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Joint Select Committee on Australia's Family Law System,  
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Dear Sir/Madam

Re – **Submission to the Inquiry into Australia's Family Law System.**

We thank the Joint Select Committee for allowing us to present our submission to your Inquiry into Australia's Family Law System.

### **Introduction.**

Once having been involved with family law and child support issues, most people will invariably ask themselves one (1) or two (2) of the following questions.

1. What was the cause of their unfair and inequitable result?
2. How can this system be fixed to prevent this problem from happening to other people, in the future?

It can be readily considered that the cause of their unfair and inequitable result is an unfair agenda.

However how the system can be then fixed is somewhat more complex.

We have made submissions to many family law, child support and related inquiries over the years. This is to outline the cause of the problem and to show how the system can be fixed in order to prevent this problem from re-occurring.

For example, one of our earlier submissions was made in a letter dated 7 August 2003. Our submission from 2003 can be found at:

<http://www.equalparenting.org.au/wp-content/uploads/2011/06/2.-Submission-by-John-Flanagan-FICS-to-the-Standing-Committee-on-Family-and-Committee-Affairs-re-Shared-Parenting-7-August-2003.pdf>

That submission was made sixteen years ago. Unfortunately nothing has changed since that time.

We still have a problem with an unfair agenda and we still do not have the solutions put in place to fix that problem.

### **Our Current Submission.**

Whilst all of the points outlined in your Terms of Reference for this current inquiry are important, we believe that they are very often related. Therefore our submission is specifically directed at items “c” and “i” (and perhaps “k”) of your Terms of Reference

Item “c” refers to “any other reform that may be needed to the family law”. Item “i” refers to “child support”. Item “k” refers to “related matters”.

We believe that the necessary solutions are as set out in A to C below.

### **A. Item “c” of the Terms of Reference – “any other reform that may be needed to the family law”.**

#### **1 — Rebuttable Presumption of Joint Residency.**

We would suggest that you should provide for a rebuttable presumption of joint residency, as a general presumption. That is, unless there are valid and proven reasons for not doing so.

At the same time, we believe that you should also recommend the reversal some of the negative effects of the changes made by the *Family Law Amendment (Family Violence and Other Measures) Act 2011*. This includes the removal of the effects of the domestic violence provisions contained therein and the re-instatement of the previous perjury provisions.

For example, the joint residency provisions of the Family Law Act 1975, prior to the 2011 changes, were certainly a long way from being perfect. However, as a result of the 2011 changes, what we have now is clearly not good enough.

As a result of these changes, the issue of family violence is increasingly being used to wrongly undermine legitimate attempts at children being able to have contact with both parents after either separation or divorce.

The *Family Law Amendment (Family Violence and Other Measures) Act 2011* (Act no. 189 of 2011) came into effect on 7 June 2012.

As a result, changes were then made to the *Family Law Act 1975*. This was, in particular, to sub-section 60CC(2) of the principal act with a new sub-section 60CC(2A) being added.

In this new sub-section, the “consideration” of equal time provisions was now only made the “second” consideration. Alleged or otherwise issues of family violence were made the “first” consideration.

We do not condone family violence. However the result of this particular amendment has significantly undermined legitimate attempts at children being able to have contact with both parents after either separation or divorce; when this should not be the case.

This is despite the fact that many of these allegations are not true and are not required to be substantiated. These allegations are often merely made to obtain an advantage under this sub-section 60CC(2A) of the *Family Law Act* (and also to obtain an advantage with other issues such as property settlements and superannuation splitting; child support payments and Centrelink payments). Also there is probably an element of revenge.

It is noted that paragraph (2)(a) of sub-section 60CC(2A) refers to children being able to have contact with both parents after either separation or divorce. Whereas the currently dominant paragraph (2)(b) of the same sub-

section refers to family violence.

To overcome the negative effects of the *Family Law Amendment (Family Violence and Other Measures) Act 2011*, we would propose that the priority now given to paragraph (2)(b) over paragraph (2)(a) should be reversed.

