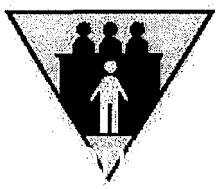


# Shared Parenting Council of Australia

House of Representatives Standing Committee on Family and Community Affairs
Submission No: 1050
Date Received: 15-8-03
Secretary: .....


13 August 2003

Ms Beverley Forbes
Committee Secretary
Standing Committee on Family and Community Affairs
House of Representatives
Parliament House
CANBERRA ACT 2600

Dear Ms Forbes,

Please find enclosed 14 printed copies of the Shared Parenting Council of Australia's submission to the Inquiry into Child Custody Arrangements in the event of Family Separation.

The Shared Parenting Council of Australia would be happy to further submit a supplementary submission, specifically in relation to how best to implement any Family Law reforms, if the Committee so requires.

We thank you for the opportunity to provide this extensive submission, and for the brief extension to your deadline.

We also confirm that our Federal Executive members would be happy to further discuss any aspect of this submission and to provide evidence to public hearings that you may conduct.

Sincerely,

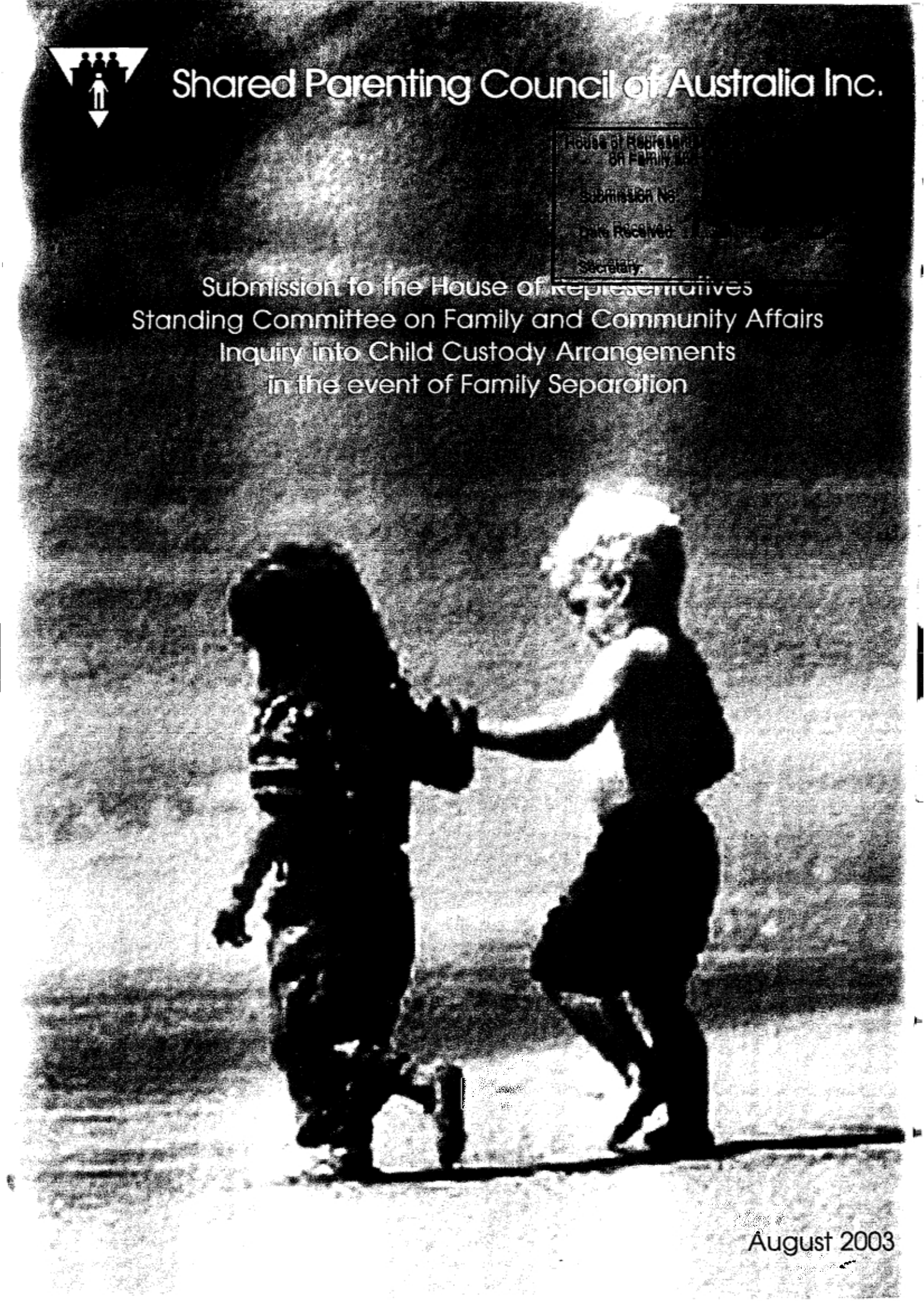
**Geoffrey Greene**
Federal Director

PO Box 105, Stepney SA 5069 Tel: 08 8261 5191
Email: secretariat@spca.org.au Web: www.spca.org.au

# Shared Parenting Council of Australia Inc.



## Submission to the House of Representatives Standing Committee on Family and Community Affairs Inquiry into Child Custody Arrangements in the event of Family Separation



August 2003

# Submission

A submission to the House of Representatives Standing Committee on Family and Community Affairs on the introduction of Shared Parenting and Alternative Dispute Resolution Processes for administering Family Breakdown in Australia

Authorised by the Submission Review Committee and the Federal Executive of the Shared Parenting Council of Australia

**Submission Review Committee:**

Matilda Bawden, Geoffrey Greene, Dr Shane Kelly, Sue Price, Jim Carter, Michael Green QC

8 August 2003

.....
Matilda Bawden
President

.....
Geoffrey Greene
Federal Director

**Shared Parenting Council of Australia Inc.**
PO Box 105, Stepney SA 5069 Tel: (08) 8261 5191
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Web: www.spca.org.au

# Federal Executive

The current Federal Executive is listed below, their full contact details are available on request to the Secretariat by email secretariat@spca.org.au or by telephone on (08) 8261 5191.

| Name | Position |
|---|---|
| Matilda Bawden | President |
| Sue Price | Vice President (1) |
| Barry Williams | Vice President (2) |
| Coral Slattery | Vice President (3) |
| Greg Cairns | Vice President (4) |
| Jim Carter | VP Political |
| Terry Bowker | Secretary |
| Geoffrey Greene | Federal Director |

**State Branches**

| | |
|---|---|
| Ian Wilson | State Director (QLD) |
| Peter Marsh | State Director (NSW) |
| Lindsay Jackel | State Director (VIC) |
| Dr Shane Kelly | State Director (SA) |
| Lionel Richards | State Director (WA) |
| Michael Gray | Territory Director (ACT) |
| Paul Muckarovski | Territory Director (NT) |

# Affiliate or Associated Organisations

There are many organisations that support the aims and objectives or have affiliated with the Shared Parenting Council of Australia. Most of these organisations have representatives on the Council and those groups include:

- Australian Family Association
- Australian Family Support Services Association
- Australian Information & Support Services for Men Pty Ltd
- Australian Institute of Men's Studies
- Conservative Council of Australia
- Contact Father's Coalition
- Dads Australia Inc
- Dads Landing Pad Inc
- Family Council of South Australia
- Family Law Reform and Assistance Association Inc
- Family Law Reform Association NSW Inc
- Family Law Reform Association QLD
- Fatherhood Foundation
- Fathers After Divorce
- Festival of Light
- Focus on the Family Australia
- International Council for the Status of Fathers
- Joint Parenting Australia
- Lone Fathers Association Australia (National)
- Men's Advisory Network (M.A.N)
- Men's Confraternity
- Men's Rights Agency (National)
- Men's Help Information and Resource Centre (NSW)
- Midwest Men's Health Inc (WA)
- Nuance
- OzyDads
- Reliable Parents Inc.
- The Australian Separated Fathers Network

# Recommendations

### Sharing the Care of Children

1. That the Family Law Act be amended to require parents to jointly and equitably share the rights, duties and responsibilities of parenthood.

2. That the Family Law Act be amended to include a statement acknowledging the fundamental rights of children to maintain frequent and continuing contact with both their mother and father following parental separation or divorce and to experience and enjoy, the love, guidance and companionship of both their parents in an equal and shared manner.

3. That the Family Law Act be amended to establish a rebuttable presumption in favour of both shared residence and shared parenting responsibility with the burden of proof to rebut the presumption being placed upon the party seeking to impinge upon the rights of the child, a parent or other significant person, in specified circumstances where there is a clear and imminent risk of harm to the child.

### Structural Administration Changes

4. That the Parliament further inquire into proposals to operate an 'inquisitorial' style Court or Magistrates Service, limited to children's matters where there is a serious or imminent risk to a child.

5. That the Parliament explore implementing a 'Child Risk Protocol' agreed upon by State and Federal Governments to improve the Family Court and State based child welfare departments ability to cooperate for the purposes of expediting investigation and resolution of 'child at risk' matters.

### Removal of Inappropriate Case Law Precedents

6. That the Family Law Act be amended to disallow disagreement, conflict or hostility between the parents from being a sufficient basis alone to rebut a presumption for shared parenting and that the primary concern of the Court is the impact of the parent's behaviour on the child and whether the child would be put at risk by the implementation of a shared parenting order.

7. That the Family Law Act be amended to remove the current usage of the 'status quo' principal from being a determining factor when considering an application by one or more parties for a shared parenting order.

8. That the Family Law Act be amended to remove the current usage of the 'primary parent' doctrine from being a determining factor when considering an application by one or more parties for a shared parenting order.

### Reducing Fatherlessness

9. That the Parliament address the issue of fatherlessness in Australian society by establishing a 'Prime Ministerial Council on the Status of Fatherhood' with a brief to look at and report to Government on all aspects of legislation and

government policy, and more generally, societal issues that impact negatively on the capacity of fathers to be more closely involved in the care and upbringing of their children.

### Shared Parenting Rebuttal Issues and Procedures

10. That the Family Law Act be amended to provide for the presumption of shared parenting to be rebutted in circumstances where it is established after consideration of clear and convincing evidence that a child is at serious or imminent risk of harm, or where it is not in the best interests of the child with respect to the relevant matters as detailed in the best interests checklist detailed at section 68F(2) of the Act.

11. That section 68F(2) of the Family Law Act be amended to provide for the Court to consider which parent would be most likely to facilitate contact of the child with the other parent if it is found inappropriate to issue a shared parenting order.

12. That section 68F(2) of the Family Law Act be amended to provide for the Court to consider whether any party has knowingly made false allegations concerning child abuse or domestic violence if it is found inappropriate to issue a shared parenting order.

13. That the burden of proof that a shared parenting order ought not be granted falls upon the party requesting alternative custodial arrangements.

14. That if a court declines to award a shared parenting order, then the court shall clearly state in its decision the specific findings of fact upon which the presumption has been rebutted.

### Grandparents and other relationships

15. That the objects section of the Family Law Act be amended to provide specifically for a grandparent of a child, and/or other people significant to the child, to make an application for reasonable contact with the child.

### Alternative Dispute Resolution

16. That a proposed statutory framework for mandatory mediation be implemented for all family matters that would ordinarily come before the Family Court and that exemptions to mandatory mediation be only given in specified circumstances where there is a clear and imminent risk of harm to the child;

17. That a person acting as Family Assistance Mediator be approved by the Attorney-General and be competent on a National Standard for the tasks apportioned to such a role. Where one or both parties are not prepared to mediate about the future sharing of care for the child, then the mediator be given authority to interview and the duty to assess the needs of the child and to prepare a report for the Court. The approved mediator will have, under specified circumstances, the power to appoint a separate representative for the child if required.

18. That the Family Law Act be amended to require a Court to order mandatory psycho-educational programs for parents and their children, where parenting

issues remain in dispute after mediation, and that these courses be provided by agencies approved for such programs by the Attorney-General.

### Financial Arrangements and Child Support

19. That an application for Government administration of Child Support not be available to parents who share the care of their children with a residence schedule of between 40% - 60% of the time, subject to an Approved Parenting Plan or Court Order that provides a structure for payment of outside and ancillary costs associated with the child.

20. That the 'Low Cost' Budget Standards Unit (B.S.U) guidelines be established as the benchmark formulae in a fixed dollar amount for child support to be paid by parents who have between 0% - 40% care of a child and that the child support amount be determined on a proportionate percentage of the B.S.U. calculated conversely to the amount of care the paying parent would provide as established by either an Approved Parenting Plan or Court Order.

21. That upon assessment and default of payment by the payer in accordance with an Approved Parenting Plan or Court Order, the payee may make application to the Federal Magistrates Service for enforcement of payments of child support.

22. That the Government consider abolishing the Child Support Agency and transfer these responsibilities to either Centrelink or the Family Assistance Office to avoid departmental duplication concerning separated family arrangements.

23. That the rules governing provision of Centrelink 'Parenting Payment' benefits be reviewed to make them available to both parents where they share between 40% - 60% of the care of their children.

# Contents

# Introduction

This submission has been prepared by the Federal Executive of the Shared Parenting Council of Australia and is presented to the House of Representatives Standing Committee on Family and Community Affairs Inquiry into Child Custody Arrangements in the event of Family Separation.

