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To:

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Parliamentary Inquiry into Joint Residence Arrangements in the Event of Family Separation

Personal Background

I was the principal solicitor of Hawkesbury Community Legal Centre, a generalist Community Legal Centre in the western suburbs of Sydney from 1992 until 2000. I am currently employed as the Northern Sydney Regional Violence Against Women Specialist for the NSW Attorney General's Department. I am divorced with 3 male children. This submission will express my opinions from my practice in the Family Law and domestic violence area not that of the government department I am currently employed by.

Dispelling myths and presenting the realities

I am opposed to a legal presumption of joint residence for separating families. Such a presumption represents a dangerous and dramatic policy shift in the government's family policy that is not evidence-based but is, instead, being led by emotive anecdotes such as, the notion of 'unequal' treatment of fathers by mothers who are viewed as blocking fathers' access to participate in children's care and thus ignoring the dangers some men can pose in families. These ideas have increasingly promoted by the militant fathers rights movements particularly with regard to the joint residency issue. The presumption that shared residency will offer a solution is a simplistic, 'one-size-fits-all' solution to families who are complex, have a multitude of needs and patterns and operate in a variety of ways.

As a legal practitioner in the family law I am concerned that some of the reporting and comment around this issue in the media has contained inaccuracies and myths about aspects of the family law system.

The current Family Law Act

There is no principle of family law that advantages either parent in family law proceedings. Although mothers more often have legal “residence” of children, most of these orders are made by consent. Further, the Family Law Act provides that each parent has parental responsibility (current term for “guardianship”) for their child and that this is not affected by parental separation.¹ If those advocating for the current proposals suggest joint residence as being the sharing of legal responsibilities of parenthood then they currently have this as parental responsibility unless the Court varies this situation. Should parents be seeking equal periods of time with the children, the court, where it is in the best interests of the child can make such orders.

Where parents cannot agree on arrangements for the children and the Family Court has to decide it is bound by law to look at the **best interests of the child as the paramount consideration.**² Many men already participate actively in their children’s lives after separation. In these families neither fathers nor mothers need the law to tell them to do this. Further, most mothers wish to share parenting duties and responsibilities cooperatively with fathers who were significantly involved with their children prior to separation.

The presumption of joint residency or that children spend equal time with both parents, will in fact in most cases work to the detriment of children for whom such an arrangement is inappropriate (I.e. where there are allegations of violence) or impractical due to work arrangements or geographic location of parents. Such a presumption is a parent focused, not child focused, and could be seen as placating a parent (of either gender) rather than advancing the welfare of a child. Thus the governments proposed changes would privilege the rights of parents over the rights of children by over-riding the paramouncy of the ‘child’s best interests’ principle which is entrenched in the Family Law Act. This ignores the factors listed in the *Family Law Act* which must be considered by the Court in deciding parenting orders, such as children’s wishes, capacity of the parent to provide for needs of the children, maintaining children in a settled environment and family violence.

The proposition also reduces families abilities to make their own decisions about parenting arrangements depending on children’s needs, parent capacities, geographical distance between them, parent’s work patterns, finances and housing.

The legislative framework already encourages parents to share duties and responsibilities of their children’s care. Where parents cannot agree, the Family Court is *required* by law to make decisions based on the needs, wishes and rights of **children**, not parents.

¹ See section 61C(2) of the FLA

² see section 65E of the FLA

What we know from research

Families arrange post-separation care of children in various ways

A large majority of men who are separated (64%) have contact with their children³ and almost three quarters of these men have children staying overnight with them.⁴ There is no Australian research showing why more contact does not occur. Interestingly, a recent study on contact arrangements shows that 25% of resident mothers believed that there was not enough contact⁵, suggesting that, where fathers have good relationships with the children, mothers are keen for more contact to occur.

