Standing Committee on Family and Community Affairs

Inquiry into Child Custody Arrangements in the Event of Family Separation

Submission prepared by Women's Legal Service, Brisbane

August, 2003

SUMMARY OF KEY POINTS IN SUBMISSION

1. Family laws must address the needs of the difficult cases

Any recommendation of the Committee regarding the law must address the dynamics of cases of parents in high conflict where there are allegations of domestic violence and child abuse and other complex social problems.

2. Equal time shared parenting should not be a rebuttable presumption

Our clients' experiences and the social research we have accessed suggest that 'equal time' shared parenting is only feasible in a small minority of cases. WLS is vehemently opposed to the idea of equal time being elevated to a rebuttable presumption.

3. Equal time shared parenting does not occur in intact families

Equal time shared parenting after separation is an extremely radical concept. It should not be seen as a conservative position which supports the current paternal role. It is a huge and untested shift away from the reality of existing family structures – both before and after separation – for most families.

4. Many fathers are already involved meaningfully with their children after separation

The current law allows committed and involved fathers to continue to play a major role in the lives of their children after separation. There is no evidence to suggest that it is the law which prevents fathers from involvement, except in extreme cases.

5. The Family Law Act should include the role of primary carer as a factor relevant to the best interests of a child

WLS recommends the inclusion of a provision in the *Family Law Act* which allows the role of primary carer to be included in the list of factors relevant to consideration of the best interests of children.

6. A rebuttable presumption of equal shared care will increase the difficulty for mothers to pass the legal aid merits test.

We believe that any rebuttable presumption about shared parenting would make it even more difficult for survivors of domestic violence to satisfy the merits test at legal aid commissions.

7. Role players do not understand the post separation impact of domestic violence on the conduct of the victim.

Training is required for role players in the family law system on the impact of domestic violence on the post separation conduct of women survivors.

8. Consideration should be given to reforming the FLA to enhance protection from violence

There would appear to be three critical steps required in law reform intended to enhance protection against violence:

(a) where family violence has been alleged the court should take early steps to determine whether, on the evidence available, the violence is proved;

(b) if it is proved there should be a rebuttable presumption that residence or shared care involving the abuser will not be in the child's best interests; and

(c) a contact order can only be made in favour of the abuser if the court is satisfied that contact will be safe.

9. A rebuttable presumption about shared care will diminish the importance of the section 68F(2) factors.

The section 68F(2) factors to be considered when determining what is in the best interests of a child are likely to lose significance if a rebuttable presumption about shared parenting is introduced.

10. A rebuttable presumption about shared care will diminish the importance of the individual circumstances of each child

The change in focus of argument is likely to mean that there will be a diminution in the examination of the individual circumstances of each child.

11. A rebuttable presumption about shared care will be used as a weapon by abusive parents

WLS is concerned that it is abusive men – exactly the wrong kind of fathers for shared care arrangements – who will seek to use the presumption if it were introduced.

12. A rebuttable presumption about shared care will influence out of court negotiations.

The existence of a rebuttable presumption of equal time may force some parents to 'agree' to inappropriate sharing arrangements which may ultimately be breached and become the subject of acrimonious enforcement actions.

13. A rebuttable presumption about shared care will lead to an increase in litigation

The introduction of a rebuttable presumption for equal time shared care would lead to an increase in litigation in the Family Court, Federal Magistrates Service and local Magistrates Courts. The increase would occur across a range of proceedings, but in particular; residence and contact cases, enforcements, contraventions and location and recovery orders.

14. Equal time shared care is not fair to some children

WLS is concerned that a rebuttable presumption of equal time will place pressure on children to "deliver fairness" to their parents.

15. If statutory recognition of share parenting is to occur, there are some essential features to include.

If any mention is to be made of 'shared parenting' in the law, there are four essential features to consider in the context of this Inquiry:

(a) it must not be a rebuttable presumption;

(b) there must be no suggestion of specific time splitting;

(c) there must be a staged legislative process to ensure that only suitable families consider the option – ones for whom it *could* work – if it is in the interests of the individual children - positive prerequisites; and

(d) there would need to be exclusions for families for whom the arrangement would not work (exclusory provisions).

16. Child support reform needs careful social and economic research

The results of well-constructed research into the links between contact and child support, such as the work of the AIFS, must be considered when formulating child support policy.

17. Any legislative reform must be include protective provisions.

It would be very dangerous for women and children if legislation were introduced which further promoted shared care after separation, unless this was done together with provisions which set out a more detailed and effective process for dealing with allegations of abuse.

18. A further process of detailed research and consultation should be undertaken before any changes are made to the law about shared parenting.

If the Committee wishes to suggest change, we consider that the following ideas are essential:

(a) There must be extensive community consultation about the detail of any model which is suggested.

(b) The Washington State model should be further researched.

(c) The total package and balance of any legislative models examined must be understood.

Inquiry into Child Custody Arrangements in the Event of Family Separation

Submission from Women's Legal Service, Brisbane.

BACKGROUND TO WOMEN'S LEGAL SERVICE

Thank you for the opportunity to submit to this Inquiry.

The Women's Legal Service (WLS) is a Brisbane based community legal centre which has been operating since 1984. During the 2001-02 year we provided advice to over 6,000 women. Over 80% of our advices are in family law, with the main issues being domestic violence, residence, contact and property entitlements. Because of our telephone advice service more than 30% of our clients are from outside the Brisbane metropolitan area. Our clients come from diverse racial, cultural and religious backgrounds, and until recently we had a specifically funded position for a solicitor to work with women with disabilities.

We also undertake community education and community development work through which we learn about a wide range of women's experiences in the family law system.

During the late 1990s WLS was closely involved with a research project about contact arrangements for children. In 2000 we published a report on this research entitled *Unacceptable Risk: A Report on child contact arrangements where there is violence in the family.* We have provided 10 copies of *Unacceptable Risk* to the Committee Secretariat for the members of the Committee.

STRUCTURE OF SUBMISSION

Although the time frame has bee very tight, we have taken the opportunity to consult with a small group of colleagues about the ideas put forward in this submission. The people consulted include members of our management committee, one of whom is a practicing family lawyer, a social worker in private practice and a number of researchers.

Part I – Origins of Inquiry: Who Advocates Change?

This submission will firstly provide a snapshot of the groups or people in Australia who are likely to be advocating for the kinds of changes implicit in the Terms of Reference (ToR). We will endeavour to include a brief analysis of where some genuine grievances may lie, as well as a discussion about those whose grievances may be less legitimate or created by their own behaviour.

Part II – Terms of Reference

Secondly, we will address the ToR by reference to our client work, our community education and development work and our research.

Part III – Ideas from an Existing Model

Thirdly, we will analyse a statute from Washington State in the United States of America which we believe may answer an important question which lies behind this inquiry:

> How do we get more separated Australian families for whom shared parenting could work, to consider this possibility?

The text of the statute is set out at annexure 'A'.

PART I - ORIGINS OF INQUIRY: WHO ADVOCATES CHANGE?

1.1. Introduction

The Report of the Family Law Pathways Advisory Group, *Out of the Maze*, ('Pathways') noted that men and men's advocacy groups "dominated both the written submissions and attendance at consumer forums":

> It was evident that many men felt angry, frustrated and hopeless. Their anger was directed at both the system (particularly the law, lawyers, courts and the Child Support Agency) and ex-partners (who, they felt, deserved their anger for a range of reasons including leaving the relationship, denying contact or making false allegations). ... they felt that the system was unfair and biased against men ...
>
> In relation to residence, many men expressed the view that the presumption in law should be that children live with each parent on an equal-time basis (often expressed as '50:50').[1]

Presumably to some extent the men who raised these concerns with the Pathways Group are amongst those who have agitated for this Inquiry. This opens the question: is there a major social problem in Australia whereby committed and willing fathers are being denied the opportunity to have a meaningful relationship with their children after separation?

1.2. Father-Child Relationships After Separation

A large majority of Australian men who are separated (64%) have contact with their children[2] and almost three quarters of those men have children staying overnight with them.[3] Some other recent studies suggests even higher levels of contact occurring:

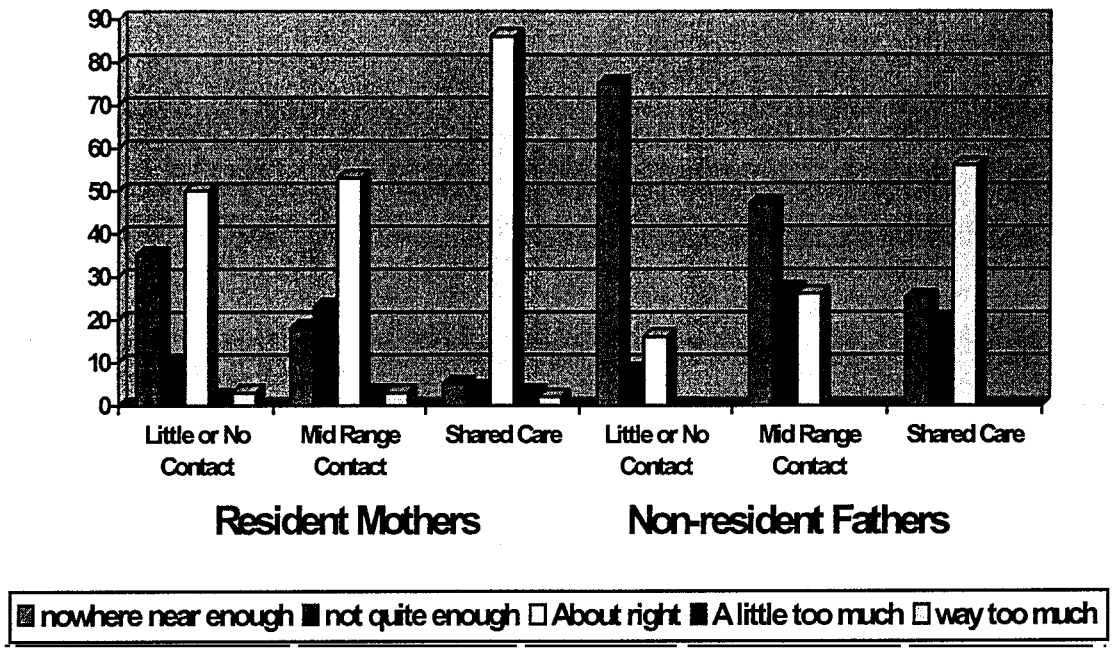
> ... several years after separation the majority of today's Australian non-resident fathers remain in frequent contact with their son or daughter of primary school age. This indicates a substantial increase in the frequency of ... fathers' contact ... in the last two decades. ... there is a clear pattern that more and more nonresident fathers are remaining in children's lives.[4]

It seems that, in fact:

- many fathers have high levels of on-going involvement with their children after separation; and
- the amount of contact and the numbers of fathers and children concerned have increased in recent times.

