

Justice Committee - Pre-legislative scrutiny of the Children and Families Bill

Australian Institute of Family Studies Submission to the House of Commons Justice Select Committee inquiry (CFB 51)

PRE-LEGISLATIVE SCRUTINY OF THE CHILDREN AND FAMILIES BILL

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1. INTRODUCTION

The Australian Institute of Family Studies (AIFS) is a statutory authority that originated in the *Family Law Act 1975* (Cth). It carries out a wide range of research that is relevant to policy and practice on issues affecting families. This submission begins with an update on recent developments in approaches to post-separation parenting in Australia. It then highlights some findings from recent research projects examining the circumstances of separated families and the operation of the Australian family law system to assist the Justice Select Committee in its consideration of some of its concerns.

2. RECENT DEVELOPMENTS IN AUSTRALIA

Legislative amendments and program development in Australia in the family law area have become increasingly oriented towards meeting the needs of families affected by complex issues, including family violence and safety concerns. This focus has emerged as a result of findings and recommendations in a series of reports, including the AIFS Evaluation of the 2006 Family Law Reforms.¹

2012 legislative amendments

In terms of legislative change, amendments to the *Family Law Act 1975* (Cth) (*FLA*) came into effect on 7 June 2012.² These are intended to place greater emphasis on ensuring children are protected from harm in making post-separation parenting arrangements. The shared parenting provisions, including the presumption in favour of equal shared parental responsibility, have been left intact but a series of new provisions is intended to heighten the focus on examining issues that may compromise the wellbeing and safety of children and their caregivers. The main legislative changes are summarised in the next paragraphs.

The definition of family violence has been widened to recognise non-physical forms of abuse. The new core definition is: "for the purposes of this Act, family violence means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member), or causes the family member to be fearful" (*FLA* s4AB(1)). The definition is accompanied by a non-exhaustive list of examples, such as assault, sexual abuse, stalking, repeated derogatory taunts, property damage, injury or death to an animal, withholding financial support, isolation from family friends or culture or deprivation of liberty (*FLA* s4AB(2)). The new definition provisions also acknowledge children's exposure to family violence in this way: "a child is exposed to family violence if the child sees or hears family violence or otherwise experiences the effects of family violence" (*FLA* s4AB(3)).

The amendments resolve what has been referred to as a tension³ in the two main factors (referred to as "primary considerations") that guide determinations as to what parenting arrangements are in a child's best interests, which remains the paramount consideration. These principles are the "benefit to the child of a meaningful relationship" (*FLA* s60CC(2)(a)) with each parent after separation and the child's need "to be protected from harm" from exposure to abuse, neglect and family violence (*FLA* s60CC(2)(b)). The amendments resolve

the potential for conflict between the two principles by specifying that where they conflict, greater emphasis is to be given to the need to protect children from harm (*FLA s60CC(2A)*).

In order to ensure that protection from harm is not only given greater weight in litigated matters, but also in cases negotiated by consent, the amendments have changed the obligations of “advisors” under the Act. “Advisors” include a wide range of professionals who assist parents after separation, including family counsellors, lawyers, family consultants and family dispute resolution practitioners (*FLA s60D(2)*). Advisors remain obligated to advise parents to enter into a parenting plan and consider whether “equal” or “substantial and significant time” may be in their children’s best interests (*FLA s63DA*). Now, in addition, they have an obligation to tell parents that parenting arrangements should be in a child’s best interests, allow them to have a meaningful relationship with each parent and protect them from harm (*FLA s60D(1)*). This advice should also prioritise protecting children from harm where a conflict arises (*FLA s60D(1)(iii)*).

Legislative provisions perceived to create disincentives to raising concerns about family violence and ongoing safety concerns have been repealed. These are the provisions obligating courts to make costs orders against a party found to have “knowingly made a false statement” in court proceedings and the so-called “friendly parent provision” that directed the attention of courts to the extent to which a parent had facilitated a child’s relationship with the other parent.

