Family Law Council

24 September 2003

Mrs Kay Hull MP (Chair)
Standing Committee on Family and Community Affairs
Child Custody Arrangements Inquiry
Department of the House of Representatives
Parliament House
Canberra ACT 2600
Australia

Dear Mrs Hull

Inquiry into Shared Parenting by the House of Representatives Family and Community Services Committee Family Law Council Submission

I am pleased to provide you with the Family Law Council's submission **(Attachment A).**

I understand previous communication between the Council's Secretariat and your Committee Secretariat foreshadowed that our quarterly meeting was to be held in Brisbane on 27-29 August 2003. While the Council normally sits for two days I arranged for an extra day to be set aside to discuss the Inquiry and Council's response to it. I would like to thank you for the consideration your Committee has shown to the Council in recognising the special circumstances faced by Council in finalising its submission to your Committee.

You will note that while the Council concludes that an equal time presumption has significant disadvantages there are never-the-less several initiatives that are in a similar vein which it may be worthwhile exploring further.

One of these involves a revisiting of the contact order enforcement process. Council considered ways of better assisting parents, especially fathers, in terms of the contact arrangements sought and providing more assistance to non-residence parents to enforce their right of contact with their children.

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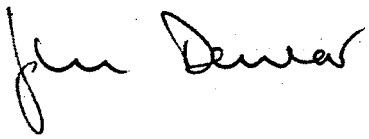
The Council would be happy to provide a more fully developed proposal should the Committee, after examining the submission, wish to pursue this line of reasoning.

Finally, if it could be arranged I, or a colleague on the Council, would welcome the opportunity to appear before the Committee at one of its public hearings.

Yours sincerely



John Dewar

ATTACHMENT A

FAMILY LAW COUNCIL

SUBMISSION TO

THE INQUIRY INTO CHILD CUSTODY ARRANGEMENTS

IN THE EVENT OF FAMILY SEPARATION

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Family Law Council

The Family Law Council (the Council) is a statutory body whose function is to advise and make recommendations to the Attorney-General on the working of the *Family Law Act 1975* and other legislation relating to family law. The Attorney-General appoints members to the Council and provides references to the Council.[1] The Attorney-General has given his permission for this submission to be lodged with the Inquiry. The content of the submission is, however, the independent view of the Council.

Members of Council are:

Professor John Dewar, Pro-Vice-Chancellor, Business and Law, Griffith University, Gold Coast, Queensland (*Chairperson*)
Ms Josephine Akee, Indigenous Consultant, Family Court of Australia, Cairns, Queensland
Mr Kym Duggan, Assistant Secretary of the Family Law Branch, Attorney General's Department, Australian Capital Territory
Ms Tara Gupta, Director of Legal Services, Department for Community Development, Western Australia
Ms Susan Holmes[2], Executive Director, Relationships Australia, Tasmania
Ms Kate Hughes, Head of Family Law, Legal Aid Office, ACT
Professor Patrick Parkinson, University of Sydney, New South Wales

[1] Section 115 *Family Law Act 1975*. For further information see <www.law.gov.au/flc>
[2] Ms Holmes contributed to the first draft of this submission but was unable to participate in its finalisation.

The following six agencies and the Family Law Section of the Law Council of Australia have observer status on the Council (with names of observers):

Australian Institute of Family Studies - Ms Ruth Weston[3]

Australian Law Reform Commission – Mr Jonathan Dobinson

Child Support Agency - Ms Sheila Bird[4]

Family Court of Australia - Ms Jennifer Cooke, and Ms Margaret Harrison

Family Law Section, Law Council of Australia – Mr Garry Watts

Family Court of Western Australia – Acting Judge Stephen Thackray

Federal Magistrates Court – Mr Peter May

[3] Mr Bruce Smyth attended the meeting which formulated this submission.
[4] Ms Yvonne Marsh attended the meeting which formulated this submission.

Introduction

This submission has been written on the understanding that the family law system must be seen in its social context. Despite the extent of separation in the community it is a time of great difficulty and upheaval for many adults and children. The family law system cannot always count on the pain and suffering of mothers and fathers being translated into the energy needed for constructive and protective parenting after separation. It is in the nature of this area of the law that difficult choices must be made between parents. Family breakdown results in loss, be it of parenting time, the opportunity to maintain close emotional bonds with children, or property.

