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Submission

to the

House of Representatives Standing Committee on Family and Community Affairs

Inquiry Into Child Custody Arrangements in the Event of Family Separation

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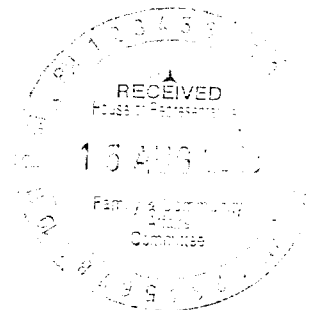
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1. Introduction

Festival of Light Australia has been concerned about the impact of family law on marriages and the children of those marriages since the Family Law Bill was first introduced into federal parliament in 1974.

This submission to the *Inquiry into child custody arrangements in the event of family separation* of the House of Representatives *Standing Committee on Family and Community Affairs* addresses the terms of reference announced on 25 June 2003 by the Minister for Children and Youth Affairs, the Hon Larry Anthony MP, and the Attorney-General, the Hon Daryl Williams AM QC MP:

Having regard to the Government's recent response to the Report of the Family Law Pathways Advisory Group, the committee should inquire into, report on and make recommendations for action:

(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

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

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

(c) with the committee to report to the Parliament by 31 December 2003.

These terms of reference are addressed under the following headings:

- Government Response to the Family Law Pathways Report
- The best interests of the child
- Parenting of children post separation
- Presumption of shared parenting
- Rebuttal of shared parenting presumption
- Contact with grandparents and others
- Fairness of existing child support formula

Throughout this submission the term “custody” has the same meaning as “residence”, the term currently used in the Family Law Act as amended in 1995. Likewise, the term “access” has the same meaning as “contact”.

2. Government Response to the Family Law Pathways Report

The *Government Response to the Family Law Pathways Advisory Group Report*¹ is unsatisfactory in several ways.

(a) Marriage

Nowhere is marriage mentioned in the Government Response. Through the Australian Constitution the Australian people have given to the Commonwealth Parliament the power to make laws for peace, order

and good government regarding (among other things) marriage, divorce and related matters.² This power has been exercised in the Marriage Act 1961, which requires marriage celebrants to remind those about to be married of the solemn and binding nature of the relationship they are about to enter and that:

*Marriage, according to law in Australia, is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.*³

The Australian government, therefore, is principally responsible for legislation on marriage, not cohabitation. Throughout history, some couples have cohabited without making a solemn and binding marital commitment to each other and to the exclusion of others. The government's responsibility is to ensure that those who do make the solemn commitment of marriage are protected from arbitrary dissolution of their marriage.

In other words, Australian laws should uphold marriage as an honoured institution by granting it a more privileged status than cohabitation. The prohibition against discrimination on the ground of marital status in the Sex Discrimination Act⁴ should not be used to prevent marriage being given a privileged status in law. Discrimination on commonly prohibited grounds, such as sex, marital status, race and age, is desirable and necessary in many situations and, if necessary, the Sex Discrimination Act should be amended to allow for justifiable discrimination on the ground of marital status.

Recommendation 1

Australian laws should uphold marriage as an honoured institution by granting it a more privileged status than cohabitation and, if necessary, the Sex Discrimination Act should be amended to allow for justifiable discrimination on the ground of marital status.

(b) Parental conflict

The Government Response baldly asserts: "Research indicates that parental conflict ... is a more potent predictor of poor child adjustment than is divorce." However, this assertion is simplistic and misleading.

The 1998 report of the House of Representatives Committee on Legal and Constitutional Affairs, *To Have and to Hold*,⁵ deals with this subject in some detail. The report notes:

*... the existence of conflict has been cited as a reason in favour of divorce: better to separate than to inflict a conflictual relationship on children. More recent research has raised serious questions about this presumption.*⁶

The report quotes a study by researchers Monica Crockett and John Tripp, who conclude:

*Data from this study ... suggests ... that parental separation itself is one of the major associations with difficulties for children.*⁷

A 15 year intergenerational study by Professors Paul Amato and Alan Booth of Pennsylvania State University led the authors to conclude that:

*... most divorces in the past (when marital dissolution was uncommon and occurred only under the most troubling circumstances) freed children from home environments that were especially aversive. In contrast, many divorces today (when marital dissolution is common) subject children to a range of stressful experiences with few compensating advantages.*⁸

From the research data obtained in their study, Professors Paul Amato and Alan Booth concluded that:

*... less than a third of parental divorces involve highly conflicted marriages.*⁹

Given the similarity in divorce rates in Australia and the USA, it is reasonable to assume that some 70% of Australian divorces occur in low-conflict marriages, where the disruptive effect of divorce itself is the primary cause of damage to the children involved.