Family Court data reveals that the rate at which fathers are awarded residence of their children is increasing. Outcomes of residence orders made in the Family Court for 2000-2001 show that 70% of residence orders are made in favor of the mother and 20% of orders for residence are made in favour of the father. In the mid 1990s only 15% of residence orders favoured the father. These statistics include orders made by consent as well as orders made as a result of contested hearings.⁶ In looking at outcomes for fathers of contested residence applications, two studies in the Family Court in 1983 and 1994 showed that fathers were successful in 31% of cases.⁷ In a smaller analysis conducted in 2000, fathers were successful in 40% of contested residence applications.⁸

Shared residence is the least common post-separation arrangement with only 3% of children from separated families in 'shared care' arrangements in 1997.⁹ Less than 4% of parents registered with the Child Support Agency last year had equal (or near equal) care of their children.¹⁰

US studies have shown that where shared residence couples make these arrangements they do so voluntarily, often without legal assistance and irrespective of legislative provisions. These studies have also shown that relationship between shared residence parents are commonly characterised by cooperation between the parties and low conflict prior to and during separation.¹¹

Research with children in the UK undertaken by Carol Smart has shown that, for children living in two homes, they had 'emotional and psychological space' to traverse as well as physical space.¹² The research showed that shared care was more likely to be organized to suit parents than to suit children.

³ Australian Bureau of Statistics, *Family Characteristics Survey 1997*, Cat No 4442.0, AGPS, Canberra; See also Smyth B and Parkinson P; 'When the difference is night and day: Insights from HILDA into patterns of parent-child contact after separation', Paper presented at the 8th Australian Institute of Family Studies Conference, March, 2003, page 7 available at <http://www.aifs.org/institute/pubs/papers/smyth3.pdf>.

⁴ see Parkinson and Smyth above note 23 at page 9

⁵ see Parkinson and Smyth above note 23 at p11

⁶ Residence Order Outcomes 1994/1995 – 2000-2001: Family Court data available on line at www.familycourt.gov.au/court/html/statistics.html

⁷ See Bordow, S; 'Defended cases in the Family Court of Australia: Factors influencing the outcome', *Australian Journal of Family Law*, volume 8, No 3, pp 252 - 263

⁸ Moloney, L; 'Do fathers 'win' or do mothers 'lose'? A preliminary analysis of a random sample of parenting judgements in the Family Court of Australia', Presentation to Australian Institute of Family Studies, September 2000

⁹ Australian Bureau of Statistics; *Family Characteristics Survey*, Ct 4442.0, AGPS, Canberra, 1997.

¹⁰ Attorney General's Department; *Child Support Scheme Facts and Figures, 2001-02*, Canberra, 2003.

¹¹ Bauserman, R; 'Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements: A Meta-Analytic Review', *Journal of Family Psychology*, 2002, volume 16, no1, 91-102 at page 99. See also Rhoades, H, Graycar, R and Harrison M; 'The first years of the Family Law Reform Act 1995', *Family Matters* No 58, Autumn, 2001 page 80 available at <http://www.aifs.org.au/institute/pubs/fm2001/fm58/hr.pdf>

¹² Smart, C., 'Children's Voices' Paper presented at the 25th Anniversary Conference of the Family Court of Australia, July, 2001, available at <http://familycourt.gov.au/papers/html/smart.html>.

It found that the majority of children in 'shared residence knew how important the equal apportionment of time was for their parents. The study showed that children often carry the burden of shared care and found it emotionally straining to upset the balance between their parents. Children felt responsible for ensuring 'fairness' between their parents and in fact put their own interests below the interest of their parents for shared care. The research argues that being shared on a fifty-fifty basis can become 'uniquely oppressive' for some children.¹³

There is to date no Australian research looking at predictors of successful shared residence arrangements in separated families. Little is known about parents who opt for shared care of their children, how these arrangements are structured, how well the arrangements 'work' and the effect of these arrangements on children.

The Family Court in cases such as Pagen (1991)FLC92-231, Forck and Thomas (1993)FamLR 516 found that joint custody orders were not appropriate unless the parties were compatible, were able to cooperate, communicate and trust each other. These factors are incompatible with contested contact and residence cases where often the history of the parents is that of conflict, poorly developed parenting skills, addiction, abusive temperament, dysfunctional or unwillingness to care for the children. In some of these cases contact is quite inappropriate.

