SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

INQUIRY INTO THE FAMILY LAW AMENDMENT BILL 2003

SUBMISSION NO:	11
DATE RECEIVED:	17 July 2003
RECEIVED FROM:	NSW Commission for Children & Young People
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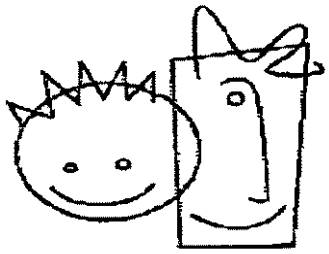

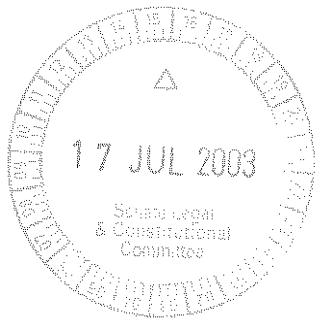

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FACSIMILE MESSAGE

Date: 17 July 2003	**No. of Pages** 13 (including this page)
To: Ms Louise Gell Acting Secretary Senate Legal and Constitutional Legislation Committee	**From:** Ms Rachel White Legal Officer Commission for Children & Young People
Phone:	**Phone:** 9286 7206
Fax: 6277 5794	**Fax:** 9286 7267
RE: Submission on Family Law Amendment Bill 2003	

Dear Ms Gell

Please find attached the submission of the NSW Commission for Children and Young People on the Family Law Amendment Bill 2003.

I apologise that this submission has been sent after the closing date. Nonetheless, it would be appreciated if it could be taken into account in the Committee's final report on the Bill. A hard copy of this submission has been dispatched by post today.

Please contact me if you have any queries on tel: 9286 7206.

Yours sincerely

Rachel White

Rachel White
Legal Officer

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Ph: 9286 7276 Fax: 9286 7267
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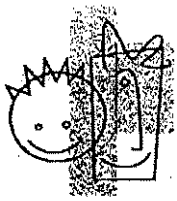

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Ms Louise Gell
Acting Secretary
Senate Legal and Constitutional Legislation Committee
Parliament House
CANBERRA ACT 2600

Dear Ms Gell

I am writing regarding the Family Law Amendment Bill 2003, which is the subject of an inquiry by the Senate Legal and Constitutional Legislation Committee.

I am pleased to enclose my submission to the inquiry. One of the statutory functions of the Commission is to make recommendations to government and non-government agencies on legislation, policies, practices and services affecting children.

With the Committee's approval, I would like to place a copy of the submission on the Commission's website. Making work such as this publicly available is one mechanism I use to be accountable to the children and young people and Parliament of New South Wales. I would appreciate your seeking the Committee's consideration of this request at an appropriate time.

If you have any queries arising from the Commission's submission or the above request, please contact Mr Stephen Robertson, Policy Manager, on 9286 7270.

Yours sincerely

Gillian Calvert

Gillian Calvert
Commissioner
17 July 2003

SUBMISSION BY THE NSW COMMISSION FOR CHILDREN AND YOUNG PEOPLE

TO THE SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE ON THE

FAMILY LAW AMENDMENT BILL 2003

July 2003

NSW Commission for Children and Young People
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SUBMISSION BY THE NSW COMMISSION FOR CHILDREN AND YOUNG PEOPLE TO THE SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE ON THE FAMILY LAW AMENDMENT BILL 2003

1. The Commission for Children and Young People

1.1 The NSW Commission for Children and Young People ('Commission') promotes the safety, welfare and well-being of children in NSW. The Commission was established in 1998 by the NSW *Commission for Children and Young People Act 1998* ('Commission's Act').

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 The Commission is required by s.12 of the Commission's Act to give priority to the interests and needs of vulnerable children.

1.4 Children are defined in the Commission's Act as all people under the age of 18 years. The terms 'child' and 'children' will be used in this submission to refer to children and young people under the age of 18 years.

1.5 It is 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: Commission's Act, section 11(d).

2. This submission

2.1 The Commissioner thanks the Senate Legal and Constitutional Legislation Committee for its invitation to make a submission as part of its inquiry into the Family Law Amendment Bill 2003 ('Bill').