Recommendation 2

Due recognition should be given to the indications that the majority of divorces in Australia today occur in low-conflict marriages, where the disruptive effect of divorce itself is the primary cause of damage to the children involved.

3. The best interests of the child

The interests of a child are best served by growing up with his or her natural or adoptive parents in an intact family. Research studies abound showing that divorce has both short-term and long-term adverse impacts on children. Harmful effects extending into adult life include consequences for health, educational performance, family life and occupational status - up to thirty years later.¹⁰

Studies indicate that:

- children of divorced parents seem much more susceptible to psychiatric illness;¹¹
- women whose parents divorced consume more alcohol than women from intact families;¹²
- children who experienced divorce were two to three times more likely to have been suspended or expelled from school, and three times more likely to have needed treatment for emotional or behavioural problems;¹³
- the chances of attending university decrease for children of divorce;¹⁴
- unemployment and employment in low paying jobs is more prevalent for children of divorced parents.¹⁵

Boys appear to suffer even more than girls from divorce - possibly because most children of divorce live with their mother and for various reasons may lose frequent regular contact with their father. Thus boys often miss out on a male role model and support after their parents' divorce.

Jennifer Buckingham of the Centre for Independent Studies, in her excellent analysis of the House of Representatives Standing Committee on Education and Training report *Boys: Getting it Right*, noted that the otherwise insightful report "fails to acknowledge a link between family structure and stability ... and boys' educational problems, despite research and anecdotal evidence to the contrary."¹⁶

Given the serious and long-term adverse consequences for children of divorce and the large proportion of divorces from low conflict marriages, a high priority for legislative reform should be to reduce the incidence of divorce. This could be addressed by reducing current opportunities to benefit financially or otherwise from divorce and introducing disincentives for those who breach the solemn commitment of marriage.

Recommendation 3

A high priority for legislative reform should be to reduce the incidence of divorce by reducing current opportunities to benefit financially or otherwise from divorce and introducing disincentives for those who breach the solemn commitment of marriage.

4. Parenting of children post separation

Since divorce law in the USA is a state responsibility, not a federal matter as in Australia, the experience of states favouring joint custody of children after divorce can be compared with that of states favouring sole custody. In a paper presented to a Child Rights conference in Washington DC in 1997, Richard Kuhn and John Guidubaldi conclude:

*States with high levels of joint physical custody awards (over 30%) in 1989 and 1990 have shown significantly greater declines in divorce rates in following years through 1995, compared with other states. Divorce rates declined nearly four times faster in high custody states, compared with states where joint physical custody is rare. As a result, the states with high levels of joint custody now have significantly lower divorce rates on average than other states. States that favoured sole custody also had more divorces involving children. These findings indicate that public policies promoting sole custody may be contributing to the high divorce rate.*¹⁷

This conclusion is reinforced by a meta-analysis of 33 studies involving a total of 1846 sole-custody and 814 joint-custody children by Robert Bauserman, published in the *Journal of Family Psychology* in 2002.

*Children in joint physical or legal custody were better adjusted than children in sole-custody settings, but no different from those in intact families. More positive adjustment of joint-custody children held for separate comparisons of general adjustment, family relationships, self-esteem, emotional and behavioural adjustment, and divorce-specific adjustment. Joint-custody parents reported less current and past conflict than did sole-custody parents, but this did not explain the better adjustment of joint-custody children. The results are consistent with the hypothesis that joint custody can be advantageous for children in some cases, possibly facilitating ongoing positive involvement with both parents.*¹⁸

This evidence from overseas that divorce law and practice favouring joint custody of children of divorce over sole custody has huge benefits. Firstly, joint custody has led to a significant lowering of divorce rates. Secondly, joint custody has contributed to better adjustment of both children and parents following divorce. Australia has the opportunity to benefit from this research and lower the huge social and economic cost of divorce by modifying laws and adopting practices that favour joint custody of children following divorce.

Recommendation 4

Australian laws and court practice relating to divorce should be changed to favour joint custody of children following divorce.

