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Family Law Council

05/9558

17 January 2006

The Hon Philip Ruddock MP
Attorney-General
Parliament House
CANBERRA ACT 2600

Dear Attorney-General

Family Law Council Advice on the ‘Child Paramountcy Principle’ in the Family Law Act

1. BACKGROUND AND TERMS OF REFERENCE

In May 2000 the Family Law Council discussed the amendments made to the *Family Law Act 1975* by the *Family Law Reform Act 1995* in relation to the paramountcy principle (the rule that the best interests of the child must be regarded as the paramount consideration when making specified decisions in the *Family Law Act 1975*).

Council appointed a committee to develop draft terms of reference which were approved by the Attorney-General on 9 October 2000. On 3 June 2003 the Attorney-General agreed to extend the terms of reference to include an examination of relocation cases. The final terms of reference are:

1. To examine the nature and application of the legal principle that the child’s best interests must be regarded as the paramount consideration in family law litigation concerning children and to consider whether the *Family Law Act 1975* should be amended in this respect.

The Council shall have particular regard to:

- the law before and after the *Family Law Reform Act 1995*; and
- the nature and scope of similar provisions in other jurisdictions.

2. To examine:

- (1) How the best interests of the child principle set out in section 65E of the *Family Law Act* operates in relation to other legitimate interests in a relocation case;
- (2) How best to take account of the interests of other children who may be affected by the relocation decision but are not the subject of proceedings;
- (3) How best to take account of the interests of other people affected by the relocation decision;
- (4) The significance of section 92 of the *Constitution* for the law of relocation;
- (5) Approaches to the problem of relocation in other jurisdictions; and
- (6) Whether the *Family Law Act* should be amended to provide specific criteria for making relocation decisions.

2. DISCUSSION PAPER

In December 2004 the Council released a discussion paper titled *The 'Child Paramountcy Principle' in the Family Law Act*. The scope of the discussion paper was limited to paragraph 1 of the terms of reference and did not examine the operation of the principle that the child's best interests should be the paramount consideration (hereafter referred to as the 'paramountcy principle') in relocation cases. Council will release a separate discussion paper on this second aspect of the terms of reference.

The discussion paper was sent to 53 individuals and organisations and made available on Council's website. Submissions and comments on the discussion paper were initially sought by 6 May 2005, although the closing date was later extended to 30 June 2005. Council received 12 submissions by 30 June 2005. Seven of the submissions were from legal practitioner groups, including Law Societies. Two of the submissions were from academics, one was from a men's support group and two were from private citizens. A list of people and organisations who prepared submissions is provided in appendix A.

Council is very grateful for the time and effort individuals and organisations spent in the preparation of their submissions. It should be noted that some of the submissions went beyond the ambit of Council's inquiry and included comment on relocation, for example. Those which addressed relocation will be taken into account when Council considers this issue and will not need to make separate submissions on the discussion paper on relocation (but will of course be free to do so).

The purpose of the discussion paper was to explain the existing provisions of the *Family Law Act 1975* (the Family Law Act) and review how they have operated, having regard to the way they have been interpreted. The effect of the 1995 amendments to the Family Law Act was to restrict the application of the paramountcy principle to particular sections of Part VII.

The discussion paper spells out the paramountcy principle as applying when:¹

- revoking, varying or setting aside a parenting plan that was registered prior to the *Family Law Amendment Act 2003*: sections 63E, 63F, 63H
- making parenting orders: section 65E
- making an order that a counsellor is required to supervise or assist compliance with parenting orders: subsection 65L(2)
- making location and recovery orders: sections 67L and 67V
- making orders relating to the welfare of children: section 67ZC, and
- varying parenting orders following contravention: subsection 70NJ(5).

In the following instances the paramountcy principle does not apply, although the child's best interests will nevertheless be considered when the court exercises its discretion.²

- When considering whether to grant leave for proceedings to be commenced for the adoption of a child section 60G.
- When making an injunction: section 68B.
- When varying contact orders in family violence proceedings: subsection 68T(2).

