Mr Jonathon Curtis

Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
Parliament House
Canberra ACT 2600
Australia

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

Dear Sir

I wish to present the following submission to the Senate Legal and Constitutional Committee. My name and contact details are as below:

Dr Ron Baker (PhD)

Lower King

Western Australia

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Submission to the Inquiry into the provisions of the Family Law Amendment (Shared Parental Responsibility) Bill 2005

In lodging this submission, I would firstly congratulate the Government on what may well result in the most significant and needed changes to family law for the last thirty years. However, the following submission focuses on two aspects of the proposed Bill, which will assist the intended goals of these reforms. The first is more general and discusses potential problems with the Government's stated public aim of shared parenting, as formulated in the concept or strategy of 'equal shared parental responsibility' to achieve that goal.

Secondly the submission discusses the lack of specific attention to the issue of children's schooling in parenting orders and parenting plans to ensure ongoing involvement by both parents in their children's schooling and education. Furthermore, the submission discusses these issues in reference to past reform efforts.

A Presumption of Equal Shared Parenting instead of a Presumption of Equal Shared Parental Responsibility

It is clear that, providing the child's best interests are paramount and issues of abuse and violence are not a factor, the intent of the Amendments is to find workable ways for children to have, or continue to have, both parents cooperatively and meaningfully involved in the children's lives following family separation. Arising from the 2003 House of Representatives inquiry (Commonwealth of Australia, 2003) and the *Report on the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005* (Commonwealth of Australia, 2005), it is clear that the Government has attempted to face up to the dilemma of family separation long ago recognized by the Family Law Council:

> "*The question of how to achieve on-going involvement by both parents in the lives of their children is the crucial one"* (Family Law Council, 1992, p. 55 italics added).

In grappling with this issue, the Government has the goal of 'facilitating shared parenting' (Commonwealth of Australia, 2005). The Attorney-General, the Honourable Philip Ruddock, confirmed that the aim of the reforms was shared parenting, in that he referred to the new Bill both as the 'Shared Parental Responsibility Bill' and 'Shared Parenting Bill,' stating; "The Shared Parenting Bill promotes the right of children to know both their parents and encourages people to resolve post separation parenting arrangements outside of the courts" (written communication, 14/2/06). The principles underlying Section 60B of the Bill clearly support these intentions.

As currently conceived and worded, however, there is a mismatch between the Government's desired goal of shared parenting, and the strategy of equal shared parental responsibility to achieve this goal. This introduces ambiguity into the concepts and language of reform and dilutes the potential of the Bill.

The new presumption at 61DA needs to be of equal shared parenting rather than equal shared parental responsibility. A presumption of equal shared parenting should be seen only as an optimal starting point for negotiation. The Bill should similarly be known as the Shared Parenting Bill to avoid confusion and ambiguity.

The House of Representatives Committee (Commonwealth of Australia, 2003) recognized that there were potential problems in 50/50 shared parenting. However, this should only be seen as an optimal starting point and not as an invariant 'one-size-fits-all' approach. Moreover, notwithstanding the potential difficulties, or impracticalities of equal shared parenting for some families, they nevertheless, should not be presumed ahead of the factual, specific circumstances of particular separating families. Families should be supported in arriving at living arrangements that will fulfil shared parenting for their particular circumstances. The rationale to implementing this requirement being that if either parent or children in the family express a wish for equal shared parenting, then it is incumbent upon other parties to demonstrate why this should not happen, rather than rule such possibilities out of hand prematurely. The case to be made in such situations is not why shared parenting should be adopted but why shared parenting should not be adopted.

However, there has been a determined position to avoid joint physical custody models, or shared parenting, to achieve this goal or aim. Instead, the Amendments

adopt the strategy of a presumption of equal shared parental responsibility to balance two primary considerations as defined in Section 60CC subsection (2):

> (a) the benefit to the child of having a meaningful relationship with both of the children's parents; and
>
> (b) the need to protect the child from physical or psychological harm from being subjected to or exposed to, abuse, neglect, or family violence.

The difficulty in ensuring protection for children from physical or psychological harm (b) is seen to directly compete with the benefits to the child of having a meaningful relationship with both of the children's parents (a) by many opponents to the Bill. Fears for children's safety and domestic violence concerns – which are addressed in the Bill - have led opponents to argue for legislation that would assume all family separations are violence or abuse ridden, or likely to be so. However, to frame legislation with such assumptions is to overlook the majority of separating Australian families, who do not fit such scenarios and who could benefit from support in reaching arrangements of shared parenting, in line with their own family circumstances.

