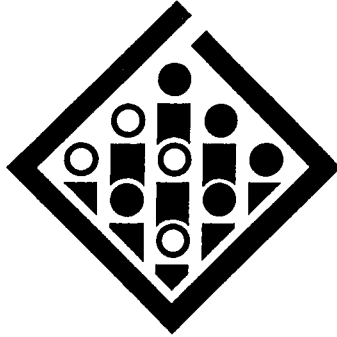


House of Representatives Standing Committee  
on Family and Community Affairs

Submission No: .....1023.....

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# Family Services Australia

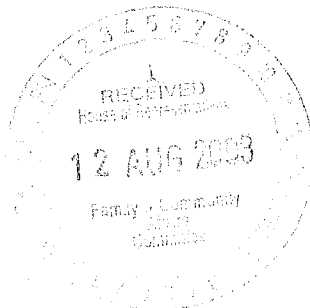
*working together with families*

**August 2003**

**FSA SUBMISSION**

**HOUSE OF REPRESENTATIVES FAMILY AND COMMUNITY  
AFFAIRS COMMITTEE**

**INQUIRY INTO  
CHILD CUSTODY ARRANGEMENTS  
IN THE EVENT OF FAMILY SEPARATION**





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## 1. Executive Summary

This submission to the House of Representatives Family And Community Affairs Committee Inquiry into Child Custody Arrangements in the Event of Family Separation has been prepared on behalf of Family Services Australia (FSA), the largest national Industry Representative Body and member association of providers of family relationship services and other family support services.

FSA notes that the current provisions of the Australian *Family Law Reform Act 1995* already provide for an arrangement where children may spend equal time with each parent if the family wishes. The fact that few Australian families currently choose this arrangement indicates that a rebuttable presumption would impose an arrangement upon families that the majority will not accept. Statistics provided from the Child Support Agency (CSA) indicate that "the number of families sharing care more than 30% of the time is a small component of the total CSA caseload" (Child Support Agency 2003). Moreover research and the experience of FSA member organisations indicates that where parents have significant levels of conflict between them, an arrangement where children spend equal time with each will be detrimental to all family members, in terms of emotional, psychological and physical well-being.

FSA also notes the current provisions of the Act provide for the practice of law where children are considered as independent beings, where children have rights and parents responsibility for their nurture and care. The *Family Law Reform Act 1995* changed the language to reflect a significant shift towards a perception of children as independent beings, not owned by parents but for whom parents have responsibility, and any consideration of 'custody' is now inappropriate, irrelevant and incorrect at law.

The four key principles of the Australian *Family Law Reform Act 1995* clearly establish the 'best interests' of the child as paramount in family law proceedings. These principles are that:

- children have a right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and
- children have a right of contact, on a regular basis, with both their parents, and with other people significant to their care, welfare and development; and
- parents share duties and responsibilities concerning the care, welfare and development of their children; and
- parents should agree about the future parenting of their children.

FSA supports the position of the *Family Law Reform Act 1995*, and reminds the Inquiry that acting in the best interests of children implies that they will be directly consulted, their opinions listened to and acted upon. Adult perceptions of a child's best interests are rarely accurate when children themselves are not consulted.

FSA's member organisations agree with the comments of others who have submitted to the Inquiry, that a rebuttable presumption that children will spend equal time with each parent has the potential to create difficulties for families in the implementation of such an arrangement. The concept of a rebuttable presumption of this kind appears oriented toward the needs of parents rather than those of children. It ignores the uniqueness of Australian families and treats them in a universal manner. Cultural and societal factors are ignored in this approach, as are the experiences of victims of domestic violence. A rebuttable presumption that children will spend equal time with each parent following



separation has the potential to keep victims of violence in a situation that remains dangerous.

FSA, informed by the experience of member organisations and research of what works to enable parents to maintain functional and nurturing contact post separation, urges this Inquiry to also consider the successful services that support Australian families in this context. Strengthening these services is the best approach to assisting families maintain nurturing contact.

This submission addresses these issues in greater detail and makes the following recommendations.