In particular, this submission addresses the following areas of the Terms of Reference of the before mentioned inquiry:-

> *Having regard to the Government's recent response to the Report of the Family Law Pathways Advisory Group, the Committee should inquire into, report on and make recommendations for action:*
>
> 1. *given that the best interests of the child are the paramount consideration:*
>
>  *(i) what other factors should be taken into account in deciding the respective time each parent should spend with their children post separation, in particular whether there should be a presumption that children will spend equal time with each parent and, if so, in what circumstances such a presumption could be rebutted; and*
>
>  *(ii) in what circumstances a court should order that children of separated parents have contact with other persons, including their grandparents.*
>
> 2. *whether the existing child support formula works fairly for both parents in relation to their care of, and contact with, their children.*

The scope of this submission is restricted to the authority created in the Aims and Objectives of the Constitution of the Shared Parenting Council of Australia, particularly:-

> 3.1.1. To encourage and support parents, to jointly and equitably share the rights, duties and responsibilities of parenthood;
>
> 3.1.2. To promote the fundamental rights of children to maintain frequent and continuing contact with both their mother and father following parental separation or divorce and to experience and enjoy, the love, guidance and companionship of both their parents in an equal and shared manner;
>
> 3.1.3. To advocate the enactment of Commonwealth and/or State legislation which establishes a rebuttable presumption in favour of both shared residence and shared parenting responsibility;
>
> 3.1.4. To bring to the attention of relevant Commonwealth and/or State authorities the social and legal circumstances of separated families, and to ensure their

interests are safe-guarded in the implementation of legal and administrative systems affecting them;

3.1.5. To raise public and official awareness of social policy which acts against the best interests of children, and exposes them to unacceptable risk of emotional or physical harm;

3.1.6. To advocate the right of children to the continuing emotional, moral, physical and financial support of their mothers and fathers following separation or divorce;

3.1.7. To advocate the enactment of Commonwealth and/or State legislation which encourages the continuing involvement of their mothers and fathers in the support of their children following parental separation or divorce.

Due to the nature of various international expressions of terminology for the 'parenting' of children post separation or divorce, the Shared Parenting Council has adopted the terminology of 'Shared Parenting' where it is referenced in relation to the general concept of sharing of parental rights, duties and responsibilities.

We have also adopted the terminology of "joint custody" when referring to the proposed shared parenting concept in a legal environment. This is primarily because in many overseas jurisdictions and also in pre-1995 Family Law Reform Act terminology in Australia, this term is more often employed. It is also a more descriptive, universal and better understood phrase when referring to children being raised by both their mother and father in a separated environment.

For legal clarity and as a reference to the current Family Law Act in Australia, the term "joint custody" is the equivalent of Australia's current "joint residence" or a "residence/residence" Order made in the Family Court whereby "day to day responsibility for the child" is allocated to each parent when the child resides in their care.

Equally, we have used the term "sole custody" in this submission when seeking to describe the circumstance whereby one parent solely has "residence" of the child and the other parent has "contact" or a "residence/contact" Order made in the Family Court whereby "day to day responsibility for the child" has been vested in the sole "residence" parent alone.

There is other terminology used when describing post-separation parenting arrangements in various jurisdictions and accordingly we have included a table of these and compare them to the current terminology in the Family Law Act 1975 (Cwlth) As Amended:

| Terminology Used | Current Aust. Terminology Equivalent |
|---|---|
| Sole Physical Custody | Sole Residence (Residence/Contact) with all day-to-day responsibility vested in the residence provider, with contact generally awarded to the non-resident parent. Long term care and welfare of the children are usually vested in both parents. |

| | |
|---|---|
| Sole Legal Custody | Sole Residence (Residence/Contact) with all day-to-day responsibility and long-term care and welfare of the children being vested in one parent alone. |
| Joint Physical Custody | Joint Residence (Residence/Residence) is awarded to both parents with day-to-day responsibility and long term care and welfare of the child being also vested in both parents |
| Joint Legal Custody | Either Sole or Joint Residence whereby day-to-day responsibility and long term care and welfare of the child being vested in both parents |

Where the term "Shared Parenting" is used in this submission, we define that to mean the equivalent of "Joint Physical Custody" as described above.

This submission aims to provide the Federal Parliament with an outline of the essential issues of concern, analysis of the research available in the relevant areas, and a range of proposed policy reforms that will alleviate the depth of family destruction that unquestionably results from current Family Breakdown policies.

# Executive Summary

## *Sharing the care of children*

Few family policy issues attract more controversy than how we best deal with child custody after parental separation or divorce. This issue has attracted the attention of governments, government departments, law professionals, academics, psychologists and psychiatrists from around the world.

There are numerous research studies available that specifically look at the issues of child adjustment following parental separation or divorce. There is no valid empirical research available that justifies the current Family Law policy of making sole-custody orders in the ordinary everyday case coming before the Family Court in Australia.

It is therefore surprising that the Family Court itself has failed to improve its 'client' outcomes by facilitating 'shared parenting' orders for families, and accordingly it has now become necessary for the Parliament to act to rectify the escalating problems experienced by children of divorce.

In a recent 'meta-analytic' review by Robert Bauserman, published in the American Psychological Association's Journal of Family Psychology, Bauserman assessed that:

> "Children in joint physical or legal custody were better adjusted than children in sole-custody settings, but no different from those in intact families. More positive adjustment of joint-custody children held for separate comparisons of general adjustment, family relationships, self-esteem, emotional and behavioral adjustment, and divorce-specific adjustment. Joint-custody parents reported less current and past conflict than did sole-custody parents, but this did not explain the better adjustment of joint-custody children. The results are consistent with the hypothesis that joint custody can be advantageous for children in some cases, possibly by facilitating ongoing positive involvement with both parents."

Research evidence demonstrates that children from divorced families are not as well adjusted as those from intact families. However when looking at all the custody options available at the time of parental separation or divorce, the option that is most likely to result in emotional harm and increased maladjustment of children is the sole-custody model currently practiced by Australia's Family Court.

There is no doubt that the available research indicates that joint physical custody (Shared Parenting) outcomes after parental separation or divorce has the least harmful impact on children, and provides the best child adjustment outcome when compared to the intact family.

At first glance, this would appear common sense. In a shared parenting environment, children are free to maintain and develop an individual relationship with both their parents, after their parents have chosen to no longer live together.

Maintaining the once 'un-fettered' access that children had developed with both their parents' results in the best adjustment for children in the new parental separation environment. Feelings of loss for the child are reduced when there is a maintaining of pre-separation relationships.

Arguments supporting current Family Law Policy are based around the proposition that due to parental conflict, one parent (usually the father) must be effectively removed from the child's day-to-day life. The purpose of which aims to reduce the conflict in which the child must live and to re-engineer a new home environment that does not rely on any parental cooperation allowing the custodial parent to make day to day decisions solely about the child's emerging needs.

It is also argued that if there is conflict between the parties, then a shared residence (joint physical custody) order cannot be made by the Family Court. The Court relies on the fact that one or both parents have filed an application before it, therefore evidence of the conflict exists and accordingly the parents are unable to 'share' the parenting of the child(ren).

That there be conflict between the parents (i.e. the parents are separating or divorcing) is so obvious that it requires little explanation. However, the Family Court's attitude to eliminating conflict by putting the parties of the dispute at 'war' over each parent's desire to maintain an equal opportunity and relationship with their child(ren) defies any rational logic.

A more salient point that seems to be missed by this argument, is that if the parents have separated - and it is they who are in conflict - then implementing a shared residence regime will in no way further escalate or involve the children in the conflict - as the parents no longer live together. Additionally, the imposition of a sole custody order upon the parties is even more likely to increase conflict between the parents - and to permeate outside of the parent's dispute resulting in higher involvement of the child in the dispute, impacting negatively on the child.

It is a fact that when parents separate or divorce, the parents generally no longer reside in the one home. As a result, children of divorce have no choice but to experience their relationships with both their parents in two separate homes.

Research concludes that it is the continuing nature and quality of the relationships between the child and each parent that has the most impact on the post parental separation outcomes for children. Research also indicates that a separated environment with the children now living in a two residence regime, is not of itself generally problematic for children. The notion that children need the stability of one home is certainly outweighed by the children's need to maintain their relationship - as close to equal as possible - with both parents.

It must be therefore given and accepted that children of divorce no longer have the option to reside solely in one home, and accordingly, society must adjust to the result that children of separated parents will now live in two homes.

The real issue at present is how much time children live in each home. Even under the sole-custody regime children will live a proportion of their time in two homes. So from this viewpoint, sole-custody outcomes generally do not satisfy the proposition that children need the stability of just one home environment.

Arguments in favour of joint custody have often focused on benefits for the child of maintaining relationships with both parents. In contrast, opponents have argued that joint custody disrupts needed stability in a child's life and can lead to harm by exposing children to ongoing parental conflict.[1]

[1] Bauserman R., Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements: A Meta-Analytic Review, Journal of Family Psychology, Vol. 16, No. 1, 91-102, American Psychological Association, Inc., 2002.

With the latter argument being completely discredited as having no scientific basis in fact, the debate now falls to how 'shared parenting' arrangements can be best implemented to improve the outcomes for children of divorce.

## *Alternative Dispute Resolution*

Upon separation or divorce parents often have little or no choice but to enter the Family Court of Australia to seek certainty and continuation of their parenting responsibilities.

This brings parents, who are at their most vulnerable and emotionally sensitive period, before an adversarial process whereby each party, usually assisted by a lawyer, applies to the Family Court for orders and files affidavits in support of their positions. In other words, parents are put into a situation of legal conflict at the very beginning of their separation process.

In any other Court in the land parties generally litigate issues of finance, debt or other similar or commercial matters for judicial and final resolution of their complaint - all generated as a 'last resort' to resolve their differences or alleged injustices. It is well expected that a process of litigation will result in a 'terminating event' for the parties concerned. There is no expectation that the parties of an average lawsuit will ever continue or re-establish any relationship after the litigation process has concluded.

However, in relation to family matters, we expect to put parents through a similar, if not more arduous system, whereby we will then expect the parents to put away their hostilities after litigation to continue to parent their children cooperatively for the indefinite future.

Not only is this unrealistic, it is a recipe to create division and hostility amongst parents who have the joint responsibility of raising their children after litigation has ceased. It would be hard to imagine or create a more dysfunctional way for dealing with the problems of separated families.

Whilst there may be 'specific issues' that ultimately may require the determination of a judicial officer, at the first instance parents experiencing separation should be guided through a non-adversarial process of mediation.

Mediation in family matters has an excellent reputation for resolving disputes in the jurisdictions around the world where it has been implemented. Even in Australia, the Family Court's evaluation of its 'pilot study' of voluntary mediation outcomes found it to be viable and beneficial for its participants.[2]

Assistance from professionals who are experienced and trained in this area can provide a much needed 'pressure valve' for parents in this emotionally charged time of their life. Decisions of critical importance, such as the future care and upbringing of their children, requires a sensitive and responsive process that will enable parents to reduce conflict, come to terms with the changing nature of their relationship and provide outcomes that will enable all parties to best get on with their lives in a new environment.

[2] Evaluation of the Family Court Mediation Service, Office of the Chief Executive, Research Report Number 12 (March 1994).

Equally important is the opportunity for the parties to further consider counselling, and even reconciliation, with the latter being a more likely considered outcome from a non-adversarial process such as mediation.

Inherent in the process of mediation acting as an acceptable proposition for the parties to resolve disputes, is the need to have a Family Court system in the background that has a duty and obligation to treat all parties as equal, and to have a process that will support the child's rights to equal access and opportunity with both parents. Without this amendment to the Family Law Act, there is little capacity for agreement to be reached when one party (usually the mother) can rely on existing case precedents that will ensure her sole-custody of the child(ren) and provide little incentive to cooperate in an alternative dispute resolution process.

The research evidence has demonstrated the degree to which mediation has been successful in overseas jurisdictions, however, it must be noted that there are substantially better outcomes for non-adversarial resolutions of disputes when the statute also supports joint physical custody presumptions in their family law.

In several United States jurisdictions, mandatory mediation has been enacted, restricting parties' access to the Court without prior attempts to resolve their differences in an alternative dispute resolution process.

One could suggest that if the Family Court of Australia has already found the outcomes of mediation to be beneficial to the parties and to the children of divorce, it can only further be advantageous that, subject to the before mentioned amendments to the Family Law Act, mandatory mediation should be considered as the primary process for resolution of children's matters in Australia.

It is also presupposed that before an application to the Family Court can be accepted, this process must be first explored, with exceptions provided for only in specified cases where there is a clear and imminent risk of harm to the child.

# Family Law reform in a societal context

"When a family is broken up, when there is a divorce, at least let us enable those people involved to solve their differences in a decent human and dignified way, and without their being subjected to this kind of expense."

*Senator Lionel Murphy, 28 March 1973*

## *History of Family Law Reform in Australia*

Since the introduction of the controversial Family Law Act in 1975, there has been more debate, research and inquiries held into the operations of the Family Court and the Family Law System than practically any other area of Federal Government responsibility.

Every year or so, a "Family Law Amendment Bill" is passed by the Federal Parliament - each one seeking to rectify problems identified in previous inquiries. Without exception, there has been a legislative failure of Family Law Amendments to achieve outcomes that resemble the system originally planned and designed by the Late Senator Lionel Murphy and introduced by the Whitlam Labor Government in 1975.

Primarily, the inquiries have usually been concerned with issues to do with custody and access, contact enforcement, legal processes for dealing with children at risk, financial, property and superannuation issues, and a range of ancillary amendments - all seeking to redress failures of Family Court procedure or law - ie. that the system does not operate in a fair, decent and dignified way, and that the care of the children is not adequately being shared between parents and extended families, nor is there any improvement in outcomes for children.

We arrive at this point in time, in 2003, whereby the majority of Australians have determined that the Family Law Courts are biased, unfair, expensive, incapable of dealing with Family matters in a timely and orderly manner, and of more concern, expose children to risk of abuse or harm.

Similarly, we have an overwhelming majority of Child Support Agency 'clients' bitterly complaining that the Agency has destroyed their lives, has taken practically any semblance of human dignity away from the 'payer', has eliminated the prospect for several hundred thousand Australian parents from ever being able to afford a decent standard of living, a new life post-separation or to provide a positive legacy or inheritance to their children, and has tragically resulted in up to three fathers[3] committing suicide every day when they are unable to face life with any capacity to live or survive. For many non-custodial parents the devastation of family breakdown, compounded by the operations of the Family Court and the Child Support Agency, have left them living in despair and poverty.

[3] Data extrapolated from ABS Health & Welfare Series, and other ABS series and CSA Facts and Figures compared with Census data and factored demographic ratios of separated fathers versus male suicide statistics in each age group. Figure quoted remains undisputed by the Federal Government.