That is, the changes to sub-section 60CC(2A) would be as follows:-

**Delete**

*(2A) If there is any inconsistency in applying the considerations set out in subsection (2), the court is to give greater weight to the consideration set out in paragraph (2)(b).*

**Insert**

*(2A) If there is any inconsistency in applying the considerations set out in subsection (2), the court is to give greater weight to the consideration set out in paragraph (2)(a).*

As a result of this change, family violence would be still an issue that has to be considered. However there would be now a priority given to children being able to see both parents after either divorce or separation.

At the same time, it is hoped that many of the currently false allegations of family violence would then become less prevalent.

**2 — Providing Parents with Individual Rights.**

The word “*paramount*” should be replaced with the word “*primary*” in the *Family Law Act 1975*. This change is with regard to the “*best interests*” principle or the paramountcy principle (as it is often called) in Part VII of the *Family Law Act 1975*.

At present, parents, grandparents and other relatives, etc do not have any individual rights under family law.

**3 — Reduce Court Secrecy and Increase Accountability of the Family Court.**

The repealing of section 121 and substitution with a new section 121 would need to be carried out to reduce court secrecy and to increase the accountability of the Family Court. Details can be provided if required.

(Also for technical reasons, section 102PC would need to be modified so that there is no inconsistency between that section and the new section 121).

#### **4 — Assets Acquired Prior to the Marriage or the Relationship.**

Section 79 "*Alteration of property interests*" of the *Family Law Act 1975* is reasonably ill-defined. This is particularly with regard to the question of determining "*future needs*".

It is recognised by the courts that although a party cannot claim to have contributed to the acquisition of property or the provision of superannuation obtained by the other before their relationship commenced; he or she may have then contributed to the conservation or improvement of the property or the value of the superannuation fund.

In court proceedings, it is found that the value of the assets owned by the person or persons prior to the marriage or the relationship often becomes "vague" and the original asset value is then often diluted. This is because of the issue of "*future needs*".

Section 79 needs to be amended to reinforce the fact that the value of property owned and/or superannuation acquired prior to the marriage or relationship will remain in the possession of the individual that had ownership of the assets at the time of the marriage or the commencement of the relationship. This would include all assets such as shares and/or liquid assets.

It should be noted that details of all assets should be included in the court orders. This is for the purpose of obtaining any of the usual stamp duty and/or capital gain tax concessions that may be applicable.

This is not to affect the distribution of any of the any subsequent assets, etc and the making of any other orders relating to subsequent assets, etc that may relate to child maintenance and spousal maintenance issues.

#### **B - Item (i) of the Terms of Reference – "*Child Support*".**

### **1 — Restoration of Individual Privacy.**

Section 16C of the *Child Support (Registration and Collection) Act 1988* and Section 150D of the *Child Support (Assessment) Act 1989* should be repealed.

This is simply to restore individual privacy which does not exist at the present time.

### **2 — Remove the Unnecessary Link Between Family Tax Benefit Payments and Child Support.**

At present, there is a forced enlistment into the child support scheme through Centrelink. This is by having the current legislation create an artificial need for the custodial parent to join the child support scheme or face the prospect of only obtaining the minimum family tax benefit payments.

As such, section 151A of the *Child Support (Assessment) Act 1989* and Clause 10 of *Schedule 1 of A New Tax System (Family Assistance) Act 1999* should be repealed.

### **3 — Increase the Accountability of the Commonwealth Child Support Officers.**

Paragraph (s) of *Schedule 1 of the Administrative Decisions (Judicial Review) Act 1977* allows the decisions of Commonwealth child support officers, where they relate to child support change of assessments, to be exempt from review.

As a result, these Commonwealth child support officers are exempt from being accountable for any decisions that would be otherwise seen as being improperly made.

We believe that there is no legitimate reason for this exemption to exist.

We believe that paragraph (s) should be deleted from *Schedule 1 of the Administrative Decisions (Judicial Review) Act 1977* to make these Commonwealth officers accountable for their decisions. This is in the same way that other Commonwealth officers are accountable for other similar decisions.

(For details regarding the effect of the above paragraph “s”, please refer to *Tydeman v Deputy Registrar of Child Support Agency [1999] FCA 88 (12 February 1999)* and *Tydeman v Deputy Registrar of Child Support Agency [1999] FCA 936 (9 July 1999)* and the subsequent Tydeman appeals)

#### **4 — Child Support Registrar’s Decisions to be Governed by the Rules of Evidence.**

The wording “*bound by any rules of evidence*” should be inserted into section 98H of the *Child Support (Assessment) Act 1989* and into section 33 (with respect to child support matters) of the *Administrative Appeals Tribunal Act 1975*.