## LIST OF RECOMMENDATIONS

FSA recommends that the Inquiry:

1. **Hears and considers the voices of children in its deliberations**, with the prime focus on achieving better outcomes for children rather than for parents.
2. Consider **children as contributors to their own lives** rather than mere recipients of adult 'care,' protection and decision-making processes.
3. **Consult children** – both those who have experienced a joint residence arrangement and those who have not – in the preparation of its report on a presumption that children spend equal time with each parent.
4. Explore **other avenues of involving children** in decision-making processes following their parents' separation.
5. Notes the **effectiveness of the current provisions within the *Family Law Reform Act 1995*** and their application for families where joint parenting arrangements will work, noting that the Act provides now for joint parenting which can include shared living arrangements.
6. Carefully consider the research on **children's attachment to significant others**.
7. Carefully consider issues of **domestic violence** in determining the advisability of children spending equal time with both parents following separation.
8. Consider issues relating to **parental flexibility**, level of **communication** between the parents, and parents' **residence arrangements** in deciding on the advisability of a presumption that children will spend equal time with both parents.
9. Consult widely with different **cultural groups** within Australia to determine the applicability of an assumption of joint residence to their own value and belief systems.
10. Recognises the need for **expanding the delivery of services** which have proven to be effective in assisting parents post divorce or separation to establish effective, nurturing shared parenting.
11. Consider the development of further effective **parenting skills programs and support services**, and seek funding for these programs to be developed as a matter of urgency. Programs should be available for parents from the time of pregnancy through the family and child life cycle, and especially both pre- and post-separation.



## 2. About Family Services Australia

FSA was formed in 1994, and is funded through membership fees and by the Commonwealth Family Relationships Services Program (FRSP), which is administered by the Department of Family and Community Services (FaCS). Funding for the FRSP is appropriated both through the Federal Attorney-General's Department and FaCS.

FSA has 70 national member organisations located in over 250 sites in city, suburban, regional and rural areas throughout Australia. The organisations are diverse in size and in their relationship to a broad range of not-for-profit community welfare organisations. They may be, for example, associated with a Community Legal Centre, be an independent community based incorporated association or company, or part of a large church network.

Our member organisations provide core services around Australia and across all of the service activities in the FRSP. These services include Family Relationships Counselling; Family Relationships Mediation; Children's Contact Services; Contact Orders Program; Men and Family Relationships Services; Family Relationships Education; Family Relationships Skills Training; Adolescent Mediation and Family Therapy; Specialised Family Violence Services; and Rural and Regional Primary Dispute Resolution. FSA members have direct contracts with and provide direct services to the Family Court and the Federal Magistrates Service.

Some FSA member organisations only provide services funded by the FRSP; others offer an extended range of community and welfare services funded through other Commonwealth and State programs and other sources. Services include: other family support services; residential and community care; services to persons with a disability; drug and alcohol abuse counselling; support and rehabilitation; alternative care programs; supported and crisis accommodation; youth health; financial counselling; unemployment programs; out of school care; specialist education programs; emergency relief; domestic violence and sexual abuse counselling programs; multicultural and non-English speaking services; refugee and migrant accommodation, placement and support; torture and trauma counselling; and rural and remote programs.

FSA and its member organisations are committed to the provision of services that are accessible to all families and individuals throughout Australia and which strengthen and sustain individuals, couples and families in all their diversity, enabling them to live within communities which contribute to the well-being of all.

In recent years, FSA's member organisations have been instrumental in establishing and building practices that address the specific needs of children in a respectful and inclusive manner. We have responded to two significant events in developing effective and timely programs that meet the unique needs of children, and which are salient to this Inquiry. These events were Australia's ratification of the *United Nations Convention on the Rights of the Child* in 1990, indicating our agreement to improve conditions for our children, and the 1995 reforms to the Australian *Family Law Act 1975*. FSA recognises its responsibility to ensure that Australia's children receive the best opportunities possible while they grow, and that their rights as people are supported.

In the past, FSA has responded to a number of Inquiries and Government initiatives in relation to family law matters which lead to the reports known as *To have and to hold – Strategies to strengthen marriage and relationships* 1998 (the Andrews Report), *The Delivery of Primary Dispute Resolution Services in Family Law* 1997, and *Out of the Maze – Pathways to the Future for Families Experiencing Separation* 2001.



FSA's leadership role in the family services sector is reflected in this submission which draws on both the significant expertise and experience of FSA's member organisations in working with families across a wide spectrum of issues and our commitment to improving the position of families and children within Australian society.

### **2.1. The Relationship of the work of the FSA's membership to the Terms of Reference of the Inquiry.**

The FSA national network of 70 community organisations provide services across the full range of Commonwealth funded services which support families prior to, during and post separation and divorce. More specifically for example, the FSA network is the largest provider of Childrens Contact Services, the Contact Orders Program initiative (UnitingCare Unifam's *Keeping Contact*, Anglicare WA's *Mums and Dads Forever*), the Men and Family Relationships Program's Services, Family Relationship Education and Family Relationships Skills Training.