2.2 The Bill makes a range of amendments to the *Family Law Act 1975* ('Family Law Act'). This submission focuses on those amendments that may

potentially impact on children, including those amendments proposed to Part VII of the Family Law Act. The stated object of Part VII is to:

> ... ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children: Family Law Act, s.60B(1).

3. General comments

3.1 Section 4 of this submission comments on amendments proposed by the Bill concerning:

(a) the circumstances in which admissions and disclosures in relation to child abuse are admissible in Family Court of Australia ('Family Court') proceedings;
(b) the removal of the requirement for the Family Court to register parenting plans;
(c) children's separate representation before the Family Court;
(d) the use of new technology by the Family Court; and
(e) Family Court orders for attendance at post-separation parenting programs.

3.2 The Commission welcomes the amendments in the Bill. However, it considers that they are insufficient to involve children in decisions that affect them (whether made by the Family Court or by their parents) and to protect them from abuse. In particular, the limited exception to the inadmissibility of disclosures and admissions in counselling and mediation sessions does not go far enough to protect children from abuse. It fails to fully implement recommendations 16 and 17 of the Family Law Council's September 2002 report, *Family Law and Child Protection* ('Family Law Council's report').

3.3 Section 5 of this submission concerns the establishment of a federal Child Protection Service and the implementation of the 'one court' principle – the central recommendations of the Family Law Council's report. It is concerning that the Bill does not implement either of these recommendations. If we want good outcomes for children in the family law system, the legislative and structural deficiencies in the family law system identified in both the Family Law Council's report and the *Out of the Maze-Pathways to the Future for Families Experiencing Separation* report need to be addressed. As the Family Law Council concluded in its final report:

> '[t]here is no greater problem in family law today than the problems of adequately addressing child protection concern... Reform is urgently needed... Child protection is the fundamental responsibility of government. As this Report demonstrates, it is not only a responsibility of the governments of the States and Territories. Through the *Family Law Act*, the Federal Government has a major responsibility for child protection. It requires the co-operation of the States and Territories also, in meeting the obligation and ensuring that no children are endangered because of preventable harm arising from system failure. (p.15).

4. Amendments proposed by the Bill

(a) The circumstances in which admissions and disclosures in relation to child abuse are admissible in Family Court proceedings

4.1 The normal rule is that nothing said in confidential counselling or mediation sessions may be admitted into evidence in court proceedings: Family Law Act, s.19N(2). Similar provisions are included in s.62F(8) and s.70NI of the Family Law Act in relation to court-ordered conferences with family and child counsellors or welfare officers and post-separation parenting program assessments. It is recognised that this principle is an important one to promote frankness and honesty in seeking to reach a settlement of disputes.

4.2 Items 7 and 13 of Schedule 7 to the Bill amend the existing, blanket inadmissibility provisions of s.19N, s.62F and s.70NI of the Family Law Act. The amendments allow into evidence an admission of an adult in a counselling or similar context that he or she has been abusive or may become abusive toward a child or a disclosure of a child in that same context that he or she has been abused or is at risk of abuse. This evidence will be admissible unless the court is of the opinion that there is sufficient evidence of the admission or disclosure available to the court from other sources.

4.3 The Commission supports this amendment. It argues, however, that it should be broadened so as to fully implement recommendations 16 and 17 of the Family Law Council's September 2002 report on *Family Law and Child Protection*. These recommendations are set out below:

> Recommendation 16
> Section 19N(3) should be amended along the following lines:
> "Subsection (2) does not apply to:
> (a) any admission of an adult or disclosure of a child which indicates a child under eighteen years of age has been seriously abused; or
> (b) any admission of an adult or disclosure of a child which indicates a child under eighteen years of age is at risk of serious abuse
> unless in the opinion of the Court there is sufficient other evidence of an admission of an adult or disclosure of the child relating to such abuse which is available to the Court.
>
> Recommendation 17
> Sections 62F(8) and 70NI of the *Family Law Act* should be amended along the following lines so as not to apply to:
> "(a) any admission of an adult or disclosure of a child which indicates a child under eighteen years of age has been seriously abused; or
> (c) any admission of an adult or disclosure of a child which indicates a child under eighteen years of age is at risk of serious abuse
> unless in the opinion of the Court there is sufficient other evidence of an admission of the adult or disclosure of the child relating to such abuse which is available to the Court.