But we know there is a disaffected group and the research currently being conducted by the Australian Institute of Family Studies (AIFS) into contact arrangements may provide some clues. Drawing on data from the Household, Income and Labour Dynamics in Australia (HILDA) Survey, the researchers were able to analyse reports from over 1,000 separated parents with a variety of arrangements for the children.

The following diagram shows the level of satisfaction experienced by the parents in respect of contact, depending on the type of contact in place.[5]



Notes: 'little or no contact' = 0-17 nights/days; 'mid-range' = 18-109 nights/days; 'shared care' = 110+ nights/days.

From this graph it can be seen that there is already a group (although it is small in number) implementing a shared care regime and 86% of the mothers and 56% of the fathers in this group thought this was about right in terms of the time each parent spent with the children. These people did not require special laws to put their shared parenting arrangements in place and obviously found the current system sufficiently flexible for this arrangement to be implemented.

1.2.1. WHO MAY BE DISCONTENTED?

There are also significant numbers of parents who want the father to have more contact. 10% of mothers and 8% of fathers in the little or no contact group and 23% of mothers and 27% of fathers in the mid-range group believe there is not quite enough contact.

These people are likely to be the ones who are able to negotiate increases and variations in contact over time.

The tensions that lead to political agitation are more apparent in the contrasting figures which show that 5% of mothers in the little or no contact group think there is too much contact, whereas 83% of fathers in that group think there is not enough. Even in the mid-range group stresses are evident. 6% of the mothers believe there is too much contact while 74% of the fathers say there is not enough.[6]

To a certain extent, some of the women in these groups are likely to share characteristics with some of our clients; women who were subjected to domestic violence by their former partner and who have suffered on-going violence since the separation. Despite this they are obliged, either by court order or fear of reprisal, to provide the children for contact. Within this group would be found some mothers who, at times, fail to comply with contact orders.

Some of the men in these groups may have genuine grievances; men who wish to play a more active role in the children's lives but are prevented from so doing by limited contact. This may be because of unresolved conflict, geographical distance or other reasons. However, other men may have been limited in the amount of their contact by the system itself, because allegations of violence, abuse or other serious concerns have been proven to the satisfaction of a court or other authority.

1.2.2. WHAT GROUPS COULD CONTEMPLATE SHARED PARENTING?

The sad irony is that the groups of men and women who are experiencing tension and stress about the contact arrangements are exactly the parents for whose children shared parenting would not be happy or successful. These may be some of the people who are advocating change to the law, but they are also the people who should not try to establish a shared parenting arrangement.

These parents are generally ones involved in 'high conflict' situations and cases. In a USA study on 'high conflict divorce' cases, eminent researcher, Janet Johnson, concluded that:

> Children [in high conflict cases] need custody and access arrangements that minimize the potential for ongoing inter-parental conflict.
>
> [In these cases] ...custody arrangements should allow parents to disengage from their conflict with each other and develop parallel and separate parenting relationships with their children ...
>
> A clearly specified regular visitation plan is crucial, and the need for shared decision-making and direct communication should be kept to a minimum.

These high conflict families will often enter and re-enter the court system many times. They require tight case management and on-going support and assistance outside the legal system. It was for these families that the Magellan system of case management[7] was developed. This group may feel aggrieved, but they should not be the driving force behind changes to the law aimed at encompassing ideals such as shared parenting after separation.

1.3. Family Law Policy

WLS has long been concerned that family law policy is often created for the people who do not need to resort to the formal system. When this happens it means that the law may be under-developed or inapplicable for the cases at the 'hard edges' of family law. In this Inquiry it is possible that there is a conflicted minority of parents arguing for changes to the law that would only be useful for the most amicable minority. In fact, the law needs to cover the problems which arise in the high conflict families.

As Dr Johnson noted:

> ... family law as well as court policies are often justified by research findings from the broad population and are insufficiently backed by studies of the special subgroup of the divorcing population to which they are most frequently applied, that is, to families of high-conflict divorce.[8]

The law must provide for the group in high conflict; for example, where there are allegations of domestic violence and child abuse and other complex social problems. If the law does not address this group it will fail the very clients of the system.

Key Point 1

Any recommendation of the Committee regarding law reform must address the dynamics of cases of parents in high conflict where there are allegations of domestic violence and child abuse and other complex social problems.

PART II - TERMS OF REFERENCE

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:

ToR (a)(i) Rebuttable Presumption of Equal Time

Given that the best interests of the child are the paramount consideration 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.

2.1. Introduction

There are three major issues captured in the first ToR:

1. shared parenting as a legislated concept or option for separated parents;

2. how to determine appropriate amounts of time with each parent in such an arrangement; and

3. that equal time should be a rebuttable presumption

WLS has no problems with the idea of shared parenting because we see it as possible in all sorts of situations. Even where parents have a reasonably 'standard' contact regimen in place, if those parents are able to communicate and not overly conflicted, they will be sharing the parenting of the children. For example, a parent who sees the children every second weekend, half the school holidays, has reasonably open telephone contact, open access to the school and other special occasion visits will be playing a vital role in the children's lives. Shared parenting is not a night-counting exercise – it is an emotional and psychological concept.

What WLS is concerned about is the idea that equal time could become a rebuttable presumption. This is the nub of the Inquiry. This is totally different to the idea of including shared parenting as a legislated concept. Such a presumption becomes a starting point from which all alternative propositions must be argued – a constant point of departure.

Key Point 2

Our clients' experiences and the social research we have accessed suggest that 'equal time' shared parenting is only feasible in a small minority of cases. WLS is vehemently opposed to the idea of equal time being elevated to a rebuttable presumption.

2.1.1. MORE THAN SEMANTICS

To a certain extent this first ToR in somewhat misconceived. Although the ToR seems to imply that the best interests of children should remain the paramount consideration, the use of the word "other" before "factors" suggests that the factors to be looked at are different from (or "other" than) the best interests of the child. Currently the section 68F(2) factors of the *Family Law Act* (FLA) are the factors to be considered by the court to determine what is in the best interests of the child – they are subsumed under that concept – not separate from it.

Further, it is somewhat disturbing that the Inquiry uses the 'old' terminology of 'custody' rather than the contemporary term of 'residence'. This may serve to emphasise the attitude of children as property – an attitude that the 1995 amendments aimed to diminish.

2.2. Sharing Patterns In Intact Families

Lyn Craig has used data from the Australian Bureau of Statistics Time Use Survey in 1997 to undertake some calculations into how mothers and fathers spend time with their children in intact families.[9] Below is a table which summarises some of her findings.

	PRIMARY ACTIVITY		PRIMARY & SECONDARY ACTIVITY	
CHILDCARE ACTIVITY CATEGORY	**FATHER**	**MOTHER**	**FATHER**	**MOTHER**
Interactive care - % of child time	40%	22%	30%	25%
Interactive care – absolute time	24 mins	40 mins	36 mins	1 hour, 30 mins
Physical care - % of child time	31%	51%	13%	21%
Physical care – absolute time	18 mins	1 hour, 32 mins	16 mins	1 hour, 15 mins
Travel & communication – % of child time	13%	17%	5%	7%
Travel & communication – absolute time	8 mins	30 mins	6 mins	25 mins
Passive care - % of child time	16%	10%	52%	47%
Passive care – absolute time	10 mins	18 mins	1 hour, 2 mins	2 hours, 50 mins
TOTAL % of CHILD TIME	100%	100%	100%	100%
TOTAL – ABSOLUTE TIME	**1 hour**	**3 hours**	**2 hours**	**6 hours**

In terms of absolute time spent on child care as a primary activity, men spend about one hour per day and women spend three hours per day. When primary and secondary child care time are combined, fathers undertake a total of 2 hours while mothers do 6 hours. Despite changes in employment patterns for women and domestic patterns for men, most mothers still do the bulk of the 'work' and nurturing associated with children; and this is children's experiences and expectations of their respective parents.

Mothers also spend much more time alone with children. They spend nearly half their time with children alone with them, whereas fathers, who spend less time with children anyway, are only alone with the children for 16-18% of that time.[10]

Therefore many children only start to spend significant time alone with their father if their parents separate. In some cases this can lead to a new and more meaningful relationship between the children and their father – but it may need time and careful nurturing. Some fathers are not capable of this. It is, of course, also true that some mothers are not capable of nurturing their children safely.

Key Point 3

Equal time shared parenting after separation is an extremely radical concept. It should not be seen as a conservative position which supports the current paternal role. It is a huge and untested shift away from the reality of existing family structures – both before and after separation – for most families.

2.3. What Post-separation Child Arrangements are Common Now?

In a recent Australian study of 260 nonresident fathers, Bruce Hawthorne found the following patterns of contact[11]:

NON-RESIDENTIAL FATHER'S CONTACT WITH CHILDREN IN PREVIOUS YEAR

FREQUENCY OF CONTACT IN PREVIOUS YEAR	PERCENTAGE	**LEVEL OF CONTACT**	PERCENTAGE
None at all	6.5	**Low**	11.5
Once	4.7		
Several times	13.5	**Medium**	58.9
1 to 3 times per month	25.8		
Once per week	18.2	**High**	29.6
More than once per week	31.3		

This study may show some sample bias because it relied partly on divorces (there is some evidence that fathers who were married to the mothers of children remain more connected) and the criteria used for the study possibly led to a more educated and financially comfortable group being included. However, Hawthorne also noted that:

> It seemed reasonable to expect that the fathers who had some axe to grind or who saw themselves as thwarted by their child's mother in their efforts to be involved with their child would be likely to respond [to the study].[12]

This was not the case and "only a few fathers vented strong anger towards their former partners, laying responsibility at their feet for lack of contact or involvement".[13] This is consistent with our client work - ie most women we see initially want contact to occur.