There are three salient facts in relation to both this Inquiry and to the delivery of these services on the ground:

- Overall government funding for the Family Relationships Services Program has declined in real terms since 1998 and agencies are running deficit budgets and /or are having to reduce the number of clients services in order to stay viable;
- services dealing with issues of joint/shared parenting are in high demand and have long waiting lists; and
- formal evaluation of these services identifies their high degree of success.<sup>1</sup>

In terms of this inquiry the relevance of the facts above are that what has shown to be working to facilitate active shared parenting are services like the Contact Orders Program. This submission will refer to the concern that a rebuttable notion of joint custody does not focus on the relationship skills that, when enhanced, have been proven to be at the core of facilitating positive joint/shared parenting. These services provide the way forward to help separated parents develop ongoing, positive contact relationships and maintain non adversarial regular contact. This Inquiry represents an important opportunity to highlight the effectiveness of these developing, and as externally evaluated, successful services.

The focus of this submission however is mainly concerned with Part (a) of the Inquiry's Terms of Reference, namely:

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<sup>1</sup> Evaluation of the Contact Orders Program, Executive Summary, May 2003: *Over 70% of clients reported receiving a positive benefit from attending the Program. Program practitioners reported a similar rate of clients benefiting from participating. "This is the type of result many social programs would like to be able to report."<sup>1</sup> They are especially pleasing for this client group, considering the difficulties they have had with contact with their children.*

*The Program helps very conflicted adults move towards a more co-operative stance about child contact with their former partners. Benefits include learning about the positives of parenting and communication skills. Even in a situation where the child contact outcome is not what a parent wants, the Program helps that parent move on to another stage in life where further litigation is unlikely. Clients describe the Program as 'a lifeline' and as having 'saved our lives'. Many are in favour of the Program being made mandatory for separating parents.*



- (a) Given that the best interests of the child are the paramount consideration:
- i. what other factors should be taken into account in deciding the respective time each parent should spend with their children post separation, in particular whether there should be a presumption that children will spend equal time with each parent and, if so, in what circumstances such a presumption could be rebutted; and
  - ii. in what circumstances a court should order that children of separated parents have contact with other persons, including their grandparents.

The submission will first consider a number of general issues in relation to the terms of reference before addressing specific matters arising from the questions posed above.



### 3. General Observations

#### 3.1 The Title of the Inquiry

FSA notes that this Inquiry addresses issues of child *custody*. The Australian *Family Law Reform Act 1995* abolished this terminology in favour of the term *residence*. This change has implications for the current Inquiry, in that any consideration of *custody* is now inappropriate, irrelevant and incorrect at law.

The Parliamentary preparation for the introduction of the 1995 Family Law reforms referred to the notion of children as being 'owned' by parents and argued that use of the term *custody* suggested that parents could wield power over each other through 'ownership' (Chisholm, 1996; Lloyd-Smith & Tarr, 2000). Indeed, a 1998 article suggested that a "major decision" following parental separation concerns the question, "Who gets the kids?" (Mullis & Otwell, 1998, p. 103). The *Family Law Reform Act 1995* changed the language to reflect a significant shift towards a perception of children as independent beings, not owned by parents but for whom parents have responsibility (Attorney-General of Australia, 2001; Chisholm, 1996). While the impact of the changes in terminology has been minimal, with family lawyers and parents showing slowness in accepting the philosophies underpinning the new terms (Attorney-General of Australia, 2001), experience in other jurisdictions indicates that it takes time for attitudinal changes to occur (Tapp & Taylor, 2001). To revert to the use of the term *custody* at this stage will be a retrograde step, confusing separating people, their legal representatives and the court alike. Chisholm (1996) argues that the 'new concepts' (of *residence* and *contact*) will succeed if they are applied in a uniform and straightforward manner. Reverting to the old term *custody* will not achieve this in any positive way.

Some jurisdictions, such as those in America and Canada, refer to the concept of 'joint legal custody.' This concept provides for parents to share the responsibility for children's care and development, and is a separate concept to 'joint physical custody,' which relates to residence. With the 1995 changes to the Australian *Family Law Act 1975*, the concept of 'joint legal custody' (the sharing of legal responsibilities for children) was incorporated into the new terminology, and is often referred to as *shared or joint parenting*. Parental responsibilities are now shared between both parents unless there is a specific order that alters this arrangement. This means that now both parents share responsibility for major decisions about children, including those related to education, health issues, living arrangements, and daily care. Ideally, parents will communicate together to decide how to best manage these issues. Indeed, the recent Family Law Pathways report *Out of the Maze – Pathways to the Future for Families Experiencing Separation 2001* recommended that the Government explore the concept of shared parenting,

*The Family Law Reform Act 1995 changed the language to reflect a significant shift towards a perception of children as independent beings, not owned by parents but for whom parents have responsibility ... any consideration of 'custody' is now inappropriate, irrelevant and incorrect at law.*

*To revert to the use of the term 'custody' at this stage will be a retrograde step, confusing separating people, their legal representatives and the court alike.*





The current Australian Family Law Reform Act 1995 contains provisions which encourage parents to consider arrangements that encompass both joint parenting and joint residence.