Women do most of the domestic work in relationships prior to separation

It is clear from the most recent Time Use surveys that women in relationships still do the bulk of caring for children and domestic work: 90% of women and 63% of men spent time on housework such as cooking, laundry and cleaning. Where child care was noted as a person's main activity, women spent twice as long as men caring for children and were more likely than men to provide direct care that includes feeding, washing and dressing.

The proposed joint residence proposal does not reflect current caring practices in intact families where mothers are still predominantly the primary carers of children and undertake most of the domestic work. Shared residence would mean arrangements for some families post-separation would be significantly different from pre-separation arrangements.

I would also suggest that many men who are actively involved in their careers and have not been involved in the primary care of their children should not be forced to accommodate shared parenting arrangements or be asked to file court proceedings to rebut the presumption of joint residence. This would very likely increase the caseload being brought to the Family Court as well as cause some parents quit, or force parents to accommodate the 50% care responsibilities by employing outsiders in stead of relying on the other parent who is prepared to give up career for the children's sake.

It has been my experience as a practicing solicitor who advised men and women in Family law contact issues, that most women contacting the legal centre for advice were seeking advice on how they could encourage the children's father to have regular access with his children and if it was possible to seek a contravention order for the father failing to attend an agreed access visit. It is possible that many of these fathers who are currently failing to have contact with their children are the children who desperately need a male role model but the father is not interested or has not prioritised contact visits with the children. Joint residence will not assist these children.

¹³ Smart C; 'From Children's Shoes to Children's Voices' *Family Court Review*, volume 40, No 3 July 2002, pp 307 – 319 at page 314.

Single mothers are poor

Of single parent families, 75% - 85% are headed by single mothers.¹⁴ Being the resident mother of children is still the most likely predictor of poverty in Australia. Research over the past two decades has consistently shown that women are more likely to experience financial hardship following marital dissolution.¹⁵ 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%.¹⁶ More recent studies have revealed a statistically significant relationship between gender and financial living standards after divorce.¹⁷

Research has also shown that the degree of financial disadvantage experienced by women post-separation may be exacerbated by a number of factors.

In Northern Sydney women accessing the Domestic Violence Court Assistance schemes have stated their reluctance to leave the violent relationship was because of financial constraints such as, their inability to gain child support due to complicated family/ business trusts or company arrangements that their partner operates, difficulty to get legal representation for Family Court matters due to the refusal of a grant of Legal Aid (because of the perceived wealth of their husbands or partners, wealth the women are unable to access) and inability to finance a solicitor wanting and up front payment to secure future legal representation to assist then in very complicated division marital property agreements.

There will be an increase in litigation as parents who want 50:50 shared residence may feel the need to go to court. The impact of the 1996 amendments showed an increase in the number of applications for parenting orders as it was reported that fathers had misunderstood the intent and assumed that henceforth they would automatically share their children on an equal basis. Given the lack of legal aid funding experienced by all state Legal Aid commissions with regard to Family Law grants, many people will be self-represented, increasing delays and stretching the resources of the Family Court and Federal Magistrates Service. It should also be noted that as many parents initiate there Family Law proceedings the NSW Local Courts, and the Local Court also hears allegations of violence that the work and delays within the local courts may also increase.

Women who have been out of the work place for long period of time raising their children have also experienced lower rates of employment¹⁸ and lower earning capacity.¹⁹ The government's proposal for joint residence would severely affect women's ability to gain employment, i.e. women would only

¹⁴ Australian Bureau of Statistics, *Labour Force Status and Other Characteristics of Families*, Australia, Cat No 6224.0, AGPS, Canberra, 2000.

¹⁵ See R Weston, 'Changes in Household Income Circumstances', in P McDonald (ed), *Settling Up: Property and Income Distribution on Divorce in Australia*, Australian Institute of Family Studies (1986) 100; R Weston, 'Income Circumstances of Parents and Children: A Longitudinal View', in K Funder, M Harrison and R Weston (eds), *Settling Down: Pathways of Parents After Divorce*, Australian Institute of Family Studies (1993) 135.

¹⁶ *Settling Down: Pathways of Parents After Divorce*, above, note 11 at p 137.

¹⁷ R Weston and B Smyth, 'Financial Living Standards After Divorce' (2000) 55 *Family Matters* 11.

