

**Review of exposure draft of the  
*Family Law Amendment  
(Shared Parental Responsibility)  
Bill 2005***

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House of Representatives  
Standing Committee on Legal &  
Constitutional Affairs

4 August 2005 – Supplementary comments

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## Family Law Section

### Law Council of Australia

#### Supplementary submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs

##### ***Family Law Amendment (Shared Parental Responsibility) Bill 2005***

1. At the Committee hearing on 20 July 2005, the Family Law Section of the Law Council of Australia (FLS) undertook to provide further comments on the following matters:
  - Dictionary of terms and definitions
  - Restructuring Part VII of the *Family Law Act 1975*
  - Definition of *major long-term* issue
  - Definition of *abuse*
  - Sections 61DA and 61DB – interim orders
  - Section 64D – parenting plans overriding court orders
  - Sections 60B and 68F – objects, principles and how a court determines best interests
  - Accredited family law specialists
  - Section 79 of the *Judiciary Act 1903*.
2. The FLS comments on these matters are provided hereunder.

##### **Dictionary of terms and definitions**

3. In its submission dated 18 July 2005, FLS recommended that the relevant definitions contained in section 4 [Interpretation] and in Part VII [Children] of the Family Law Act should be collated and grouped together in a single dictionary. This idea was discussed further at the Committee hearing in the context of ensuring that any change to terminology<sup>1</sup> be readily understood in the international community.
4. FLS maintains its strong support for a dictionary of definitions. FLS also recommends that the dictionary contain supporting notes for those terms which have application outside the Family Law Act<sup>2</sup>. This will ensure that the language used in the Family Law Act, irrespective of what that is, is readily understood and transferable to the international community.

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<sup>1</sup> For example, it is proposed that references to 'residence' will be replaced with 'lives with' and references to 'contact' will be replaced with 'spends time with' and 'communicates with'.

<sup>2</sup> For example, the term 'custody' is used in various international conventions. 'Residence' has been accepted in most (but not all) jurisdictions as having an equivalent meaning. The introduction of further terms without the necessary explanation, as proposed in the Bill, will create unnecessary confusion.

## **Restructuring Part VII of the Family Law Act**

5. Part VII of the Act has been amended continuously over the last 30 years and as a result it has become complex and difficult to navigate - provisions which should go together are often many pages apart. The amendments proposed in the *Family Law Amendment (Shared Parental Responsibility) Bill 2005* (the *Bill*) will only perpetuate this problem.
6. FLS maintains its previous position in recommending that Part VII of the Act be restructured as a matter of priority so that its contents are arranged in a more logical and helpful sequence, with the relevant provisions grouped together.

### **Definition of *major long-term issue***

7. In our submission dated 18 July 2005 FLS suggested that the proposed inclusion of a definition for *major long-term issue* is likely to encourage disputes and applications about certain aspects of parental responsibility that might not otherwise exist. This position was reinforced at the Committee hearing on 20 July 2005.
8. It is not so much the categories themselves that cause concern but rather that FLS believes that the mere listing of categories will encourage parties to litigate. For example, some parties may feel that it is necessary to work through the list simply because it's there, when in fact there may not have been an issue in dispute about a particular category. The combined effect of a list of categories and the provisions of subsection 65DAC(2) that such decisions should be made jointly, is likely to increase rather than reduce litigation.

### **Definition of *abuse***

9. FLS has previously expressed concern about the narrow definition of *abuse*, particularly as the concept has been imported into a number of the amendments proposed in the Bill<sup>3</sup>. At the Committee hearing on 20 July 2005 there was some discussion about expanding the definition to include *entrenched conflict*.
10. FLS maintains the view that rather than trying to narrowly or specifically define *abuse* it is better for the term to be broadly defined to include *behaviour of any parent that is likely to cause harm to the child*. A broad definition (however defined) will enable a matter to come before a judicial officer for determination. If it is subsequently found that there is no *abuse* the court can refer the parties back to the Family Relationship Centres or make such orders as it considers appropriate in the circumstances.

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<sup>3</sup> For example, see paragraph 60B (2)(b) [Principles underlying objects of the Act; paragraph 60I(8)(b) [Attending family dispute resolution before applying for Part VII order]; section 60J [Family dispute resolution not attended because of child abuse or family violence]; section 61DA [Presumption of joint parental responsibility when making parenting orders]; and subsection 68F(1A).

## Sections 61DA and 61DB – Interim orders

11. In its submission dated 18 July 2005, FLS recommended<sup>4</sup> that subsection 61DA(3)<sup>5</sup> and section 61DB be deleted. FLS was concerned that these provisions would restrict the court's capacity to consider factual circumstances that may result as part of interim proceedings. FLS has subsequently reconsidered this issue and requests that these recommendations be withdrawn.
12. In lieu of our initial recommendations 1.14 and 1.15, FLS makes the following two substitute recommendations:
  - 12.1 That the note to subsection 61DA(1) be incorporated into the legislation. This note, which explains the effect of a presumption of joint parental responsibility, is very important and it is not simply an aid to interpretation. FLS recommends that subsection 61DA(1) be amended to include a provision (not a note) to the effect that an order under section 65DAA does not detract from joint parental responsibility nor does it imply that a child must spend equal or substantial time with each parent.
  - 12.2 That section 61DB<sup>6</sup> be amended as follows (with new text in italic font):