The question that comes from this analysis is: How is it possible that review after review, amendment after amendment, reform after reform, have so clearly failed to achieve a system of fairness, justice, and equity in Family Breakdown situations - whilst simultaneously failing to act in the best interests of the child, when assessed on any positive child outcome measure?

It is fair to say that the Family Law Act and the Family Court are a failure of public policy, a failure of legislative intent and a failure of the implementation of the will of Parliament.

Primarily, the first and most significant societal problem in administration of Family Law has been the Courts inability to implement shared parenting (joint custody) when this was the original intention of the Act's drafters almost 30 years ago.

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"It would create the concept of Joint Custody under the law."

*Senator Missen, 29 October 1974*

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Since the passage of the Family Law Act in 1975 and until the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act Inquiry was established on the 13 March 1991, the Family Law Act had been amended 34 times.

When delivering the report of the Joint Select Committee Inquiry to the Senate on the 24 November 1992, the Chairman of the Committee, Senator Jim McKiernan said the following:-

---

"The Committee's terms of reference required us to inquire into the court's counselling service and the role of mediation and marriage guidance, the resolution of custody, access and guardianship disputes, the enforcement of Family Court orders, the resolution of property disputes..., the exercise of discretion by the courts under the Act, the appropriateness of the current adversarial legal system for the resolution of family law disputes, the cost of legal proceedings in the family law area and whether the current restrictions on the full publication of proceedings in the Family Court should be eased." [4]

*Senator Jim McKiernan, 24 November 1992*

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So it appears that 17 years after the introduction of the Family law Act, the Parliament was still struggling with the very same basic and fundamental issues that the Family Law Act was supposed to have resolved at its inception in 1975. Further, Senator McKiernan said:-

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"On the question of children, by far the most important issues considered by the Committee related to the resolution of disputes in which children were involved. Disputes were usually about who had custody of the children and what access arrangements were going to be put in place for the non-custodial parent.

---

[4] Senator J,P McKiernan (ALP, WA, Government) Senate Hansard, 24 November 1992, p 3293

> It was put to the Committee that more joint custody or shared parenting arrangements should be adopted." [5]
>
> *Senator Jim McKiernan, 24 November 1992*

Ultimately, it was regrettable that the issue of further mandating shared parenting outcomes did not receive positive endorsement from the report of the Joint Select Committee. The Committee's reasons for this decision was that the proposed reforms had been tried in one major overseas jurisdiction and subsequently repealed as unworkable. Unfortunately this determination was wrong.

The jurisdiction referred to was that of California in the United States. Both the Family Court of Australia and the Family Law Council had presented false information to the Joint Select Committee about the operation of family law in California.

In submissions from both those organisations, references were made that California had introduced a rebuttable presumption of shared parenting and that the system was so unworkable and problematic that it had been subsequently repealed.

The Family Court and the Family Law Council's submission on this issue was demonstrably false and has been well canvassed.[6] Joakimidis (2002) analysis of this issue follows:-

> "The Family Law Council after citing Lenore Weitzman, misrepresented California joint custody law as a preference statute and wrongly advised that the law was repealed in 1988.[7] This advice was central to Council's recommendations against joint residence.[8] In fact, the statute states a presumption in favour of joint custody only when parents agree to such an arrangement and lists joint custody and sole custody as co-equal options when parents cannot agree (Nygh 1985; McIsaac 1989).[9,10] Section 4600.5 (a) of the California civil code creates a presumption for agreement and it was not repealed." [11]

[5] ibid

[6] Joakimidis Y, Back to the Best Interests of the Child: Towards a rebuttable presumption of Joint Residence, Joint Parenting Association, Proof Copy, June 2002, p 134

[7] Family Law Council. Patterns of Parenting After Separation: A Report To The Minister For Justice and Consumer Affairs. Australian Publishing Service, Canberra (April 1992). *Hereinafter cited as Patterns of Parenting at page 36* "California was the first state in the United States to introduce a statutory presumption of joint custody after separation (paragraph 4.46 ). California repealed its joint custody presumption in 1988. Prior to its repeal, Weitzman (1985) criticised California's legislation....(paragraph 4.57).

[8] ibid. Conclusions at 31 (paragraph 4.51) "The joint custody presumption has been tried and abandoned in at least one major jurisdiction".

[9] Nygh J. Sexual Discrimination and The Family Court. 8 University of New South Wales Law Journal 1986. "Section 4600.5(a) of the California Civil Code provides for a presumption that joint custody is in the best interests of the child where both parties agree to an award of joint custody, thereby, it would seem, relieving the court from the duty to make further inquiries. There is it would seem, no such presumption in the case of contest (ibid at 70)".

[10] McIsaac H. The Divorce Revolution: A Critique. 10(5) California Family Law Report (May 1986) p 3071 "In fact, the law states a presumption if parents agree, and then has joint custody and sole custody as equal options for the courts to decide upon if the parents cannot agree"

[11] Joakimidis 2002, supra 6

The issue of misleading of Federal Parliament by both the Family Court of Australia and the Family Law Council are serious issues that require further investigation by the Senate Privileges Committee. It may also be argued that these bodies have acted corruptly, possibly in an attempt to pervert the course of a Federal Parliamentary Inquiry.

Australian Society has been told many times by the Federal Parliament that there would be a presumption of shared parenting in family breakdown matters that come before the Family Court. Yet in 1992, 17 years after the Family Law Act was first introduced, the Family Court and the Family Law Council had substantially mislead Federal Parliament arguably to frustrate or avoid literal translation of this presumption into the Family Law Act.

Not long after the report of the Joint Select Committee was handed down, there was the watershed judgment in Georgia, North America in which Justice Dorothy Beasley of the Georgia Appeal Courts made her now famous judgment. An extract from this judgment appears below:-

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"Although the dispute is symbolized by a 'versus' which signifies two adverse parties at opposite poles of a line, there is in fact a third party whose interests and rights make of the line a triangle. That person, the child who is not an official party to the lawsuit but whose well-being is in the eye of the controversy, has a right to shared parenting when both are equally suited to provide it. Inherent in the express public policy is a recognition of the child's right to equal access and opportunity with both parents, the right to be guided and nurtured by both parents, the right to have major decisions made by the application of both parents' wisdom, judgement and experience. The child does not forfeit these rights when the parents divorce."

*Presiding Judge Dorothy T. Beasley,*
*Georgia Court of Appeals,*
*"In the Interest of A.R.B., a Child," July 2, 1993*

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Family law regimes around the western world, were finally turning to protect the rights of children to experience equal access and opportunity with both parents after parental separation or divorce.

In 1995, the Federal Parliament once again looked at reforming the Family Law Act in Australia in an attempt to bring about the intended operation of the Family Court as espoused by Senator Lionel Murphy some 20 years earlier. During the debate for the 1995 Family Law Reform Bill, The Hon. Peter Duncan MP, Parliamentary Secretary with responsibility for carriage of this Bill, said in his second reading speech: -

> "The original intention of the late Senator Murphy was that the Family Law Act would create a rebuttable presumption of shared parenting, but over the years the Family Court has chosen to largely ignore that. It is hoped that these reforms will now call for much closer attention to this presumption and that the Family Court will give full and proper effect to the intention of the parliament." [12]

However, according to the Chief Justice of the Family Court, Alastair Nicholson, these parliamentary reforms meant no such thing:-

> "The intention of these amendments was not to introduce any presumptions as to who would parent children after separation. It was rather to encourage parental responsibility, and exhort both mothers and fathers to focus on their children's future wellbeing rather than their own grief and anger. This concentration on responsibilities rather than rights appears to have been a resounding failure, if the media reports on 'joint custody' are accurately being reported." [13]

Now there appears to be either a legislative or judicial failure when you consider the statement of the rights of the child and duties of the parents in Section 60B of the Family Law Act (1975) as amended, which now states:-

- children have the right to know and be cared for by both their parents; *Section 60B 2(a)*
- children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development; *Section 60B 2(b)*
- parents share duties and responsibilities concerning the care, welfare and development of their children; *Section 60B 2(c)*
- parents should agree about the future parenting of their children. *Section 60B 2(d)*

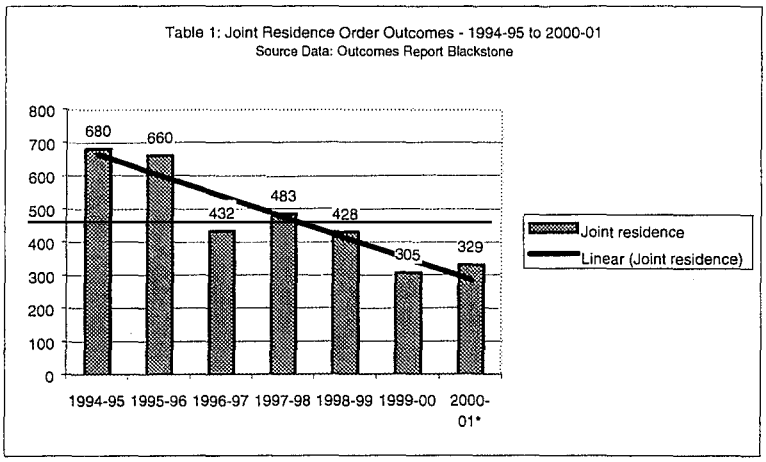
In effect, there is nothing in the law preventing the Family Court from routinely issuing shared parenting orders despite one parent's objection, unless there is an established risk to the child from doing so and awarding significant care is not in the best interests of the child.

Conversely, there is nothing in the objects part of the Act that supports current Family Court practice to routinely assume that one party is able to impinge upon the child's right to be cared for by both parents, without establishing that it is in the best interests of the child to do so.

[12] The Hon. Peter Duncan MP, Parliamentary Secretary to the Attorney-General, House of Representatives, Hansard, 21 November 1995, p3303

[13] Children and Children's Rights in the Context of Family Law by the Honourable Justice Alastair Nicholson Chief Justice, Family Court Of Australia, 21 June 2003, Brisbane

The most interesting aspect of the Reform Act's implementation, is the Family Court's almost direct opposition and open hostility to its intention as spelt out by Parliament. The words of the Parliamentary Secretary (quoted above) have been met with thundering opposition. Shared parenting (joint residence) orders have actually more than halved since 1995, from what was then, appallingly low levels. Table 1 indicates the Family Court's response to the Duncan parliamentary challenge.




The people of Australia have been led to believe for almost 30 years, that this country's system of administration and management of families experiencing separation and breakdown is fair, just, equitable, low cost and dignified. The Parliament has told the people that it would be based on a shared parenting presumption, and that these would be the expected outcomes from the Family Court.

Each reform enacted since 1975 have been unsuccessful in restoring equity, justice and fairness into the system for children and their parents, but more importantly, both in Australia and overseas, sole custody jurisdictions have failed to provide better outcomes for children on practically all wellbeing and societal indexes.[14]

**Recommendations**

1. That the Family Law Act be amended to require parents to jointly and equitably share the rights, duties and responsibilities of parenthood;

2. That the Family Law Act be amended to include a statement acknowledging the fundamental rights of children to maintain frequent and continuing contact with both their mother and father following parental separation or divorce and to experience and enjoy, the love, guidance and companionship of both their parents in an equal and shared manner;

3. That the Family Law Act be amended to establish a rebuttable presumption in favour of both shared residence and shared parenting responsibility with the burden of proof to rebut the presumption being placed upon the party seeking to impinge upon the rights of the child, a parent or other significant person, in specified circumstances where there is a clear and imminent risk of harm to the child.

[14] Bauserman R., Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements: A Meta-Analytic Review, Journal of Family Psychology, Vol. 16, No. 1, 91-102, American Psychological Association, Inc., 2002.

## *Alternative Proposals for Family Law Reform*

That the Court is having great difficulty in handling its primary role - is acknowledged by the Chief Justice of the Family Court, Alastair Nicholson. In an article recently printed in The Advertiser (SA) the Chief Justice said:-

> "I consider that any reform of family law should be looking much more broadly than the present inquiry. I have long advocated a less adversarial system, as practised in a number of European countries, and the Family Court is investigating ways in which this approach may be introduced in order to reduce the conflict and tension of court appearances." [15]

It would be apparent that the Chief Justice is advocating a change from the adversarial based system of litigation to one more closely resembling an inquisitorial system - along similar lines to those that operate in Coroner's Courts around the country.

This submission supports the proposition that the current style of proceedings operating in the Family Court are inadequate and that separating families may be better served by one based on an inquisitorial system as opposed to the current adversarial legal system. We believe, however, that this is an issue for further inquiry and accordingly we recommend further investigation of this proposal. We do not support that there is a Court role required for everyday cases that do not involve a serious and imminent risk to a child.

The proposed reform of the Court's structure, as proposed by the Chief Justice, should be further explored by the Parliament. We believe that with necessary reforms including shared parenting, mandatory mediation and counselling services, an inquisitorial low-cost legal service may be better able to resolve matters that could not be finalised in alternative dispute resolution processes. We are mindful that a Court system for resolving parental disputes is widely accepted as the least likely process to ensure continuity of a relationship between the parents post separation.

Other reforms considered by the Family Court include expansion of the Magellan Project - which is a system of fast tracking matters that involve issues of child abuse, neglect or other risk. Notwithstanding that we believe that this project has some structural problems, there appears common ground between our organisation, and other supporters of reform, as well as opponents of shared parenting[16], that children at risk are not adequately protected by the current operations of the Family Court.

We have not submitted detailed analysis of this issue here, as they are not part of the Terms of Reference of this inquiry, however, it is important that structures for dealing with these types of matters are effectively catered for under any new family law regime.

There are good indications that once again, poor outcomes in the area of dealing with children at risk, may also be a reflection of the adversarial nature of Court proceedings. Improved outcomes for these families, and a speedy resolution of these

[15] Nicholson A., Putting interests of the children first, The Advertiser (Adelaide), 2 July 2003, Page 18

[16] National Family Court Child Protection Service Urgently Needed, Press Release, National Council of Single Mothers and their children Inc., 26 May 2003, Elspeth McInnes

very serious matters may be more likely with the introduction of an inquisitorial based judicial system.

**Recommendations**

4. That the Parliament further inquire into proposals to operate an 'inquisitorial' style Court or Magistrates Service, limited to children's matters where there is a serious or imminent risk to a child.

