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Secretary:

Committee Secretary
Standing Committee on Family and Community Affairs
Child Custody Arrangements Inquiry
Department of the House of Representatives
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Dear Secretary

Submission to the Inquiry into child custody arrangements in the event of family separation

Response to term of reference (a):

given that the best interests of the child are the paramount consideration:

- (i) what other 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 equal time with each parent and, if so, in what circumstances such a presumption could be rebutted; and

The consideration of the best interest of the child is a fundamental principle of Australia's family law system. Australian family law already allows for the Family Court to take into account any factor the Family Court deems relevant. Decisions regarding the best interest of any given child in the event of family separation require a complex assessment of all relevant factors, whether that assessment is made by the child's parents or by a court. Any presumption that skews an assessment of a child's best interest, by assuming a particular outcome is preferable to any other, undermines the fundamental principle of the best interest of the child being the paramount concern. To introduce a presumption that a child will spend equal time with each parent undermines the ability to assess each child's individual circumstances and keep that child's best interest paramount.

I strongly oppose any change that has the potential to undermine the paramount consideration of the child's best interest, such as the presumption that a child will spend equal time with each parent.

I am also concerned that introducing the presumption of a child spending equal time with both parents would encourage parents to focus on ensuring they receive 'their fair share' rather than focussing on what is in the child's best interest. I am at a loss to understand how encouraging a competition between parents to maximise their 'entitlements' under the law can possibly lead to the best interest of the child. A child is not a piece of property to be divided equally. Child custody arrangements post-separation must be encouraged to focus on parental responsibility, not parental rights. Given that the Family Law Pathways Advisory Group heard that many separating parents are emotional and distressed at the time of separation,



and that this may affect parents' capacity to put children's interests first, any change that does not directly encourage and support the immediate and ongoing consideration of the child's best interest as the paramount concern cannot improve the current system and should not be introduced.

Further, it must be acknowledged that some custody disputes are not about achieving the best outcome for the child, but an attempt by one parent to control and/or punish the other parent for leaving the relationship. A presumption of equal time would provide a powerful (and court endorsed) means for a vindictive parent to instigate a dispute, forcing the other parent to enter into an adversarial role to rebut the claim.

The motivation for a custody claim must be examined to ensure that the child's best interest is truly the fundamental concern. The Australian family law system must minimise any potential to encourage or assist vindictive disputes, and introducing a presumption of equal time will not achieve this.

The family law system should be working to reduce conflict, and should support and assist parents to make their children's best interest their paramount concern. In most circumstances, ongoing contact with both parents is in a child's best interest. However, a child's experience of family life is coloured far more by the levels of conflict and animosity experienced before, during and following separation than it is by the precise number of hours that child spend with either parent.

Insisting on equal hours, particularly where separated parents cannot communicate effectively, will not reduce conflict nor support parents to consistently consider the child's best interest. Rather, introducing a presumption that a child will spend equal time with each parent will produce a more divisive, more adversarial system in which the best interest of the child is no longer of paramount concern.

Response to term of reference (a):

given that the best interests of the child are the paramount consideration:

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

Given that Australian family law already allows for the Family Court to take into account any factor the Family Court deems relevant, decisions regarding a child's contact with other persons must be made on a case-by-case basis according to the relevant circumstances. Decisions regarding the best interest of any given child in the event of family separation requires a complex assessment of all relevant factors, whether that assessment is made by the child's parents or by a court. Any presumption that skews an assessment of a child's best interest, by assuming a particular outcome is preferable to any other, undermines the fundamental principle of the best interest of the child being the paramount concern.

To introduce a presumption that a child should spend time with any particular person undermines the ability to assess each child's individual circumstances and keep that child's best interest paramount. I strongly oppose any change that has the potential to undermine the paramount consideration of the child's best interest.

Response to term of reference (b):

whether the existing child support formula works fairly for both parents in relation to their care of, and contact with, their children.

The child support formula should work to ensure that both parents provide financial support for their child whether the parents remain in a relationship or not, and that the child benefits from financial support to the extent each parent is capable of providing given their income and family circumstances. However, the current child support system does not deliver this outcome, due to factors outlined below:

- **Treatment of Payer and Payee income**

Under the existing formula, the payer's income is capped, with any income over the cap not taken into account when calculating child support. This runs contrary to ensuring a child benefits from financial support from a parent to the extent that parent is able to provide it. Why the benefit a child can receive should be capped is difficult to understand – where the capacity is there, the child should have full access to all that benefit.

