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AUSTRALIAN ASSOCIATION OF SOCIAL WORKERS

**Submission to the House of Representatives Family and Community Affairs
Committee**

**Inquiry into child custody arrangements in the event of family
separation**

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WHO ARE THE AUSTRALIAN ASSOCIATION OF SOCIAL WORKERS?

Australian Association of Social Workers (AASW) is a national organisation representing over 6,000 social workers in Australia. Our members work in both government and non-government practice, research and policy settings, providing extensive knowledge and expertise to the AASW on various social issues.

The membership is represented by ten branches located in each state and territory of Australia, including additional branches in north Queensland and the Hunter region of NSW. Each branch has a representative on our Board.

The AASW represents issues that its members believe are of primary concern to the social work profession, at the national level through:

- The development and maintenance of a Code of Ethics and a subsequent complaints process
- A commitment to professional development for social workers
- National committees and working parties including a National Social Policy Committee
- Contributing to the Federal Government's policy and program development via submissions
- Advocating for the rights of the disadvantaged and/or marginalised through media releases and the development of position papers by the Association
- Networking and forming partnerships to achieve positive outcomes for disadvantaged and/or marginalised people including representation on Boards of other peak organisations.

The AASW has developed its own policies and evaluates social policy in accordance with the following values:

- **Human Dignity and Worth** – The social work profession holds that every human being has a unique worth and that each person has a right to well being, self- fulfillment and self-determination, consistent with the rights of others.
- **Social Justice** – Each society has an obligation to pursue social justice, to provide maximum benefit for all its members and to afford them protection from harm.
- **Service to humanity** – The social work profession holds service in the interests of human well being and social justice as a primary objective.
- **Integrity** – The social work profession values honesty, reliability and impartiality in social work practice.
- **Competence** – The social work profession values proficiency in social work practice.

Introduction

The AASW has many members working in the Family Court system, and numerous other services involved in addressing issues of family separation and subsequent living arrangements for children. Our members are therefore well aware of the difficulties that families might experience in making decisions for their children following a relationship breakdown. However, this inquiry has come as a surprise to those who work in the area, particularly as it is not clear from the terms of reference what the Prime Minister is seeking to determine from the inquiry. The terms of reference appear to presuppose a need for the state, or its legal systems, to determine living arrangements for a child following family separation. This is despite the fact that currently only 5% of applications to the Family Court result in a child's living and contact arrangements being decided by a judicial officer.¹ There are many more arrangements determined successfully outside of the court system with out legal intervention. Most often in these private arrangements, mothers retain primary care of the children. This is probably based on caring arrangements that existed in the relationship prior to separation and societal/cultural norms where the care of children has been left mostly to women (This is changing with younger men engaging in fatherhood more than their fathers and grandfathers, but does not seem to be reflected yet in care arrangements).

The inquiry also alludes to problems in the child support formula and its fairness for both parents. These two issues raised in the terms of reference reflect the long-term lobby of mens/fathers groups that perceive the family court system as biased against fathers. This is despite the fact that of all the decisions made by judicial officers about children, fathers win somewhere between a third and a half of cases, according to an AASW member with 19 years experience as a Family Court counsellor. The inquiry is apparently in response to the Family Law Pathways Advisory Group Report, but it would seem that it only picks up on issues raised by some men in that consultation process. In that report, both men and women agreed that a less adversarial system of resolution, with litigation either as a last resort or to manage violence was preferred, yet this is not reflected in the terms of reference and in fact this inquiry is proposing action that might result in more court or system involvement². Nonetheless, the inquiry in its terms of reference purports to hold the best interests of children as paramount, not simply advocating for non-residential fathers, and this will remain to be seen.

The Terms of Reference

Firstly, the phrase 'child custody arrangements' is quite ambiguous apart from being out of date with the current context and principles of parenting after separation, enshrined in the amendments to the Family Law Act of 1995/96. The terms *custody* and *access* were replaced with *residence* and *contact* seven years ago, to remove the concept of ownership of children by parents, and to elevate the rights and value of children in the Family Law process. Our submission will consequently refer to

¹ Justice Alistair Nicholson AO RFD Children & Children's Rights in the Context of Family Law, paper presented at LAWASIA Conference June 2003, Brisbane.