Where high levels of animosity and conflict already exist, the burden of 'proof' will build on the animosity, creating further difficulties for children in negotiating their relationships with each parent.

emphasising cooperation between parents. Joint *custody* was not referred to in that report.

Where the conflict between parents is so significant that it is impossible for them to talk together in a civil manner, an order can be sought that provides for decisions to be made by one parent (Nicholson, 2003). In the majority of families orders of this type are not sought, leaving the decision-making tasks to be shared between the parents. The concept of joint parental responsibility (or 'joint legal custody') is therefore a reality for many parents. There is no necessity to change the legislation in relation to this issue.

### 3.2. The Difference Between Custody and Residence

Central to any discussion about *joint custody* or *residence* is the difference in meaning between the two concepts. Prior to 1995, the term *custody* carried with it clear expectations that the 'custodial parent' would have specific responsibilities and decision-making tasks, and that the children would reside with that parent. Under the 1995 reforms, while the children will live with the 'residential parent,' that parent has no specific decision-making responsibilities separate from those of the 'non-residential' parent. In other words, parents are now considered to have joint responsibilities for the children's care unless specified under a parenting order. This concept could be referred to as 'joint parenting.' As Chisholm (1996) suggests, children may now benefit from the court being restrained from removing responsibilities from one or both parents.

The current Australian *Family Law Reform Act 1995* contains provisions which encourage parents to consider arrangements that encompass both *joint parenting* and *joint residence*. Parents can agree from a range of possibilities in relation to the way in which children will maintain contact with each parent and how decisions will be made following separation and/or divorce. If the Inquiry's concerns are about the ability of both parents to have input into decision-making processes in respect of children, then the current reforms adequately address these concerns. However, if the Inquiry's concerns are related to the concept of children residing for some time in both parents' homes (the concept of 'joint residence,' rather than 'joint parental responsibility'), there are some major issues that must be addressed. They will be discussed in more detail later in this submission.

### 3.3. 'Joint Custody' and the Divorce Process

FSA has concerns that a rebuttable presumption of 'joint custody' or 'residence' could create a return to high levels of litigation and the concept of fault. In order for a parent to argue that the children should live with one parent rather than move between them, s/he will have to 'prove' at law that the other parent is unsuitable in some way and that contact with the other parent will be inappropriate for the children's best interests. Where high



levels of animosity and conflict already exist, the burden of 'proof' will build on the animosity, creating further difficulties for children in negotiating their relationships with each parent. A return to pre-1975 attitudes and approaches to fault divorce contests could result.

**4. Factors which should be taken into account in deciding the respective time each parent should spend with their children**

**4.1. A Focus on Children**

In 1990 the Australian Government ratified the *United Nations Convention on the Rights of the Child* (CROC). This instrument has four guiding principles, incorporated in 41 Articles: Non-discrimination, the paramountcy of children's 'best interests,' rights to survival and appropriate development, and rights to both have an opinion and be heard.

Much has been written in current literature on the importance of children themselves being consulted about decisions that directly affect them following their parents' separation (Campbell, 2002; Chisholm, 2000; Eekelaar, 1994; Redman, 1997; Taylor, 1998). Honouring children's rights necessitates consulting them on issues that directly affect them. FSA recommends that the Inquiry centralise the voices of children in its deliberations, with the prime focus on achieving better outcomes for children rather than for parents. In commenting on current Australian practices, authors have argued that a focus on parents and their issues does little to resolve issues for children in an effective manner:

The Court must *access what children think* if it is to obtain all the information it requires to make an order reflecting reality for all. That the rhetoric of parental responsibility is about parental rights, especially the rights of the non-residential parent, is made more obvious by the fact that the child has no effective means of enforcing any of the 'rights' stated in s60B [of the *Australian Family Law Act*] (Taylor, 1998, p. 12)(italics added).

A focus on children requires professionals and parents to place children's issues at the forefront of their deliberations. Rather than discuss "the respective time each *parent* should spend with their children," a child-focussed inquiry would ask "What are the most beneficial ways in which *children may have contact with each parent?*" Similarly, it would not be *presumed* that children will spend "equal time with each parent;" rather, the specific circumstances of each child would be considered in relation to the best arrangements for her/him.