While Council does not support the equal time presumption, for the reasons set out below, it does understand the motivations of those who suggest that such a presumption requires consideration. It believes that children's relationships with their parents should not be damaged because the relationship between their parents has ended. Accordingly at the conclusion of this submission Council has made some alternative suggestions for reform that may bear further consideration. These reforms might contribute to promoting the best interests of children and contribute to reducing the amount of anger, frustration, and hopelessness of parents dealing with family breakdown, whilst at the same time recognising that the fundamental focus of the law should be the promotion of the best interests of children and ensuring the safety of all members of the family.

Council comments with respect to Terms of Reference (a) (i)

(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;

General Comments

While Council does not support the introduction of an equal time presumption, it endorses what it takes to be the rationale of the presumption: that following separation a child's best interests are, in the absence of contrary factors, advanced by having two committed parents, in two separate homes, caring for their children in an atmosphere of civilised and respectful exchange.

Council acknowledges the legitimate wish of parents, and increasingly of many fathers, to play a greater role in the lives of children after separation. Council supports the goal of encouraging both parents to participate in the lives of their children, as Part VII of the *Family Law Act* currently seeks to do, providing safety issues have been considered.

Council notes that while time spent with children is a necessary condition for positive parenting to take place it is not the sole criterion. Merely increasing the time spent with one parent is not of itself sufficient to bring about positive benefits for the child. Rather, research indicates that parental co-operation, the *quality* of the parent-child relationship and its expression across a full range of activities is a central factor for positive child development.[5]

[5] Quality time that a child spends with grandparents and significant others may also greatly contribute to positive child development.

The Presumption – Uncharted Territory

The Council is concerned that the creation of a legislative equal time presumption would be to enter uncharted territory where no other comparable family law system has gone. Neither the United States,[6] the United Kingdom, Canada, nor New Zealand have an equal time presumption; their legislation is far more likely to reflect the objectives of the *Family Law Act*, which are to encourage shared parental responsibility for children.

In light of available evidence Council is of the view that a presumption of equal time is not the direction in which Australia should be moving to promote the best interests of children. Moreover, Council's analysis indicates that there are significant risks attached to such a proposal.

Council's analysis of the presumption resulted in six key issues being highlighted:

1 A presumption of equal time is at odds with a principle that decisions must be made in the best interests of the child

An approach to decision making based upon a legal presumption is very different from an investigation of what parenting arrangement is in the best interests of the child.

Typically a legal presumption is applied where a fact is to be established and rather than impose the costs of proving this fact when it is almost certainly the case, the law says 'take this fact as a given, subject to proof of facts to the contrary which rebut the presumption.'[7]

A parenting order is not a matter of bare fact. A decision about the well-being of a child should not be put in this category. The best interests approach is all about

[6] Council's examination of the various US jurisdictions suggests considerable misunderstanding of what are popularly thought to be 'joint custody' regimes. No presumption in the same terms as that proposed has been located in any US jurisdiction.

[7] Examples include the presumptions of paternity in the *Family Law Act*, presumption against intestacy, presumption of death, and the presumption of legitimacy.

treating each child as an individual and looking at their separate and distinct circumstances before deciding what parenting arrangement best serves that child.

To this end the *Family Law Act* provides a non-exclusive list of the matters a court must consider to determine what is in the best-interests of the child.[8] For example there may be particular considerations for a breast fed infant that are significantly different to the arrangements for a ten year old child. Of course, the age and level of physical dependency of a child are just two of the many crucial circumstances to be considered by the court before deciding what parenting arrangement is in the best interests of the child.

Two questions may be posed to illustrate the problems associated with the presumption:

i) ***Would a decision-maker determining the parenting of a child after the parents' separation be assisted by having to apply an equal time presumption?***

Relevant research suggests that the majority of separated couples will not have the resources in terms of time and infrastructure for equal time parenting.[9] The data on current post separation equal time parenting arrangements suggests that only 6% of separated parents in Australia share their children on such a basis. A significant number of these parents have high incomes and are tertiary educated.[10] This makes them a minority of the separated parent population. The question is then whether a presumption based on a practice that is not currently widely in use would put significant pressure on one parent to rebut the presumption. It would be most anomalous to require a court to proceed on a presumption that does not in fact apply in the majority of cases. Moreover, all litigants whose circumstances fall outside the presumption will be required to use scarce resources to rebut the presumption should the other parent insist on its application. This would be the reverse of the usual

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[8] Section 68(F)(2) *Family Law Act 1975.*

[9] Grania Sheehan, 'Financial Aspects of the Divorce Transition in Australia: Recent Empirical Findings', (2002) 16 *Journal of Law, Policy, and the Family*, 103.

