

Our Ref: FAM:MAP2006
Direct Line: 9926 0212
Your Ref: Jonathan Curtis

27 February 2006

Jonathan Curtis
Committee Secretary
Legal and Constitutional Legislation Committee
Parliament House
CANBERRA ACT 2600

Dear Mr Curtis,

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

I refer to your email dated 10 February 2006 and enclose a submission of the Family Issues Committee of the Law Society of New South Wales.

Thank you for the opportunity to comment on this important Bill and for allowing an extension of time in which to respond.

Would you kindly advise whether you would have any objection to publication of the submission by the Society on its website for the information of members?

For anything further, please contact Maryanne Plastiras, Responsible Legal Officer of the Family Issues Committee on 9926 0212 or by email at map@lawsocnsw.asn.au.

Yours faithfully

June McPhie
President

SENATE LEGAL & CONSTITUTIONAL AFFAIRS COMMITTEE

Family Law Amendment (Shared Parental Responsibility) Bill 2005

Introduction

The Family Issues Committee of the Law Society of NSW (called 'the Committee') is pleased to accept the invitation to make a written submission to the Senate Legal & Constitutional Affairs Committee for the purpose of its enquiry into the Family Law Amendment (Shared Parental Responsibility) Bill 2005 (called 'The Bill').

The Family Issues Committee comprises New South Wales solicitors who have extensive experience and expertise in the practice of Family Law.

The Committee has already made a written submission to the House of Representatives Legal and Constitutional Affairs Committee, and Dr Altobelli appeared on its behalf at the House of Representatives' Sydney Inquiry in July 2005. It is not intended in this document to repeat matters previously raised. Instead, this submission will primarily focus on concerns held by the Family Issues Committee in relation to changes in the current iteration of the Bill as compared to the Exposure Draft of the Bill.

The Family Issues Committee expresses its support in general terms, for the entirety of the Bill and its objects. The Committee's concerns arise in discrete areas of the Bill, particular as regards potential unintended consequences.

Schedule 1 – Share Parental Responsibility

Definition of 'family violence' proposed in section 4(1)

The introduction of the notion of 'reasonableness' in this definition seems, *prima facie*, to be quite innocuous and justifiable. After all, how can the introduction of an objective factor in the context of family violence be a bad thing? And yet, on closer scrutiny, it is actually quite disconcerting. This is because of the nature of family violence itself. Family violence is complex. In all but the simple cases family violence is not just an action, it is a course of actions. It is not just an event, it is a progression of events. Family violence often follows a complex cycle. Therefore, to treat family violence in a mono-dimensional manner in legislation is to treat family violence in an extremely simplistic manner, which is potentially dangerous and disempowering to the victims and survivors of violence.

For example, consider the notion of 'time' in the context of family violence. A menacing stare at a particular point in time is clearly "conduct..towards..a member of the person's family" that might cause that person to fear or be apprehensive about their "personal well being or safety". The Family Issues Committee's concern is that the introduction of 'reasonableness' will lead to decisions on whether conduct amounts to family violence by reference to that particular point in time, rather than to a period of time preceding it. The victims and survivors of long-term relationships of

fear and apprehension often have lived in the shadow of *threatened* violence due to actual violence perpetrated in the past. Thus, if for example actual violence was perpetrated 5 years ago, will the menacing stare 5 days ago justify a 'reasonable' fear today? If family violence is treated in a mono-dimensional fashion (eg as an event rather than as a complex progression of inter-related events), it is quite likely that the fear will not be found to be 'reasonable' and so there will be no family violence.

The Family Issues Committee recognises but rejects the argument in favour of the introduction of the notion of reasonableness in that this would bring the *Family Law Act* into line with state domestic violence laws. Indeed, the argument based on similarity to state legislation is quite misleading. Part 15A of the *Crimes Act 1900* (NSW) sets out the legislative scheme for apprehended domestic violence orders (ADVOs). In empowering a Court to make an ADVO section 562AE requires "reasonable grounds to fear" certain conduct including violence, harassment, molestation, intimidation or stalking. However, the definition of intimidation in section 562A(2) explains that "a Court may have regard to any pattern of violence in the person's behaviour" in determining whether conduct amounts to intimidation. Thus the 'menacing stare' referred to in the example above is clearly intimidation that can be protected by ADVO under the *Crimes Act* (NSW), but the same menacing stare is not necessarily family violence for the purposes of the Bill. The Bill treats family violence as a single event, but the *Crimes Act* regards it as a complex progression of inter-related events over a period of time.

