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House of Representatives Standing Committee
on Family and Community Affairs

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Secretary:

The Committee Secretary
Standing Committee on Family and Community Affairs
Child Custody Arrangements Inquiry
Department of the House of Representatives
Parliament House
CANBERRA ACT 2600

via e-mail FCA.REPS@aph.gov.au

Dear Committee,

The Law Institute of Victoria "LIV" makes this submission on behalf of its more than 8,000 member solicitors. In so doing it makes no representation that its members hold unanimous views on this issue.

This submission results from the views expressed by members of the LIV predominantly through its Family Law Section with most of them from the Section's sub-committee on Children's & Youth Issues. The LIV is grateful for this opportunity to make a submission and it, and individual members, seek in addition to the submissions the opportunity to present views and participate in any hearings to be conducted by the Inquiry sitting in Victoria.

The LIV acknowledges that no legal system can satisfy all who use it and welcomes the opportunity to contribute. It acknowledges that there are some who are dissatisfied with the present legal system and its approach to parenting orders and accepts that the effectiveness of the system should be subject to monitoring and review.

1. **The best interests of the child are the paramount consideration**

We refer to the Terms of Reference of the Child Custody Arrangements Inquiry which clearly state:

“Given that the best interests of the child are the paramount consideration ...”

The LIV takes considerable comfort that the Terms of Reference of themselves contain an appropriate presumption and/or “given”. Federal legislation, State legislation and common law enshrine the principle of paramountcy. Legislation relating to Family Law, child welfare and adoption specifically states this principle and the common law recognizes such principle in strong and clear terms. In translating “the best interests of the child” into the application of law it is submitted that considerable emphasis must be placed on the United Nations Convention of the Rights of the Child (UNCROC) which convention was ratified by the Commonwealth of Australia in 1991. It is further submitted that the convention forms part of our legal system as a consequence of the provisions of the Family Law Reform Act 1995 and therefore the principles and requirements of UNCROC must be observed, or at the very least acknowledged, in determining “the best interests of the child”.

If the relevance of UNCROC is accepted, firstly as a matter of law or in the alternative as a matter of general principle, the responsibility to ensure that the opportunity exists for the child to have involvement in determination of the child’s best interests, by virtue of separate representation, is fundamental. It is submitted that the Committee is required to gain an appreciation as to the importance of the need for the separate representation of the child, the manner in which such separate representation is currently facilitated for the child and improvements which might be made to ensure that the separate representation is available and of the highest standard. The relevant articles of the convention are:

Article 12 states:

1. *Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*
2. *For this purpose, the child in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.*

It is acknowledged and submitted as fundamental that pursuant to the provisions of the Family Law Reform Act 1995 and UNCROC there is a principle motivating those responsible for decision making in relation to children, particularly the Court, to ensure that a child has the right to a relationship with each of that child’s parents and it is submitted that the right must be strongly advocated by legislators and in turn the judicial system.

2. **Terms of Reference (a) (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**

The LIV acknowledges that rebuttable presumptions exist within the present legal system. Examples of such rebuttable presumptions are:

- (a) The rebuttable presumption that a child is a child of a marriage;
- (b) The rebuttable presumption of joint tenancy in relation to property ownership; and
- (c) The rebuttable presumption of testamentary capacity of a testator.

The criteria applied by Courts in determining whether presumptions are able to be rebutted follow precedent set by superior courts in relation to the application of facts and the decisions flowing from same.

Concern is expressed by the LIV that the proposal "a presumption that children will spend equal time with each parent" represents a significant shift in the legal sense from the application of the concept of rebuttable presumptions. The presumptions referred to in paragraph 3.1 by way of example are presumptions in relation to what might be described as static factual situations. For example, a child might be presumed to be a child of a marriage but following appropriate scientific testing and analysis, the presumption might be rebutted as a question of fact. In relation to the presumption proposed the LIV expresses very strong concerns and reservations as to the application of a presumption that is not factually based and cannot by definition ever be factually based because of there being no permanent and unchangeable concept.

With respect, the concept ignores the following factors:

- (a) The requirement that in some form the child have a voice and/or representation in relation to the outcome as described above;
- (b) That the family, and in particular the children, are not a static entity impervious to change whether that change be instigated simply by the passing of time, the entering by one or both parent into new relationships, altered parental employment opportunities or current and/or historic issues leading to protective concerns.

