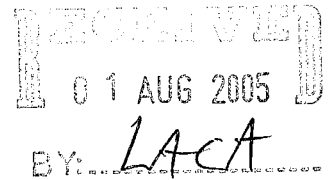


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Dr Nicholas Horne
Inquiry Secretary
House of Representatives Standing Committee
On Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

Dear Dr Horne

Inquiry into the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005

I refer to your memorandum to this Department on behalf of the Committee dated 22 July that set out a number of matters about which the Committee was seeking comments from this Department. The issues and our response are set out below.

1. The Bill will unnecessarily complicate matters with the introduction of apparent hierarchies in the new objects and principles provisions (s.60B) and in the new primary considerations for determining the best interests of the child provision (s.68F(1A)).

The government does not consider there to be a hierarchy in the objects provision (subsection 60B(1)).

In relation to proposed subsection 68F(1A), the government's intention is to better direct the court's attention to the objects of Part VII of the Act. The government does not consider that this amendment will unduly complicate matters for the court. Under subsection 68F(2), the court is currently required to consider a number of factors in determining the best interests of the child.

The court is therefore used to dealing with weighing competing issues and, depending on the particular circumstances of a matter, elevating the importance of one factor over another. For example, in a relocation case, the court may consider a number of factors. These include allowing parents the freedom to relocate, how the proposed relocation will affect the general happiness of parents, and allowing parents to follow work opportunities. However, in taking these matters into account, the court must elevate the overarching factor of whether the relocation will be in the best interests of the child.

2. The consideration of the safety of the child (s.68F(1A)(b)) appears to be subordinated to the consideration of the benefit to the child of a meaningful relationship with both of the

child's parents (s.68F(1A)(a)). The Department may have a view on the weight that the Court would give to the new primary factors compared to the existing factors in the Act.

The government does not believe that paragraph 68F(1A)(b) is in any way subordinate to paragraph 68F(1A)(a). The two primary factors in proposed subsection 68F(1A) are intended to be of equal importance.

In determining the best interests of a child, the court must firstly consider both primary considerations. The factors in subsection 68F(1A) are not intended to be independent of one another. For example, a court would not require a child to have a meaningful relationship with a parent, if the court considers that the parent would harm the child.

The government has ordered the primary considerations in such a way because paragraph (a) will apply to all cases before the court, whereas paragraph (b) will only apply to those matters where violence is an issue. This issue will be clearly addressed in the explanatory memorandum.

We appreciate the concerns of the witnesses who have raised this issue. While protecting a child from harm has been elevated to a primary consideration in subsection 68F(1A), it does not appear as an object of Part VII. The benefit of a child having a meaningful relationship with both parents however, appears as both a primary consideration in subsection 68F(1A) and an object of Part VII.

As suggested below, consideration could be given to making the safety of a child (as appears in paragraph 60B(2)(b) of the Bill) an object of Part VII.

Under subsection 68F(1), the court must consider all primary and additional factors (to the extent that they are relevant in any particular case) in determining the best interests of the child. Therefore, the government's intention is that the court will consider each relevant factor, but give particular attention to the key considerations set out in subsection 68F(1A). For example, if the court is satisfied that the child can have a meaningful relationship with both parents while allowing the child to enjoy his or her Aboriginal or Torres Strait Islander culture, the court may make such an order.

3. The considerable amount of new material introduced by the Bill will mean that the current s.65E will become less visible in the Act.

Section 65E is the guiding principle for the Divisions in Part VII that relate to the resolution of disputes by the court. The best interests of the child will continue to be the paramount consideration of the court in determining proceedings relating to children. The government does not consider that the court will have difficulty in coming to terms with the application of the principle in light of the proposed amendments to the Act.

In order to address concerns that the principle may be less visible in the Act, consideration could be given to relocating proposed Division 1A – Principles for conducting child-related proceedings (inserted by Schedule 3 of the Bill), to a later stage in Part VII. This will reduce the amount of new material that precedes section 65E.

Please see below for discussion of moving section 65E to below the objects provision.

4. It has been suggested that the above issues and concerns could be addressed in part by the following changes to the Bill:

- **Expression of the ‘best interests of the child’ as an object at the beginning of the objects provision (s.60B(1)) with the concomitant removal of the same text from s.60B(1)(c);**

Consideration could be given to reflecting the best interests of the child in the objects provision. The suggestion put forward by the Family Law Section of the Law Council in its submission and endorsed by the Family Court in its appearance before the Committee is a possible model.

- **Some mention of ‘safety’ (e.g. safety of children) in the objects provision (s.60B(1));**

As discussed in issue 2, consideration could be given to making the safety of the child (as set out in paragraph 60B(2)(b) of the Bill) an object in subsection 60B(1).

- **Moving s.65E to a position directly after the objects provision to be the first operative provision of Part VII;**

The provisions that follow the objects provision (with the exception of the definitions provision) are designed to provide guidance to parties on coming to agreement about child-related matters outside of the court system. For example, Division 2 details the concept of parental responsibility and Division 4 outlines parenting plans. This is another reason for considering moving the proposed new Division 1A.

From Division 5, the provisions focus on the resolution of disputes by the court and the making of court orders. Section 65E is the guiding principle for the court when making such orders. The government considers that this is a logical progression for Part VII.

However, as discussed in issue 3, consideration could be given to moving Division 1A – Principles for conducting child-related proceedings (inserted by Schedule 3 of the Bill) to a later stage in Part VII. This will reduce the amount of new material that precedes section 65E.

- **Moving the considerations in s.68F (including the new primary considerations in s.68F(1A)) to a position directly after the re-positioned s.65E so the considerations for the Court to take into account would be clearer.**

Please refer to above discussion regarding moving section 65E.

5. A conflict could arise between the new primary considerations in s.68F(1A). The Department may have a view on how the Court would resolve such a conflict.

As discussed in issue 1, the court will need to consider both primary considerations.

Where both considerations apply to a particular matter, the government anticipates that the court will then give consideration to the additional factors in subsection 68F(2) in order to determine what is in a child’s best interest. For example, the willingness and ability of a parent to facilitate a close and continuing relationship between the child and the other parent or any views that may be expressed by the child.

6. It has been suggested that the discretion of the Court in the new s.60KI(3) relating to Aboriginal and Torres Strait Islander children should be widened to apply to all child-related proceedings.

Consideration could be given as to whether these principles should also apply to all proceedings relating to children.

By way of background, proposed subsection 60KI(3) is a modified version of section 86 of the *Native Title Act 1993*.

The amendment contained in subsection 60KI(3) implements recommendation 5 of the Family Law Council's December 2004 Report, *Recognition of Traditional Aboriginal and Torres Strait Islander Child-Rearing Practices: Response to Recommendation 22: Pathways Report, Out of the Maze*. The Report found that such a provision could provide a court with the flexibility to draw on relevant evidence adduced in other proceedings in other courts to inform decision-making in the best interests of the child. It suggested that such an approach would assist a court in informing itself of the content of the relevant kinship obligations and child-rearing practices wherever such reliable information exists.

I hope this response is of assistance to the Committee and I would be happy to respond to any further issues that the Committee may have.

Yours sincerely

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