Standing Committee on Family and Community Affairs

Submission to the Inquiry into child custody arrangements

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ABSTRACT

An argument suggesting that, post separations, the presumption that both parents spend equal time with their children is unworkable.

A child's time requirement from both parents varies according to maturation differentials and gender from age 0-18.

Time involvement cannot be arbitrated by a court. The presumption that the 'birth of a child' creates an 'obligato civilis' in terms of positive upbringing by both parents should be mandatory.

The existing child support formula does not work fairly for both parents.

Mandatory parenting plans organised through a tribunal format allowing both parents and grandparents to self determine optimum time commitments in order to stabilize active parent roles to favour a child's development would be a preferred equitable process.

The court as a tribunal would have the duty to decide the merit and risks of the 'parenting plan' from 'a priori' process and not arbitrate contact / custody time.

Current social dynamics and situational variables demand that a comprehensively constructed family law and child protection act seems necessary.

This argument is premised on

1. The notion that the family unit provides the necessary condition for the most efficient means for positive child upbringing.
2. Constructive family law and procedures need to be introduced to allow the above notions to be equitably met in optimum parent time – terms.
3. That the lack of an active father in terms of formal time commitment is now recognised as a primary contributor to much negative behaviour and transgressions of law that lead to custody of young males.

It follows that all children, regardless of parents marital status should be included under a comprehensive national Family Law and Child Protection Act for guiding the best exposures and outcomes for children's well being.

The current Family Law Reform Act (1995) is poorly constructed and unreliable. It grants too much discretion to judges. This is evidenced by the many prima facie and invalid decisions that have led to systemic injustice and community angst that led to the Family Law Pathways Advisory Group and consequently this inquiry into custody arrangements.

Further, with the increasing and variable pressures affecting social dynamics and family structure then family law and child protection cannot be separated if consistent natural justice is to prevail for the upbringing and welfare of children. A comprehensive family law should ideally subsume child protection and it is necessary that this ideal is achieved through statute not precedent.

The current common law test which must apply in family court proceedings involving children is that of the welfare of the child being the only principle to be applied.

In a due process model of justice this means that for each case an 'a priori' investigation must be made to evaluate what the welfare of the child requires.

However, case evidence shows that the family court deviates from the due process ideal.

A common national perception is that it is desirable for a child to maintain a meaningful relation with each of his or her parents.

But this desirability only operates where there is a chance of a meaningful relationship which is beneficial to the child.

In order to allow this principle to operate it seems there needs to be introduced legal mechanisms that will best allow chances to realise potential of parenting in time – terms linked with the element of parental responsibility to emerge and be normalised and maintained in the Australian community.

Factors to account for when deciding respective parent time spent with children post separation:

(i) The four recognised maturation stages in children for 0-18 years
(Newborn, pre-school, school age and adolescence)

(ii) Bonding and environmental attachments that stabilise psycho emotional development.

(iii) Diminishing or extinguishing already established bonding and extended family attachments between a child's parent and grandparents. Poorly designed court procedures create 'systems abuse' and introduce or exacerbate social harms affecting children particularly innate emotional stability.

(iv) Either parents social vulnerabilities.

(v) Risks of physical, sexual or emotional abuse types.
A priori procedures must be standardised within a court system to prove the truth of these allegations. It appears that with an over general non-dimensional category of 'family violence' linked with discretionary confounding there occur decisions made on presumptions of fact (praesumptiones hominis vel facti) – inferences drawn from the facts but not conclusively.

(vi) The effects of vicarious conditioning either parent can often introduce after a separation.

It would appear from well founded psychological findings that maturational differentials would preclude an arbitrary 'equal time' for children with each parent from age 0-18. Obviously and normally, the newborn and preschooler need more time with their mother, with increasing active – time involvement for a father in proportion to the child's gender as they begin primary and secondary school. However this parental time involvement factor cannot be best determined by court discretion.

It would seem then appropriate that to ensure stable upbringing for children that the necessary time factor must proportionately apply through a child's maturation processes so to be consistent and equitable with community expectations for mothering and father roles.

Perhaps the most sensible notional feature of the Family Law Reform Act that provides for validity in determination is the concept of allowing disputing parents to formulate a 'parenting plan' that can aid in stabilizing child nurture to age 18.

Currently this plan can be registered with the court so that both parents are bound by their agreement and both parents assume the responsibility for establishing the plan and its operations with parent – time schedules.