[10] This information derives from a recent unpublished analysis of HILDA data conducted by Smyth, B, and Lixia Qu from the Australian Institute of Family Studies. See also Smyth, B, Caruana, C. & Ferro A, (2003) 'Shared Parenting: The views of separated parents with 50:50 care arrangements', *Family Matters*, vol 65, pp.48-55.

outcome of applying legal presumptions, which are designed to reduce disputes and minimise the cost of litigation.

The presumption is particularly inappropriate where interim parenting orders are sought (while awaiting a final hearing), especially in the typical case where the 'facts' alleged by each party are hotly contested. The Court decides these matters at short hearings without oral evidence and cross examination - 'on the papers'. Evidence of violent behaviour and other factors which might compromise a child's safety is generally not able to be tested at this stage of the proceedings. Current jurisprudence in interim matters generally favours the status quo unless there is a real risk to the child associated with that status quo. Although it is by no means ideal that the court must make important interim decisions without a full hearing, reliance on the status quo is much less likely to give rise to unfortunate outcomes, since it usually continues arrangements that the parents themselves have put in place for the care of their children. Hence applying the presumption would place the decision-maker in an invidious position as the full material necessary to rebut the presumption may not be available and there may be a consequent risk that inappropriate arrangements are made.

It follows that a decision-maker would not be assisted by having to start from a point that does not match the circumstances of the majority of cases that fall to be decided.

ii) Can a best interests approach be reconciled with a presumption approach?

Council considers the two approaches are contradictory. Conceptually, the legislation either contains a presumption which has a starting point of equal time or it contains a best interests test which assumes no starting point. To have one followed by the other is logically inconsistent. An equal time parenting arrangement is either in the best interests of the child or it is not.

2 Family Violence and Child Abuse

Council is concerned that a presumption of this kind could have the unintended adverse consequence of jeopardising the safety of a parent and children in circumstances where there has been domestic violence or child abuse.
The presumption's adverse effects may operate differently before and after separation:[11]

(a) Pre-separation:

The fear of the protective parent that after separation an abused child will have equal time with the perpetrator may lead to decisions to stay in the relationship where the parent thinks they will be able to provide some degree of protection for the child.

With the prospect of a loss of this control and faced with no longer being able to act as a buffer for the child, a parent may remain in an environment which damages the child, but which is seen as the lesser of two evils. Such an environment would also continue to damage a parent who is a victim of abuse

Providing an abusive parent with a 'bargaining chip' would bring with it significant risks to the safety of other family members.

(b) Post-separation:

The effect of the presumption after separation is that there is a greater risk that children will be required to live with violent or abusive parents.

Given the role of interim decisions the reality is that such unmediated contact with a parent who may be harmful to the child is a real possibility. Research findings

[11] For other examples of analysis of custody rules based on pre and post separation perspectives see Katharine T. Bartlett, 'Preference, Presumption, Predisposition, and Common Sense: From Traditional Custody Doctrines to the American Law Institute's Family Dissolution Project', *Family Law Quarterly*, Volume 36, Number 1, Spring 2002.

concerning the extent of violence and child abuse suggest that this will affect a significant minority of children coming before the courts.[12]

Finally, while it is the case that the presumption is open to rebuttal in court the presumption is likely to very quickly take on a life of its own in the mind of the community. As a rule of thumb 'equal time parenting' will be all the family law that many in the community will know. They will act or refrain from acting accordingly. Any bargaining in these circumstances will be done in the shadow cast by a law ill-suited to resolving disputes and fostering outcomes in the child's best interests.

3 Practical Difficulties: Housing, Money, Work/Time, and Distance

Council anticipates that the majority of parents would confront significant physical and financial barriers to implementing an equal time arrangement. This is likely to be a particular issue for sole parents relying on government income support given that Parenting Payment (Single) cannot currently be apportioned pro rata across two households. The broader economic consequences are far-reaching and complex.