New provisions also impose obligations on courts to ask the parties about a history of family violence and the presence of concerns about child safety (*FLA s69ZQ*). Parallel obligations are imposed on parties to disclose any involvement of child welfare authorities with the child subject to proceedings under the *FLA* or another child in the family (*FLA s60CH* and *s60CI*).

Program development in family law

Family-law-related program development in Australia in recent years has focused on creating a more integrated system and meeting the needs of families with complex concerns. In 2009, a program aimed at increasing access to legal advice was implemented, with publicly funded legal assistance services (legal aid commissions and community legal centres) being resourced to provide legal information and advice to clients in Family Relationship Centres (FRCs). FRCs were a key element of the 2006 reforms and 65 of these centres around Australia provide information, referral and mediation services to separated families. Largely positive results of an evaluation of this program (conducted by AIFS) indicate that it improves client understanding of the law relating to post-separation parenting arrangements, contributes to more effective dispute resolution and strengthens the ability of FRCs to provide an holistic service.⁴ The evaluation report is provided as Attachment A to this submission.

A second program, a pilot for the provision of mediation where there has been a history of family violence, also reflects program development focused on complex families. The pilot involved a process of coordinated family dispute resolution being applied to assist parents to resolve parenting disputes with the support of a case manager, one or two family dispute resolution practitioners, a lawyer for each party and a support worker for each party (either a family violence support practitioner or a men’s support practitioner). The model on which the pilot is based was developed by Women’s Legal Service Brisbane and other consultants. The service is being piloted in five sites around Australia. An evaluation by AIFS is nearing completion, but no results are publicly available yet.

3. RESEARCH EVIDENCE

We make the following points about the evidence on post-separation parenting to assist the Committee in its consideration of the questions of enforcement and shared parenting. The discussion summarises key research findings about the circumstances of separated families and patterns in parenting arrangements in Australia. It is based on two waves of data from the Longitudinal Study of Separated Families (LSSF). In the first wave of data collection, 10,000 parents from a near-nationally representative sample of separated parents were

interviewed in late 2008, some 15 months after separation. In Wave 2, 70% of these parents were re-interviewed in late 2009.³ On average, the parents in the sample had been separated for some 28 months at that time. A copy of the report on LSSF Wave 2 is in Attachment B to this submission.

Prevalence of family violence and safety concerns

A history of family violence (physical and non-physical) is more common than not among separated couples, and around half the parents interviewed indicated that non-physical forms continued well beyond separation. In LSSF Wave 1, 65% of mothers and 53% of fathers reported either physical hurt before separation (26% of mothers and 17% of fathers) or emotional abuse before or during separation (64% of mothers and 52% of fathers).⁴ In LSSF Wave 2, 4–5% of mothers and fathers reported experiencing physical hurt at the hands of the former partner in the previous 12 months, and 53% of mothers and 45% of fathers indicated emotional abuse in the same time frame. In both waves, the parents who reported experience of physical hurt before separation (Wave 1) or in the preceding twelve months (Wave 2) were asked if their children had witnessed violence or abuse in that timeframe. Affirmative responses were given by the majority of parents in both waves.

In LSSF Wave 1, 21% of mothers and 17% of fathers reported holding safety concerns for their children and/or themselves as a result of the child's ongoing contact with the other parent. By LSSF Wave 2, a similar proportion of the sample reported holding safety concerns, with a core group of 10% holding the concerns through both LSSF waves.² For 10% of parents, concerns held in Wave 1 had dissipated by Wave 2, while newly arising concerns were reported by 7% of parents in Wave 2.

These data underline the extent to which complex concerns are pertinent to separated families in Australia. The findings indicate that child wellbeing is adversely affected when there is a history of family violence, or where a parent indicates safety concerns or reports relationships that are "fearful" or characterised by "lots of conflict".⁸ They underline the complexity involved in formulating policies that can realistically assist families to make arrangements that support the wellbeing of their children. An article published in the *Journal of Social Welfare and Family Law* that uses findings from the Evaluation of the 2006 Family Law Reforms to address this issue in some depth is Attachment C to this submission.⁹

Parenting arrangements

Consistent with Wave 1, three-quarters of the children in Wave 2 of the LSSF were in families with post-separation parenting arrangements where they spent most or all nights with their mothers.¹⁰ Arrangements were stable between the waves for two-thirds of the children in the sample, with one-third experiencing changes in parenting arrangements. Across care-time arrangements, the arrangements where children saw one parent during the daytime only were less stable than other care-time arrangements, which was most often attributable to arrangements for young children (under three) converting from daytime-only contact with fathers to overnight stays, reflecting the implementation of developmentally appropriate parenting arrangements.

