

**Human Rights and
Equal Opportunity Commission**

Sex Discrimination Commissioner

27 February 2005

Mr Jonathan Curtis
Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Mr Curtis

Re: Inquiry into the provisions of the Family Law Amendment (Shared Parental Responsibility) Bill 2005

Please find attached a Submission to the Senate Legal and Constitutional Committee's Inquiry into the provisions of the Family Law Amendment (Shared Parental Responsibility) Bill 2005.

HREOC thanks the Committee for opportunity to make this submission and looks forward to your consideration of the matters raised.

Yours sincerely



**Pru Goward
Sex Discrimination Commissioner**

Background

The Human Rights and Equal Opportunity Commission (HREOC) is pleased to make a submission in relation to the provisions of the Family Law Amendment (Shared Parental Responsibility) Bill 2005 and submits this document pursuant to its legislative functions under section 48(1) of the *Sex Discrimination Act 1984* (the Sex Discrimination Act) and sections 11(1) and 31 of the *Human Rights and Equal Opportunity Commission Act 1986* (HREOCA).

HREOCA and the Sex Discrimination Act give HREOC responsibility in relation to a number of human rights instruments ratified by Australia including:

- The International Covenant on Civil and Political Rights (ICCPR).
- Convention on the Rights of the Child (CROC) and the Declaration of the Rights of the Child
- Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)

The ICCPR imposes obligations upon Australia to:

- protect the rights of children to such measures of protection as are required by their status as minors on the part of the child's family, society and the State;¹ and
- provide for the "necessary protection" of children upon the dissolution of marriage.²

The key principles in CROC are:

- the right to survival and development
- respect for the best interests of the child as a primary consideration
- the right of all children to express their views freely on all matters affecting them
- the right of all children to enjoy all the rights of the Convention without discrimination of any kind.

The preamble to CROC recognises the family:

"...as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities in the community".

Relevantly article 18 of CROC requires Australia to take all appropriate measures to:

¹ Article 24(1) of the ICCPR.

² Article 23(4) of the ICCPR.

“...ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of children”;³ and

“...render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities”.⁴

Further, articles 9(1) and 9(3) of CROC make more specific provision regarding circumstances in which parents are separating.

“9(1) States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child’s place of residence.”

“9(3) States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.”

Australia ratified CEDAW on 28 July 1983. The preamble to CEDAW recognises that the:

“...upbringing of children requires a sharing of responsibility between men and women and society as a whole’ and that ‘a change in the traditional role of women in society and in the family is needed to achieve full equality between men and women”.

Relevantly the operative provisions of CEDAW require Australia to take all appropriate measures to:

“...ensure that family education includes the recognition of the ‘common responsibility of men and women in the upbringing and development’ of their children”;⁵

The Committee on the Status of Women states that:

“Women, as well as children, have particular rights, under international law, to protection from violence, in recognition of their ongoing history as victims of physical, sexual and emotional violence”.⁶

HREOC has conducted a range of legal and policy work in the areas of children’s rights and gender equality. Some of these activities are noted at Annexure 1.

3 See art 18(1).

4 See art 18 (2).

5 See art 5(b).

6 See Committee on the Status of Women General Recommendation No. 19 (11th session, 1992) *Violence against women*, discussing CEDAW Art 1.

Overview of HREOC's recommendations on the Family Law Amendment (Shared Parental Responsibility) Bill 2005

HREOC is in regular contact with members of the public and community organisations expressing concern about aspects of the family law and child support system. HREOC understands that these are difficult areas of law and public policy in which it will always be difficult to find a balance between the needs and perspectives of different groups.

While all would agree that the best interests of the child should be the paramount consideration in all family law matters dealing with children, there will continue to be differences in how those best interests are perceived.

HREOC recognises that the Family Court deals with the most difficult and contested cases of family breakup in our community in which it is often difficult to deliver an outcome that satisfies all parties. Nevertheless, the Family Court must deal with families as it finds them – families in crisis and often dealing with violence. The Court must also deal with families that very often conform to the traditional male breadwinner/female carer family model and that are attempting to come to terms with the need to restructure their relationships during times of often high trauma.

