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Child Custody Arrangements Inquiry
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A submission to the Inquiry into child custody arrangements in the event of family separation

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It is now 28 years since the passing of the Family Law Act and 13 years for the Child Support legislation. Those pieces of legislation have created the systems and outcomes which impose a 'one size fits more than 90%' set of outcomes for Australian children. The result is the leveraging of the relationship and contact between children and their fathers against the amount of property settlement and Child $upport to be paid. Contact is measured in $$$ by the Family Court and Child $upport Agency. Contact is the mechanism which seeks to legitimate the process whereby $$$ are directed and extracted from fathers to be forwarded to the preferred 'eligible custodian' which is code for 'the mother'. The deleterious effects upon Australian families and children and the economic destruction associated with those pieces of legislation and practices are increasing at an exponential rate. Despite the damning evidence presented to two parliamentary inquiries and numerous reviews, and the overwhelming rejection of the legislation by ordinary Australians, the reactions to date by the legislators, judiciary and bureaucrats have been to strengthen the punitive and regulatory mechanisms in the hope that crude force will prevail over morality and common sense. The greatest immediate losers in this process have been children and fathers; the long-term destructive effects upon Australian society have been evident for more than a decade and the time for the parliament to either radically overhaul or abolish those institutions is long overdue.

Current government policy approaches to marriage and divorce have been driven by ideology rather than the best interests of children (Green, 2000). Recent attempts by the parliament to improve the situation have been worse than ineffectual, in many cases they have contributed to or exacerbated the very problems which they were designed to prevent. The increasing divorce

rate, the poor performance across nearly all social and economic indicators of fatherless children, the increase in so-called 'one-parent families' – often by active choice of the mother, the epidemic of abuse allegations; all can be seen in some measure as predictable outcomes of current policy settings. Prenuptial agreements, DNA testing, IVF, paternity alternatives such as 'social fatherhood' (choosing the 'client' with the most $$$ to access) and superannuation splitting are all predicated on policies which currently provide strong incentives for women to end relationships and to deny children access to their father. The results have been catastrophic for all concerned but the greatest burdens have fallen on children and on the extended families of those (overwhelmingly men) who have given up all hope and taken their own lives.

There are some fundamental links in the current approach to residency and contact. The first and most serious is the direct link between the amount of child contact time and the amount of child $upport to be paid. This fundamental link distorts all other practices. The Family Court weights property settlements in favour of the parent who claims residence and the Child $upport Agency calculates liability on the basis of time spent with either parent. A very simple logic operates, whoever can convince the Family Court and the Child $upport Agency that they have control over the child will get a greater share of the property and 'spousal maintenance' in the form of child $upport until the child turns 18 (sometimes longer). Once committed to paper in the Court or the Agency it doesn't matter whether the child leaves the mother to live with the father or even runs away and live in another state. Once money has been paid it will never be retrieved. The property settlement will never be renegotiated and the child $support payments to the mother will continue nonetheless (the child could even be living independently on a welfare payment). If there is any doubt about achieving the first step of ensuring that the mother will be the preferred custodian then the simple process of making allegations about domestic violence or child abuse will guarantee an interim court order preventing the father having contact with the child and thus guaranteeing the maximum transfer of property and child $upport to the mother. Research has indicated that Magistrates know that an overwhelming majority of domestic violence allegations are made as a