The cap on payer's income should be abolished to ensure a child has full access to the financial support available to him or her.

More significant, however, is the treatment of payee income. Currently, any income received by the payee over the disregarded amount reduces the assessable income of the payer parent by 50% of the excess amount. The relevant child support percentage is then applied to ascertain the payer's liability. In effect, this element of the child support formula increase the payee's effective marginal tax rate by reducing the income the payee receives, providing a disincentive for the payee to increase their income.

For me, the effect of this element of the child support formula is that my income will reduce the payer's assessable income by approximately \$7500 in the 03/04 tax year, and reduce his child support liability by approximately \$1350. In real terms, because he often chooses not to work and so has a relatively low income, his child support liability will be reduced from almost \$2000 to just under \$600 for the 03/04 year, assuming his and my income remains similar to the current assessment. That \$1350 is roughly equivalent to the cost of after-school and holiday care required for my child because I work fulltime. To provide a

stable home and decent life opportunities for my child, fulltime employment is a necessity, not a choice. Yet, the benefit of undertaking that paid work is undermined by the reduction in the payer's liability.

The current tax and family assistance regime rewards a partner in a two parent family for remaining a fulltime parent, but applies pressure on sole parents to juggle parenting and paid work. The regime treats a sole parent whose main income is from paid employment identically to a two parent family where one partner is paid employment and the other is largely not. This identical treatment fails to acknowledge that the sole parent is carrying all the roles of working, parenting and managing a household where the two parent family can spread that load across two people. For the many sole parent families who are able to find suitable work, which is sufficiently well paid to be justified, and are able to balance the demands of significant paid work and parenting responsibility- doing precisely what the family assistance regime is seeking - to then be penalised via the child support system is a serious flaw in the child support formula.

A reduction in the payer's liability reduces the financial support available to a child, again running contrary to the intent of ensuring a child benefits from financial support from both parents to the extent that parent are able to provide it. Parental income is only relevant in determining the payee and payer, and should not reduce the level of financial support available for a child through the application the payee's 'excess income' to reduce a payer's liability.

A payee's income has no effect on the payer's capacity to financially support their child and should therefore be irrelevant in the assessment of a payer's liability.

- **The child support review process**

Under the current child support system, any review of the child support assessment made for a particular child requires an examination of the current and future financial circumstances of both parents, regardless of who requested the review and for what purpose. This requirement results in a payee parent having to provide and substantiate their current financial circumstances, and be subject to a speculative examination of their future financial potential. This assessment of the payee's financial capacity is still required, even when the review has been requested by a payer parent seeking a reassessment of their liability or arrears due to changes in their own financial circumstances rather than an assertion that the payee's circumstances have changed. As discussed above, a payee's income has no effect on the payer's capacity to financially support their child and should be considered irrelevant in any assessment of a payer's capacity to pay.

Therefore, the payee's financial circumstances should also be considered irrelevant in the review process, unless the review is specifically to determine the payee and payer. A payee's financial capacity should never be considered in assessing a payer's liability.

- **Collection and arrears**

The Child Support formula would provide a fairer and more reasonable assessments of a payer's liability, if the changes detailed above were made. However, the assessment is only effective when payment is actually made. Currently, the Child Support agency's collection system seems unable to ensure that many child support payments are made in a regular and timely manner and the Agency can only pay the payee the amount the Agency has actually received rather than the amount owed. The payee's ability to effectively budget for the household and accurately assess Family Tax Benefit is severely compromised when the payee cannot rely on receiving child support payments when they are due. The Child Support Agency appears to be very lenient on payers making late payments or not making payments at all, and it takes much effort on the payee's part to get the Child Support Agency to take action to remedy the situation with many payees being owed arrears. In the meantime, the child is not benefiting from financial support from the payer.

Where arrears are actually collected, often in a lump sum from the payer's tax return, payees often face substantial, unavoidable Family Tax Benefit overpayments, as the arrears payment is included as child support received for that financial year, regardless of the period of time the arrears were actually accrued over. Centrelink then raise a debt to recoup the overpayment resulting in the payee having their tax return withheld or Family Tax Benefit reduced. As a result, not only does the payee have to manage the immediate financial stress that occurs when child support payments are not made when they are due, but then faces a further financial difficulty managing the Family Tax Benefit debt. Further, as the timeframe the arrears were accrued over is not acknowledged, the value of the arrears payment is often undermined both because there may not have been a reduction of Family Tax Benefit if child support payments were made when due, and because arrears are not indexed to CPI and therefore may not reflect equivalent value in real terms.