Given the difficult context in which the Family Court works, in general terms, HREOC is pleased to see that changes proposed in this Bill make a real attempt to strike an appropriate balance between the disparate matters that the Court should consider in performing its functions.

However, HREOC would like to raise concerns with a number of particular aspects of the Bill that could be better formulated and which would better serve the interests of children and better facilitate equality between men and women.

In particular, HREOC is concerned about:

- the division of considerations for determining the best interests of the child into primary and secondary considerations in proposed section 60CC(2);
- the amendments to the definitions of family violence and abuse;
- the failure to include a reference to a same sex parent in the definition of a relative in subsection 4(1).

Best interests of the child

In 1997, HREOC, along with the Australian Law Reform Commission (ALRC), produced a report of the comprehensive analysis of children and the Australian legal system: *Seen and Heard: Priority for children in the legal process*.⁷ That report considered, among many other topics, how the representation of children before Australian courts and tribunals could become more consistent with the requirements of CROC.

⁷ *Report of the National Inquiry into Children and the Legal Process* ALRC Sydney 1997.

Article 12 of CROC sets out the child's right to participate in judicial and administrative proceedings. It requires that a child capable of forming his or her own views has the right to express those views freely in all matters affecting the child and that they be given due weight in accordance with the child's age and maturity. Further, it requires that the child be provided with the opportunity to be heard in any judicial and administrative proceedings affecting the child - this being either directly or through a representative or appropriate body.

The Inquiry was told that about 70 per cent of children over the age of about 12 with a separate representative in family law matters express wishes as to the outcome of a matter. In most cases those wishes are sufficiently developed for them to form the basis of submissions on the best interests of the child.⁸

HREOC notes that the primary considerations of the best interests of the child established in new section 60CC(2) of the Bill are, equally:

- the benefit to the child of having a meaningful relationship with both the child's parents; and
- the protection of the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

The explanatory memorandum to the Bill indicates that the safety of the child is not intended to be subordinate to the child's meaningful relationship with both parents.⁹ The views expressed by the child are listed in new section 60CC(3)(a) of the Bill as an additional consideration.

The proposed amendments therefore add a new consideration and elevate the need to protect the child from harm to a primary consideration, and this is to be commended. However, HREOC is disappointed that the views of the child are now given only secondary weight, notwithstanding that the explanatory memorandum to the Bill indicates that in some situations the secondary considerations may outweigh the primary considerations.¹⁰

Recommendation: HREOC recommends that either the list of matters to be considered in deciding on the best interests of the child all be given equal weight, as in the current Act, or that the views of the child be included as a third primary consideration of the child's best interest in new section 60CC(2). If the division into primary and secondary considerations is to be retained, then HREOC recommends that the note in the explanatory memorandum that in certain circumstances the secondary considerations may be given greater weight

8 Submissions to the National Inquiry into Children and the Legal Process from J Ryan, NSW Legal Aid Commission, 11 November 1996 and D Smith (Judicial Registrar, Family Court of Australia) and J Rimmer, 2 August 1996: Australian Law Reform Commission and Human Rights and Equal Opportunity Commission *Seen and Heard: Priority for children in the legal process* (Report of the National Inquiry into Children and the Legal Process) ALRC Sydney 1997.

9 Parliament of the Commonwealth of Australia *Family Law Amendment (Shared Parental Responsibility) Bill 2005 Explanatory Memorandum* p13.

10 Parliament of the Commonwealth of Australia *Family Law Amendment (Shared Parental Responsibility) Bill 2005 Explanatory Memorandum* p13.

than the primary considerations should be included in the Bill as a note following the subsection.

Safety during separation

HREOC commends the Government's clear aim in this Bill to protect children and separating partners from violence. However HREOC is concerned that the Bill could go further in protecting family members from violence.