Proposed amendments to section 60CC

The proposed section 60CC(4), which effectively builds on the foundations created by section 60CC(3)(c) and (i), may have the unintended consequence of actually generating more acrimonious disputation and litigation between parents.

These provisions, cumulatively, tend to make section 60CC adult-centric rather than child-centric. In this regard a child-centric provision is one that looks at considerations that relate to the child *directly* (eg any views expressed by the children: paragraph (a); likely effect of any changes in the child's circumstances on the child: paragraph (d); personal factors relating to the child: paragraph (g); family violence and the child: paragraphs (j) and (k); or relate to the child *indirectly*, particularly as regards the child's relationship with a parent or other adult (eg the child's relationship with parents: paragraph (b); practical issues relating to contact: paragraph (c); capacity to provide needs of the child: paragraph (f)). By contrast, an adult-centric provision is one that focuses on the relationship between parents and invites conduct-related evidence about previous actions, omissions and attitudes.

As a general proposition, the experience of Committee members is that the intensity of conflict between parents is directly related to a focus on parent-centric considerations. Once parents are encouraged to focus on their children, conflicts reduce significantly in intensity, and child-centric solutions are found. The Committee believes that, hitherto, section 68F(2) adequately balances child-centric and adult-centric considerations. The Committee's concern is that section 60CC(4) has the potential to unsettle that balance by explicitly directing attention to adult-centric considerations, particularly in self-represented litigation.

The Family Issues Committee recognises that section 60CC(4) may, from the perspective of some stakeholders in the broader debate about shared-parenting, be needed to provide some balance to section 65DAA(1) and (2) considerations of equal time and substantial and significant time. Perhaps one possible option is for the section 60CC(4) considerations to be incorporated amongst the ‘reasonable practicably’ considerations in section 65DAA(5). On a broad reading of section 65DAA(5) however, the section 60CC(4) considerations are *already* covered in any event.

Section 60CC(4) is a statutory invitation to all litigants, represented or unrepresented, to produce evidence about matters relating, ultimately, to a parent’s conduct. For some self-represented litigants, section 60CC(4) will be read as a statutory licence to “have a go at the ex”.

At a broader level, section 60CC(4) has the potential to introduce into Australian family law a new “friendly parent doctrine” ie the friendly parent - the one who has always participated in the life of the child and facilitated the other parent’s participation – gets the advantage under section 60CC(4) of the Bill. This hopefully changes the culture of disputation between parents and brings about better outcomes for their children too. As parents start to realise that their conduct will potentially be the subject of such scrutiny, they may think twice about actions such as abuse, violence, or restricting the time spent between children and their parent.

The risk, unfortunately, is that *justifiable* unfriendly behaviour becomes a high-risk strategy. A parent who has *genuine* concerns about shared parenting, and therefore wishes to place restrictions on the same, runs the risk of falling foul of section 60CC(4). A mother who has concerns about violence, abuse, neglect, lack of parenting skills, attachment, appropriateness of physical care arrangements, drugs and alcohol, new partners etc must think twice. By relying on other section 60CC factors, they run the risk of losing out on section 60CC(4) factors. Women who have experienced violence in relationships not only face the evidentiary challenge of establishing family violence as proposed, but will also face the tactical dilemma of dealing with section 60CC(4). If violence is raised but not proved, there is an automatic penalty under section 60CC(4) (the metaphorical ‘black cross’), but if violence is not raised then the grounds for denying or restricting shared parenting cannot be made out.

The Family Issues Committee observes that while no law or legal system should ever facilitate the making of frivolous or suspicious allegations, neither should a law or legal system discourage the ventilation of allegations, which, if established, go to the heart of the welfare of children.

Proposed amendments to section 60I – attending family dispute resolution

While the current version of section 60I is substantively similar to its Exposure Draft predecessor, it imports a ‘good faith’ requirement into family dispute resolution (called ‘FDR’). Parties are now required to attend FDR and to make a genuine effort to resolve their dispute: section 60I(1). The Family Issues Committee has no objection to this. The concern, however, relates to the certificates issued by FDR

practitioners under section 60I(8), and specifically to their capacity to make judgments about whether a party has “made a genuine effort to resolve the issue”, particularly when costs implications may follow under section 117 of the Act. The Committee prefers the certification provisions contained in the Exposure Draft of the Bill.