During the research for *Unacceptable Risk* we investigated mothers' attitudes towards contact. It was notable that, notwithstanding the violence which may have been experienced, most of the focus group participants in our study initially wanted the children to have some contact with their father and an on-going relationship with him after separation. Indeed, some of the women seemed to think separately about the violence to themselves and the safety of their children. They thought that on-going contact with their father would be positive for the children and they encouraged this.[14]

In another recent Australian study women had done everything possible to facilitate contact at first, including:

- compromising their safety by allowing contact at their home;

- waiting for hours in public places;
- asking relatives and friends to supervise; and
- one woman even bought bunk beds for the father so the children could stay overnight[15]

In the *Unacceptable Risk* research it was only after the realisation that the children were unsafe that the women wanted to change these arrangements. Generally the women were seeking ways to enable on-going contact with safety assured. This could involve supervised contact, but occasionally meant that the women sought to terminate contact.

Many women found it difficult to have the history of violence taken into account by the Family Court and other decision-makers, although in some cases contact is stopped by the court.[16] It must be said that mothers are also sometimes ordered to have limited or no contact with their children when their conduct is found to be abusive.

Key Point 4

In summary it seems that **the current law allows committed and involved fathers to continue to play a major role in the lives of their children after separation. There is no evidence to suggest that it is the law which prevents fathers from involvement, except in extreme cases.**

2.4. What are the Issues for Women?

Unacceptable Risk also identified an issue which our client work reveals – that the family law system tends to focus on the post-separation attitude of the mother towards giving contact to the father.[17] This can displace examination of the woman's role as primary carer of the children and can minimise the relevance of violence by the father.

2.4.1. LACK OF RELEVANCE OF ROLE OF PRIMARY CARER

Despite the oppressive atmosphere in which they lived, it was clear that all of the focus group participants in *Unacceptable Risk* were the primary carers of their children during the currency of their relationships and they expected, and wanted, this to continue after separation. Many of the women reported that, prior to the separation, the children's father was not involved in the care of the children, did not participate in their daily routines and was uninterested in the children's experiences.

The women reported that the fathers generally expressed a desire to have contact with their children, and some even wanted residence, no matter how minimal their role in their children's daily lives before separation. When violent partners, who have spent little time alone with the children, suddenly demand long periods of contact after a separation, this causes enormous concern for women. They have never, or rarely, seen their former partners display the skills necessary for parenting such as being child-centred in decision-making, being interested and involved in the children's lives or displaying the organisational skills necessary in running a home including cooking, washing and other general domestic chores. The men may be living in accommodation which is unsuitable for children. They may rarely exercise affectionate behaviour such as hugging or staying quietly with a child who is disturbed and cannot sleep.

Key Point 5

WLS recommends the inclusion of a provision in the *Family Law Act* which allows the role of primary carer to be included in the list of factors relevant to consideration of the best interests of children.

2.4.2. LACK OF RELEVANCE DOMESTIC VIOLENCE

Our client work shows that key players in the family law system do not necessarily take a history of domestic violence into account to the extent required to protect survivors and the children.

Case Study 1

Recently a woman consulted WLS about her prospects of appeal against an order granting residency to the father of two little girls aged 6 and 4. (We will call the mother Mary and the father Kevin for the purpose of this submission.)

Although we find that some family reports do not fully discuss domestic violence allegations raised by the parties, the report in this case did – partly because Kevin was so open about his own violence:

> *Kevin ... "presented as pleasant and cooperative, although somewhat nervous at first. ... Once he relaxed and felt free to tell his story his account of the marriage was very similar to Mary's. The astounding aspect of this was that he clearly felt he could justify the violence and efforts to control displayed by him towards Belinda during the marriage.*
>
> *He spoke in positive and appropriate terms about his daughters but his attitude to Belinda raises concerns about his attitude to women in general and how this might impact on the girls."*

Former neighbours gave clear evidence of denigrating verbal abuse daily. There was no question that Mary was a survivor of serious domestic violence.

Given the generally accepted long term effects of domestic violence on women, it is not really surprising that Mary kept on performing badly in the assessments of her. Both the family report writer and the judge formed a negative view of her.

The second family report said:

> *Mary demonstrated great difficulty communicating clearly, having an extremely circuitous manner of conversing, her voice often fading away and becoming inaudible before sentences were complete and before the logic of her comments could be understood.*
>
> *I again noted Mary's very odd manner of interaction – even with her daughters. She continued to be very tentative in her suggestions to them, apparently lacking confidence and assertiveness. I felt that her demeanour would not instill confidence in the girls about her parenting or about their security in her care.*

Here we begin to see a familiar pattern emerging. In the family law system a woman can lose residence of her children partly because of the effect of the domestic violence inflicted on her by the children's father.

The trial judge was not impressed with the credibility of Mary. He commented that "in some instances she was being deliberately dishonest, on other occasions she simply lacked insight into her behaviour." There may be many reasons for this which relate to the violence with which Mary has lived.

The judge did demonstrate some insight into the possible impact of Kevin's conduct on the girls. In respect of s68F(2)(e) "the capacity of each parent ... to provide for the needs of the child, including emotional and intellectual needs" he recognised that Kevin's attitude may not be limited to this relationship and remarked:

> *If Kevin was to engage in verbal abuse in a new relationship to anything like the extent he did during the period of the relationship with the applicant, it would be a most unfortunate environment for the girls to be placed in.*

However, when delivering his Reasons for Judgment, the judge appears to have ignored the evidence of domestic violence. In respect of the two provisions of section 68F(2) which relate to family violence he said "No comment", thereby rendering the history of domestic violence invisible and irrelevant to the decision-making.

It is also concerning to note that, despite the acknowledged violence, the family report writer suggested a "7 day shared care arrangement". It is our opinion that this would not have been in the girls' best interests given the history of violence and conflict. The judge rejected the shared care proposal - and instead granted residence to Kevin, with Mary to have contact every second week from Thursday after school to Monday morning.

Impact on eligibility for legal aid

This minimization of the relevance of domestic violence by the system is also apparent when women apply for legal aid in parenting cases. It is clear from Women's Legal Services around Australia that there are serious problems with the availability of legal aid for representation in family law proceedings. Current data on self-representation in the Family Court indicates that nearly half of the litigants are self-represented "at some stage during their case"[18].

One of the ways by which legal aid commissions control their expenditure is by imposing a 'merits' test on applications for legal aid. Although there are guidelines for these tests, they actually allow for significant exercise of discretion by legal aid grants officers. In particular, where a mother is seeking a limited or no contact order she has difficulty establishing grounds under the 'merit' test. Further, parties reach the 'cap' of $10,000 expenditure per file quite quickly in heavily litigated cases – often leaving the parties self-representing by the time of the final trial.

Legal Aid Queensland (LAQ) implements its merits test very rigorously. Recent research for National Legal Aid into the relationship between legal aid funding and self-representing litigants (SRLs) in the Family Court around Australia indicates that the SRLs in Brisbane "were more likely than others to cite merits as the reason for rejection of their legal aid application".[19] This means that many of our clients are forced to represent themselves in court when there is a history of domestic violence.

Key Point 6

We believe that any rebuttable presumption about shared parenting would make it even more difficult for survivors of domestic violence to satisfy the merits test at legal aid commissions.

Firstly, this will mean that more mothers are likely to feel pressured into settling cases with 'consent' orders which do not really reflect their safety concerns. Such orders frequently create more litigation and conflict in the future.

Secondly, it will lead to more SRLs in the family law system, which will exacerbate frustration and delay. Further, because our legal system is based on precedent, the whole system is affected when legal argument is not facilitated in half of the cases. Meaningful jurisprudence depends on lawyers arguing some of the more complex cases.

2.4.3. LACK OF UNDERSTANDING OF IMPACT OF VIOLENCE ON POST-SEPARTION CONDUCT OF WOMEN

Our client work and research has taught us that there are a number of features about family violence not well understood by family law system decision-makers. One of the

most important of these is that living with domestic violence affects the post-separation behaviour of women.

In Case Study 1 neither the judge nor the family report writer demonstrated deep awareness of the possible links between the apparently negative aspects of the mother's behaviour and the violence to which she had been subjected.

Conduct of women domestic violence survivors which is associated with attempting to secure safety for themselves and protection for their children is often misinterpreted by key decision-makers. When a woman has lived with violence, it is difficult for her to trust the abuser. But the system asks her to do this, encouraging her to forge a new relationship for the children with their father now that the parents have separated.

In the *Unacceptable Risk* research women reported being told they were paranoid when they raised their concerns about abuse. They also reported feeling that they were being judged as stupid, malicious or over-reacting to concerns about their children. One family report contains these words:

> ...She [the children's mother] tended to overreact to some situations, fed most likely by the paranoia that has developed as a result of threats made to her and the children.[20]

It is hard to understand why that mother would not justifiably develop FEAR if she and her children have been subjected to threats. Why is this defined as 'paranoia'?

The mothers who have lived with violence are afraid that violence towards the children may be unrestrained in their absence as the protector.

Key Point 7

Training is required for role players in the family law system on the impact of domestic violence on the post separation conduct of women survivors.

2.5. Law Reform Considerations about Domestic Violence

WLS has reviewed laws and practices from other jurisdictions which take a different approach to Australia and specifically prioritise the relevant of allegations of violence:

- the New Zealand *Guardianship Act 1968* (see Annexure 'B');
- the USA's *Family Violence: Model State Code* produced by the National Council of Juvenile and Family Court Judges

- the United Kingdom's *Guidelines for Good Practice on Parental Contact where there is Domestic Violence*

2.5.1. NEW ZEALAND *GUARDIANSHIP ACT 1968*

Section 16B of the *Guardianship Act 1968*, which was introduced in 1995, legislatively prioritises the issue of safety for children. It establishes that where there has been domestic violence, the court cannot make an order for custody or unsupervised access to the violent party, unless it is satisfied that the children will be safe.