**61DB Application of presumption of joint parental responsibility after interim parenting order made**

- (1) If there is an interim parenting order in relation to a child, the court must, in making a final parenting order in relation to the child, disregard the *existence of any allocation of parental responsibility in the interim order; and;*
- (2) *Notwithstanding subsection (1) the court may take into account any facts or circumstances which are relevant to the making of a final parenting order whether those facts or circumstances occurred before or after the making of the interim order.*

## Section 64D – Parenting plans overriding court orders

13. At the hearing on 20 July 2005, the Committee expressed some concern about the level of protection for parties entering into parenting plans which have the effect of overriding court orders. In its submission dated 18 July 2005, FLS indicated that it had no objection to parenting plans overriding orders on the basis that a parenting plan was made in writing; signed and dated by both parties; and that the plan included a cooling-off period.

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<sup>4</sup> See recommendations 1.14 at page 10 and 1.15 at page 11 of FLS submission.

<sup>5</sup> Subsection 61DA(3) provides that the presumption of joint parental responsibility does not apply if the court considers that it is not appropriate to apply the presumption in making an interim parenting order.

<sup>6</sup> As currently drafted, section 61DB provides that if there is an interim parenting order in relation to a child, the court must, in making a final parenting order in relation to the child, disregard the allocation of parental responsibility made in the interim order.

14. A further safeguard that FLS would recommend is that the legislation make it clear that parenting plans are subject to the ultimate supervision of the court, and that the court has the power to consider the terms and effect of the plan and the circumstances in which it was entered into. The issue of whether or not a plan is legitimately or appropriately entered into will only arise if one of the parties subsequently takes the matter to the court. In these circumstances the court should have the capacity to consider:
- The content of the plan
  - The circumstances in which the plan was made
  - Whether or not the plan was obtained by fraud, duress, undue influence or unconscionable conduct
  - Whether or not it is in the best interests of the child to disregard or vary the plan.

**Sections 60B and 68F – Objects, principles and how a court determines best interests**

15. At the 20 July Committee hearing there was some discussion about FLS concerns regarding changes to sections 60B and 68F. FLS was particularly concerned that the changes proposed in the Bill will result in a two-tiered approach, differentiating between *primary* and *additional* considerations, in determining the best interests of the child. The explanatory statement for the Bill provides that:

*“The intention of separating these factors into two tiers is to elevate the importance of the primary factors and to direct the court’s attention to the objects of Part VII of the Act.”<sup>7</sup>*

16. Under the two-tiered approach the court will first look at the *primary* considerations, that is, the benefit to the child of having a meaningful relationship with both parents; and the need to protect the child from physical or psychological harm. After this, the court will then look at the *additional* considerations set out in subsection 68F(2). Under this arrangement it is interesting to note that the views of the child, *inter alia*, become an *additional* consideration.
17. FLS maintains its view that splitting the considerations into *primary* and *additional* is likely to create unnecessary debate and tension about the relationship between each set of considerations. There is no argument from FLS about the content of each consideration but rather that it is unnecessary and undesirable to differentiate between *primary* and *additional* considerations in the way proposed. All considerations should be listed under the one section, with the court to apply discretion as it considers appropriate.

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<sup>7</sup> Page 8, Explanatory Statement, *Family Law Amendment (Shared Parental Responsibility) Bill 2005*, circulated by the authority of the Attorney-General, the Honourable Phillip Ruddock MP.

### **Accredited family law specialists**

18. At the Committee hearing on 20 July, FLS undertook to provide further information about accredited family law specialists.
19. To become an accredited family law specialist a practitioner must undergo a rigorous assessment process which includes a written exam, a take home mock file and drafting exercise, and a videotaped interview with a client (actor). Part of the assessment is based on a practitioner's capacity to present to their clients options for reaching resolution. This includes knowing the various types of dispute resolution processes which may be available and appropriate at various stages of a matter, adopting an attitude of openness to paths other than litigation (for example, counselling, negotiation, mediation, conciliation and arbitration); and preparing the client for his or her part in the settlement process.
20. At present there are 612 accredited family law specialists in Australia.

### **Section 79 of the *Judiciary Act 1903***

21. The proposed section 60KG<sup>8</sup> effectively abolishes the current structure provided by the *Evidence Act 1995* (Cth). The unintended effect of this proposal is to render operative, by virtue of section 79 of the *Judiciary Act 1903* (Cth), the Evidence Acts of the States and Territories.
22. Section 79 of the *Judiciary Act 1903* (Cth) provides:

*“The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable”*
23. While it is clear that the Commonwealth could legislate to overcome the consequences described above FLS submits that it is unnecessary to do so; and the mere attempt may in itself have further unintended consequences.
24. Given that the proposed section 60KI<sup>9</sup> is sufficiently wide to enable the Court to implement the Children's Cases Program, FLS submits that no good reason exists for enacting Section 60KG.
25. FLS otherwise reiterates its earlier submissions highlighting the undesirability of abandoning in Family Court proceedings what are nationally accepted rules of evidence which are both well established and well understood.

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<sup>8</sup> Section 60KG provides that the rules of evidence do not apply unless the court decides.

<sup>9</sup> Section 60KI sets out the court's general duties and powers relating to evidence.