

7 March 2006

Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
Parliament House
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Dear Senator Payne

Inquiry into the provisions of the Family Law Amendment (Shared Parental Responsibility) Bill 2005

We wish to bring to your attention our concerns about the Family Law Amendment (Shared Parental Responsibility) Bill 2005 (“**the Bill**”). We would appreciate this submission from the National Children’s and Youth Law Centre being taken into account in your considerations. We understand that the closing date for submissions has already passed. However, we did not become aware of the Senate Inquiry until after the closing date.

The National Children’s and Youth Law Centre (“**NCYLC**”) is a community legal centre dedicated to addressing and promoting the rights of children and young people in NSW and across Australia. NCYLC is supported by a network of volunteers, lawyers, policy workers and academics who believe that children’s and young people’s views, interests and rights should be respected and taken into account in law reform and policy debate.

Summary of NCYLC’s position

NCYLC is particularly concerned by the lack of priority that the Bill gives to children affected by family law proceedings. Already under the existing legislation, the Centre is concerned that current measures do not yet adequately address children’s interests. The proposed amendments only heighten our concerns.

NCYLC adopts the submission of the Law Society of South Australia.

The Centre has considered many of the submissions to the Inquiry posted on the Committee’s website. In particular, the Centre endorses wholeheartedly the submission made by the Law Society of South Australia (Submission 30).

However, in other respects, we are not satisfied that the Inquiry has had the benefit of a balanced range of views that include (and sufficiently highlight) children’s interests.

Children want a say

NCYLC's experience, drawn from its service delivery to children, consultations and advocacy, supports the Law Society of South Australia's submission that there is a "very strong desire of many children, particularly teenagers, to have a more integral part in negotiations that relate directly to their future care and welfare". NCYLC runs a legal advice website for children, www.lawstuff.org.au. Children are also able to send emails to the Centre seeking specific legal advice. A large number of the emails received from children relate to their role in family law proceedings and indicate their ongoing desire to have a say in decisions concerning where and with whom they live, and how often and when they are able to have contact with their other (non-resident) parent, as well as a range of other related issues. These emails reflect significant ongoing concerns from all over Australia. Already in the first two months of 2006, the rate of emails concerning choice of residence has doubled compared with the number in 2005.

Section 60CC – not in accordance with the Convention on the Rights of the Child

Section 60CC purports to define what is in a child's best interests. Disturbingly, the views of the child are not listed as a primary consideration. Instead, his or her views are only an "additional consideration".

Article 9 of CROC specifically states that in relation to proceedings regarding a child's place of residence "all interested parties shall be given an opportunity to participate in the proceedings and make their views known". Article 12 of CROC goes on to provide that children shall be **assured** the right to express their views freely in all matters affecting the children and that those needs will be given due weight.

Listing consideration of a child's view as merely an additional consideration in assessing his or her best interests fails to give those rights due weight and to ensure a process for them to be heard.

How are a child's views are made known to the Court?

The Bill fails to address the current inadequacies with which a child's views are expressed to the Court and arguably compounds them.

In most cases, a counsellor or psychologist who may have spent minimal time with the child will be the only source of evidence as to the child's views. While there is provision for the Court to order that a child have a separate representative in some family law proceedings, unlike New Zealand, this does not occur in all contested cases. As the ALRC observed:

"The best interests representative must tell the court what wishes the child has expressed but does not have a duty to make submissions to the court which represent the wishes of the child or to argue for an outcome in line with the wishes of the child. The credibility and weight given to children's wishes are matters for the court and will vary from case to case. In many cases involving

children the representative for a child may discount, editorialise or reject the child's wishes and argue the case in accordance with his or her own views of the child's best interests.”¹

This is a wholly inadequate way of communicating the child’s views to the Court. Provision should be made for direct representation of a child’s views.

It is acknowledged that the process of obtaining a child’s views is not always straightforward. Appropriate process should recognise the obstacles to a child’s effective participation in what is fundamentally a world of adult decision-making. It should involve the exercise of significant communication and listening skills on the part of an advocate and the assistance of those with appropriate understanding of child and adolescent development. It should also include appropriate explanations to children as to why their views may not always be reflected in final decisions.

These obstacles and the demands of good process should not be used as an excuse. The benefits of appropriate involvement by children should be clear. Respect for adult decision-making processes is built on the experience of childhood.

Our experience in communications with children and young people is that many are unhappy about the way their views have not been taken into account and respected. It would appear that this state of affairs will be perpetuated in this legislation.

We ask the Committee to consider these submissions. We are available at your convenience to discuss them in more detail.

Yours sincerely

James McDougall
Director
National Children’s and Youth Law Centre

¹ “Seen and Heard: Priority for Children in the Legal Process” Australian Law Reform Commission, Report No 84, para 13.39.