

**Senate Legal and Constitutional Legislation Committee**  
Inquiry into the Family Law Amendment (Shared Parental Responsibility) Bill 2005

Attorney-General's Department

Responses to Questions on Notice

Question 1:

What is the Department's view on the impact of an amendment which changes the presumption from one of 'equal shared parental responsibility' to a presumption of 'joint responsibility'?

The Government believes that the term 'equal shared parental responsibility' more accurately reflects the community view that parents have an equal responsibility to share in major decisions for their children. The Government considers the new wording is clearer than the term 'joint parental responsibility'.

The Government has accepted the bi-partisan recommendations of the House of Representatives Standing Committee of Family and Community Services in the *Every picture tells a story* report and of the House of Representatives Standing Committee on Legal and Constitutional Affairs (the LACA Committee) that the Bill should provide for a presumption of 'equal shared parental responsibility'. These words have been directly endorsed by two Parliamentary Committees having received submissions and oral evidence from thousands of people and organisations.

The Government is aware of concerns that the term 'equal shared parental responsibility' may be thought by some to imply 50/50 time sharing and that use of the term 'equal' may focus people on issues of time rather than sharing in decision making. The note related to section 61DA at item 13 of Schedule 1 of the Bill makes clear that 'equal shared parental responsibility' is about the sharing of major long-term decisions and not time. Further, the Explanatory Memorandum accompanying item 13 of Schedule 1 of the Bill makes clear that equal shared parental responsibility is not a presumption of equal shared parenting time.

Question 2:

The Committee has heard from industry groups concerned about the requirement for family dispute practitioners to **certify whether parties have or have not made a genuine effort** to resolve their dispute, particularly that such a certification requires a subjective judgement by the practitioner which undermines their position of neutrality. **Does the Department have any response to those concerns?**

The requirement to make a genuine effort is designed to ensure that people will not be able to circumvent the aims of the introduction of compulsory dispute resolution by attending a dispute resolution process and making no effort to participate, or approaching the event only as a step in the process of obtaining a court order, rather than using the process as a means to explore alternatives to a court-ordered solution.

In the absence of this provision, there is a real risk that the adversarial culture which these reforms are intended to change will not be diminished. The provision is designed to send a clear signal to parties and their advisers that undertaking a genuine attempt wherever possible to resolve their dispute outside the court system is preferable to having the issues litigated before the court. Without the provision, the focus on parties resolving their disputes outside of the court system will be seriously undermined.

The requirement also reflects current Schedule 1 of the Family Law Rules which requires each party to a case in the Family Court to make a 'genuine effort' to resolve the dispute before starting a case by, among other things, participating in primary dispute resolution.

What constitutes a 'genuine effort' will be assessed by practitioners, in their professional judgment, taking into account the individual circumstances of the case.

#### Question 3:

The Government's amendments to the Bill **remove the term 'having contact'** with a parent in part of proposed paragraph 60CC(3)(e) and **replace it with 'spending time with and communicating'**. However, the paragraph still **retains the phrase 'direct contact'**.

- What does the Department envisage by the term 'direct contact'?
- Are you able to explain to the Committee the rational of removing the phrase 'having contact' on one hand, and retaining 'direct contact' on the other?

#### *The Meaning of 'Direct Contact'*

The Government envisages the term 'direct contact' to mean the one-on-one contact that a child has with a parent. It is a subset of what is envisaged by spending time and communicating with a parent. For example, 'direct contact' would include the child spending actual time with a parent or communicating directly with the parent via the telephone or e-mail. 'Direct contact' would not include messages relayed between the child and parent via a third party. The term 'direct contact' is intended to relate to the quality of the contact as well as the means of contact.

#### *Retaining 'Direct Contact'*

The reference to 'having contact' in paragraph 60CC(3)(c) is replaced by 'spending time with and communicating' by Government amendment 4. This is consistent with Schedule 8 of the Bill which changes the terminology of the *Family Law Act 1975* (the Act) to remove the references to 'residence', 'contact' and 'specific issues orders'.

