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The Secretary
House Standing Committee on Social Policy and Legal Affairs
Inquiry into the Child Support Program
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Dear Sir/Madam

## House Standing Committee on Social Policy and Legal Affairs Parliamentary Inquiry into the Child Support Program

A number of questions were asked of the LFAA at the hearing of the House of Representatives Standing Committee on Social Policy and Legal Affairs on 17 July 2014.

The LFAA provides the following information in response to those questions.

**The number of children living i Australia who cannot see their dads**

The situation regarding the number of children living in Australia who cannot see their dads is as follows.

Of the five million children in Australia, one million have a natural parent living elsewhere. A quarter of a million of those children see their natural parent less than once a year or never, and in 80% of cases the natural parent is the father (ABS).

**Page 5. Child support schemes in other countries**

The LFAA has brought to the notice of the Committee a CSA publication entitled "Child Support Schemes: Australia and Comparisons, 2006", which provides comparative details of the child support arrangements of a number of other countries.

Another useful source is the "OECD Family Database, 2012", which summarises the definition and methodology of child support in the OECD group of countries (including Australia) as follows:

"All parents who are not living in the same households as their children are legally obliged to make child support payments towards their financial expense. Most OECD countries have formal child support systems that ensure compliance of 'absent' (or

'non-resident') parents. Some member states go one step further by making available advance maintenance payments to compensate for unpaid (or late) payments by non-resident parents. The rules for determining child maintenance obligations vary widely across countries, with some systems applying rigid rules and others informal guidelines.

"Member States with an agency system (such as Australia, Denmark, New Zealand, Norway, and the United Kingdom) apply rigid formulas to calculate maintenance amounts. In contrast, in countries where the courts take the lead (Austria, Belgium, Canada, France, Germany, and Sweden) they operate with discretion, using informal guidelines when fixing formal agreements. In general the factors that determine the level of child support payments include: financial resources of residential and non-residential parents, obligations to other children and ex-partners, custodial arrangements (contact time and shared care of children) and children's needs."

Two schemes of particular relevance in the present context (but for quite different reasons) are the schemes operating in Norway and Denmark.

***Norway***

The Norwegian child support scheme was influential in the redesign of the Australian scheme which occurred in 2006.

Norway underwent a major revision to its child support legislation in 2001. The first Step of the 2001 rules are "actual costs of children" based on the "standard family budget". The standard family budget estimates the expenditure of a family with a "reasonable" standard of living. Different ages of children are taken into account. Step 2: once costs have been determined, the costs are then shared between the parents. The non-resident parent's income is calculated as a proportion of the total parents and then compared to a six-step scale. Step 3: The liability of the non-resident parent is then determined. Step 4: finally the child support liability is adjusted according to the level of contact the non-resident has with the children.

The Norwegian scheme has significantly lower payments than the Australian scheme.

***Denmark***

The Danish scheme is deserving of note because of the way in which it interacts administratively with the treatment of access issues in family law.

In the Danish scheme, child support consists of three parts, namely a fixed basic amount, a fixed supplement, and (in some cases) an *additional* supplement. Currently, "standard" maintenance amounts to DKK1,270 per month or DKK15,240 (US$2,740) per annum. Whether the *additional* supplement is levied depends on the relevant parent's gross income and the number of children the non-custodial parent is required to support. The additional supplement is calculated on the basis of the fixed basic amount. It appears (P Greenspun 2014) that the maximum amount that a person can collect in child support is about US$8,000 per annum. The income of the custodial parent is not part of any of the calculations.

The Danish scheme has lower payments than the Norwegian scheme, and much lower payments than the Australian scheme.

A comparison between the outcomes of the Australian scheme and the Norwegian and Danish schemes is shown below.

| Details | Australia | | Norway | | Denmark | |
|---|---|---|---|---|---|---|
| Measure | 1994 | 2004 | 1994 | 2004 | 1994 | 2004 |
| Average child maintenance payment per sole-parent family, US$PPP | 249.2 | 283.2 | 189.0 | n.a. | 115.5 | 197.0 |
| Average child maintenance payment per child, US$PPP | 146.4 | 176.7 | 136.1 | n.a. | 82.6 | 131.6 |
| Child maintenance as % of net disposable income | 17.3 | 14.2 | 11.3 | n.a. | 7.4 | 9.2 |
| Child maintenance as % of total income transfers | 34.9 | 26.1 | 25.5 | n.a. | 19.3 | 26.3 |

Source. OECD Family Database, 2012.

**Domestic violence: recent book launch stating that "One woman is killed every week at the hands of a partner or ex-partner"**

All such cases of domestic homicide are human tragedies. The statistics also include a number of men and children who have fallen victims of domestic violence.