5. That the Parliament explore implementing a 'Child Risk Protocol' agreed upon by State and Federal Governments to improve the Family Court and State based child welfare departments ability to cooperate for the purposes of expediting investigation and resolution of 'child at risk' matters.

# Sharing responsibilities and reducing conflict

> "All of the old traditional views about the importance of secure environments for families were right and we have ignored it at the cost of far too many of our children... the warning signs are everywhere. Are we going to go on ignoring them or are we going to have an honest debate about it?"
>
> *The Hon. John Anderson MP, Deputy Prime Minister, 15 June 2002*

Raising children is about parents sharing the responsibilities for their care. Without access to the children, in an everyday and ordinary sense, it is not possible for a parent to bring to the child the full quality and nature of their character, as parents - and for the child to enjoy and learn from their experience, love, guidance and companionship.

After more than 50 years of research one thing is clear. Children love and need their mothers and fathers equally. Children from intact or shared parenting homes in general demonstrate better outcomes than those from sole mother headed households[17], and both mothers and fathers generally have improved health, financial, work[18] and social[19] outcomes from implementing a shared parenting regime after separation.

Everything we know about child development indicates that children need both parents in their lives for healthy growth. Children of separated or divorced parents need both their parent's love and affection more so. Government must recognise that children and their separated parents remain a family requiring society's compassion, assistance and care in helping them to recover from the tragedy of family breakdown.

It requires acceptance that although a child's parents may have separated or divorced, it is our duty and responsibility to protect the child's relationship with both their parents in the best interests of the child.

Parents who have suffered family breakdown are arguably at their most sensitive and vulnerable. Often feelings of resentment, anger or just "getting back" at the other parent are at the forefront of their emotional response to the circumstances they have found themselves in. It is regrettable that at this point in their lives that their individual conflict is more likely to be encouraged by our current adversarial system for resolving disputes.

Australian society needs a better alternative.

During the intact family preceding the separation, parents have routinely shared the responsibilities of rearing their children. Many intact families often experience differences of opinion on how best to deal with children's matters in their family.

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[17] Bauserman 2002 supra 14

[18] Dickenson J., Heyworth C., Plunkett D., Wilson K., Sharing the care of children post-separation: family dynamics and labour force capacity, Department of Family and Community Services, Parenting Payment and Labour Market Branch, November 1999

[19] Smyth B., Caruana C., Ferro A., Some whens, hows and whys of shared care, Australian Institute of Family Studies, July 2003.

Ultimately through a process of consultation and cooperation, these parents manage to resolve their differences.

So why is the concept of separated parents sharing the same rights, duties and responsibilities apparently beyond resolution apart from removing one parent from the child's day to day life?

Over the past 20 years many jurisdictions around the world have found a better way.

The concept of shared parenting in a post separation environment is now established as a more successful method of dealing with these issues. The preponderance of research concludes that by allowing parents the opportunity to continue their parenting role equally in a separated environment provides enormous benefits for children. In particular, shared parenting arrangements provide the least disruption and emotional harm to children suffering from their parents separation or divorce.

Maintaining as close as realistically possible the pre-separation relationships of the child with each of their parents minimises and reduces the feelings of loss to a child.

The Family Court's current methodology of awarding sole custody to one parent, when those parents are in dispute has failed to protect the rights and best interests of the innocent child of divorce.

By establishing a winner-loser structure for the parents you create no other result than a lose-lose outcome for the child. In every sole custody outcome the child's relationship with one of their parents will be severely curtailed, creating intense feelings of loss, resulting in emotional and psychological harm to the child that may last their entire life.

The disenfranchised non-custodial parent will have been legally reduced to little more than a visitor in the child's life. For the custodial parent, immense emotional and financial burdens of singularly raising the child may leave them physically and emotionally unable to cope with the new family structure. The inequitable outcome for all parties is likely to lead to increased feelings of resentment, anger, loss of self esteem by all affected members of the family. Sole custody is an unnatural and unstable post-separation structure for the affected individuals to rebuild their lives.

In contrast, shared parenting provides a win-win outcome for both parents and the child. Shared parenting allows each fit parent substantial time with the child. Shared parenting is a recognition that the child needs a substantial relationship with both parents and that both parents have important contributions to make to the child's growth and development.

It is important to understand the various styles of shared care arrangements that can result for children of separated parents. In some cases this can start from a 50:50 residential arrangement for the children operating most commonly in a week about structure. For younger children the parenting schedule often reflects 3 or 4 days about, other alternatives can include fortnightly or monthly changeover with intervening contact. For other families, particularly those where the parents live considerable distance from each other, this can be with a child residing with one parent during school terms and the other parent in mid term, weekends and school holidays.

Shared parenting is often the best arrangement that provides sufficient flexibility to suit the emerging needs of the child and provides the least impact on the day to day lives of the parents. The key ingredient to qualify a custodial arrangement as that of

shared parenting is most commonly where both parents share the day to day and long term decision making in respect of the child. Often shared parenting arrangements include a process for resolving disputes outside of the court structure.

### Parenting Plans

To facilitate shared parenting outcomes, parents would be required to agree upon a Parenting Plan for the children in the post divorce or separation period. It is the process of preparing the Parenting Plan where families are more likely to require the services of an impartial and non-threatening counsellor or mediator. Parenting Plans set out in detail how the child's needs will be met and what routines are to be established. A Parenting Plan is most likely to include:-

- Location of the residences of the child;
- The financial support base on the needs of the child and actual resources of the parents;
- A fair allocation of parental time with the child including holidays and birthdays;
- Handover arrangements and locations;
- Educational, Religious and Medical needs and requirements;
- Process or rules for resolving disputes.

It is our proposal that in disputed child custodial arrangements that parents would still be required to complete and lodge Parenting Plans for determination in court. In these circumstances each parent should sufficiently outline their position with respect to the scheduling and allocation of rights, duties and responsibilities.

Upon submission to a court a judge would determine which of the submitted Parenting Plans is most likely to provide adequately for the child and create the least disruption to the child's rights as determined in the redefined Objects and Principles section of the Family Law Act.

## *Shared Parenting Reduces Conflict*

There is a longstanding myth proffered by family law academics, some psychologists and many lawyers that if the parties have a dispute about the custody of the child, then there is insufficient cooperation for shared parenting to be successful. It is upon this premise that the Family Court generally refuses to award joint custody.

Another myth states that joint custody decisions imposed against one party's wish will inevitably lead to a continuation or escalation of conflict or hostility, increased litigation and poor child outcomes.

These myths are unsupported and contradicted by the evidence. Not to mention common sense.

Firstly, when you analyse the true basis of the dispute between the parents - the primary dispute is rarely about parenting styles and is more likely to be a dispute between the parents themselves.

The separation of the parents actually assists to remove the source of conflict, enabling both parents to be free to continue their parental roles in a separated yet shared

parenting arrangement. This is an arrangement for reducing conflict and therefore harm to the child would be minimised.

Research also concludes that joint custody outcomes actually reduce litigation, eliminate the capacity for parents to abuse their children by using them "as a football",[20] and establishes an environment more conducive for all to rebuild their lives.

It would be obvious that litigation would be expected to fall with more shared parenting arrangements because neither parent stands to become the winner or loser, rather both are confirmed as parents before the law.

There is no research that suggests evidence of increased long-term conflict because of shared parenting presumptions.

Clearly some research suggests that the present adversarial system unnecessarily polarizes separating parents and actually provokes conflict. [21]

However, even when parents do experience high levels of conflict, there remains a strong case that shared parenting determinations are more likely to reduce the conflict than the imposition of a sole custody order. [22]

In one research paper,[23] parents in high conflict situations were documented and categorised according to conflict variables. These parents were in both joint and sole custody arrangements. The details contained in the Court Orders were a determinate of whether there was a continuation or a reduction in conflict. The researcher found that relationships with high conflict were benefited by more detailed and structured parenting orders. The higher level of conflict in the relationship, the more detailed and structured the shared parenting orders were, and the more likely that conflict between those parents would be reduced. Conversely, shared parenting orders that didn't adequately provide for significant parenting issues were less likely to be successful in reducing conflict, because they provided more areas for potential disagreement. It was found that the more conflict in the post separation relationship, the more details needed to be recorded in the Parenting Plans and conflict would then fall. It was found that there is nothing preventing a shared parenting order to be implemented even in cases of high parental conflict so long as sufficient detail is addressed in the Parenting Plan or Court Order.

In high conflict situations, if shared decisions are to be included in the order, then the order should also stipulate how those decisions should be made if the parents are unable to resolve the matter at a future date. In some high conflict divorces providing a process that may involve a third party to determine disputes often removed a potential uncertainty resulting in a lowering of conflict.

It must be fully understood that conflict between separating parents is almost always present at some degree or other, however, it usually subsides over time. Research shows that this is more likely to occur under shared parenting orders than under sole custody.

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[20] Dr Danya Glaser., International Family Law Conference, Melbourne, 26 October 2002

[21] Saposnek D., Mediating In Child Custody Disputes. Jossey-Bass, New York 1983

[22] Kelly J B., Longer-Term Adjustment In Children of Divorce: Converging Findings and Implications for Practice, Journal of Family Psychology 1988 p 119-140

[23] Williams F S., Child Custody and Parental Cooperation, American Bar Association Family Law Section 1987

Immediate post separation conflict itself is not ordinarily indicative of future conflict between parents and therefore should never rank as a predetermined factor or pathology preventing a shared parenting order.

The reality is that nothing creates more conflict between separated parents than one or the other losing the right and opportunity to the love and companionship of their child.

A rebuttable presumption for shared parenting orders in disputed matters before the Court is likely to reduce conflict between separating parents, uphold the child's right to a relationship with both parents and minimise the financial and familial loss to the separated family and other parties such as grandparents and extended families.

### Recommendations

6. That the Family Law Act be amended to disallow disagreement, conflict or hostility between the parents from being a sufficient basis alone to rebut a presumption for shared parenting and that the primary concern of the Court is the impact of the parent's behaviour on the child and whether the child would be put at risk by the implementation of a shared parenting order.

7. That the Family Law Act be amended to remove the current usage of the 'status quo' principal from being a determining factor when considering an application by one or more parties for a shared parenting order.

8. That the Family Law Act be amended to remove the current usage of the 'primary parent' doctrine from being a determining factor when considering an application by one or more parties for a shared parenting order.

# Improving outcomes for children of divorce

> The costs of divorce for children have been studied in longitudinal comparisons between children of intact families and those of divorced parents. Short-term studies report that children are confused and depressed, sometimes clinically so. They fare worse in school, have problems in their peer relationships, and are more apt to "act out." Over the longer term, researchers report that the children of divorce are more likely to drop out of school. Girls, especially, are more likely to be promiscuous. Boys are more likely to become delinquents or criminals. Both sexes have a higher rate of marital failure when they grow up.[24]

Thirty years ago, the 'free love' generations of the sixties and seventies were telling the world that divorce was ok, that children were going to be much better off in a broken family rather than remaining in an intact one under pressure, that marriage was a social construct that had limited life left, and the world would be a better place so long as we could divorce easily and as often as we like.

Nothing has proven to be further than the truth than the 'free-loving' belief that "divorce would not harm children".

With the benefit of over a quarter of century of research we now know that one of the most harmful circumstances that can befall a child is their parent's divorce.

Yet we continue to divorce at an unabated rate. Last year over 55,000 couples broke their marriage vows and terminated their marriage. Throw into this pool the ever increasing break-up of defacto relationships and we are now looking at around 200 children a day faced with the prospect of a broken home, and very possibly a parental custody battle that could last for many years into the future.

That the continuing failure of marriage and defacto relationships are a curse on our children, is somewhat an understatement. That we have done very little to address the problem is bordering on negligence.

Questions for Government that arise out of this bleak reality are: How do we provide a system that will accept the inevitability of broken families, yet still provide protection and the best possible outcomes for children of divorce? Is our system of Family Law acting to promote or to discourage divorce? Is there a better way?

Since the introduction of the Family Law Act in 1975, there has been an escalation of children living in single parent (primarily mother) headed households. It seems to be an unstoppable statistic that has had little or no impact made upon it through Family Law amendments over almost 30 years. As a result of the propensity for sole mother custody, much of the negative outcomes for children directly relate to the issue of practical, or imposed fatherlessness on children.

In 2003, with now over 1 million children living in single parent families, our society is starting to crumble under the weight of the outcomes to which such a large proportion

[24] Brinig M.F. & Buckley F.H., Joint Custody: Bonding and Monitoring Theories, Indiana Law Journal, Vol 73 No 2, Spring 1998

of our children are subjected, through no fault of their own. The primary reason that children live in a single parent household is simply family breakdown, combined with a preference of the Family Court to issue sole custody orders.

Much has been said about the impact on children of living in single parent (mother headed) households, but to recap the situation that children experience without their biological fathers, we refer to the Civitas Research[25] - Experiments in Living: The Fatherless Family. That research concludes that children who grow up away from their biological fathers:-

- Are more likely to live in poverty and deprivation;
- Have more trouble in school;
- Tend to have more trouble getting along with others;
- Have higher risk of health problems;
- Are at greater risk of suffering physical, emotional, or sexual abuse;
- Are more likely to run away from home;
- Are more likely to experience problems with sexual health;
- Are more likely to become teenage parents;
- Are more likely to offend;
- Are more likely to smoke;
- Are more likely to drink alcohol;
- Are more likely to take drugs;
- Are more likely to play truant from school;
- Are more likely to be excluded from school;
- Are more likely to leave school at 16;
- Are more likely to have adjustment problems;
- Are less likely to attain qualifications;
- Are more likely to experience unemployment;
- Are more likely to have low incomes;
- Are more likely be on income support;
- Are more likely to experience homelessness;
- Are more likely to be caught offending and go to jail;
- Are more likely to suffer from long term emotional and psychological problems;
- Tend to enter partnerships earlier and more often as a cohabitation;
- Are more likely to divorce or dissolve their cohabiting unions;
- Are more likely to have children outside marriage or outside any partnership.