To assist the court in making a decision about the safety of children subsection 16B(5) sets out a list of considerations to which the court must have regard including:

- the nature and seriousness of the violence used;
- the likelihood of further violence occurring;
- the physical or emotional harm caused to the child by the violence;
- whether the other party to the proceedings considers that the child will be safe while the violent party has custody of, or access to the child; and
- the wishes of the child.

In a recent evaluation of this reform conducted by the New Zealand Ministry of Justice it was found that the legislation had improved the safety of children.

> The majority of key informants believed that the new legislation had enhanced the safety of the children involved in domestic violence. The legislation gave a clear message that children in violent family situations were at risk and their safety was a high priority. It had improved awareness and knowledge of domestic violence and as a consequence, children's safety had been enhanced.[21]

2.5.2. FAMILY VIOLENCE: MODEL STATE CODE

The *Family Violence: Model State Code* produced by the USA National Council of Juvenile and Family Court Judges[22] provides a strong blueprint for family law legislation where there has been family violence. Chapter 4 deals with family and children and the model provisions contain rebuttable presumptions that:

- it is not in the best interests of a child to be in the sole or joint custody of a perpetrator of family violence (sec 401); and

- it is in the best interests of a child to reside with the non-perpetrator in the location of that parent's choice (sec 403).

2.5.3. UNITED KINGDOM - *GUIDELINES FOR GOOD PRACTICE ON PARENTAL CONTACT WHERE THERE IS DOMESTIC VIOLENCE*

In Britain the Children Act Sub-Committee of the Lord Chancellor's Advisory Board on Family Law has been consulting and reporting on the issue of domestic violence and contact over the last few years. A final report was delivered to the Lord Chancellor in February, 2000.[23] The Sub-committee then produced a set of *Guidelines for Good Practice on Parental Contact in Cases Where There is Domestic Violence* which were endorsed by the government in March 2001 and are presently being put into effect.[24]

The Guidelines only relate to contact cases where domestic violence is an issue. They seem to assume that residence is uncontested and the question is the amount and type of contact to be ordered. This could be because those are the cases that sparked the research in Britain. In any event, from the point of view of our clients, who are often looking at a residence / residence dispute, we consider this distinction to be somewhat arbitrary and artificial.

Important Features of the Guidelines

The first guideline requires courts to give early consideration to allegations of domestic violence and

> decide whether the nature and effect of the violence alleged by the complainant ... is such as to make it likely that the order ... for contact will be affected if the allegations are proved.

Where the court decides in the affirmative, particular steps to follow are provided.

In terms of final hearings the guidelines say the court should:

> wherever practicable, make findings of fact as to the nature and degree of the violence which is established on the balance of probabilities and its effect on the child and the parent with the child is living (1.5(b))

Another guideline lists the 'matters to be considered where findings of domestic violence are made'. These include:

- the effect of the domestic violence ... on the child and on the parent with whom the child is living (1.6(a); and

- whether or not the motivation of the parent seeking contact is a desire to promote the best interests of the child or as a means of continuing a process of violence against or intimidation or harassment of the other parent (1.6(b))

An Evaluation of the Guidelines was recently conducted. This included surveying many key stakeholders. Generally the guidelines have been well received. In particular the respondents made the following positive points:

- they recognize the impact of domestic violence on the child – and that impact may now be prioritized more than it was;
- now more awareness of the relevance of domestic violence to contact;
- the safety of resident parents is receiving higher priority;
- there is a more structured focus on domestic violence.[25]

2.5.4. NEED FOR REFORM OF FAMILY LAW ACT

Based on our clients' experiences, if any rebuttable presumption would be useful in the FLA it would be about protecting children and other family members from a violent parent. It should include the concept that, when certain types of past behaviour are proved, automatic consequences will flow.

Key Point 8

There would appear to be three critical steps required in law reform intended to enhance protection against violence:

1. **where family violence has been alleged the court should take early steps to determine whether, on the evidence available, the violence is proved;**
2. **if it is proved there should be a rebuttable presumption that residence or shared care involving the abuser will not be in the child's best interests; and**
3. **a contact order can only be made in favour of the abuser if the court is satisfied that contact will be safe.**

2.6. Legal Concerns

2.6.1. DIMINUTION OF RELEVANCE OF SECTION 68F(2) FACTORS

As discussed in the introduction, we are concerned about the legal relevance of the section 68F(2) FLA factors if a rebuttable presumption of shared parenting for equal time were introduced. In fact a rebuttable presumption assumes that shared parenting by separated parents is usually in a child's best interests. It would be for the parent not desiring that outcome to argue against the proposition.

This would demand a very different approach to arguing parenting cases by lawyers. It is likely to sharpen the focus even more vigorously on the 'failings' of the other parent, rather than 'selling' the advantages of your own client by reference to s68F(2). It could make family law litigation even more toxic.

Key Point 9

The section 68F(2) factors to be considered when determining what is in the best interests of a child are likely to lose significance if a rebuttable presumption about shared parenting is introduced.

2.6.2. LACK OF IMPORTANCE OF CHILDREN'S INDIVIDUAL CIRCUMSTANCES

Instead of discussing the benefits of what the proposed residential parent can provide, the evidence will swing to examining the likely disruptions and disadvantages of living in two houses. Individual circumstances related to the children who are the subject of each case may be overlooked with the focus on the new central question – "Can shared care work here?" rather than "What would be in the best interests of these particular children?"

Key Point 10

The change in focus of argument is likely to mean that there will be a diminution in the examination of the individual circumstances of each child.

2.6.3. WHO WOULD USE THE PRESUMPTION IF IT WERE INTRODUCED?

WLS predicts, as we correctly predicted about the 1995 reforms, that abusive men would see such amendments as intended to benefit them. They will say to their partners "You have to give the kids to me half the time now." If the women do not, the men will litigate – some willingly representing themselves.

Interestingly in a recent study on the topic of shared care some gendered differences emerged within a focus group of parents who have put equal time shared parenting arrangements in place. In respect of the motives for the arrangements the fathers referred to their own rights as parents. By contrast, mothers were generally more child-focused and motivated by the rights of the child and the father to continue their relationship.[26]

Key Point 11

WLS is concerned that it is abusive men – exactly the wrong kind of fathers for shared care arrangements – who will seek to use the presumption if it were introduced.

2.6.4. BARGAINING IN THE SHADOW OF THE LAW

It is WLS experience that changes to the law do not only affect outcomes of litigated cases – they also influence agreements made by parties privately, at mediation, legal aid conferences, through solicitors' negotiations and in court corridors. This is the phenomenon known as bargaining 'in the shadow of the law'. Such 'consent' arrangements are not really voluntary and cause many difficulties for the parents and their children in the future.

Australian research into contact enforcement cases exemplifies the problems. Rhoades analysed 100 files in which an enforcement application was filed in 1999. The overwhelming majority of applications were to enforce *consent* orders (n=88). Despite the fact that the most common problem was the resident parent's concerns about domestic violence (n=55), 50 of the orders had been made by consent. In other words, even though women may be worried about domestic violence, they still consent to the violent partner having contact. In 32 of the cases involving domestic violence the enforcement proceedings ultimately led to "more restrictive contact arrangements" being imposed on the father.[27]

WLS is also concerned that the community tends to have an imperfect understanding of the subtleties of legal issues. The rebuttable presumption would become known – but exclusory features or factors which rebut the presumption will not be so well understood. It is likely to mean that some families try to implement a 50:50 program when it is not at all appropriate. For some children, this may be quite damaging to their welfare.

Key Point 12

The existence of a rebuttable presumption of equal time may force some parents to 'agree' to inappropriate sharing arrangements which may ultimately be breached and become the subject of acrimonious enforcement actions.

2.6.5. INCREASE IN LITIGATION

When the 1995 reforms were introduced the philosophy behind the changes was commendable. It was hoped that the new terminology would reduce notions of ownership of children which the family law system seemed to generate. Further, there was an intention to encourage parents to share the responsibilities of parenting.

In fact, almost the opposite occurred. Between 1997 and1999 Griffith University researchers examined the impact of the 1995 reforms by interviewing judges, registrars and counsellors from the Family Court, solicitors in private practice, barristers, LAQ and community legal centres (CLCs).

The solicitors specifically identified that the changes had led to an increase in the number of contact applications as well as an increase in the amount of contact sought. One of the solicitors, who takes referrals from men's rights groups, said that many fathers who came by this route 'had a perception that the legislation entitled them to more contact than previously. ... the legislation has had the effect that children's

matters were now being perceived increasingly as concerned with parental rights and entitlements'.[28]

We anticipate that any amendments of the nature proposed in the ToR would bring a surge in litigation; not only where parents have recently separated but also cases that have already been to court. The incidence of cases being re-opened may cause an unprecedented blockage in the caseload of the Family Court and the Federal Magistrates Service and, to some extent, local Magistrates Courts.

We also believe that such a presumption would cause more women to flee in fear of the consequences of court proceedings in which they may be self-representing. This would lead to more location and recovery proceedings, more *ex parte* hearings.

Key Point 13

The introduction of a rebuttable presumption for equal time shared care would lead to an increase in litigation in the Family Court, Federal Magistrates Service and local Magistrates Courts. The increase would occur across a range of proceedings, but in particular; residence and contact cases, enforcements, contraventions and location and recovery orders.

2.7. How and When Could Equal Time Shared Care Work?

In the work of the Australian Institute of Family Studies (AIFS) on contact arrangements, the following common features are found in working shared parenting arrangements:

- the men have reduced or flexible work arrangements
- the women were all in paid work
- the parents live close to each other
- they had reasonable financial resources and infrastructure
- a cooperative parenting style
- child-focussed arrangements
- a degree of paternal competence
- most had not sought legal intervention[29]

Other research suggests that the parents will tend to be better educated[30] and, we would suggest that it is most likely to be possible in reasonably small families – perhaps up to 3 or 4 children at the most.

Even where a family seems appropriate there are limiting factors:

- it is unlikely to be in an infant's best interests to be separated from his or her mother for half of the time;

- as children grow older their social lives change and expand. They will want to spend less time with parents generally. Equal time parenting at this stage may place stress on the child (adolescent) to evenly divide their 'parent available' time;

- the reality may be that young children will spend significantly longer in formal child-care when they are living with one of the parents. The desirability of this would need to carefully assessed for each individual child; and

- new step-parents or other siblings will complicate arrangements. This may enrich the lives of some 'shared' children and create more tensions and animosity for others.