*Recommendation 1*

*FSA recommends that the Inquiry hears and considers the voices of children in its deliberations, with the prime focus on achieving better outcomes for children rather than for parents.*

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**children rather than**  
**for parents (section**  
**4.1).**



**Recommendation 2**  
***FSA supports these children's views, and recommends that the Inquiry consider children as contributors to their own lives rather than mere recipients of adult 'care,' protection and decision-making processes. Consulting with children about arrangements for their future is considered a high priority (section 4.1).***

Although the 'best interests' principle has a strong history in law, it has been criticised as being imprecise and open to adult interpretations that may not benefit all children (Kelly, 1997) (McWinney, 1997). Many authors have referred to the discretionary nature of the 'best interests' principle, with family law professionals often having different concepts of what 'best interests' are (Kelly, 1997; Landerkin, 1997; Rotman, Tompkins, Schwartz, & Samuels, 2000). It has been suggested that the only way in which a specific child's best interests can be determined is to ask the child him/herself.

Members of FSA have over the past five years developed a number of effective and responsive child inclusive practices. Results from action research projects relating to these practices, together with other research, indicate that children feel significantly more satisfied with the outcome of decisions that affect them when they are themselves involved in some way in the decisions (McIntosh, 2000). This research is supported by research undertaken in the United Kingdom for the Joseph Rowntree Foundation (Dunn & Deater-Deckard, 2001). There, children reported experiencing positive feelings when they had been consulted about living arrangements for them following their parents' separation. These results indicate the importance of both hearing and acting upon children's views in any decision that will directly affect them. Moreover, children themselves are asking that their opinions be heard and acted upon (Campbell, in preparation; Taylor, 1998; Thomas & O'Kane, 1999). In Canada, a 14-year-old boy felt so strongly about the need for parents to consult with children about their future residence and contact arrangements that he rode his bicycle from Alberta to Ottawa then down to Washington, D.C., to alert the governments of Canada and the United States to that need (Giles, 2002). In a current Australian study, all children interviewed expressed the view that they should be consulted in issues that directly affect them, and especially in relation to living and contact arrangements following their parents' separation (Campbell, in preparation).

**Recommendation 2**  
***FSA supports these children's views, and recommends that the Inquiry consider children as contributors to their own lives rather than mere recipients of adult 'care,' protection and decision-making processes. Consulting with children about arrangements for their future is considered a high priority.***

Identifying (with children contributing) the factors that will maximize children's well being post separation (continuing significant attachments being primary) would diminish the potential tussle between parents' and children's' rights. This means taking account of:

- Stable living arrangements;
- Financial security;
- Optimizing educational outcomes; and
- Maintaining significant attachments with family and friends.



*The United Nations Convention on the Rights of the Child positions children as active shapers of their own lives and able to make decisions (however small) independently of adults. In this view parents and other adults (such as teachers) have responsibilities toward children, to help them to grow appropriately, to make positive decisions about their own lives, and to realise their full potential.*

*A presumption that children will spend equal time with each parent ignores the rights of children to structure their own time for contact, appropriate to their age and stage of development, and to decide for them how that contact will be managed. Moreover, it ignores parents' responsibilities to provide positive experiences for children regardless of time spent with them.*

#### **4.2. Parental 'Rights' and Responsibilities**

Much research in 'joint custody' arrangements has focussed on the experience of the parents rather than the children (Baum, 2003; Madden-Derdich & Leonard, 2002; Mullis & Otwell, 1998). It is argued that a 'joint custody' arrangement "satisfies parents, even though the arrangement may not take into consideration the rights and needs of the children" (Mullis & Otwell, 1998, p. 106), and focuses more upon parents' rights than those of children (Lederman, 1999).

Use of the term *custody* suggests that parents have rights and entitlements over children: that it is their right to see and have 'meaningful' contact with the children of their family, and that these rights take precedence over those of others such as the children themselves. The *United Nations Convention on the Rights of the Child* positions children as active shapers of their own lives and able to make decisions (however small) independently of adults. In this view, parents and other adults (such as teachers) have *responsibilities* toward children, to help them to grow appropriately, to make positive decisions about their own lives, and to realise their full potential. Following separation, parents have responsibilities to ensure that children's routines are not significantly disrupted, to develop appropriate arrangements for their adequate care, to maintain positive relationships with the children and to provide them with security and continuity in their lives. These responsibilities apply independently of with whom the children reside and the ways in which they manage contact with each parent.

A presumption that children will spend equal time with each parent ignores the rights of children to structure their own time for contact, appropriate to their age and stage of development, and to decide for them how that contact will be managed. Moreover, it ignores parents' responsibilities to provide positive experiences for children regardless of time spent with them. Tim Mulvaney, a Melbourne Family Lawyer, recently pointed out, "Parents have responsibilities more than they have rights, and of course that's my view of the way that the legislation's expressed, trying to have verbs, which are doing words, and not nouns, which make children possessions" (Carrick, 2003).