4.4 As currently worded, the exception proposed would not apply to:

- a disclosure by an adult that indicates that a child has been abused or is at risk of abuse by another person (such as that person's spouse);
- a disclosure by a child that indicates that another child, such as a sibling, has been abused or is at risk of abuse; or
- an admission by a child that another child (such as a sibling) has been abused or is at risk of abuse by that child.

4.5 The exclusion of the above situations from the proposed exception is intended, as paragraphs 165 and 174 of the Explanatory Memorandum to the Bill make clear. The Explanatory Memorandum does not indicate the rationale underpinning the scope of the proposed exceptions. A Media Release issued by the Attorney-General on the introduction of the Bill into Parliament referred to the appropriateness of a 'limited exception to the overall confidentiality of counselling and mediation where the safety and well-being of children is at stake' ('Family Law Amendment Bill 2003', 12 February 2003).

4.6 If this is the rationale for the exception, it is unclear why it so significantly narrower than the exception recommended by the Family Law Council. If the safety and well-being of children underpins the proposed exception, it should be applicable in circumstances such as those described in paragraph 4.4.

Recommendation 1: The exception to the inadmissibility of anything said in the circumstances covered by s.19N, s.62F and s.70NI of the Family Law should be broadened (Schedule 7 to the Bill, Items 7,13 and 19). The exception should cover admissions and disclosures indicating abuse or the risk of abuse in the circumstances covered by recommendations 16 and 17 of the Family Law Council's report.

(b) The removal of the requirement that parenting plans be registered with the Family Court

4.7 Parenting plans are a means by which parents may agree, following their separation, about matters concerning their children. The Commission agrees that parents should be encouraged to reach agreement about their parenting responsibilities, avoiding the need for resort to the Family Court to make consensual arrangements legally enforceable or to resolve differences of view. The Commission supports s.63DA of the Bill, which requires family and child counsellors, mediators and legal practitioners to explain the availability of programs to help parents who are experiencing difficulties complying with a parenting plan.

4.8 Section 63B of the Family Law Act articulates the principles that are to underpin the development of a parenting plan. Section 63B current provides:

The parents of a child are encouraged:

(a) to agree about matters concerning the child rather than seeking an order from the court; and
(b) in reaching their agreement, to regard the best interests of the child as the paramount consideration.

The Bill proposes that s.63B read as follows:

The parents of a child are encouraged:
(a) to agree about matters concerning the child; and
(b) to take responsibility for their parenting arrangements and for resolving parental conflict; and
(c) to use the legal system as a last resort rather than a first resort; and
(d) to minimise the possibility of present and future conflict by using or reaching an agreement; and
(e) in reaching their agreement, to regard the best interests of the child as the paramount consideration.

4.9 The Commission recommends that s.63B of the Bill should encourage parents to involve their children in the development of a parenting plan. Parenting plans are, after all, designed for the assistance of separating parents at a low level of conflict, where the potential for the manipulation or inappropriate involvement of children is minimised. A culture of appropriately involving children in the choices to be made in developing parenting plans should be fostered by the Bill. Children who are capable of and willing to have a say in their family circumstances should have the opportunity to do so.

4.10 The Commission also recommends that the best interests of the child should extend beyond the reaching of agreement as to a parenting plan (paragraph (e)). The best interests of the child that is, or the children that are, the subject of the parenting plan should flow through to the implementation of the parenting plan and the resolution of any disputes concerning the arrangements reflected in the plan.

Recommendation 2: An additional paragraph should be added to s.63B, encouraging parents to involve their children in the process of reaching their agreement.

Recommendation 3: Paragraph (e) of s.63B should also be amended to encourage parents 'in reaching their agreement, implementing their plan and resolving any parental conflict, to regard the best interests of the child as the paramount consideration'.

4.11 The Family Law Act currently requires parenting plans to be registered. The Commission supports the removal of this requirement. Parenting requires continual adjustment to the needs and interests of children as they grow and develop. The registration requirement makes parenting plans too inflexible and difficult to change.

4.12 The Commission recommends, however, that the Family Court should be able to have regard to the 'wishes expressed by the child' in determining what

is in the child's best interests, when considering an application under s.63H of the Family Law Act. Section 63H empowers the Court to set aside, discharge, vary, suspend or revive registered parenting plans.