¹⁸ In June 2001, only 21% of female lone parents were employed full-time and many are unemployed, Australian Bureau of Statistics, *Year Book Australia 2002*, Cat No 1301.0, 2002. Further the employment rate of lone mothers with dependant children is considerably below that of couple mothers, Australian Bureau of Statistics, *Labour Force Status and Other Characteristics of Families, Australia*, Cat No. 6224.0, 2000.

¹⁹ Women may have a weaker position in, and attachment to, the labour market, often due to the roles adopted during marriage that can involve substantial costs for their career development. They typically have a lower earning capacity than similarly aged men. See K Funder, 'Work and the Marriage Partnership', in P McDonald (ed), *Settling Up: Property and Income Distribution on Divorce in Australia*, Australian Institute of Family Studies (1986) 65;

be able to work limited periods. The finding of affordable and flexible childcare will also be a very significant issue for parents who will be forced into the 50 - 50 arrangement.

The notion of joint presumption of shared residence also supposes that parents reside within a reasonable proximity to allow children to attend schools and sporting activities that are a reasonable travelling distance from their homes. This is unrealistic for most parents particularly where there are issues of financial difficulty. In NSW the waiting list for Department of Housing even where clients are given priority is very lengthy, there is also an expectation from Department of Housing that clients should accept the first offer of housing or lose their priority. The client may be asked by the Department of Housing to move from the area they currently reside in, sometimes to other regions, this may cause parents who are often on welfare and unable to afford alternate accommodation, (in Sydney the rapid increase in house prices have also caused rents to increase) to be concerned that they may lose residence of their children, particularly under the current proposal.

Many women do not receive their child support entitlements

In 2000, a survey conducted of Child Support Agency (CSA) clients revealed that only 28% of payees reported always receiving payments on time, while 40% reported that payment was never received.²⁰ The total child support debt grew at an average rate of 7% in the four years to June 2001, to a total of \$670 million.²¹ The age of child support debt increased over this period²² and the percentage of payers with child support debts rose from 56% to 74% in 2001.²³ The older and larger the debt amount, the harder the debt is to recover from payers. The Child Support Agency failed to collect nearly \$770 million in 2000-2001 and the debts written off by the Child Support Agency during this period rose by 27% to \$74 million.²⁴

The child support consequences will force single mothers, already amongst the most impoverished group in the community, to plummet further into poverty and consequently increase the number of children also living in poverty.

Many women are victims of violence

The current proposal will place women and children who are victims of violence at increased risk of further violence. The presumption will force some children to live with violent fathers and will force mothers to have to regularly negotiate with and be in the presence of violent ex-partners. It provides a dangerous tool in the hands of abusive men who wish to control their women partners after separation.

Data from a 1996 Australian Bureau of Statistics national benchmark study showed that 23 % of women who have ever been married or in a defacto relationship had experienced violence in that relationship. This means that one in five Australian women have experienced family violence by their current or former partner representing a total of 1.4 million women.²⁵

²⁰ Tammy Wolffs and Leife Shallcross, 'Low Income Parents Paying Child Support: Evaluation of the Introduction of a \$260 Minimum Child Support Assessment' (2000) 57 *Family Matters* 26.

²¹ Australian National Audit Office, *Client Service in the Child Support Agency Follow-up Audit*, Audit Report No 7, 2002-03, 126.

²² Australian National Audit Office, *Client Service in the Child Support Agency Follow-up Audit*, Audit Report No 7, 2002-03, 127.

²³ This can partly be attributed to a legislative change in 1999 which introduced a minimum child support liability of \$260 per annum for all payers unless the liability was assessed as nil.

²⁴ Attorney General's Department, *Child Support Scheme Facts and Figures 2000-2001*, 2002.

²⁵ ABS; *Women's Safety Australia*, Canberra 2000, Catalogue No 4108.9 at page 51 and see Table 6.5 at page 53.

There is now a significant body of research that demonstrates that there is a high incidence of domestic violence in cases going to the Family Court²⁶ and that domestic violence against women continues after separation. A 2002 study found that of the 35 resident mothers, 86% described violence during contact changeover or contact visits.²⁷ It is not surprising that violence and abuse is more prevalent in families who separate, than families who remain together.

