COMMONWEALTH OF AUSTRALIA

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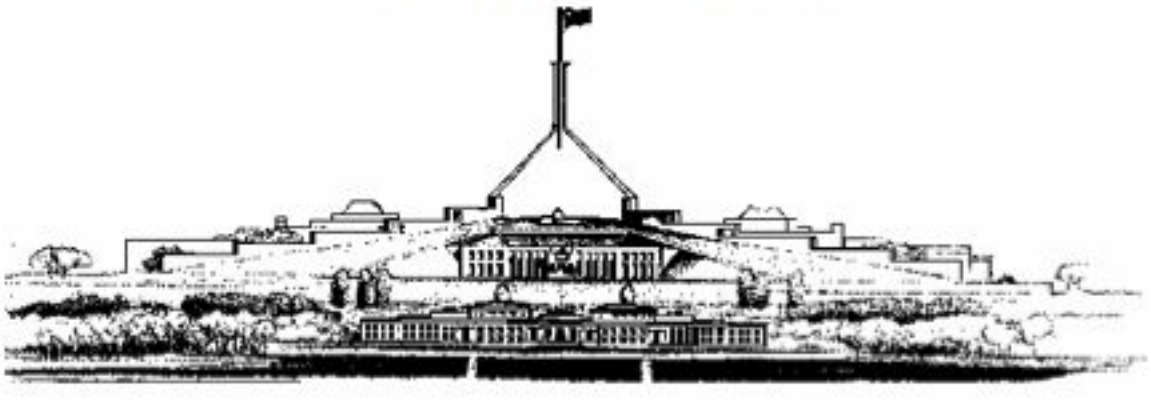

THE SENATE

BILLS

Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011

Second Reading

SPEECH

Tuesday, 22 November 2011

BY AUTHORITY OF THE SENATE

SPEECH

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Questioner		**Responder**	
Speaker	Brandis, Sen George	**Question No.**	

Senator BRANDIS (Queensland—Deputy Leader of the Opposition in the Senate) (19:30): Family law is the one jurisdiction of the federal judicial system to which almost all Australians have some level of exposure at some time in their lives. It is a sad fact of life that virtually every one of us will either have a first-hand experience or have someone—or most likely more than one person—within our family or close circle who will have contact with the Family Court or the Federal Magistrates Court in its family law jurisdiction. It is also a sad fact of life that family law disputes are among the most intractable matters that come before a court, often in a context of extreme personal bitterness and too often occasioned by violence and abuse of the most horrible kind, conduct which, it should be unnecessary to say, is abhorrent to all members of the community.

It is also a fact of life that any attempt to resolve these disputes will often leave both parties feeling aggrieved and, much worse, their children exposed to the fallout and remaining at risk of violence and abuse. Many of the failed relationships that come before the courts have been blighted by mental illness and substance abuse problems, sometimes on both sides, and because judges are human the courts do not always get it right, much as they strive to do so. In disputes involving children, the principal guidance provided by the Family Law Act is that the best interests of the child are the paramount consideration. Just how the best interests of children can be determined, however, is and will always be a vexed question and a matter on which decent people will arrive at different views.

In December 2003 the House of Representatives Standing Committee on Family and Community Affairs tabled a unanimous report entitled *Every picture tells a story*. The committee was asked to consider, given that the best interests of the child are the paramount consideration, what other factors should be taken into account in deciding the respective time each parent should spend with their children post-separation. The committee, headed by Kay Hull MP, heard evidence from more than 2,000 witnesses over the course of six months. One of its findings, which informed many of its recommendations, was:

We—

that is, the entire committee across party lines—

are convinced that sharing responsibility is the best way to ensure as many children as possible grow up in a caring environment. To share all the important events in a child's life with both mum and dad, even when families are separated, would be an ideal outcome.

The committee heard heartbreaking evidence of children separated from one of their parents by inflexible Family Court orders which caused anguish to parents and children alike and which had long-term detrimental effects on children. The so-called 'shared parenting laws' which were introduced by Mr Ruddock, the Attorney-General in the Howard government in 2006, were a response to the report. In my view, they were some of the best and most important law reforms for which that great Attorney-General was responsible.

The changes to the family law system included changes to both the legislation and the family relationship service system. The main elements of the legislative changes were: to require parents to attend family dispute resolution before filing a court application, except where there are serious concerns about family violence and child abuse; to place an increased emphasis on the need for both parents to be involved in their children's lives after separation, including the introduction of a presumption of shared parental responsibility; to place greater emphasis on the need to protect children from exposure to family violence and child abuse; and to introduce legislative support for less adversarial court processes in children's matters. This legislative suite included a requirement for the Australian Institute of Family Studies to undertake a large-scale longitudinal evaluation of the effect of the reforms. That evaluation was completed in December 2009, and I will return to its findings in a moment.

