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(responsible for Community and Disability Services and the Ageing)

Minister for Housing

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House of Representatives Standing Committee
on Family and Community Affairs

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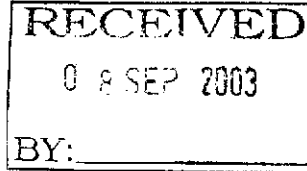
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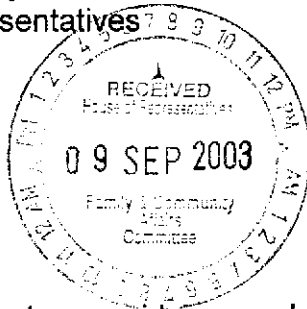
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Ms Kay Hull MP
Chair
Standing Committee on Family and Community Affairs
Child Custody Arrangements Inquiry
Department of the House of Representatives
Parliament House
CANBERRA ACT 2600



Dear Ms Hull

Thank you for the opportunity to provide a submission to the House of Representatives Standing Committee on Family and Community Affairs Inquiry into Child Custody Arrangements in the Event of Family Separation. I understand that contact was made with the committee secretary to negotiate an extension for the submission.

Please find enclosed the submission from the South Australian Government. The South Australian Government commissioned a Review of Child Protection undertaken by Ms Robyn Layton QC that was published in March 2003. A copy of this Report entitled: *Our Best Investment: A State Plan to Protect and Advance the Interests of Children* is also attached and is submitted to the Inquiry as part of this submission.

Yours sincerely

HON JAY WEATHERILL MP
Acting Minister for Social Justice

Government of South Australia

Submission to the Standing Committee on Family and Community Affairs *Inquiry into Child custody arrangements in the event of family separation*

Introduction

The South Australian Government notes the importance of this Inquiry and recognises that its findings could have significant implications for parents and children. Given the level of public interest in this matter, the very brief time frame for making submissions is concerning as it has the potential to limit community input and the balance of views presented.

Context

When considering the issue of joint custody, it is important to acknowledge that most couples decide what is to happen with their children after separation without relying on court determinations. Of the couples that do file proceedings in the Family Court about 95% reach agreement, many through mediation.

Chief Justice Alastair Nicholson of the Family Court of Australia notes that:

"The disputes the court is called upon to adjudicate very frequently involve one, or sometimes two parents, who are incapable for reasons of violence, addiction or temperament, of caring for a child. In such cases, joint parenting is out of the question".¹

The *Family Law Act* clearly outlines the basis for legal decision-making regarding the care of children following separation. Decisions have to be based on the best interests of the child as the paramount consideration.

In this respect, the *Family Law Act* complies with the fundamental principles and articles outlined within the *UN Convention on the Rights of the Child (UNCROC)*. This Convention and the *Family Law Act* allows for consideration of each child's unique interests and concerns. They acknowledge the child's rights to know their parents but also acknowledge the separate identity of the child, the vulnerability of the child and the rights of the child to protection by parents or other caregivers and the State (which has a continuing responsibility).

¹ Nicholson A, *Putting interests of the children first*, Advertiser, July 2 2003, p18.

(a) (i) Factors in deciding respective time each parent should spend with the child post separation and the presumption of shared parenting

The South Australian Government confirms its strong support for the current policy underpinning the *Family Law Act* (the Act) whereby the interests of the child are the paramount consideration.

The Government recognises the importance of maintaining relationships between parents and their children in appropriate situations. However, it believes that any decision on custody must continue to have the “best interests of the child” as the paramount consideration.

The best interests of the child requires a detailed assessment by the Court and must be decided in the context of the child’s unique circumstances, age and stage of development stage. For example:

- The granting of parental access to a young infant may impact on early attachment which is critical in early child development, particularly where the infant is breastfed. A younger child may in fact need an “unequal access” due to the need to be with the primary carer;
- A child who has little prior contact to a parent would need a graded introduction to access;
- Where there are any indications that a child does not want to have access to a parent, there needs to be an assessment to ensure the child is not subject to abuse or neglect nor witnessing domestic violence;
- Where a parent has had little prior responsibility for his or her child, the Court may need to require that parent to take steps to ensure the child will be adequately cared for and that the parent’s living circumstances are safe for the child;
- Continuity in a child’s life is important to their stability and needs to be considered in granting of access. A child needs to be able to attend school, participate in schooling activities and maintain peer friendships. These are particularly important issues for children in early and late childhood and early adolescence;
- Access arrangements need to change as the child grows and develops. A decision made at one stage of a child’s life will likely not be suitable for the child, or possibly the parent, a few years later.

