

Submission to the Senate Legal and Constitutional Affairs Committee

Family Law Amendment Bill 2023

Patrick Parkinson AM

Emeritus Professor of Law, University of Queensland; Special Counsel, Watts
McCray Lawyers Sydney

Summary

As honourable senators may be aware, I am an academic expert in family law and child protection, and was Chair of the Family Law Council between 2004-2007 at a time when major changes were enacted to Part VII. During this period I also led the review of the Child Support Scheme. I was President of the International Society of Family Law from 2011-2014.

My main concerns are with the Schedule 1 changes to Part VII of the Family Law Act. The problems to which these amendments give rise are set out in the attached paper that I gave to a legal conference recently.

In essence, there is a disconnect between the Government's stated intentions, as expressed in the Second Reading Speech and the Explanatory Memorandum, and the text of the Bill. This is a serious problem. Courts are meant to give effect to the intentions of Parliament, but it is far from clear what Parliament intends by enacting some of these changes to Part VII of the Act. The courts will eventually rule on what Parliament intended, of course; but given such ambiguity within the Bill and uncertainty created by statements in the Explanatory Memorandum, it will take a lot of litigation before the law is, once again, clear. The ultimate decision about what Parliament intends by this legislation may or may not be the same as the Government intends. Unless it resolves the problems now, the Parliament may have to come back to this in a few years' time to amend again what it is now amending.

Fundamentally, the problem is this. As a matter of statutory interpretation, when a Bill amends existing legislation, Parliament is assumed to have intended to bring about a change in the law. That change in the law will often reflect a different legislative policy.

Essentially, the Government is saying that all it intends to do with these changes is to streamline the law, reduce complexity, and remove the erroneous impression that parents are entitled presumptively to an equal time order. That could be achieved by far fewer amendments and deletions than it now proposes. It proposes to delete from the text of the Act a number of provisions concerning what is in the best interests of most children with which it specifically says, in the Explanatory Memorandum, it is in strong agreement. This begs the question why then, it wants to delete them. Its amendments also introduce new complexities that didn't exist before.

Parliament has a fundamental obligation, independent of party affiliation, to make its intent as clear as possible in the text. For the reasons I give in the attached paper, this will require some straightforward amendments to the Bill, largely reversing unnecessary deletions.

Inter alia, I propose the retention of the existing objects and principles because they provide helpful guidance to lawyers, mediators and others about some fundamental values that can guide negotiations about parenting arrangements outside of the courts. Because of the changes made by this Bill to s.60CC, there is no longer the problem identified in the ALRC report of substantial overlap between the objects and principles and the factors a court must consider in s.60CC. It is clear that the Government has no quarrel with any of the existing objects and principles, and nor would I expect any member of Parliament to have difficulties with them. They express, in plain English, rights of the child that have long been guaranteed in international law.

Recommendations

I have endeavoured to keep my recommendations to a minimum, and for the purpose only of giving effect to the Government's intentions as expressed in the Explanatory Memorandum. These recommended amendments to the Bill maintain continuities in policy as expressed in the law from 1995 through to the present day, and which have had the unanimous, or almost unanimous endorsement of members of previous Parliaments. There is no indication that they do not continue to have widespread support in the present Parliament or in the Australian community.

1. Schedule 1, Part 1 p.4, line 7: Delete item 2 (repealing existing principles)
2. Schedule 1, Part 1, p.4, line 9: Delete item 3 (repealing existing principles)
3. Schedule 1, Part 1, p.4, line 11: Delete item 4 (leave the existing s.60B objects and principles as they are)
4. Schedule 1, Part 1, p.4, line 23: Delete item 5 (repealing existing principles)
5. Schedule 1, Part 1, p.5, lines 23-25: Amend item 6 to read:
 - (e) the benefit to the child of being able to have a meaningful relationship with the child's parents, and other people who are significant to the child, unless it is unsafe for the child;
6. Schedule 1, Part 1, p.6, line 14: Repeal the paragraph, substitute, instead of the proposed paragraph:
 - (b) encourage the person to act on the basis that the child's best interests are best met by arrangements that do not expose the child or a person caring for the child to an unacceptable risk of harm from family violence, abuse, neglect, or other such conduct; and
 - (c) subject to (b), and to the extent that it is reasonably practicable:
 - (i) allow each parent to spend time with a child not only at the weekends and in school holidays, but also during the school week, and
 - (ii) provide an opportunity for each parent to be involved in the child's daily routine and in occasions and events that are of particular significance to the child or to that parent.

7. Schedule 1, Part 1, p.6, line 17: Delete item 9 (repealing existing principles).
8. Schedule 1, Part 2, p.7, lines 6-14: Replace proposed section 61CA as follows:

61CA Consultation between parents on major long term issues

When parents both have parental responsibility, they should consult with one another on major long-term issues in relation to the child in the same way as if there are parenting orders that provide for joint decision-making.

Note: The effect of a court order for joint decision-making is set out in sections 61DAA and 61DAB.

Another benefit of these several deletions is to reduce further the complexity of Part VII.

Emeritus Professor Patrick Parkinson AM
University of Queensland
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