Committee Secretary
House of Representatives Standing Committee on
Legal and Constitutional Affairs
Parliament House
Canberra ACT 2600

18 July, 2005

Dear Ladies and Gentlemen,

Thank you very much for your correspondence having granted me the extension to the 18th of July to respond to the Exposure Draft of the Family Law Amendment. I spent the weekend with my children, therefore I had very limited time to work on this. Please see my comments below. In the current proposals I see a historic opportunity being missed in correcting the statutory base upon which the family and ultimately society rests. Please consider my suggestions on their merits.

SUBMISSION to the
Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005

Preamble
The book of Nature is written in a way, that children are inseparably both: a responsibility and a source of joy. The responsibility, as well as the joy should be borne and shared equally between the two biological parents. Responsibility is discharged by fulfilling parental duties, performed primarily by the combined means of providing financial means and giving personal care. Joy is experienced through spending time with the children. A parent can only be expected to wear more than an equal share of the financial burden to the tune of his/her unwillingness to perform half of the personal care. It is also unjust to deny a parent the joy proportionate to the burden he/she carries or is willing to carry. As long as one parent is willing to discharge half the share of the parental duties, the other parent should not be allowed any demand on him/her whatsoever.

Also, children have equal rights to both of their parents. The parent, which tries to deny them this basic right, should be brought in line by law.

In principle

The Family Law Act 1975 is wrong both: 1) in principle and 2) in application and 3) lacks transparency.

1)The wrong principle is the no fault system. It cannot be applied beyond the point of granting a divorce. When it comes to children and financial issues, the proportion of fault must be established and taken into account, so the principle of protecting the innocent and "punishing" the guilty can be upheld. The law allows for the truth to be suppressed by order of judiciary. Suppressing the truth and perpetuating injustice works to undermine the main cohesive force of society, being justice.

2)Lack of precise definition given to key principles, such as what is the best interest of the child allows for injurious outcomes. Way too much is left to the discretion of judges, who's beliefs often contradict the beliefs of that majority, on whom society relies for the

production of continuing generations. Children's issues are not decided on their true and practical merits, keeping a defined preferred outcome (children's interest) in sight, but on legal arguments.

13)Family law -via its section 121 "the secrecy code"- is administered outside of public scrutiny.

What flows from the principle is:

*no fault principle not to be applied beyond granting a divorce

*law must be created aiming to establish the truth and decisions to be made on truth and based on desired outcome

*precise definition must be given to key concepts such as the best interest of the child and 68 factors describing the practical, tangible issues as black and white as possible

*law must be based on the protection and needs of the future generation

*system must be open to public scrutiny

Relying on the recommendations of Every Picture Tells a Story (EPTS)

Rejecting 50-50 time share of parenting time based on EPTS is wrong, because EPTS does not reflect the contents of the submissions received. There were 731 submissions in total. 1338 submissions could be read. There were731 submissions for shared parenting (meaning 50-50 residency) and 401 against. There were 206 submissions that did not address the terms of reference directly. Relying solely or even pre-dominantly on that report is highly unlikely to produce an outcome with the desired benefit to children and society. Currently there is no better fix idea in public domain than a half share of parenting time as a starting point. **Alternatively, in cases where both parents want to be primary caregivers and no agreement is reached between them -in serving the best interest of the children- male children should be placed under their father's primary care and female children under their mother's primary care the latest at the age of entering school.**

On the draft legislation in general:

The proposed changes do not address any of the fundamental flaws of the current statutory base upon which the Australian Family ultimately rests. The proposed new system enlarges the "divorce industry" further burdening society with the additional costs of it. I run the risk of saying, that the results, if changes implemented as proposed will not be in proportion to costs. Instead of the proposed, merely cosmetic changes the underlying principles should be corrected. The proposed changes leave the current incentives in place for wemen to break up families for the enormous benefit they gain through property settlement (justified by being made residential parents), and ongoing out of proportion child maintenance, what they can spend without scrutiny. From the children's point of view, if the proposed changes become law, the currently stolen generation will be stolen to a somewhat lesser extent.

Comments on the draft changes:

The proposed changes would not be sufficient to correct the errors or prevent them from repeating as identified in the actual case used to illustrate some errors of law in the Appendix. The identified obstacles currently in the way of ruling for the best interest of the child are in italics in the Appendix. They are repeated below for quicker access.

