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Secretary:

**SUBMISSION TO THE HOUSE OF REPRESENTATIVES STANDING
COMMITTEE ON FAMILY AND COMMUNITY AFFAIRS**

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**1. The nature of the best interests of the child and custody arrangements after
separation.**

It is imperative for the future harmony and well-being of Australian society that the best possible conditions of care be determined for children, and that children should have the benefits of strong and loving families and extended families. In the event that their parents separate, then every effort should be made by the Family Law system to ensure support for the safety, harmonious relationships and well-being of children involved.

'Well-being' includes adequate food, shelter, stable housing, adequate income, support, access to education and caring adults to ensure children grow up with minimal anxiety, stress and trauma, in safety, and with positive self-esteem.

It is only within the last century that total custody of children by the *pater familias* within legal marriages was challenged. Early in the twentieth century, mothers obtained the legal right to care for their children after death of the father, whereas previously custody of and responsibility for children shifted to his brother on a man's death.

Alongside the advent of research into personal development, the twentieth century saw an increased emphasis on children's needs, rights, interests and personal development. The twentieth century also saw advances in recognition of women's equal citizenship and capacity to assume full responsibilities and participation of adulthood, previously only the right of men. Further, in the division of labour within families, it became clear that women were frequently the primary carers, even when they also worked for pay outside the home. Fortunately there appears to be an increasing consciousness among men motivated to be active family members, and active in parenting. This appears to be one element in the Government's suggestion that 'joint custody' might become a 'rebuttable presumption' following family breakdown.

The impact of violence in families:

The superior 'rights' of fathers have, however, remained embedded in the power relations within families, even when their behaviour is counter-productive to family life and when they are absent as caring parents. The most serious challenges to men's parenthood rights arise from some men's propensity to

violence, both to women and to children. Men continue to be the most frequent perpetrators of violence (see for example, Australian Bureau of Statistics, 1996; Mouzos, 1999; Bagshaw and Chung, 2000).

Bagshaw and Chung (2000, p14) conclude their review of relevant research with the statement that:

Evidence also strongly suggests that men are more violent than women in intimate relationships, and that women are not equally likely to be violent in this situation. The use and effects of violence differ both in the extent and nature for males and females.

Research was undertaken into the income, social support and safety of 400 women, by the Women's Studies Research Unit, Social Work, University of Melbourne and the Women's Social Support Services, Royal Women's Hospital, Melbourne, and completed in 2002. 90 women were found to have experienced some form of abuse, and 18 women left their partnership during their pregnancy, due to increasing violence. This is consistent with other research on the incidence of violence in pregnancy.

Services responding to domestic and family violence report that the danger to women in relationships with a history of violence increases, rather than decreases after separation. This poses serious challenges to the Family Court in approving contact arrangements for children after parental separation.

Kaye, Stubbs and Tolmie (2003) have completed in-depth research of women negotiating contact arrangements in forty situations where their previous partners had abused them. A range of professionals familiar with the situations also provided information for the research. Most women were highly motivated to enable contact with the non-residential parent, however 97.5% had experienced incidents of violence or rough handling of children during handover. In this difficult context, women were trying to negotiate safe and appropriate handover arrangements for contact visits. Supervised access occurred in half of the situations. According to the research summary in the *Australian Domestic and Family Violence Clearinghouse* (No 15, June 2003, p3) :

Overwhelmingly the report expresses unease with assumptions that contact with both parents, even when there are circumstances of serious violence and abuse, is appropriate.

In view of the evidence referred to here, contact arrangements in situations where there has been violence to either the wife/female partner or children, considerable caution should be exercised in approving access or contact situations after separation.

A presumption of joint custody:

Joint custody, joint care, support by all family members and extended family members for children is an ideal family situation, where there is harmony and goodwill. **However this cannot be presumed.**

- i. Joint custody requires co-operation and goodwill, it cannot be forced or legislated.
- ii. It puts the 'equal rights' of parents over the best interests of the child, which will vary situation by situation.
- iii. It will expose mothers and children to more danger if joint custody is resumed in situations where there has been violence.
- iv. There is no adequate research evidence to show that moving children between two households is in their interest. Joint custody (which I and many people known to me have undertaken) requires geographical proximity, and active on-going participation by two parents. This requires a capacity for co-operation and harmony unlikely to be present in situations where family breakdown is the result of violence.
- v. Where a non-residential parent has been violent to the partner, this violence (not only violence to children) should be taken seriously as a barrier to unsupervised child contact. Violent behaviour must be taken as counter-indicative to adequate parenting, and a contributor to anxiety and problems in contact. The common assumption that a person can be a 'poor or dangerous partner', yet a 'good parent' should be challenged.

Re: Term of reference a (i) *'what factors should be taken into account in deciding the respective time each parent should spend with their children post-separation, in particular whether there should be a presumption that children will spend time with each parent, and in what circumstances such a [presumption could be rebutted']*

It is recommended that

- i. **Joint custody be the presumption only in situations where the couple involved can demonstrate that cooperation and shared parenting is a realistic and feasible option, post-separation.**
- ii. **In determining the 'best interests of children', all factors be taken into account in decisions about residence and contact, however safety of the children, and safety of the mother should be the threshold determinant in deciding 'best interests of children'.**
- iii. **Coordination systems, such as the Magellan project in Victoria, which provides individualized support and assistance and facilitates decisions between child protection authorities and the Family Court,**

should be widely adopted. It is recommended that the Government implement the recommendation of the Family Law Council (2002) to establish a national child protection unit to attend to child protection in situations with a history of family violence.

- iv. The Government and Family Court are encouraged to explore the New Zealand system where the onus is on a previously violent partner to demonstrate capacity to parent, and win back trust and confidence of former family members.
- v. The Government and Family Court are encouraged to explore the Ontario, Canada, system in which all divorces are accompanied by investigations of satisfactory arrangements for residence and contact.
- vi. In situations of incest, it should be assumed that the perpetrator has, in committing a criminal offence, foregone rights to parenting.
- vii. Additional funds be made available to community organizations for the development of supervised access centres, for situations where the history of violence precludes any unsupervised or residential contact visits.

Re: Term of Reference a (ii) *in what circumstances a court should order that children of separated parents have contact with other persons, including their grandparents.*

It is recommended that :

i. The Court be encouraged to explicitly encourage contact with and access to extended family members (aunts, uncles and grand-parents) to increase the children's participation in their extended family community, post- separation of their parents. This would take the pressure off relatives who currently have the right to make applications, but who, for various reasons including ignorance of the law, may not take initiative in this regard.

ii. Extended family or community responsibility for children, as a principle, should be given priority to a presumption of joint custody between two parents.

2. The extent and nature of child support arrangements.

The Child Support Legislation was an important step forward in addressing the poverty of single parents with primary responsibility for the care of children.

It is important that the amount of financial support for children determined by the Court to be the responsibility of each parent relates to their income and capacity to pay, not to the time spent with the children. Residence and time spent with children must remain a separate decision based on 'best interests of children', including safety, from income arrangements.

Recommendations:

In relation to government income support policy, it is recommended that the costs of running two households be acknowledged. For example:

- **If joint custody is chosen and is approved as feasible, then each parent should be eligible for Parenting Payment (Single)**
- **Family Tax Benefit A and B should be increased by 40% for each child, to reflect the higher needs and costs of providing two households.**

References:

Bagshaw, Dale and Chung, Donna (2000) *Women, Men and Domestic Violence*. Partnerships Against Domestic Violence, Commonwealth of Australia, Canberra

Australian Bureau of Statistics (1996) *Women's Safety, Australia*. ABS, Canberra

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