While the *United Nations Convention on the Rights of the Child* mentions parental 'rights' (at Article 5), it positions these rights in relation to "responsibilities" and "duties" of parents or other caregivers "to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the...Convention." These responsibilities can be adequately carried out under the current provisions of the *Family Law Reform Act 1995*, which provides for the sharing of parental responsibilities of these functions.



### 4.3. Children's Views on Shared Residence

As a result of action based research, practitioner members of Family Services Australia report that children's experiences of shared residence are varied. It should be noted also that to date there is limited Australian research looking at predictors of successful shared residence arrangements in separated families. However research within FSA membership services supports the fact that while those children who have not experienced shared residence may ask that they see each parent for an equal amount of time, those who have moved between homes on a regular basis may report frustration and dissatisfaction with the arrangements. For some, this dissatisfaction may not be voiced to parents because of loyalty issues, while for others the fear of negative consequences for asking for a change in the arrangements will prohibit them from voicing dissatisfaction.

*Parental responsibilities can be adequately carried out under the current provisions of the Family Law Reform Act 1995, which provides for the sharing of parental responsibilities of the functions recognised in the United Nations Convention on the Rights of the Child.*

In a current research project children are being interviewed about their experiences with decisions following their parents' separations (Campbell, in preparation). The children involved with this research have commented on a number of issues relating to residence and contact with their parents. Their comments reflect those of children with whom FSA member organisations have worked across the country.

The research indicates that children will generally have positive feelings towards both parents regardless of the amount of contact they have with them (Wallerstein & Kelly, 1980). They often wish that the parents did not separate and that they will return to cohabitation. Children maintain a fantasy about their parents for many years following separation, viewing both in a positive light and remaining loyal to them throughout their lives. These feelings can often be communicated in children's comments about their parents and the arrangements for their residence and contact with each parent. Children who live with one parent and visit the other on a weekly or fortnightly basis may express a wish to spend more time with the 'contact' parent. For some children, this is related to the perception of the 'contact' parent as different from the parent with whom the child resides:

Amy, aged 9, is asked, "You see your dad every second weekend?" She replies:

Amy: I'd like to see my dad more often.

Q: Why would you want to see him more often?

Amy: Because I like seeing my dad cos he's heap - heaps of fun (Campbell, in preparation).

For others, feelings of loyalty to both parents will motivate children to consider ways to create more 'fairness' in arrangements:

Felicity, aged 9: It might be a bit too hard for children saying, well, I don't know who to go for cos they're both nice.

Q: So then what should happen?

Felicity: Well, if he had a brother or sister maybe one can go



with that one or one could go with that one so they're both not lonely (Campbell, in preparation).

For Felicity, attending to her parents' needs, and not her own, is a high priority. She equates fairness with ensuring that her parents are "not lonely". In doing so, she is taking on a parenting role that is considered inappropriate for children.

Fairness is an issue for some children who do spend equal time with each parent; however, it is often not clear whether they are considering the issue of fairness from their own viewpoint or from that of their parents:

Daniel, aged 10, reported that when his parents separated they visited a building in the city where they talked with "someone." Daniel stated that his parents considered several options in relation to "what to do" with him and finally agreed to Daniel living with each of them on a weekly rotational basis. Daniel stated: "So, the person who we went to, they decided to do the switching over weeks one...cos it's fairer" (Campbell, in preparation).

Evidence suggests that where parents live closely together following their separation and communicate well together, children may enjoy an arrangement where they spend equal time with each parent. However, such an arrangement may be more effective where the children feel no restrictions on their movement between each parent and where parents are supportive of their seeing each at their own leisure.

Ellen, aged 9, lives with her mother during most weeks while her father, who lives a short distance away, works long hours. Ellen's parents agreed that Ellen would spend alternate weekends with her father and visit him each Wednesday evening for a meal. In practice, Ellen spends far more time with her father, often seeing him at times during the week and on most weekends. She says:

Ellen: Oh, like I live with my mum, but on Wednesdays I go to my dad's for the, like for tea, and then on every second weekend I go to Dad's or sometimes go round there, um, like,

Q: During the week?

Ellen: Yeah, or on the weekends when I'm with Mum. Yeah, cos I'm allowed to go all week and stuff. [Mum] tells me if I'm bored to go round there (Campbell, in preparation).

When parents live some distance away from each other, or when there is a degree of conflict between the parents, children often find spending equal time with each parent highly stressful and unsatisfactory. In Family Court matters requiring the preparation of a Family Report for the Court, children who have been residing in each parent's home on a weekly basis have reported feeling tired from the necessity to travel sometimes long distances between the two residences; having to ferry notes between the parents, which puts them in the middle of a conflict that they sometimes think is about them; having to carry all their belongings between homes; and having to 'fit in' with the children of parents' new partners while feeling as if they no longer belong.