This is a damning wake-up call to all of Australian society. We cannot afford for this outcome to be accepted as normal and an unpreventable symptom of our free-living society.

Sole parent custody is arguably the worst possible living arrangement, post parental separation or divorce, that society could ever invent. The outcomes for the innocent children are perilous and life-long. The outcomes for parents are financially and emotionally devastating, and the outcomes for society are an immeasurable loss of

[25] O'Neill R., Experiments in Living: The Fatherless Family, CIVITAS, London, September 2002

opportunity for social, educational and financial achievement for millions of Australians.

Yet, there is a better alternative.

Early intervention programs that help to reduce divorce and parental separation would be a step in the right direction - however, where that is not effective, we must consider better options for dealing with children of separated parents.

Shared parenting clearly shows tremendous advantage to children when compared against outcomes from sole custody households.

On all measurable scales, children of separated families who experience the continuation of their parental relationships with both their mother and father, adjust much better to the 'stress' of divorce than children who live apart from one of their parents (typically their father).

Children in shared parenting arrangements describe their relationships with both parents as positive and that they feel loved and close to both parents.[26] Children are more satisfied with shared parenting arrangements,[27] and believe that having two homes is more an advantage than a disadvantage. They also do not feel uncertain or confused by a shared parenting arrangement.[28]

In a review of the international literature published since 1980 examining the impact of father involvement on child well-being (Amato 1999) it was determined that 82% of all reports found significant and positive associations between father involvement and child well-being.[29]

Typically, children from shared parenting arrangements report more positive experiences throughout their lives from the equal input of both their mother and father. They have higher self-esteem and have lower periods of adjustment to their parents separation than do children from sole custody homes.

Father involvement post separation is a critical factor in child outcomes. For sons, predicting educational and occupational outcomes is supported by the father's encouragement for intellectual-academic achievement. For daughters, it is the father's physical-athletic encouragement that matters.[30]

Another study in the US representing sixteen hundred (1600) 10 to 13 year olds found that children who shared important ideas with their fathers and who perceived the amount of time they spent with their fathers as excellent, had fewer behaviour problems.[31] Father-child interaction has been shown to promote a child's physical well-being, perceptual abilities, and competency for relatedness with others, even at a young age.[32]

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[26] Luepnitz D.A., A comparison of Maternal, Paternal and Joint Custody: Understanding the varieties of post-divorce family life., Journal of Divorce (1986) p 1-12

[27] Luepnitz D.A., Child Custody: A Study of Families after Divorce, Lexington Books, 1982

[28] Williams M., Address to the 5th Annual Conference, Children's Rights Council, 20 October 1990

[29] Amato P. and Rivera F., Paternal Involvement and Children's Behaviour Problems", Journal of Marriage and the Family 61, 1999 p 375-384

[30] Snarey J., How Fathers Care for the Next Generation, Cambridge MA: Harvard University Press, 1993

[31] Williams M., Reconceptualizing Father Involvement, Masters Thesis, Georgetown University, 1997

[32] Krampe E.M. and Fairweather P.D., Father Presence and Family Formation: A Theoretical Reformulation, Journal of Family Issues 14.4, December 1993, p 572-591

Children who have a high involvement and interaction with their fathers attain higher levels of education and economic self-sufficiency than children whose fathers are not actively involved. A high level of paternal involvement and improved father-child relations through adolescence were associated with lower levels of delinquency and better psychological well-being.[33]

It is also the case that children who are able to share meals with their father, enjoy leisure time with them, or have them help with reading or homework do significantly better.[34] For girls, studies link a sense of competence in daughters - especially in mathematics and a sense of femininity - to a close, warm relationship between father and daughter.[35]

There is no research in existence to support the proposition that children do well without their fathers taking an active and primary role in their lives. Accordingly, a rebuttable presumption of shared parenting after separation, will go a long way to restoring the father's place in the child's life as well as minimising the emotional and psychological harm to the child, post parental separation.

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"Over the past four decades, fatherlessness has emerged as one of our greatest social problems. We know that children who grow up with absent fathers can suffer lasting damage. They are more likely to end up in poverty or drop out of school, become addicted to drugs, have a child out of wedlock or end up in prison. Fatherlessness is not the only cause of these things, but our nation must recognize it is an important factor."[36]

*President George W. Bush, 7 June 2001*

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**Recommendations**

9. That the Parliament address the issue of fatherlessness in Australian society by establishing a 'Prime Ministerial Council on the Status of Fatherhood' with a brief to look at and report to Government on all aspects of legislation and government policy, and more generally, societal issues that impact negatively on the capacity of fathers to be more closely involved in the care and upbringing of their children.

## *Protecting Children at Risk*

Given that the best interests of the child are the paramount consideration when dealing with issues of child welfare, it is critical that any risk or potential harm to a

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[33] Mullan Harris, Kathleen, Frank F Furstenberg and Jeremy K Marmer., Paternal Involvement with Adolescents in Intact Families: The Influence of Fathers over the Life Course, American Sociological Association, New York 16-20 August 1996.

[34] Cooksey E.C., Fondell M.M., Spending time with his kids: Effects of Family Structure on Fathers' and Children's Lives, Journal of Marriage and the Family 58. August 1996, p 693-707

[35] Radin N., Russell G., Increased Father Participation and Child Development Outcomes, Fatherhood and Family Policy Eds M.E. Lamb and A. Sagi, Hillside Lawrence Erlbaum, 1983, p 191-218

[36] President George W Bush, National Fatherhood Initiative's 4th Annual National Summit on Fatherhood, Washington D.C., 7 June 2001

child is minimised. There are many organisations[37], including the Family Court of Australia, who have concerns that children are not being adequately protected when issues of child abuse are raised in Family Court applications.

Whilst these positions are taken on an 'anecdotal' basis, there is little or no information available to fully determine how children are placed at risk by custodial arrangements, and whether this risk is represented in actual custodial orders made by the Court.

It is our submission that any issue of child abuse must be determined and resolved by a Court as quickly and expeditiously as possible. Children who are exposed to potentially life threatening or psychologically harmful environments require protection and there can be no excuse for exposing a child to a serious or imminent risk of harm.

The problem that the Family Law system faces in these circumstances, is how to best balance the custodial needs of the child against the responsibility of the state to protect the child, and for the Court to expedite resolution of matters and determine the facts or otherwise of any potential risk to the child.

In the past the Family Court has generally taken the 'lingering doubt' position against the alleged perpetrator, and restricted contact to that parent pending further investigation and the preparation of a Child Welfare Agency report and/or a Family Assessment.

Regrettably, when these investigations result in an unsubstantiated or false accusation finding from the applicable Child Welfare Agency, there has usually been many months that have passed whereby the child has been forced to suffer the deprivation or loss of relationship with one of their parents. This issue has caused much grief and angst amongst separated parents who, along with the child, have suffered an injustice and an interruption to their parenting roles - with little or no recourse against the false accuser.

On this issue, Brown (2003) in her investigation of abuse allegations said, "It is clear that allegations are made against fathers more frequently than against any other family member and that the person making these allegations is most commonly the mother. Furthermore, many fathers are found not to be the perpetrator as alleged. This gives some support to the belief of fathers that their former partners pursue them with malicious allegations of child abuse".[38]

When the accusations made against a parent are found to be false, the children in these situations have been subjected to another form of child abuse called parental alienation, perpetrated by the false accuser. The child, having their relationship with the other parent interfered with, has suffered parental deprivation and may also have been made a part of or included in the process of the false accusation made against the innocent parent.

The issue of dealing with a 'child at risk' is a genuine concern under the current family law arrangements. It is unlikely that there would be any change to risk assessment if parliament were to prescribe a rebuttable presumption of shared parenting. It is, however, an area that almost all sides of the debate argue for further improvement.

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[37] NCSMC, Press Release, supra note 16

[38] Brown T., Fathers and Child Abuse Allegations in the context of Parental Separation and Divorce, Family Court Review, Vol 41 No.3, July 2003, p 367-380

Children at risk need to be protected, and false allegations aimed at reducing one parents involvement with the child also need to be reduced or eliminated. One could forcibly argue that:

- An established child abuse incident and/or determined abusive relationship should be sufficient basis for a Court to consider rebutting the presumption of shared parenting against the perpetrator; and
- Equally, an established false allegation of abuse, ought properly be considered a form of psychological child abuse and should also be sufficient basis for a Court to consider rebutting the presumption of shared parenting against the false accuser.

This proposition would provide a satisfactory method of dealing with claim/counter claim of child abuse in so much as both a perpetrator and a false accuser would be potentially open to have their parenting roles appropriately diminished or cancelled.

Many women's rights groups would argue that this would prevent women raising legitimate complaints against fathers in Family Court proceedings for fear of losing custody of their children. However, the consideration of altering custodial arrangements based on a false accusation would only be determined where the claim was reported as false. Where the claim may be determined as 'unsubstantiated', ie the child welfare authorities were unable to determine that the alleged abuse occurred, then the rebuttal issue would not automatically come into play, and any interruption to the aggrieved party could be reasonably rectified with make-up contact time with the child and a costs order against the party making the unsubstantiated claim.

There is nothing unusual about Courts of law making rectification orders when one or other party has intentionally or otherwise, inflamed litigation and raised a parties costs as a result of allegations made in such claims.

Unfortunately, in Family Law in Australia, liability for a costs order has generally not been employed and it would be a prudent measure for the Parliament to reconsider the issue of when costs ought to be rightly applied against a party - especially in such circumstances as those of false allegations. Not only is this an equity and fairness measure, it also helps to keep parents minds focused on real issues of concern, rather than attempting to 'add to the shopping list' of terrible things the other parent has done, simply in an attempt to remove that parent from the child's life.

**Recommendations**

10. That the Family Law Act be amended to provide for the presumption of shared parenting to be rebutted in circumstances where it is established after consideration of clear and convincing evidence that a child is at serious or imminent risk of harm, or where it is not in the best interests of the child with respect to the relevant matters as detailed in the best interests checklist detailed at section 68F(2) of the Act.

11. That section 68F(2) of the Family Law Act be amended to provide for the Court to consider which parent would be most likely to facilitate contact of the child with the other parent if it is found inappropriate to issue a shared parenting order.

12. That section 68F(2) of the Family Law Act be amended to provide for the Court to consider whether any party has knowingly made false allegations concerning

child abuse or domestic violence if it is found inappropriate to issue a shared parenting order.

13. That the burden of proof that a shared parenting order ought not be granted falls upon the party requesting alternative custodial arrangements.

14. That if a court declines to award a shared parenting order, then the court shall clearly state in its decision the specific findings of fact upon which the presumption has been rebutted.

# Facilitating contact for Grandparents and other relationships

Section 60B of the Family Law Act (1975) states:

- Children have a right of contact on a regular basis, with both their parents and with other people significant to their care, welfare and development; section 60B2(b)

Logically this is referring to the child's right to a continuing relationship with close and extended family members. These include but are not limited to brothers and sisters, grandparents, aunts, uncles, cousins etc.

Despite this legal right of the child, many sole custody situations result in alienation of the child from an ongoing relationship with their grandparents and other significant family members from the non-custodial parent's side of the family.

As is the case with fathers, social science research establishes the importance for children to develop with the wider knowledge that they belong to and are part of a wider family structure. Children need to know their roots and with whom they share a common ancestry. It is critical that these relationships be continued wherever it is in the best interests of the child, to enable the child to experience the warmth and contentment that comes with 'knowing you belong'.

An extended family network is also a reassuring aspect to the child of family separation - to know that these relationships are and will continue - assists the child to overcome the loss of their parent's relationship.

Ever increasing numbers of grandparents are acting on behalf of their grandchildren and are seeking ongoing contact with them after family breakdown through the only means possible, litigation. They are finding the same kinds of obstructions and difficulties in obtaining contact as non-custodial parents experience.

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"The best way to punish an ex-partner is to keep the children away from their grandparents. Unfortunately this punishes the children as well"[39]

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Modern grandparents in particular are becoming more involved with their grandchildren, especially in the area of child care providers for working parents. It is not unreasonable for children to expect to continue benefiting from an opportunity for a similar closeness in relationship with their grandparents and other family members after separation as they did before the family breakdown.

Grandparents are becoming increasingly active and vocal about their distress at being excluded from their grandchildren's lives after separation, and most believe they represent the best interests of their grandchildren too.

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[39] Liela Friedan 'Losing a special bond' Melbourne Herald-Sun 12 Dec 1994

Shared parenting would alleviate this situation with the expectation that each parent would negotiate with the grandparent or other family member as to contact time, with the same pathway to mediation in the case of disagreement.

In the case of an unfit parent, the grandparents or other family member should be able to make application for an appropriate contact or custodial arrangement.

Judicial consideration for grandparent contact privileges are currently allowed for in 49 states in the US.[40]

This is also the case in relation to Australian Family Law.

The circumstances affecting grandparents and extended families of separated parents under the current regime, are dealt with harshly and bluntly. It is anticipated that a rebuttable presumption of shared parenting, together with a mandatory mediation process for resolving child custody and contact matters, is likely to provide for better and improved access to children by their grandparents and extended families, under the current provision.

However, it is also strongly argued that Grandparents should be afforded rights in relation to their unique position in the family unit, and accordingly the Family law Act should be amended to specifically mention grandparents, and to provide a mechanism for contact in cases where it is both appropriate and in the best interests of the child.

**Recommendations**

15. That the objects section of the Family Law Act be amended to provide specifically for a grandparent of a child, and/or other people significant to the child, to make an application for reasonable contact with the child.

[40] Grandparents Rights 1985 Report from the Committee on Education & Labor, House of Representatives, First Session, Washington DC

# Alternative Dispute Resolution Process

Mediation in family matters has an excellent reputation for resolving disputes in the jurisdictions around the world where it has been implemented.

Assistance from professionals who are experienced and trained in this area can provide a much needed 'pressure valve' for parents in this emotionally charged time of their life. Decisions of critical importance, such as the future care and upbringing of their children, requires a sensitive and responsive process that will enable parents to reduce conflict, find methods or rules to adapt to the changing nature of their relationship and provide outcomes that will enable separated families to best get on with their lives in a new environment.

