SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
ATTORNEY-GENERAL'S DEPARTMENT

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Question No. 18

Senator Evans asked the following question at the hearing on 13 February 2007:

Exclusive Brethren: Is the Exclusive Brethren's submission to the family law consultation process available to the committee?

The answer to the honourable senator's question is as follows:

Yes. The submission by the Exclusive Brethren to the family law reforms consultation process, received on 13 January 2005, is attached. The names and contact details of the persons signing the submission on behalf of the Exclusive Brethren have been omitted for privacy reasons.

COMMENTS ON ASPECTS OF THE GOVERNMENT'S 10 NOVEMBER 2003 DISCUSSION PAPER – *A NEW APPROACH TO THE FAMILY LAW SYSTEM* – IMPLEMENTATION OF REFORMS

Key Points:
The key points made in this submission are:

- The importance of the institution of marriage must be paramount in family law issues;
- The concept of a child's rights is wider than assumed in the discussion paper;
- The time a parenting agreement can be entered into must be examined;
- The age at which a child's wishes should be seriously considered must be reviewed and a younger child should not be subjected to radical lifestyle changes without compelling reasons.

The following are important matters that we firmly believe must be taken into account in evaluating the proposals for change put forward in the Discussion Paper.

1. The institution of marriage

In any discussion of issues relating to family law it is essential to take as the starting point the importance of the institution of marriage in Australia and the need to prevent the institution falling into further disregard. That the institution of marriage in this country has been seriously weakened is well described by one commentator as follows:[1]

> ″At the heart of the growing disarray of the Australian family is the decay of marriage…..
>
> Family breakdown represents a massive body of child and adult misery and unhappiness. It is a common factor in wider social problems of crime, suicide, violence, poverty, child abuse and educational underperformance.
>
> Over the last 30 years, marriage and family life have been transformed by a variety of social, cultural and economic changes. In conjunction with the advent of no-fault divorce in 1975, these changes have powerfully contributed to the fragility of marriage."

Against this background, the amendment of the *Marriage Act 1961 (Cth)* last year by the *Marriage Amendment Act 2004* to specifically enact a definition of "marriage" for the purposes of Australian law (the union of a man and a woman to the exclusion of all others, voluntarily entered into for life) and to define certain relationships that will not be recognised in this country as a marriage even if they are

[1] Barry Maley: Reforming Divorce Law, Centre of Independent Studies, Issue Analysis No. 39, 1 September 2003

so recognised in another country, was a significant development which we wholeheartedly support.

Parliament has, therefore, correctly in our view, made it very clear that the institution of marriage is basic to our society. Just as physical violence, whether against the other party of the marriage and/or the child(ren), is an important factor in relation to the welfare of children, so too, it is submitted, can what could be called "moral" violence to the institution of marriage, and in particular, the elements of the exclusion of all others and for life, as occurs all too frequently.

2. Children's "rights"

The discussion paper (at page 10) states that the Government proposes to strengthen the underlying principles of children having a "right" to be known and cared for by both parents and a "right" to contact on a regular basis with both their parents and other people significant to them, subject always to the best interests of the child.

This proposal is stated as a "right" of a child. The nature of this "right", however, needs to be articulated. Is it some abstract right or is it a more tangible right which a child can him or herself have a say in in appropriate circumstances? It is submitted that the concept of the "right" of a child extends to a child of suitable age being able to have substantial weight, sometimes decisive weight, placed on what his or her wishes are as to matters that effect his or her life, including living arrangements, contact, etc. See also 6 below.

3. Parenting Plans

The discussion paper (again at p. 10) states that the Government supports shared parenting and wants people to reach agreements about parenting, rather than using the courts. An issue, not address in the discussion paper, is at what point a parenting plan or agreement can be agreed to by the parties to the marriage.

For instance, can such a plan, whether comprehensive or not, be entered into at any time before the marriage breakdown, as in the case of financial arrangements? If, for example, at the time of marriage both parents have a common purpose as to one or more aspects of the lives of their children, why should this not be able to be put into a parenting plan, subject to appropriate safeguards? Or if not, why could not a parenting plan be entered into at some later time before the marriage breakdown?

To take the last point a step further, if parents are agreed on parental responsibility issues for their child(ren) (health, schooling, religion and so on) and have in fact given effect to this, this may effectively be a parenting plan or perhaps create some kind of rebuttable presumption. A child should not, without adequate and compelling grounds, be subject to a radical lifestyle change. Why should this not be a "right" of a child?

4. Equal shared parental responsibility

What the Government proposes is to make equal shared parental responsibility the starting point under the *Family Law Act* by making it a rebuttable presumption with the best interests of the child being the most important factor to be taken into account and decisions being made on the circumstances of each case. Having regard to what is said at 3, this proposal needs modification.

In addition, the proposed rebuttable presumption of equal shared parental responsibility does not represent a real advance and, indeed, could in many cases turn out to be detrimental. Such a rebuttable presumption will treat as being prima facie normal many situations that are not and may potentially place an "innocent" parent at a substantial disadvantage. After all, it is likely that where equal shared parental responsiblity is approriate, the parties will be in agrement between themselves in any event.

The discussion paper proposes that the rebuttable presumption of equal shared parental responsibility be replaced by an opposing rebuttable presumption where there is evidence of violence, abuse or entrenched conflict involved in the case. Some of these concepts would need to be defined which could cause difficulty. For example, "abuse" would cover more than physical abuse and the concept of "entrenched conflict" is rather nebulous. For instance, is entrenched conflict meant to refer to some long standing conflict or could the nature of the issue in relation to which the conflict exists be sufficient to make it "entrenched" in appropriate circumstances?

5. Substantially shared parenting time

The proposed requirement that the Court consider substantially shared parenting time when both parents want half or more of the time with their child will need to be refined. But more fundamentally, having regard to what is submitted is the right of a child and what is stated above, particularly at 2, this proposal is deficient.

The compulsory dispute resolution mechanism that is proposed in the discussion paper (at page 12) will carry with it a sanction of a possible adverse cost order if the compulsory dispute resolution requirement is not complied with. It is submitted that this should be the only possible downside to a parent who does not attend "Dispute Resolution" and that this should be specifically stated in the legislation.

6. The age of a child

Insufficient attention has been directed to the possibility of making more appropriate provision for the wishes of a child to be determined and given effect to.

It is recognised in the discussion paper that the best interests of the child is the paramount consideration and for something to be forced on a child against the child's wishes and without adequate reason appears to be contrary to the "right" of a child

which is referred to elsewhere in the discussion paper. As submitted above, in the case of a younger child, there should not be drastic lifestyle changes without adequate reason.

Date: 13 January 2005