The AIFS also reported some 'musings' about fathers' roles which suggest that committed, safe fathers who have not been strongly involved with the children during the relationship can develop enhanced relationships with their children:

> 50:50 care affords quantity time, from which quality time can flow; time allows fathers to envelop and embed in their children's lives[31]

But it is clear that:

> The earlier fathers become involved in caring for children the more competent they may feel as fathers should they separate. Nonetheless, some fathers may benefit from support – especially in managing role transitions[32]

Here we see the need for new social policy initiatives to encourage paternal involvement in intact families such as more flexible work hours and more child-care places. There is also a need for education programs to assist separated fathers with parenting skills.

Case Study 2

WLS has recently provided advice to a woman (say Cathy) who has something close to a shared care arrangement in place – but in inappropriate circumstances. The subject child is a boy, Tom, aged 8. (Our client also has a 3 year old girl to a different father and the arrangements in place there are amicable and more traditional.)

The current arrangement is that Tom lives with Cathy for 8 days per fortnight and his father (Greg) for 6 days.

Cathy is not very well educated but the family report which has been prepared is very positive about her parenting skills. She is very child-focussed.

There are mutual domestic violence orders in place since there was a 'blow-up' outside the school at the time of a change-over.

Cathy buys all of Tom's clothes and school requirements. When Tom is with Greg he refuses to take him to his sport. He also pays no child support but receives some FTB.

Cathy provides for Tom from the Single Parents Benefit she receives because of the younger sister.

Cathy wants the arrangements to be changed to 9 days with her and 5 days with Greg because she believes this will be better for Tom. The family report supports this. Greg wants 7 days per fortnight plus ***sole*** *parental responsibility. He claims that Cathy is incapable of making decisions.*

Cathy has been unable to obtain legal aid for the impending trial because LAQ considers that "there is not a substantial dispute" – one of the prerequisites to obtaining legal aid for a parenting case.

In our opinion case is typical of the kinds of unacceptable shared care which would become more common if a rebuttable presumption of equal time were introduced. Such arrangements will be imposed on some parents by their uncooperative and demanding former partner who is determined to get their half.

2.8. Is Equal Time Shared Care Fair for Children?

Research into children in shared care in the United Kingdom by Smart and others found that children in these arrangements started to take on the role of ensuring fairness to their parents:

> ... we found in our interviews with children after divorce that the question of fairness *to* and *for* parents was paramount. It was as if these children were already well versed in the negotiations that are part of adult family life and marital separation.[33]

Case Study 3

The issue of children taking on the burden of distributing themselves fairly is of deep concern to WLS. We are already seeing inklings of this in our case-work.

In a family report prepared this year the following comments are made about a 13 year old boy (say Peter):

> *Peter presented as an alert, intelligent and very guarded young person. He appeared to be very aware that he has become a central focus of his parents' conflict and showed signs of hypervigilance in how her responded during the interviews.* ***He spoke of wanting a "50:50" living arrangement and appeared to be trying very hard to please both parents.*** *At one point, he indicated that he felt both parents would be very upset if he was principally in the other's care. However, he felt that his mother would be less upset with him than his father.*

This may mean that Peter will stay with his father for all the wrong reasons, or he will go 50:50 – placing him constantly in the war zone between his parents.

Smart found that for some children shared care works well, but she recorded the complex realities of the situation for others. She describes children as moving across emotional and psychological spaces as well as physical ones. It cannot be easy for anyone to live in two homes.

Her research also identified the troubling issues faced by children for whom one parent was difficult, unhappy or dangerous to be with:

> Some of the children we interviewed had to spend time with aggressive, resentful or depressed parents and this could be a problem for them. Whereas, when their parents still lived together there might be one parent who could mediate the other parent's moods or behaviour (or even protect the child), after separation the co-parented child is obliged to spend time *alone* with the problematic parent without the other parent to mediate or deflect some of the problems. For some of the children this meant that they attempted to reduce the time they spent with the problematic parent, but this was not always easy, especially where the problem parent was committed to his or her equal share in the child.[34]

Key Point 14

WLS is concerned that a rebuttable presumption of equal time will place pressure on children to "deliver fairness" to their parents.

2.9. Possible Legislative Model

It seems clear that:

> 50/50 or shared parenting arrangements are only appropriate where parents have good relations and they can harm children where parental relations are conflicted.[35]

During our research we were interested to find the parenting laws from Washington. There are aspects of that model which may address a variety of concerns raised by the community in responding to this Inquiry.

Although there are similarities between the 'cultures' and legal systems of Australia and the USA, there are also many differences. There are features in the model which are out of tune with Australian 'legal lore'. However, we believe that much can be learned from studying and understanding its content and structure. It is discussed in detail in Part III.

Key Point 15

For all the reasons discussed WLS believes that, **if any mention is to be made of 'shared parenting' in the law, there are four essential features to consider in the context of this Inquiry:**

1. **it must not be a rebuttable presumption;**

2. **there must be no suggestion of specific time splitting;**

3. **there must be a staged legislative process to ensure that only suitable families consider the option – ones for whom it *could* work – if it is in the interests of the individual children (positive prerequisites); and**

4. **there would need to be exclusions for families for whom the arrangement would not work (exclusory provisions).**

ToR (a)(ii) Contact with Persons other than Parents

Given that the best interests of the child are the paramount consideration in what circumstances a court should order that children of separated parents have contact with other persons, including their grandparents.

We have not had time to research this subject. However, we believe the existing law is flexible enough for anyone with a genuine interest in a child's welfare to seek orders regarding his or her living arrangements.

ToR (b) Fairness of the Child Support Formula

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

Child Support

The establishment of earlier Inquiries into child support, attempts to amend the *Child Support Act* and the fact that fairness of the child support formula is one of the ToR leads to the conclusion that child support payers have been urging change for a few years. Is there really a group of payers who are pushed towards poverty because of the child support payments they make?

Being the resident mother of children is still the most likely predictor of poverty in Australia. Research over the past two decades has consistently shown that women are more likely to experience financial hardship following marital dissolution.[36] In a 1993 study, husbands surveyed three years following their marital breakdown had returned to income levels equivalent to pre-separation while wives' income levels had dropped by 26%.[37] More recent studies have revealed a statistically significant relationship between gender and financial living standards after divorce.[38] Whether alone or with children women's financial circumstances are comparatively significantly worse than the male equivalents.[39]

It must also be recorded that many payers do not honour their child support obligations. In 2000, a survey conducted of Child Support Agency (CSA) clients revealed that only 28% of payees reported always receiving payments on time, while 40% reported that payment was never received.[40] Of course, some of the defaulters are also women. The Child Support Agency failed to collect nearly $770 million in 2000-2001 and the debts written off by the Child Support Agency during this period rose by 27% to $74 million.[41]

In its on-going work on financial living standards after divorce, the AIFS noted the "mounting concern in recent years about the extent to which child support might be driving payers into poverty".[42] The researchers investigated this issue.

Of the younger men in their analysis who were wage earners (10% of whom had children from a new union in the household) the proportion with incomes below the Henderson poverty line increased from 3%, before child support was deducted, to 7% after the payments were made. The researchers concluded that:

> Child support payments did not appear to be creating financial hardship for the majority of these wage-earning men.

However, it can be argued that for a small group – the 4% who dipped below the Henderson poverty line after making their child support payments, there may be genuine cause for concern.

But when compared to the women, the men are clearly better off. Without child support, 24% of the wage-earning women (and children) would have been below the Henderson poverty line. With child support the proportion was reduced to 10%. Thus child support assisted 14% of the women and children to avoid living below the Henderson poverty line, largely without placing the payers in poverty.[43]

WLS is concerned to note the way that this Inquiry has linked child support and contact. We acknowledge that it costs money to have the children for contact – but this was taken into account when developing the child support formula. It is also understandable that parents who support their children want to see them, there is a permeating sense of trading time with children as a form of income retention.

Already careful calculations are made in court corridors, working out the precise impact of proposed contact arrangements on child support payments. Submissions dressed up in language about 'most appropriate contact' are tinged with child support implications. The increasing pattern of a week-night stay over and collection and return of the children through the school (Thursday to Monday say) may be partly the result of devising contact arrangements which reach the magic figure of 30% of nights, thereby reducing child support. WLS acknowledges that many children enjoy this time with their father and benefit from it, but it is naive to suggest that there are no financial interests at play.

We have referred to the attempts to reduce the sense of children as property by the new terminology introduced in 1996, however, the fiscal value of children is deeply entrenched in this debate.

If more parents engaged in shared parenting after separation, this will also increase the likely share of property received by fathers. Children as property: children as income. Given the generally better financial circumstances of men, women will be quite badly affected by these shifts. It is likely that more women and children will live in poverty.

Key Point 16

In respect of answering the ToR, WSL is aware of **the research the AIFS is conducting into the links between contact and child support and we believe it is important to await those findings. Any changes to the child support formula need careful, informed analysis. It is a highly charged issue in the community.**

PART III – IDEAS FROM AN EXISTING MODEL

3.1 Introduction

In this Part we have provided a discussion of relevant sections of Chapter 26 of the Revised Code of Washington State[44] (RCW) and a discussion of the benefits and disadvantages within this model. We discovered this statute and a very thoughtful report on its effectiveness[45] while undertaking our research for this Inquiry.

A copy of the relevant provisions of the RCW is provided at annexure 'A'.

WLS's position is that this particular Inquiry should not be the catalyst for any change to the Family Law Act. We do not believe that the FLA is ideal, but the areas we believe require reform relate to improving the system's response to violence and abuse. These have been canvassed.

However, we acknowledge that there appears to be a level of discontent in the community. If the Committee is tempted to respond to those calls, we consider that the RCW provides an interesting model for consideration. It seems to contain a number of attributes which address a range of concerns which have been raised in family law system debates in the last few years by both men and women. There are also a number of features which are probably inconsistent with the Australian approach to family law and which we would not want to see contemplated in Australia.

