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Date

22.02.2023

Dear Prime Minister and Attorney-General:

Exposure Draft to Repeal Shared Parenting—Throwing the Baby out with the Bathwater Summary

The proposed repeal of the presumption of equal shared parental responsibility and the related equal time and substantial and significant time provisions in the Exposure Draft¹ to amend the *Family Law Act 1975* constitutes an excessive and unsubstantiated policy response to what has been identified as the straightforward need for interpretative refinement and streamlined clarifications. The proposed approach throws the baby out with the bathwater and would give Australia the unwelcome distinction—and your government the unenviable legacy—of being the first country to roll back shared parenting contrary to established science and popular national support at a time when other countries are increasingly embracing shared parenting. These radical changes would undo the political and popular consensus of the past quarter century largely supported by your party in favour of retrograde shift to a thinly disguised and problematic 1980's style maternal preference policy. We respectfully lay out our analysis and suggested straightforward resolution below.

International Council on Shared Parenting (ICSP)

ICSP² is an international non-profit organization that promotes and disseminates scientific research on shared parenting and related sub-fields and makes evidence-based recommendations on the needs and rights of children whose parents do not live together. It organizes the International Conference on Shared Parenting.³

¹ *Family Law Amendment Bill 2023* Portal (<https://consultations.ag.gov.au/families-and-marriage/family-law-amendment-bill/>)

² ICSP (www.twohomes.org)

³ ICSP Conferences (<https://www.twohomes.org/category/conferences/>)

Shared Parenting

The 2019 ALRC Final Report⁴ undergirds the subsequent work of the Select Committee⁵ which together inform the Exposure Draft. As the ALRC findings and recommendations were premised on a tunnel-vision interpretation of shared parenting that largely downplayed mainstream science findings, we offer an expanded balanced view:

Social Science research has identified shared parenting as the best post-dissolution arrangement for children, including infants and toddlers,⁶ barring issues of child safety. In a summary of 60 studies, joint parental decision-making with substantive parenting time was found to improve child well-being on emotional, behavioural, physical, and academic measures across all income categories and independent of family conflict even up to hi-conflict levels.⁷ Shared Parenting is contra-indicated in domestic violence situations. Subsequent to the 2006 Shared Parental Responsibility Act, shared parenting has become largely settled science to the point where experts in 2017, in sharp contrast to the directions of the Exposure Draft, concluded scientific evidence is sufficiently strong for policy makers to consider a rebuttable presumption for shared parenting.⁸ Recent evidence indicates mothers in shared parenting arrangements have higher income and life satisfaction than their sole custody counterparts.⁹

Australian experience with shared parenting as documented in the comprehensive and exhaustive 2009 Evaluation Report¹⁰ of the 2006 Shared Parental Responsibility Act generally aligns with published data in other jurisdictions. Although not all results may be attributable to the sole effects of shared parenting, the evaluation report found a decrease in safety concerns¹¹ together with a 24% decline in court filings.¹² The Spanish experience with joint custody is associated with a dramatic 50% decline in domestic violence.¹³

⁴ 2019-02 *Family Law for the Future—An Inquiry into the Family Law System*, ALRC Report 135 (Final Report)

⁵ 2021-03 *Joint Select Committee on Australia's Family Law System. Improvements in family law proceedings*, Second Interim Report. (Note: Second Interim Report was subsumed into the Select Committee final "addendum" report issued 2021-11 as noted in para 1.7)

⁶ Warshak, R, *Social Science and Parenting Plans for Young Children: A Consensus Report*. Psychology, Public Policy, and Law, 20.1 (2014).

⁷ Nielsen, L. *Joint versus sole physical custody: Outcomes for children independent of family income or parental conflict*. Journal of child custody 15.1 (2018); for meta-analysis see also: Bauserman, Rt. *Child adjustment in joint-custody versus sole-custody arrangements: a meta-analytic review*. Journal of Family Psychology 16.1 (2002) and de Torres Perea, JM. *Recent developments in shared parenting in western countries* "The Routledge international handbook of shared parenting and best interest of the child (2021): 355-369.

⁸ Braver, SL and Lamb, ME. *Shared parenting after parental separation: The views of 12 experts*. Journal of Divorce & Remarriage 59.5 (2018).

⁹ Johnson, E. *Single Mom Income and Time-Sharing Survey (2021)* (<https://www.prnewswire.com/news-releases/single-moms-with-equal-time-sharing-earn-more-finds-new-survey-of-2-279--301254329.html>)

¹⁰ 2009, *Evaluation of the 2006 Family Law Reforms*. Rae Kaspiw, Matthew Gray, Ruth Weston, Lawrie Moloney, Kelly Hand, Lixia Qu et al.

