potential impact of the Family Law Amendment (Shared Parental Responsibility) Bill 2005 on clients accessing FRSP funded services and service delivery agencies/practitioners, including both current services and the Family Relationship Centres to be established in 2006-08.

Analysis of the Bill

Overall, the Bill provides some positive directions for supporting parents who are experiencing difficulties in establishing shared parenting arrangements following separation.

Terminology changes

The changes in terminology, to remove references to residence and contact, are welcomed because these changes have the potential to decrease conflict around these issues. It is noted, however, that the 1995 removal of the terms 'custody' and 'access' from the Act appeared to have had little effect on the public's use of those terms, and they are still very much in use.

A cultural change, accompanied by a vigorous education campaign to familiarise the public with the new provisions, seems imperative. The government is urged to consider instigating such a campaign as soon as possible following the passing of this Bill (see Recommendation 8).

Sharing information

Family counsellors and dispute resolution practitioners are likely to support changes in the Bill, contained in Section 10, which allow individuals participating in counselling and dispute resolution to consent to information being shared with other agencies. Recognising the benefits of an approach that permits the exchange of relevant information between professionals and referring agencies, helping to ensure that clients will receive the most appropriate service available; also that professionals will be appropriately informed about the issues and concerns on which to work.

While we welcome these changes there are a number of issues that require clarification:

- Whether information provided by a family counsellor or family dispute resolution practitioner to a family consultant in the family court remains confidential or is reportable to the court – generally and in specific circumstances such as where a child or adult discloses abuse/violence or is at risk of harm.
- The status of practitioners in States and Territories that do not have mandatory child protection reporting requirements enshrined in legislation, when disclosing evidence relating to abuse, neglect or risk;
- Whether there are any restrictions on how disclosures can be made and to which agencies or professionals; and
- The circumstances under which such disclosures would or would not be admissible in court.

Privilege and confidentiality

While we welcome provisions to improve information sharing between professionals, it is essential that privilege of information is maintained in the courts, ensuring that evidence of anything said in counselling or family dispute resolution will be inadmissible with the usual exceptions. We understand that the protections formerly contained in Section 19N of the *Family Law Act 1975* have been retained in Sections 10E and 10J of the Bill.

There is some potential for confusion between retaining the privilege of information in the courts while not providing immunity for family counsellors and family dispute resolution practitioners under the *Family Law Act 1975* from suit for negligence or other civil wrong. FSA is aware that advice on this issue was provided to the Attorney General from the National Alternative Dispute Resolution Advisory Council and Family Law Council (joint letter dated November 15, 2005). This does not appear to be a source of concern for FSA members. Any provision to provide

practitioners with immunity from being sued for unethical practice is not in the best interest of professionalism within the sector and if there are practitioners who do not always work in an ethical manner there would be support for appropriate action to be taken to address this.

Potential for confusion

The family consultants, who are to be appointed by the Court and work within that system (encompassing those who are currently described as family and child mediators or family and child counsellors employed by the Family Courts), will not have the same level of privilege as that given to community-based family counsellors and dispute resolution professionals (see earlier discussion 'privilege and confidentiality') but will presumably have to maintain the confidentiality of information provided to them by a community based practitioner, where the consent of the client has been given. There is some potential for confusion between practitioners about how information that has been shared with consent can be used and what information is admissible or not admissible in court proceedings. This has the potential to confuse working relationships between community and court-based personnel, as community-based professionals may restrict the information they share with their colleagues working within the court in the interests of protecting their clients' confidentiality. There may also be confusion amongst clients who may have difficulty understanding the different rules that apply to practitioners within the court system and those based in community organisations.

Accreditation

Family dispute resolution practitioners and family counsellors have, for some time, expressed concern about the quality of service delivery and accompanying issues of accreditation. It is therefore pleasing to note that the Bill includes provisions for accreditation rules to be prescribed under the regulations. There is a concern about the processes through which accreditation rules will be developed, however. It is recommended that any accreditation rules be developed in consultation with the sector; whose members have been addressing issues of accreditation for some years (see Recommendation 1).