² Family Law Pathways Advisory Group Report, 2000, Commonwealth of Australia, Canberra

residence and contact and maintain our focus on what is in the best interests of children and their families. The AASW strongly advocates that children's rights and parent's rights and responsibilities can coexist, and do not necessarily negate each other, but that children's rights are of paramount consideration.

Secondly, we question if the Prime Minister is seeking information about whether parents should have equal time with their children or whether they should have shared legal responsibilities as parents. If it is the latter then this is already in place in sections 61B and 61C of the Family Law Act. We will therefore assume that he is in fact asking about the merits of a presumption of equal time with each parent. Amendments to Part VII of the Family Law Act 1996 already determined that 'it is the child's right to know and be cared for by both parents, to have contact on a regular basis with both parents and significant others and for parents to share duties and responsibilities concerning the care, welfare and development of their children'. This amendment also sets out the key to this debate: parents should agree about the future parenting of their children. It is this basic point that brings negotiations undone between parents, and no additional legislation is going to change the fact that some parents cannot agree on parenting for a multitude of reasons, mostly self focussed. Legislating or enforcing an arrangement does not guarantee the goodwill or capacity of parents to implement it.

Residence, Contact and Financial Support

The decisions facing parents about children post separation are in relation to residence, contact and financial support. In an amicable separation, these issues may be sorted out reasonably well and families needing support can access primary dispute resolution (PDR) services such as mediation and counselling to assist in these decisions. The Department of Family and Community Services should be commended for its recognition of the value of these services and its support and funding of PDR programs. Those services play an integral role in supporting families to consider children's best interests, and to assist in working towards arrangements that meet everyone's needs. They play an especially important role in assessing whether there is a risk for children with a parent due to violence, abuse or some other issue, and provide necessary information and guidance to parents on negotiating the legal system to ensure the safety of their children.

Of the very small percentage of parents who cannot come to an agreement about the care and residence of their children, there already exists comprehensive legislation to assist judicial officers of the Family Court in determining the best outcomes for children³. There is an argument proffered by some sections of the community that women use their role as primary carers to deny children contact with their fathers after separation. An AASW member states that while this does happen in some cases, in his experience other things also sometimes happen including:

³ Section 68F(2) of the Family Law Act sets out matters that must be considered when making a parenting order.

Fathers who are quite happy for the mother to care for the children, as long as he has reasonable contact and where mothers are happy for this to be the case. This would appear to be the majority.

Fathers who are quite happy for the mother to have total responsibility for the children conditional on the father not having to do anything with the children. Often mothers in this situation are quite angry at being left with total responsibility for the children

Mothers who alienate children against their father, and seek to deny him any contact

Fathers who alienate children against their mother, and seek to deny her any contact (if he has total responsibility for them)

Then there are scenarios where one parent is violent, has a drug addiction etc.

The inquiry seems to be focusing on only one scenario and this is of concern to the AASW. A solution based on this premise will be disastrous for families following separation.

Shared care, specifically equal time – Can it work and for whom?

Parenting after divorce requires that parents work out how to coordinate their children's lives between two households, how to divide child rearing activities, and how to remain parents united in this task yet no longer partners. This is a very difficult process reflected in the fact that in Australia in 1997, less than three percent of children with a natural parent living elsewhere had shared care arrangements.⁴ Some United States research has identified that mothers are more likely than fathers to remain the primary managers of a child's life in terms of health care, education, social life, clothing etc. regardless of the residence or contact pattern.⁵ The same research also identified that 'regardless of the living arrangements at the time of divorce, many children's residency will change, particularly those living in more complicated custody patterns'.⁶ The AASW considers that this is echoed in Australia. An AASW member makes two interesting points:

How the kid's time would be shared between parents is a problem. Some fathers (in particular) say they want equally shared care, but also want to be able to continue their careers, take overseas study or business trips with the other parent providing total care at those times, making up the time on their return. Any government-imposed regimen would have to have answers as to how such

⁴ ABS 1998 Family Characteristics Survey 1997. Cat No. 4442.0 AGPS, Canberra

⁵ Maccoby and Mnookin (1992) *Dividing the Child: Social and Legal Dilemmas of Custody*. Cambridge, MA: Harvard University Press

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situations would be handled, or the courts would need extra judicial officers to handle them on a case-by-case basis. There is also the question of whether the government is envisaging that Dad will notionally have care of the children, but subcontract the work out to his mother, sister or new partner, a common scenario.