The Committee’s concerns in this regard arise out of the extensive experience that many of its members have had in family dispute resolution, both as providers of mediation and conciliation services, and also as lawyers representing their clients during these processes. Not only is making a judgment about genuine effort extremely difficult and highly subjective, it introduces an adjudicative element into what is otherwise a purely consensual process. In short, if the supposedly neutral and independent person who is there to help people resolve their family dispute is also called upon to make a judgment about behaviour during the process that may eventually lead to a costs sanction, the Committee queries in those circumstances whether that person is truly neutral and independent. Many New South Wales solicitors who practise family law wish to continue the important work they already undertake as family dispute resolution practitioners, and would prefer not to be in the position of having to issue certificates that will, in fact, make their fundamental role of facilitating settlements harder.

Proposed section 60K – Prompt action in relation to violence and abuse allegations

The Family Issues Committee understands that the current form of this provision is to be amended and will reserve its comments until it has considered the amendment.

Proposed section 61DA – Presumption of equal shared parental responsibility

The Family Issues Committee is concerned about the potential inconsistency between section 61DA and existing section 61C. The latter section provides that “each of the parents...has parental responsibility”. The conferral of this parental responsibility survives separation. When parents separate, *each* retains full parental responsibility, which can be exercised independently of the other, until such time as that unfettered, independent, parental responsibility becomes fettered by a parenting order. The Committee agrees that the parenting order is the best way to modify this state of parental authority, wherever it is necessary to do so. But section 61DA in effect directs the Court to convert that independent, several parental responsibility into *equal shared* parental responsibility.

The Committee’s first concern about this is that the presumption of equal shared parental responsibility is imposed irrespective of whether it is what the parents themselves want. In this regard it is legislative paternalism at its worst.

Second, the presumption applies when making a parenting order, even though the parenting order may only relate to a very discrete aspect of parental responsibility such as how much time the child spends with each parent. In other words the presumption applies even to cases where there is no dispute between the parents about broader issues of decision-making.

Third, it is somewhat incongruent that if there is a dispute about broad issues of parental responsibility, the imposition of equal shared parental responsibility potentially creates *more* problems, not less. The experience of members of the Law Society's Family Issues Committee indicates that parents who experience relationship breakdown, and who are not able to resolve their differences without litigation, often experience high levels of communication difficulties. For these parents, whilst they were *severally* yoked about parental responsibility before coming to Court, they are now *equally* yoked by virtue of this presumption in section 61DA. And yet these parents are the least capable of sharing responsibility and making decisions as equals.

The rationale for what seems to be a fundamental shift between section 61C and section 61DA is unclear. Perhaps section 61DA was needed in order to underpin section 65DAA with its emphasis on equal shared parental responsibility leading to considerations of equal time or substantial and significant time. It is probably the case, however, that section 65DAA could achieve the same result without the fundamental changes to the nature of parental responsibility contemplated by the Bill.

Parenting plans – proposed amendments to section 63C and section 64D

Whilst the amendments proposed to section 63C(1) are obviously necessary, they don't go far enough. The Family Issues Committee understands the rationale for having a simple form of agreement that parents can use to record changes to parenting arrangements as the circumstances of the children and the parents change. Thus, evolutionary changes can be easily recorded. However, the informality and simplicity of parenting plans as described in section 63C(2) is totally disproportionate to the standing they are accorded in section 64D, which provides, in effect, that a parenting order is subject to a later parenting plan, save for exceptional circumstances when a court may specify to the contrary.

Committee members have expressed serious concerns that section 64D will enable parents to reverse, in effect, parenting orders made after careful judicial scrutiny and consideration, after a full hearing involving receipt of expert evidence and the testing of all the evidence. The reality is that there is a small percentage of parents who cannot be entrusted to make decisions in the best interests of their children. For them, a court-imposed parenting order is the only solution and from the community's perspective, it is the only way to ensure that the welfare of children is protected. For these parents, section 64D may provide a statutory licence to enter into parenting agreements that may advance their own interests, but not that of the children. For example, carefully crafted court imposed conditions about supervision of contact with children might be reversed by agreement between parents, one of whom denies the need for supervision and the other of whom decries its inconvenience.