Ensuring that children are receiving the financial support they are entitled to and minimising financial stress experienced by payee households is easily achieved. As is done in other countries, the Federal Government should pay the payee parent the amount stipulated by the child support assessment, recouping the payment from the payer. This would also allow an accurate calculation of Family Tax Benefit payments, eliminating the unavoidable over and under payments that frequently occur for payees. This system would also, I believe, improve community understanding of the ongoing nature of parental responsibility, the importance of child support payments and the role they play in minimise child poverty, through Government providing a clear endorsement for regular predictable payment.

The Federal Government should pay the payee parent the amount stipulated by the child support assessment, recouping the payment from the payer. The real value of arrears should be maintained by indexing the arrears, in a similar manner to the indexing of HECS debts owed to the Government.

This indexing should occur regardless of whether the payee receives child support payment from the payer, via the Child Support Agency or directly from the Government.

- **Child support and shared care**

The Government must seek systems and processes to encourage and support separated parents to maintain meaningful relationships with their children, and to ensure that both parents can provide a place for their children within their home. The existing Child Support formula already deals with various scenarios including subsequent children and different levels of care, modifying child support payments to respond to the particular circumstances. Where the formula is unable to appropriately reflect the relevant circumstances the formula can be departed from to provide a reasonable assessment. I believe the current Child Support system is adequate to deal with the variety of circumstances.

Family separation often causes major financial stress for both parents, with the fall in living standards consistently demonstrated to be more significant for custodial parents both immediately post separation and over the longer term than for non-custodial parents. Indeed, one parent households are consistently over represented in households living below the poverty line. Yet many non-custodial parents report financial difficulties in their attempt to maintain ongoing contact with their children, particularly in providing adequate accommodation for children that do not live with them permanently.

The Government's aim must be to support both parents to provide ongoing nurture to their children. Assisting non-custodial parents to create and maintain meaningful relationships with their children, where that is in the child's best interest, is important. A strong relationship between a child and a non-custodial parent, as well as being beneficial for that child and parent, often also has the potential to reduce the pressure faced by the custodial parent. However, support for non-custodial parents cannot come at the expense of custodial parents, who as a group already experience financial difficulty. To reduce child support, income support and family assistance payments to the custodial parent, as a means of providing additional support to non-custodial parents, would severely disadvantage custodial parents and undermine their capacity to adequate care for their children. The existing Child Support formula addresses different levels of care by parents and in fact provides a much fairer basis for varying payment than the current Family Tax Benefit arrangements currently do. To introduce changes to the formula to compensate non-custodial parents for increased contact by reducing the amount payable to custodial parents would be divisive, encouraging parents to make care decisions based on financial gains and losses rather than the best interest of the child.

If the Government is really looking to address a child's best interest, and is serious about supporting all separated parents, a critical examination of the family assistance regime is required to assess the real level of assistance required for both parents to adequately care for children post separation. The family

assistance regime is predicated on the notion that a child 'lives' with one parent and may 'visit' the other. However the care of children post separation is clearly far more complex than that simplistic picture, and separated parents attempting to maintain significant contact with their children face additional cost, particularly around adequate housing. The current family tax regime does not provide any additional payment to respond to those additional costs, and attempts to split family payments between parents who share care. This approach causes frustration for both parents, as the cost to the custodial parent of housing, clothing and educating a child is not significantly reduced (if at all) because a child spend a weekend with the other parent, and the small amount of family payment the non-custodial parent may receive does not represent anything like the cost of providing a reasonable accommodation for that child. A family tax regime that acknowledged those additional costs for both parents, refrained from placing financial penalties on custodial parents whose children have any contact with the other parent, or better yet, provided realistic financial assistance to both parents who share care is far more likely to support parent's making decisions that are in the best interest of the child.

The current Child Support system is adequate to deal with the variety of child custody circumstances, and must not be changed. Consistent definitions of, and responses to, the financial implications of levels of care should be created across all Government agencies by replacing the current Family Tax Benefit 'shared cared' arrangements with the existing Child Support formula modifications to acknowledge different levels of care by parents. Appropriate and adequate assistance should be provided through the family tax regime to address any further financial support needed by separated parents to maintain meaningful relationships with their children, as ensuring the optimum outcome for the child is in the interest of the community as a whole.


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