In reality, little is known apart from anecdotal evidence, of how shared care arrangements for children are organised and how well they work. A recent pilot study by the Australian Institute of Family Studies identified from their data that shared care arrangements are 'logistically complex, and those who opt for shared care appear to be a relatively distinct subgroup of separated parents'.⁷ From examination of their study, the AASW would conclude that this distinct subgroup consisted of financially secure, well-educated and well skilled parents that had a high degree of cooperation. It raises the question of how this experience can translate to those living on low incomes or dependent on income support, and those with limited parenting skills and high conflict. The authors of the study themselves identify that 'a number of conditions – relational and structural – appear necessary to make shared care a viable option for separated parents including:

- Geographical proximity
- The ability of parents to get along as parents
- Child-focussed arrangements
- A commitment by everyone to make shared care work
- Family-friendly work practices – especially for fathers
- A degree of financial independence – especially for mothers
- A degree of paternal competence'⁸

What remains missing from the debate is how the shared care arrangement impacts on children and there is an urgent need for research in this area.

When should shared care not be an option?

Shared care must be assessed on parental capacity of each parent. Children are entitled to be cared for by parents who are capable of meeting their needs. Contact with a parent whose capacity is compromised needs to be adjusted to ensure the safety and well being of a child. Parenting capacity can be affected by substance abuse, mental illness, disability or chronic illness, violence or abuse, or can be limited by employment requirements such as regular travel or relocation interstate or overseas. This is currently a significant problem in the Family Court System as it takes some time to establish that a parent can't exercise appropriate care at times or at all. The issue would be made even worse for the capable parent and the children if it were assumed that children should spend equal time with both parents. Much time and money would be tied up proving otherwise even more than currently happens. A system that promotes safe and appropriate contact is much more desirable, as well as one that supports children emotionally. For example, Children whose parent has a mental illness or disability have

⁷ B. Smyth, C Caruana & a Ferro *Some whens, hows and whys of shared care* Paper presented to the Australian Social Policy Conference July 2003.

⁸ B. Smyth, C Caruana & a Ferro *Some whens, hows and whys of shared care* Paper presented to the Australian Social Policy Conference July 2003.

feelings of obligatory care and responsibility to that parent. Supported contact is important with an understanding of their emotions and counselling available if required or requested.

Family violence or abuse should clearly rule out shared care. Such an arrangement would make it worse for the victim and the children where the allegations are genuine, especially since one member informs the AASW that the Courts seem to operate from the assumption that the allegation is malicious unless violence is obviously evident. Contact arrangements that consider the safety needs of the victim and children are essential. The separation of powers between Federal and State needs to be examined in protecting children within the Family Court system. State child protection authorities are reluctant to investigate matters appearing before the Family Court yet the Court seems unable to appropriately address or respond in a timely nature where there is a risk of abuse to children in a contact or residence arrangement. The situation is confused by the level of parental conflict, and whether abuse claims are genuine or malicious.

The question must be asked if shared care meets the needs of the parents or the children. The AASW is unable to make a conclusion one way or the other however a member made the following observations:

‘I’d have to say I have seen shared care work well. However we live in a mobile society, and shared care is likely to come undone when one parent wants to move away because of a partner’s new job or something. On the other side, I have had kids say to me during family report interviews: “I don’t care who I live with, I just don’t want to live in this shared care situation any more”...If shared care were to become a legal requirement, I wonder what sanctions would be in place for a parent who did not want to care for their children in this way. If shared care is in the children’s interest, then a parent refusing involvement would surely be as culpable as one who denies the children’s rights by refusing contact? Then there are the problems of what activities will the children be involved in, who will provide transport, who will pay etc.’

Contact with extended family and significant others

In private arrangements, extended family contact is generally handled by each parent taking responsibility for contact between their children and their own side of the family. In court ordered arrangements there is already mention in the Act that children are to have contact on a regular basis with significant others, this can include grandparents or anyone else that is significant in the child’s life.⁹ The court currently has the power to assess and order such contact if requested and appropriate.

