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Submission No. 58

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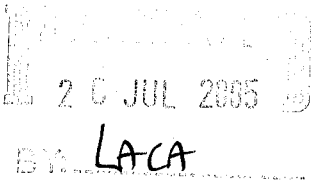
The Committee Secretary
House of Representatives Standing Committee on
Legal & Constitutional Affairs
Parliament House
CANBERRA ACT 2600



By email: laca.reps@aph.gov.au

EXPOSURE DRAFT – FAMILY LAW AMENDMENT (SHARED PARENTAL RESPONSIBILITY) BILL 2005

Attached is a submission to the Committee on the above exposure draft legislation.

A submission, dated 13 January 2005, to the Departmental Consultation Group of the Attorney-General's Department on the Government's discussion paper "A New Approach to the Family Law System – Implementation of Reforms" was previously made by us.

As with the earlier submission, this submission is made by us on behalf of Christians known as Brethren. A brief description of who the Brethren are is given in the attached submission under the heading "Background".

While we recognise that any legislative changes passed by the Parliament must address family situations across the whole spectrum, and must therefore usually be expressed in general terms, we submit that in the drafting of any amendments to the law, it is essential that the possible implications of the amendments in the context of particular situations must not be overlooked. To that end our submission raises several matters.

We firmly believe that the underlying issues raised in the submission are very important and would appreciate the opportunity to express our concerns to the Committee in a brief interview.

We trust the Committee finds the submission of use.

Contact was made with the Committee by phone last Thursday and an extension of time to lodge the submission arranged.

Yours faithfully,

John W Gaal

Philip B McNaughton

SUBMISSION TO STANDING COMMITTEE ON LEGAL & CONSTITUTIONAL AFFAIRS

EXPOSURE DRAFT – FAMILY LAW AMENDMENT (SHARED PARENTAL RESPONSIBILITY) BILL 2005

SUMMARY

The key points made in this submission are:

- the draft legislation should clarify what is meant by "culture" for the purposes of draft sec 60B(2) which is to set out the principles underlying the objects of Part VII of the *Family Law Act 1975* ("the Act");
- the circumstances in which, and the time at which, a parenting plan may be entered into should be expressly provided for and, in particular, it should be provided that a parenting plan may be entered into at any time and may relate to children of the marriage not then born;
- the legal status of a parenting plan and the weight to be given to a parenting plan in parenting order proceedings needs to be more adequately addressed;
- the primary consideration in parenting order proceedings relating to physical and psychological harm should be revised to ensure that the concept of "other behaviour" has a sufficiently wide scope;
- some general indication should be given as to what "other circumstances" may be prescribed in which the family dispute resolution provisions will not apply.

BACKGROUND

As indicated in the covering letter, this submission is made on behalf of Christians known as Brethren.

The Brethren fellowship had its origins in the UK in the 1820's. They are Christians who seek to order all aspects of their lives in accordance with the teachings of the Bible which they believe is the written word of God, is profitable for teaching and should be followed in its entirety by Christians as relating doctrine and conduct. From it they have learned that Christ's death and resurrection alone suffice for salvation; that, having ascended into heaven, He has sent down the Holy Ghost to indwell all true believers; that, as thus indwelt, believers form the one church, or body of Christ, of which He is the head; that, according to 1 Thessalonians 4, Christ is coming personally to take His people to be with Himself.

A cardinal principle that governs Brethren is separation from the world, as required by passages in the Bible such as 2 Corinthians 6: 14-18 and 2 Timothy 2: 19-22. Separation means, for example, that Brethren do not have radios and televisions, do not attend places of entertainment, such as theatres and concerts, do not enter into partnerships with non-Brethren and do not engage in any conduct which would involve fellowship with others than those who are Brethren – that is, those with whom they celebrate the Lord's Supper.

Because of separation, Brethren are sometimes referred to as exclusive Brethren and, while separation is often seen by others as restrictive, in practice, it proves to be essential to proper Christian fellowship.

It is well known that Brethren make a substantial positive contribution in the wider community in their business affairs and general conduct.

Brethren conduct their own government accredited schools for the high school years and there are many opportunities of social interaction for both young and old. Unemployment and juvenile delinquency are virtually non-existent in the Brethren fellowship and it is ensured that all have suitable living conditions.

As to marriage, they regard this as a primary institution of God which is accurately defined in the definition enacted by the Parliament in the *Marriage Amendment Act 2004*. Because marriage, like any other aspect of their lives, is governed by the Bible, marriage amongst Brethren is inevitably between Brethren. They are a recognised denomination for the purposes of the *Marriage Act 1961* and, accordingly, have their own marriage celebrants.

The incidence of marital breakdown amongst the Brethren is extremely low but, where there is the isolated case of a marriage breakdown which proves to be irremediable, it has been proved to be the case that, where the children are taken by the parent who does not wish to remain with the Brethren and are subjected to influences and circumstances that are completely alien to what both their parents have taught them and practiced in their lives, this places the children in a position of emotional turmoil who will see their way of life being attempted to be torn apart.

It is from this perspective that this submission is being made and it is firmly believed that children should not be subjected to radical changes in lifestyle without compelling reasons.

Further information about the Brethren can be obtained from the website http://www.theexclusivebrethren.com/.

THE PART VII OBJECTS & PRINCIPLES

Draft sec 60B sets out what the objects, and the principles underlying those objects, of Part VII of the Act (Children) will be after the draft amendments.

One new principle being enumerated is that children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture) (draft sec 60B(2)(a)(v)).

There is no definition in the draft Bill of what the term "culture" covers in this provision, but it should be made clear in some way that this is wide enough to include a way of life, as described above under the heading "Background".