In proceedings under the *Family Law (Child Abduction Convention) Regulations 1986* the principle does not apply. This is because such proceedings are not 'proceedings for a parenting order' as required by section 65E of the Family Law Act.³

The next part of the discussion paper reviewed case law on the application of the paramountcy principle in specific contexts.⁴ The case law shows that there are a number of instances where the paramountcy principle does not expressly apply, but the courts regard the child's best interests as a relevant consideration. For example, in *CDJ v VAJ*⁵ the High Court held that even though the paramountcy principle does not apply expressly in statute, the child's best interests will remain a significant or 'powerful' consideration in an order admitting or rejecting fresh evidence on appeal. In cases involving questions of jurisdiction, the child's interests are also relevant.⁶

There are also cases which have confirmed when the best interests of the child are not the paramount consideration, for example, when a parentage test is being ordered.⁷

The third part of the paper reviewed comparable legislation in the United Kingdom and New Zealand. The case law in these countries offers some examples of situations where the paramountcy principle has been invoked and where it would not have been applied in Australia.

The discussion paper then invited comment on 3 specific questions, which will be outlined in part 4 below, along with a detailed discussion of the responses in the submissions.

¹ Family Law Council *The 'Child Paramountcy Principle' in the Family Law Act*, December 2004, pp11-14.

² Discussion paper pp14-16.

³ Discussion paper p17.

⁴ Discussion paper pp18-22.

⁵ *CDJ v VAJ* (1998) FLC 92-828.

⁶ *B and B (Re Jurisdiction)* (2004) 31 Fam LR 31.13.

⁷ *Duroux v Martin* (1993) 17 Fam LR, 17.130.

3. RECENT DEVELOPMENTS

Since the release of Council's discussion paper, the Government prepared an exposure draft Family Law Amendment (Shared Parental Responsibility) Bill 2005 (the Bill) which was referred to the House of Representatives Standing Committee on Legal and Constitutional Affairs (the Committee) for inquiry. The Committee reported on 18 August 2005 and made 59 recommendations about the Bill. Two of the recommendations specifically relate to the paramouncy principle – recommendations 16 and 17 which are set out in full below:

The Committee recommends:

- (a) co-locating section 65E related to the best interests of the child as the paramount consideration in parenting orders and section 68F related to how the court determines what is in the best interests of the child at the start of subdivision 5 of Part VII about parenting orders; and
- (b) proposed Division 1A come later in the Act.

The Committee recommends that the objects set out in proposed subsection 60B(1) of Part VII be amended to:

- (a) make more explicit reference to the need for consistency and the paramouncy of the best interests of the child; and
- (b) to recognise as an object the safety of the child (as currently set out in proposed paragraph 60B(2)(b) of the Bill (as amended by recommendation 16).

The Government responded to the recommendations made by the Committee on 8 December 2005 (the same day as the Bill was introduced in the House of Representatives). The Government agreed with both of the above recommendations of the Committee and, if passed, the Bill will implement the recommendations. Therefore the proposed changes have been taken into account in preparing this advice.

4. RESPONSES TO QUESTIONS FOR CONSULTATION

In part 4 of the discussion paper, Council expressed a tentative view and invited comment.⁸ This was that the restriction of the principle to an enumerated list of specific decisions was appropriate. Indeed Council's examination of the case law since 1995 suggested that the present legislation makes sense. In particular, when considering the decisions to which the paramouncy principle does not apply Council noted that those decisions involve balancing the child's interests against some other interests.

The New South Wales Bar Association, Family Law Section of the Law Council of Australia and the Law Society of Tasmania all stated in their submission that they support Council's tentative view.

There were three submissions which propose an alternative formulation of the paramouncy principle, beyond just extending or removing its application. These submissions were from the Family Issues Committee of the Law Society of New South Wales, National Legal Aid and MacLean and Batagol.

⁸ Paragraph 4.2 on page 30 of the Discussion paper.

The Family Issues Committee of the Law Society of New South Wales submits that there should be a general statement of the paramountcy principle within the Family Law Act, with enumerated exceptions. MacLean and Batagol also submit that the paramountcy principle should be expressed in a single section, like subsection 1(1) of the UK *Children Act 1989*, which provides that:

When a court determines any question with respect to –
(a) the upbringing of a child; or
(b) the administration of a child’s property or the application of any income arising from it,
the child’s welfare shall be the paramount consideration.

National Legal Aid submitted that the paramountcy principle should apply to all proceedings in relation to parenting orders, not just the making of parenting orders per se. National Legal Aid support enumerated exceptions, although did not recommend the same exceptions as the Family Issues Committee of the Law Society of New South Wales.

