

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
ATTORNEY-GENERAL'S DEPARTMENT

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Question No. 5

Senator Stott Despoja asked the following question at the hearing on 14 February 2006:

- (a) Can the Attorney advise how the new provisions proposed to be introduced into s60CC to refer to the need for children to have "a meaningful relationship with both parents" will not, in every case where an allegation of violence or abuse is made, render nugatory the provisions in the same sections that refer to the need to protect children from harm?
- (b) Can you explain the relative weight intended to be given in determining a child's best interests to the 'primary considerations' in s60CC(2), the 'additional considerations' in s60CC(3) and the further considerations inserted by s60CC(4)?
- (c) Will a parent's fulfillment or failure to fulfill their responsibilities as a parent while the family is still intact be taken into consideration under s60CC(4)?
- (d) Can you explain how the Bill is child focused when the effect of s60CC is to relegate the child's views to being an 'additional consideration'?

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

- (a) The benefit to the child of having a meaningful relationship with both parents and the need to protect the child from harm are both primary considerations for the court in determining what is in the child's best interests. These primary considerations mirror the two new objects of Part VII.

The application of these considerations will depend on the circumstances of the case. Provisions in section 60CC that relate to the child's meaningful relationship with parents will not render nugatory the provisions relating to the need to protect the child in every case where an allegation of family violence or child abuse is made. The factors are both important and the court will need to try to achieve both of these aims. The factors will be considered by the court in light of the circumstances of the individual case.

- (b) As discussed in (a), the relative weight that the court will give to each factor in section 60CC will be determined by the individual circumstances of the case. The court is used to dealing with weighing competing issues and, depending on the circumstances of the matter, elevating the importance of one factor over another.

There may be some instances where the court gives greater weight to the additional factors over the primary considerations. For example, consider the case of a teenage indigenous child who wants to continue living with one parent to maintain their connection to traditional culture. The other parent lives far away, is unable to travel regularly and has demonstrated that they will not facilitate a connection with the child's traditional culture. In these circumstances, the court may decide that for this child, the additional factors outweigh the primary consideration of maintaining a relationship with both parents and that it would not be in the best interests of that child to change residence.

Subsection 60CC(4) does not include a third set of factors to be considered by the court. The subsection is designed to provide further information for the court in considering the 'additional

factors' set out in paragraphs 60CC(3)(c) and (i). Paragraph 60CC(3)(c) relates to the willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent. Paragraph 60CC(3)(i) relates to the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents. In considering these paragraphs, the court must consider the extent to which each of the child's parents has fulfilled, or failed to fulfil, his or her responsibilities as a parent. This includes the extent to which each parent has taken, or failed to take, the opportunity to spend time with the child, communicate with the child and participate in decision-making about major long-term issues in relation to the child.

(c) Government amendment number 5 clarifies that under subsection 60CC(4) the court is to particularly focus upon post-separation parenting when considering the fulfilment of parental responsibility as a factor relevant to the best interests of the child. The Government recognises that the main period of interest for the court is the post-separation period, as parental attitudes and behaviour may change on separation and that the current attitude of the parent will be what is most relevant to the best interests of the child. The Government notes that the subsection may also apply to some cases where it is meaningless to talk about 'post-separation', such as where parents have never lived together.

(d) The Shared Parenting Bill is child-focussed in that it makes clear that decisions about children must be made in the best interests of the child. There are a significant number of changes in the Shared Parenting Bill that direct the court to make decisions based on the best interests of the child. For example, the objects of Part VII are now phrased in terms of ensuring the best interests of children are met. The provisions have been reordered to make the best interests provisions more prominent. The Shared Parenting Bill reduces the emphasis on the rights of parents and focuses on the responsibilities of parents to the care of their children.

Depending on the circumstances of the matter, the views of the child will have different weight and they may well be a determining factor for the court depending on other circumstances. While paragraph 60CC(3)(a) indicates that the court should consider any views expressed by the child, it also emphasises that the court should consider any factors that are relevant to the weight it should give the child's views, for example, the child's maturity or level of understanding. The Government considers that this is entirely appropriate. The fact that this is an additional factor will not mean that it is not given weight by the court in a particular case.

In addition amendments contained in Schedule 5 of the Bill strengthen the obligation on the independent children's lawyer to ensure that the views of the child are before the court.