

Submission
No 5

**INQUIRY INTO IMPACT OF THE FAMILY LAW
AMENDMENT (SHARED PARENTAL RESPONSIBILITY)
ACT 2006 (CTH)**

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NON-CUSTODIAL PARENTS PARTY

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The Director,
Standing Committee on Law and Justice,
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Submission to Inquiry into the Impact of the *Family Law Amendment (Shared Parent Responsibility) Act 2006 (Cth)*

We thank the Standing Committee for providing us with the opportunity to make a submission on the Impact of the *Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth)*.

We submit that:

1. The Family Court is taking note of the new changes. However it is still far too early to determine the effects of these legislative changes.
2. In any case, the changes to the Family Law Act did not go anywhere near far enough to totally prevent any future injustices.

(a) The Impact of Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth) on women and children in NSW.

The Family Court has said that between 69.2 per cent (in contested cases) and 78.4 per cent (cases determined by consent) of custodial parents are women ("*Every Picture Tells A Story*". December 2003. Section 2.13 "*Residence Orders*").

The Child Support Agency has stated that 88.8 per cent of payees are women (*Child Support Scheme. Facts and Figures 2004-2005* Table 4.7).

We believe that the actual figure for the number of women who are custodial parents is probably closer to the figure provided by the Child Support Agency.

In any case, the significant majority of custodial parents are women.

The Commonwealth Attorney-General, Phillip Ruddock, tabled the *Family Law Amendment (Shared Parental Responsibility) Bill* in Parliament and read the second reading speech on 8 December 2005.

The Attorney-General promoted the Bill by saying that it will help to change the culture of family law. Unfortunately clear direction to achieve this goal was not provided in the legislation.

One of the key sections is new Section 65DAA. A copy of Section 65DAA is provided in the Appendix to this submission.

If there is any change in the culture, it should mean that children would be able to spend more time with the non-custodial parent.

Prior to the introduction of the amendment, less than two (2) per cent of court orders were being made for equal time, shared parenting.

With the inclusion of Section 65DAA in the *Family Law Act*, the words "*court to consider child spending equal time or substantial and significant time with each parent in certain circumstances*" were added to the *Family Law Act*

As a result, a Family Court judge has to at least consider if both parents can have either *equal time* or *substantial and significant time* with their children after separation.

Using words like "*equal time*" and "*substantial and significant time*" is certainly a good start. However when linked to the word "*consider*", this change creates a large degree of uncertainty.

In that regard, the new legislation certainly does not give sufficient direction.

Similar amendments were made to the Family Law Act in 1995. There was no change to the culture of family law.

With the loose wording that we currently have in the *Family Law Act* and in particular Section 65DAA, it is highly possible that the current amendments may simply result in the same outcome.

However we again reiterate it is still too early to tell.

The desired outcome of any future change to family law legislation amendments would be for the introduction of "*a rebuttable presumption of equal time, shared parenting*" (i.e. unless desired otherwise by the parents).

The Federal politicians have not been game enough to include this outcome in the current legislation

As a result of Section 65DAA, there is a potential for increased contact to be provided to the non-custodial parent. Some social security payments* and all child support payments are affected by the percentage of contact that the parents have with the children.

(*Parenting payments are paid to the custodial parent only).

(*Family Tax Benefit payments will cease to be paid to non-custodial parents with less than 35 per cent contact. This will occur after 1 July 2008).

As a result, the new legislation may have a financial impact on some custodial parents (mainly women).

Again this is problematical. This is because it has yet to be shown that increased contact of the children with non-custodial parents will be the result of the legislative changes

If this does occur, the children from separated families would be better off. This is because the children will see more of the non-custodial parent. This would be a good outcome in itself.

In any case, increased contact often equates to increased child support being paid. This would tend to negate any loss in social security payments.

(b) The Impact of the Family Law Amendment (Shared Parental Responsibility) Act 2006 on the operation of court orders that can prevent family violence perpetrators coming into contact with their families

The term "*family violence*" was previously defined in Section 60D of the *Family Law Act*. The new definition of family violence can be now found in Section 4.

Both definitions have been provided in the Appendix of this submission.

In the new definition, the word "*reasonably*" has been added to the previous definition of "*family violence*". The new phraseology is "*reasonably to fear for, or reasonably to be apprehensive about, his or her personal wellbeing or safety.* "

The addition of the word "*reasonably*" is a good start. However it is grossly insufficient to prevent the family violence issue from continuing to be used as an inappropriate tool to gain a financial advantage in the Family Court and in other areas.