Domestic and family violence continues to be a concern in Australia, and this is particularly so in the context of family breakdown. The last national Australian Bureau of Statistics (ABS) Women's Safety Survey in 1996 determined that at least 23 per cent of women had experienced domestic or family violence.¹¹ A quarter of intimate partner homicides occur between separated, divorced or former couples. Recent research in NSW reports that family breakdown was a precipitating factor in almost 20 per cent of child homicides.¹² Similarly, North American research shows that the risks of non-lethal and lethal violence are highest for women when they are leaving the male partners with whom they have been living in an intimate relationship.¹³

Violence and safety concerns are key reasons many women and children enter the Family Court. A 2003 Family Court survey showed that over 66 per cent of cases that reach the final stage of judgment in the Family Court contain issues of serious physical domestic violence.¹⁴

HREOC is well aware of the concerns of some individuals and community organisations that false allegations of family violence are regularly made. For example, in its submission to a review of legislation regarding protection orders, the Lone Fathers' Association states that protection orders "are employed as a routine separation procedure" by women to force their husbands out of their homes, without any violence having occurred, "and/or as a vindictive retaliatory act".¹⁵

HREOC would caution against accepting this contention uncritically. There is no doubt that Family Court proceedings often are accompanied by allegations of domestic violence and the use of protection orders. However, this may reflect the fact

11 ABS Women's Safety Australia, 1996 Cat No. 4128.0 December 1996. That survey did not include data on violence against men, but the 2005 Personal Safety Survey, to be released later this year, will do so.

12 Jenny Louzos and Catherine Rushforth *Family Homicide in Australia* Australian Institute of Criminology Trends and Issues in Crime and Criminal Justice No 255 June 2003 pp2-4. In addition, one quarter of Australian children have witnessed or experienced acts of violence against their mother or stepmother: David Indermauer *Young Australians and Domestic Violence* Trends and Issues in Crime and Criminal Justice No 195 Australian Institute Of Criminology 2001 p1.

13 Walter S DeKeseredy, Mckenzie Rogness and Martin D Schwartz 2004 "Separation/divorce sexual assault: The current state of social scientific knowledge" *Aggression and Violent Behavior* 9 pp 675-691 at p 677.

14 Submission of The Family Court of Australia: Part B Statistical Analysis, to the House of Representatives Inquiry into Child Custody Arrangements, February 2004.

15 Lone Fathers' Association *Protection orders legislation review (ACT) Discussion Paper: Comments* by Lone Fathers Association (Australia) Inc Canberra 2004 pp 11 and 38.

that domestic violence often escalates when couples separate. Australian data demonstrate that women are as likely to experience violence by previous partners as by current partners and that it is the time around and after separation which is most dangerous for women.¹⁶

It should be noted that a significant number of cases before the Family Court involving violence do not include prior Apprehended Violence Orders (AVOs). In a study of 176 files in which children's matters were contested, 95 of the files (54 per cent) included evidence of domestic violence. However, AVOs had not been obtained in over a third of these cases.¹⁷ It is further noted that in only three per cent of the intimate partner homicides each year was there an AVO in place and only in one quarter was there evidence of a reported history of domestic violence.¹⁸

The weight of this research suggests that women going through Family Court proceedings and living with domestic violence do not routinely take out protection orders. It does not support the contention that women who do not suffer from domestic violence routinely abuse the Court's processes by applying for AVOs on specious grounds.

In this regard, then, HREOC is pleased to see that:

- mandatory family dispute resolution is not required where there are reasonable grounds to believe that the child has been abused or is at risk of abuse, or where there has been family violence or there is a risk of family violence by one of the parties under new subsection 60I(9)(b);
- the presumption in favour of shared parental responsibility does not apply where there are reasonable grounds to believe that a parent of the child has engaged in abuse or family violence under new subsection 61DA(2).

However, HREOC has some concerns about the amendments to the definition of family violence in the Bill. The new definition proposed in section 4(1) applies an objective test to the definition of family violence that is not included in the current definition of family violence in section 60D.

