

Relationships Australia

NATIONAL OFFICE

27 February 2006

Mr Curtis
The Secretary
House of Representatives
Standing Committee on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

Dear Mr Curtis

Response to Inquiry into the *Family Law Amendment (Shared Parental Responsibility) Bill 2005*

Thank you for your letter dated 10 February 2006 inviting Relationships Australia to make a submission to the parliamentary inquiry into the *Family Law Amendment (Shared Parental Responsibility) Bill 2005*.

In response to matters arising, we draw your attention to the following issues.

Schedule 1 - Shared Parental Responsibility

Relationships Australia acknowledges that the concept has moved from a 'presumption of equal time' to a presumption of 'equal shared parenting responsibility. However, we are concerned that with a starting point of a child spending 'equal time or substantial and significant time with each parent' (Section 65AA). this will be a de facto presumption of equal time. Relationships Australia has in previous submission set out our reasons why this is of concern. Please refer to our earlier submissions for details of our reasons.

Relationships Australia strongly support 'shared or joint parental responsibility' in preference to 'equal' responsibility.

We strongly support the focus on a child's best interests and the importance of the child having meaningful relationships with both parents and being protected from harm.

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Our long and extensive experience in the field indicates that even in functioning families children do not have equal time with each parent. To provide flexibility and allow for the needs of contemporary Australian families, we suggest that it may not be practical for a child to have equal time with each parent and that 'quality time' does not equate with 'equal time'.

Child's Best Interests

We have some comments to make about specific subsections of 60CC:

- The wording of 3(d) in the event of an order being made may result in a separation not being considered.
- The wording in 3(e) "personal relations and direct contact" is unclear and does not reflect communications technology. For example, would a video link or telephone conversation with a parent be considered a "personal" or "direct" contact? Is it the intention that these be considered as such?
- With respect to 'consent orders' in 5 if a child's best interest is accepted as a paramount consideration in "making" parenting orders it should also be paramount in consent orders and this surely puts an obligation on the courts to consider the same matters when the orders are with consent.

Obligation of Advisers

We are concerned about the requirement that an adviser (including family counsellors or family dispute resolution practitioners) must inform parents that they could consider an option of spending equal time with both parents in developing parent plans. (63DA).

Relationships Australia does not support this requirement as it firmly frames the discussion around parental rights rather than focussing on the child. Child focussed mediation centres the discussion around the needs of the child as described by both parents. Child focussed practice is required as a minimum standard for organisations receiving funding under the Family Relationships Services Program. The research has shown child focussed, and child inclusive mediation, to be highly effective in assisting parents move to resolution in understanding their child's needs and in developing parenting plans.

In addition, this obligation is at odds with allowing the adviser to be impartial. It is this impartiality that gives the process strength and credibility to the parties involved. Advisers are skilled at drawing out options within the discussion without making specific suggestions. The option referred to in this section would not be treated any differently.

Furthermore, subsections (2 (c), (e) (f) (h)) indicate that the adviser may be/is required to refer to subsection references when giving advice to parents. This is highly inappropriate for cases where the advisor is not a lawyer and inappropriate as the section numbers have no relevance to clients being advised and may interfere

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with the capacity to take in advice which is intended to focus on the children's best interest as opposed to a legal obligation.

As such, we believe it would be a backward step to move to 'rights based' discussions and would not be compatible with the government's overall view of changing the culture to a less adversarial one.

Relationships Australia recommends the removal of the Clause 63 DA (2) and (3) and this be replaced with the notion that advisers can give information regarding various options (for example, hand outs on options to consider along with handouts on childhood development, names of lawyers, child support issues, etc).

Certificates

Relationships Australia supports the use of the certificates advising attendance and non attendance.

However, whilst we appreciate the difficulty in identifying parental party commitment to dispute resolution, we are concerned about the use of the 'genuine effort' and that family counsellors and family dispute resolution practitioners will need to identify a parent's 'genuine effort' in engaging in the process. This could result in a subjective decision being made about a parent's capacity to engage in a process at a time of considerable personal turmoil. This identification may jeopardise future deliberations for parents and may not take into account changes in responsiveness that may occur at a later time.

Therefore, we recommend that 60l(8) be amended to remove consideration of 'genuine effort'.

Given the focus of the Family Relationship Centres (FRCs) working closely with the legal and court system, Relationships Australia considers that the removal of immunity for family dispute resolution practitioners may create a gap between the FRCs and their legal colleagues. The successful roll out of the FRCs will be dependent upon the development of strong collaborative partnerships using open channels of communication between the FRCs and relevant legal bodies. In particular we note that family dispute resolution practitioners will be required to file certificates with an application for a Part VII parenting order, which implies a considerable link with legal proceedings.

Services to Indigenous and Rural, Remote and Regional clients

Relationships Australia strongly supports measures to address issues Indigenous communities face and commends the inclusion of such measures. We have also had considerable experience in assisting clients in rural, remote and regional areas and suggest that consideration of appropriate service provisions is needed in meeting the complexity of diverse needs of clients in very remote areas.

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False Allegations

Relationships Australia is concerned about the expectation that there will be ‘false allegations’ about family violence made in relation to parenting arrangements and that an expectation of false allegations may distort how family violence issues are addressed. We acknowledge that false allegations may happen, but there seems to be limited evidence of how many allegations occur and this is a concern. This matter, and the matter of false denials needs to be carefully analysed and considered as it may jeopardise counselling processes.