Professor Lawrie Moloney (2005), has addressed the issue of differentiating between separating families by proposing they be placed into four broad categories: (i) Systemically Abusive (ii) Mental Health Issues (iii) Overwhelmed and (iv) Grown Apart. Moloney states a minority of families are 'Systemically Abusive' or have 'Mental Health Issues.' Moloney describes these cases:

> Though the first two categories represent a minority of family-law cases, they are the most resource intensive and also the most likely to be handled inadequately (p. 13).

There is no denying that children and vulnerable family members in such categories need all possible protection and intensive support mechanisms. However, to assume that legislation should be framed as if these categories covered the vast majority of family separations is neither appropriate nor accurate. Moloney describes the majority of family separations as:

> The two further categories (Overwhelmed and Grown Apart) represent the majority of family-law cases. With some exceptions (which require feeding back into a formal decision making process) the family re-formation tasks

> facing these families can be brought to a satisfactory conclusion, if from the outset, they are handled appropriately and with consistency via high quality facilitated processes (Moloney, 2005, p. 13).

'Overwhelmed and Grown Apart,' aptly and succinctly picture the majority of Australian families that separate. These are the majority of Australian parents and children who stand to benefit from shared parenting initiatives, particularly if supported by the initiative of the proposed non-adversarial Family Relationship Centres (FRCs). There is therefore, the dual task of adequately providing safeguards for children and permitting those families, where such issues are not a factor, the maximum potential to arrive at situations that will deliver the aim of the intended reforms for the children of such families:

> These kids want and deserve the same things as any other child; to grow up with the love and support of their mum and dad. They don't want to see their parents fighting in court. Nobody does (Ruddock, 2005, p. 2).

A presumption, or starting point, of equal shared parenting (which will include equal shared parental responsibility as part of the conceptual definition) is appropriate to enable these families to achieve this end.

A Need to Include Children's Schooling in Parenting Orders/Parenting Plans

(The following discussion discusses the Bill as framed in terms of parental responsibility). A primary focus of my own research has been nonresidential parents' involvement in their children's schooling (Baker, 1996; Baker, 2005; Baker & Bishop, 2002; Baker & McMurray, 1998). Despite the lack of empirical research directly investigating nonresidential parents' involvement in their children's schooling, my own research provides clear evidence that many nonresidential parents wish to be more involved in their children's schooling. Moreover, there is clear evidence that children benefit when nonresidential parents are directly involved in their children's schooling (Baker & Bishop, 2005).

It is a major point of my submission to draw more attention to this issue than previous reforms have given. The failure of all past reforms to address the issues surrounding nonresidential parents' involvement in their children's schooling has been a

significant but unacknowledged reason for the failure of efforts to involve both parents in children's lives following family separation.

The assumptions of past reforms have been that simply giving general statements on court orders that the custodial (residential) parent is to keep the nonresidential parent informed of school issues was sufficient for this to occur. However, this has proved to be totally ineffective. Moreover, without specific directions, education authorities and schools have had ambiguous and confusing attitudes towards the involvement of nonresidential parents in the school community. Even where policies exist they are inconsistently followed. (The NSW Dept of Education appears to have the exemplary benchmark in terms of inclusive and non-discriminatory policies for custody issues in schools and offers a model for other educational authorities).

Given the importance of school and education in children's lives, there is a need in the Bill to specify exactly how children may be guaranteed the ongoing presence and benefit of both their parents in the children's school life. An appropriate place to insert such directions in the Bill occur at Section 61DA regarding parenting orders and in particular at Section 65DAA.

Section 65DAA defines situations in which 'equal time' is to be granted to both parents, or failing this (and given that the child's best interests remain paramount at all times), the court must grant 'substantial and significant time' with each of the parents [65DAA(2)]. However, 65DAA(3), which outlines what 'significant and substantial' time means, fails to specifically detail that this includes the child's schooling. This subsection would be improved if it were to specifically state at:

> (3)(b) the time the child spends with the parent allows the parent to be involved in:
>
> (i) the child's daily routine, *including the child's school routines*, in the normal course of events, and
>
> (ii) occasions and events, *including such events at school*, that are of particular significance to the child; and
>
> (iii) the time the child spends with the parent allows the child to be involved in occasions and events that are of special significance to the parent, *including out-of-hours school events*. (suggested additions italicised).

A further insertion on school involvement would be appropriate in Section 65DAB. This section refers to parenting plans. Parenting plans were part of the 1995 reforms but were never widely adopted. Nonetheless, they have merit and if encouraged, their potential to provide clarity for all parties on school involvement for the nonresidential parent (in current terminology) should be considered. Previous parenting plans provided only generalized and limited space for parents to outline school involvement for the nonresidential parent. A sample school involvement plan I developed in the course of my research and based on my professional experience of 17 years as a school psychologist is appended (Appendix A). Such a plan could be included within the education section of the overall parenting plan.