The by case study identified obstacles in serving the best interest of the child are:

not acknowledging the bread winning as a share of care giving, protecting a status quo

the best interest of the child, being undefined allows for a child to be in the primary acre of the parent, who's parenting he can not only benefit less from, but who has already psychologically harmed the child

empty legal principles with no practical benefit to the child are upheld against practicalities

"match-fixing"

the truth is suppressed by court order

the protection of status quo, disregarding the truth, hiding behind meaningless legal argument

making finding against fact, by relying on the results of the match-fixing

the application of a merely legal principle of no sufficient change in circumstances; disregard to fact and practicality; sufficient change in circumstances undefined; judge's permitted discretion too much

Body of Comments

Key issue:

Page 3 line 23; 26 and elsewhere in the draft -best interest of the child-

I found no precise definition as to what the law proposes to be the best interest of the child, not even at section 68 factors. It needs to be precisely defined, and the law must demand judges to evaluate the competing proposals available to the child on merit. The issues for definition should be: parenting record of parents; effect of parents character is likely to have on the child (parent as an example); what the child can learn from the parent; housing provided; education provided; each parent's vision for the child and ability to work towards it; available resources etc.

Having to serve the best interest of the child must be made a paramount and all overriding principle of the law, overriding any procedural, secrecy, privacy and other considerations. Making having to serve the best interest of the child alone is like creating a toothless tiger, because the best interest can only be determined based on the truth and without the necessary information on the facts the truth cannot be established.

Page 10 line 21; 22

Abuse of the child should be extended to psychological abuse including alienation

Page 10 line 25

'Interim order' should not be disqualified from the presumption, because if it is, it is inconsistent with the serving of the best interest of children, as

a) interim stage can currently stretch to years, what can be further stretched by a litigating parent.

b) interim stage creates the status quo, what the law intends to uphold, but in

any event the decision made at interim stage can become the base for arguing that parenting orders (right or wrong) shouldn't be changed in order to provide stability to the child. If the presumption does not apply at interim stage, it may as well not apply at all!!!

Page 17 line 2

Substantial time must be specified

a) a minimum time of not less than a 100 days should be specified if the other parent wants it

Not withstanding

b) allowing time for the beneficial activities the parent intends to engage the child in e.g.:holiday travel, allowing the child to develop and maintain certain interests, hobbys or be supplementing education etc. Again competing proposals to be judged on merit and benefit to the child. One parent may wish the child to be with him/her with no plan, the other may compete for that time by taking the child to a holiday or simply to a maths-coach or swimming lessons. The child should spend maximum time whare she/he benefits more.

Page 17 line 8

Not reasonably practicable is undefined and leaves too much open to interpretation, allowing dangerous level of discretion, what is currently a main problem. Needs to be defined or left out if it cannot be.

Page 17 line 10

Parenting plan must mean a parenting plan, that was made with the agreement of both parents, needs to exclude mere court orders. The wording must be careful to definitely avoid the current situation where a child order cannot be changed unless some condition is met (such as currently "sufficient change of circumstances")

Page 18 line 32

The benefits must be based on principles of common law, long standing principles, not trends

On 68 F in general

Currently it lacks any precision in definition. It needs to be precisely defined, and the law must demand judges to evaluate the competing proposals available to the child on merit. The issues for definition should be: parenting record of parents; effect of parents character is likely to have on the child (parent as an example); what the child can learn from the parent; housing provided; education provided or credibly intended; each parent's credible vision for the child's future and ability to work towards it; available resources etc. - or else how does the best interest of the child served?

Page 23

Standard of proof. Currently there are different standards of proof in Western Australia and elsewhere. The two need to be legislated into line.

Page 23 line 19

A reasonable excuse could be defined in relation to effect

Page 24 lines 27-31
and Page 26 lines 22-35

Make up contact needs to include "penalty" contact !!must explain, nothing rel to this in case illustr.!!

1)Granting make up contact alone does not discourage the parent from breaching contact orders again.

1)a. Make up contact needs to be awarded at earliest possible similar quality time, as children grow up, lost time cannot be brought back.

2)Quality of time lost due to contravention must be considered. E.g.: child and other parties miss out on going for a long weekend trip, because child was not made available at all, or for the first day, or on time and the trip was not worthy of making due to shortened time - no good to give the 5 extra hours or extra day, if the same quality time that was lost cannot be re-created. The same quality time needs to be made as make-up time. If the child missed out on a long weekend trip due to being made available for contact 5 hours late, a full long weekend needs to be given as make-up, so the planned long weekend trip can take place, otherwise parents engaging in frustrating contact win in their ulterior aims.

Penalty contact of similar quality (opportunity) needs to be also awarded over and above the ordering of make-up contact. Penalty contact should be time lost times one, on first offence; time lost times 2 on second offence; time lost times 3 on third etc.

