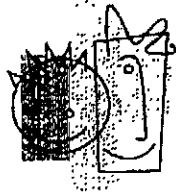


Submission
No 1

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

Organisation: NSW Commission for Children and Young People
Name: Ms Gillian Calvert
Position: Commissioner
Telephone: 02 9286 7276
Date Received: 11/10/2006



nsw commission for
children & young people

RECEIVED

11 OCT 2006

LAW & JUSTICE

The Hon Christine Robertson MLC
Chair
Standing Committee on Law and Justice
Legislative Council
Parliament House
Macquarie St
SYDNEY NSW 2000

Dear Ms Robertson

I am writing regarding your request for submissions to the Standing Committee on Law and Justice on the Inquiry into the impact of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth).

I support the Inquiry as an opportunity to consider the impact of the recent changes to the *Family Law Act 1975* on children in NSW. However, I am unable to make a detailed submission to the Inquiry at this stage.

In 2005 the Commission made a submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs on the exposure draft of the *Family Law Amendment (Shared Parental Responsibility) Bill 2005*. I have attached a copy of this submission for your information. It is also available on the Commission's website at http://www.kids.nsw.gov.au/news/lawspolicies/1124412007_23285.html.

I thank you for the opportunity to comment.

Yours sincerely

Gillian Calvert
Commissioner
9 October 2006

Encl. Commission's submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs

**SUBMISSION BY THE
NSW COMMISSION FOR CHILDREN AND YOUNG PEOPLE
TO THE HOUSE OF REPRESENTATIVE STANDING COMMITTEE ON
LEGAL AND CONSTITUTIONAL AFFAIRS**

**ON THE EXPOSURE DRAFT OF THE FAMILY LAW AMENDMENT (SHARED
PARENTAL RESPONSIBILITY) BILL 2005**

JULY 2005

1. THE NSW COMMISSION FOR CHILDREN AND YOUNG PEOPLE

- 1.1 The NSW Commission for Children and Young People was established in 1998 by the *Commission for Children and Young People Act 1998* to promote the safety, welfare and well-being of children in NSW.
- 1.2 Section 10 of the Commission's Act lays down three statutory principles which govern the work of the Commission:
- (a) the safety, welfare and well-being of children are the paramount considerations;
 - (b) the views of children are to be given serious consideration and taken into account; and
 - (c) a co-operative relationship between children and their families and community is important to the safety, welfare and well-being of children.
- 1.3 Section 12 of the Commission's Act requires the Commission to give priority to the interests and needs of vulnerable children. Children are defined in the Commission's Act as all people under the age of 18 years.
- 1.5 Section 11(d) of the Commission's Act provides that one of the principal functions of the Commission to make recommendations to government and non-government agencies on legislation, policies, practices and services affecting children.

2. GENERAL COMMENT

- 2.1 The Commission is pleased to make a submission on the exposure draft of the *Family Law Amendment (Shared Parental Responsibility) Bill 2005*.
- 2.2 The central view of this submission is that while additional resources to assist separating families are welcome, the proposed changes to the Act are overly complicated, wrongly focussed and do not promote the

best interests of children. In particular, the changes undermine the importance of seeking the views of children in relation to parenting orders and arrangements, are likely to lead to unnecessary complexity in determining a child's best interests, fail to address the practical realities of shared parenting which may have adverse effects on children and young people and do not adequately protect children where allegations of child abuse have been made. In addition a major opportunity to establish a child protection system integrated with the Family Court has been missed.