It is noted that the existing sec 68F(2)(f) of the Act, which describes one of the considerations a court must consider in determining what is in a child's best interests, is being replaced with a new draft paragraph which refers to (inter alia) "lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child's parents". This new provision makes culture something that is included in "background", if not "lifestyle and background". It should be ensured that it is made clear the expressions in the new provision cover a way of life such as, for example, described under the heading "Background" above.

Because draft sec 60B(2)(a)(v) is expressed as a right of a child, it is submitted that the word "culture" should be suitably defined in such a way that it reflects the concept in draft sec 68F(2)(f), clarified as suggested.

PARENTING PLANS

When may a plan be entered into?

Neither the legislation as presently enacted nor the draft amendments contain any express provision governing the time at which a parenting plan may be entered into. For instance, does there need to be a marriage breakdown before a parenting plan can be entered into?

There seems no reason why, as a matter of principle, the parties to a marriage should not be able to enter into a parenting plan at a time when there is no prospect of the marriage breaking down. Indeed, there is much to be said for the view that such a plan would often be more likely to reflect the long-term best interests of a child or children of the marriage than a plan entered into in the context of the breakdown of a marriage.

Arguably, the present and proposed law is open-ended, so a parenting plan could be entered into at any time. It is submitted that this should be made clear by express provision.

Future child(ren)?

Having regard to the way the present legislation relating to parenting plans is drafted, and the draft amendments also do not vary this, a parenting plan can only be made in respect of a child of the marriage. Presumably, the legislation envisages that this will be a child that has been born.

It is submitted that a parenting plan should be able to be entered into on suitable terms that would cover a child or children of the marriage who may be born after the plan is entered into.

Legal status of parenting plans

Before the parenting plan provisions of the *Family Law Act* were amended by the *Family Law Amendment Act 2003*, a parenting plan could be registered in a court and be enforced. As a consequence of that amending Act, there is no longer the option of registering a parenting plan and the precise legal status of a parenting plan is somewhat unclear, although presumably a party acting on the plan would have some protection from the general law.

However, there is no specific provision at present in the *Family Law Act* which sets out the legal consequences of a parenting plan, despite the fact that the Act and the draft amendments encourage the entering into of such plans.

Draft amendments

Under the draft amendments, when making a parenting order in relation to a child, the court is directed to have regard to the terms of the most recent parenting plan (if any) if doing so would be in the best interests of the child (draft sec 65DAB).

This draft provision is welcome. However, it is submitted that the draft provision should be reviewed to avoid some elements of possible ambiguity and to make the status that a parenting plan has clearer.

The effect of the direction in the draft provision for the court to "have regard" to a parenting plan in the circumstances envisaged is far from clear. Because the "having regard" direction seems only to apply "if doing so would be in the best interests of the child", the direction presumably is meant to have an active, not merely a passive, role once the court considers the best interests issue. It is not clear, for example, whether a court could have regard to a parenting plan in order to determine what would be in the best interests of the child.

It is submitted that the draft provision should be reworded to provide to the effect that, in determining what is in the best interests of the child, the court must take as its starting point any current parenting plan or, at the least, the court must consider, and give due weight to, any current parenting plan.

It is also being provided in the draft amendments that, in the absence of a court directing otherwise, a parenting order is taken to include a provision that the order is subject to a subsequent parenting plan (draft sec 64D).

This draft provision raises the question of the status of a parenting plan which, by virtue of draft sec 64D, has effectively varied a parenting order of a court. For instance, if the parenting plan variation is of only part of the court order, does the court order remain enforceable as such to the extent that the parenting plan does not alter it, or does the parenting plan have a more substantive effect and will it itself be capable of enforcement? If the latter is the case, this raises the issue why a parenting plan should not be given greater weight under the legislation.

The provisions of draft sec 70NEC and 70NGB are noted, but these provisions do not deal with the case where there is a deemed provision in a parenting order that the order is subject to a subsequent parenting plan.

THE CHILD'S BEST INTERESTS

One effect of the draft amendments to sec 68F of the Act is, for the purposes of determining what is in a child's best interests, to make two considerations the primary considerations. These primary considerations are, broadly:

(1) the benefit to the child of having a meaningful relationship with both of the child's parents; and

(2) the need to protect the child from physical or psychological harm caused, or that may be caused, by being subjected or exposed to abuse, ill-treatment, violence or other behaviour.

Consideration (2) is presently one of the considerations listed in sec 68F(2).

Although consideration (2) is a reflection of a current consideration, it is suggested that attention should be given to it to ensure that it has an appropriate scope of operation.

One basic issue raised in our earlier submission and mentioned above is the damaging effect that a drastic and forced lifestyle change will inevitably have for a child.

There is a definition of "abuse" and the concept of "violence" should not ordinarily need definition. The other expressions used, namely, "ill-treatment" and "other behaviour", are not defined and are not ordinary expressions.

Condition (2) is aimed at protecting a child from physical or psychological harm. It is submitted that it should be ensured that the expression "other behaviour" has a sufficiently wide meaning which would include behaviour that may bring a child into situations that would cause it emotional conflict and distress and that "other behaviour" does not have a meaning which is affected by its association with the preceding words "abuse, ill-treatment, violence". It is noted that the explanatory statement to the exposure draft Bill seems to envisage that the expression "other behaviour" is so affected.

FAMILY DISPUTE RESOLUTION

Draft sec 60I will, when it is fully in force, require by subsec (7) that an applicant to the court for an order under Part VII of the Act either have attended family dispute resolution or have not attended family dispute resolution due to the fact that the other party or parties refused or failed to attend. This is to be subject to the exceptions in subsec (8) which include, in paragraph (f), "other circumstances specified in the regulations are satisfied".

It would be helpful if a broad indication were given as to what kind of situations are currently envisaged could fall within "other circumstances" for this purpose.

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Philip B McNaughton