If such school involvement plans were offered, it would be appropriate in Section 63DA(1)(a)(b) Obligations of Advisors, to require advisors to discuss this at the time of discussing parenting plans. Moreover, 63DA(1)(b) requires advisors to inform parents where they can get further assistance to develop a parenting plan and the content of the plan. This assistance would seem a natural function of the proposed FRCs. I have previously discussed the usefulness of having school personnel (school psychologists/school social workers) assist FRC counsellors and families on school involvement issues (Baker & Bishop, 2005). It would be appropriate for school involvement plans to be part of that assistance at the FRCs.

The language and history of reform

My concern with the concept of shared parental responsibility is in part based on the language of reforms and previous reform efforts. It was patently clear from the Parliament's intentions in the 1995 reforms and the principles underlying Section 60B in Part VII that children have the right to an ongoing and meaningful relationship to both parents (given the paramountcy of the best interests of the children). The 2003 inquiry emphatically reported the 1995 and previous reforms had failed. That is, previous practices tended to re-interpret the new reforms to maintain the status quo.

In fact, as Michael Green QC, reported in discussing the passage of the original 1975 Family Law Act through Parliament, there is a long history of failure to implement reforms. Green quotes Mr Peter Duncan in his second-reading speech in moving the amendments to the Family Law Act 1975 as saying:

> The original intention of the late Senator Murphy was that the Family Law Act would create a rebuttable presumption of shared parenting, but over the years the Family Court has chosen to largely ignore that. It is hoped that these reforms will now call for much closer attention to this presumption and that the Family Court will give full and proper effect to the intention of the parliament (Green, 2000, p. 2).

The intent to involve and preserve, where possible, children's rights to involvement with both parents, as enshrined in the principles of Section 60B of the 1995 reforms has appropriately been retained in the current reforms, with an insertion of 60B(1) and the addition of 60B(2)(e) to cover cultural issues. Obviously, the intention of the Government, and hopefully the Parliament, continues to recognize the importance of these underlying principles.

However, there remains an ambiguity between the Government's aim of 'facilitating shared parenting,' and the strategy of 'shared parental responsibility' to achieve that end because of the possibility of misinterpretation of 'parental responsibility.' Given the past history of the failure of reforms, the concern is that such ambiguity will permit dilution of the current Bill and watering down of the reforms. For this reason, and in light of changing community attitudes which endorse shared parenting arrangements, I believe the Bill would strengthen the intended reforms to also use the presumption of equal shared parenting.

In its current wording, however, there is a core dilemma arising from the Government's intent to promote shared parenting through the strategy of shared parental responsibility. The dilemma being that there is a nexus between sharing parenting responsibility and the proposed amendments promoting meaningful involvement, which necessarily requires consideration of the issue of time children are to spend with the nonresidential parent.

The issue of time has been one of contention between lawyers; researchers and lobby groups (with the prevailing view that children's best interests are better viewed from the quality of relationships, rather than on quantity of time spent with either parent, notably the nonresidential parent). The Amendments recognize this issue and address it in Section 65DAA in the term 'significant and substantial time,' where 'equal time' is not appropriate.

In making parenting orders 61DA states:

> when making a parenting order in relation to a child, the court must apply a presumption that it is in the best interests of the child for the child's parents to have equal shared parental responsibility for the child.

However, there is then a qualifier:

> Note: The presumption provided for in this subsection is a presumption that relates solely to the allocation of parental responsibility for a child as defined in section 61B. It does not provide a presumption about the amount of time the child spends with each of the parents (This is dealt with in section 65DAA).

However, the knowledge that forms the basis for sensible 'parental responsibility' comes from the nuances and intimate knowledge arising from daily family life. For that parents need a substantial amount of time to live with children, not simply 'spend time' with them. That is, how will parents be able to share parenting responsibility unless it is also possible for nonresidential parents (as now called) to have sufficient time with children to truly have a full understanding of the children's needs, upon which to base parental responsibility and decision making?

Sharing parenting requires nonresidential parents and children to *live* together in the full meaning of the word – as a family, where possible. Only by specifically including living arrangements in defining shared parenting time do we get to the nub of family life. For it is the shared living that defines family life, and it is this loss that so damages family life and threatens ongoing parent – child relationships and child wellbeing.