4.13 Sub-paragraph 63E(3)(b) of the Bill permits the Family Court to have regard to all or any of the matters set out in s.68F(2) of the Family Law Act, including a child's wishes, when considering the revocation of a registered parenting plan. Moreover, notes after existing provisions in the Family Law Act (such as s.65E) remind judicial officers of the provisions of Division 10 allowing for a child's views to be heard, as do notes after new provisions (such as s.65LA).

4.14 The parenting plan amendments should reflect a consistent philosophy of involving children in decisions that affect them. It seems curious, therefore, that the Bill does not amend s.63H of the Family Law Act to make reference to s.68F(2) or at least to include a note pointing a judicial officer to the provisions governing how a child's best interests are determined. Any order suspending a registered parenting plan under s.63H, for instance, may affect children just as much as an order revoking that plan under s.63E of the Bill.

Recommendation 4: The Family Court should be expressly permitted to have regard to all or any of the matters set out in s.68F(2) of the Family Law Act in exercising its powers under s.63H. Alternatively, a note could be included after s.63H, specifying that Division 10 of Part VII of the Family Law Act deals with how a court determines a child's best interests.

(c) Separate representation of children in the Family Court

4.15 The Commission has no objections to the proposed inclusion of a definition of 'child representative' in s.4 of the Family Law Act. It is appropriate that the definition make clear that a child representative must have been appointed by the Family Court under s.68L(1) of the Family Law Act.

4.16 The Commission believes that the Bill presents an opportunity for a review of the role of child representatives in the family law system. A representative should be required to act on a child's instruction, rather than give advice on that child's best interests, where the child is able and willing to express his or her views or provide instructions.

4.17 The Commission wholeheartedly supports the view on this issue expressed by the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission in the 1997 Report, *Seen and Heard: Priority for Children in the Legal Process* ('Seen and Heard Report'). Recommendation 70 of that report was that:

> ... in all cases where a representative is appointed and the child is able and willing to express views or provide instructions, the representative should allow the child to direct the litigation as an adult client would. In determining the basis of representation, the child's willingness to participate and ability to

> communicate should guide the representative rather than any assessment of the 'good judgment' or level of maturity of the child (p. 661).

4.18 It is acknowledged that the Family Court is to make determinations that are in the 'best interests' of a child, which is the paramount consideration. There are other mechanisms available for the court to hear adult views about what is in a child's best interests (other than a child representative), including through Family Reports or experts appointed under the Family Law Rules.

4.19 It is uncommon for children and young people to commence proceedings under the Family Law Act, although they are able to do so: s.65C(b) and 69C(2)(c). There is also no requirement that a child or young people be legally represented unless the Court believes that the child or young person should be represented, in which case the Court has the power to make an order under s.68L of the Family Law Act. However, an appointed child representative does not act upon instructions of the child or young person, but rather upon his or her assessment of their best interests. The appointment of a best interest representative places a lawyer in a substituted judgment role, for which he or she may not always be suitable or trained.

4.20 There is clearly a role for the child's representative to ascertain, present evidence of, and to make submissions with respect to the wishes of a child or young person. This role has been recognised by the Family Court: e.g. *ZN and YH and Child Representative* (2002) FLC 93-101 per Nicholson CJ at 88,953-4. In the case of *In the Matter of P and P* (1995) FLC 92-615 at 82, 517, the Full Court of the Family Court stated that a child representative should:

> ... inform the court by proper means of the children's wishes in relation to any matter in the proceedings. In this regard the separate representative is not bound to make submissions on the instructions of a child or otherwise but is bound to bring the child's expressed wishes to the attention of the court.

4.21 Nonetheless, the Commission considers that the child representative should not merely be the conduit for the expression of children's views, but should be advocating for those views. It should not matter whether the child's representative considers that another option would be in the child or young person's best interests, just as it should not matter whether a lawyer for either or both parents agrees with the submissions they have been instructed to make. A direct instructions model acknowledges the competence and capacity of most children to express views about decisions that affect them and to provide instructions to lawyers.

Recommendation 5: Recommendation 70 of the Seen and Heard report should be adopted by the federal Government and reflected in the Bill. Clear standards for the representation of children in all family law proceedings should be based on a direct instructions model where children are willing and able to express views or provide instructions to a child representative.

