Chairperson: Professor Patrick Parkinson

Members:  Ms Nicky Davies
         Mr Kym Duggan
         Ms Christine Mead FM
         Justice Susan Morgan
         Mr Clive Price
         Ms Susan Purdon
         Justice Garry Watts

13 September 2005

The Executive Director
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001

Submission on Discussion Paper 69 – Review of the Uniform Evidence Acts

The Family Law Council (the Council) is pleased to make a submission about certain matters raised in the ALRC discussion paper that are relevant to family law (attachment A). The function and composition of the Council is set out in attachment B.

The Council is grateful that Associate Professor Les McCrimmon was able to speak to the Council about the discussion paper on 4 August 2005, as this informed the Council’s submission.

I would be happy to provide further information about the content of the submission should this be required.

Yours sincerely

Professor Patrick Parkinson
Chairperson
Chapter 13: Privileges

Privileges protecting other confidential communications

The ALRC’s proposal is that a confidential relationships privilege be inserted in the Commonwealth Evidence Act 1995 to apply pre-trial as well as to court proceedings.\(^1\) The privilege would apply to relationships such as doctor and patient, social worker and client, and psychotherapist and patient.\(^2\) If this proposal were to be implemented, if the privilege is claimed the judge will need to consider the likely harm to the confider if the evidence is adduced and balance this against the probative value of the evidence and other relevant factors.\(^3\)

This would be a considerable change to proceedings under the Family Law Act 1975. A range of information is often necessary to make a parenting order that is in the best interests of the child or children. Such information might include files from State/Territory child welfare authorities, medical records and school counsellor’s records. It is imperative that the court has access to this information. If one of the child’s parents claimed the privilege (such as a parent who had been investigated by a child welfare authority), it may hamper the operation of the paramountcy principle under the Family Law Act.\(^4\) As the name suggests, in the specific contexts when the best interests of the child is paramount,\(^5\) it overrides the interests of the parents or other adults. If the adults in the proceedings were to have a confidential relationships privilege, it would have the potential to limit the evidence the court has available to make the best possible decision.

The Council is concerned that the proposed privilege may also hamper the Family Court’s Magellan project, which involves the Family Court more actively managing parenting disputes involving allegations of serious physical and/or sexual abuse against children. It is built on inter-organisational agreements that create a series of strong collaborative arrangements between the court and relevant State and Territory agencies, including child protection authorities and legal aid. As the project is based on information sharing to reach faster resolution in matters, a confidential relationships privilege may impinge on its successful operation.

\(^2\) Ibid, p405.
\(^3\) Similar to section 126B of the Evidence Act 1995 (NSW), provided by the ALRC, ibid, pp406-7.
\(^4\) The rule that the best interests of the child must be regarded as the paramount consideration when making specified decisions under the Family Law Act 1975.
\(^5\) These contexts are outlined in the Family Law Council’s discussion paper, the ‘Child Paramountcy Principle’ in the Family Law Act, December 2004. The paper is available online at www.law.gov.au/flc.
Another concern is who can claim the privilege. Children cannot claim privileges and it is their parents who are likely to be in dispute in family law matters, so they are therefore unlikely to claim a privilege on their child’s behalf.

For these reasons, the Council submits that there should be an exemption from the ALRC’s proposed confidential relationships privilege for family law proceedings, due to the special nature of family law cases and the paramountcy principle under the Family Law Act.

The Council supports the ALRC’s proposed qualified sexual assault counselling privilege.

Chapter 18: Matters Outside the Uniform Evidence Acts

Evidence and the paramountcy principle

The ALRC notes in the discussion paper that the Council is in the process of consulting on a discussion paper titled, the ‘Child Paramountcy Principle’ in the Family Law Act. The closing date for submissions on the discussion paper was extended to 30 June 2005. The Council is now considering the submissions, which will form the basis of a letter of advice to the Attorney-General.

The Children’s Cases Program

The Council supports the ALRC’s view that the evidentiary provisions to support less adversarial procedures in parenting cases are best placed in the Family Law Act 1975. This is the government’s proposed approach in schedule 3 of the exposure draft Family Law Amendment (Shared Parental Responsibility) Bill 2005.6

---

6 Available on the Attorney-General’s Department website at www.ag.gov.au
Functions of the Family Law Council

The Family Law Council is a statutory authority which was established by section 115 of the Family Law Act 1975. The functions of the Council are set out in subsection 115(3) of the Act as follows.

It is the function of the Council to advise and make recommendations to the Attorney-General, either of its own motion or upon request made to it by the Attorney-General, concerning:
(a) the working of this Act and other legislation relating to family law;
(b) the working of legal aid in relation to family law; and
(c) any other matters relating to family law.

The Council may provide advice and recommendations either on its own motion or at the request of the Attorney-General.

Membership of the Family Law Council (as at 1 July 2005)

Professor Patrick Parkinson, Chairperson
Ms Nicola Davies
Mr Kym Duggan
Federal Magistrate Christine Mead
Justice Susan Morgan
Mr Clive Price
Ms Susan Purdon
Justice Garry Watts

The following six agencies and the Family Law Section of the Law Council of Australia have observer status on the Council (with names of observers):

Australian Institute of Family Studies – Mr Bruce Smyth
Australian Law Reform Commission – Ms Kate Connors
Child Support Agency – Ms Yvonne Marsh
Family Court of Australia – Ms Jennifer Cooke and Ms Dianne Gibson
Family Court of Western Australia – Justice Stephen Thackray
Federal Magistrates Court of Australia – Mr John Mathieson
Family Law Section of the Law Council of Australia – Ms Maurine Pyke