Many would believe that this procedural system would be the most reliable, responsible and equitable way of achieving and stabilising the welfare and protection of the growing child.

However at present, the procedure is only voluntary and is thus passive and inconsistent in being applied.

It would therefore appear reasonable that this procedure, if mandatory would actively provide a consistent and reliable formulation for realising the concept of strict liability and the element of responsibility with time commitments to parenting for the optimum upbringing of children relative to their maturation stages and also preventing situational vulnerability evolving in family types. i.e. a 'parenting plan' is an 'obligato civilis'.

It could be presumed that this method would be constructive and ensure that a meaningful relationship for the child would ensue, or at least not be diminished or extinguished if a parent was arbitrarily ordered reduced or insufficient parental input in terms of time and active responsibility as can now happen with current family court systems.

Thus a mandatory 'parenting plan' system initiated for 100% of cases would maintain as a behavioural filter and so be dimensionally classifying system of positive parenting behaviours or 'risks' and would tend to be proactive in effect.

This procedure would eliminate court discretion and inconclusive 'prima facie' decisions and therefore many anomalies for parent's time – involvement with their children.

1. A 'plan' system would act as a providentially self correcting tool for guiding parental behaviours allowing for tailored counselling to the extent necessary, for all parents within their capacity, to formulate parenting plans.
2. Thus validity and parental responsibility within the scope of the procedure is insured since time – frames for contact / custody can be negotiated and organised for each individual family case.
3. Time commitments relative to normal bonding associations for a child to both parents and grandparents could be formulated and met fairly through the parenting plan concept relative to the child's age and maturation stage.
4. The 'ownership' of the obligation to provide time involvement should be emphasised and be a 'must do' responsibility for both parents to activate their roles in a 'strict liability' sense.
5. The court should not function to determine arbitrary parent contact / residency time such as the current ill-conceived fortnightly contact. Contact times should be formed by parents (and grandparents wherever possible) relative to their means and abilities to cope with parenting schedules.

6. The court duty should be to decide the merit and risks of the 'parent plan' relative to 'a priori' evidence and due process to organise parent's optimum time commitment.
7. The current structure of the family court is ineffective and is over costing taxpayers with its hierachieal adversarial format where it seems to be over-reliant on assuming a 'crime control' model concerned with efficiency and 'prima facie' quick disposal of cases.
8. In the best interests of the Australian community in terms of natural justice and affordability, then with a comprehensive and effectively constructed Family Law and Child Protection Act, the family court could evolve into a more efficient reliable and parent friendly tribunal with powers of conciliation (parents formulation of 'parenting plans') and arbitration (decisions binding parents to the plan.)
9. Once the tribunal had made a 'family plan' order, that order could be enforced in the magistrate's court if the other party did not comply with the decision. Or prosecuted under criminal law if abuse occurred to either mothers or children.

It could be presumed that by restructuring family law into a proactive code in strict liability terms using 'parenting plans' would most likely aid in securing long term stability for children's welfare in terms of parents time involvement and subsequently child protection by contributing to eliminating welfare vulnerability for some mothers.

Therefore this type of strategy would explicitly be diversionary and offer guidance for operationalising meaningful relationships for children.

The law must specifically recognise the criminality of abuse types (Physical, sexual, emotional). As structured the law would be reliably guiding for enforcement using state police response to urgently administer and quickly resolve issues of child protection.

The current presumption with domestic and social arrangements is that they do not create legal relations and lack legal intentions.

Agreements between husbands and wives who have not legally separated are likely to lack legal intentions.

But agreements made by husbands and wives after they have legally separated are more likely to create legal relationships.

It can be assumed that these agreements would theoretically follow for common law relationships (live in) and other liaisons where children are included.

One situation in which the presumption can be rebutted is where one party reasonably relied on (believed and acted upon) promises made in agreement and would suffer significant loss if the dispute could not be determined by court.

However, if the welfare and best interests of a child born as a consequence of marriage or any other relationship type is to hold consistency and validity then a contractual obligation by both parents would seem to be 'born with the child'.

In such simple contracts emerging with the birth of a child to parents then consideration must take the form of legal obligation to the elements of positive upbringing for the child to the age 18 and not just be binding in honour only.