The coalition is proud of the Ruddock reforms. The Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 seeks to amend the Family Law Act by including an additional object to give effect to the UN Convention on the Rights of the Child, to which decision-makers may have regard when dealing with children's matters. This will change the definitions of family violence and abuse; strengthen the obligations of lawyers, dispute resolution practitioners, family consultants and family counsellors to prioritise the safety of children; require inquiry and reports on family violence and child abuse

in court proceedings; repeal the so-called 'friendly parent provisions'; repeal the provision for cost orders in the case of false family violence allegations; and provide for simpler procedures for the participation of child welfare agencies in family law proceedings. Some of these amendments will have the coalition's support. Others, however, in our view will have the effect of winding back the Ruddock reforms and will therefore be opposed. I will deal with the substantive provisions in turn.

The bill proposes to insert a new section 60CC, which requires the court when determining what is in the child's best interests to give greater weight to the primary consideration that protects the child from harm where there is inconsistency in applying the two primary considerations, the other being the benefit to the child of having a meaningful relationship with both parents. This amendment is unnecessary and gratuitous. The existing section 60CA makes the best interests of the child the paramount consideration. The existing section 60B clearly articulates that a meaningful relationship with a parent is subordinate to the paramount consideration. In purported aid of the objective of this amendment, the bill seeks to add as a further object of part VII of the act that it is to give effect to the UN convention. The explanatory memorandum states that the intention is to confirm in cases of ambiguity that part VII should be interpreted consistently with the convention. However, to the extent to which the act departs from the convention, the act will prevail. The proposed amendment does not corporate the convention into domestic law. Given that the act already gives effect to the principle of the paramountcy of the best interests of the child, the need for that amendment is not clear.

The exposure draft of the bill proposed a definition of family violence that included any behaviour that was subjectively emotionally, psychologically or economically abusive or threatening. Many stakeholders voiced their concern that any instance of marital discord could be tailored to fit the definition. The definition now proposed defines family violence as 'violent, threatening or other behaviour that coerces or controls a member of the person's family or causes the family member to be fearful.' It differs from the existing definition in that it imposes a subjective test. The definition in the existing act requires a reasonable fear for the family member's wellbeing or safety.

The new definition attempts to qualify its subjectivity by incorporating a list of examples of behaviour, which includes assault, repeated derogatory taunts, damage to property and other unreasonable or criminal behaviour. However, it is an open question whether the list of examples is sufficient to frame and limit the subjectivity of the definition. There is no doubt that any of the behaviours listed would cause a person to be fearful; however, they would also give rise to a reasonable fear for a person's wellbeing or safety under the existing test. The problem with a subjective test is that a person seeking to demonstrate that another person is violent need only state that he or she feared controlling or coercive conduct. The state of mind need not be reasonable. The consequences of a finding of violence can be drastic and permanent. It is not appropriate to divert a court from inquiry as to whether a fear alleged to exist is well founded. Accordingly, the coalition will press for the retention of the objective test in the act.

The AIFS evaluation—that is, the longitudinal study to which I referred a few moments ago—found that the legislative changes introduced as part of the 2006 reforms placed greater emphasis on the need to protect children from harm and from exposure to family violence and child abuse. This meant that the identification of and response to family violence became more systematic under the reforms. However, it found that improvements still needed to be made in identifying and responding to pertinent safety concerns. The proposed amendments broaden the reporting requirements in this regard to interested persons, rather than just parties in child related proceedings. This will include independent children's lawyers, dispute resolution practitioners, family consultants and family counsellors. There is a continuing need to improve responses to child safety concerns and these amendments will therefore be supported by the coalition. Similarly, the record of child welfare agencies in family law proceedings has in many cases been unsatisfactory. Amendments to improve their participation and accountability are welcomed by the coalition and will be supported.

Section 60CC(3)(c) of the act currently requires family courts to consider the willingness of one parent towards facilitating the other to have a meaningful relationship with the child. The provision has been criticised as discouraging parents' disclosures of family violence and child abuse for fear of being found to be unfriendly. The bill seeks to repeal this provision and replace it with considerations of the extent to which each of the child's parents has taken or failed to take the opportunity to participate in major long-term decisions in relation to the child and spend time with and communicate with the child, and the extent to which each of the parents has fulfilled or failed to fulfil the parent's obligation to maintain the child. However, these criteria already exist in section 60CC(4).

The explanatory memorandum cites the AIFS evaluation and the Family Law Council report as the basis for the repeal of the friendly parent provision. This, however, is misleading. The AIFS found that

some concerns were expressed that the provision discouraged the reporting of violence but that there was no statistical information to suggest that this was the case. The criticism was in fact voiced in the Chisholm report, uncited in the explanatory memorandum, and was described as gossip by the Family Law Council.