The phrase 'personal relations and direct contact' comes directly from the current paragraph 68F(2)(d). The Government considers that it is appropriate for the provision to direct attention to the nature of the relationship between a child and parent and the direct nature of the interactions a child has with a parent. In this

context, replacing the reference to contact with an alternate term would be difficult to achieve without putting at risk the intended meaning.

Question 4:

The Committee received a number of submissions concerned with the potential for proposed section 64D, where except in exceptional circumstances, parenting orders can become subject to later parenting plans. **Is the Department satisfied that the proposed amendments to the Bill, which provide that an agreement is not a parenting plan unless it is made free from any threat, duress or coercion,** is sufficient to address concerns that parents might be 'bullied' into an unfavourable parenting plan?

The Government considers that the safeguards contained in the Bill are sufficient to ensure that one parent does not coerce the other parent into agreeing to an unfavourable parenting plan.

It is important for the Government to emphasise that parenting plans are voluntary agreements that can be changed at any time. Parenting plans are an important mechanism to allow parents to come to their own decisions about suitable parenting arrangements without using the court system. They allow for flexibility and recognise that the needs of children change over time.

Parenting plans must be in writing, signed and dated by the parties. This provides clarity about what is a plan. Government amendment 13 makes explicit that parenting plans must be free of any threat, duress or coercion. An additional safeguard is that in 'exceptional cases' the court has the discretion not to include the default provision (that a parenting order will be subject to any subsequent parenting plan) to ensure that the best interests of the child remain paramount. Further Government amendment 14 clarifies that the Government intends 'exceptional' to include:

- circumstances where the court considers that there is a need to protect the child from harm; or
- where there is substantial evidence that one parent is likely to seek to coerce or use duress to gain the agreement of the other parent.

The Government is confident that these measures provide ample scope for courts to manage appropriately cases where there is a risk that a parent could seek to avoid parenting orders being enforceable by pressuring the other party to agree to a parenting plan.

Question 5:

The Women's Legal Services Australia has criticised the manner in which the Family Law Council's recommendations in respect of Division 11 have been modified.

- Could you explain why the FLC recommendations were not accepted in their original form?

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| <ul style="list-style-type: none"><li>• Would you also like to address WLSA's specific concerns in relation to the requirement for new material in proposed paragraph 68R(3)(b)?</li></ul> |
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Division 11 deals with the relationship between orders made under 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 and difficult to understand.

The intention of the amendments contained in the Bill is to make Division 11 clearer and therefore easier to understand by the people who use and implement it, in particular, State and Territory Magistrates making family violence orders. The amendments implement recommendations to simplify and improve the operation of the provisions of Division 11, made by the Family Law Council (the Council) in its letter of advice to the Attorney-General dated 16 November 2004. However, in drafting the amendments it became clear that further simplification was necessary to ensure consistency with other reforms in the Bill.

The primary difficulty with the existing Division is that there are a number of complex definitions including a 'Division 11 contact order' and a 'section 68R contact order'. The Council recommended simplifying the definitions by using a single definition of 'contact order'. The Government did not adopt the terminology of contact as one of the reforms in the Bill is to change the terminology of the Act to remove the references to 'residence' and 'contact' and instead use more family friendly terms such as 'lives with', 'spends time with' and 'communicates with'. The aim of this change in terminology is to focus the courts and parents on parenting as the central issue. The amendments in the Bill simplify the definitions in Division 11 to make them less complex and confusing, as well as ensuring consistency with the Government's other reforms to terminology.

The amendments in the Bill also amend the purposes of Division 11. The Council raised this issue in recommendation 3. The new purposes of Division 11 are to resolve inconsistencies between State and Territory family violence orders and orders under the Act, and to achieve the objects and principles set out in the new section 60B. The objects and principles set out in section 60B include:

- ensuring that the child benefits from a meaningful relationship with both parents, and
- ensuring that the child is protected from physical or psychological harm.