It is apparent nowadays that moral obligation per se is unsatisfactory as the only binding element, therefore a 'parenting plan' driven system formally introduces the requirement of equity in parenting and would redeem the balance to parenting as is implied in the constitution.

It could be interpreted that an 'a priori' recognition of a child's best interests is indicated under the constitution s51(xxii). Therefore the rights of the child are contained within the rights of the parents either collectively (in a stable relationship) or singly, to actively Contribute in an optimum time – frame to raising their children in the most positive way available to the parent's means. Constitutionally, then s51 implies parent – child interdependence rights, surely a common feature of moral and ethical 'marriage' in its many forms.

Given that there is precedent recognising the priority for maintaining positive welfare for children with both parent's involvement then it follows that revision of family law legislating 'parenting plans' as a compulsory tool would contribute to formally activating the father role more effectively in terms of optimum time commitments for every individual family.

The lack – of – an –active father is now recognised as a primary contributor to much negative behaviour and transgressions of law that lead to custody of young males.

Many parents' mediational experience and case evidence shows that arbitrary court imposed residency / contact times (fortnightly contact) is unbalanced and has created social harm for many children and parents alike by denying sufficient time involvement for one parent.

The feature and vitality of a tribunal system would include the necessary parent's equity and responsibility for parenting and be 'open ended' with contact / residency times which would be self-determined by parent's and grandparents.

In principle this system would likely be readily assimilated and accepted by the national community since it would preclude large and prohibitive costs for obtaining justice and preclude much discretionary confounding associated with the current court and therefore inherent bias toward one or other parent: therefore time – abuse for active parenting roles and extended family roles.

This system would subsume state child protection policy and consistently provide national legal guidance for protecting vulnerable children.

It appears that both legislators and judges can be identified as blameworthy in contributing to some family harm as indicated by the lack of an active father factor.

The number of Australian children growing up without their natural fathers is increasing where now about 25% of all resident families have only one resident parent – mostly because of separation.

In 90% of these cases the resident parent is the mother. Most fathers continue to co parent as best they can, but there are also many boys who rarely or never see their dads. Many live almost completely in a world of women and children. Their mothers are single, their teachers are likely to be women, they often have no men naturally present in their lives.

In extreme cases, with less vulnerable and secure single mothers; the only men they see are strangers. It seems however that some perceptive individuals have organised groups that can offer a substitute friend as a father to a young male and who provides initiatives, stability and support in allowing that young boy the opportunity to do all the things he can't do with mum.

However, this provision of opportunity only works where the mother is unequivocal in her awareness that she cannot be both a mother and father to her son. Organisations such as YWCA Big Sister Big Brother programs, and 'Uncle' in Byron Bay set up mentoring relationships between men and boys without active fathers.

The 'Uncle' organisation was established as a consequence of a local man in Byron Bay who worked in gaols and boy's detention centres where he observed that most inmates had received either poor fathering or no fathering at all.

World studies support the lack of an active father contributes to much negative behaviour and transgressions of law that lead to custody of young males.

On measures ranging from anti-social and violent behaviour to drug use, incarceration and suicide, such boys too often simply self-destruct. Further, statistics from USA show that girls from fatherless families are more likely to become teenage mothers and boys are more likely to get into trouble with the law.

Without questioning the mothering they receive, the belief is that lack of good adult male role models during the four recognised stages of maturation (newborn, preschool, school age, and adolescence) limits both boys and girls in building self-esteem and a sense of appropriate social and personal boundaries.

Some of these organisations are now federally funded to aid in their positive response to reducing the impact and consequences of the lack of an active father problem.

But a second concerning issue exists where single mothers – from broken marriages and unmarried mothers – have social vulnerabilities and less capacity of control over their lives and don't maintain an unequivocal awareness that she cannot be both a father and mother to her son.

These mothers often involve themselves in new relationships with a male partner. The new partner can create tensions for children. These tensions can escalate into risks of violence both to the mother and children. Sexual and/or physical abuse can co-occur against children from defactos or boyfriends.

In extreme cases many vulnerable mothers become involved in relationships that expose their children to negative nurture that leads to death of a child from intentional abuse by a male partner who is not the natural father.

The [redacted] incident of 1990 was the pivotal example of these situations occurring and from which child abuse reporting was made mandatory in Victoria for doctors, nurses, teachers and police.

However, this was only one of the many examples that showed there was and still is a lack of comprehensive statute that contributes to creating the development of unequivocal awareness for vulnerable single mothers to gain some control of the conditions and situations that can occur in social interactions that create negative nurture for children.

