

From: [REDACTED]
Sent: Thursday, 21 July 2005 2:18 PM
To: Horne, Nicholas (REPS)
Subject: Family Law Act proposed amendments

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BY: *W.A.C.A.*

Importance: High

Submission No. <i>68</i>
Date Received

Dear Sir, *NH*

I understand that you are the Inquiry Secretary to the House of Representatives Standing Committee on Legal and Constitutional Affairs dealing with the proposed amendments to the Family Law Act (Shared Parenting). I do not wish to comment on the policy basis for the proposed amendments. My comments relate to the proposed amendments which purport to assist the courts to determine what order, if any, is in the best interests of the children concerned. It is in that context that I provide comments on the drafting of the amendments to assist the committee.

The proposed Division 1A of Part VII requires the courts to abandon certain important rules of evidence. As the recent ALRC discussion Paper (DP69) says;

" 7.287 In consultations, the abolition of hearsay rules in civil proceedings was opposed. It is considered that the breadth of the exceptions to the hearsay rule and the waiver provisions were sufficient to allow for appropriate use of hearsay evidence. One New South Wales District Court judge comments:

The hearsay provisions are, in my view, basic to the requirement of fairness in the courts, despite the criticisms that have been levelled at them. In some situations it is conceivable that all parties might consent to allow the admission of hearsay evidence, but in my view these would be relatively rare. In my submission it is better that the Act remain as it is. [310]

7.288 In addition, some judges oppose the abolition of the hearsay rule on case management grounds. That is, leaving aside concerns about the reliability of evidence, liberalising the admission of hearsay evidence could add to the volume of evidence before the court, potentially prolonging trials and increasing costs. The Commissions propose no change to the uniform Evidence Acts in this regard. "

These principles apply to establishing the facts about children's lives as much as the facts about businesses or debts.

The abolition of the rules about opinion evidence will also prolong trials, increase costs and divert the courts from the reliable evidence.

The proposed amendment suggests that a court cannot apply the long established, well recognised principles of evidence unless "the court considers it necessary in the best interests of the child concerned to do so". (see proposed Section 60KG(2)(a)).

This mistakenly assumes that the best interests of each particular child can be determined without hearing evidence. It is impossible for the court to determine the best interests of a particular child without hearing the evidence about that particular child.

The evidence to be admitted will therefore need to be determined before the court is able to decide what is in the best interests of that child.

The existing provisions of the Evidence Act and the existing provisions of the Family Law Act and Rules allow the courts to implement many of the features of the Children's Cases Programme without risking the standard of justice by encouraging hearsay and unqualified opinion evidence.

I suggest that the rules of evidence be retained to ensure that just decisions are made about children using reliable evidence.

2. The proposed amendments to section 70NEA misunderstand the process involved. Courts are required to determine the facts of a matter before considering sentence. These amendments suggest that the court must determine which sentence to impose before applying any standard of proof to the evidence.

3. Generally the proposals in Division 13A (compared to the existing sections relating to breach of financial orders) suggest that Parliament wants to direct that a person who has failed to pay money can be sentenced to imprisonment after the rules of evidence have been applied to proof on the balance of probabilities but if a person does not obey an order for contact to a child then the rules of evidence do not apply but proof beyond reasonable doubt is required before a fine or other serious sentence is imposed. It seems illogical to require the strictest proof but require the abandonment of the basic rules of evidence. Requiring proof on the strictest standard for proceedings for contravention of children's orders but not for contravention of financial orders seems to be in conflict with the publicity surrounding the proposed amendments.

Please acknowledge receipt of this email and confirm that it will be made available to the members of the Committee. I request that my comments remain confidential. I am happy to discuss these comments with the Committee members if they wish.

Yours faithfully,

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