There is a much larger number of parents who do try to focus on the needs of their children but succumb to pressures exerted by one on the other. With no checks and balances in place, the risk is that those parents enter into arrangements for their children where the children's interests are subsumed to those of the parents. One parent may impose pressure on the other in order to secure a parenting arrangement or some other benefit that is in their interests. The type of pressure exerted may be

located anywhere along a broad spectrum that includes physical pressure at one extreme, to emotional pressure at the other and which includes financial and sexual pressure in between. Many relationships between parents are characterised by power imbalances between them. This power imbalance is highly complex and sometimes shifts but is still present after separation. Indeed, the experience of many solicitors who practise extensively in family law is that the period of psychological, legal and financial reorganisation after separation is the period when power imbalances are most likely to have a profound impact on outcomes, unless these imbalances are carefully and firmly addressed.

It is a strange aberration of the Bill that it seeks to grant parents such a high level of autonomy by virtue of parenting plans, but such little autonomy when it comes to presumptions of equal shared parental responsibility in section 61DA. It is curiously inconsistent of the Bill to provide, in effect, no supervision or scrutiny of parenting plans, when the rest of the *Family Law Act* ensures that parents' arrangements about finances must be within certain statutory standards (eg property settlements must be just and equitable under section 79, financial agreements need to be certified under section 90G, consent orders must be made by a Registrar with delegated judicial powers, etc). Moreover it is interesting that parenting plans provide parents the opportunity to undermine what may rapidly become the new benchmarks for shared parenting time set out in section 65DAA.

It is perhaps misleading, or certainly somewhat of a fiction, to describe parenting plans as non-legally binding and therefore to require no checks and balances as regards their formation and very low thresholds as regards their implementation. The effect of section 64D is, for all practical purposes, to make them legally powerful because they 'trump' an earlier order. As a result of this, another unintended consequence is the creation of a whole new area of conflict between parents – about the interpretation, implementation and enforcement of their parenting plans.

Research has already indicated that a clear relationship has existed in the past between spousal violence and very poor outcomes in financial settlements for the victims of violence (Sheehan G and Smyth B 'Spousal Violence and Post-Separation Financial Outcomes' (2000) 14 Australian Journal of Family Law 102). This must surely cast doubt on the wisdom of allowing parents the unfettered capacity to enter into non-legally binding, but nonetheless powerful, agreements relating to parenting, without checks and balances to ensure that those agreements have been freely entered into and are in the best interests of the children.

The Family Issues Committee believes that there are at least 3 possible options to deal with the concerns raised above.

The first option is to remove all provisions in the Bill that relate to parenting plans. The overall objectives of the Bill would be unhindered. No one is prejudiced by this change. Parents for whom parenting plans are most suited (ie those with high levels of communication skills and with a child focus in their parenting arrangements) are the least likely to need them. These parents already have non-legally binding arrangements in place and do not come near the legal system. For all other parents (ie those with problems in communication and who can't separate their interests from those of the children) parenting plans are simply not suitable.

The second option is to retain parenting plans but raise the threshold in terms of their formation and validity. There are several ways to achieve this. The Family Issues Committee favours certification requirements whereby a lawyer certifies that his/her client has understood the *effect of* the agreement and believes it to be in the best interest of the child. Another alternative would be to provide for certification by family dispute resolution practitioners, or by staff at Family Relationships Centres. A further alternative is a statutory cooling-off period.

The third option is to lower the threshold for section 64D purposes, that is to limit the ability of later parenting plans to prevail over parenting orders and broaden the powers of a court, and indeed the parents if they so desire, to constrain their ability to enter into a later inconsistent parenting plan. This could be achieved, for example, by inserting into section 64D(1) a requirement that the parenting plan is entered into as a result of changed circumstances relating to the child. The changed circumstance threshold is the same test used in family law to vary existing parenting orders and is based on the best interests principle. The change to section 64D(2) would need to remove the current reference to “exceptional circumstances”.

Equal time, substantial and significant time : section 65DAA

Section 65DAA is a significant development in Australian Family Law and will, in all likelihood, set new benchmarks in terms of shared parenting arrangements after separation. The Family Issues Committee has some minor concerns about the drafting of section 65DAA(5), dealing with the notion of ‘reasonable practicality’.