The Government considers it valuable to link the purposes of Division 11 back to these objects, which also mirror the primary considerations that must be considered by a court in determining the best interests of the child.

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 (Government amendment 24). This is a purpose of section 68Q of the existing Act. The Government considers it appropriate to include this purpose to clarify that consideration must be given to the safety of all parties in the application of this division. This amendment responds to

one of the major concerns from the Women's Legal Services Australia (WLSA) about the new Division 11.

Consistent with the Council's recommendation 4, the amendments in the Bill remove the power for a court of a State or Territory to 'make' a parenting order under the Act as part of family violence proceedings. Family violence proceedings often require interim orders made in urgent situations. It is not generally appropriate for such proceedings to lead to the making of parenting orders that require much greater consideration of, for example, the best interests of the child.

*Paragraph 68R(3)(b)*

In relation to the paragraph 68R(3)(b), WLSA raise concerns about the restriction of the power of magistrates who are considering whether to vary or suspend an order for contact to situations where there is material that was not before the court that made the order. WLSA consider the provision to be unnecessary and raise concerns that there is potential for the provision to obscure a long history of family violence which may be very relevant to the decision of the State (or Territory) court.

The intention of the amendment is to ensure that family law contact orders are not circumvented by revisiting the same evidence before a State court. The provision is intended to avoid forum shopping and provide clarity around when a State 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 has before it material that was not before the court that made the order or injunction. In this sense the evidence does not have to relate to instances which occurred after the original order was made. It is appropriate to prevent parties circumventing family law orders by applying to a State court where there is no new evidence of violence or abuse.

Question 6:

Both the Queensland and Western Australian Governments have raised issues regarding the operation of section 69ZW, particularly:

- regarding the time limits for State agencies to provide information; and
- the relationship of section 69ZW with section 91B.

Have you had the opportunity to discuss these issues with the State Governments, or do you intend to look at the issues raised by them?

New section 69ZW gives the court the power to make an order in child-related proceedings requiring a prescribed State or Territory agency to provide the court with documents which contain information about one or more of the following:

- any notifications to the agency of suspected abuse of the child or family violence affecting the child
- any assessments by the agency of investigations into a notification of that kind,
- any reports commissioned by the agency in the course of investigating a notification.

The prescribed agencies will include the child welfare agencies of the States and police departments as they are likely to be the agencies which would conduct investigations and hold reports related to issues of child protection and family violence. They will be prescribed in the *Family Law Regulations 1984*.

Section 69ZW implements recommendation 11 of the LACA Committee. The intention is to ensure that where allegations of violence or abuse are made, the court has as much information as possible relevant to those allegations when making a determination about what is in the best interests of the child.

The Government's intention is that the court take a more direct and inquisitorial role in ensuring that relevant documents or information held by State agencies are before the Court. Providing the court with a direct power to make orders is consistent with less adversarial provisions in Schedule 3 of the Bill.

The Government does not consider that there is any inconsistency between the operation of section 69ZW and section 91B. Section 91B allows the court to request an officer of a State who is responsible for the administration of the laws of that State (for example, the Chief Executive Officer of a State child protection agency) to intervene in proceedings under the Act where the proceedings relate to child welfare. Where an officer intervenes, he or she is deemed to be a party to the proceedings.

The Government does not consider that it is necessary, in every case where the court requests an agency to produce documents or information under section 69ZW, for the Chief Executive Officer of that agency to become a party to the proceedings.

The Government does not consider that the provision will have resource implications for State agencies. The provision does not require agencies to create documents or seek additional information. Much of the information would currently be obtained through the subpoena process.

However, the Government considers it is important to ensure that courts exercising family law jurisdiction are able to compel the same information from all States and Territories in spite of the differences in their child welfare legislation and to allow courts to directly seek this information if parties have not sought to have it made available. This is to ensure the court has as much relevant information as possible when making a determination about what is in the best interests of the child. Given the nature of the allegations and the potential impact on parenting orders that might be made, this is considered appropriate. The Government is happy to further consider and consult with the States about these issues.