strategic strike for possible Family Court proceedings (Carpenter, Currie and Field, 2003). As the Family Court only hears about 5% of cases then the court obviously knows that any allegations contained in the other 95% are not worthy of judicial oversight. As a result, 'Domestic violence' has been re-introduced 'fault' in Family Law which can be used to increase property settlements in favour of the wife. This mechanism links allegations (without any need of proof) of violence and abuse to exclusive residency of children which then establishes the status quo enshrined in the '90% fits all' 'consent orders' which are the guarantee to financial windfall. It is these fail safe mechanisms which the Family Court and Child $upport Agency have been imposing on fathers and children which lead to the charges of bias. Proof of the bias is in the 90% of fathers who lose by default of their gender. The lack of equality before the law diminishes the moral authority of any orders made and often leave the father with no means of reconstructing a life in which he can contribute equally to raising his children. These outcomes also leave many men in a position where they cannot start a new life or a new relationship as an ex-wife has powerful legal and bureaucratic tools to continue to regulate his existence. Unemployment is one of the few safe havens and can, in many cases, substantially improves the father's standard of living. Up to 40% of Child $upport Agency 'clients' are in this category (Cruickshank, 2003).The loss of productivity and diversion of welfare dollars to what should otherwise be a productive individual is significant. These practices and outcomes are not in the best interests of children; they are not in the best interests of the nation. The most obvious and legally defensible option is for the presumption of joint parenting and residence (Henaghan, 2000).

In order to restrict the Australian public's access to the complete data and the effects of their practices, the Family Court and Child $upport Agency resort to secrecy, official misinformation (lies) and refusing to collect critical information on the number of suicides. Section 121 secrecy provisions, jailing C$A defaulters and measures to increase the collection rate from struggling non-custodial parents are signs of a system in crisis. The root cause of that crisis is a lack of legitimacy, the most obvious manifestation is the systemic corruption of administrative systems and legal procedures designed to

manufacture 'consent'. The processes include mechanisms to criminalise fathers and reduce them to excluded financial providers (payers with obligations and duties but no corresponding rights), to commodify children (whose 'rights' are regulated by Family Court judges) as the property of mothers (who are protected and encouraged to leverage contact against increased property settlements and child $upport payments). The current approach of the Family Court is a one size fits 90% who 'consent' to standardised orders based on less than 30% of contact for children with their fathers. However, in most cases this is not free and informed consent, it is manufactured by coercion and exhaustion, emotional, physical and economic. Fathers subjected to 'rougher than usual handling' eventually submit. 'Tearful consent' and the subsequent denial of contact with their children in many cases ends in suicide and violence (Smith and Wang, 2000). The federal parliament lost a sitting member to suicide and no one in the parliament had the moral courage to talk about the reasons why it happened; worse still, the cause of that suicide was granted a further $30 million in the last budget to continue the process. Every day across Australia men suicide as a result of their treatment by the C$A or the Family Court and neither of those institutions will acknowledge their part in the process. The Family Court separates children from their parents. A new stolen generation of children is being created. Civil libertarians who would normally be allies in the fight against injustice are more concerned with fathers and children in detention centres or in overseas countries but are deaf to their neighbours' cries. The abuse of children is narrowly defined to exclude administrative and legal exclusion from the love and protection of their natural fathers. Those voices who spoke most loudly against the Governor General's and ministers of religion in their failure to protect children are noticeably silent in asking the same questions of Ministers of the Crown and judicial officers when their actions affect childrens' rights and happiness.

Given the absence of any community input to the determination of matters before the Family Court there is a public interest need in annual public reporting of every single Family Court decision. Although the Australian Law Reform Commission already has access to them for research it is obvious from

the evidence presented in the last two Parliamentary Inquiries into Family Law that peer review is ineffectual. Only selected Family Court decisions are published, the vast majority are kept secret. For the same reasons, Chief Justice Nicholson's recommendation for a more active and inquisitorial approach must be seen for what it is, an attempt to extend and maintain his exclusive power over those coming before his court and its officers and the unquestioned right to prevent the community from knowing what transpires in the Court. As less than 5% of cases go to full judgment and these set the precedent for the other 95% then it is essential that those cases be subject to determination by a jury.