5. Presumption of shared parenting

The decisions of the Australian Family Court in recent years suggest that it operates on a presumption that the mother will have custody while the father is allowed access to his children for two days a fortnight.

Interim custody orders made by the Court immediately after separation grant sole custody, usually to the mother, in over 95% of cases. Many fathers are not in a financial position to contest the interim order. There is considerable anecdotal evidence that lawyers tell them, "You could spend a lot of money, and end up no better off." Thus, although only 5% of custody cases are contested in the Family Court, this low figure does not show that a majority of parents are happy with their custody arrangements.

The legal advice that fathers have little chance of being awarded custody is confirmed by Family Court decisions. In the 5% of custody cases determined by the Family Court, sole custody is awarded to the mother in some 70% of cases and the father in only 20% of cases. Split custody (mother with one child, father with the other) and grandparent or other custody is awarded in about 6% of cases. Only 3% of the parents are given joint custody.¹⁹

The deluge of calls to talkback radio in June this year from fathers desperate to see their kids - sometimes denied even their two days a fortnight by malicious ex-wives who ignore court orders without penalty - indicates the seriousness of problems with custody arrangements. A recent case which came to our attention illustrates the problem.

A wife left her husband and was granted custody of their three year old son, with the father given the usual access of two days a fortnight. The son misses his dad and his dad misses him. Despite being allowed only one day access in seven, the father is required to pay over \$225 a week in maintenance - a big slug from his pay packet.

The father would like to change his work arrangements to work one week on, one week off so that he can care for his son 50% of the time. He would be able to bond much more closely with his son, and to reduce the heavy burden of maintenance payments. His ex-wife is not keen on this arrangement because she would lose some (but certainly not all) of the payments from her ex-husband.

There have been no allegations of child abuse by either party in this case. Both parents acknowledge that the other parent loves the child. It seems a clear case for the court to order joint physical custody, in the best interests of the child.²⁰

Another situation relevant to the state of the nation has come to the attention of Festival of Light.

A 30 year old man with a good job is living with a young woman but has no intention of marrying her, or of having any children. He made this decision after observing the high number of divorces among his friends and relatives, where the wife ended the marriage, walking away with the children plus over half the value of the house and hefty amounts of child maintenance.

He said the present law discriminates against fathers and he saw no point in marrying or having children until the law changes. He said the Family Law Act, as currently interpreted by judges of the Family Court, encourages women to quit marriages for less than substantial reasons, leaving their ex-husbands to "slave their guts out" supporting the children, but only being allowed to see them if the mothers felt like it.²¹

The sharp decline in the Australian birthrate since the passage of the Family Law Act in the mid 1970s suggests this young man's views may be held more widely.

Recommendation 5

The Family Law Act should be amended:

- (a) to require separating or divorced parents to share equitably the rights, duties and responsibilities of parenthood and*
- (b) to acknowledge the fundamental right of children to maintain frequent and reasonable contact with both mother and father following parental separation or divorce*

unless there is a clear and demonstrable risk of harm to the child.

6. Rebuttal of shared parenting presumption

The recommended presumption of shared parenting following parental separation or divorce must be subject to rebuttal in the best interests of the child. From the evidence cited in section 2 above, some 30% of Australian divorces occur in medium to high conflict marriages, where the best interests of the children may involve limitations on the contact of one parent with the child.

Grounds for the rebuttal of equally shared parenting should include:

- a breach by one parent of the marital commitment, such as adultery or desertion;
- unreasonable behaviour by one parent, such as habitual drunkenness, addiction or abuse of the other parent;
- serious abuse of the child; or
- a serious risk to the child from a subsequent partner of one parent.

A court ordered restriction on contact between a parent and his or her child effectively imposes a penalty on both the parent and the child. Such a penalty should not be imposed without adequate evidence of the objectionable behaviour. In the emotionally heated circumstances of separation and divorce, false or exaggerated allegations are sometimes made without due cause. Consequently, any allegations made to rebut the presumption of shared parenting should not be accepted unless established by clear and convincing evidence. A parent making false allegations should be liable to prosecution for perjury.

The degree of restriction on contact between a parent and his or her child - should be proportional to the seriousness of the objectionable behaviour and the potential risk to the child.

Recommendation 6

The Family Law Act should be amended to allow the presumption of shared parenting to be rebutted on the basis of objectionable behaviour by one parent breaching the marital commitment or posing a risk to the child with the burden of proof resting on the parent seeking to restrict contact by the other parent. Allegations should not be accepted unless established by clear and convincing evidence and a parent making false allegations should be liable to prosecution for perjury. The degree of restriction on contact should be proportional to the seriousness of the objectionable behaviour and the risk to the child.