Our submission supports the extension of mediation as a preferred method of resolving issues relating to all family separation matters, especially children's issues.

## *Objectives of Mandatory Mediation Programs*

- To avoid, to the greatest extent possible, the need for parents or other parties (including extended family), to engage in litigation over child custody and or access rights, responsibilities and related issues.
- To negate the need for excessive state or professional interventions by teaching and encouraging the use of pro-active parenting skills, according to the "least restrictive alternative" principles of intervention.
- To raise awareness of the needs of children in family disputes and affirm parental commitment to meeting and nurturing those needs.
- To empower, encourage and support parents to recognise and meet the best interests of their child, both during and post-separation or family breakdown, through education, counselling, therapy and mediation.
- To encouraging and maximise positive parenting skills.
- To manage and minimise conflict between parents.
- To minimise and negate the conflict between parents and children, especially where child abuse and parental alienation is a risk factor.
- To educate, inform and caution parents and others on the wisdom and/or consequences of their choices (including legal, social and economic) and behaviours which may adversely impact on the child in their care.
- To provide professional expertise in monitoring and managing high conflict relationships and high-risk family situations, especially those which may involve evidence of child abuse, mental illness, gambling addiction, substance abuse, repeated criminal behaviour or other forms of social and family dysfunction.
- To assist in the development, registration and monitoring of compliance with Parenting or Family Preservation Plans.
- To recognise the importance of family and extended community networks in protecting children from harm.
- To protect all innocent parties from vexatious and malicious accusations and litigation.

The primary Mission of mandatory mediation is to provide aggrieved parties unambiguous pathways through which they can seek remedy or recourse, in ways which:

- are sensitive to the needs of both children and their parents;
- recognise the relevance and importance of the whole family structure to serving the child's best interests; and
- will be difficult to frustrate or re-interpret.

## *Why Mediation?*

When parents split, or have never lived together, their relationship usually has a range of negative characteristics (unresolved or even unrecognised) that will impact on their ability to negotiate appropriate arrangements for the ongoing care of their child.

Two adults, living in different households with different lifestyles, are likely to have different values, ways of doing things, and other variables and contingencies that impact on shared parenting.

While complete compatibility and equity between two homes may be impossible to achieve - there needs to be some attempt towards social fairness and to deal with disparities that may effect the child negatively.

## *Why Mandatory?*

Abuse, or damaging behaviour, is not always overt or extreme. For example, passive-aggression maybe demonstrated in a refusal to enter into discussion when the other party raises issues, or not complying with agreements (e.g. tardiness or non-availability) or persistent annoyances (e.g. phoning at mealtimes). Parents who are inclined towards manipulative, aggressive or passive-aggressive relationship behaviour, or who wish to avoid scrutiny or being questioned can refuse to be a party to voluntary mediation (or opt out).

It supports accountability and transparency - parenting is one of the most vital roles an adult has, so their behaviour as a parent is of concern and interest to the community.

It's about child care, support and protection. Many child risk situations could be avoided and/or addressed if strategies for appropriate parenting were in place, with negotiation and communication expected (the norm) - supported by the community and community agencies and providing early detection of problems and intervention if necessary.

We have road rules and laws to protect people in our community - sometimes from their own irresponsible behaviour e.g. wearing seat-belts or drink-driving - so mandatory requirements regarding parenting children should not be seen as an unacceptable infringement of individual rights.

It's not about judging 'good parent' against 'bad parent' - it is about expecting all parents to take their responsibility as a parent seriously and to respect the rights of the other parent - in the best interest of the children in our community.

## *Current Mediation Training Packages*

We believe that mandatory mediation must result in tangible and clearly articulated grounds that enable courts to become involved when a dispute cannot be resolved, as opposed to the current situation where parents are simply being urged to file with the courts.

So to begin with we would need to establish a nationally accredited training package for Family Mediators which would ensure consistency and compliance with competency standards, nation-wide.

There is in existence a nationally accredited mediation course. Although there is provision for "specialising" in family mediation within this training package, we consider these elective topics to be wholly inadequate for the purposes of providing mandatory mediation services under any shared parenting regime.

We propose that a minimum pre-requisite accreditation of mandatory mediation be made compulsory before any Mediator can work in the field. In much the same way as National Accreditation in Disabilities does not qualify a person to work in Aged Care, so to it is proposed that that Family Mediation be regarded as requiring specialist skills.

We propose that a specifically designed Certificate IV course in mediation be made compulsory for mediators wishing to work in the family relationships area. Practitioners would also need to be highly skilled and trained in Family Preservation methods, models and practices.

## *Service Provision*

It is envisaged that the provision of mandatory mediation services would be provided through outsourced, non-government service providers, in much the same way as the current Job Network system operates, where payment is proportionately provided on the number of positive outcomes achieved (eg. as the Case-Based Funding system is applied within employment services).

Cases could be divided into categories according to the type and duration of services that are expected to be required (eg. Level One - Parenting Education and Training; Level Two - Mediation and Counselling; Level Three - Family Preservation and Therapy).

These levels of intensity of service provision may be determined using an appropriate Assessment Tool (such as the Disability Performance Indicator (DPI) and Disability Maintenance Instrument (DMI) is used in employment to determine funding requirements). These tools would however, need to be developed within the philosophical and ideological framework of a shared parenting regime. Caution needs to be given to which agency will be given the task of developing such a tool and by what methodology and ongoing supervision.

Level One services may provide equal, generic, non-gender specific information about choices, options and consequences (eg. Questions and Answers about shared parenting; How does it work; etc). They may also provide:

- examples for parents on developing their own "off the shelf" Parenting Plans (eg. perhaps a little like the "Do-Your-Own" Divorce or Will Kits);
- referrals to other services (eg. Police, welfare programs and services);

- One-stop-shop information kits, containing information about community-based training and education services (eg. marriage-survival, relationship building courses and an array of parenting programs, amongst other things).

Information brochures should be produced with comprehensive details of shared parenting legislation and what this means to families in layman's terms. The brochure should be distributed immediately to all Australian Families and be furnished to religious organisations, marriage celebrants, welfare organisations, high schools and universities. In addition it should be posted to the last known addresses of all new applicants of sole parent payments and child support applications as well as the new address of the other parent.

Level Two services will require the couple to engage in dialogue and constructive communication where one party feels aggrieved and is seeking potential legal remedy or recourse. Of course, Level Two services must also be optional and readily available for parties not necessarily seeking to litigate, but for whom such mediation may serve as a form of early intervention. It is envisaged a Parenting Plan will become a necessary outcome of accessing such intervention services. Referral to specialist services (eg. Psychologists, Psychiatrists, rehabilitations clinics and other professional supports) may also be necessary and appropriate in some circumstances at this level of service provision.

Level Three services would be reserved for the most resistant families and individuals where dysfunction, hostility or violence is apparent and all other forms of assistance have been tried and failed. It would be our recommendation that liaison with Access Changeover services only be recommended in these cases, concurrent with a Family Preservation Plan.

## *Child Protection: Family Preservation in the context of Mandatory Mediation*

It is imperative that Family Preservation services are made relevant and tied in with Level Three-type interventions and services.

Situations which require such interventions obviously include all high risk families where child abuse, substance abuse, mental illness and other evidence of family dysfunction are apparent.

It is recommended that mandatory mediators be amply trained to detect actions that can be construed as being motivated to undermine agreement, in order to recommend, at the earliest possible time, that the matter proceed to court to ensure quick resolution and, in doing so, enforce the current Parenting Plan to remain in force.

Where Child abuse is established so as to require an alteration to any existing Parenting Plan, it is envisaged that existing default provisions of the Family Court would be sufficient to deal with those. Of course, there is an expectation that there will be compliance with investigation time-frames, so as not to protract investigation or litigation.

It is also expected that "make-up time" will be built into those Parenting Plans once an investigation is completed and a party has been sufficiently cleared of suspicion, such that vexatious or malicious parties can not use false allegations as a form of relief or as a vehicle for impeding the other parent's relationship with the child. The proper

restoration of contact recognises that the child is not to be punished as a consequence of parental conflict.

## *Early Intervention*

It is crucial that mandatory mediation recognises several co-incidental trends as are occurring in South Australia.

The Children of Parent With Mental Illness Project (COPMI) is due to hand down a report with recommendations in September 2003, on strategies for identifying and meeting the needs of children whose parents come to the attention of the mental health system. The Draft Report of April 2003, (Principles and Actions for Services and People Working with Children of Parents With a Mental Illness) indicates that an essential part of this project has been a focus on Family Preservation practices and interventions.

These recent developments appear to be consistent with the current inquiry into shared parenting. A focus on Family Preservation as part of any mandatory mediation Process will, we believe, compliment the practices advocated by the child protection systems as well as COMIC (Children of Mentally Ill Consumers and Carers) and COPMI.

## *Problems with existing Counselling Services*

To intervene or not to intervene? That is the question. Yet the answer is not so difficult.

One response from a non-custodial parent postulates that, without proper regulation and scrutiny, the mandatory mediation model may presume that the majority of parents are not equipped to make mutually acceptable agreements without intervention.

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"[Its success] relies on keeping those outside the family structure with vested interests, (ie: Counsellors, Lawyers, Psychologists, etc., and the organisations they work for) powerless in the decision making process. It relies on keeping those who have something to gain from particular outcomes completely outside the program... carrot and stick programs don't work when they are overseen by a genderised structure. Just saying that it won't be genderised will not stop the Courts becoming involved...."

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This parent had a "confirmed" false allegation of child sexual abuse subsequently overturned by the South Australian child protection services, despite originally having favourable findings from the Family Court, but in which he still lost custody.

For this reason, we submit that mandatory mediation under any rebuttable presumption for shared parenting system, must be underpinned by the least restrictive alternative principle for intervention. In other words, interventions should be provided only according to carefully-assessed need and in carefully-measured increments.

Many parents report that they have been poorly treated by Family Court Counsellors in the present system.

There are countless examples where non-custodial fathers or extended family members have been advised or discouraged from pursuing contact with their children or where they have been insufficiently consulted in determining or defining the problems in family dynamics where children are concerned. Whilst individual circumstances have differed, commonly it has been reported that counsellors have assisted hostile parents to get away with making false allegations of domestic violence or child abuse, with no penalty or consequence.

By the same token, Counsellors have been reported as making mandatory notification with state child protection authorities where one parent has made allegations of child abuse.

In many instances, however, parents report that nothing eventuated as a result of their contact with the counsellor. Therein lies at least some of the difficulty.

In one case, the father reports: "I was very upset over my counsellor trying to convince me that twice a fortnight visitation was a good deal for me and my son."

The silence of the entire Social Work profession on the very subject of shared parenting is deafening. This comes as little surprise given that feminist theory and models of Social Work intervention are widely promoted in Universities. The same ideologies have been broadly embraced by the community - from government agencies and academia to the smaller non-government sector.

On the subject of mandatory mediation, one father's cynicism and disillusionment with counselling services was reflected in the following comment:

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"As with the Family Court of Australia, teams of "professionals" would get together, viewing themselves as "experts" on the subject of parenting/dispute resolution, and impose their procedures and "Best Outcome Principals" on all separating parents and their Children. Somehow I figure the first one would be "Sole Parenting".

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To ensure that does not happen, it will be necessary to change the culture of the entire sector. It is, therefore, strongly recommended that all practitioners in the field be required to undertake compulsory retraining and that all performance appraisals reflect the relevant outcomes of the new shared parenting framework.

Of course, an appropriate change to the composition and qualifications of the Australian Institute of Family Studies, Family Council of Australia and Family Pathways Advisory Group will be necessary to successfully accomplish the proper implementation of any new system of family dispute resolution towards a rebuttable presumption for shared parenting.

## *Post Separation Parent Educational Programs*

Parents are likely to be consumed with intense emotional responses to the circumstances they find themselves in after family separation. Often these feelings can consume parents to the point that they are unable to put the best interests of their child above their own interests in the process. For this reason, we support the introduction of mandatory psycho-educational programs for all family members where there is unresolved disputation requiring intervention.

Psycho-education programs would necessarily cover issues of post separation parenting, including how best to manage the multitude of issues involved in sharing the care of their children.

We submit that these programs should also be conducted by approved agencies who are best able to educate parents about the need for maintaining healthy parenting attitudes after separation.

## *Costs*

Services should either be means tested (with provisions for waiver of fees) or free for the most needy and extreme circumstances (perhaps at Level Three interventions).

This will recognise the primacy and importance of all family members to the best interests of the child and represent a commitment by government to ensuring families are both valued and properly supported.

It is reasonable to believe that the amount of Federal and State taxpayer dollars which will be saved in unnecessary representations during litigation could properly be appropriated to positive, pro-active and preventative family-oriented programs.

### Recommendations

16. That a proposed statutory framework for mandatory mediation be implemented for all family matters that would ordinarily come before the Family Court and that exemptions to mandatory mediation be only given in specified circumstances where there is a clear and imminent risk of harm to the child;

17. That a person acting as Family Assistance Mediator be approved by the Attorney-General and be competent on a National Standard for the tasks apportioned to such a role. Where one or both parties are not prepared to mediate about the future sharing of care for the child, then the mediator be given authority to interview and the duty to assess the needs of the child and to prepare a report for the Court. The approved mediator will have, under specified circumstances, the power to appoint a separate representative for the child if required.

18. That the Family Law Act be amended to require the Court to order mandatory psycho-educational programs for parents and their children, where parenting issues remain in dispute after mediation, and that these courses be provided by agencies approved for such programs by the Attorney-General.

# Rethinking Financial Support for Children

Sharing the care and upbringing of children requires sufficient property and financial resources to enable the child to experience a reasonable standard of living together with the opportunity to participate fully in society.

Currently, both the Child Support schemes and Social Security Parenting Payment rules, were not designed to, and do not support shared parenting outcomes in the everyday case.