¹¹ Parkinson, P. *Violence, abuse and the limits of shared parental responsibility*. Family Matters 92 (2013), p.13 ("The AIFS evaluation found—in interviews with about 10,000 parents, conducted on average fifteen months after separation—that a smaller number of parents had current safety concerns either for themselves or their children than had reported a history of violence or emotional abuse...The AIFS team also found that a history of family violence did not necessarily impede friendly or cooperative relationships between the parents...only 19% reported a continuing fearful relationship.")

¹² 2009 Evaluation Report, Fig. 13.1 (calculated 2005-06 18,880 applications to 2008-09 14,549).

¹³ Fernández-Kranz, D. et al. *Bargaining under Threats: The Effect of Joint Custody Laws on Intimate Partner Violence*. (2020) (policy increased the incidence of joint custody... from less than 11% of all divorces to 40% in just five years. ... led to a large and significant decrease in intimate partner violence [50%], with the largest effects among couples in which the mother was more likely to seek sole custody before the policy change.... the policy also led to a significant reduction in female partner homicides... we also find evidence of more police reports by victims of intimate partner violence with a significantly higher proportion of these reports ending in dismissals or non-guilty decisions by the specialized courts. We interpret this finding as evidence of strategic behavior by mothers who want to retain sole custody of their children").

This reflects the experience in the USA of Kentucky after passage of its strong presumptive shared parenting laws in 2017 which resulted in a 17% decline in domestic violence case filings.¹⁴ The qualitative assessment of 2013 shared parenting legislation in Arizona based on maximum parenting time provisions reflects no significant change in legal or interpersonal conflict between parents.¹⁵

While earlier analyses suggested that shared parenting prevalence had plateaued allowing the inference by detractors that it was not a popular post-dissolution arrangement, recent Australian data indicates shared parenting prevalence of 22% in Australia¹⁶ now mirror the international average of 22% based on data from 15 countries.¹⁷ The proposals in the Exposure Draft are not in line with the continued international growth and acceptance of shared parenting as the preferred post-dissolution parenting arrangements for children, nor with the popular support for the reforms expressed in the Evaluation Report.

Presumption of Equal Shared Parental Responsibility (ESPR)

Your government relies exclusively on the findings of the ALRC and the Joint Select Committee on Australia's Family Law System as the basis for the proposed repeal of the presumption of ESPR. In point of fact, neither support this proposal. The ALRC Report recommended clarification of the presumption¹⁸ noting ESPR had sometimes been conflated with a presumptive entitlement to equal shared care¹⁹ notwithstanding explanatory notes in the Act. The Joint Select Committee divided on removing presumptive ESPR²⁰ and recommended amendment without specific reference to repeal.²¹

We respectfully submit that repeal is an unnecessary and unsupported drastic step when the straightforward solution, as noted in the Government response to the ALRC recommendation,²² is simply to strengthen existing notes or add a clarifying clause to eliminate any confusion regarding automatic entitlements to equal shared care. We note other countries have adopted this straightforward approach.

¹⁴ Johnson, E. Data request made to Kentucky Department of Information and Technology Services (2023-01-31). (Calculated as additional case decline in 7 years following legislation (2017-2022) , 53%, compared to decline 5 years prior (2010-2017), 38% with 15 % incremental difference).

¹⁵ Fabricius, W. *et al. What happens when there is presumptive 50/50 parenting time?: An evaluation of Arizona's new child custody statute.* The Routledge International Handbook of Shared Parenting and Best Interest of the Child. (2021)

¹⁶ 2021-03 Joint Select Committee, para 5.96.

¹⁷ Colman, GC and Piskor GW. *Equal Shared Parenting International Innovations: Evaluating Myths and Stereotypes.* Association of Family and Conciliation Courts 56th Annual Conference, Toronto (2019-06-01)

¹⁸ 2019-03 ALRC Final Report, p.172 ("Section 61DA of the Family Law Act 1975 (Cth) should be amended to replace the presumption of 'equal shared parental responsibility' with a presumption of 'joint decision making about major long-term issues'")

¹⁹ Ibid, p.39

²⁰ 2021-03 Joint Select Committee, para 4.38.

²¹ 2021-03 Joint Select Committee. Para 4.40 ("The committee recommends that the Australian Government urgently draft and release an exposure draft of legislation which would amend section 61DA of the Family Law Act 1975 to address the current misunderstanding of the provision that equal shared parental responsibility equates to equal time with the children")

²² 2021-03 Government Response to ALRC Report 135: *Family Law for the Future – An Inquiry into the Family Law System*, p. 14 ("the Government will focus on improving drafting to minimise confusion between this concept and the concept of equal time with children whilst preserving the agreed principle")

Shared Care- Consideration of Equal Time and Substantial and Significant Time Provisions (Section 65DAA)

The Consultation Paper relies exclusively on ALRC recommendation²³ for repeal as the Joint Select Committee split²⁴ and did not make any committee recommendation on section 65DAA²⁵ and the Government Response disagreed with the proposition that a drastic policy U-turn was warranted.²⁶

We note that Joint Select Committee deliberations were undertaken from the perspective of “what the committee considers to be the most pressing issue—assisting parties to those three per cent of highly complex family law matters that are expected to require resolution by the courts.”²⁷ We submit that narrowly focused policy deliberations that sideline the majority of situations make for bad law that throw the baby out with the bathwater.