Page 24 lines 33-35
and Page 26 lines 22-35

Contradiction. When contact was ordered in the first place, it was in line with considering the benefit of the child, therefore making up the loss of it cannot be contrary to the best interest of the child. It only allows contraveners to come up with arguments, waste resources and allows the application of judicial discretion, what is not desirable. Best interest is -again- undefined.

Page 35 line 14

Justification of costs seems to contravene the principle of serving the best interest of the child.

Page 37 lines 6-7

Extremely dangerous should not be included in current form. It allows for disregarding crucial evidence at the whim of a judge. How can the best interest be determined if evidence can be disregarded?

Page 37 lines 18-19

Evidence on any issue needs to be allowed from both sides, or else how can the truth be determined

Page 38

The contents of that page amounts to what cricket calls "match fixing" , what the precedent case makes clear as disregarding evidence would be enshrined in law if that piece of proposed law is enacted. All the good work in making the best interest of the child the compulsory primary consideration could be nullified by the proposals on that page

Other important issues

1)The law needs to be made uniform throughout the Commonwealth of Australia. The Family Court of Western Australia cannot remain a "no-mens land", as it currently is. The WA Attorney Generals have claimed, they have no jurisdiction over it as it is a Federal Body and past Commonwealth Attorney General claimed, he had no power over it, as it is State Body. This confusion needs to be cleared up.

2)Provision needs to be made for existing court orders to be speedily re-negotiated in light of the amended law. (Children grow up, lost time cannot be recreated.)

3)The current law does not have the best interest of the child as a consideration the judges must satisfy. The current law has been in force for 30 years and has produced a number of precedent cases, which are today used as authorities. They should be all scrapped as authorities.

Appendix
Actual Case to illustrate the point that the Family Law Act 1975 currently works in a way, that it can and does disregard the interest of the child altogether from the beginning of the process through to and inclusive the Full Court of the Family Court of Australia.

-The mother, who has [redacted] booked for her by the father, leaves the matrimonial home after less than [redacted] of marriage with the less than [redacted] to an unknown address without any event of violence or morally acceptable reason. The child was never breast-fed, is removed from the father's house to [redacted] and is supported from the [redacted] alternative option was to live/share residency with [redacted] father in the house [redacted] was borne into and be supported by the father's income. At that time all opinion by health professionals indicated that the child was developing as normal.
-Father initiated proceedings in the [redacted] asking for a 50-50 shared custody. A magistrate ruled, that the child is to reside with the mother, reasoning that the deciding factor must be, who had the bigger share of the care of the child. The argument, that if the father didn't work to earn an income, he would have had more than an equal share of the care is not considered. The creation of yet an other half stolen child was in the making.

Incorrect principles of law: *not acknowledging the bread winning as a share of care giving, protecting a status quo, which was created by unfair means*

-The mother keeps contravening contact orders and contravention proceedings follow. It becomes clear for the mother, that the court will order some contact between father and child and enforce some of it, so the mother applies for permission to [redacted] with the child. Father applies for residency of the child, detailing the benefits the child would have in his care.
-Final orders are made, providing residence of the child to the mother with certain orders for contact and property settlement, but disallowing the mother to [redacted]

[redacted] The judge notes, that the mother has no interest in fostering a relationship between father and child.

Incorrect principle of law: *the best interest of the child, being undefined allows for the child to be in the primary acre of the parent, who 's parenting [redacted] can not only benefit less from, but has demonstrated to be likely to harm the child psychologically.*

-Mother keeps contravening contact orders and is found guilty.
-All proceedings the father initiate, lead nowhere, the court using the reasoning that by law the status quo must be protected and upheld.

Incorrect principle of law: *empty legal principles with no practical benefit to the child are upheld against practicalities*

-The wife appealed against the final orders and the [redacted] interfered with the orders and ordered that the application for final parenting orders be remitted to a hearing before a judge of the [redacted] based on the reasoning that the single judge didn't consider the competing proposals as [redacted] proposals. The [redacted] also cancels all contact orders made by the single judge.

-By the time of the remitted hearing is scheduled, [redacted] is not adequately addressed by the mother; [redacted] developmental problems are ignored and the child is diagnosed by a clinical psychologist as [redacted] due to the mother's alienation practices. The father has the above documented by health professionals and raises concerns, that the child, who [redacted] is not toilet trained; cannot dress and feed [redacted] and lags with [redacted] development will not be ready to commence [redacted] education as age appropriate. A judge [redacted] the scheduled trial on the day, [redacted] orders the appointment of a child representative; halves the child's contact at the time with the father and sets the case on track for future hearing. In short: he "fixes the match" and injures the child (the child, who was on contact [redacted] and had regular scheduled activities, goes on contact only [redacted].