7. Contact with grandparents and others

Festival of Light has been approached over the years by a significant number of grandparents who have been devastated to lose contact with their grandchildren following the collapse of their son's marriage. As is almost always the case, their former daughter-in-law has been granted sole custody of the children and has sometimes deliberately moved to the country or interstate, making access by their father, let alone their grandparents, very difficult. Sometimes the mother has returned cards and gifts posted by the grandparents, marked: "Return to sender".

The problem of divorce severing contact between children and their grandparents and other significant people in their lives should be lessened by adopting shared parenting as the norm in cases of separation or divorce.

Grandparents play an important role in the lives of their grandchildren. They help provide “roots” and identity - a link with the past and loving support for the future. The sudden rupture of a warm grandparent relationship by divorce is not in the best interests of children. Australian family law should provide for the continuation of close family and other relationships, such as godparents, unless they pose a risk to the child.

Recommendation 7

The Family Law Act should be amended to allow grandparents and others who can demonstrate a close and beneficial relationship with a child to apply for reasonable continuing contact with the child following parental separation or divorce, unless such contact would pose a risk to the welfare of the child.

8. Fairness of existing child support formula

As every federal MP can attest, there is widespread dissatisfaction with the current system of child support payments which are determined, without due regard for individual circumstances, using a formula based on unrealistically high estimates of the cost of raising a child. Most parents would not spend \$450 a week on maintaining a three year old child, yet the father mentioned earlier (in Section 5 above) was expected to pay \$225 per week as his “half share”.

Parents who have had dealings with the Family Court have told us that where one parent is granted sole custody, he or she receives considerably more than half the assets of the marriage as well as significant income from the other parent in child maintenance.

“The child maintenance is effectively also ex-partner maintenance,” these parents tell us. “There is a strong financial incentive for a mother, who may be experiencing boredom in her marriage, to walk out on her husband and take the children. She will be tempted to refuse any realistic attempts at reconciliation, since she has every expectation of receiving well over half the value of the family home plus significant child support payments after divorce.

“Fathers in this situation can become very angry and depressed when they learn that their ex-wife, to whom they are paying a big slice of their income in child maintenance, is living with a boyfriend in the home the father has built, with the father’s money paying most of the bills. If the mother then denies the father contact with the children, thus disobeying orders which are not enforced by the court, the father’s depression will increase.

“Is it any wonder that a significant number of fathers in this situation end up attempting or committing suicide each year?” these parents say. “This is not in the best interests of the children involved. This is not justice.”

When responsibility for children following separation or divorce is shared equitably by the parents, there should be no need for payments by one parent to the other. The day-to-day costs of raising a child, such as food and clothing, should be borne by the parent who has custody of the child at the time. Other more major costs, such educational or medical expenses, should be borne equitably by the parents.

When contact between a parent and his or her child is restricted by court order, on the basis of objectionable behaviour by the parent or a risk to the child, the culpable parent should bear a larger proportion of the costs of raising the child in proportion to the severity of the objectionable behaviour and risk to the child. In such circumstances, when child support is payable, enforcement should be by court order not by government administration.

Recommendation 8

When separated or divorced parents share responsibility for their children, government administration of child support should not apply. When child support is payable by a culpable parent, enforcement should be by court order not by government administration.

9. References

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3. *Marriage Act 1961*, ss. 46(1) and 69(2).
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6. *Ibid.*, p 42.
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8. *Ibid.*, p 44; P R Amato and A Booth (1997) *A Generation at Risk: Growing up in an era of family disheaval*, Cambridge MS: Harvard University Press.
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11. *Ibid.*, p 35; M E J Wadsworth (1984) "Early stress and associations with adult health behaviour and parenting" in N R Butler and B D Corner (eds) *Stress and Disability in Childhood*, Bristol: John Wright and Sons pp 100-104; and D Kuh and M Maclean (1990) "Women's childhood experience of parental separation and their subsequent health and socio-economic status in adulthood", *Journal of Biosocial Science* 22: 121.
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17. Richard Kuhn and John Guidubaldi (1997) "Child custody policies and divorce rates in the US" *11th Annual Conference of the Children's Rights Council*, 23-26 October 1997, Washington DC.
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