Council is of the view that the approach outlined by the Family Issues Committee of the Law Society of New South Wales, National Legal Aid and MacLean and Batagol have merit. The advantage of a general statement of the paramountcy principle with enumerated exceptions would be that people would not have to refer to case law to understand the application of the paramountcy principle. Increasing clarity of family law is a worthy objective. It has to be recognised that re-writing the sections of the Family Law Act that apply the paramountcy principle may not be sufficient to increase the clarity of the law, though, and the whole of Part VII may need to be re-drafted to ensure the provisions operate in a coherent way.

The Family Law Act is being amended at a rapid rate. If the amendments in the Bill are passed, this is likely to create some confusion amongst the community (at least initially). It will also take some time for judicial interpretation of the new provisions to clarify their operation. For this reason, Council is reluctant to recommend a major departure from the paramountcy principle, beyond the proposals in the Bill.

Council has concluded that if the whole of the Family Law Act is to be re-written in line with recommendation 49 made by the Committee, then a clear statement of the paramountcy principle should be included as part of this re-write. The exceptions to the paramountcy principle would need to be determined and be clearly stated. In general at least, in Council’s view it would be appropriate to formulate those exceptions to incorporate the position expressed in case law. The Government’s response to recommendation 49 was to agree in principle, but note that “this is a matter for the Parliamentary Business and Budget process”.

As noted in part 2, the discussion paper posed 3 specific questions for comment. The responses to these questions will now be considered in turn.

1. Taking account of the observations of the High Court in *CDJ v VAJ*, and the differences of view in the High Court in *Northern Territory of Australia v GPAO* are there any decisions where the paramountcy principle:

(a) does not currently apply to which it should be made applicable?

(b) currently applies to which it should be made inapplicable?

Some submissions suggest the paramountcy principle should be made applicable in two areas where it does not currently apply. These are parentage testing and the situation which arose in *Northern Territory of Australia v GPAO*⁹ about production of documents and inconsistent Commonwealth and Territory laws.

Firstly, the National Network of Women’s Legal Services (NNWLS) submits that “the best interests of the child should be the paramount consideration in determining whether parentage testing is ordered. At the very least, it should be a significant consideration”. The NNWLS suggests that it is likely that different or additional factors would need to be specified in the legislation for determining the best interests for this purpose and submits that this requires further research and consideration.

If the Family Law Act was to be amended to make the best interests of the child a “significant consideration”, it would not change current practice. Therefore Council has concluded that there should be no change to the current parentage testing provisions in this regard.

Secondly, in *Northern Territory of Australia v GPAO*, the High Court was called upon to consider whether as the Full Court of the Family Court had held, the paramountcy principle overrode other inconsistent statutory provisions. The High Court was satisfied that both the paramountcy principle and the Territory immunity operated freely each in their proper sphere. This raises significant issues beyond the paramountcy principle, which concern Commonwealth/State relations.

In their submission the Family Law Section of the Law Council of Australia “strongly recommends” that the principle be extended to cover situations where state/territory provisions regarding the production of documents from welfare authorities are inconsistent with Part VII of the Family Law Act. Both National Legal Aid and the Family Issues Committee of the Law Society of New South Wales argue that a statement of the paramountcy principle alone would not be specific enough to address the difficulty highlighted in the *NT v GPAO* decision. They suggest a provision in the Family Law Act that requires production of evidence in the best interests of the child where that evidence would otherwise be protected by state legislation, subject to a number of safeguards. The safeguards could include, for example, that it can be demonstrated to the court that it is probable that the documents will be relevant to determining the best interests of the child and that it can be demonstrated that no alternate source can be identified for the material likely to be found in the documents.

Council is merely drawing the content of these three submissions to your attention and will not make any recommendations. To do so would be likely to go beyond the scope of Council’s terms of reference.

⁹ *Northern Territory of Australia v GPAO* [1999] HCA 8 (11 March 1999).

2. Should the law be amended to allow the paramountcy principle to qualify the application of the *Evidence Act 1995* (Cth) in any circumstances?

The majority of the submissions Council received do not support any amendment to allow the paramountcy principle to qualify the application of the *Evidence Act 1995* (Cth) in any circumstances and Council supports no change. If any change was necessary, it would be preferable to amend the Family Law Act, rather than the Commonwealth Evidence Act, as the Evidence Act does not apply to the Family Court of Western Australia.

Council notes that schedule 3 of the Bill (dealing with less adversarial procedures for children's cases), if passed, is likely to reduce the need for any amendment.