Current Australian Family law policy recognises that where there is severe domestic violence it is a cogent factor that the courts can consider to deny or limit contact. The courts and state child protection services also recognise that children witnessing such conduct can have a negative impact on the children including that some children may imitate such behaviour as adults. The research of Lynne Harne based on fathers who had been identified as domestically violence (as documented in her paper at the Townsville international Women's Conference July 2002) titled "Childcare, Violence and fathering - Are violence fathers who look after their children, likely to be less abusive?" in KleinR and WallerB(eds) (2003) *Gender, Conflict and Violence*. Vienna, Studien Verlag Wien) concluded that despite being regularly involved in childcare activities, violent fathers can continue to physically and emotionally abuse children. Indicators also showed that increased child caring responsibilities could provide more opportunities for fathers to abuse with some of the fathers deflecting the responsibility onto very young children for provoking the abuse and their inconsistent parenting behaviour having grave implications for harm for the children themselves.

Despite this the Family Court is prepared to afford violence fathers the opportunity to have contact with their children via supported or supervised contact often after periods of only 6 months arrangements may proceed to unsupervised contact. However there has been very little research on the violent men's fathering practices and how they look after their children in their care, it is often assumed that they are 'good enough' fathers despite their domestic violence. During my years as a solicitor representing women in domestic violence proceedings, I have heard many women say to me that he is a 'good father' this is despite the fact that the children may have witnessed many severe beatings or seen their mother threatened by their father with a rifle put in her mouth to blow her brains away. Women in severe domestic violence often see only that the violence is directed only towards them (even where children are caught/ injured in the violence) and often do not recognise the damage to their children.

Role models are not always good for young men

Social policy in the UK points out that lone motherhood and father absence from families has come to be seen as the cause of all problematic masculinities and it is urged that fathers have been deprived in their role as fathers in the care of their children. However a shift in new labour policy in the UK has indicated that the increasing emphasis on the notion of 'unequal' treatment of fathers by mothers who are viewed as blocking father's access to participate in the children's care are ignoring the dangers some men can pose in families.

²⁶ Hunter R "Family Law Case Profiles" *Justice Research Centre*, June 1999 at p. 186

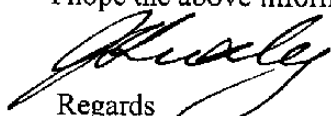
²⁷ Kaye M, Stubbs J and Tomie J; *Negotiating child residence and contact arrangements against a background of domestic violence*, Working Paper No 4, 2003, Family Law and Social Policy Research Unit, Griffith University, p36. Available on line at <http://www.gu.edu.au/centre/flru/>. Analyses of cases in the Melbourne and Canberra Registries of the Family Court between 1994 and 1995 found that one half of all cases going to Pre Hearing conferences involved allegations of child abuse. T Brown, M Frederico, L Hewitt and R Sheehan; 'Child Abuse and the Family Court' [1998] *Trends and Issues in Crime and Criminal Justice* no91, pp 2-3. See also

Some boys and young men suffer from an *excess* of destructive male role models, not from their absence. They grow up with neglectful or abusive adult men and violent and dominating images of manhood. It is wrong to assume that *any* male role model is better than none. It is more important that boys are raised by nurturing and positive parents of *either* sex, rather than by fathers in particular.²⁸

Have you heard from the fathers who do not want access?

As stated above many men fail to take or keep the agreed contact arrangements. This has a huge impact on the children, many men failing to turn up because that weekend did not suit them or because they do not have the knowledge or capacity to make contact work for the benefit of their children. Some of these fathers prior to separation have had no major role in child care and thus do not have parenting skills necessary to meet the needs of their children. It is possible that many of these fathers who are currently failing to have contact with their children are the children who desperately want to have a male role model but the father is not interested. The proposed changes to the Family Law Act will not assist these children.

I hope the above information helps to inform your committee.



Regards
Jennifer Huxley

²⁸ Silverstein, L; 'Deconstructing the Essential Father', *American Psychologist*, Vol .54, number 6, June 1999 in an email communication by Dr Michael Flood, Research Fellow, The Australia Institute, Canberra.