The current section 60D provides:

family violence means conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person's family that causes that or any other member of the person's family to fear for, or to be apprehensive about, his or her personal well being or safety.

The proposed section 4(1) provides:

family violence means conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person's family that

16 ABS Women's Safety Australia, 1996 Cat No. 4128.0 December 1996 p 8.

17 Angela Melville and Rosemary Hunter "'As everybody knows': Countering myths of gender bias in family law" *Griffith Law Review* 10(1) 2001 pp124-138 at pp127-128.

18 Jenny Mouzos *Homicidal Encounters: A Study of Homicide in Australia* 1989-1999 Research and Public Policy Series No. 28 Australian Institute of Criminology 2000 p xxii.

causes that or any other member of the person's family reasonably to fear for, or reasonably to be apprehensive about, his or her personal wellbeing or safety.

HREOC's concern is not that the law should countenance unreasonable allegations of violence, but that 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.

This particularly applies to cases involving sexual assault. For example the ABS crime survey has estimated that only 28 per cent of female victims of assault and 20 per cent of female victims of sexual assault in Australia report the incident to police.¹⁹

Further, this requirement imposes a higher threshold for evidence, or apprehension, of violence than exists in some State and Territory legislation dealing with AVOs. This may well make it difficult to provide "reasonable grounds" for violence or the risk of violence even where an AVO is in place. It also places the Family Court in the position of re-trying the original application for an AVO, made under State or Territory law.

HREOC recognises that this is a very difficult area in which to find an appropriate balance between the interests of the parties, and that the Court may be required to decide only between the conflicting evidence of the parties. The definition of violence in the Bill may dissuade victims of violence from raising allegations of violence, and mean that inappropriate orders are made by the Family Court.

***Recommendation:* HREOC notes that the Australian Institute of Family Studies is to undertake a review of how allegations of family violence and child abuse are raised and addressed in the family law system.²⁰ HREOC recommends that the current definitions in the Act of violence and abuse remain be retained pending the outcome of that review.**

***Recommendation:* Additionally, and particularly if the proposed amendments are not accepted, special attention should be given to ensuring that staff of the new Family Relationship Centres are given highly specialised training on detecting and responding to signs of family violence and abuse in cases where allegations have not been made.**

Further, proposed section 63DA sets out an extensive list of obligations that must be complied with by "advisors" in relation to parenting advice or assistance. When giving advice, a practitioner must inform the client that they should consider entering into a parenting plan and provide them with information as to where they could obtain further assistance with developing the plan. He or she must also inform the client that all decisions made in the course of developing such a plan should be in the best interests of the child.

¹⁹ ABS Crime and Safety, Australia April 2002 Cat No 4509.0 June 2003.

²⁰ The Hon Philip Ruddock MP "Government launches Family Law Violence Strategy" Media Release 24 February 2006.

The proposed section does not address those cases where family violence or child abuse are involved. This raises some concern in relation to the advice provided by practitioners acting for victims of violence, as to how to address this requirement.

Recommendation: HREOC recommends that proposed section 63DA include a provision that the advisor must also explain the procedures that are to be followed in relation to parenting plans where allegations of violence or abuse have been made.

Caring arrangements in intact and separated families

The impact of divorce and arrangements for children after separation are different for men and women and in many ways reinforce gender stereotypes to the cost of both. For women, who generally continue to bear responsibility for the unpaid domestic and caring work whatever their level of engagement with paid work, separation often leads to poverty and long term economic insecurity. Men do the majority of paid work in Australian families after the arrival of children, and for these men, the greatest effect of separation is often felt on their relationships with their children. On divorce, many male breadwinners feel punished for taking that role.

HREOC considers that the Family Court must be very careful not to entrench stereotypical family models that are not appropriate in the case of a particular family. Doing so may well condemn men and women to their separate disadvantages.