Research clearly shows the adverse financial effects of divorce.[13] This limits the capacity of parents to arrange adequate housing. Where parents are not within reasonable travelling distance of each other the difficulties are compounded. It follows that for many parents the logistics of equal time parenting would simply be beyond their means.

From the child's perspective where a father has a second family or the mother has children to different fathers there may be emotional difficulties arising out of a joint custody presumption which requires the child to spend time with the father or mother and their family.

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[12] Thea Brown, Rosemary Sheehan, Margarita Frederico, Lesley Hewitt, *Resolving Violence to Children, Report Number Three: An Evaluation of Project Magellan* and the *Pilot Program for Managing Residence and Contact Disputes in the Family Court When Child Abuse Allegations are Involved,* (Social Work at Monash, Monash University, Caulfield, Victoria, 2001)

[13] Grania Sheehan, 'Financial Aspects of the Divorce Transition in Australia: Recent Empirical Findings', (2002) 16 *Journal of Law, Policy, and the Family*, 103

Council also considers there is a real question about what in practice 'equal time' may mean for the child. Where one parent may have been the primary care giver and the other parent maximised returns for the family by taking employment, equal time may in fact not mean equal time spent with both parents. Where employment patterns remain unchanged it may mean the child is placed 'in care'.

Council also notes research pointing to the tendency for many workers (particularly men aged 35-59) to have longer working hours.[14] Many parents also undertake shift work. These factors exacerbate child care responsibilities in both intact relationships as well as in separated families. This is more problematic in separated families when many parents have not re-partnered. Therefore, the likelihood is that without major lifestyle changes and altering of work patterns a child will be cared for predominantly by a child care agency, or by the parent's new partner, a relative, or in some other informal arrangement.[15] A presumption designed to ensure that children spend more time with one of their parents will in many cases result in them spending more time in the care of people other than their parents. This would be an unintended consequence of introducing the presumption and while these arrangements may not in themselves be harmful they need to be considered in the total context of the child's situation and not assumed to be best for the child simply because it allows the 50% time quota to be reached.

'Equal time' is therefore a notion that needs to be carefully thought out in practical terms. Council has concluded that issues about the logistics of managing an equal time arrangement will be a significant hurdle for most separating parents. The presumption may push some parents into an arrangement they are not in many ways able to manage. The adverse impacts on children need to be carefully weighed.

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[14] Healey, E. (2000) 'The shift to long working hours: A social and political crisis in the making', *People and Place*, vol 8, pp.38-50

[15] Lyn Craig, 'How do they find the time? A time-diary analysis of how working parents preserve their time with children', SPRC and School of Social Science and Policy, UNSW, 2003 <http://www.sprc1.sprc.unsw.edu.au/aspc2003/abstract.asp?PaperID=67>

4 The Presumption devalues the Child's Voice

Council considers the presumption would be a retrograde step in terms of restricting the space for hearing what children have to say.

Council considers the presumption focuses on the wants of parents rather than the needs of the child. Recent qualitative research highlights how acutely attuned most children are to their parents' moods and feelings and the almost complete lack of control children exert over their lives. When familiar patterns and comforting routines are threatened, this combination leads to severe stresses on children.[16] A presumption which applies a 'one size fits all' approach does a disservice to the legitimate needs of children to be heard and to experience high quality post-separation parenting.

5 The presumption will increase distress and anger with the Family Law System

Council's analysis suggests that the presumption will not in practice apply to the majority of parents. However, if it is enshrined in the law, an 'equal time' outcome is likely to be seen as the expected or default outcome. It will become part of the folk-lore of the law. Therefore for those parents not granted equal time it is likely to be understood as a failure on their part or as a source of anger and bitterness against the other parent and/or the system. They are likely to perceive themselves, and perhaps be perceived by others, as not worthy of the equal time arrangement.

Hence, paradoxically what was intended to increase satisfaction in the Family Law system may do the opposite.

[16] Carol Smart, 'From Children's Shoes to Children's Voices', *Family Court Review* 40 (3) July 2002, 319

6 The presumption will increase litigation

Increased litigation will result from two sources:

(a) litigation to rebut the presumption;

(b) litigation to enforce the equal time arrangement.

This prediction is based on the clear impact of litigation arising out of the 1996 changes to the *Family Law Act*. These changes enshrined the principles that 'children have the right to know and be cared for by both their parents' and 'children have the right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare, and development.'[17]

The presumption would also not assist in any way with issues regarding the enforcement of court orders. In fact it could lead to greater litigation over breakdown in the arrangements for 'equal time'.