We welcome the study on family violence being undertaken by the Australian Institute of Family Studies as part of the Government’s Family Violence Strategy.

We recommend that the findings of this research be used to further amend this legislation.

Schedule 3 - Child related proceedings

Representation / evidence of children

Relationships Australia strongly supports child inclusive practices and applauds the consideration of children’s views in developing parenting orders and notes that children are not required to express a view (60CE). We also note that ‘evidence of representation by a child about a matter that is relevant to the welfare of the child or another child....is not inadmissible.....’ (69ZV) and that the courts will give weight as it think fit. The focus on child inclusive practices is to be commended.

Schedule 4 - Dispute Resolution

Accreditation

Relationships Australia welcomes the inclusion of the accreditation rules and regulations and agrees about the important of establishing standards for family counsellors and family dispute resolution practitioners. Of specific interest is how private practitioners are to be accredited, how standards will be met and who will monitor compliance. We are very keen to assist the Government in developing the rules, regulations and guidelines and look forward to working with the Government on this. We are involved in the project on practitioner competencies being managed by the Attorney-General’s Department.

The accreditation standards will be a critical determinant of the successful application of the reforms. While bodies like NADRAC and the Family Law Council should be consulted, existing organisations that have provided mediation for many years (over 20 years experience in many cases) are in a significant position to provide advice regarding the necessary training and skills required. While there is a general consultative process taking place, there appears to be no formal consultation with experienced service providers. We recommend that there be on-going consultation with the sector.

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If a family dispute resolution practitioner is to be expected to give advice with regard to parenting matters and remain impartial / neutral, they will require high-level skills in dispute resolution, child development etc. The shift towards compulsory dispute resolution and the removal of privileged processes from the court system will increase the complexity (degree of conflict) of cases presenting to community mediators.

Defining roles

In relation to the family counsellor and family dispute resolution practitioners roles we note their key activity is to 'help' families by providing information which has been defined by NADRAC and the Family Law Council as a 'facilitative role'. This information giving role is very different to the 'advisory' role of the court based family consultant. However, in Schedule 1 63DA (5) an 'adviser' includes:

- (a) a legal practitioner; or
- (b) a family counsellor; or
- (c) a family dispute resolution practitioner; or
- (d) a family consultant.

There is a lack of clarity around the use of the term 'adviser' when the functions of the above roles vary so greatly and especially with respect to the issue of immunity.

Relationships Australia is concerned that the role and functions of family dispute resolution practitioners needs to be clearly articulated in the legislation and that accreditation standards accurately reflect the skills required to carry out these functions.

Immunity

Relationships Australia notes the removal of immunity for non-court based services provided by 'family dispute resolution practitioners' and that 'arbitrators' have the same immunity as a judge.

The November 2005 letter from the National Alternative Dispute Resolution Advisory Council (NADRAC) and the Family Law Council to the Attorney-General advised that the mediation role undertaken by a family counsellor or family dispute resolution practitioner is a *facilitative*, not an *advisory* role and thus 'it is likely to be difficult to establish that loss has been caused as a consequence of a mediator's conduct'.

NADRAC also correctly advise that organisations offering mediation would already have insurance to cover liability. However, for community organisations providing a range of associated services, the loss of immunity for 'family dispute resolution practitioners' is likely to lead to increased cost of insurance to cover appropriate liability requirements. This may also impact on the Government's Family Relationship Services Programme as additional insurance cover may be required.

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In the discussion earlier regarding certificates advisers may be particularly cautious about providing subjective comment (genuine effort) with this immunity provisions being dropped. Some training for advisers who currently have this immunity would be useful in the transition period to assist with understanding impacts of this the cultural change.

Confidentiality

In view of the removal of immunity for family dispute resolution practitioners, we note the importance of confidentiality for family dispute resolution practitioners and the provision of confidentiality being extended to family counsellors. While there is no suggestion to remove section 19N from the Act, which Relationships Australia is very pleased about, the proposed amendments in 10H significantly threaten the confidentiality of mediation.

We support the concept of disclosure between practitioners and relevant referring agencies with the agreement of both parties as this will in theory allow normally confidential information to be "moved" with the client. In practice we strongly recommend that protocols be developed in conjunction with the sector to ensure the integrity of this concept.

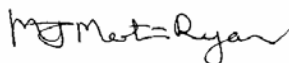
However, we are cautious about removing confidentiality, without the agreement of both parties, for a lawyer representing the child's interest in Section 10H (4) (f), thus negating the confidentiality of the mediation process. We recommend that parties' agreement also be required in this instance.

Sections 10E (4) and 10J (4) place an obligation on counsellors and family dispute resolution practitioners who refer to professionals to inform the professional of the effect of these sections. This does not seem to be an appropriate obligation to place on non legal service providers.

Given the high skill level required for family counsellors and dispute resolution practitioners we strongly recommend that both be able to disclose information (other than personal information within the meaning of Section 6 the Privacy Act 1998) for clinical supervision purposes. Supervision is an integral part of best practice for practitioners.

If you have any questions about the submission or require additional information, please do not hesitate to contact me on (02) 6285 4466 or via email mmertin-ryan@relationships.com.au.

Yours sincerely



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Relationships Australia Inc.

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