

CENTENARY HSE INQ

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BY: LACA

**FAMILY LAW COUNCIL****APPEARANCE BEFORE THE HOUSE OF REPRESENTATIVES  
STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL  
AFFAIRS REVIEW OF EXPOSURE DRAFT OF THE FAMILY LAW  
AMENDMENT (SHARED PARENTAL RESPONSIBILITY) BILL 2005**

Ms Nicky Davies appeared before the Committee on Monday 25 July 2005 between 3:15pm – 4:15pm, representing the Family Law Council. The following questions were taken on notice.

- 1) Does the Family Law Council have any data on perjury in family law proceedings?
- 2) What is the Family Law Council's view about a possible amendment to the *Family Law Act 1975* that would remove case law?
- 3) Should Family Relationship Centres be part of the Attorney-General's Department or the Department of Family and Community Services?

The Family Law Council's answers to the questions are as follows.

- 1) No.
- 2) The Family Law Council is of the view that removing case law would disadvantage people because case law provides guidance about interpretation of legislative provisions. For example, the Family Law Council recently prepared a discussion paper titled *The 'Child Paramountcy Principle' in the Family Law Act*. There is a lot of case law which shows how this principle operates in different types of cases (which is outlined in the discussion paper).

Case law shows how the legislative provisions apply to the myriad of circumstances individuals going through family breakdown are in. Parties and their representatives can refer to previous decisions as a guide when they are making their own arrangements. For example, entering into consent orders.

The doctrine of precedent upon which the common law system is based provides certainty about the correct interpretation of the legislation, as courts are bound by decisions of higher courts. Once the Full Court of the Family Court or the High Court has made a determination, there is no need for successive parties to re-open the issue. A possible consequence of removal of case law would be

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<sup>1</sup> The rule in the *Family Law Act 1975* that when the court makes certain decisions relating to a child, the best interests of the child must be regarded as the paramount consideration.

increased litigation as parties litigate issues that are currently considered to be settled.

Therefore the Family Law Council would not support an amendment that removed case law and notes that it would be likely to go against the government's objective of 'encouraging and assisting parents to reach agreements on parenting arrangements after separation outside of the court system where appropriate'.

If the Parliament wants to alter or reverse a particular line of case law, it can of course do so by amending the legislation. However, it is not always clear that a particular amendment is intended to overturn a line of case law. It would certainly assist the courts in their task of interpreting the intentions of Parliament if the Explanatory Memorandum and/or the Second Reading Speech could in appropriate cases indicate not only what the purpose of a legislative provision is, but how it is intended that this provision should alter the existing law as it has been interpreted by the courts.

- 3) The Family Law Council is of the view that the Attorney-General's Department and the Department of Family and Community Services should maintain strong links in the provision of support services for families experiencing separation. The Family Law Council notes that there may be advantages in both departments being involved in the establishment and operation of Family Relationship Centres.