Unless family violence is proven and not merely "*reasonably*" alleged, then this mis-use will simply continue to occur (perhaps at a slightly lower rate than what it is now).

(c) Summary

Some progress has been made to correct previous legislative wrongs.

However, until significant changes are made to our family law legislation, the problems that we have in this area will continue.

Regards

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APPENDIX

1. Previous Definition of Family Violence

Section 60D “*defined expressions*”.

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.

2. Current Definition of Family Violence

Section 4 “*interpretation*”

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 reasonably to fear for, or reasonably to be apprehensive about, his or her personal wellbeing or safety.

Note: A person reasonably fears for, or reasonably is apprehensive about, his or her personal wellbeing or safety in particular circumstances if a reasonable person in those circumstances would fear for, or be apprehensive about, his or her personal wellbeing or safety.

3. New Section 65DAA

65DAA Court to consider child spending equal time or substantial and significant time with each parent in certain circumstances

Equal time

- (1) If a parenting order provides (or is to provide) that a child’s parents are to have equal shared parental responsibility for the child, the court must:
 - (a) consider whether the child spending equal time with each of the parents would be in the best interests of the child; and
 - (b) consider whether the child spending equal time with each of the parents is reasonably practicable; and
 - (c) if it is, consider making an order to provide (or including a provision in the order) for the child to spend equal time with each of the parents.

Note 1: The effect of section 60CA is that in deciding whether to go on to make a parenting order for the child to spend equal time with each of the parents, the court will regard the best interests of the child as the paramount consideration.

Note 2: See subsection (5) for the factors the court takes into account in determining what is reasonably practicable.

Substantial and significant time

- (2) If:
 - (a) a parenting order provides (or is to provide) that a child’s parents are to have equal shared parental responsibility for the child; and

- (b) the court does not make an order (or include a provision in the order) for the child to spend equal time with each of the parents; and

the court must:

- (c) consider whether the child spending substantial and significant time with each of the parents would be in the best interests of the child; and
- (d) consider whether the child spending substantial and significant time with each of the parents is reasonably practicable; and
- (e) if it is, consider making an order to provide (or including a provision in the order) for the child to spend substantial and significant time with each of the parents.

Note 1: The effect of section 60CA is that in deciding whether to go on to make a parenting order for the child to spend substantial time with each of the parents, the court will regard the best interests of the child as the paramount consideration.

Note 2: See subsection (5) for the factors the court takes into account in determining what is reasonably practicable.

- (3) For the purposes of subsection (2), a child will be taken to spend ***substantial and significant time*** with a parent only if:

- (a) the time the child spends with the parent includes both:
 - (i) days that fall on weekends and holidays; and
 - (ii) days that do not fall on weekends or holidays; and
- (b) the time the child spends with the parent allows the parent to be involved in:
 - (i) the child's daily routine; and
 - (ii) occasions and events that are of particular significance to the child; and
- (c) 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.

- (4) Subsection (3) does not limit the other matters to which a court can have regard in determining whether the time a child spends with a parent would be substantial and significant.

Reasonable practicality

- (5) In determining for the purposes of subsections (1) and (2) whether it is reasonably practicable for a child to spend equal time, or substantial and significant time, with each of the child's parents, the court must have regard to:
 - (a) how far apart the parents live from each other; and
 - (b) the parents' current and future capacity to implement an arrangement for the child spending equal time, or substantial and significant time, with each of the parents; and
 - (c) the parents' current and future capacity to communicate with each other and resolve difficulties that might arise in implementing an arrangement of that kind; and
 - (d) the impact that an arrangement of that kind would have on the child; and
 - (e) such other matters as the court considers relevant.

Note 1: Behaviour of a parent that is relevant for paragraph (c) may also be taken into account in determining what parenting order the court should make in the best interests of the child. Subsection 60CC(3) provides for considerations that are taken into account in determining what is in the best interests of the child. These include:

- (a) the willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent (paragraph 60CC(3)(c));

- (b) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents (paragraph 60CC(3)(i)).

Note 2: Paragraph (c) reference to future capacity—the court has power under section 13C to make orders for parties to attend family counselling or family dispute resolution or participate in courses, programs or services.