Section 65DAA (2) does attempt to safeguard children's rights to live with their nonresidential parent to preserve a meaningful family and parent-child relationship. Unfortunately, the history of reforms and previous practice suggest that interpretation of 'substantial and significant time' will be so diluted as to wind back the intent of the reforms to perpetuate existing practice. For this reason, a presumption of shared parenting as a starting point would provide a stronger guarantee of protecting children's rights to an ongoing relationship with both parents.

Summary

This submission asks Senators to reconsider the issue of a presumption of equal shared parenting, in preference to the proposed presumption of equal shared parental responsibility. In doing so, it urges Senators to be mindful of the past history of reforms which have failed to fulfil Parliament's intentions through the ongoing reform processes. It especially urges Senators to give detailed consideration to the previously neglected issue of school involvement for nonresidential parents. I strongly suggest that children will only be assured of both parents' ongoing involvement and support of the children's education if specific directions are included in the Bill as suggested above. Such specific directions in law will provide clear unambiguous frameworks for State and Territory Education Departments to formulate appropriate policies on family law issues for schools. Thank you for considering this submission.

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Appendix A

SAMPLE SCHOOL INVOLVEMENT PLAN

Relationships Australia has provided a model Parenting Plan, published by the Family Law Council (1994), which includes a section on Education. A school involvement plan such as this example, offers parents the opportunity to specify in detail the agreed involvement of the noncustodial parent, in accordance with the needs of the particular family. Such a plan could then be appended to their Parenting Plan. (Parents may prefer a separate school involvement plan for each child).

We, the undersigned,

Mother.....……

Father.....……

Parents of the following child/children:

……

……

attending…….....……School/s,

have agreed to include this **School Involvement Plan** as part of our **Parenting Plan** under the heading EDUCATION, and we agree that this plan is subject to the responsibilities agreed to in our Parenting Plan.

The following list outlines the type and extent of involvement (name)

……..... as the noncustodial parent, is to have in our child/children's schooling. For some/all occasions we would prefer to have separate contact/meetings with teachers and other school personnel, and these situations are listed below. We have written in the spaces provided our particular requirements.

I. FINANCIAL

contributing to school fees, extra fees (e.g. music lessons, camps, outings)

.....

.....

2. COMMUNICATION FROM SCHOOL

This covers all information from the school concerning our child/children's education; for example, school newsletters, child's school/progress reports, notices, brochures, merit awards/certificates, and communication regarding discipline/behaviour, **illness or accidents.**

.....

.....

.....

3. CONTACT WITH CLASS TEACHER

This includes informal contact; before/after school, phone calls, parent-teacher meetings/conferences.

.....

.....

4. CONTACT WITH OTHER SCHOOL PERSONNEL

School Principal/ Deputy, specialist teachers, student services (school psychologist/social worker, nurse) registrar, and others.

.....

.....

5. VISITING SCHOOL

Class visits, sharing activities with child/children, parent-helper, attending assemblies, special days; sports days (fetes, concerts, sports days, religious ceremonies).

.....

.....

6. HELPING HAND

This includes such things as serving on Parents and Friends Committees (P & C) or School Based Decision Making Groups; as parent helper on camps or outings, coaching/supporting sports events; as canteen & library aides, or busy bees.

.....

.....

7. ATTENDING OUT OF HOURS FUNCTIONS/EVENTS

Attending parent-teacher evenings, information nights, involvement in extra curricular activities, family evenings.

.....

.....

8. DAY TO DAY ACTIVITIES

Transporting/accompanying child/children to school, drop-off, pick-up, going to school to collect child/children in case of illness, specialist appointments.

.....

.....

OTHER ISSUES

(Parents may wish to specify times and circumstances when the other parent is to collect the child/children from school. This needs to be in accordance with any current court orders)……

.....

.....

……

……

PROVISIONS FOR CHILDREN WITH LEARNING DISABILITIES, SPECIAL NEEDS (EDUCATION SUPPORT/SPECIAL EDUCATION), REFERRAL TO SCHOOL PSYCHOLOGY SERVICE

Parents should discuss this section, if relevant, with support personnel, such as special education or remedial teachers and student services professionals to ensure the particular needs of their child/children are met.

.....……

.....……

.....……

We have discussed this plan with our child/children in the way we think they can best understand and express their wishes, and we agree to review this plan ...../...../.....(date), or (in the event of our child/children changing schools) to review it with the new school.

(Note: A copy of this plan is to be retained by each parent and a copy lodged with the child/children's school records. In the event of specialist referral (School Psychology Service/Special Education) additional copies may be made available for confidential files).

Signed (mother)……date……..

Signed (father)…….date…….