The failure to facilitate a relationship between a child and a separated parent remains a salient issue for the attention of a court and has been found to be an incident of emotional abuse in several reported cases. If the enhanced violence and abuse reporting obligations are supported, there can be no reason for a parent's obstructive behaviour to be excluded from consideration. It should also be noted that this consideration should not arise in the usual course if there are well-founded fears that contact with the other parent exposes the child to violence or abuse. The existing section 60CG makes that clear. Unwillingness on the part of a parent to facilitate a close and continuing relationship with the other parent is undoubtedly a relevant consideration in making parenting orders, which is why the coalition supports the retention of the friendly parent provision.

In the 2009 case of Villey and Prabsik, Mr Justice Watts ordered that a seven-year-old child be removed from his father's primary care to that of his mother. The relevant factual findings were that the mother had suffered a significant mental illness following the parties' separation as a result of the treatment she had suffered at the hands of the father during the relationship. Psychiatric examination of the parties revealed the mother to be fully recovered with an excellent prognosis. She demonstrated insight into her illness as well as its impact on the child. She had rebuilt her relationship with the child in an appropriate manner assisted by professionals. The father, however, was assessed as having a narcissistic personality with overvalued ideas or a delusion that the mother remained ill, unsafe and should have minimal involvement in the child's life. Mr Justice Watts accepted the mother's argument that it would be more likely for the child to have a meaningful relationship with both parents if he lived with his mother rather than his father and that the child would be likely to suffer psychological harm by damage to his relationship with his mother if he continued to reside with his father. This finding would have been more difficult to arrive at had the friendly parent provisions not been in the present act. That case illustrates why the coalition views it as an unwise decision to amend the act by repealing that provision.

The bill proposes to repeal section 117AB, which provides for mandatory cost orders—albeit some such orders might cover only a portion of the costs—where a party knowingly makes a false allegation or statement in the proceedings. The explanatory memorandum cites the AIFS evaluation and the Family Law Council report's finding that the section operates as a disincentive for disclosing family violence. Again, this is misleading. The Chisholm report alludes to practitioner concern as the basis of its recommendation for repeal, but neither of the major studies cited makes any substantive finding. The Family Law Council report in fact recommends that the provision be clarified with an explanatory note or public education, not that it be repealed.

It should be noted that the test propounded in section 117AB is a stringent one. A mandatory cost order could not arise from evidence which was not proffered in the circumstances or even was given recklessly or without belief. It applies only to knowingly false evidence. If a court was prepared to make such a finding there is no reason why a cost order should not follow, as it would in any other court. Individual members of the judiciary have confirmed that such false accusations are by no means unknown and that sanctions must apply in such cases, yet this bill would remove that sanction.

The courts have provided guidance on the application of the existing provision. In Charles and Charles in 2007, Justice Cronin said:

There can be no room for misunderstanding or doubt; objectively, the person making the statement cannot believe the statement to be true.

So constrained, there is no reason to believe that the existing provision acts as a disincentive to properly made allegations or even erroneous allegations made in good faith of abuse. Cost orders are made much less routinely in the family jurisdiction than in any other. Sadly, it is clear that some parties can and will make false statements if they perceive an advantage in doing so. Because cost orders are not routine, there must be an express disincentive within the act.

The policy objectives of the 2006 reforms were: firstly, to help build strong and healthy relationships and prevent separation; secondly, to encourage greater involvement by both parents in their children's lives after separation and to protect children from violence and abuse; thirdly, to help separated parents agree on what was best for their children, rather than litigating, through the provision of useful information, advice and effective dispute resolution services; and, fourthly, to establish a highly visible entry point that operated as a doorway to other services and helped families to access those other services. As the AIFS evaluation confirmed, the legislative changes introduced as part of the reforms placed greater emphasis on the need to protect children from harm, exposure to family violence and child abuse. This meant the identification

of and response to family violence became more systematic under the reforms.

Although the Ruddock reforms have been subject to some criticism, all the indications are that overall they have been hugely successful. Some of those criticisms have arisen from misrepresentation or misinterpretation, whether wilful or otherwise. Sensibly, the government has withdrawn its more radical proposals and at this stage will leave the core shared parenting provisions largely intact. However, it is disturbing that it accepted criticisms of the friendly parent and cost orders provisions at face value and has misleadingly cited positive or neutral findings on those provisions in support of its proposed amendments.

The coalition will support any sensible proposals to reduce the exposure of children to abuse and family violence. Our record indicates that we take these issues very seriously indeed. Some of the amendments proposed by this bill are worthy of support; however, as I have said, it must be recognised that proceedings in the family jurisdiction are some of the most bitterly contested and intractable found in any court process. Judges and practitioners are well aware that child related proceedings may be brought with any number of collateral purposes, themselves a form of child abuse, and mechanisms must exist to deal with them. To the extent to which this bill facilitates that objective it will have the coalition's support but to the extent to which in the areas I have indicated the bill overreaches or erroneously applies the conclusions of the studies of the operation of the Ruddock reforms and in doing so sets back those objectives the coalition will move amendments to delete those provisions from the bill.