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House of Representatives Standing Committee
on Family and Community Affairs

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Secretary:

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

Submission to the Inquiry into child custody arrangements in the event of family separation

(a) given that the best interests of the child are the paramount consideration:

- *(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; and*
- *(ii) in what circumstances a court should order that children of separated parents have contact with other persons, including their grandparents.*

(b) whether the existing child support formula works fairly for both parents in relation to their care of, and contact with, their children.

(c) with the committee to report to the Parliament by 31 December 2003.

Please accept this submission to the Inquiry on my own behalf. I am a man with professional experience as a lawyer and formerly as a crisis counsellor working with both men and women over many years. I have worked most in the area of family law and have experience with both victims and perpetrators of domestic violence. Currently I am the Acting Director of the Southern Communities Legal Education Service (SCALES) and I refer to the submission made on behalf of that organisation.

Part of my background includes doctoral research that examined the history of masculinity in the Australian legal system. The title of my doctorate is *Marriage Masculinity and Law in Australia, 1900 – 1999* (University of Western Australia, 2001). It analysed the way that family law has been created by politicians and interpreted by the courts in many cases to force onto society a certain perspective. Up until the 1970s there was a strong emphasis on the man's perspective, especially in 'matrimonial law' disputes, and that was consistent with the prevailing patriarchy. Families were headed by the man and this was not controversial in most decades during the twentieth century.

In 1975, Australia introduced fault-free divorce, along with most other Western countries around the same time, and this enabled many women to leave their husbands without risking prosecution for the matrimonial offence of desertion. Marriage became more consensual rather than obligatory. However many men were not psychologically prepared for this introduction of formal equality between husband and wife. Some men continued to think that the wife should obey the husband in most matters.

Since the 1970s there has been a number of active men's groups that oppose the 1970s reforms as 'feminist' inspired. These reactive men's groups increased dramatically following introduction of the Child Support scheme. It appears symptomatic of this kind of men's group to distrust the family court, legal aid commissions, the child support system and to often accuse women of falsely alleging domestic violence for ulterior motives.

Question a(i): a rebuttable presumption of joint residence?

Given this background I oppose the introduction of a rebuttable presumption of joint residence.

I would oppose any presumption in family law regarding children, because the best interests of many children could be compromised by imposing any rule across the board. We cannot assume that parents will be reasonable and agree to another arrangement when joint residence is not appropriate. Many men for example would recognise that joint residence would reduce their child support obligations and try to insist on joint residence regardless of their abilities to parent or the appropriateness of that arrangement for their children.

Imposing joint residence on all separating couples symbolically turns children into chattels. It would create similar problems to imposing a presumption of 50/50 division of property in all cases. This kind of thinking assumes a level playing ground and that everyone has equal resources, similar personal capacities and access to the law if they need it. In fact, there is still a lot of inequality between the sexes, despite equality principles and anti-discrimination laws. Most men earn significantly more than most women. Most mothers are the primary care givers to most children, and most fathers are the principle providers in families and many do not share the burden of direct parenting tasks.

We also cannot assume that there is enough legal aid capacity for those individuals who would need to go to court to rebut the presumption of joint residence and cannot afford a lawyer.

A rebuttable presumption is not the answer.

What we need is some way to encourage men to get more involved in parenting **before separation**. A rebuttable presumption of joint residence risks allowing men to be less involved with their children. Many men would have less incentive towards developing parenting skills and engaging with their young children if they believed they did not have to. Some would think it does not matter what they do, they will get joint residence anyhow if separation occurs.

The rebuttable presumption of joint residence would return Australian society to something like a pre-1975 situation, where the law favoured the man's point of view in the majority of cases. That would not be an improvement but a dangerous change given the current views in society. Many men would feel empowered, that they are the head of the family, and their wife

should obey them 'or else'. Such attitudes could well lead to increased rates of domestic violence. In some cases, women in abusive relationships would put up with the violence instead of objecting, or leaving or reporting the violence to police because of fear of 'losing' their child under a joint residence presumption.

The parties who would benefit from any presumption of joint residence in many cases would be the ones with the greatest resources, as they are better able to defend the presumption if the other party raises a challenge to it. If a mother for example opposed the joint residence yet could not persuade the father to agree to another arrangement, the only option would be filing an application in court. This would increase hostility between the parents, and be damaging to children's interests in the short and long term.

At the least, there would be a significant increase in the number of family law disputes and calls for increased funding for Legal Aid and Community Legal Centres. The effectiveness of ADR mediation in resolving disputes would be compromised because the people would believe that the paramount principle is to be applied subject to the presumption of joint residence.

Question a(ii): contact with other persons.

I believe the law as it applies at the moment regarding contact with children is the best of possible options. Maximising the discretion available to the courts is the only way to ensure the best outcome for children in the greatest number of cases. Ensuring judges consider a range of factors in that process, including the option to consider any other matters relevant to a particular case, appears to be the best way to guide the discretion of judges towards the best interests of the children. The only qualifying factor is the varying knowledge and wisdom of the judges who may well have prejudices and cannot be controlled in *how* they make their considerations. Research on that should consider ways to provide education to judges, rather than the current system of political appointments from a panel of competent legal practitioners.

Question b: the child support formula

The current child support system is complicated and expensive but is probably the best of possible systems. Both parents should remain responsible to contribute to the best of their ability to the costs of all their children until they are at least 18 years. Any other arrangement would risk returning the legal system to recognising fault, and increase the burden on the tax payer to compensate for the liable parent's refusal to maintain their child.

Yours sincerely,

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