In relation to Child Support, the system has been established on the basis that most separated families will result in one parent having custodial care of the child with the other parent primarily as a source of income for the custodial parent, to meet the day to day needs of the child ie. there will be one 'payer' and one 'payee'. Even though the current system acknowledges that parents can be both payers and payees, and that the Child Support formulae operates on a sliding scale for child support once the current, but inadequate, level of 30% is reached - the outcomes of the CSA formulae actively acts as a disincentive for separated parents with shared care of their children to further individual enterprise. This is particularly troublesome when extra effort by one parent raises their income level above the CSA free threshold and that parent ends up subsidising the lower enterprise and income of the other, in addition to the costs incurred for raising the child who is in the care of the paying parent for approximately 50% of the time.

When looking at the actual financial support and liability of each parent in a shared parenting regime, it is hard to justify, for the issue of child support, that one parent should be subsidising or transferring income to the other when they both equally share the costs of raising the child by supplying accommodation, clothing, food and other child welfare costs when the child resides with that parent.

In this circumstance, the issue of creating a child support liability by one parent to the other becomes a source of aggravation between the parents, and is often viewed by the payer parent as some type of spousal maintenance. Naturally, this feeling of injustice is valid, but more importantly it has the potential to raise conflict between the parents and thus potentially affect the child in a negative sense.

Add to this mix a formulae that can effectively calculate a cost to the enterprise parent substantially in excess of the actual costs of raising the child, and the potential for creating hostility between the parents is exacerbated. The Child Support agency is aware that the current formulae will effect this poor outcome and it is acknowledged by the agency themselves:-

> "The cost of children was also taken into account as research suggests that the child support formula requires paying parents on higher incomes to provide more financial support than the total costs of their children." [41]

In relation to Social Security, it is apparent from information presented by the Parenting Payment and Labour Market Branch of the Department of Family and Community Services, that there is an inequity present in the guidelines for awarding

[41] Letter from the Child Support Agency, 19 December 2001

parenting payment (single) to separated parents who equally share the care of their children.[42] In the "Sharing the Care of Children post-separation: family dynamics and labour force capacity" report prepared by the Department of Family and Community Services, the authors explain as follows:-

> "The impetus for this research arose from the treatment of shared care parents in the social security income support system. Carberry (1998) argued that family law and social security provisions are at odds with one another in relation to the treatment of separated parents who share care of their children on a substantially equal basis.
>
> In brief, under current rules only one parent is eligible to receive an income support payment for being primary carer of the children"[43]

The problems previously noted in this submission in relation to the attitude of Government bodies and Courts, when describing separated parents, are compounded in the practical day to day implementation of shared parenting. It is clear that for a rebuttable presumption of shared parenting to be effective, it will be necessary to harmonise government policy across the board and to remove prejudicial assumptions and terminology such as "primary carer", "custodial" and "non-custodial" parent.

Government Policy needs to reflect and understand the nature of parental relationships in a shared parenting environment. This is particularly an issue when it comes to determining a fair and commensurate level of financial support that parents are necessarily required to contribute towards the care of their children.

Separated parents suffer enormous costs as a result of family breakdown. Financial resources that formerly were available to the entire family are effectively split, and each parent will need to establish independent residences for themselves and their children post separation. It is obvious that the economics of this separation will result in a lowering of financial assets, resources, and an increased total cost for the upbringing of the family in a shared parenting environment.

To attempt to 'force' one parent to fund the other parent for child support so that the payee parent is able to maintain the pre-separation lifestyle is both unrealistic and absurd. Further it is a direct disincentive for enterprise by the payer parent as the more effort put into progressing their new family and support structures through increased enterprise and income is effectively eroded by a transfer of the income from that parent to the other and also lowers the need and requirement for the payee parent to adequately and effectively further their own enterprise in the best interests of themselves and the children.

Parents who engage in substantial shared parenting arrangements call this potential intervention by the Child Support Agency as "a deadly embrace - guaranteeing less incentive to work". Effectively, this type of permanent financial linkage is more likely to increase social security payments for both parents as there is practically no remaining incentive for either parent to progress - unless both parents take steps simultaneously and move forward on equal incomes. This also actively works against the proposition that the parties have separated and dissolved their union, and should

[42] Dickenson et al, supra note 18 at p 2
[43] ibid

no longer be tied to each other in a property or financial basis - except in relation to the direct expenditure of necessary costs for the children in their care.

The issue of Child Support needs to be effectively rethought when it comes to considering the shared care of children. It is our submission that there is no valid place for an exchange of financial resources between parents who share the care of the child for periods between a 40% to 60% care ratio, and hence the Child Support Agency (or similar authority) should not be available to either parent when they share the care of the child in the range of the before mentioned care percentages.

What is important in this situation is that a process or agreed structure for fulfilling incidental costs incurred by, or through the children (school fees, extracurricular activites etc) should be adequately addressed in any Parenting Plan and/or Court Order, and therefore it would only come down to the issue of non-payment by either party whereby any further intervention may be needed.

In these circumstances, we submit that it may be better for the Office of Family Assistance through the Centrelink Agency, to act as the vehicle for resolving these issues through the tax, family benefits and social security systems.

Under a shared parenting regime and through the effective use of Parenting Plans, it is reasonably easy for parents to make arrangements and agreements about how outside costs of the children ought to be met. In the simplest form a statement in the Parenting Plan or Court Order that confirms the process and sharing arrangement for payment of these additional costs of raising children ought to be sufficient, and therefore there is no role for the Child Support Agency to play in the circumstances whereby parents equitably share the care and upbringing of their children.

**Recommendations**

19. That an application for Government administration of Child Support not be available to parents who share the care of their children with a residence schedule of between 40% - 60% of the time, subject to an Approved Parenting Plan or Court Order that provides a structure for payment of outside and ancillary costs associated with the child.

20. That the 'Low Cost' Budget Standards Unit (B.S.U) guidelines be established as the benchmark formulae in a fixed dollar amount for child support to be paid by parents who have between 0% - 40% care of a child and that the child support amount be determined on a proportionate percentage of the B.S.U. calculated conversely to the amount of care the paying parent would provide as established by either an Approved Parenting Plan or Court Order.

21. That upon assessment and default of payment by the payer in accordance with an Approved Parenting Plan or Court Order, the payee may make application to the Federal Magistrates Service for enforcement of payments of child support.

22. That the Government consider abolishing the Child Support Agency and transfer these responsibilities to either Centrelink or the Family Assistance Office to avoid departmental duplication concerning separated family arrangements.

23. That the rules governing provision of Centrelink 'Parenting Payment' benefits be reviewed to make them available to both parents where they share between 40% - 60% of the care of their children.

# Frequently asked Questions about Shared Parenting

There are many myths and distortions currently distributed in relation to the implementation of a shared parenting presumption in Family Law and also in relation to many of the procedural processes of Family Law as they operate in Australia.

This section aims to highlight the misinformation currently in circulation about this issue and provide straightforward answers to many of the questions raised by this important social reform policy.

Many of the statistics contained in this section are drawn from international resources in countries where the cultural and legal issues are similar to those facing Australia.

**What is Shared Parenting?**

Shared parenting is a formulae for post separation families to make arrangements for the future care and upbringing of children where both parents are equally involved in the duties and responsibilities of bringing up their children.

Shared parenting does not necessarily mean that children will spend exactly equal time with each parent, however it does mean that the child will have equal access and opportunity with both parents and that both parents are to be responsible for the care and welfare of the children of a union in a post separation environment.

**Will Shared Parenting be detrimental to children?**

No. Public misinformation and fear-mongering campaigns being put forward by sole parent advocacy groups suggest that research shows shared parenting to be detrimental to children. No such credible and gender-neutral research exists. The preponderance of available research indicates that child outcomes under a shared parenting regime are superior on almost all measurable child wellness indicators. Shared parenting outcomes also provide the fastest recovery from the trauma of family separation for all members of the immediate and extended family.

**Is Shared Parenting a "one size fits all" approach to family separation?**

No. Shared parenting is the most flexible and responsive approach to how best to raise children in a post separation environment. Because shared parenting allows for a multitude of family arrangements, there is enormous scope for each individual family to determine a shared parenting arrangement that will suit the current and evolving dynamics of practically any family situation.

The current Family Court bias for issuing sole custody orders is precisely a "one size fits all" solution which sees over 95% of children have their relationship severely diminished or terminated with one of their loving parents. There is little or no scope for a sole custody order to provide flexibility for individual or emerging needs of the separated family.

Whilst it is easy to administer, the sole custody regime of the present system has created a social catastrophe with disastrous consequences, both for the children of divorce and for the long-term socio-economic effects on society.

Complete or near complete removal of one parent where it is unnecessary, avoidable and preventable can be extremely distressing for all children, yet the present system

has a blatant disregard for the distress this causes and continues to treat all family situations as essentially identical - regardless of special needs or circumstances of each family.

**Will Shared Parenting force women and children to keep in contact with predators and abusers?**

No. This is one of the biggest falsehoods and fear-mongering campaigns which has been launched by sole parent lobbyists in recent months.

The proposed presumption of shared parenting is rebuttable where a party can show that there is a clear and imminent risk of harm to a child. Parents who have demonstrated that they are abusive to children would not be eligible for a shared parenting order. To suggest that no contest or challenge can be mounted by a parent who reasonably and genuinely fears for the safety of their child, or that the system would somehow force children into abusive households at a greater rate than at the present time is incorrect.

It is a demonstrable fact that single parent households pose the greatest risk and threat to the safety and well-being of children and the Family Court makes such sole custody decisions at least 95% of the time - every day!

It is vital that any reform to Family Law in Australia provides for a system that must - at all costs - protect children from an unacceptable risk of harm. It must equally recognise that the current system itself can be used as a tool against the child's best interests and, accordingly, these reforms will serve to protect children from malicious and vexatious litigants who would use the Courts for personal advantage and gain, or as a means of punishing and frustrating the other parent.

**Does Shared Parenting put the rights of parents above those of their children?**

No. A rebuttable presumption of shared parenting is based upon protecting the child's fundamental right to equal access and opportunity with both parents. Implementing this policy will confirm that the rights of the child will be upheld in the first instance. It is this legislative protection for a child's rights that provides a genuine system designed to support and act in the best interests of the child. Upholding the child's rights when parents are in conflict about future parenting arrangements, actually places the child's rights above those of their parents.

Equally, the rebuttable provisions of a shared parenting regime provides sufficient safeguards against serious or imminent risks of harm to a child and therefore in circumstances of child abuse, the child's rights are again upheld in preference to the rights of parents.

As is indicated throughout this submission, research shows time and again that outcomes for children of divorce are substantially better under shared parenting than under sole custody arrangements.

It is the sole custody solution which in fact throws away any consideration of the child's best interest in favour of the interests of (ultimately) one of the parents.

**Isn't the current Sole Custody model based on sound, academic research?**

No. There is no available research that suggests that sole custody arrangements post separation are in the best interests of the child. Research clearly shows that the sole custody model is the worst of all possible outcomes for separating families. The primary opponents to Family Law reforms in favour of shared parenting are professional feminists, whose interests far outweigh those of children. A great deal of feminist

literature which has been embraced by our legal and judicial systems for over three decades, serves not only to incite hatred towards the common man and devalue the role of fathers, but undermine the very belief in healthy hetero-sexual relationships. If the categorisation associated with males were similarly applied to any ethnic or minority groups, one might reasonably believe there would be community outrage and backlash.

**Will a presumption of Shared Parenting disadvantage parents who have sacrificed careers and education to be a stay-at-home or primary carer?**

No. A post separation family plan that involves equitable time in caring for children will leave both former partners with more time to pursue career development, economic security and self reliance away from the welfare system. It will allow both parents to continue with their career and provide a healthy balance of career and family commitment.

This is all the more important in a welfare system which can be brutal and unforgiving for long-term unemployed persons. For many jobs, domestic skills are not regarded as readily-transferable work skills, nor are they highly valued in today's workforce, without higher experience or significant qualifications. This is a growing problem amongst women who, after their children have left home, have to face either becoming integrated into a workforce where they have to compete against more experienced or qualified peers, or are forced to enter retraining programs within a job-market where their training will never bring them up to speed because they have been out of the system for too long.

Shared parenting also offers some parents the opportunity to reduce their child support obligations, while allowing a more equitable sharing of core parenting work. And that is a fair outcome for separated parents.

**Will Shared Parenting increase litigation and prolong instability and uncertainty for parents and children?**

No. US research demonstrates that there is a decrease in litigation in those states where a rebuttable presumption for shared parenting has been established. It is also well documented that friendliness between the parents increased and conflict was reduced in shared parenting arrangements. A rebuttable presumption of shared parenting will provide more certainty for parents and children that their pre-separation relationships will be allowed to continue in the everyday case of family separation.

**Will Shared Parenting create distress and disruption for children who have to move between two residences?**

No. Research clearly establishes that to the child, the benefits of maintaining their pre-separation relationship with both their parents on as equal a basis as possible far outweighs any inconvenience or disruption to the child from effectively residing in two loving homes. Disruption to the child is no more the case where a child lives with both parents than where a child is shunted back and forth between day care, school, baby-sitters or other carers because the single parent is at work or has other commitments and priorities.

> "It is the continued parental bonding, not the number of homes or vehicular travel, that will be the crucial determinant of children's forward psychological development following divorce. In these days, when both parents frequently work, and rely on sharing the child-rearing with each other, with other family members, and with housekeepers and day care personnel, the concept of one 'primary psychological caretaker' is outdated. Frequently there are two

psychological caretakers, or a network of caretakers, supervised by two parents." [44]

**Shouldn't children of "tender years" reside only with their mothers?**

No. Children need the relationship with both their mothers and fathers from birth. Children that have had the benefit of a father closely involved in their life from infancy, have better self esteem, and improved empathy than children who have not had their father's actively and equally involved in their early childhood years.

The "Tender Years Doctrine" was widespread in Family Law in the United States prior to 1970. It held, as a fundamental rule, that infant children required the care of their mother above all others. This created a situation where almost all children subject to divorce proceedings were given over to the custody of the mother. This doctrine also helped establish the ongoing bias in the operations of Family Law in the Western World under the subsequent "Shadow of the Law" which it created. The "Tender Years Doctrine" is unsupported by scientific evidence.