Incorrect principle of law: *"match-fixing"*, the best interest of the child could only be determined based on the truth, *the truth is suppressed by court order.*

-The child representative appoints a few experts to compile reports on the child's development and progress. Those opinions agree, that the child's commencement of age appropriate education is not in jeopardy in the mother's care.
-On the day of the remitted hearing, the judge states, that [redacted] but conducts a [redacted] because in order to establish if there is sufficient change she needs to hear the evidence. The trial is conducted, centred around the evidence commissioned by the child representative's entourage, and the father's evidence from clinical psychologist and child paediatrician, as well as other evidence are ignored.
-New orders are made, leaving the child in the mother's care, rejecting [redacted] as often and for as long as it takes, but ordering the mother to address [redacted] and ordering her to address other developmental delays.

Incorrect principle of law: *the protection of status quo, disregarding the*

truth, hiding behind meaningless legal argument, that the health and developmental issues the father raised, and could establish, do not constitute adequate change in circumstances and *making finding against fact, by relying on the results of the match-fixing* (being, that the child commencing schooling as age-appropriate schooling is not in jeopardy)

-Mother continues to frustrate and contravene contact orders and is found guilty on numerous occasions and does not address the child's developmental delays as ordered. Child commences [redacted]

-Father forces a new trial on the bases, that the child is now proven to be worse off residing with the mother and asks for being made primary caregiver, in an arrangement of the child living [redacted] with alternative parent. Father brings proof to court in the form of photographic evidence, [redacted] what the child spends in his care. This is the best evidence the father can provide in the "match-fixed" environment. The father has a demonstrated positive track record in parenting by the fact, that he has [redacted] from a previous relationship, has almost everyday contact with [redacted] pays half [redacted] private school fees and related expenses and solely provides [redacted] There is no family court file or child support agency file in relation to [redacted] ordering to do any of what he does.

-Following the trial orders remain the same, based on the argument, that there is no sufficient change in the circumstances. The judge makes her point as [redacted]. The mother's ardent contact frustrations and denials are no change in circumstances, as the original trial judge established, that the mother has no interest in fostering a relationship between father and child.

Incorrect principle of law: *the application of a merely legal principle of no sufficient change in circumstances; disregard to fact and practicality; sufficient change in circumstances undefined; judge's permitted discretion too much.*

-Father appeals to the Full Court of Australia, arguing, that the child's documented progress in the mother's care is not satisfactory; that the mother doesn't provide the necessary assistance to the child to overcome [redacted] problems, not even the ones court ordered her to attend to etc., the father is arguing based on practicality and also based on, what he calls principle necessary if the Full Court wants to help the child, as from the start of his submission to the Full Court:

> "a)the **best interest of the child is the paramount consideration,** meaning primary and overriding consideration to which **all else**, that hinders determining [redacted] best interest, including procedural matters **must give way.**
>
> b)the best interest **can only be determined by having the benefit of the truth** and considering the competing proposals on their merits
>
> c)a **child cannot be disadvantaged** in any way due to, or as a result of [redacted] **parents not having legal training and/or lack economic means of obtaining learned counsel.**

None of the above seems to have any influence on the Full Court. It becomes clear from the judges' input, that an order can only be changed if there are sufficient change in circumstances and a trial judge went beyond the allowed discretion, so basically the law

cannot change the existing residential orders, or parenting orders in substance.

The father argued, that if change in circumstances was the only base upon which an order can be changed, then the best interest of the child couldn't possibly be served if the original order was in error, by placing the child into a care, where the child was harmed, as long as the child is kept on being harmed, therefore the requirement of the law, being serving the best interest of the child couldn't be fulfilled. The reply to this argument was unwillingness to comprehend the contents, and when the father explained it the 3rd or 4th time with slightly different wording, it was said, that serving the best interest of the child is not the law. Full Court reserved it's decision, but the child in question should nurture no hope for the better.

Sticking points of the law: *the maintenance of the status quo at all costs; using so called legal requirements (change in circumstances) to sidestep practical issues and facts.*

The result of [redacted] of litigation in all the family courts from the child's point of view is, that [redacted] lives with his mother in [redacted] (meaning surrounded by people of the worse social behaviour and example) -when [redacted] could live in a family home (meaning in a social environment of prosperous families)-; [redacted] is [redacted] behind age appropriate education, not doing well and does not receive coaching -when [redacted] could attend the same private school, [redacted] and receive all the coaching and assistance [redacted] could benefit from-; [redacted] has a very meagre and eventless childhood in the mother's care -when [redacted] could develop [redacted] interests ([redacted] in the father's home and workshop and have very eventful and interesting times via regular holiday trips etc. In summary [redacted] is **deprived of reaching [redacted] potential** with the blessing of the full extent of the law.