3 OBJECTS, PRINCIPLES AND BEST INTERESTS FACTORS

- 3.1 The Bill introduces a new object into the *Family Law Act* ('the Act'), that of 'ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child.' A new principle has also been introduced: that 'children have the right to enjoy their own culture' with special application to Indigenous children.
- 3.2 The new object is matched by changes to the definition of a child's best interests. Currently, section 68F of the FLA contains a list of factors that the court is required to consider in determining a child's best interests, although the court has the discretion to determine the weight it gives to each factor. The Bill now establishes a two tiered system of factors. The first tier consists of two primary considerations:
- The benefit to the child of having a meaningful relationship with both parents
 - The need to protect the child from violence or psychological harm.
- 3.3 The response states that the intention of this change is to direct the court's attention to these factors as primary considerations in the determination of a child's best interests.
- 3.4 The factors that are currently relevant to the determination of a child's best interests, including the views of the child (as set out in the current section 68F(2)(a)) now become secondary factors. Instead of the court being required to consider them as the Act currently provides, their status is simply that of 'additional considerations.' Worded this way, a court is no longer required to consider the views of children, they are just an additional consideration with low status given the hierarchy of objects, principles, primary and secondary factors. While section 60KB of the Bill requires the court to consider the needs and concerns of children involved in the conduct of the proceedings – a provision which the Commission supports – this provision is not matched by a requirement that the court considers the views of children in determining what order to make.
- 3.5 Insofar as the Act relates to children it should be simplified rather than made more complex. The object of the Act should be that the best interests of the child are the paramount consideration, in accordance

with Article 3 of the Convention on the Rights of the Child ('CRC'). A child's right to express his or her views and have them taken into account as appropriate should be a guiding principle of the Act, consistent with Article 12 of the CRC which states that the views of the child should be given due weight in all matters affecting the child. The proposed changes to section 68F are unnecessary and confusing.

- 3.6 As the best interests of each child will depend on that child's situation, the Act needs to provide discretion in decision making and flexibility to accommodate the needs of different children. For that reason the Commission opposes amending the Act to follow the Florida legislation stating that as a matter of public policy children should have frequent and continuing contact with both parents. For some children, such contact will not be in their best interests. The Florida legislation has not been demonstrated to have any positive impact in furthering the best interests of children.
- 3.7 Nevertheless, if this provision is to be included in the Act, then the underlying principle should be consistently applied throughout the Act. Where a child's right to contact with both parents is violated by the failure of a parent to undertake contact, then penalties should apply. The proposed contravention provisions in Schedule 2 need to be amended to deal with that situation, enabling the right to contact to be enforced against a parent who omits or fails to adhere to contact arrangements. Sections 70NG and 70NJ of the Bill which allow the court to order a person who contravened a parenting order, with the result that another person did not spend time with a child, to pay the reasonable expenses and costs incurred by that second person. They need to be amended to also allow the court to order a person who fails to spend time with a child in contravention of a parenting order to pay the reasonable expenses and costs incurred by the other person.
- 3.8 The specific reference to the right of children to enjoy their own culture and its elevation to an underlying principle is welcome. Recognising it as a 'right' rather than 'any need' emphasises its importance and makes it less dependent on a particular judge's view of its relevance. The Commission also supports the related provisions: section 61F requiring the court to have regard to the kinship obligations and child-rearing practices of Aboriginal and Torres Strait Islander children and section 60KI(3) allowing the court to take into account other evidence concerning the relevant practices of Aboriginal and Torres Strait Islander children.

4 OBLIGATIONS OF ADVISERS AND ROLE OF FAMILY RELATIONSHIPS CENTRES

- 4.1 Section 63DA requires advisers giving advice or assistance to people in relation to parental responsibility for a child to advise parents of certain matters. They include the desirability and content of a parenting plan and giving consideration of the possibility of shared parenting time. Unfortunately those matters do not include the importance of taking account of the views of the children concerned. Section 63DA should

make specific reference to the desirability of seeking the views of the children concerned where they are developmentally able to express those views, including their views on shared parenting time. Given that parenting plans are intended to assist separating families to minimise conflict and focus on the needs of their children, a culture of appropriately involving children in the choices to be made in developing parenting plans should be fostered by the Bill. It is important that parents consider the views of children in relation to shared parenting time or other proposed arrangements as it is the children who will usually have to move between residences with the dislocation that can entail – not the parents.

- 4.2 While the proposed resourcing for Family Relationships Centres makes specific mention of funds available to assist parents, particularly fathers, there is no reference to funding services for children. The priority should be the wellbeing of children and to that end provision made for adequately resourced and appropriately designed child-focused services.