Genuine effort

Subdivision E, Section 60I requires that "…all persons who have a dispute about matters that may be dealt with by an order under this Part…make a genuine effort…". Further, Subsection 60I(8) requires family dispute resolution practitioners to provide the court with a certificate that states either that a party did not attend family dispute resolution, or that all attended a family dispute resolution process and did or did not make a genuine effort to resolve the issues of concern.

The difficulty with the concept of 'a genuine effort' is its subjective nature. Sometimes a party can feel protective of him- or herself or a child but still have a 'genuine' wish to resolve the issues. Others may not feel ready to work towards resolving the issues at that specific time, feeling coerced into attending dispute resolution. This may not necessarily mean that that person will not be ready for a 'genuine effort' in another month or two. A person might also have a 'genuine' wish to resolve issues but feel unable to resolve them at the time of dispute resolution because of fear or confusion over what is best at the time. Nevertheless, a person's demeanour might be interpreted as not 'genuine'. A certificate that suggests that a person's efforts were not genuine on one occasion may jeopardise that person's wish to enter into family dispute resolution at some later stage. It is against the principles of dispute resolution processes to assume that a person is not making a 'genuine effort' to resolve an issue when other factors (such as the above, or a person's emotional state, subtle power differentials between the parties, or the possibility of coercion) may be present but not overt.

Additionally, the provision of such a certificate can violate the family dispute resolution practitioner's role as a neutral and impartial facilitator of the process. The receipt of a certificate that charges a party with not having made a 'genuine effort' may lead to distrust of the process

and an entrenchment of the conflict rather than an opportunity to consider one's position and perhaps subsequently modify it. A party may decide not to enter family dispute resolution at a later stage because of a perception that the dispute resolution practitioner will not be impartial towards that party. It is recommended that the proposed certificate not include a judgment about the genuineness of a party's effort at dispute resolution.

Mandatory attendance at dispute resolution

While it is acknowledged that attendance at dispute resolution is mandatory in some overseas jurisdictions, and that mandatory attendance does not necessarily impact on the quality of the outcomes of dispute resolution, there are issues that must be considered before a dispute resolution session can take place. Assessment of power differentials, the capacity of each party to negotiate together at specific stages of the separation process, the situation for the children of the relationship, and each party's willingness and capacity to decide on issues at these stages, is vital.

Family dispute resolution professionals must have discretion to either terminate the work or not enter into a dispute resolution process based on a rigorous assessment of each party's capacity and willingness, needs, situation, range of options and relative level of relational power. It is recommended that this important prerequisite be acknowledged in the Bill and strengthened in relation to the mandatory requirement for parties to attend family dispute resolution (see Recommendation 3).

Family violence, abuse and risk

Family counsellors and dispute resolution practitioners have consistently and vigorously addressed issues relating to family violence of all kinds, including but not limited to physical, emotional, economic and social violence. The focus on 'false allegations' of violence and the need to 'prove' its existence is of concern because of the potential for much family violence to go unnoticed due to this focus.

The government is urged to consider maintaining a broad definition of family violence and focus on its existence rather than on the possibility of 'false' reports. Failure to acknowledge the various forms of violence and to accept the possibility of these forms occurring (because it is often difficult to prove their existence) may result in underreporting, leaving victims and their families at increasing risk.

In addition, Sections 10E & 10J contain provisions that allow evidence provided to a family counsellor or family dispute practitioner to be admissible in court if an admission or disclosure that indicates a child under 18 has been abused or is at risk of abuse. FSA would argue that this should be broadened to include risk of family violence towards both children and adults, recognising that the safety of children cannot be guaranteed if an adult carer (be that a parent or grandparent) is at risk of violence. It is imperative that community based practitioners can disclose information to the court when the safety of any person is compromised or in doubt and know that the information will be admitted as evidence and that they are making a lawful disclosure.

FSA is aware of detailed analysis and advice relating the potential impact of changes to Division 11 dealing with Family Violence, including the advice of the Family Law Council to the Attorney General (letter dated November 16, 2005) and comments on the extent to which the provisions of this Bill are consistent with that advice from Women's Legal Services Australia (letter dated 1 February 2006). FSA urges the Government to re-examine the family violence provisions and prioritise the need to protect people from violence in all decision making (see Recommendation 4).