Concern is expressed that if the concept of a presumption "that the children will spend equal time with each parent" is enshrined as a matter of law, subject to the paramountcy principle, the presumption is likely to be of little effect other than adding to the involvement of lawyers and the legal system in developing a series of justifiable criteria for the rebutting of such presumption. This will have a flow on effect, as to evidence, admissibility and add to polarisation between litigious parties. Costs will therefore increase.

The LIV acknowledges Court based statistics and anecdotally, the fact that in the majority of relationship breakdown occurrences, both parents are able to resolve parenting arrangements comparatively early in the post-separation process predominantly by consent orders made by Courts holding jurisdiction. The LIV acknowledges that many parents, post-separation, discharge their parenting responsibilities with "equal time" with each parent, "with each parent" being interpreted to mean in the control and/or household of as distinct from simply a time division. The LIV considers these examples to be commendable and exemplary but submits that judicial decisions and the experience of LIV members practising in this area is that such arrangements flow from an exceptionally high degree of trust between the separated parents. These parents have an ability to focus upon the needs of the children and to communicate with each other with there being very little criticism of the other. Essentially the parents are able to move on from the relationship period and not dwell upon incidents and perceptions which are historical.

The LIV, based on the experience of members practising in the area and the criteria applied by Courts in deliberations upon parenting orders, considers that the ability of lawyers acting in the interests of a parent will result in the development of numerous criteria to rebut the presumption "equal time with each parent". Criteria commonly applied by the Courts, for example in the appointment of a separate representative for a child, include and are certainly not limited to the following:

- (a) Allegations of sexual abuse and/or domestic violence;
- (b) Intractable conflict between parents;
- (c) The possibility of the separation of siblings;
- (d) Allegations of substance abuse and dependency and/or alcohol abuse and/or dependency;
- (e) Strong wishes being expressed by a child of appropriate age;
- (f) The wish of a parent to relocate; and

- (g) Alleged special needs and requirements of a child;

The above examples are certainly not exhaustive but are placed before the Committee as an indication of "common place" grounds for the presumption to be rebutted. Obviously one parent's view of the other's parenting capacity is likely to be a general ground for rebuttal.

It is respectfully suggested that the concept of "equal time with each parent" itself gives rise to problems of definition and practical application. For example members practising in the area indicate the following issues which arise in cases where parties are polarised:

- (a) Does the concept require that the parent be physically present? If so, it may well impede employment, the reality of before school care, after school care, crèche etc.
- (b) If the parent is not physically present, does the concept create difficulties for a parent who knows that the child is spending substantial time with the partner and family of another parent in a re-partnering situation and/or the relatives of the other parent?
- (c) Will there be a requirement for "substantial attendance" during "time" by one parent of the other?

It is submitted that the concept and the presumption respectfully ignores the individuality of each family, the specific tapestry of a child's parental relationships and endeavours to apply idealistic but impractical presumptions upon the children and through them to the parents.

The LIV further submits that the legislation of a presumption along the lines of that proposed fails to attribute appropriate weight to the reality of relationship breakdown. In particular, based upon the experience of members practising in the area of parenting disputes the following issues are drawn to the attention of the Committee:

- (a) The reduced ability of either or both parents to make decisions with informed and proper consent which impact upon the future of themselves and their children such reduced ability being attributable in many cases to a range of factual and emotional issues, many of which involve the circumstances referred to in paragraph 3.6 above;
- (b) The propensity of those separating in circumstances of hostility and/or dysfunctionality, to be distracted by anger, retaliation, economic circumstances, attraction to a new geographical area and/or lifestyle and the necessity for assistance from health professionals and/or allied health professionals, including family therapists and counsellors, in order to empower each parent to plan for children of the relationship with appropriate informed consent.

It is submitted that the existence of a presumption, and the requirement that a separating parent, or a parent proposing to separate gather evidence to rebut a presumption, may well result in children being forced to remain in an unhappy parental household, externally exhibiting signs of a functioning relationship but internally and in fact continuing an unhappy existence thereby failing to advance the best interests of the child. It is submitted by the LIV that the above difficulties warrant particular consideration in situations wherein one of the parents is a victim of domestic violence and/or where children have been exposed to domestic violence, including verbal abuse between parents which abuse is from time to time extended to verbal abuse between the family constellations of each parent.

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

Flowing from the initial "given" above, namely the best interests of the child and the submission incorporating UNCROC, it is acknowledged that Courts holding jurisdiction are charged with the responsibility of making orders which address the best interests of the children as required by statute and by common law. In an ideal world the response to this question ought be in the affirmative acknowledging the importance for children of other individuals including their grandparents.