On the other hand, the Family Court cannot be considered an appropriate forum singlehandedly to reshape family arrangements towards a model of greater shared care where this has not been the experience of the family before separation.

In many cases before the Family Court there is little choice for the Court to award equal time with children to fathers, given that it is mothers who have usually been the main carer prior to separation.

Nevertheless, the Family Court can play a part in developing norms of better sharing of care for children in intact families and following separation. In this regard, HREOC is pleased to note that the Bill provides that the best interests of the child are met by, among other factors, ensuring that parents fulfil their duties and meet their responsibilities concerning the care, welfare and development of their children.

HREOC also welcomes the requirement that the Court consider the extent to which each of the child's parents has taken or failed to take the opportunity to spend time with the child, communicate with the child and participate in decision making about major long term issues in relation to the child (new subsection 60CC(4)). This should not be considered to be punitive of breadwinner parents who have had less time to spend directly caring for their children, but it is to be hoped that it will contribute to the development of a shared care norm in Australian families.

Further attention is required, however, if the current disadvantage faced by breadwinner parents engaging more directly with their children is to be addressed.

While it is outside of the scope of this Inquiry, Senators should be aware that in order to encourage fathers to be strong role models and active carers of children, it is critical that attention be given to implementing laws and policies that allow fathers time with their children well before relationship breakdown. It is unfair to expect fathers to play a significant and ongoing role in their children's lives without considering the factors that prevent or permit such involvement. HREOC will release the final paper from the *Striking the Balance* project in the next few months and would encourage Senators to give serious consideration to the recommendations of this project.

Other Issues

HREOC is pleased to support the amendments in new subsection 60B(2)(b) which establish a specific right of children to spend regular time with grandparents and other relatives with an important role in the child's life.

HREOC also supports the amendments in new subsection 60B(2)(e) and 60B(3) which require that the Court consider the child's right to enjoy their culture with others who share that culture and to maintain a connection with and a positive appreciation of that culture.

Changing attitudes to same sex parenting is demonstrated by the approach of the Family Court of Australia which has refused to regard sexual orientation of parents as a disqualifying factor and shown a readiness to recognise that the best interests of a child can be served by making parenting (including residence) orders in favour of same sex couples.²¹

The ABS Census in 1996 and 2001 examined same sex couple and their families. The 2001 census identified 11 000 male same-sex couples and 9 000 female same-sex couples in Australia. Nationally, same-sex couple families represented 0.1 per cent of couples with children and one per cent of couples without children, or 0.5 per cent of all couple families. Almost 20 per cent of lesbian couples had children and around five per cent of male same sex couples.²²

Australia has responsibilities in international law to remove discrimination against people on the basis of their sexual preference. Article 2 of the International Covenant on Civil and Political Rights states that the rights recognised in the Covenant should be available to all individuals equally, not depending on the status of the individual.²³

21 The leading Australian family law case involving a lesbian mother was decided some 20 years ago. In *In the Marriage of L and L Baker J* granted custody (as it was then called) of the four children of the marriage to the wife, who was living in a lesbian relationship. The wife's sexual preference was a matter of concern for Baker J yet he held 'I am firmly of the view that her proclivity in this regard is not and cannot be, *per se*, a disqualifying factor against her': (1983) FLC 91-353 at 78,366.

22 Feature Article: Same Sex Couple Families: ABS *Year Book Australia* 2005 Cat No. 1301.0.

23 See also First Optional Protocol to the International Covenant on Civil and Political Rights.

It should also be noted that a number of States have in recent years amended legislation to recognise the children and the nature of the parental relationship with respect to same sex couples.²⁴

A non-biological parent does not automatically have parental responsibility under the Family Law Act. This means a non-biological parent does not have the same legal capacity to make decisions and give legal authorisation as a biological or adoptive parent does. However the same sex partner of a biological parent can apply to the Family Court for an order that shares or specifies parental responsibility between the couple. This can happen during the relationship or, if the relationship breaks down, after the couple separates.