Of great interest to the proponents of shared parenting is that the RCW anticipates these kinds of orders as an active option and overtly includes them in the statutory regime. However, it does not elevate them to the presumed starting point. Rather it positions the concept towards the end of a staged process which is only reached after all matters in the best interests of the child have been considered.

In our opinion it is compatible with the "four fundamental principles" which guided the thinking of the Pathways Advisory Group:

- overriding importance given to the best interests of the child
- priority for use of non-judicial processes to resolve issues of family conflict and transition
- need to ensure safety from family violence
- responsibility of parents to provide financial support for their children[46]

3.1.1 IMPORTANCE OF THE LEGISLATIVE 'PACKAGE'

When considering legislative reform, governments must always be careful to examine the whole package of any model from a different jurisdiction which is under consideration. Part of the appeal of the RCW is in the whole package it encompasses. Although it actively encourages shared parenting, it starts by emphasizing protection from abuse.

It would be a serious mistake and detrimental to children if recommendations were made which embraced the shared parenting part of the RCW while ignoring the protective aspects. This statute strikes a balance between protection of family members from abuse while encouraging on-going involvement from both parents where appropriate.

Key Point 17

It would be very dangerous for women and children if legislation were introduced which further promoted shared care after separation, unless this was done together with provisions which set out a more detailed and effective process for dealing with allegations of abuse.

3.1.2 OVERVIEW OF WASHINGTON LEGISLATION

The RCW provides a staged process to follow when developing an agreement or pursing a judicial decision about arrangements for children after separation:

1. the best interests of the child are the overarching policy framework
2. decisions should be made so that each parent is encouraged to have a positive on-going relationship with their children
3. where contra-indications to safety exist, restrictions are placed on the kinds of orders which can be made
4. the legislation specifically refers to the possibility of making orders which involve shared care or frequent exchanges
5. however, agreements or orders for shared care can only be made when certain positive features exist in the circumstances of the family and cannot be made if there are certain contra-indicators

We will now examine the provisions in detail.

3.2 Policy Statement

RCW 26.09.002 provides a policy framework for of the all sections about family relationships.

Firstly it states clearly that best interests of the child is the test:

> In any proceeding between parents under this chapter, the best interests of the child shall be the standard by which the court determines and allocates the parties' parental responsibilities.

Australia is very comfortable with the best interests test and we believe its continued use is widely supported. American expert on custody law, Joan Kelly says of the test:

> The most compelling reason for relying upon a determination of the child's best interests is that decision-making is centered on children's needs, rather than adult considerations or societal stereotypes and legal traditions.
>
> The second advantage of the best interest standard is that it is responsive to changing social or legal trends outside of custody law ... Certainly, the "best interest" standard enabled fathers who had engaged fully in significant caretaking roles within the family to have an expanded role in the child's life after divorce.[47]

This latter concept is clearly vital in the current Inquiry. It seems to suggest that it is not necessary to have a rebuttable presumption in the law. The best interests of children test may be all that is needed for fathers to remain meaningfully involved with their children after separation, particularly to a level similar to the extent of their involvement prior to separation.

Notwithstanding the fact that the ToR appear to assume that the best interests test would remain paramount, we are concerned that this would not really be the strict legal interpretation of the law if a rebuttable presumption were legislated.

The policy statement also emphasizes the "fundamental importance of the parent-child relationship to the welfare of the child" and states that the relationship should be fostered "unless inconsistent with the child's best interests". The wording used is actually very similar to our 'principles' section 60B(2) of the Family Law. This indicates that the RCW and Australian law share some common underlying philosophies.

3.3 Criteria For Making Parenting Decisions

RCW 26.09.187 sets out the criteria for establishing what the RCW calls "parenting plans". (Parenting plans seem to be used in Washington whether the parties develop the plan themselves by agreement, or whether it is judicially imposed.)

PDR Processes

1. It is interesting to note that the section starts by clearly excluding cases with a history of violence and abuse from the "dispute resolution processes" (see 26.09.187(1)). This is the equivalent of our "PDR" processes and no such overt exclusions exist in our law. WLS commends this provision of the RCW.

Both parents encouraged to be meaningfully involved

2. Subsection 26.09.187(3)(a) again includes a concept similar to the principle contained in our section 60B(2) of the FLA, requiring the court to make orders "which encourage each parent to maintain a loving, stable and nurturing relationship with the child".

Some behaviour creates restrictions

3. However, the subsection also draws in the notion of restricting residential arrangements for parents who have engaged in certain kinds of behaviour:

> The child's residential schedule **shall be consistent with RCW 26.09.191. Where the limitations of RCW 26.09.191 are not dispositive of the child's residential schedule**, the court shall consider the following factors:

In other words, where certain features outlined in 26.09.191 exist in a particular case, there are specific approaches to be taken in decision-making. Those features are extensive, but tend to relate to abuse and violence.

4. The idea that allegations of violence and abuse should be determined early and thereafter influence decision-making is emerging as an important approach to the protection of children. We have already described its presence in the laws and practices of a number of jurisdictions.[48]

The precise behaviour which creates restrictions is contained in RCW 26.09.191 and will be discussed a little more later.

General factors listed for best interests of the child

5. Where no restrictive matters apply, the section then sets out a list of factors for the court to consider in the best interests of the child which are very similar to section 68F(2) factors of the FLA. See RCW 26.09.187(3)(a)(i)-(vii).

Role of Primary Carer

6. Interestingly, the first factor includes a concept not really present in our FLA; that is that in assessing the relationship of the child with each parent, the court is required to take into account "whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child".

Parenting functions are defined in detail at RCW 26.09.004 (see annexure A). They are very broad, ranging from practical care, through to meeting developmental needs and providing emotional and financial support.

7. The section provides that this factor "be given the greatest weight". This should give greater importance to the role played by either parent as primary carer. We believe that this role is undervalued in our family law system at present and that it is this undervaluing which allows abusive parents to have inappropriate prospects of success of residence in some cases.

WLS works with mothers who are fearful of sending their children on contact visits to their violent partners. They were the primary carer and protector of the child during the relationship. Fathers apply for, and are sometimes granted residence of children in these 'high-conflict' cases. An emphasis on the importance on the role of primary carer may subtly change the emphasis on that part of the evidence in some cases.

It is an important part of the package and balance of this legislation.

Anticipates possibility of shared parenting

8. Importantly subsection 26.09.187(3)(b) anticipates the idea that the arrangements could include something like a shared parenting arrangement with "brief and substantially equal intervals of time". This legislatively promotes the concept of shared parenting, however, it does not entrench nor promote a specifically 'equal time' model.

It could be that including the concept of shared parenting in legislation in this manner facilitates its consideration by appropriate families. It may become more visible in community education materials and be discussed more frequently by counsellors and other key players. It may generally encourage more active and innovative education programs.

9. The study into the RCW suggested that parents needed more information so it would be possible to "encourage more creativity and individualizing of parenting plans".[49] The Pathways Report also found that parents wanted more information about what is actually in the best interest of their children.[50]

Many parents would like mediators and other professionals to play a more active role in working out options. One member of the AIFS shared parents focus group said:

> ... when I put it on the mediator – not so much to give me the answers but to give me and my ex ideas on the variables that you need to consider in this model – they weren't forthcoming. It was an answer like: 'You have to work it out.'[51]

However, on a cautionary note, it is important to realize that the social reality may not follow any legislated ideal.[52] "There is no evidence to suggest that shared caregiving has become a lived reality for the children of separated parents who have engaged with the 'family law system' since the [Family Law Act changed to promote shared parenting]."

Excludes some parents from shared parenting arrangements

10. The provision also includes a list of strict qualifications for shared parenting:

    i. none of the restrictions relevant to residential orders can be present (ie. the RCW 26.09.191 factors);

    ii. (A) there is agreement; OR

    (B) the parties have a satisfactory history of cooperation and shared performance of parenting functions *[and further practical matters]*; and

    iii. the provisions are in the best interests of the child.

    These qualifications are vital and establish legislatively the essential criteria which need to be present if shared parenting after separation is to be contemplated by a particular family. They do not appear to provide abusive parents with a further litigious weapon. Rather, the law provides an invitation to committed parents to be creative in their arrangements for the children and to find ways by which both parents can continue to have meaningful relationships with their children after separation.

3.4 Restrictions on Deciding Parenting Arrangements

As we have discussed, WLS believes that the family law system would be improved in terms of its response to domestic violence and child abuse if the law encouraged early determinations of these allegations. In our view, the current law allows the Family Court and professionals in the family law system to discount the importance of violence – particularly spousal violence[53]. Where the mother has been the primary carer, violence against the woman is not separable from violence against the children. Therefore we support the idea of clear restrictions being included in the law.

However, we believe that the actual list of exclusory factors contained in RCW 26.09.191 is not in line with Australian practice more generally. The concept of "wilful abandonment" is not one really referred to in Australian family law. This exclusion could disadvantage a woman who leaves the children with an abusive father, believing it to be the only way to get away safely. It could also disadvantage a father who disengages from his children for a period of time and then wishes to re-establish himself with his family. We would not recommend the inclusion of this concept in any Australian model.

We can also envisage cases where both parents would be excluded by these provisions – thus perhaps placing children precipitously in the child protection system.

Further, the definition of domestic violence contained in 26.50.010 (which is linked in to section 26.09.191) is very narrow and appears to encompass mainly physical abuse. Concepts such as social, emotional and financial abuse have not been incorporated.

Finally section 26.09.191(3) contains a description of conduct which "may have an adverse effect on the child's best interests" and allows the existence of this conduct to limit the provisions of a parenting plan. It seems to us that this moves towards an approach which is far more prescriptive than the more discretionary regime with which Australian courts are comfortable.

Great caution is required before adopting list after list of prescriptive provisions.

3.5 Conclusions to Model Discussion

It is the opinion of WLS that the current *Family Law Act* works adequately in terms of encouraging parents to share parenting. We believe that the real obstacles to this occur long before separation and are related to the stereotypical gendered roles still played by mothers and fathers in contemporary Australian homes. Although a slow change is occurring, there will also need to be changes to work place practices, increased availability of child care places and a raft of other social policy initiatives before shared parenting can become a common pattern.

We advocate no change to the law at present, but rather enhanced community education for fathers and parents generally. Such kinds of education probably need to start with young children. Consideration of the social policy initiatives needed to improve the prospects of shared parenting is also required.