The Exposure Draft is ultimately rooted in recommendations of the ALRC Final Report. The ALRC Report makes a tendentious case for repealing even the currently modest “consideration” of parenting time in favour of reversion to the problematic overly broad judicial discretion of the last millennium that triggered major policy changes in the 2006 reforms. Using a “tail wagging the dog” rationale, ALRC argues that confusion regarding equal parenting time provisions or justifies total repeal rather than corrective redrafting or public education as legal prudence would suggest.

The ALRC Report advances the notion that parenting time considerations may affect judicial deliberations on child safety. This is logically incorrect as current legislative wording makes it clear that any parenting responsibility and shared care considerations are conditioned on child safety considerations.

Most tellingly, the ALRC Report falls back on anecdotal evidence, personal narratives, or individual opinions related to shared care while all but ignoring the 2009 Evaluation Report of the 2006 reforms which to this day stands as the most comprehensive scientific assessment of shared parenting undertaken by any country, and reforms which were endorsed by the Labor Party.²⁸ The conclusions of the evaluation bear summarizing to provide a balanced perspective:

- “The philosophy of shared parental responsibility is overwhelmingly supported by parents, legal system professionals and service professionals.”²⁹
- “The majority of parents in shared care-time arrangements reported that the reforms worked well for them and for their children. But up to a fifth of separating parents had safety concerns that were linked to parenting arrangements; and shared care time in cases where there are safety concerns correlates with poorer outcomes for children.”³⁰

²³ 2019-03 ALRC Final Report, p.176 (“Recommendation 8 Section 65DAA of the Family Law Act 1975 (Cth), which requires the courts to consider, in certain circumstances, the possibility of the child spending equal time, or substantial and significant time with each parent, should be repealed”).

²⁴ 2021-03 Joint Select Committee, para 4.39 (“The committee also considered the ALRC recommendation to repeal section 65DAA”).

²⁵ Dissenting view in addendum “Australian Labor Party Additional Comments”, p.134 (“1.36 Labor Members also consider that section 65DAA FLA should be repealed as recommended by the ALRC report and would encourage the Government to urgently respond to that report”).

²⁶ 2021-03 Government Response to ALRC Report 135, p.15 (“Not Agreed”). But note, “The Government also accepts the ALRC’s position that the legislation be redrafted to minimize confusion”.

²⁷ 2021-03 Joint Select Committee, para 4.11.

²⁸ Ludwig, J (2006), Second Reading Speech on Family Law Amendment (Shared Parental Responsibility) Bill 2006, Senate Hansard, 27 March.

²⁹ 2009 Evaluation Report, p.365.

³⁰ 2009 Evaluation Report, p.366.

The plain reality is that shared care arrangements have become an integral and popular part of Australian cultural and community mores notwithstanding any confusion³¹ about arcane and cumbersome legislative

wording. Shared care arrangements post-dissolution have grown to 33%³² with 22.2% having division of nights in the 35-47% range³³ consistent with the universal definition of substantive shared parenting. This places the prevalence of shared care in Australia in line with other advanced countries—on approximate par with North America; behind the Nordic countries, Belgium, France, and the autonomous regions of Spain; and ahead of Central and Eastern Europe.

Conclusion

While the case has been made for streamlining legislative wording, with respect, the rationale for repeal of the presumption of equal shared parental responsibility and the related equal time and substantial and significant time provisions is predicated on throwing the baby out with the water. If anything, advances in social science research and community thinking suggest that Australia should use this opportunity to advance from a “consideration” to a higher standard of policy preference parental responsibility and shared care with maximum practicable shared care barring issues of child safety.

Australia is viewed by many in the international community as the gold standard in progressive family law thinking not only for its principled approach to shared parenting but also for its recognition via its Family Relationship Centres (FRC) that divorce/separation is a socio-psychological issue more so than a purely legal one. Our hope for the children and parents of Australia is that this remains so.

Yours faithfully,



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³¹ We note that the potential for confusion from legislative wording was recognized in the 2009 Evaluation Report, p.366: “The new substantive parenting provisions introduced into Part VII of the FLA by the SPR Act 2006 tend to be seen by lawyers and judicial officers to be complex and cumbersome to apply in advice-giving and decision-making practice”.

³² 2021-03 Joint Select Committee, para 4.20 (“Based on the data provided by Services Australia, it appears the majority of child support payees (65 per cent) have more than 86 per cent care of their children, and the majority of payers (65 per cent) have less than 14 per cent care of their children.”)

³³ 2021-03 Joint Select Committee, para 5.96.