Equal shared parental responsibility

Family counsellors and dispute resolution practitioners have consistently worked with separating parents to reach satisfactory decisions on the future management of their responsibilities for their children. The focus of this work over at least the past decade has been to ensure that parents assume *joint* responsibility for the children's future.

The term 'equal' has the potential to create further conflict between parents. The definition of 'equal' assumes that responsibilities can be carved up between parents on a fifty-fifty basis. In practice, such an arrangement is rarely, if ever, effective. Moreover, it is doubtful that an arrangement of 'equal' responsibility will always be in a child's best interests. Decisions made by one parent in the interests of a child under specific circumstances will often infringe on understandings of 'equal' responsibility, thus causing further conflict between parents that can be damaging to the child. While the strengthening of the use of parenting plans is supported, it is recommended that all references in the Bill to 'equal shared parental responsibility' be replaced with the term 'joint parental responsibility' (see Recommendation 6).

Equal or substantial and significant time with each parent

The requirement for parenting advisers, including family counsellors and family dispute resolution practitioners, to inform parents that they could consider an arrangement whereby a child spends equal or substantial time with each of them, may present problems. First, such information may maintain a focus on the parents rather than the child, whose experiences, developmental stage, emotional and physical bonds and relationship with friends and pets may be compromised by an arrangement that does not take these considerations into account. Second, the place of assessment in the process is not clear, although it is implied by the terms 'reasonably practicable' and 'in the best interests of the child'. Comprehensive assessment of a family is a pre-requisite of any family work and the basis on which any information of the type required by Subsection 63DA(2) might be given. It is recommended that the Bill incorporate a clear statement regarding the essential nature of rigorous assessment of a family's needs prior to discussing specific arrangements for the future. While the role of assessment in the court setting is implied in Section 65DAA, this must be made clearer for programs funded under the Family Relationship Services Program.

Third, the specific nature of the requirement for family advisers to inform parents of the possibility of equal and/or substantial and significant time again jeopardises the adviser's neutrality and impartiality, often considered to be cornerstones of the work of dispute resolvers. In practice, family dispute resolvers may include arrangements for equal or substantial time in a range of options that parents could consider; but these options are usually no more or less important than all others listed. Parents are not directly encouraged to consider specific options over any others, so their final decisions are their own, not something that has been imposed, either directly or subtly, on them. Family advisers hold a position of power, in that parents can look to them for guidance and advice rather than considering their own needs, and any focus on a specific arrangement can be viewed as an endorsement over other options. Research has shown that decisions imposed on parties are likely to break down far more quickly than decisions reached by consensus.

It is therefore recommended that the requirement for family advisers to inform parents of these options be removed from the Bill and a clause relating to information about a range of options, of which equal or substantial time are but two, be inserted (see Recommendation 6).

Subsections 64B(6) to 64B(8)

It is noted that the above subsections deal with the persons in whose favour parenting orders may be made. This subsection seems at odds with the stated focus on children's best interests, in that those in whose favour parenting orders will be made do not include children at all. A focus on a parent in whose favour a parenting order is made has the potential to build a 'win-lose' culture, thereby increasing the level of conflict between parents. Family counsellors and dispute resolution practitioners are careful to focus on the child as the central person in the family, so parenting plans and other parental agreements are written with the child in mind. It is thus recommended that references to orders made in the favour of specific adults be removed from the Bill and replaced with a clause that reiterates that any parenting orders made focus on the child's best interests rather than the favour of either parent. (see Recommendation 7).

Equity in access and impact

There are aspects of this Bill, particularly those relating to mandatory participation in dispute resolution processes, that rely on adequate access to services including family dispute resolution practitioners as well as other services including independent legal advice, either through a legal practitioner in private practice or through legal aid or community based legal services. In addition, individuals with specific needs including (but not limited to) those with Indigenous heritage, culturally and/or linguistically diverse background, disability or mental health issues may need specialist assistance including appropriately trained practitioners, culturally sensitive services and support from related support services to provide assistance with language interpreting, transport, help to understand and participate in processes etc.

Although we welcome the establishment of the national network of Family Relationship Centres, FSA believes that there are some significant gaps in the network and there will be some areas where families do not have ready access to a Centre, particularly in rural and remote regions. There has been some suggestion that compulsory family dispute resolution may be delivered via teleconference in some cases but this model has not been fully developed and we have some reservations about whether that would be appropriate.