Within this context, there are two fundamental questions that the Inquiry must consider. The first is whether the assertion of a shared parenting presumption, rebuttable or otherwise, challenges the paramountcy of the principle of the best interests of the child. If the presumption does not or is not intended to challenge this principle, then the next question is whether, in practice, the presumption will have any effect.

While, in theory, a presumption of shared parenting appears reasonable, the South Australian Government is concerned that, in practice, such a presumption could be problematic as it would offer a 'one-size-fits-all' solution to families who have complex issues, have a multitude of needs and who operate in a variety of ways.

Depending on how it is framed, a shared parenting presumption could elevate the 'rights' of parents and reduce the paramountcy of the best interests of the child to a consideration of equal or lesser weight. Therefore, if a presumption of joint custody is to be included in the Act, it must be a rebuttable presumption that does not subordinate the best interests of the child as the Court's paramount concern.

The issue of parenting arrangements in families often involves issues of far greater complexity than a presumption would indicate. There are a wide variety of family relationships and interactions, often involving more than the immediate parties to a separation. In specific cases, these relationships may be relevant to a decision on shared parenting.

For example, the relationship with a parent's new partner, the interaction of children from different relationships within the family, the impact on sibling relationships, all may have an impact on a decision as to what is in the best interests of a child.

Matters such as the child's age and his or her particular needs, the stages of the child's development and their ability to sustain separation for long periods of time from their primary carer, as well as their own wishes regarding their living arrangements are also relevant.

Patterns of parenting, that is, the quantity and quality of interaction between a parent and a child and responsibility for childcare in families prior to separation need to be taken into consideration in determining post-separation caring arrangements. For young children, primary attachment is usually with the parent who has provided the majority of care. Consideration needs to be given to whether a presumption of shared parenting may create instability for children and interfere with the child's developing attachment and relationship with their primary caretaker.

Any arrangement involving shared parenting would need to consider the impact on the financial position of the children. A shared parenting presumption may impact a parent's capacity to work. It may also influence living arrangements, for example, accommodation may need to be organised to minimize any impact on the child's schooling or other arrangements. The current situation for low-income families in accessing affordable appropriate housing or public housing does not make this an easy option. This could have a further impact on the capacity to realise shared parenting arrangements.

Another important issue to be considered in the context of shared parenting is whether there is a history of violence or abuse. The likelihood that a history of violence will be denied by the offending parent may result in the need to place additional evidence before the Court to rebut the presumption. This could place a greater resource burden on the Family Court as well as on State agencies, such as Police, Family and Youth Services and related services.

The Act already sets out the factors that the Court must take into account when deciding what is in the child's best interests. The factors include the child's wishes, the capacity of a parent to provide for needs of the child, the maintenance of the child in a settled environment and, importantly, child abuse, neglect or family violence.

All these factors are relevant to a child's best interests. The existence and extent of the list in the Act highlight the complexities of modern family relationships and decisions about the custody of children. An amendment to entrench shared parenting must provide enough flexibility to allow these factors to be given proper weight. Yet, if the amendment does allow such flexibility, it is likely to be illusory as the current provisions of the *Family Law Act* already provide for shared parenting, where it is in the child's best interests.

If this is thought not to be the case, another option would be to amend section 68F (2) to require a court to specifically consider the desirability of a shared parenting arrangement in a particular case.

Issues with accessing legal aid

The Inquiry should also consider the likely impact of any amendment entrenching a rebuttable presumption of shared custody will have on the level of litigation. Any increase in litigation, which is not matched by an increase in legal aid funding, will lead to more parties being un-represented. This situation will in all likelihood extend the time required to hear matters leading to further delays in the resolution of matters before the Court.

There are suggestions that there may be an increase in litigation as parents who do not want 50:50 shared residence may feel the need to go to court. It may lead parties to re-open finalised cases in the belief that a joint residence presumption law will bring them a different outcome. There have been concerns about reduced access in terms of eligibility and the quantum of legal aid.

Review of Child Protection in South Australia

The South Australian Government commissioned a Review of Child Protection undertaken by Ms Robyn Layton QC that was published in March 2003. A copy of

this report entitled: *Our Best Investment: A State Plan to Protect and Advance the Interests of Children* is attached and is submitted to the Inquiry as part of this submission.