Currently child support reviews can be seen as being effectively quasi judicial proceedings. This is rather than being true tribunal proceedings. However the conduct of these child support proceedings is not bound by the rules of evidence.

The Child Support Registrar’s decisions should be governed by the rules of evidence. This is to allow the perception of proper fairness to be seen by the participants as having taken place.

#### **5 — Restriction of Access to Tax File Numbers.**

Changes should be made to remove the ability of the government employees of the Child Support Programme to arbitrarily access another person’s tax file information. This is unless the affected person(s) has been notified and has also approved of this access occurring.

Prior to 2001, the government employees of the Child Support Agency (as the Child Support Programme was then known), had direct access to a person’s tax file number and tax details. This was because the Child Support Agency was then part of the Australian Tax Office,

In 2001, amendments in Schedule 5 to the *Child Support Legislation Amendment Act 2001 (Act No. 75)* repealed section 8WD of the *Taxation Administration Act 1953*. This consequently removed the Tax Commissioner from holding the Office of Child Support Registrar.

The Child Support Agency was then moved to another Government department and then subsequently moved to the Department of Human Services, where it is now located.

There are generally heavy penalties for wrongly accessing tax information.

The two main legislative sections that restrict this access are:

1. Section 8WA of the *Taxation Administration Act 1953* “Unauthorised requirement etc. that tax file number be quoted”
2. Section 8WB of the *Taxation Administration Act 1953* “Unauthorised recording etc. of tax file number”

However the employees of the Child Support Agency/Child Support Programme were able to keep their direct access to a person’s tax information after the legislative changes made in 2001.

This was only because the Child Support Registrar was provided with an exception to this restriction in the above sections 8WA and 8WB of the *Taxation Administration Act 1953*.

This was done by adding an item (*ga*) to sub-section 8WA(1AA)(b) and to sub-sections 8WB(1A)(a) and (b) of the *Taxation Administration Act 1953*.

The wording of item (*ga*) is as follows:

*(ga) to facilitate the administration of the Child Support (Assessment) Act 1989 and the Child Support (Registration and Collection) Act 1988;*

Reference to item (*ga*) was also inserted into section 202 of the *Income Tax Administration Act 1936*. This was to enable the exemption to take effect.

The Child Support Registrar has then delegated this exception to nearly all of the employees of the Child Support Programme. As a result, access to tax information is unrestricted to most employees of the Child Support Programme.

We believe that the (*ga*) exemption should be removed from the relevant sub-sections of the *Taxation Administration Act 1953* to restrict access to a person’s tax information.



This is in the same way that other Commonwealth Officers, such as those that are employed within the Australian Tax Office and Centrelink are restricted.

## **6 — Capping of Child Support Payments.**

From the latest available figures, approximately 43 per cent of child support payers are either unemployed or effectively unemployed on very low incomes. (Reference: Obtained from Table 5.2 of the Child Support Agency's publication, *Child Support Scheme Facts and Figures 2006-07*).

Unfortunately the Child Support Agency/Child Support Programme has not made these "unemployment" figures available since their 2006-07 publication. However it can be still considered that a large and significant number of child support payers are still unemployed or effectively unemployed on very low incomes.

We believe that unreasonable and unfair child support assessments have created this unemployment issue. This situation does not help anyone. It does not help the child support payer, the child support payee, the children or the Australian Tax Office (which collects less taxation revenue).

This is mainly because the present child support formula does not allow for a fair cap on child support payments. A fairer cap can be easily placed on child support income. This is by simply deleting columns 2 to 6 in the 'Costs of children' table in the current child support formula.

Only column 1 would remain in the table, thereby providing this fairer cap on child support payments.

As result, more people would in employment, thereby benefiting everyone concerned.

## **C - Item "k" of the Terms of Reference – "*any related matters*".**

Should it be considered that any of the above items should fall outside items "c" and "i" of the Terms of Reference, then it is submitted that they could be then considered for inclusion by your Committee as being part of Item 'k' of the Terms of Reference – "*any related matters*".

Thanking you.

Yours faithfully,

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