If change is to be considered by government we hope that we have provided an interesting and informative model which may address a range of concerns. We believe that many of the groups which will be represented at this Inquiry would have some of their issues answered by legislative reform which draws from this model.

Key Point 18

If the Committee wishes to suggest change, we consider that the following ideas are essential:

1. **There must be extensive community consultation about the detail of any model which is suggested.**

2. **The Washington State model should be further researched.**

3. **The total package and balance of any legislative models examined must be understood.**

Annexure 'A'

MAJOR DECISION-MAKING PROVISIONS ABOUT RESIDENCE REVISED CODE OF WASHINGTON

Policy Statement

RCW 26.09.002
Policy
Parents have the responsibility to make decisions and perform other parental functions necessary for the care and growth of their minor children. In any proceeding between parents under this chapter, the best interests of the child shall be the standard by which the court determines and allocates the parties' parental responsibilities. The state recognizes the fundamental importance of the parent-child relationship to the welfare of the child, and that the relationship between the child and each parent should be fostered unless inconsistent with the child's best interests. The best interests of the child are served by a parenting arrangement that best maintains a child's emotional growth, health and stability, and physical care. Further, the best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm.

Criteria for establishing permanent parenting plan.

RCW 26.09.187
Criteria for establishing permanent parenting plan.
(1) DISPUTE RESOLUTION PROCESS. The court shall not order a dispute resolution process, except court action, when it finds that any limiting factor under RCW 26.09.191 applies, or when it finds that either parent is unable to afford the cost of the proposed dispute resolution process. If a dispute resolution process is not precluded or limited, then in designating such a process the court shall consider all relevant factors, including:

(a) Differences between the parents that would substantially inhibit their effective participation in any designated process;

(b) The parents' wishes or agreements and, if the parents have entered into agreements, whether the agreements were made knowingly and voluntarily; and

(c) Differences in the parents' financial circumstances that may affect their ability to participate fully in a given dispute resolution process.

(2) ALLOCATION OF DECISION-MAKING AUTHORITY.

(a) AGREEMENTS BETWEEN THE PARTIES. The court shall approve agreements of the parties allocating decision-making authority, or specifying rules in the areas listed in RCW 26.09.184(4)(a), when it finds that:

(i) The agreement is consistent with any limitations on a parent's decision-making authority mandated by RCW 26.09.191; and

(ii) The agreement is knowing and voluntary.

(b) SOLE DECISION-MAKING AUTHORITY. The court shall order sole decision-making to one parent when it finds that:

(i) A limitation on the other parent's decision-making authority is mandated by RCW 26.09.191;

(ii) Both parents are opposed to mutual decision making;

(iii) One parent is opposed to mutual decision making, and such opposition is reasonable based on the criteria in (c) of this subsection;

(c) MUTUAL DECISION-MAKING AUTHORITY. Except as provided in (a) and (b) of this subsection, the court shall consider the following criteria in allocating decision-making authority:

(i) The existence of a limitation under RCW 26.09.191;

(ii) The history of participation of each parent in decision making in each of the areas in RCW 26.09.184(4)(a);

(iii) Whether the parents have a demonstrated ability and desire to cooperate with one another in decision making in each of the areas in RCW 26.09.184(4)(a); and

(iv) The parents' geographic proximity to one another, to the extent that it affects their ability to make timely mutual decisions.

(3) RESIDENTIAL PROVISIONS.

(a) The court shall make residential provisions for each child which encourage each parent to maintain a loving, stable, and nurturing relationship with the child, consistent with the child's developmental level and the family's social and economic circumstances. The child's residential schedule shall be consistent with RCW 26.09.191. Where the limitations of RCW 26.09.191 are not dispositive of the child's residential schedule, the court shall consider the following factors:

(i) The relative strength, nature, and stability of the child's relationship with each parent, including whether a parent has taken greater responsibility for performing parenting functions *[see definition below]* relating to the daily needs of the child;

(ii) The agreements of the parties, provided they were entered into knowingly and voluntarily;

(iii) Each parent's past and potential for future performance of parenting functions;

(iv) The emotional needs and developmental level of the child;

(v) The child's relationship with siblings and with other significant adults, as well as the child's involvement with his or her physical surroundings, school, or other significant activities;

(vi) The wishes of the parents and the wishes of a child who is sufficiently mature to express reasoned and independent preferences as to his or her residential schedule; and

(vii) Each parent's employment schedule, and shall make accommodations consistent with those schedules.

Factor (i) shall be given the greatest weight.

(b) The court may order that a child frequently alternate his or her residence between the households of the parents for brief and substantially equal intervals of time only if the court finds the following:

(i) No limitation exists under RCW 26.09.191;

(ii)(A) The parties have agreed to such provisions and the agreement was knowingly and voluntarily entered into; or

(B) The parties have a satisfactory history of cooperation and shared performance of parenting functions; the parties are available to each other, especially in geographic proximity, to the extent necessary to ensure their ability to share performance of the parenting functions; and

(iii) The provisions are in the best interests of the child.

Restrictive provisions in parenting plans.

RWC 26.09.191
Restrictions in temporary or permanent parenting plans.

(2)(a) The parent's residential time with the child shall be limited if it is found that the parent has engaged in any of the following conduct: (i) Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions; (ii) physical, sexual, or a pattern of emotional abuse of a child; (iii) a history of acts of domestic violence as defined in RCW 26.50.010(1) *[see definition below]* or an assault or sexual assault which causes grievous bodily harm or the fear of such harm; or (iv) the parent has been convicted as an adult of a sex offense under:

[The section then sets out a range of sections and goes on to develop a complex regime of rebuttable presumptions against parents who have been convicted of sexual offences or who reside with people convicted of sexual offences ...]

(3) A parent's involvement or conduct may have an adverse effect on the child's best interests, and the court may preclude or limit any provisions of the parenting plan, if any of the following factors exist:

(a) A parent's neglect or substantial nonperformance of parenting functions;

(b) A long-term emotional or physical impairment which interferes with the parent's performance of parenting functions as defined in RCW 26.09.004 [see definition below];

(c) A long-term impairment resulting from drug, alcohol, or other substance abuse that interferes with the performance of parenting functions;

(d) The absence or substantial impairment of emotional ties between the parent and the child;

(e) The abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological development;

(f) A parent has withheld from the other parent access to the child for a protracted period without good cause; or

(g) Such other factors or conduct as the court expressly finds adverse to the best interests of the child.

Definition of domestic violence

RCW 26.50.010
Definitions.
As used in this chapter, the following terms shall have the meanings given them:

(1) "Domestic violence" means: (a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members; (b) sexual assault of one family or household member by another; or (c) stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member.

Definition of parenting functions

RCW 26.09.004
Definitions.
The definitions in this section apply throughout this chapter.
...

(3) "Parenting functions" means those aspects of the parent-child relationship in which the parent makes decisions and performs functions necessary for the care and growth of the child. Parenting functions include:

(a) Maintaining a loving, stable, consistent, and nurturing relationship with the child;

(b) Attending to the daily needs of the child, such as feeding, clothing, physical care and grooming, supervision, health care, and day care, and engaging in other activities which are appropriate to the developmental level of the child and that are within the social and economic circumstances of the particular family;

(c) Attending to adequate education for the child, including remedial or other education essential to the best interests of the child;

(d) Assisting the child in developing and maintaining appropriate interpersonal relationships;

(e) Exercising appropriate judgment regarding the child's welfare, consistent with the child's developmental level and the family's social and economic circumstances; and

(f) Providing for the financial support of the child.

Annexure 'B'
EXTRACT FROM: *NEW ZEALAND GUARDIANSHIP ACT 1968*

16B. Allegations of violence made in custody or access proceedings

(1) This section applies to any proceedings relating to an application made under this Act for an order relating to the custody of, or access to, a child, (including, without limitation, an application for the variation or discharge of any order with respect to the custody of, or access to, a child, or for the variation or discharge of any condition of any such order), whether or not the proceedings also relate to any other matter (whether arising under this Act or any other enactment).

(2) Where, in any proceedings to which this section applies, it is alleged that a party to the proceedings has used violence against the child or a child of the family or against the other party to the proceedings, the Court shall, as soon as practicable, determine, on the basis of the evidence presented to it by or on behalf of the parties to the proceedings, whether the allegation of violence is proved.

(3) Nothing in subsection (2) of this section requires the Court to make any inquiries of its own motion in order to make a determination on the allegation.

(4) Where, in any proceedings to which this section applies, the Court is satisfied that a party to the proceedings (in this section referred to as the violent party) has used violence against the child or a child of the family or against the other party to the proceedings, the Court shall not

(a) Make any order giving the violent party custody of the child to whom the proceedings relate; or

(b) Make any order allowing the violent party access (other than supervised access) to that child,

unless the Court is satisfied that the child will be safe while the violent party has custody of or, as the case may be, access to the child.

(5) In considering, for the purposes of subsection (4) of this section, whether or not a child will be safe while a violent party has custody of, or access (other than supervised access) to, the child, the Court shall, so far as is practicable, have regard to the following matters:

(a) The nature and seriousness of the violence used:

(b) How recently the violence occurred

(c) The frequency of the violence:

(d) The likelihood of further violence occurring:

(e) The physical or emotional harm caused to the child by the violence:

(f) Whether the other party to the proceedings

i. Considers that the child will be safe while the violent party has custody of, or access to, the child; and

ii. Consents to the violent party having custody of, or access (other than supervised access) to, the child:

(g) The wishes of the child, if the child is able to express them and having regard to the age and maturity of the child:

(h) Any steps taken by the violent party to prevent further violence occurring:

(i) Such other matters as the Court considers relevant.

(6) Notwithstanding subsection (2) of this section, where, in any proceedings to which this section applies,

(a) The Court is unable to determine, on the basis of the evidence presented to it by or on behalf of the parties to the proceedings, whether or not the allegation of violence is proved; but

(b) The Court is satisfied that there is a real risk to the safety of the child,

the Court may make such order under this Act as it thinks fit in order to protect the safety of the child.

(7) The provisions of this section shall apply notwithstanding section 23 (2) of this Act.