*Evidence suggests that where parents live closely together following their separation and communicate well together, children may enjoy an arrangement where they spend equal time with each parent.*

*When parents live some distance away from each other, or when there is a degree of conflict between the parents, children often find spending equal time with each parent highly stressful and unsatisfactory.*



Daniel, aged 10 describes living with each parent on a weekly basis as "difficult":

Daniel: Cos when sometimes I'm with my dad, um, they've got, cos we live so far away it takes a long time to get home, so when we get home my dad's like working or something so I don't, I don't really get to see him that often.

For Daniel, his father's work also interferes with his ability to spend as much time as he would like with him:

Daniel: During these holidays, I'm not going to get to see my dad very much because he and [his current partner] are going overseas for two weeks and my dad's been working for the last couple of days, so I've only spent one full day with my dad, and half a day.

Daniel stated that remembering to take all of his belongings to each parent's home is also difficult:

Daniel: Um, like my Nintendo things, my mice; I don't want to take my mice again, cos they went into Dad's car. And, um, it's hard, cos I have to make sure my bags are packed, got everything in one huge box or something, I don't know, and might be like, with my Nintendo, I...forgot to take the pow, bring the power supply down here, so I couldn't play Nintendo. Then um, I, I went up there without my Nintendo, forgot to bring the power supply back again (Campbell, in preparation).

Daniel also reported difficulties with the children of his father's new partner. The new partner's son is two years younger than Daniel, and they share a room at Daniel's father's home. Daniel reported:

Daniel: So he is always, like, making things difficult, like...he has this bunk bed. We took it apart, so I slept on the bottom one...I've got this huge chiffonier with all these books and stuff and then my clothes and stuff are down the bottom, and whenever I call it my bed he says, 'What do you mean, your bed? I'm letting you use my bed.' He's always leaving his stuff on my bed, so whenever I say, 'Stop leaving your stuff on my bed:' 'What do you mean your bed?' He doesn't bother. He never helps me clean up.

While conflicts such as these can mirror those of close siblings, the difference is that Daniel and children like him find themselves feeling like virtual strangers in one home, if not both. Children of new partners can 'squeeze out' children who 'visit' every second week, denying them a space of their own. Even when parents try to include all children in the family, sometimes a timid or uncertain child will find the experience highly stressful. Again, they may not wish to voice their dissatisfaction for fear of upsetting their parents or becoming the target of anger from one or both parents.

Seven-year-old Brenda sometimes expresses a wish not to exercise contact with her father. On those occasions, she reports, "I tell [Mum] that I don't want to go and she just says, 'Fine, but you'll have to do all the stuff that I want to do.'

Q: And how does your dad...feel about you not going?

Brenda: He just um...he sometimes gets a tiny bit mad with



**Recommendation 3**  
***FSA recommends that the Inquiry consult children – both those who have experienced a joint residence arrangement and those who have not – in the preparation of its report on a presumption that children spend equal time with each parent (section 4.3).***

**Recommendation 4**  
***Additionally, FSA recommends that the Inquiry explore other avenues of involving children in decision-making processes following their parents' separation (section 4.3).***

me, so he just says, 'That's OK, it's fine with me.'

Q: How do you know he's feeling mad?

Brenda: Well, sometimes I go to his house and I do something wrong and he just gets a tiny bit angry with me (Campbell, in preparation).

There is evidence to suggest that, given positive contact experiences with each parent, children will want to maintain that contact. Fran, aged 17, stated:

...if they're saying no [to contact with a parent] there could be a very strong reason why they're saying no (Campbell, in preparation).

Fran pointed out that children will not cease contact with a parent unless there are strong reasons for them doing so. However, Fran also indicated an awareness that parents' needs were involved in children's decisions to spend time with each parent:

Fran: Well, yeah, it's like you know, sometimes we don't, like the parents have big problems and stuff if we don't see them a lot, but still even if we have problems with our dads and mums, if we still a, obligated to really go see him every once in a while, so, if it works sometimes we can't go on the weekends, we just don't do it or not sort of thing, but we still have to see him (Campbell, in preparation).

Fran argued that children should be consulted about contact arrangements (Campbell, in preparation). This argument is supported by the current literature both in Australia and the United Kingdom (Chisholm, 2000; Coady, 1996; Redman, 1997; Taylor, 1998). However, consulting children does not necessarily mean simply obtaining their wishes, as provided in Section 68F of the Family Law Reform Act 1995. Children have expressed the opinion that simply seeking their wishes is not as positive for them as asking them about their interests and needs (Campbell, in preparation; Jones & Marks, 1996; Tapp & Taylor, 2001; Thomas & O'Kane, 1998).