Information from the Australian Institute of Criminology indicates that in 2006-07 child victims of homicide by assault included 11 children killed by their mothers, 5 killed by their biological fathers, and another 5 killed by other male partners of the children's mothers.

**Page 6. Amendments to legislation which the LFAA would have in mind to discourage the making of false accusations of domestic violence**

See also page 12.

Mr Pasin suggested that:

"While an allegation is made it needs to be referred coincidentally or previously to the police for investigation, and if the matter is not maintained and some priority given to the investigation of these matters then the matter needs to fall flat."

The LFAA believes that that is the correct approach.

Danish family law, as one example out of many, utilises a more balanced approach than the current Australian law. A commentary by Fathers and Families on an article on Danish family law noted (in 2012) that, "It appears that the law in Denmark requires *actual proof* of domestic violence or child abuse before allowing a judge to limit a parent's contact with his her child. That's the most radical difference from court practice in (the US). Here *mere allegations* of domestic violence or child abuse, particularly when made by mothers, serve to keep fathers and children separate. Perhaps worse, pretty much anything a mother experiences as uncomfortable can qualify as abuse sufficient to get a no contact order issued against her ex. State after State places greater value on a mother's unsupported claim of feeling in fear than on a child's rights to his or her father".

The article described the cases of two American women who married Danish men. "Their marriages hit the rocks and the women are (upset) that claims of child abuse against the men were not sufficient to deny them contact with their children. … neither the courts nor the Copenhagen Post could find any corroboration of the women's claims but that didn't stop the women from assuming that a great injustice has been done."

The effect of the 2011 legislation in Australia has been to follow the gender-biased approach operating in the US. In effect, the onus of proof has been placed on the fathers to prove that they have not been violent.

**False accusations of domestic violence**

Surveys in New South Wales and Queensland indicate that a large proportion of magistrates in those States believe that false claims of family violence are often made in order to secure an advantage in divorce settlements. Justice Collier has also recently expressed the same opinion, and a number of other judges have expressed a similar view.

***Recommendations in relation to 2011 domestic violence legislation***

LFAA recommendations relating to 2011 domestic violence legislation are as follows.

The Parliament should:

Correct the failure of the 2011 legislation to give proper attention to the medium to longer term benefits to the children of an ongoing relationship with both their parents

Correct the completely open ended nature of the definition of "domestic violence" in the legislation and the failure to restrict the definition to physical or mental abuse. This will involve removing from scope any behaviour a party claims makes them feel threatened "irrespective of whether that behaviour causes harm". At present such

fears need not be reasonable but may be totally subjective, based only on the complainant's state of mind.

Restore the "friendly parent" provisions, in the light of advice from leading family lawyer practitioners that these provisions have not in practice discouraged parents from providing information about family violence where that has been a significant issue. .

Restore the requirement that a family violence order, in order to be considered in family law matters, must be final or contested.

Review obligations in the current legislation on both courts and advisers to trawl officiously for statements alleging family violence.

Restore the mandatory cost order provision for false allegations. This provision was removed in 2011 in spite of the fact that it served a fundamentally important purpose in discouraging false accusations. The court's reputation is at present being damaged by persons knowingly making false allegations.

The effect of these proposed changes would be to considerably reduce the likelihood that some parents would engage in parental alienation and denial of access, with consequent psychological damage to their children.

***Recommendations to 2014 Domestic Violence Inquiry***

The LFAA has provided further information on this subject to an inquiry currently being conducted by the Senate Social Policy and Legal Matters Committee. Key recommendations in that evidence include the following.

It is recommended that the Australian Government should:

Amend the legal definition of domestic violence to identify denial of access (except where court-ordered) as a serious form of child abuse, and require this to be taken into account by the CSS (Child Support Program) in calculating child support.

Repeal or radically modify amendments made to family law in 2011 which encourage the making of false accusations of domestic and sexual violence

Enlist the cooperation of both men and women in reducing the incidence of domestic violence *without gender-profiling* good husbands and fathers as "perpetrators"

Undertake more frequent and extensive data collections relating to domestic violence, with a view to pinpointing areas where expected reductions in violence are not being achieved

Collect data on awareness of men and women's experience of domestic violence, including collection by police intervention teams and State health departments, and

Develop sensitive, well informed, and honest anti-domestic violence campaigns targeting all perpetrators (not just men).

***Pages 5-7.*** **Information on the way in which the Danish legal system deals with denial of access issues - in the context of possible use of a similar approach in Australia**

***Proposed model for a Child Orders Enforcement Agency (COEA)***

In evidence to the Committee on 17 July 2014 the LFAA proposed the establishment in Australia of a Child Orders Enforcement Agency.