[17] *Family Law Act* section 60B – Objects of Part and Principles Underlying it.

Council comments with respect to Terms of Reference (a) (ii)

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

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

Council has concluded that the provisions in the *Family Law Act* appropriately deal with contact with 'significant others', including grandparents.[18]

While the law may be appropriate, Council's consultations on this subject suggest that grandparents are often unaware of their rights in seeking contact, or know about the legislative provisions but considered the making of an application to be unduly stressful.[19]

Anecdotal information received nevertheless suggests that many grandparents and other significant adults do seek to intervene in proceedings, particularly where they perceive that the parents of the children are unable to provide adequate care for the children. This is particularly so in the increasing numbers of matters coming before the Court as a result of the serious drug dependence of one or both parents.

Council concluded that the often overlooked role of grandparents in this area should be given greater prominence and appropriate resources made available to assist them.

[18] See section 65Cwhich provides that grandparents may apply for a parenting order and section 68(F) (2) which is expressed in inclusionary language allowing for grandparents and other persons having a relationship with the child to be considered.
[19] Family Law Council meeting, Gold Coast, 10-11 May 2001

Council comments with respect to Terms of Reference (b)

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

Council endorses two principles that currently underpin the Child Support Scheme:

a) parents have the primary duty to maintain their children, and they should share in the support of their children according to their capacity; and

b) a parent's willingness to have the children live with or have contact with them does not detract from their obligation to provide financial support for the children. Limited contact or no contact with a child should not detract from the parent's obligation to provide financial support for the child.

Council considers that the current system generally works well.[20] It works well for poor households and it works particularly well for Government. It avoids perverse incentives to litigate. Any change to the child support system would need to take account of the impact on poverty levels. In addition, if any change were contemplated the potential impact on Government revenue would need to be carefully costed.

Council would not support linking contact enforcement with child support payments. There should be a clear line maintained between parents' financial obligations for their children and the conduct of parenting arrangements. Difficulties with contact should not be linked with payment of child support. To do so would penalise children for matters outside their control.

However Council acknowledges that all systems are amenable to improvement. Given the significant social and economic changes since the introduction of the Child Support Scheme Council would support an evaluation of this system based on contemporary research and comprehensive data, as recommended in 1994 by the Joint

[20] See, for example, Smyth, B. and Weston, R. (2000) *Financial living standards after divorce: a recent snapshot*, Research Paper No. 23, AIFS, Melbourne

Select Committee on Certain Family Law Issues.[21] Council considers it would be inappropriate to alter the current formula or the principles which allow departure from the current formula without such an evaluation being carried out.

[21] *Child Support Scheme: An examination of the operation and effectiveness of the scheme*, 1994, Canberra AGPS – see recommendation 158 at 516: 'the Government, as a matter of priority, commissions the next evaluation...to be carried out by an independent research organisation...'

Council's Suggestions for Reform

General Comments

While not in favour of the presumption, Council considered a number of options to address the difficult issue of ensuring that, wherever possible, children have a meaningful relationship with both parents after separation. The Council particularly encourages initiatives that recognise the growing number of fathers who want to change their lifestyles to accommodate different post-separation parenting responsibilities.

There are several practical measures which may achieve this object but they are qualified by some important considerations:

(1) Family members should not be placed in situations where their safety may be compromised.

(2) Currently the law provides that the best interests of the child is the paramount consideration in parenting order cases.[22] Council believes it is appropriate to retain a 'child focussed' perspective when determining the issue of parenting.

(3) The limits of the law must be acknowledged. The law can only do so much to manage the conduct of adults towards each other and to moderate the fallout where those relationships deteriorate and eventually break-down completely.

1 Enhanced Contact Enforcement Process

The Council has previously considered the issue of enforcement and penalties with respect to child contact orders.[23] Its recommendations concerning a need for a three tiered approach in dealing with contravention of contact orders was adopted by Government. The report included recommendations concerning a range of other

[22] Section 65E *Family Law Act 1975*.
[23] *Child Contact Orders: Enforcement and Penalties*, June 1998, Family Law Council.

measures and flagged, but did not include as a recommendation, the option of giving responsibility for taking court action against breaches of court orders to a public body.