In LSSF Wave 1 and Wave 2, 17% and 18% of children respectively were in shared care arrangements (involving at a minimum a 35%/65% night split between parents). The data indicate that while the dynamics for many of these families are positive, there is a substantial minority who report ongoing conflictual and fearful relationships and the presence of safety concerns (for themselves or their child) as a result of contact with the other parent. At least one in two mothers who maintained a shared care-time arrangement between survey waves indicated they had experienced emotional abuse in the period between survey waves, while at least two in five fathers also reported such experiences.

Findings from LSSF Wave 1 and Wave 2 indicate that family dynamics have a more important influence on children's wellbeing than care-time arrangements. Analysis of parents' reports on child wellbeing indicate there are no clear patterns of differences across different care arrangements entailing contact with both parents. Children fare less well in any arrangement where the dynamics involve inter-parental relationships that are fearful or conflictual and

where abuse and safety concerns are reported. In Wave 1 of the LSSF, mothers' reports suggested the children in shared care arrangements where there were ongoing safety concerns fared considerably less well than children living mainly with their mother where there were ongoing safety concerns. In Wave 2, this effect was evident in relation to some aspects of wellbeing but not others.¹¹

In Australia, as in the UK, children whose relationship with one parent (usually the father) diminishes significantly or ends after separation have been of significant policy concern. In relation to this group of children in Australia, the findings of the LSSF indicate that 12% of children had no contact with their fathers in Wave 1, and this proportion increased to 13% in Wave 2.¹² The family dynamics for this group are significantly more negative than dynamics in other care-time groups. For example:

45% of mothers who reported having this arrangement indicated a "distant" relationship with the other parent (contrasted with 20% of mothers who reported arrangements involving daytime-only contact with the father);

28% reported "lots of conflict", compared with 15% in the daytime-only group; and

19% reported a "fearful" relationship, compared with 3% in the daytime-only group.¹³

Mediation

The findings of Waves 1 and 2 of the LSSF demonstrate that a significant number of parents who use mediation in Australia are doing so in the context of historical or ongoing family violence. In an ideal world, family mediation would take place in an atmosphere in which both parents are equally respectful of each other's perspectives, demonstrated by no history of physical hurt or emotional abuse. In practice, it was found in both LSSF waves that both mothers and fathers who had experienced emotional abuse or physical hurt were considerably more likely than other parents to report making use of family mediation services. In LSSF Wave 2, use of family dispute resolution was reported by around one in three fathers and one in four mothers who said that they had experienced physical or emotional abuse between survey waves. This contrasts with about 10% of parents who had not experienced either form of abuse.¹⁴

Most family mediators interviewed with respect to Wave 1 clients felt confident about their capacity to screen out cases in which the history of violence made mediation unworkable.¹⁵ Most felt competent in their capacity to deal with the power imbalances that existed in the cases that were "screened in". Though relatively positive, family lawyers were less enthusiastic about the capacity of family mediators to deal with family violence.¹⁶ Clients had mixed reactions to family mediation, though more than 70% reported that everybody was treated fairly.¹⁷

The Australian experience is that post-separation family mediation deals almost exclusively with complex cases, many of which have a history of family violence or other dysfunctional behaviours linked to substance abuse or certain forms of mental illness. These features of mediation clientele have underpinned the development of policies and programs aimed at dealing with families with complex needs, such as those referred to in section 2 of this submission. They also underline the need for rigorous screening and assessment processes, the application of mediation in ways designed to reduce or minimise risk (including through the application of shuttle processes), and mechanisms for identifying cases that should proceed directly to court.