The Government has not officially endorsed the recommendations of the Layton Review and is still taking advice on this. However, the Report reinforces the need to treat the interests of the child as the paramount consideration.

In dealing with child protection, the Review highlighted a number of concerns arising from the intersection of State child protection law and the operation of the *Family Law Act*. In Chapter 15 of this report, the Family Court's role in child protection was discussed. The report noted that there were six major issues raised in community submissions concerning child protection in the Family Court. They included:

- the interface between the Youth Court (SA) and the Family Court;
- the focus and jurisdiction off the Family Court in respect of cases involving allegations of sexual abuse of children;
- the relationship between the State statutory child protection authority, that is, Family and Youth Services, and the Family Court;
- funding of cases before the Federal Court which concern child protection;
- the role and training of child representatives; and
- the role of State statutory social workers and recognition of their expertise.

These issues are dealt with in pages 15.34 to 15.43.

The Report highlights some of the difficulties arising from allegations of sexual abuse of children, the complexity this adds to the cases before the Family Court, and the alternative court forum shopping that may occur following a decision in the Family Court or State Youth Court, among other issues. The Review emphasises reducing the level of dispute through appropriate resolution processes and ensuring these processes are managed effectively across State and Federal Court jurisdictions.

At page 15.46, the Layton Review of Child Protection in South Australia recommended strengthening the paramountcy principle in South Australia's *Children's Protection Act 1993* as follows:

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That the Act be amended to empower the Youth Court to inform itself with the assistance of professional opinion as to whether access arrangements are in the best interests of the child. The court to also have regard to matters which include:

- *The practicalities of where and how any supervised access arrangements can be implemented*

- *The capacity of the parent to partake in a quality access period which is beneficial for the child*
- *A requirement that the parent undertake a parenting program to be arranged by FAYS.*

The Review indicated that the reason for the recommendation was to enable the Youth Court to ensure the focus of any access arrangements would be on the child and to ensure that Court has access to the best information when making access orders. This should apply equally to the Family Court.

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

A parenting order in relation to a child may be applied for by a grandparent of the child under section 65C (ba) of the *Family Law Act 1995*. Section 65E states that, in deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.

The Family Court must take into consideration the same circumstances as found under section 68F to assist in determining what is in a child's best interests when deciding whether to order that children of separated parents have contact with other persons, including their grandparents. The continuation of these requirements is supported.

It is noted that grandparents may be restricted in making applications by reason of cost and the lower likelihood of receiving access to legal aid. There may be some benefit in considering how such applications could be better supported provided that section 68 F prevails as the basis for consideration of contact.

(b) Child Support

The issue of the relative impact of shared parenting on income for all parties, including children, requires close examination as it is likely to have an impact on income levels for separated families.

In a 1993 study, husbands surveyed three years following their marital breakdown had returned to income levels equivalent to pre-separation while wives' income levels had dropped by 26% (Funder et al, 1993). More recent studies have revealed a statistically significant relationship between gender and financial living standards after divorce (Weston et al, 2000).

The changes in resident mothers' income are also affected by the effectiveness of the child payment support system. In 2000, a survey conducted of child support clients revealed that only 28% of payees reported always receiving payments on time, while 40% reported that payment was never received. (Wolfs et al, 2000).

Any arrangement of shared parenting is likely to impact on the financial well being of parents and children. The implications of splitting Family Tax Benefit (FTB) and the impact on child support payments needs to be considered. Any resultant increase in poverty will increase the number of children also living at in poverty or on low incomes- even if for only half of the time.

On the question of the existing child support arrangements, the following matters will need to be considered in the context of a shared parenting arrangement and their implications for income support for children:

- The appropriateness of the existing child support formula;
- The costs of raising children and the relative contribution of child support payments to supporting children financially;
- The adequacy of the threshold level for the maintenance income test and the effect of the FTB taper rate on child support received.

REFERENCES

Funder K, Harrison M and Weston R (eds) (1993): 'Settling Down: Pathways of Parents After Divorce', *Australian Institute of Family Studies*, pp192- 194.

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Wolffs, T and Shallcross, L 'Low Income Parents Paying Child Support: Evaluation of the Introduction of a \$260 Minimum Child Support Assessment' (2000) 57 *Family Matters* 26.