[1] Family Law Pathways Advisory Group (2001) *Out of the Maze: Pathways to the Future for Families Experiencing Separation*, Commonwealth of Australia, p 6

[2] Australian Bureau of Statistics, *Family Characteristics Survey 1997*, Cat No 4442.0, AGPS, Canberra; See also Smyth B and Parkinson P; 'When the difference is night and day: Insights from HILDA into patterns of parent-child contact after separation', Paper presented at the HILDA Conference, The University of Melbourne, March, 2003, p 7 available at http://www.aifs.org.au/institute/pubs/papers/smyth3.pdf

[3] see Parkinson P & Smyth B above note 23 at p 9

[4] Hawthorne B, 'Nonresident Fathers: Missing in Action? A preliminary analysis of a study of Australian nonresident fathers'. Paper presented at the 8th Australian Institute of Family Studies Conference, March, 2003, p 5, available at http://www.aifs.org.au/institute/afrc8/hawthorne.pdf

[5] Smyth B and Parkinson P, 'When the difference is night and day: Insights from HILDA into patterns of parent-child contact after separation', Paper presented at the HILDA Conference, The University of Melbourne, March, 2003, p 11, available at http://www.aifs.org.au/institute/pubs/papers/smyth3.pdf

[6] These figures combine the 'a little too much' and' way too much' groups and the 'nowhere near enough' and 'not quite enough' groups.

[7] See Brown T, Sheehan R, Frederico M and Hewitt L (2001), *Resolving Family Violence to Children*, Monash University, (*Magellan Evaluation*). The Magellan project is a system of case management piloted in the Melbourne Registry of the Family Court for cases involving allegations of sexual abuse. It has proven to be an effective system which is soon to be implemented in other registries.

[8] Johnson J (1994), 'High-Conflict Divorce' in *The Future of Children: Children and Divorce*, Vol 4, No 1, Spring, p 172. Dr Johnson is the director of research at the Center for the Family in Transition in California.

[9] Craig L, 'Do Australians Share Parenting? Time-diary evidence on fathers' and mothers' time with children', Paper presented at the 8th Australian Institute of Family Studies Conference, March, 2003, available at http://www.aifs.org.au/institute/afrc8/craig.pdf

[10] Craig L, 'Do Australians Share Parenting? Time-diary evidence on fathers' and mothers' time with children', Paper presented at the 8th Australian Institute of Family Studies Conference, March, 2003, available at http://www.aifs.org.au/institute/afrc8/craig.pdf

[11] Hawthorne B, 'Nonresident Fathers: Missing in Action? A preliminary analysis of a study of Australian nonresident fathers'. Paper presented at the 8th Australian Institute of Family Studies Conference, March, 2003, p 4, available at http://www.aifs.org.au/institute/afrc8/hawthorne.pdf

[12] ibdi., p 6

[13] ibid., p 6

[14] Rendell K, Rathus Z and Lynch A (2000) *Unacceptable Risk: A Report on child contact arrangements where there is violence in the family*, Women's Legal Service, Brisbane, p 53

[15] Kaye, M., Stubbs, J and Tolmie, J (2003) *Negotiating Child Residence and Contact Arrangements Against a Background of Domestic Violence*, Griffith University, p 139

[16] In a random sample of 229 unreported final decisions of the Family Court in 1998/99, 14% involved no contact. Rhoades H, Graycar R and Harrison M (2000) *The Family Law Reform Act 1995: The First Three Years*, University of Sydney and Family Court of Australia, p 48-49

[17] Rendell K, Rathus Z and Lynch A (2000) *Unacceptable Risk: A Report on child contact arrangements where there is violence in the family*, Women's Legal Service, Brisbane, p 119

[18] Hunter R, Genovese A, Chranowski, A and Morris C (2002) *The changing face of litigation: unrepresented litigants in the Family Court of Australia*, Law and Justice Foundation of NSW, p 41

[19] Hunter R, Giddings J and Chrzanowski A (2003) Legal Aid and Self-representation in the Family Court of Australia: A study to examine the relationship between the limited availability of legal aid funds for family law matters and the phenomenon of self-representing litigants in the Family Court, Griffith University, p 22

[20] Rendell K, Rathus Z and Lynch A (2000) *Unacceptable Risk: A Report on child contact arrangements where there is violence in the family*, Women's Legal Service, Brisbane, p 101

[21] Chetwin,A., Knaggs, T. & Te Wairere Ahiahi Young,P. (1999) *The Domestic Violence Legislation and Child Access in New Zealand*, Ministry of Justice, Wellington, p 70.

[22] The Model Code is available on the internet at http://www.ncjfcj.org/dept/fvd/publications/main.cfm?Action=PUBGET&Filename=new_modelcode.pdf

[23] Advisory Board on Family Law: Children Act Sub-Committee (2000), *A Report to the Lord Chancellor on the Question of Parental Contact in Cases Where There is Domestic Violence*, London. It can be found on the Lord Chancellor's website at <www.lcd.gov.uk/family/abfl>

[24] Personal correspondence, Lord Chancellor's Department, October, 2001

[25] Advisory Board on Family Law: Children Act Sub-Committee (2001-2002), *Summary Report on Findings from the Lord Chancellor's Department's Survey Monitoring Awareness of Guidelines* at <www.lcd.gov.uk/family/abfl/abflguiderep.htm>

[26] Smyth, B., Caruana, C and Ferro, A (2003) *Some whens, hows and whys of shared care: What separated parents who spend equal time with their children say about parenting,* paper presented the Australian Social Policy Conference, Social Policy Research Centre, University of NSW, pp 16 & 18

[27] Rhoades H, *The 'No Contact Mother': Reconstructions of Motherhood in the Era of the 'New' Father* (2002) 16 IJLP&F 71-94 at 84-85

[28] Dewar,J. & Parker,S. (1999) 'Parenting, Planning and Partnership: the impact of the new Part VII of the Family Law Act 1975' *Family Law Research Unit Working Paper. No 3.* p 24

[29] Smyth, B., Caruana, C and Ferro, A (2003) *Some whens, hows and whys of shared care: What separated parents who spend equal time with their children say about parenting,* paper presented the Australian Social Policy Conference, Social Policy Research Centre, University of NSW, pp 10 & 22

[30] Kelly, J, (2003) *The Determination of Child Custody in the USA*, World Wide Legal Information Association, http://wwwlia.org/us-cus.htm

[31] Smyth, B., Caruana, C and Ferro, A (2003) *Some whens, hows and whys of shared care: What separated parents who spend equal time with their children say about parenting,* paper presented the Australian Social Policy Conference, Social Policy Research Centre, University of NSW, p 19

[32] ibid., p 20

[33] Wade A and Smart C, As Fair as it can be? Childhood after Divorce, to be published in A Jensen & L McKee (eds)(2002), *Children and the Changing Family,* London, Lalmer Routledge, p 4

[34] Smart, C., (2001) *Children's Voices,* paper presented at the 25th Anniversary Conference of the Family Court of Australia.

[35] Lye, D (1999) *Washington State Parenting Plan Study,* Washington State Supreme Court Gender and Justice Commission and Domestic Relations Commission, p I, available at http://www.courts.wa.gov/committee/pdf/parentingplanstudy.pdf

[36] See R Weston, 'Changes in Household Income Circumstances', in P McDonald (ed), *Settling Up: Property and Income Distribution on Divorce in Australia,* Australian Institute of Family Studies (1986) 100; R Weston, 'Income Circumstances of Parents and Children: A Longitudinal View', in K Funder, M Harrison and R Weston (eds), *Settling Down: Pathways of Parents After Divorce,* Australian Institute of Family Studies (1993) 135.

[37] *Settling Down: Pathways of Parents After Divorce,* above, note 11 at p 137.

[38] Weston, R & Smyth B, 'Financial Living Standards After Divorce' (2000) 55 *Family Matters* 11.

[39] Smyth, B and Weston, R (2000) *Financial living standards after divorce: A recent snapshot,* Australian Institute of Family Studies, pp 8-11

[40] Wolffs, T& Shallcross, L, 'Low Income Parents Paying Child Support: Evaluation of the Introduction of a $260 Minimum Child Support Assessment' (2000) 57 *Family Matters* 26.

[41] Attorney General's Department, *Child Support Scheme Facts and Figures 2000-2001,* 2002.

[42] Smyth, B & Weston, R (2000) *Financial living standards after divorce: A recent snapshot,* AIFS, p 13

[43] AIFS (2000) pp 13-14

[44] Available at http://www.leg.wa.gov/rcw/index.cfm?fuseaction=title&title=26

[45] Lye, D (1999) *Washington State Parenting Plan Study,* Washington State Supreme Court Gender and Justice Commission and Domestic Relations Commission available at http://www.courts.wa.gov/committee/pdf/parentingplanstudy.pdf

[46] Family Law Pathways Advisory Group (2001) *Out of the Maze: Pathways to the Future for Families Experiencing Separation,* Commonwealth of Australia, pp 4-5

[47] Kelly J, *The Determination of Child Custody in the USA,* World Wide Legal Information Association, last modified February, 2003, available at http://wwlia.org/us-cus.htm

[48] United Kingdom's *Guidelines for Good Practice on Parental Contact where there is Domestic Violence;* the USA's *Family Violence: Model State Code* produced by the National Council of Juvenile and Family Court Judges; and the New Zealand *Guardianship Act 1968.*

[49] Lye, D (1999) *Washington State Parenting Plan Study,* Washington State Supreme Court Gender and Justice Commission and Domestic Relations Commission, p ii, available at http://www.courts.wa.gov/committee/pdf/parentingplanstudy.pdf

[50] Family Law Pathways Advisory Group (2001) *Out of the Maze: Pathways to the Future for Families Experiencing Separation*, Commonwealth of Australia, p 12

[51] Smyth, B., Caruana, C and Ferro, A (2003) *Some whens, hows and whys of shared care: What separated parents who spend equal time with their children say about parenting,* paper presented the Australian Social Policy Conference, Social Policy Research Centre, University of NSW, p 14

[52] Rhoades H, Graycar R and Harrison M (2000) *The Family Law Reform Act 1995: The First Three Years*, University of Sydney and Family Court of Australia, at p 59.

[53] To a certain extent some of the problems around direct child abuse are about proving that it has occurred.