4. CONCLUSION

In the past two years in Australia, significant emphasis has been placed on meeting the needs of separated families who are affected by complex issues, including family violence, ongoing safety concerns and some mental health issues. Empirical evidence demonstrates that such families are the main users of services, including Family Relationship Centres, mediation services and courts. The empirical evidence also indicates that a substantial proportion of parents are capable of managing post-separation parenting issues with minimal use of services. For some of these families, shared parenting arrangements involving varying distributions of time between each parents' home meet the needs of parents and children,

but such arrangements still apply to a minority of children (peaking at 27% for the 5–11 year age group, but averaging 18% across the population).¹⁸ Care-time arrangements are less influential on child wellbeing than family dynamics, with children in families where there is family violence, ongoing safety concerns and negative inter-parental relationships faring less well than children in families not affected by these issues.

Recent legislative changes in Australia are intended to heighten the focus on ensuring children are protected from harm in making post-separation parenting arrangements, with these changes aimed at influencing the advice parents receive from relationship services as well as the way in which matters are litigated and decided in court. Program development has been oriented toward achieving greater integration between legal and non-legal support services to provide parents with access to more holistic support. Attention has also been focused on developing approaches to mediation that are safe and appropriate in some circumstances where there has been family violence, and identifying cases that need to proceed expeditiously to court.

5. REFERENCES

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Qu, L., & Weston, R. (2010). *Parenting dynamics after separation: A follow-up study of parents who separated after the 2006 family law reforms*. Melbourne: Australian Institute of Family Studies.

6. ATTACHMENTS

Attachment A: Evaluation of the Family Relationships Centre legal assistance partnerships program.

Attachment B: Parenting dynamics after separation: A follow-up study of parents who separated after the 2006 family law reforms.

Attachment C: Legislative aspirations and social realities: empirical reflections on Australia's 2006 family law reforms.

¹Kaspiew, R., Gray, M., Weston, R., Moloney, L., Hand, K., Qu, L., & the Family Law Evaluation Team. (2009). *Evaluation of the 2006 family law reforms*. Melbourne: Australian Institute of Family Studies. The other reports are: Chisholm, R. (2009). *Family courts violence review*. Canberra: Attorney General's Department; Family Law Council. (2009). *Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues*. Canberra: Attorney General's Department.

²The amending legislation is the *Family Law (Family Violence and Other Matters) Act 2011* (Cth).

³Chisholm (2009).

- ⁴Moloney, L., Kaspiew, R., De Maio, J., Deblaquiere, J., Hand, K., & Horsfall, B. (2011). *Evaluation of the Family Relationships Centre legal assistance partnerships program*. Melbourne: Australian Institute of Family Studies, p. E2.
- ⁵Qu, L., and & Weston, R. (2010). *Parenting dynamics after separation: A follow-up study of parents who separated after the 2006 family law reforms*. Melbourne: Australian Institute of Family Studies.
- ⁶Kaspiew *et al.* (2009), pp. 26–27.
- ⁷Qu & Weston (2010), p. 25.
- ⁸Qu & Weston (2010), p. 153.
- ⁹Kaspiew, R., Gray, M., Qu, L., & Weston, R. (2011). Legislative aspirations and social realities: empirical reflections on Australia's 2006 family law reforms. *Journal of Social Welfare and Family Law*, 33(4), 397-418.
- ¹⁰Qu & Weston (2010), p. 69.
- ¹¹Qu & Weston (2010), p. 149.
- ¹²Qu & Weston (2010), p. 56.
- ¹³Qu & Weston (2010), p. 98.
- ¹⁴Qu & Weston (2010), p. 49.
- ¹⁵Kaspiew *et al.* (2009), p. 237. About two-fifths felt that about a quarter of cases referred were inappropriate for mediation because of family violence, though a further two-thirds estimated that less than a quarter were in this category. In practice, many cases are “ruled in” for family mediation, despite allegations of family violence.
- ¹⁶Kaspiew *et al.* (2009), p. 239.
- ¹⁷Kaspiew *et al.* (2009), p. 99, p. 241.
- ¹⁸Qu & Weston (2010), p. 57.