Separation of Powers: Family Court

Judicial activism has been a feature of the Family Court for more than a decade. The current Chief Justice has used his position to openly challenge and reject attempts by the parliament to apply legislation in ways which the parliament intended. The most obvious of these instances was the rejection by the Family Court of the Attorney General in the case of BvB in Cairns and the most recent is the action by the Court in the case of asylum seekers. However, there are more fundamental breaches. The Court Counselling service acts as an arm of the judiciary to 'case manage' consent. The Court refuses to review decisions made by Child Support staff and Review Officers leaving aggrieved persons with no avenue for appeal against arbitrary administrative action. One of the frequently cited reasons for fathers being self-represented litigants is that their experience of bias in the Family Court leads them to the conclusion that the Child Support Agency officers, solicitors, counsellors and judges are all part of the process which uses access to their children as leverage for the transfer of money. Self represented litigants openly discuss the change of attitude by solicitors, court officials and judges once there is no prospect of any further transfer of assets or income from the father to the mother. The number of self represented litigants grows for obvious reasons.

Separation of Powers: Child Support Agency officers

Child Support Agency officers, specifically deputy registrars and review officers know that many of their functions and decisions either cannot be reviewed or that review would be so costly and traumatic for the applicant that

their administrative decisions are in effect final determinations. Even where decisions can be reviewed the C$A systems allow such wide discretion that any ruling by a court can be sidestepped or checked by an administrative ruling against another factor. The most obvious example is the discretion to deem an income or to set a capacity to earn as an income for child $upport purposes. Another example is the Part 6A Review process. There is no effective appeal mechanism for decisions of this nature and the courts refuse to charge the Registrar with contempt where the Registrar or a delegate blatantly ignore court orders. The liability in these cases rests with the payee who is often in no financial position to challenge the decision in court. Child $upport officers also know that despite overwhelming evidence of illegal activity presented to the JSC which reported in 1994, that the parliament refused to refer that criminal activity by public servants to the Director of Public Prosecutions or Federal Police. That refusal to address illegal activity by C$A officers has legitimated the contempt for payees' legal rights and entrenched a culture of systemic corruption within the Agency. Any doubt about these issues can be easily dispelled by asking front counter staff in parliamentary offices about the complaints received

It is this blatant contempt for the parliament's intentions in legislation and the rights of payees and their children which lead to more than 20 years of complaints and charges of bias and corruption against the Family Court and Child $upport Agency. Until now it has been the federal government's practice to ignore those obvious breaches of the laws in the hope that the money collected will balance the evil it has perpetrated. It is obvious now that the strategy is both morally corrupt and economically bankrupt. All we ask is that the government have the courage to confront the vested interests which have constructed the current systems, and that you act in the best interest of children and their families, assert your moral authority and remove this evil source from our childrens' future.

If the government were to take the best interests of children and the nation as being paramount then it would do the following:

Abolish the Family Court and return the 5% of cases requiring judgment to a court of public record which requires evidence for claims and is subject to the oversight of a jury of one's peers;
Abolish the Child $upport Agency and Child $upport Acts and set a rate of child support payments which operate for all Australian children regardless of their residency or the marital status of their parents; and,
Require that all payments made for the support of children be spent on the support of children and not be misused as spousal maintenance.

If the government can not find the moral courage to do the above then it should enact the following changes:

RECOMMENDATIONS

1. That Section 121 of The Family Law Act be abolished.
2. The Family Law Act be amended to require that contested cases be subject to determination by a jury.
3. Legislation be amended to require that all property settlements are to specify that amounts over 50% be included as capitalised maintenance and credited against any child $upport payments.
4. Legislation be amended to require that every court order specify the amount of all financial support provided to a spouse or child and that a copy of the order is to be forwarded by the Court to the Child $upport Agency which will be required to include that amount in any calculation of liability.
5. That upon application, the Commonwealth intervene and take over any action against the Child $upport Registrar for contempt of the Court where the Registrar or a delegate refuses to abide by a court order.
6. That Child $upport be based on actual income and that deeming or adjustment by review officers be prohibited.
7. That Child $upport income be based on after tax income.
8. That all deaths of 'clients' subject to the Child $upport Agency and/or the Family Court be recorded on those institutions' respective files and reported to the relevant minister and the number be published in the Hansard each year.

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