Recommendation: HREOC recommends that the parental rights and responsibilities of non-biological parents in same sex relationships be recognised by adding a reference to a same sex parent into the definition of a relative in subsection 4(1). This could be done through a definition such as that in the *WA Artificial Conception Act 1985*.²⁵

Further Information

HREOC thanks the Committee for the opportunity to make this submission and would be happy to discuss these matters further.

Please feel free to contact Sally Moyle, Director of the Sex Discrimination Unit on (02) 9284-9600 should you require any further clarification on these matters or wish to take the opportunity to discuss this submission further.

24 In the ACT, WA and Tasmania same sex partners are currently permitted to adopt a child of their partner who is a biological or single adoptive parent and Victoria has recently proposed similar changes to adoption laws.

25 WA legislation automatically defines a non-biological mother as a parent if a child is born to her as a result of assisted reproductive technology (s6A *WA Artificial Conception Act 1985*) and permits same sex parent adoption in other circumstances (s67 *WA Adoption Act 1994*).

Annexure 1

HREOC's activities in relation to the rights of the child and gender equality

In children's rights HREOC has conducted a range of activities encouraging compliance with the CROC and promoting the interests of children. These activities include:

- producing, with the Australian Law Reform Commission (ALRC), a comprehensive analysis of children and the Australian legal system: *Seen and Heard: Priority for children in the legal process* (Report of the National Inquiry into Children and the Legal Process ALRC Sydney 1997);
- conducting an *Inquiry into Rural and Remote Education* focusing on the human rights provisions relevant to rural and remote school education;
- preparing a publication outlining the best interests of the child under international law;
- intervening in cases on the Convention of the Rights of the Child and its application in Australia: *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 and *In the matter of B and B: Family Law Reform Act 1995* (1997) 21 Fam LR 676; and
- making a submission to the House of Representatives Standing Committee on Family and Community Affairs Inquiry into child custody arrangements in the event of family separation in August 2003.

HREOC has also undertaken a wide range of activities aimed at encouraging equality between men and women, particularly in relation to employment and family responsibilities, and encouraging Australia's compliance with its international human rights obligations. These activities include:

- publishing a discussion paper *Striking the Balance: Women, men work and family* in June 2005 exploring both women's and men's choices for balancing their competing work and family responsibilities.
- on reference from the Attorney-General, undertaking a National Inquiry into Pregnancy and Work involving extensive consultation and research which resulted in the publication of the Commission Report entitled *Pregnant and Productive: It's a right not a privilege to work while pregnant*, 1999 and the publication of guidelines advising employers and employees of their rights and responsibilities in relation to pregnancy in the workplace entitled *Pregnancy Guidelines* 2001;
- preparing and distributing an information package entitled *Woman of the World - Know your international human rights and how to use them* 2001;

- intervening in matters before the Australian Industrial Relations Commission, the NSW Industrial Relations Commission and the High Court, and appearing as amicus curiae in the Federal Magistrates Service and Federal Court regarding issues of equality between men and women;
- preparing guidelines on pay equity issues, sexual harassment and enterprise bargaining;
- the publication of a discussion paper and final paper on paid maternity leave entitled respectively *Valuing Parenthood, Options for paid maternity leave: Interim paper*, 2002 and *A Time to Value: Proposal for a national paid maternity leave scheme* 2002; and
- in November 2005 making a submission to the Senate Community Affairs Legislation Committee Inquiry on the Employment and Workplace Relations Legislation Amendment (Welfare to work and other Measures) Bill 2005 and the Family and Community Services Amendment (Welfare to Work) Bill 2005 particularly focusing on the issue of welfare payments and job search requirements for sole parents.

Complaints

While complaints about family law are outside the jurisdiction of HREOC, as the federal complaint handling body in respect of complaints of unlawful discrimination under the Sex Discrimination Act in particular, HREOC receives regular correspondence about perceived injustices in the family law system. Such complaints assist in giving the Sex Discrimination Commissioner a picture of areas in which current family law arrangements are particularly fraught.