The sentiments and idealism expressed in the previous sub-paragraph must be weighed against the responsibility of legislators, and thereafter the Courts, to develop and continue a system of administration of justice that is efficient and contained, particularly with economic and community responsibility. The LIV submits that it would be impractical for any persons at large to simply be entitled to the benefit of orders relating to contact with a child.

However, this is not to indicate that the best interests of children are from time to time served by there being contact orders for children to experience contact with other persons, again subject to the individual circumstances of a child and that child's best interests. The legislation, Court processes and Rules permit third parties to seek parenting orders including contact orders and to apply for leave to intervene in the Court processes concerning a child. One of the roles of the Court system is to discern whether permission to intervene in proceedings ought be granted.

The LIV expresses the view that for the most part contact orders for persons other than parents are unusual and that the relationship of the child exists with other significant persons in his or her life is usually facilitated through each of the parents and their extended constellations.

The LIV acknowledges that in the individual tapestry of the life of a child circumstances may arise wherein specific contact orders might be required and accepts that the exercise of such rights ought be available if satisfying a threshold test as to bona fides and preliminary merit. The LIV accepts that in the complexity of the lives of some children the ability to do so be fostered and indicates the following examples furnished by members:

- (a) Grandparents of children who are estranged from their own child and have had a warm relationship with their grandchild which they wish to pursue independently;
- (b) Step-parents who have spent many years in a parental capacity with a child whose relationship with the other parent has broken down and who wish the child to continue an association with step-siblings;
- (c) Extended relatives and others who have paid significant roles in the life of an individual child.

4. Terms of Reference (b) - Whether the existing child support formula works fairly for both parents in relation to the care of, and contact with children

It is respectfully pointed out to the Committee that the "given" referred to above as the best interests of the child being paramount, does not of itself exist by statutory direction in Child Support legislation. It is submitted that the paramountcy principle focusing on a particular child would be counter productive to the universal concept of an administrative process which is formula based.

It is submitted that for the most part the ability to vary from a formula includes the concept of time spent in the household of each parent, the costs of travelling and like matters. It may be appropriate, if there is to be a presumption which applies, to take into account costs of re-establishment of children from one household to another.

Even if the presumption is not adopted, the LIV would be grateful to have the opportunity to address the Inquiry on the operation and administration of the child support formula. We hope that the LIV will have the opportunity to do this at any public hearing that may be held in Victoria.

The Family Law Section of the Law Institute of Victoria will be liaising with the Law Council of Australia (Family Law Section) who will be making a detailed submission on behalf of the legal profession in Australia.

Conclusion:

The LIV is appreciative of the invitation to respond to submissions and repeats its request that it be involved in any hearings in Melbourne.

The LIV accepts and commends the wording of the terms for the Inquiry in that there is the insertion of the underlying requirement "given that the best interests of the child are the paramount consideration".

The LIV is opposed to the concept of a rebuttable presumption as the process of effecting rebuttal will add to a difficult adversarial burden and in the opinion of the LIV will add to rather than lessen the necessity to seek Court orders through the process.

The LIV supports any legislative alteration which would lead to:

- (a) Early resolution through mediation and counselling processes including specifically appointed advocates (child representatives) to advocate on behalf of children;
- (b) A system more in the nature of an inquisitorial system as distinct from an adversarial system concentrating upon the positive aspects of each of the parents and an outcome based upon the realistic conditions of the present and future life of a child and on the existing circumstances facing each of the parents.
- (c) Subject to constraints on leave to intervene in proceedings, a possible constraint being a requirement of the court to conduct a preliminary determination as to initial bona fides and merits, persons other than parents who can establish a constructive nexus with a child independent of the parental nexus have the right to make appropriate application.

Consideration be given to greater resources being allocated at post-separation and pre-litigation stage for early dispute resolution process with advocacy available for the child to exercise directly or via an advocate a result which reflects the child's best interest.

The LIV has become aware of the fact that many groups in responding to the Committee have raised a number of issues which are strictly outside the terms of the Inquiry. It is understood that these issues include submissions relating to individual judicial conduct and assessment, protective services, violence, court processes, mediation and a range of other issues. In presenting this submission the LIV has contained its submissions to the terms of the Inquiry but is happy to provide personnel to response to specific questions from members of the Committee, if desired, or otherwise to respond to issues raised at any public hearings.

Yours sincerely,



BILL O'SHEA
President