Section 65DAA(5)(b) refers to the parents’ “current and future capacity to implement an arrangement”. There is some risk that this may be interpreted, particularly by self-represented litigants, as also referring to financial capacity, as well as emotional and physical capacity. The reality is that greater levels of shared parenting after separation will inevitably lead to financial implications not only in relation to maintenance, child support and property settlement, but as regards to social security as well. The potential changes in the workplace are also enormous. Specifically in the context of this sub-section, however, the Committee queries whether the intention was to potentially invite a closer connection between financial matters and parenting matters, especially for self-represented litigants.

The Committee also notes that ‘reasonable practicability’ is determined by reference to “current and future” capacity to do certain things but not, expressly, by reference to past capacity and yet past capacity is the surest indication of future capacity and is far less susceptible to manipulation by way of coaching. The Committee suggests adding the word “past” immediately before the word “current”. The Bill overwhelmingly appears to focus on adult-centric factors and this change will make no difference to that.

Costs where false allegations are made: section 117AB

The Family Issues Committee believes that section 117AB will have the unintended consequence of generating far more disputation about costs. The provision is also quite unnecessary as the court already has the power to order costs in these

circumstances. For self-represented litigants especially, section 117AB will result in far greater testing of evidence in cross-examination to try to establish that firstly, the allegation or statement was falsely made and secondly, that it was knowingly made.

Application of amendments – transitional provisions

The Family Issues Committee is deeply concerned about the provisions of Part 2 of Schedule 1 dealing with when the amendments made will come into effect. For all practical purposes, the major changes (sections 60CC and 61DA) will only apply to proceedings initiated on or after commencement.

Committee members have reported a very high level of public knowledge and enquiry about the Bill. Many clients are already asking whether they should initiate proceedings or defer commencing proceedings. Even more clients are seeking advice about what impact the proposed law has on their pending litigation. The Family Issues Committee understands that the Government is caught in a dilemma as regards the implementation of the Bill. There will always be someone who is inconvenienced or disadvantaged, whatever the Government does.

The Committee believes that if the rationale for these changes includes the expectations of better outcomes for children, then there is no reason not to apply these new laws, across the board, on implementation. The Committee believes that this is the most child-focussed option.

When law is perceived to be changing so dramatically, as is the case with the Bill, those parents who believe that they have 'missed out' will look for opportunities to invoke the new laws. Simply trying to vary the existing orders under section 65D(2) will be problematic in the absence of evidence of changed circumstances: *Rice v Asplund* (1979) FLC 90-725. It is unlikely that mere legislative change amounts to changed circumstances. But there are other ways that unhappy parents can take to bring their parenting order before the court after the Bill has commenced. The simplest might be to initiate contravention proceedings under the new Division 13A Compliance Regime, which applies to *contraventions* occurring after commencement, not *orders* made after commencement. Division 13A strongly emphasises the court's power to vary the order in question. That variation could only be in accordance with the law current at that time. Thus, by virtue of contravention proceedings, the opportunity arises for an old order to be varied pursuant to the new principles.

Several absurdities could arise under the existing transitional provisions. A busy Federal Magistrate or Judicial Registrar dealing with a duty list could be determining interim applications relating to child-time with the parents and one case will be dealt with under the old law, but the next case will be dealt with under the new law. Two children from the same family could be the subject of proceedings before the Family Court but, because the application in relation to one child was not filed until after commencement, that child's decision will be based on a different law to that of their sibling. The Law Society's Family Issues Committee strongly supports a single date of commencement across the board, for all children in Australia, in much the same way as the *Family Law Reform Act* 1995 was implemented.

Conclusion: A plea to adequately resource the legal system

The Law Society's Family Issues Committee supports the Government's initiatives both in relation to the Bill and as regards the Government's broader initiatives including the establishment of Family Relationship Centres. However, the Committee is deeply concerned at the level of current resourcing of the legal system in so far as it relates to family law. As the Bill will, no doubt, in the short-term increase litigation, it is essential to ensure that legal aid is available to those who need it and that the Family Court and Federal Magistrates Court are adequately resourced.

The Family Issues Committee would be pleased to discuss these matters with you further and, should the need or opportunity arise, would be pleased to nominate a representative to appear before the Senate Committee.

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