This LFAA proposal is in accordance with earlier advice to a House of Representatives Standing Committee Inquiry in 2003 that:

> "An effective administrative mechanism for enforcing court orders is essential to restore balance in a system which rigidly enforces child financial support obligations, in part for the benefit of residential parents (and with draconian child support percentages in some cases), but effectively ignores enforcement of contact orders designed to provide for the emotional support and guidance of their children by non-residential parents", and

a similar recommendation by the Family Law Council in October 2007 that:

> "The Government establish a child orders enforcement agency, or in the alternative that the government provide additional specified funding to enable the State and Territory legal aid commissions to assist parents to bring applications about serious contravention to parenting orders before the family courts".

***Enforcing court orders expeditiously, inexpensively, and effectively***

The Child Orders Enforcement Agency (COEA) would put in place processes that are:

- expeditious,
- office-based to a significant extent, rather than overly court based,
- designed to minimise unnecessary paper work, and
- free of cost to the parties.

***The model***

The model that the LFAA proposes for handling access, etc. matters draws, in part, on the features of the successful Danish approach - modified to suit Australian constitutional requirements.

The Danish experience demonstrates that processes that are expeditious, office-based rather than court based, designed to minimise unnecessary paper work, and free of cost to the parties, work best in this area. By contrast, the present system in Australia

is often slow, overly court-focused, adversarial, ineffective, and costly, particularly to the aggrieved parent.

The LFAA notes that determinations of both access and child support arrangements in Denmark prior to 2007 were made by County Governors' Offices within a family policy framework laid down by legislation and executive decisions. (Patrick Parkinson 2003).

A major reform in the geographical structure of the Danish government took place in 2007, which included the replacement of the existing Counties by five Regions and the strengthening of the role of municipalities. The functions of the former County offices have apparently been shared between the municipalities and Regional offices, with the Regional Offices assuming a supervisory role (including handling appeals against decisions by the municipalities.)

Counselling and in some cases mediation is made available to the parents if they wish. The parent wanting a change to existing access arrangements can initiate the matter by writing a letter to the appropriate Office. Normally the matters are resolved within a few weeks.

If necessary, the orders have been enforced by a court which deals with a variety of different kinds of court orders, and can levy fines of several hundred dollars on each occasion where an order has not been complied with after a warning.

It is understood that a meeting between the parents if required for enforcement purposes takes place expeditiously, and the proceedings are informal and held in an office rather than a court room. It is usual for problems, e.g., based on misunderstanding of the orders or a failure between the parents to communicate, to be settled at the first meeting.

The significant use which has been made of summary fines in the Danish system is a notable difference between Australian and Danish practice. The fines have immediate effect, are readily repeatable, and (like the Child Support system in Australia) provide a direct and speedy financial link between default and corresponding penalty. The fines act as a significant deterrence to defiance of court rulings.

The adoption of a similar model in Australia, employing the COEA as *both* administrative backup and handler of matters before the courts (in effect a "prosecutor"), would provide a desirable balance to the operations of the CSP by helping secure a just overall result for all members of the family.

Under the proposed model, dealing with serious and deliberate failure to provide access would have features which are already familiar in the Australian system for dealing with non-payment of *child support*. For example:

> the COEA would exert a guiding influence on determinations, as the CSP currently does in relation to child support, and this influence would be backed up by a detailed and adequate data base

- fines for access denials would in principle correspond to the financial penalties at present levied by the CSP for late payments of child support.

- the cost of enforcing orders in appropriate cases would be lifted from the shoulders of the parent who is being denied access, similar to the way in which the cost of enforcing payment of child support is lifted from the parent who is the recipient of that support.

It would be expected that the Australian Federal Circuit Court would in a large majority of cases accept the advice and recommendations (including as to financial penalties) being proposed by the COEA.

***Differences between the arrangements in Denmark and those proposed for Australia***

The proposed role of the COEA would be similar to the role of the former Danish County Governor's Office. It would, however, have less of an emphasis than the Governor's Office on interpreting broad family *policy* guidelines and more of a focus on establishing and implementing an effective client *data base* and the actual process of resolution of cases in dispute.

Australian courts, correspondingly, would be more concerned than the Danish Sheriff's Court with reviewing the *appropriateness* of determinations made by the body of first recourse (COEA compared with Governors Office), while at the same time relying to a significant extent on the *information base* maintained by the COEA. The Australian court equivalent would be more focused than the Danish equivalent on dealing with family law cases, as such.

The establishment of a COAE would strengthen the *administrative* side of enforcement in Australia, thereby in the process also enabling the strengthening of the *judicial* side of enforcement by the Australian courts. The distribution of administrative and judicial authority between the body of first recourse and the courts would be somewhat different in Australia than in Denmark, because of the different constitutional arrangements in the two countries. The combination of COEA and Australian courts would bridge the existing gap in the Australian arrangements. The key importance of the COEA lies in the *extra resources* and *more concentrated focus* it would bring to the speedy and inexpensive resolution of access cases.