A factor often associated with mothers in new relationships is the aggravating effect that their harmful liaisons with their new partners can have on the 'natural' fathers of their children. These fathers are often embittered to the point where they rationalise and feel some justification for wanting to take the law into their own hands to prevent abuse against their children or the chances of it occurring. Thus they can harm these boyfriends or defactos. A point to note is that moral sensitivities are rapidly upset if there is an absence of equitably constructed family law.

Thus there is occasion to recognise and question why there appears to be a lack of preventive family law and efficient family law administration if the consequences of unstable social effect: (single parenting, systems abuse, agents of harmful influence) coupled with situational effect: (conflict between defactos and mothers / children; obtrusion / interference between natural fathers and defactos) is increasing or at least not decreasing since the inception of the Family Law Act (1975), reform Act (1995) and mandatory reporting of child abuse in Victoria from 1993.

The Family Law Pathways Advisory Group provided a report in July 2001 containing 28 recommendations toward improving the family law system.

Of particular concern was the adversarial process and costly structure of the court in its hierarchical form and the imbalance between mothers and fathers contact time.

The lack-of-an-active father is recognised as a major causal factor with young males transgressing the law.

With unmarried mothers, their children often come under the Children and Young Persons Act (1989) in Victoria.

From the premise that the family unit provides the most fundamental and efficient means for positive child upbringing and environment then it follows that all children regardless of parents marital status should be included under a comprehensive family law, for protection against abuse.

Perhaps it is ironic that given the innate recognition and abhorrence of child abuse in all its forms that child protection in Victoria was placed under a separate state government department and not included within the State Police under a community policing role.

Thus it could be identified that Justice J. Fogarty unintentionally misled state policy in how best to implement and provide for child protection by diluting the role of policing to the Department of Human Services and further undermining the community conscious of trust in public administration.

It is readily accepted by the majority that physical, sexual and emotional abuses are criminal acts on children.

And in Victoria with the apprehension of perpetrators of criminal acts, the public confidence relies on and is more comfortable with the state police – particularly for cases that need a rapid response.

In Victoria, the mandatory reporting system is being overwhelmed by the number of reports and the Department of Human Services is unable to process them in a way to address the most serious of the issues of abuse type.

It seems for the benefit and development of community conscience that mandatory reporting of child abuse is essential for the protection of children.

But for validity and response to be effective their needs to be preventive measures to filter the false or unreliable reports of abuse.

Currently if 20% of notifications are substantiated then there are 80% of families where there are some concerns about their functioning but they don't necessarily need to go through the states child protection system.

Thus diversionary procedures to community family support services and community policing would be a more efficient strategy.

Clearly a 'parenting plan' system would achieve this. The authorisation could be achieved on a national basis through a federal family law and child protection act. The current poorly designed state of Victorias child protection system is failing the urgent requirement of abused children and is over-costing the taxpayers of Victoria.

It is then aggravating to read and compare the press comments of the current Victorian Labour Minister for Community Services, Sherryl Garbutt with opposition, Helen Shardey, on the current child protection system in Victoria.

Garbutt justified mandatory reporting but said a review of the Children and Young Persons Act (VIC) was planned. To reduce the number of unsubstantiated reports, the state government had provided for a program designed to reduce the number of notifications by working with families on parenting issues before they reached the child protection system.

Opposition Shardey said that the child protection system was harming the children it should be protecting with young children going in and out of care with multiple foster parents, lack of real support for troubled mothers and fathers and a system focused on legalities instead of what is best for children at risk.

Improvements to the system would be best achieved by an independent evaluator. Thus a child commissioner could be appointed to investigate the system and properly represent the interests of children.

In comparing these views, neither advance on any findings that are currently acknowledged. Surely the community, particularly citizens with direct experience of the adverse nature of 'family and protection' systems can provide submissions to implement changes to law and so act as a more reliable and credible commission.

It is perhaps recognisable that both positions of the state ministers duplicate and are subsumed under the principles of the family law reform act and their views contribute nothing to organising and stabilising parental responsibility as a condition for child protection.

It is reasonable to assume that child protection is a national concern and common community expectancy so consolidating family Law and Child Protection in an act would exclude state inconsistencies in child protection per se and allow all citizens to re evaluate parent roles for children's welfare.