Council believes that it is now an opportune time to examine such an option. Council is of the view that the contact enforcement process may be enhanced by consideration of two important areas:

i) New Court related Contact Enforcement Process
ii) Public support for litigants

Council recognises that there is a basic asymmetry in the Family Law system. Child support obligations are enforced by the Child Support Agency. There is no cost incurred by the parent to whom monies are paid. By contrast, there is little if any assistance provided to a parent seeking to enforce the obligation arising from court ordered contact. The parent must initiate enforcement action. The general rule in family law proceedings is that each party bears their own costs.[24] Thus the costs are generally borne by the parent bringing the enforcement proceedings.

It seems appropriate as a matter of basic fairness that more assistance needs to be given to applicant parents who want to ensure that they play a significant role in their children's lives.

In light of this the Council has concluded that just as the Commonwealth has taken responsibility for Child Support it needs to consider taking additional responsibility for the enforcement of contact orders within the existing court structures. That may mean providing resources to court officers, for example, to assist in enforcement of parenting orders.

Council can provide further details on this topic should the Committee wish.

[24] *Family Law Act 1975*, Section 117(1) ...each party of a proceeding under this Act shall bear his or her own costs.

2. Legislating for changes

i) A requirement for a Court to consider substantially shared parenting time

Council has strongly advised against a presumption of equal time for the reasons set out above. However it suggests that a Court should be required to consider the option of substantially shared parenting time when both parents are seeking to be the primary carer. The best interests of the child, especially concerning the safety of the child, would remain the paramount consideration in the Court's investigation.

ii) The language of parenting.

Language is important for the messages it sends out as much as for the information it contains. The language of 'joint custody' in the various jurisdictions of the United States, despite its widely varying practical effects at law, obviously exerts an attraction to many in the Australian community. Council has formed a preliminary view that the current statutory language of 'residence' and 'contact' does not convey sufficiently the essential parenting role that is sought to be preserved by court orders.

Where a Court order awards residence to one parent and contact to the other, it may still create the impression that one has 'won' and the other has 'lost'. Even if an order awarding 'residence' to both parents was granted there is still a difficulty insofar as the actual role of parenting is omitted from the order.

The winner/loser mentality was one the legislature tried to address in the *Family Law Reform Act 1995*. This changed the language used in parenting order cases from 'custody' and 'access' to 'residence' and 'contact'. The legislature sought to change the way people think about parenting decisions. It sought to move away from notions of 'ownership' and competition for control and influence over the child and move toward notions of joint parental responsibility.

Experience suggests that while some limited success may have been achieved more may be able to be done in this area. Hence, Council has formed a preliminary view

that that the language of residence and contact should be abandoned in favour of more 'parenting' oriented language.

Council suggests giving further consideration to the following changes which could be made to better reflect contemporary understanding of what parenting should be:

a) The *Family Law Act* could be amended to make clear that parents and children have reciprocal interests in active parenting and meaningful parenting time. A statement of principle about active parenting could say for example that the best interests of children are promoted by 'the significant involvement of both parents in the care and upbringing of their child(ren) unless there are exceptional reasons why both parents should not have such involvement'.

b) The *Family Law Act* could contain a clear statement that the child and parent (or carers) have a right to be safe, and this right outweighs an arrangement based on shared significant involvement.

c) The language of Part VII of the *Family Law Act* could provide simply for the making of parenting orders. These parenting orders would define:

- What periods of time the child should spend living with each parent or other caregiver[25]
- What contact persons other than parents should have

and should determine whether or not parental responsibility should be joint, with a presumption in favour of joint parental responsibility unless it is contrary to the best interests of the child.

This would replace residence and contact orders. The purpose of this amendment would be to express more clearly what ongoing relationships between parents and their children are in terms of the time they spend together and the responsibilities each parent has in relation to decisions affecting the child.