3. Are there specific applications of the paramountcy principle where it would be appropriate to list other factors which should be considered while treating the best interests of the child as paramount?

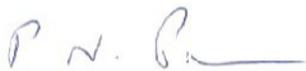
Professor Henaghan submits that without qualifying principles, the paramountcy principle can mean whatever a judge wants it to mean. He favours a clear statement of what the paramountcy interests are and what they are not and submits that if other interests are to be taken into account, they should be made apparent through legislation. Professor Henaghan notes that New Zealand's *Care of Children Act 2004* sets out principles relevant to the welfare and best interests of the particular child. Sections 4 and 5 of that Act are provided in appendix B.

Council neither accepts nor rejects Professor Henaghan's view at this stage, but will take this proposal into account as part of our consideration of the operation of the paramountcy principle in relocation cases. The terms of reference require Council to consider other interests affected by relocation decisions.

5. CONCLUSION AND RECOMMENDATIONS

In light of the proposed amendments to the paramountcy principle in the Bill before Parliament, Council does not see any justification for recommending further changes to the paramountcy principle as currently drafted. However, if the whole Family Law Act is to be re-written at some time in the future, Council recommends that a clear statement of the paramountcy principle with enumerated exceptions should be incorporated in the Family Law Act as part of that re-write.

Yours sincerely



Professor Patrick Parkinson
Chairperson

APPENDIX A

List of submissions received by 30 June 2005 (in alphabetical order)

Family Issues Committee, Law Society of New South Wales

Family Law Section of the Law Council of Australia

Flanagan J., Non-Custodial Parents Party

Haycroft C., Student at Victoria University School of Law

Henaghan M., Dean of Law, University of Otago

Law Society of Tasmania

Law Society of South Australia

MacLean M., Oxford Centre for Family Law and Policy (OXFLAP) and Batagol B., Monash University (Visitor to OXFLAP)

National Legal Aid

National Network of Women's Legal Services

New South Wales Bar Association

Orwell E., "F.N.F" – Family Support & Family Law

Care of Children Act 2004 (New Zealand)

Section 4 Child's welfare and best interests to be paramount

- (1) The welfare and best interests of the child must be the first and paramount consideration—
 - (a) in the administration and application of this Act, for example, in proceedings under this Act; and
 - (b) in any other proceedings involving the guardianship of, or the role of providing day-to-day care for, or contact with, a child.
- (2) The welfare and best interests of the particular child in his or her particular circumstances must be considered.
- (3) A parent's conduct may be considered only to the extent (if any) that it is relevant to the child's welfare and best interests.
- (4) For the purposes of this section, and regardless of a child's age, it must not be presumed that placing the child in the day-to-day care of a particular person will, because of that person's sex, best serve the welfare and best interests of the child.
- (5) In determining what best serves the child's welfare and best interests, a Court or a person must take into account—
 - (a) the principle that decisions affecting the child should be made and implemented within a time frame that is appropriate to the child's sense of time; and
 - (b) any of the principles specified in section 5 that are relevant to the welfare and best interests of the particular child in his or her particular circumstances.
- (6) Subsection (5) does not limit section 6 (child's views) or prevent the Court or person from taking into account other matters relevant to the child's welfare and best interests.
- (7) This section does not limit section 83 or subpart 4 of Part 2.

Section 5 Principles relevant to child's welfare and best interests

The principles referred to in section 4(5)(b) are as follows:

- (a) the child's parents and guardians should have the primary responsibility, and should be encouraged to agree to their own arrangements, for the child's care, development, and upbringing:
- (b) there should be continuity in arrangements for the child's care, development, and upbringing, and the child's relationships with his or her family, family group, whanau, hapu, or iwi, should be stable and ongoing (in particular, the child should have continuing relationships with both of his or her parents):
- (c) the child's care, development, and upbringing should be facilitated by ongoing consultation and co-operation among and between the child's parents and guardians and all persons exercising the role of providing day-to-day care for, or entitled to have contact with, the child:

- (d) relationships between the child and members of his or her family, family group, whanau, hapu, or iwi should be preserved and strengthened, and those members should be encouraged to participate in the child's care, development, and upbringing:
- (e) the child's safety must be protected and, in particular, he or she must be protected from all forms of violence (whether by members of his or her family, family group, whanau, hapu, or iwi, or by other persons):
- (f) the child's identity (including, without limitation, his or her culture, language, and religious denomination and practice) should be preserved and strengthened.