The above suggestions closely follow the spirit of a recommendation by a House of Representatives Standing Committee in 2003 for the establishment of a "Families Tribunal". That recommendation proposed close consultation between legally qualified persons, psychologists, and social workers in the determination of cases, but envisaged that the proposed Tribunal would explicitly exercise judicial functions.

Recommendations along the lines proposed by the LFAA would provide a firm legal and administrative basis for the proposed arrangements involving a COEA.

***An integrated system***

The above proposal draws together and integrates what appear to be the best ideas which have been put forward over the last ten years or so for an overall system which would effectively enforce access orders.

***What the Child Orders Enforcement Agency (COEA) would do***

As indicated previously, where a complaint is received that (in deliberate and repeated defiance of court orders) access is not being provided, or not being provided on a satisfactory basis, the COEA would examine and evaluate the case and, if and as appropriate, provide an expeditious recommendation to the Federal Circuit Court (or a Magistrate's Court).

There are a number of possibilities for the staffing of the COEA.

One possibility, in order to make maximum use of the staff and other resources available within the Australian Public Service, would be to establish the COEA as an area within the Department of Human Services, alongside the CSP. During the very early stages, some existing staff from the Department of Human Services engaged in investigation could be seconded to duties in the COEA area. This would help create an early capability for the COEA to establish whether access has or has not been provided in accordance with court orders.

Another possibility, favoured by the Family Law Council, would be to establish the COEA as an independent agency, to emphasise its separateness from the CSP.

***Size and cost of the COEA relative to the CSP***

There are approximately 700,000 child support cases being handled by the CSP at any one time.

By contrast, contravention applications filed per annum would on present indications amount to about 3,000 per annum.

This suggests that the staff complement required to handle the COEA activity could be maintained at a very low level compared with the CSP activity. Given the present climate of financial stringency, the COEA would naturally concentrate its efforts on dealing with the more blatant cases, and could adjust its activities to fit its budget.

***COEA data base***

In order to carry out its functions, the COEA would compile and maintain a database on amounts of access time specified in court orders and parenting agreements and amounts provided in cases where there was a serious and intractable dispute. It would organise this information in a way which would permit it to provide useful advice to any enforcement process that might be required.

Complaints of access being denied would be followed up, with the COEA having discretion in both (1) referring clients for counselling and (2) deciding which cases should be selected for prosecution.

***Auxiliary role for the CSP***

The CSA in informal discussions with the LFAA referred to the considerable amount of information that they hold in relation to court-ordered access and access actually being provided. The CSA suggested that they would, in principle, be able to assist, via suitable protocols, particularly in cases where there is non-compliance with payments, bearing in mind their responsibilities for transfer of child support.

**Page 10. Is the divorce rate 85%?**

The ratio between the number of divorces and the number of marriages in Australia per annum is currently about 40%. This represents a marked fall over the eight years or so up to 2011.

Other ratios can be used, but their significance depends on the questions the ratios are designed to address and their validity on the accuracy of the assumptions being made.

**Effective links between access and child support**

**Page 11**. Given that child support (financial) and adequate access are both key features of a successful family law system, what are the LFAA's suggestions for achieving better alignment of those two objectives?

There are three key measures which need to be taken. These are:

- establish a COEA, in combination with other supporting agencies, as outlined in the LFAA's submission. This should ensure that denial of access in defiance of the courts will be dealt with as effectively as denial of child support (financial) already is

- amend 2011 legislation which encourages parents to make false accusations about domestic violence

- make use of existing provisions which penalise clear cases of perjury.

The links between child support and access can be considered from a number of points of view. A simplistic interpretation of principle should be avoided, as it has the potential to lead to unfortunate consequences. In resolving these matters, the interests of all close family members need to be given appropriate consideration.

*An immediate and automatic* link between the two objectives of the kind that "if you don't pay child support you won't see the child" and/or "if you don't let me see the child I won't pay child support" is not acceptable, as it would in some cases be likely to have the effect of punishing the innocent child.

However, there remains a fundamental question of *fairness* between the parents which must be addressed in the interests of justice and which will almost certainly impact on the child. This aspect should be addressed by having enforcement procedures covering access as well as procedures covering child support (financial). If, for example, a parent feels driven to take his or her own life because, in spite of meticulous payment of child support, and being a perfectly good parent, he or she is prevented from seeing his or her children, this will be a very bad result for the child who loses his or her father or mother for ever.

Page 12. Where accusations of violence are not involved, the LFAA indicates that there should be a mechanism that takes over and ensures that access orders are upheld. Escorting children forcibly from one parent to the other may do more damage to the children than denying access.

Indeed. The problem could be largely overcome through the implementation of a COEA and supporting legislation.

The LFAA hopes that the above elucidations are helpful, and stands ready to add to them if the Committee wishes.

Yours sincerely

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