[25] This would address issues affecting children from cultures and traditions whose concept of family is not necessarily expressed in terms of the nuclear family, and the familial bond between genetic relatives.

d) The Act (and if orders need to be made, the Court orders) should spell out what joint parental responsibility means. It means:-

i) Parents should, if possible, talk about decisions that are necessary to be made about a child's care, welfare and development and, if possible, agree about all those decisions[26].

ii) Parents must consult and agree about the more major issues affecting a child that will impact upon the child's long term future, such as:-

- Education
- Health (particularly serious operations)
- Religious upbringing
- Undertaking of tertiary education and career
- Change of surname
- Change of where a child usually lives with a parent

iii) In the event that parents cannot agree about major issues, an order will need to be made to decide the issue in dispute or to allocate responsibility to one parent for deciding all major issues.

e) In relation to day to day decisions, in an absence of agreement between parents, the parent (or carer) who is actually caring for the child at that time should make all the decisions about where the child goes and what a child does. This parental autonomy would not be interfered with by a court unless some limit needs to be placed on these day to day decisions to protect the welfare of the child[27].

3 Infrastructure before, during, and after the making of contact orders.

Council supports initiatives to encourage fathers to take a greater role in parenting before and after separation. The more this leads to lessening the disruption experienced between parent and child after separation, the better for the development of the child and the fostering of parent-child bonds.

[26] This is a slight embellishment on what is currently set out in Section 60B(2)(d) Family Law Act
[27] Judge made law current recognises this proposition. See the decision of the Full Court of the Family Court in VR v RR (2002) FLC 93-099 at 88,942. The Council recommends that this proposition be explicitly stated as a principle in the Act.

Council believes that the objective of 'significant involvement' needs to be supported by proper and adequate infrastructure.

Parents may need early intervention assistance (perhaps in the form of pre-filing counselling) so that they understand what parenting order to seek and how to make it work for them and their child(ren).[28] One of the most significant causes of frustration for litigants in the family law system is applying for – and getting – a parenting order that is hard to understand, inappropriate, impractical or unenforceable.[29] These orders may in fact be ones that are made by consent by the parents, registered, and are thereby enforceable by the courts.

The Family Law Pathways Advisory Group in *Out of the Maze* made much of getting clear and useful information to litigant parents and children as soon in the litigation pathway as possible. The Pathways initiatives directed to early intervention work are strongly supported[30].

Council strongly endorses the further development of alternative (or 'primary') dispute resolution interventions. These can often provide better, more cost effective and more enduring ways of handling conflict both for enmeshed, highly conflicted parents, and for separating parents generally. In Australia, variations on these interventions, such as 'child-inclusive' mediation, are continually being refined and evaluated for their effectiveness and practical utility.

Alternative interventions to litigation may facilitate reaching and implementing the most appropriate parenting arrangement in the best interests of the child. Accordingly, the use of such interventions should continue to be encouraged.

There would still be a place for specialised assistance services for children, especially for example contact services. Contact services provide a capacity to supervise parents

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[28] Miranda Kaye, Julie Stubbs and Julia Tolmie (June 2003) *Negotiating Child Residence and Contact Arrangements Against a Background of Domestic Violence*, Research Report 1 (Families, Law and Social Policy Research Unit, Griffith University).

[29] *Child Contact Orders: Enforcement and Penalties* A report to the Attorney-General by the Family Law Council (June 1998): paragraph 6.11.

[30] *Government Response to the Family Law Pathways Advisory Group Report*, May 2003, see pp8-11, 'Early help: connecting people to information and services'.

in the discharge of their parental responsibilities. In the absence of supervision there may be a risk to the child's safety or to the safety of the other parent or significant carer. Safety of the child must remain a paramount consideration.

Education and support services are also important. The Council's recent consultations in Newcastle highlighted the importance of men's groups and father-specific support groups in educating and supporting fathers in their parenting roles and responsibilities.[31] It also highlighted to Council the importance of support groups which focus on fostering father-child relationships and often over-looked parenting skills that are particular to fathering.

Council notes that there are a range of support services needed already for parents post separation. Based on Council's consultations it appears that these resources are currently under pressure. Where parents who have not had primary responsibility for care of the child or who may never have lived with the child are looking to significantly increase their level of care post separation then particular support services such as parenting skills classes will be especially important.

In addition, the establishment of healthy parenting patterns in intact families are especially important. First it can reduce the probability of separation. Second, should separation occur, healthy parenting patterns are more likely to enhance parents' ability to focus on their children and put aside their own issues. Fostering healthy parenting patterns will contribute to allaying fears that may arise on the part of some mothers that fathers may not have the skills to cope with enlarged parenting responsibilities.

Family Law Council
September 2003

[31] Family Law Council meeting - Newcastle 5-6 June, for further information see <http://www.newcastle.edu.au/centre/fac/efathers/efinfo.htm>

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