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Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
Parliament House
Canberra ACT 2600

24th February 2006

Dear Sir or Madam,

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

National Legal Aid (NLA) comprises the Directors of the eight State and Territory Legal Aid Commissions. NLA has previously made submissions to the House of Representatives Standing Committee on Legal and Constitutional Affairs Inquiry into the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005, and to the Standing Committee on Family and Community Affairs "Inquiry into child custody arrangements in the event of family separation". We note that it is the Committee's preference to limit this Inquiry to matters that have arisen since, or that were not already considered by the two previous inquiries. Accordingly, we wish to draw your attention to the following three matters:

1. Section 64D – Parenting Orders subject to later parenting plans

There has been a change to the provision relating to parenting plans. The Exposure Draft of the Bill provided that a parenting order is deemed to be subject to a later parenting plan "unless the court determines otherwise". The Bill however provides in Section 64D(2) that "The court may, in exceptional circumstances, include in a parenting order a provision that the parenting order, or a specified provision of the parenting order, may only be varied by a subsequent order of the court (and not by a parenting plan)." Thus the threshold has been increased significantly. A consequence could be that in the type of complex matters which will now reach the litigation stream and where a court has heard extensive evidence, including expert evidence, one party, is able to cause the other party to enter into a parenting plan which negates the orders made by the court. The risk of duress and coercion in complex matters at the difficult end of the spectrum cannot be discounted. The consequences of the raised threshold here should be further considered. An intermediate position could be that the court is required to give specific reasons if it states that a parenting order can only be varied by a subsequent order of the court.

2. Section 68 LA - Independent Children's Lawyer

Legal Aid Commissions are responsible for arranging the appointment of solicitors as child representatives following orders made by the court for the representation of children. Child representatives can be either private practitioners or solicitors employed by the Commissions. NLA, has for many years been involved in the development and delivery of the National Child Representation Training Program. This program was initiated to provide a good base level of expertise for practitioners involved in working with children as child representatives. The Program is conducted jointly with the Law Council of Australia.

New section 68LA (6) of the Bill provides an important measure of confidentiality for communications between the child representative and the child. This was a recommendation of the report of August 2004 by the Family Law Council titled "Pathways for Children – A review of children's representation in family law." Such a provision will enable children's lawyers to more freely confer with children, as it protects children's lawyers from becoming witnesses, in a relationship where the usual client privilege does not exist.

However there are two unexpected provisions in the new section. The first relates to children's views. Section 68LA (5) (b) provides that the independent children's lawyer must inform the court of the views that the child has expressed in relation to matters to which the proceedings relate. There is a careful balance which needs to be struck here. In 2003 the Family Court published comprehensive Guidelines for the Child Representative. The 2003 Guidelines at paragraph 5.3 state that a child who is unwilling to express a wish must not be pressured to do so. This reflects what experienced child representatives are aware of, i.e. the significant conflict of loyalties experienced by children. Practitioners see children who specifically request that their wishes not be disclosed to their parents or the Court. This is something that a child representative will deal with in the course of a matter possibly with the assistance of the counsellor or expert who prepares a report for the court.

The Guidelines have a formulation which relates to children's wishes and which achieves a better balance between protecting the position of the child's lawyer and ensuring that the court becomes aware of children's wishes from an independent source. The Guidelines in paragraph 5.3 state that "The Child's Representative is to ensure that any wishes expressed by the child are fully put before the court and so far as possible are in admissible form." The difference between this and the new provision in the Bill is subtle but important. The wording of the Guidelines is preferable for legislative purposes. The Guidelines formulation avoids the child representative being pressured to effectively become a witness. Child representatives in some states have been reluctant to confer with children because they are concerned about the potential for becoming witnesses and compromising their independence. The wording in the Bill will not assist in addressing this problem. The wording in the Bill also seems inconsistent with the protection given in section 68 LA (6). There is less inconsistency if the wording in the Guidelines is used incorporating the new terminology, of "views" rather than "wishes" and "independent children's lawyer" rather than "child representative".

The second provision relates to the general nature of the role and is contained in new Section 68LA (2) and (3). A slight change to these subsections would also better reflect best practice. We respectfully suggest that the sub-sections should be changed so as to read along the following lines:

- (2) The independent children's lawyer must act in relation to the proceedings in what he or she believes to be in the best interests of the child
- (3) The independent children's lawyer must, if satisfied on the evidence available, that the adoption of a particular course of action is in the best interests of the child, make a submission to the court suggesting the adoption of that course of action

Again there is a subtle difference between this wording and what is set out in the new provisions. However it is important to the independence of the role that the child representative not be subject to undue pressure to express a view and inform the court in circumstances where, for example, the lawyer believes that would be premature in the circumstances of the case, could lead to pressure on the child, and/or might provoke an antagonistic response from a parent.

The Guidelines at paragraph 6.9 state:

Where the child's Representative has formed a preliminary view as to the outcomes which will best promote the child's best interests, it may be appropriate to inform the Court at the commencement of the hearing of those views and where appropriate, provide details of draft orders.

The suggested rewording is more consistent with the Guidelines.

These two provisions do not relate to matters covered in the recommendations of the Report of the Family Law Council. There was, however, wide consultation about the Guidelines and NLA strongly recommends amendment to the provisions along the lines suggested.

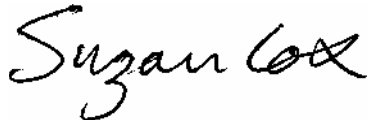
3. Section 60K, family violence and the Independent Children's Lawyer

This section focuses the court's early attention to allegations of abuse and family violence. These matters are exempted from the requirement for a certificate to accompany applications, in the circumstances set out in section 60I. Ideally these matters which particularly impact on children need to receive the early attention of the court. However, the requirements placed on the court, especially those which would effectively involve an investigation of the allegations, mean that in the absence of any other direction to or by the Court as to alternative strategies the Court may feel obliged to make an order for the appointment of an independent children's lawyer (an appointment funded by Commissions) in all these matters. Under current guidelines set out in the 1994 judgment in *Re K*, such appointments would ordinarily be made in matters where there are allegations of child abuse. However, family violence is not included in these guidelines and these provisions relating to family violence are likely to have a considerable resource impact on Commissions relating to the possible increase in the Orders for child representatives, the time of appointment and therefore the cost of the grant, and increased administration costs. This issue has been raised with the Attorney-General's Department.

We would be pleased if you would give consideration to the matters set out above, which of course we would be happy to elaborate on if you require further detail.

We thank you for the opportunity to make this submission.

Yours faithfully,

A handwritten signature in black ink that reads "Suzan Cox". The signature is written in a cursive, flowing style.

Ms Suzan Cox, QC
Chairperson
National Legal Aid