5 CHILD ABUSE ALLEGATIONS

- 5.1 Section 61DA of the Bill states that courts will be required to apply a presumption of joint parental responsibility unless there are reasonable grounds to believe that a parent has abused the child or another child in the family or there is family violence.
- 5.2 To ensure that children are protected from abuse, adequate provision must be made to investigate allegations of abuse and family violence so that information can be provided to the court as quickly as possible enabling the court to assess whether there are reasonable grounds to believe the allegations. The power to control significant decisions in a child's life should not depend upon the capacity of the other parent to undertake court proceedings in situations of alleged violence or abuse. Allegations of this kind are complex and require close and sensitive investigation with child protection the overriding concern.
- 5.3 Similarly, since sections 60I and 60J of the Bill require parties to attend family dispute resolution unless the court is satisfied that there are reasonable grounds to believe there has been abuse or family violence, or there would be a risk of abuse or family violence if the proceedings are delayed, procedures must be developed and resources set aside to investigate allegations quickly and properly.
- 5.4 The Commission supports the removal of the blanket prohibition on disclosure of communications in confidential counselling or mediation where they relate to child abuse. However it does not support the draft provisions in their present form. Sections 10D and 10L draw a distinction between the status of child abuse admissions and disclosures made by an adult and a child under 18. An admission by an adult about 'a' child is admissible in a court or a tribunal whereas a disclosure by a child is only admissible if it concerns that particular child. This means that disclosures by a child about another child such as a sibling are not admissible. There

is no reason to draw this distinction; disclosures by a child should have the same status as admissions by an adult.

- 5.5 It is most unfortunate that the opportunity has not been taken to establish a federal child protection service integrated with the Family Court's services. While innovative practices within the Court have improved the Court's capacity to deal with child abuse allegations, the position varies from state to state as does the adequacy of resources. As the Family Law Council's final report states, 'there is no greater problem in family law today than the problems of adequately addressing child protection concerns.'

6 CONFIDENTIAL COMMUNICATIONS

- 6.1 Sections 10C(2) and 10K(2) draw a distinction between the status of communications made to family counsellors and family dispute resolution practitioners for the purpose of those communications being disclosed to other persons. A person over the age of 18 can consent to disclosure, a person under that age cannot. Instead the consent must come from each person with parental responsibility or the court.
- 6.2 These provisions are inconsistent with the principle that a young person's competence to consent depends upon that person's capacity, not his or her age, as discussed in *Gillick v West Norfolk and Wisbech Area Health Authority*¹ and *Marion's Case*.²
- 6.3 Moreover, in certain circumstances they may impose an unrealistic or impractical restriction on the disclosure of information and a burden on the family counsellor or family dispute resolution specialist receiving the communication. If the information concerns a person with parental responsibility that person may refuse to consent to its disclosure; if the parents are in dispute one or both may refuse; and the alternative of initiating court proceedings to obtain consent may not be feasible. These provisions need to be reconsidered and redrafted to reflect the decision-making capacity of young people and the practical realities of counselling.

7. MISSED OPPORTUNITIES

- 7.1 As discussed above, it is very unfortunate the Government has not taken the opportunity to establish a child protection service as advocated by the Family Law Council. The establishment of such a service would have avoided the need to coordinate the differing child protection systems in each jurisdiction and adapt them to serve the Family Court's needs. It would have enabled expeditious, independent centralised investigation of allegations. Without such a system children at risk will continue to fall through jurisdictional gaps and families will experience lengthy delays and multiple uncoordinated interventions. Many of the child abuse concerns raised in family law proceedings will

¹ [1986] AC112

² *Department of Health and Community Services (NT) v JWB* (1992) 175 CLR 218.

not be addressed or investigated by child protection authorities because, while the information is of considerable importance in family law litigation, the information provided does not indicate that the child is currently at risk of harm.

- 7.2 The Commission's previous submissions to the family law reform process have urged reviewing the role of child representatives in the family law system to provide for a direct instructions model where children are willing and able to express views or provide instructions to a child representative. It is disappointing that the Government has not taken this opportunity to address this issue which was a recommendation of the 1997 Report of the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission *Seen and Heard: Priority for Children in the Legal Process*.

8 CONCLUSION

For the reasons set out above the Commission has serious concerns with the draft exposure bill. The focus of the bill should be on improving the current system for children. To that end the importance of their views and their situation needs to be prioritised. This Bill fails to do that. Rather, it threatens to complicate the family law system still further to the detriment of separating families.

NSW Commission for Children and Young People
Level 2, 407 Elizabeth Street
Surry Hills NSW 2010
Contact: Stephen Robertson, Director Policy
Phone: (02) 9286 7270
Fax: (02) 9286 7267
Email: kids@kids.nsw.gov.au