**Is it the case that children can only have one "primary parent" (also known as psychological parent)?**

No. The "primary parent" theory is a change-of-name device designed to maximise the number of cases in which the Court will be compelled to preserve the bias of maternal preference and award sole custody to the mother. It is based on psychology theory of a particular personal bias. The proposition being that children are only capable of forming meaningful relationships with one other person, that person being the "Primary Parent". The "research" which produced this concept was published by the ignoble Goldstein, Freud and Solnit who based their work on personal observation and personal bias. No scientific proof of this concept has ever been produced and all research findings have found that children have a clear need and capacity to form multiple relationships, and that such multiple relationships are necessary and beneficial to the child's development.

**Will Shared Parenting give hostile parents greater opportunity to use Parental Alienation against the other parent?**

No. Parental alienation is abuse of a child, usually by a custodial parent, by use of a number of psychological mechanisms designed to estrange the child from the target parent. This alienation becomes pathological when the child is so affected as to seek not to have contact with the target parent and expresses fear of or hatred for the target parent. This behaviour in the child is a self-preservation mechanism required to protect the child from the custodial parent.

When a child becomes aligned with one parent as the result of unjustified or exaggerated denigration, the relationship the child has with the target parent can be impaired. The child will also likely experience an absolute loss of parenting as a result of the hostility of the parent producing the alienation (Stephens).

There is less likelihood of parental alienation where a child is free to make his or her own mind up about a relationship they have with a parent, than when they are forced to rely on the words, images or descriptions of one parent alone and in absence of a real context (eg. reliant on only a vague memory of the other parent from years ago).

It is clear that the threat associated with successful alienation, in particular on the child's psychological development, far outweighs any short term distress posed by a

[44] Dr. Frank Williams, Address to the Fifth Annual Conference of the Children's Rights Council, Washington D.C., 20 October 1990

court system actively working to prevent and minimise the negative effects of the parental alienation process.

**Is the "status quo" principle a useful tool for determining the child's best interest?**

No. Often after significant delay a case for residency will be heard with the children already established for some months with one of the parents. Courts will commonly apply the principle of "status quo" and argue that a shift in residence would be distressing for the child.

This principle ignores all the benefits of shared parenting and relies upon the unsupportable falsehood that children would suffer undue stress due to any future change in living arrangements. Children are adept to coping with change in their normal lives. They move through grades in schools, often move to different cities, their bodies change and they form several relationships with school and family friends all the time. All of these changes are part of normal life and shielding children from this reality does nothing to help them adapt to future life experiences and challenges.

**What is the "Friendly Parent" Concept?**

Much hype has been generated by women's movement over attempts to introduce the "Friendly Parent" concept into Family Law in the United States. The idea is that custody should be awarded to the parent who is more likely to allow and encourage the child frequent and continuing contact with the other parent.

This concept has prompted an outpouring of feminist argument. One must ask why professional feminists fear the application of this concept?

**Is it true that most fathers don't want contact with their children and that they really just want to avoid paying Child Support?**

No. In its simplest guise many fathers are instructed by their legal council not to pursue more than alternate weekend contact, as a favourable ruling for shared parenting under the current law is unlikely and the process will be expensive. Research proves that parents who maintain a shared parental role in their child's life are more likely to contribute financially to the welfare of their child[45] than those parents who have little or no contact.

By establishing maximum or equal time with the child, parents will necessarily be committing to increased costs of raising the child.

**Don't men perpetrate over 95% of all domestic violence, and hence they will increase risks of violence to the child if they have Shared Parenting?**

No. Much of the common view of domestic violence is driven by gender-specific ideologies and improper methodology for the gathering of statistics[46], usually from academia. Statistics based on the number of police call-outs are flawed because they often count a repeat offender multiple times and they fail to take into account that it is culturally unacceptable for a male to admit to, or complain about, being battered by a female. More accurate sources of statistical information which are harder to misinterpret is where the criminal action becomes extreme and self-evident. On all

[45] Braver S.L. and Fabricius W.V., Non-Child Support Expenditures on Children by Nonresidential Divorced Fathers: Results of a Study, Family Court Review, Vol 41 No. 3, July 2003, p 321-336

[46] McNeely R. J. and Robinson-Simpson G., The Truth about Domestic Violence: A Falsely Framed Issue, 32 Vol 6 Social Work, 1987 p 480-495

available credible research, domestic violence is much closer to an equal gender split, than current gender feminist propaganda indicates.[47]

Any parent who has a demonstrated history of violence or abuse to a child would not be a suitable parent for shared parenting, and the presumption would be appropriately rebutted in this situation.

**Don't perjury laws protect people from malicious statements, reports or accusations in the Family Court?**

No. We are not aware of a single case of perjury in Family Court being pursued by appropriate criminal authorities. Several requests to the Family Law Branch of the Attorney General's Office reveals that this body - the body responsible for recommending cases of perjury in the Family Court for investigation by the Federal Police - is unable to furnish information regarding the rates of perjury and the nature of punitive measures taken against individuals who commit perjury in the Family Court.

**Is there a causal link or correlation to be made between male suicide rates and Family Court outcomes?**

Yes. In an article by Bettina Arndt, "Nothing left to lose" (Sydney Morning Herald, 4 August 2001), she revealed that: "A Queensland study of 4000 suicides found more than 70 per cent were associated with a relationship break-up. The study, conducted by Professor Pierre Baume, who is now at Monash University, showed men were nine times more likely to take their lives following a break-up than women." Work by Dr Cantor and Professor Baume[48], in the mid-1990s at Griffith University, showed a high correlation between family breakdown and male suicide. Recent estimates indicate that in excess of three male suicides[49] per day are connected with the process of Family Breakdown Administration.

A plausible link between Administration of Family Breakdown and the high incidence of male suicide in this country has been established.

**Isn't mediation already an option accessible to all parties going before the Family Court?**

Yes and No. Where there is a belief that conflict between parents is incompatible with significant parenting involvement by both parents, courts will tend to favour sole custody with limited or no contact by the other parent. In other words, the adversarial nature of legal processes can bias legal decisions away from shared custody.

In these circumstances mediated settlements could result in a more co-operative outcome, except that parties to mediation are acting "in the shadow of the law" which favours a winner-take-all outcome. The one most likely to win a legal case has limited incentive to compromise in mediation, whilst the one most likely to lose is under great pressure to make concessions even to the child's future detriment. With this the pre-cursor environment of hostility, all attempts at successful mediation are sabotaged before they begin. What is needed for mediation to be a useful process is as close to a "level playing field" as possible. A presumption of shared parenting will allow all parties (parents and child) to negotiate outcomes freely and without duress or fear.

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[47] Joakimidis Y., Silence of the Screams, Joint Parenting Association, Proof, September 2002, p 74

[48] Cantor C, Baume P., Changing methods of suicide by young Australians 1974-1994, Archives of Suicide Research 1998; 4: p 41-50.

[49] See note 3

# Appendix A
# Family Law Reform Policy Issues

It is proposed that the Federal Government establish a new Family Separation policy specifically aimed at preserving the rights of the child to maintain equal access and opportunity with both their parents following parental separation or divorce.

**Implementing a rebuttable presumption for shared parenting**

To ensure that the people of Australia, and the judiciary fully understand the public policy position of the Commonwealth, the legislative response of the Parliament will require implementation in law of the following principles:-

- That the Parliament of Australia, in recognising every child's right to experience the love, guidance and companionship of both their parents in an everyday setting following family separation, declares that the public policy of the Commonwealth is to ensure that every child may enjoy equal access and opportunity with both their parents, except where clear and convincing evidence determines that it would not be in the best interests of the child.
- That the Parliament of Australia, in recognising the child's right to frequent and continuing contact with both their parents, who have shown the ability to act in the best interests of their child, require parents to share in the rights and responsibilities of rearing their child after the parents have separated or dissolved their marriage. To effect this policy, if requested by a parent, the court shall provide substantially equal access and opportunity with the minor child to both parents at any interim hearing, unless the court finds that such shared parenting would be detrimental to the child. The burden of proof that such shared parenting would be detrimental to such child shall be upon the party seeking to refute this presumption.
- Provide that shared parenting (joint residence and shared long term and day to day responsibility) is the preferred custody arrangement where it is in the best interests of the child of the parties.
- Discourage children from being alienated or disenfranchised from their parent's lives by the geographical relocation away from either parent or through the interference of one parent.
- Assist parents to understand their obligations in this respect and to recognise the importance to the child of maintaining equal access to both parents.

**Defining the best interests of the child**

There is continued debate about what actually constitutes 'the best interests of the child' and the current guidelines that a court will consider are detailed in Section 68F(2) of the Family Law Act. To ensure that under the proposed reform policy, the public of Australia and the judiciary fully understand the meaning and interpretation of what constitutes the best interests of the child, Section 68F(2) of the Family Law Act should be amended to ensure that the Court considers and evaluates the following matters:-

- The love, affection and other emotional ties between the parents, other involved parties and child;

- The capacity and disposition of the parents and other involved parties to give the child love, guidance, affection and companionship;
- The capacity and disposition of the parents and other involved parties to continue the education and religious education of the child;
- The capacity and disposition of the parents and other involved parties to provide food, clothing and medical care;
- The mental and physical health of the parents and other involved parties;
- The home, school and community record of the child;
- The preference of the child if the court considers the child of sufficient age or maturity to express a preference, and the court is satisfied that the child has not been unduly influenced to express such preference;
- The willingness and ability of each of the parents to facilitate and encourage a close and continuing relationship between the child and the other parent.

**A court should give reasons for its decision**

To ensure that any mediated or court custody determination honours this public policy, it is further required that (in accordance with the recommendations of this submission), the Family Law Act be amended to:-

- Require the court to give reasons if it is found that the child's rights must be disturbed to serve the best interests of the child. The court must explain fully its reasons for doing so that includes and describes the facts that it found to require such interference to the child's rights, including enumerating which of the factors set forth in Section 68F(2) of the Family Law Act are applicable.
- A statement that a shared parenting order is not in the child's best interests would be insufficient to satisfy this requirement.

**Parenting Plans**

To assist parents to best reach an agreement for future parenting arrangements of their child, and/or to assist a court to determine the future parenting arrangements where there is no parental agreement, it is appropriate that the Family Law Act be amended to require:-

- Each parent to provide a Parenting Plan outlining their proposal for the future parenting arrangement of the child, and such parenting plan is to include, but is not limited to, the following criteria:-
  - Location of the residences of the child;
  - The financial support base on the needs of the child and actual resources of the parents;
  - A fair allocation of parental time with the child including holidays and birthdays and other 'special' days;
  - Handover arrangements and locations;
  - Educational, Religious and Medical needs and requirements;
  - Process or rules for resolving disputes.
- If parents have agreed upon a parenting arrangement in mediation or in an alternative dispute resolution process, then a Parenting Plan outlining

their agreement for the future parenting arrangement of the child is to be signed and declared, and such Parenting Plan will have the force of any court ordered determination, whether or not it is registered with the court.

**Procedural arrangements for effecting this policy**

The current process for determining children's issues requires the filing of an application with either the Family Court or Federal Magistrates Service. Included with such application is the requirement of the applicant to swear and serve an affidavit in support of their application. The responding party is also required to file and serve an answering response together with an affidavit. It is problematic that at this early point of entry into the Family Law system that parents are essentially put immediately into opposing (adversarial) positions and that it is often difficult to break this process once entered into.

To assist the implementation of this reform policy, legislation is required that will establish an alternative dispute resolution process as the first entry point for resolution of any child residence matter or parenting dispute.

It is also recommended that the provision of affidavits be dispensed with and that Parenting Plans become the mechanism for each party to indicate their preferred parenting arrangement for the child.

**Dealing with matters concerning a serious or imminent risk to a child**

If in the case of one or both parties (or an approved mediator) alleging that there is a serious or imminent risk to the child, then the court should provide a mechanism for hearing an application, and determining whether the claims are substantial enough to further consider rebutting the reform policy presumption for shared parenting.

It is envisaged that the process of hearing such an application be limited to the applicant providing affidavit evidence of the nature and seriousness of the risk to the child that would ensue by the implementation of the presumptive policy.

The current procedure of the Family Court or Federal Magistrates Service for hearing interim proceedings would be a sufficient process for this purpose, with some clarifying procedural changes.

If, upon consideration of the affidavit material of both parties at an interim hearing, a court finds that there is a prima facie case to be heard, then the matter should be set down for a 'short trial' within a period of 28 days of such determination and the court should take immediate steps to protect the best interests of the child, including, but not limited to, notifying current State Child Welfare Authorities with a view to initiating a proper investigation of the issues raised.

The court, upon determination that the matter should proceed to trial, would appoint a separate representative for the child, who would be required to advise the court of any procedural issues that require further orders of the court, including, but not limited to, the issuing of subpoenas on any relevant party.

If upon hearing evidence from both parties, and after consideration of affidavit evidence from any other party, the court determines that there is sufficient grounds present to rebut the presumption, then the matter will be listed for full trial at the earliest opportunity. The court would also make interim orders at this time, at the court's discretion, in accordance with the best interests of the child.

A determination by the court that there is a case to answer, would absolve the parties from further participating in any mandated mediation program.

**Modification of Existing Orders**

Modification or termination of an existing award of custody may be made by one or both parents or on the court's own motion. If the modification is agreed to by both parents, the court shall enter an order for any custody arrangement which is agreed to by both parents unless clear and convincing evidence indicates that such arrangement is not in the best interests of the child. On a party's contested motion to modify the existing custody arrangement, there must be a determination that there has been a substantial and material change in circumstances and that such modification or termination is in the best interests of the child. The burden of proof to establish the existence of such conditions is on the applicant party by a preponderance of the evidence. The mere enactment of these reforms does not, in and of itself, constitute the sole basis for modifying or terminating a custody award, however in addition to this reform, such other material fact may be sufficient for a court to review such custody order.

Other facts that should be considered sufficient to review current custody orders would be:

- Failure of a party to comply with current custody orders;
- Evidence that the child is not thriving under current custody orders;
- Change of circumstances of one or both parents since the determination of the current custody order, that would better allow for the implementation of shared parenting of the child.

This is not an exhaustive list, but is provided as an example to the Committee for considering the implications of a new family law policy on existing custody orders, and under what circumstances these may be reviewed by a court.