(d) The Family Court's use of new technology

4.22 The Commission supports those amendments to the Family Law Act designed to facilitate the use of video and audio technology for the taking of submissions and evidence. It suggests that, in the implementation of this technology, judicial officers be asked to consider children's access to, and use of, this technology when giving evidence or expressing their wishes.

(e) Family Court orders in relation to post-separation parenting programs

4.23 The Commission agrees that the Family Court should be able to order that a person attend a post-separation parenting program at any stage during proceedings for a parenting order, as is proposed by s.65LA of the Bill. It strongly supports reference to the best interests of the child as being the paramount consideration in determining whether such an order is made.

5. Matters that should also be dealt with in the Bill

(a) The establishment of a federal Child Protection Service

5.1 The Family Court currently has the power to deal with cases involving allegations of child abuse and violence. In making decisions about the best interests of a child, including decisions about residence and contact, the Family Court must consider a range of factors. One of the factors is the need to protect the child from physical or psychological harm. The Family Court must also consider any family violence and any family violence order that applies to the child or to a member of the child's family.

5.2 The Bill, in its current form, disregards the problems created by the Family Court's reliance upon private individuals to adduce evidence by which it make critical decisions about what is in children's best interests. The Commission acknowledges the innovative work of the Family Court in Project Magellan in demonstrating the value of early and careful professional assessment of child abuse allegations, separate representation of children and active case management involving interagency co-operation and co-ordination.

5.3 A federal Child Protection Service would overcome the difficulties faced by the Magellan Project, laudable as it has been. It would avoid the need to co-ordinate with the differing child protection requirements of each jurisdiction and adapt them to meet the Family Court's needs. The establishment of a Service would also see the resolution of cases earlier because it would enable independent, centralised investigation, which benefits children and families who are endeavouring to manage post-separation challenges. It would also mean that the proper resolution of Family Court matters would not depend on the resource allocation of States and Territories. In these ways, the Service is likely to most effectively and expeditiously address child abuse concerns or allegations, without the potential for children at risk to fall through jurisdictional gaps and families to experience lengthy delays and multiple,

uncoordinated interventions.

5.4 State and Territory child protection authorities do not have a general investigatory role in child protection – their mission is tied to their statutory responsibilities. Moreover, the Family Law Act requires the reporting of many incidents which are not reportable under State and Territory legislation. Many child abuse concerns raised in family law proceedings will not be investigated by child protection authorities because, although the issues may be of considerable importance in family law litigation, the information provided does not indicate that the child is currently at risk of harm.

5.5 The establishment of a Child Protection Service was not only a central recommendation of the Family Law Council's report, but is consistent with the recommendations of the Family Law Pathways Advisory Group. It is also compatible with the successful approach adopted in the Magellan Project. The establishment of the Service would involve some new expenditure, but the evidence of the Magellan Project is that there are also likely to be savings in the family law system as cases resolve earlier.

Recommendation 6: The Bill should establish a federal Child Protection Service, consistent with recommendations 1-9 of the Family Law Council's *Family Law and Child Protection* report.

(b) The introduction of the 'One Court' principle

5.6 The Bill offers an opportunity for the Government to implement other changes to the family law system to make it work more effectively. In particular, the Commission recommends that the Bill address recommendation 13 of the Family Law Council's report, as cited below:

> In child protection matters, duplication of effort between state and federal systems should be avoided, and a decision should be taken as early as possible whether a matter should proceed under the *Family Law Act* or under child welfare law with the consequence that there should be only one court dealing with the matter. This is to be known as the 'One Court principle'.

5.7 The Commission believes that determining whether a case is managed under State or Territory child welfare law or under the Family Law Act would avoid the unnecessary duplication of legal process and ensure that the child protection issues are dealt with appropriately. It would also avoid cases where inconsistent orders have been made by different courts, causing confusion and stress to the children and families involved.

5.8 Overcoming the jurisdictional overlaps and ensuring that the system works for the benefit of vulnerable children will require an ongoing mechanism at governmental level for the resolution of problems. For these reasons, the

Commission also supports the establishment of a high-level committee to promote assistance in ensuring the effectiveness of the 'One Court principle' and the fundamental protection of children (Family Law Council's report, recommendation 14).

Recommendation 7: The Bill should implement the 'One Court' principle, as recommended in the Family Law Council's *Family Law and Child Protection* report.