FAMILY COURT OF AUSTRALIA

CHAMBERS OF THE HONOURABLE DIANA BRYANT
CHIEF JUSTICE

GPO Box 9991
Melbourne VIC 3001
Telephone: (03) 8600 4355
Facsimile: (03) 8600 4350
e-mail: chief.justice.chambers@familycourt.gov.au

Commonwealth Law Courts
305 William Street
Melbourne VIC 3000

23 February 2006

Mr Jonathan Curtis
Committee Secretary
Senate Legal and Constitutional Legislation Committee
By e-mail to **LegCon.Sen@aph.gov.au**

Dear Mr Curtis

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

Thank you for your letter of 10 February 2006 inviting submissions to the Committee on this Bill.

The Court has already made detailed submissions to previous inquiries. They are reiterated and relied on without being repeated.

There is, however, one specific matter I would like to draw to the Committee's attention. It is a concern I raised during evidence before the House of Representatives Legal and Constitutional Affairs Committee but does not appear to have been taken up in the Bill.

The Court assumes that the amendments are intended to govern the determination of first time parenting cases initiated after the commencement date and that the Government does not want to encourage parties to relitigate old issues on unchanged circumstances solely on the basis of a change in the law.

There are significant ramifications if there were to be an influx of litigation by parents with existing orders hoping to have them changed solely as a result of changes to the law.

First, there could be serious resource implications if there was to be a significant increase in the number of applications filed in the Family Court and the Federal Magistrates Court. Without further judicial appointments to deal with the additional work, the inevitable outcome is that **all** cases would take longer to be heard, including those new litigants whose cases had not previously been before the Court.

Secondly, it is, generally speaking, not in the interests of children to have repeated applications concerning them before the Court.

Finally, without an understanding of the approach taken by the Court to applications to change existing orders, there may be a false perception in the community that although relevant circumstances in the family remained largely the same since the making of orders, a change in the law itself would be sufficient for the Court to reopen and perhaps overturn an existing order - see Rice and Asplund (1979) FLC ¶90-725: Evatt CJ (with whom Pawley SJ and Fogarty J agreed) at pp 78, 905-78, 906:

> The principles which, in my view, should apply in such cases are that the Court should have regard to any earlier order and to the reasons for and the material on which that order was based. It should not lightly entertain an application to reverse an earlier custody order. To do so would be to invite endless litigation for change is an ever present factor in human affairs. Therefore, the court would need to be satisfied by the applicant that, to quote Barber J, there is some changed circumstance which will justify such a serious step, some new factor arising or, at any rate, some factor which was not disclosed at the previous hearing which would have been material (passage quoted in Hayman and Hayman [(1976) FLC ¶90-140] at p 75,680).
>
> These are not necessarily matters for a preliminary submission, but they are matters that the judge should consider in his reasons for decision. It is a question of finding that there are circumstances which require the court to consider afresh how the welfare of the child should best be served. These principles apply whether the original order is made by consent or after a contested hearing. The way they apply and the factors which will justify the court in reviewing a custody order will vary from case to case.

Whilst these matters will need to be considered on a case by case basis, it is important in our view that it is understood that particularly where a matter has been determined recently, and where there has been a consideration of equal and/or substantial time by the Court, there would need to be a demonstrated change in circumstances before the Court would re-embark on another hearing.

Consent orders are even more problematic as there is no demonstrated reasoning to indicate what factors were considered by the parties.

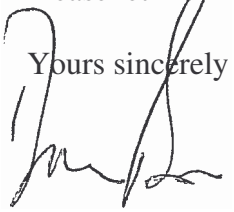
In summary, an influx of re-enlivened applications will disrupt parenting arrangements under existing orders, increase the total number of hearings in the pool of cases awaiting determination, delay the allocation of trial dates for first time litigants and have significant resource and case management implications for the Court.

Regrettably, however, the Bill does not provide any mechanism for avoiding this problem. The transitional arrangements for commencement of the new provisions about the best interests requirements and consideration of equal time arrangements at Items 43(1) and (8) of Schedule 1 Part 2 are not sufficient for this purpose.

It is submitted that the Bill be amended to include a provision that an application based only on the change in legislation cannot be filed within a particular timeframe, say, a two year period of the commencement date of the amendments.

Please let me know if I can help your enquiries in any other way.

Yours sincerely



Diana Bryant
Chief Justice