



Commissioner for Children and Young People
Western Australia

All enquiries

Mr Tim Watling
Committee Secretary
Legal and Constitutional Affairs Legislation Committee
By email: legcon.sen@aph.gov.au

Dear Mr Watling

Inquiry into the Family Law Amendment (Family Violence and Other Measures) Bill 2017 and the Family Law Amendment (Parenting Management Hearings) Bill 2017

I thank the Legal and Constitutional Affairs Legislation Committee for the opportunity to provide a submission in respect of the Family Law Amendment (Family Violence and Other Measures) Bill 2017 and the Family Law Amendment (Parenting Management Hearings) Bill 2017.

As Commissioner for Children and Young People in Western Australia, I have a statutory responsibility to monitor and review laws, policies, practices and services that affect the wellbeing of children and young people under the age of 18 in WA, and in doing so, have regard to the best interests of the children and young people as being of paramount importance. I work under the principles that children and young people are entitled to live in a caring and nurturing environment and to be protected from harm and exploitation.¹

I would like to express my support of both bills, particularly the advances for the child's right to be heard under the proposed amendments to various subsections of section 11, described at paragraph 47, page 13 of the Explanatory Memorandum of the Family Law Amendment (Parenting Management Hearings) Bill 2017.

I have some concerns regarding the concept of "best interests of the child" and how the best interests of a child are determined, including:

- The opportunity for the child to voice their opinion or wishes directly to the court in legal proceedings, including where the views expressed by experts are contrary to the child's view. It is important that they are heard in a manner

¹ Commissioner for Children and Young People Act 2006 (WA) Section 3 and 4 p2.

consistent with their wishes, taking into account their age, maturity and ability. It is also important that such views are given due weight and carefully considered.

- The appointment of Independent Children's Lawyers (ICL) as standard practice and the ability of an ICL to physically meet with a child and develop a rapport sufficient to understand their views and situation and form an opinion to present to the court, noting that an ICL's views are usually relied upon by the court. An ICL should meet with a child in person, at least once, and make an active effort to obtain the child's views on the matter. In my preliminary research for the purpose of responding to the Family Law Act review, I have heard that ICL's are only appointed in approximately ten percent of cases and, particularly in the instance of regional or remote children and young people, that there are cases where ICL's do not locate the child at all or otherwise conduct interviews by telephone.
- The ability of a family consultant, court expert and/or child protection staff to physically meet with a child and develop a rapport sufficient to understand their views and situation and form an opinion to present to the court, noting that such views are usually relied upon by the court. Family consultants, court experts and/or child protection staff should meet with a child in person, at least once, and make an active effort to obtain the child's views on the matter.
- The weighing up of factors such as culture against other considerations in the best interests of the child, including the quality and stability of care that the child is likely to receive. My consultations with children and young people have emphasised the importance of culture in their lives, however the safety of a child must always be held paramount. As this is a complex issue to consider, guidance around the implementation of such consideration must be provided to ensure that judges have sufficient information about a particular child or young person before them when making such a decision. Expertise in how to make such assessments, including consulting with children, should be built into the system at all levels. Further, judges require the training and support necessary to ensure that a rigorous process is applied to the assessment of each child's wellbeing needs. Building strong guidance in this area of law may also be hampered by the lack of a clear body of case law to be relied upon, as in many instances cases are not publicly reported. I would suggest that creating a checklist for the process to be undertaken and the information required to be obtained by or presented to the court, as has been done in the United States with the "Active Measures" guidelines under the Indian Child Welfare Act, may be a useful way of testing the rigour of the process and providing a basis for review of the quality of information presented and the conclusion reached by the court.
- The separation of the consideration and views of each child where multiple children are involved in the same proceedings. The views and individual needs of each child should be obtained and considered separately. I have undertaken some preliminary research into this area and will consider this issue further as part of a broader response to the review of the Family Law Act.
- The child's lack of recourse to review decisions made which they do not consider to be in their best interest. There should be an opportunity for children

and young people to comment upon the outcome before it is made final and to seek review of a decision they feel is not in their best interests. It is important to ensure that there are appropriate checks and balances for children and young people, particularly where plans or orders significantly impact or change their day to day living arrangements and/ or are set in place for an extended period of time.

While these concerns affect both of the proposed bills, they also apply to the area of family law more broadly. These matters should be taken into consideration in any reform affecting the best interests of a child, including consideration of the guidance provided to the court in those circumstances and the opportunities available for review of those decisions.

Yours sincerely

COLIN PETTIT

Commissioner for Children and Young People WA

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