Without adequate safeguards to ensure equity of access to services and supports as well as fairness in relation the impact of the law reform some groups may be inadvertently disadvantaged by this legislation. FSA recommends that a range of safeguards be developed to promote equity and fairness, including:

1. A regime allowing for exemptions from mandatory dispute resolution and court ordered programs where access to appropriate services is compromised;
2. Strategies to address gaps in the service network and provide access to appropriate services for people with specific needs (including related or ancillary support services); and
3. A comprehensive approach to evaluating the impact of law reform with particular emphasis on special needs groups and people living in rural and remote areas. (see Recommendation 9)

Increasing Collaboration

A positive impact of this Bill is that the court and family law professionals will be required to inform parties of non-court based family services. While this has the potential to increase the client loads for service providers in the non-government sector, it signals the potential for greater cooperation between the court, the legal profession and service providers.

The requirement does, however, place a responsibility on the court and family law professionals to become conversant with the range of services available to people and to understand the aims

and target groups for these services. Should this not occur, there is an increased possibility for inappropriate referrals to be made.

Currently, the levels of confidence in, and understanding of, the service providers and their 'products' from sections of the family law system are patchy, with some family law professionals making very few or no referrals to non-court service providers. A comprehensive educational campaign aimed at those working in the family law system is recommended to assist in building confidence and trust in the work of the non-court based services (see Recommendation 7).

There are also a number of developments in the sector including the implementation of the Children's Cases Program and the establishment of the Family Relationship Centres which require new levels of collaboration between practitioners. Some strategies, such as the establishment of family law pathway networks, provide a platform for developing cross-sector relationships but more could be done to monitor and develop the interaction between practitioners including action research and evaluative projects aimed at promoting collaboration.

FSA believes that consultation with the relevant sectors is needed to develop additional strategies to build on existing work and promote collaboration between community based counsellors and dispute resolution practitioners and legal practitioners including Legal Aid, Community Legal Centres and lawyers in private practice with expertise in family law. Strategies may include joint training, regional forums to explore collaborative approaches, participation in evaluating the impact of law reform and cross-sector project delivery (see Recommendation 10).

Recommendations

FSA recommends that:

1. Any proposed accreditation rules for family counsellors and family dispute resolution practitioners be developed in consultation with the sector, whose members have been addressing issues of accreditation for some years.

2. The proposed certificate to be provided by family dispute resolution practitioners relating to attendance at family dispute resolution not include a judgment about the genuineness of a party's effort at resolving the dispute.

3. The Bill include a requirement for rigorous assessment of a family's needs, situation, power bases and capacity to negotiate to be undertaken prior to enforcing mandatory participation in family dispute resolution and prior to discussing specific arrangements for the future.

4. Provisions relating to family violence be re-examined in light of advice provided by expert groups including the Family Law Council and Women's Legal Services Australia to prioritise the need to protect all parties from violence in all decision making.

5. Section 61DA relating to a presumption for shared parental responsibility and all other references in the Bill to 'equal shared parental responsibility' be replaced with the term 'joint parental responsibility'.

6. The requirement for family advisers to specifically inform parents about the possibility of their child spending equal or substantial time with each of them be removed from the Bill and a clause relating to information about a range of options, of which equal or substantial time are but two, be inserted.

7. References to orders made in favour of specific adults in Subsections 64B(6) to 64B(8) be removed from the Bill and replaced with a clause that reiterates that any parenting orders focus on the child's best interests rather than the favour of either parent.

8. A comprehensive educational campaign accompany the implementation of the reforms contained in the Bill, including:

   - Strategies to assist those working in the family law system to build confidence and trust in the work of non-court based family services; and

   - Strategies to ensure that the Australian people understand and accept the changes in terminology relating to children proposed by this Bill.

9. A range of safeguards be developed to promote equity of access to services and fairness in the impact of this legislation, including a regime of exemptions to mandatory processes; mechanisms to ensure that appropriate services are available to those with specific needs and a comprehensive approach to evaluating the impact of reforms.

10. Further consultation with relevant sectors be undertaken to build on existing work and promote collaboration between community based counsellors and dispute resolution practitioners and legal practitioners.