Circumstances that might lead to the court ordering such contact could be if both parents are neglecting to fulfill this contact arrangement for their children, and this is having a negative outcome for the children. It should not be driven by the needs of the significant

⁹ Amendments to Part V11 of the Family Law Act 1996

others but by the needs of the children. This should be identified through careful assessment involving all parties including the children.

The child support formula and its fairness for both parents

Child support is a very contentious issue but what should underpin any discussion on the issue is that child support payments exist to ensure the well being of children. A system is required to facilitate adequate financial support for children when their parents separate. The system is complex because it needs to take into account numerous complex arrangements for residence and contact. The current child support formula does take account of the possibility of equally shared care in a way that still results in the parent with the higher income making a contribution to the other. The current formula does not have the capacity to handle the costs of contact, but it equally does not have the capacity to handle the hidden costs of 'shared care'. As discussed earlier in this submission, mothers often continue to manage the medical, educational and social needs of their children regardless of residence and contact arrangements. This results in significant cost that is not factored into the child support formula. Costs associated with contact might include travel, food, accommodation and some expenses associated with entertainment. However, weighed against the ongoing costs of a residential parent such as suitable accommodation, transport, food, education, entertainment, clothing, healthcare, etc there is not much argument for reducing payments of non-custodial parents.

A very difficult situation faced by non-custodial parents is when they have second families. The financial responsibility towards their first family can place significant pressure on their second family. However, there isn't a simple solution to this issue. Does the system decrease the financial support to the children of the first relationship for the benefit of subsequent families? It hardly seems appropriate to make those children pay for the breakdown of their parent's relationship and the non-custodial parent's choice to have another family. There are also issues of payment avoidance by non-custodial parents that are not addressed by the current system. Some non-custodial parents use subsequent relationships for financial support therefore avoiding their financial responsibilities to their first family. Non-custodial parents who are self employed also continue to evade child support payments by false declaration of earnings. Evasion can also occur by parents failing to submit a tax return, which the CSA relies on for assessment.

Another issue with the current formula is that it is based on earnings from the previous financial year. This significantly disadvantages parents that have fluctuating incomes due to casual or contract employment, periods out of the workforce etc. It can result in over payments which are bad for all concerned as the parent paying the support is paying more than is required, and the family receiving the support must then experience a period without payment to make up for the overpayment. Financial disadvantage is subsequently experienced by all parties.

Conclusion

The AASW concludes that a good legal arrangement does not necessarily mean a good outcome for children. Due recognition must be given by Government to the many families that currently organise their own residence and contact arrangements with out legal intervention. The small percentage that remain would not benefit from a ruling that presumes equal time with each parent. These parents most often have a high level of conflict and differing views about parenting which is why they are before the court in the first place. It is highly unlikely in those circumstances that shared care would be successful. It could very likely result in a high number of cases returning to court due to a breakdown of arrangements. To extend this ruling to families that do not currently use the court system to decide arrangements is ludicrous, and risks making the entire separation process more litigious, tying up courts for longer and resulting in a higher level of conflict and poor outcomes for children.

While the current child support formula is not perfect it reflects international standards. The child support issues discussed in this submission are not easily resolved. Some non-custodial parents will never reconcile the fact that they have a responsibility to financially support their children whether they have contact or not. While the current formula offers a reduction in payments for contact of 30% or more nights a year, this still does not appease those parents who feel that they should not have to pay. This thinking is usually born around the notion that they are supporting their ex-partner not their children. Such attitudes are hard to change.

Before making a decision on the care arrangements for children, the AASW would strongly recommend more research into the impacts of differing arrangements on children to inform the debate. There is some empirical evidence available on parents' experience of shared care and some advocates for shared care are able to point out many benefits. Likewise, those who are against it warn of the potential harm to children. There is a lack of research available to support either argument without doubt. The AASW would therefore recommend that the government allow parents who are able to meet their own agreements outside of the court system to do so, supporting this pathway with a strong investment in PDR services. For those that are currently unable to agree without external direction, the AASW supports the recommendations of the Family Law Pathways Advisory Group Report that focuses on improving the system, provision of information and support, and considering the needs of each individual family.