1. **The Commission for Children and Young People**

1.1 The NSW Commission for Children and Young People (‘Commission’) promotes the safety, welfare and well-being of children in NSW. The Commission was established in 1998 by the NSW Commission for Children and Young People Act 1998 (‘Commission’s Act’).

1.2 Section 10 of the Commission’s Act lays down three statutory principles which govern the work of the Commission:
   (a) the safety, welfare and well-being of children are the paramount considerations;
   (b) the views of children are to be given serious consideration and taken into account; and
   (c) a co-operative relationship between children and their families and community is important to the safety, welfare and well-being of children.

1.3 The Commission is required by s12 of the Commission’s Act to give priority to the interests and needs of vulnerable children.

1.4 Children are defined in the Commission’s Act as all people under the age of 18 years. The terms ‘child’ and ‘children’ will be used in this submission to refer to children and young people under the age of 18 years.

1.5 One of the principal functions of the Commission as set out in s 11 (d) of the Commission’s Act is to make recommendations to government and non-government agencies on legislation, policies, practices and services affecting children.

2. **Outstanding Issues raised in Commission’s Previous Submission**

2.1 The Commission has previously made a submission to the Standing Committee on Family and Community Affairs in relation to its inquiry into child custody arrangements in the event of family separation. A copy of that submission is appended to this submission marked ‘A’.

2.2 The Commission urges the Government to take account of that submission in its proposed changes to the family law system.

2.3 The Commission is concerned that the changes outlined in the Discussion Paper, ‘A New Approach to the Family Law System’ may jeopardise the best interests of children if parenting arrangements are
imposed without consulting those most affected, the children and young people concerned, and if child protection issues are not addressed.

2.4 The Commission’s comments on the changes outlined in the Discussion Paper are set out below.

3. Commission’s Comments on Discussion Paper

3.1 Parenting Plans

3.1.1 The Commission supports the provision of assistance to separating parents to cooperate in designing a workable parenting plan. A template or checklist can be useful in drawing attention to issues that need to be addressed. However, the Commission is concerned that the list of issues for consideration in a parenting plan does not include the views of the children concerned. Section 65F(2) of the Family Law Act, which sets out the factors that a court must consider in determining the best interests of the child, includes the child’s wishes. This provision is consistent with article 12 of the Convention on the Rights of the Child. A similar provision should be included in the parenting plan template or checklist. Taking account of the views of the children will optimise the parenting arrangements that are made by providing insight into the significant issues for the children concerned.

3.1.2 The parenting plan template or checklist should also make provision for ongoing input by children as their needs and circumstances change. It is important that the adaptation of a parenting plan to meet the needs and views of the children concerned is regarded as a natural development, not a ‘breakdown’ of the plan with enforcement implications.

3.1.3 The Commission notes that the Discussion Paper does not propose a presumption of equal parenting time. It does however require advisers to raise the possibility of equal parenting time with parents. It also requires the court to consider equal parenting time where both parents want to be the primary care giver. The Commission’s previous submission discussed the challenges to children that equal parenting time can entail (see paragraphs 5.8 to 5.12). It is important that any consideration of equal parenting time take account of both the advantages and the difficulties that it can involve from the perspective of the children concerned, and the fact that it may be suitable for children at certain points of their lives but not at other times. If the Family Law Act is amended to require consideration of shared parenting time then the amendment should also require the children’s perspective on shared parenting time to be taken into account.

3.2 Family Relationship Centres

3.2.1 The Commission strongly supports additional resourcing of appropriate services which promote the interests of children in separating families by focussing on their needs. It is important that additional resources and services are integrated with the existing network of services with the
knowledge and expertise in the area of family separation and do not diminish the resources available to those existing services.

3.2.2 The purpose of Family Relationship Centres is to assist separating families to agree on appropriate parenting arrangements for the future - rather than focussing on the conflict between the parents. Their services and resources should be available to and designed for the children affected as well as the parents.

3.3 **Equal Shared Parental Responsibility**

3.3.1 While the Commission supports the concept that parents share responsibility for their children, a requirement that both parents share the key decisions in a child’s life, regardless of how much time the child spends with each parent, should not become another source of conflict to the detriment of the child concerned. Again, the focus should be on the decision-making process that is best for the child rather than a fixed view of a parent’s ‘right’ to make decisions about that child. To that end, the views of the children concerned should also be taken into account as appropriate to their age and level of understanding.

3.3.2 If rebutting a presumption of equal shared parental responsibility involves one of the parents satisfying a court that there is evidence of violence, abuse or entrenched conflict then support services including legal aid to assist parents in that situation must be available and accessible. Significant decisions in a child’s life must not depend on a parent’s capacity to undertake court proceedings in situations of alleged violence, abuse or entrenched conflict. Allegations of this kind are complex and require close and sensitive investigation with child protection the overriding concern.

3.4 **Enforcement Provisions and Child Protection**

3.4.1 Whatever changes are made to the provisions relating to enforcement of parenting orders, it is essential that the best interests of the child remain paramount. Discussion of enforcement provisions requires consideration of child protection issues since breaches of parenting orders may be associated with allegations of child abuse.

3.4.2 It is disappointing that the Discussion Paper does not make any reference to the critical issue of child protection discussed in the Commission’s previous submission (see paragraphs 7.1 to 7.5). As cited in that submission, the final report of the Family Law Council concluded ‘[t]here is no greater problem in family law today than the problems of adequately addressing child protection concerns’. The Commission urges the Government to address child protection issues before making changes to the family law system.
3.5 **Provisions from Overseas Models**

3.5.1 As the Convention on the Rights of the Child states, the best interests of the child must be the paramount principle in all actions concerning children. Each child’s situation is different and deserves individual consideration. It is clear that for some children frequent and continuing contact with both parents will not be in their best interests. For that reason the Commission is opposed to amending the Act to follow the Florida legislation cited in the Discussion Paper which states that as a matter of public policy children should have frequent and continuing contact with both parents.

3.5.2 The current section 68F of the Family Law Act allows the court to take into account a range of relevant factors in determining a child’s best interests for the purpose of making appropriate parenting orders. Those factors include each parent’s attitude to the child and to the responsibilities of parenthood, which the court has interpreted as including promoting contact with the other parent. Subject to further discussion about useful overseas models, the Commission sees no reason to amend the current list of factors that a court should take into account or to interfere with the exercise of a court’s discretion to determine a child’s best interests.

3.6 **Changes to the Courts**

3.6.1 No consideration has been given in the Discussion Paper to reviewing the role played by child representatives. As the Commission stated in its previous submission (see paragraphs 6.1 to 6.4), the current review of the family law system provides the opportunity to re-consider the role of child representatives in determining the best interests of individual children.

3.6.2 As stated in the Commission’s previous submission, the Commission’s view is that a child representative should be required to act on a child’s instructions, rather than give advice on that child’s best interests, where that child is able to give instructions.

3.7 **Other changes**

3.7.1 The Commission notes that the Government has established a Child Support Taskforce to re-evaluate the child support scheme and that the Taskforce will report back in March 2005.

3.7.2 Changes to the family law system must take into account the impact of those changes on child and income support payments. If equal parenting time results in decreased child or income support for one of the parents, this may be a disincentive to agree to it. Children in single parent households are already at high risk of living in poverty. It is crucial that their economic well-being not be further compromised by changes to the family law system.