**Recommendation 3**  
***FSA recommends that the Inquiry consult children – both those who have experienced a joint residence arrangement and those who have not – in the preparation of its report on a presumption that children spend equal time with each parent.***

**Recommendation 4**  
***Additionally, FSA recommends that the Inquiry explore other avenues of involving children in decision-making processes following their parents' separation.***

#### **4.4. The Effectiveness of Joint Parenting Arrangements**

Research suggests that joint parenting arrangements are most effective when there is little conflict and a history of cooperation between the parents, where parents have shared parenting tasks prior to their separation, where parents voluntarily agree to share





*Research suggests that joint parenting arrangements are most effective when there is little conflict and a history of cooperation between the parents.*

*When only a small number of families in Australia choose an arrangement where children share residence, and when the research suggests that parents who litigate cannot manage a shared residence arrangement due to the significant levels of conflict within the family, it is inappropriate to mandate the arrangement for all.*

*A rebuttable presumption that children will spend equal time with each parent imposes an unworkable arrangement on people who are least able to manage it, and ignores the fact that the arrangement is not highly preferred even in families who can manage it.*

**Recommendation 5**  
**FSA recommends that the Inquiry notes the effectiveness of the current provisions within the Family Law Reform Act 1995 and the application for families where joint parenting arrangements will work, noting that the Act provides now for joint parenting which can include shared living arrangements (section 4.4).**

the parenting tasks, and where arrangements are flexible enough to accommodate the child's friendship groups, activities and educational needs (Mullis & Otwell, 1998; Nicholson, 2003). When shared residence arrangements are effective, they are usually agreed to by both parents away from courts and litigation, and both are committed to the arrangement working for the benefit of the children. However, joint residence arrangements are not usual within the population of separated families with some FSA members indicating that, in their experience, approximately 11% of all separated families choose such an arrangement.

Where there are high levels of animosity and conflict between parents, joint parenting arrangements have the potential to destroy the relationships between the parents themselves and between each parent and the children (Baum, 2003). Parents who enter litigation are often so highly conflictual that joint parenting (joint residence or joint 'custody') is contra-indicated. A rebuttable presumption that children will spend equal time with each parent ignores the possibility of ongoing conflict between parents that will ultimately destroy children's relationships with one or both parents, and removes the responsibility of other parents to work together in meeting children's best interests. Current Family Law provisions include possibilities for shared parenting arrangements, including shared residence where it is considered to be in the child's best interests.

However, when only a small number of families in Australia choose an arrangement where children share residence, and when the research suggests that parents who litigate cannot manage a shared residence arrangement due to the significant levels of conflict within the family, it is inappropriate to mandate the arrangement for all. Current statistics provided by the Child Support Agency (CSA) indicate that "the number of families sharing care more than 30% of the time is a small component of the total CSA caseload" (Child Support Agency 2003). A rebuttable presumption that children will spend equal time with each parent imposes an unworkable arrangement on people who are least able to manage it, and ignores the fact that the arrangement is not highly preferred even in families who can manage it.

**Recommendation 5**  
*FSA recommends that the Inquiry notes the effectiveness of the current provisions within the Family Law Reform Act 1995 and the application for families where joint parenting arrangements will work, noting that the Act provides now for joint parenting which can include shared living arrangements.*

#### **4.5. The Significance of Attachment**

The experience of FSA's member organisations indicates that children can have strong positive relationships with both parents even when they do not live with both of them. Relationships grow through many different avenues. As children grow, they develop



friendships and strong relationships with others, including other children and adults such as grandparents, aunts, uncles and family friends. Additionally, children can experience strong and loving bonds with a parent with whom they do not live when the parent approaches the child with love, compassion and understanding.

Children are often attached to one parent more than to the other, and may experience high stress levels when removed from the more significant parent for a period of time. In recent experience, an 8-year-old child who has been sharing residence between his mother and father reported that he was tired of the arrangement and wished to reside with his mother, with whom he felt a strong bond. When asked how he would feel if this did not occur, he replied that he was not concerned about that possibility, because he knew that the Court would realise that he should be with his mother (Campbell, in preparation). In another case, a 15-year-old boy moved to reside with his father on a full-time basis, thus ending a joint residence arrangement, following a conflict with his mother. He has reported that he feels a stronger bond with his father than with his mother (Campbell, in preparation).

**Recommendation 6**  
***FSA recommends that the Inquiry carefully consider the research on children's attachment to significant others (section 4.5).***

**Recommendation 6**

*FSA recommends that the Inquiry carefully consider this issue and the research on children's attachment to significant others.*

**4.6. Presumption of Equal Time and Issues of Domestic Violence**

Research indicates that children who are exposed to violence within the home are significantly traumatised by the experience. Even when parents believe that children have not witnessed the violence between the parents, children themselves have expressed an awareness that their parents 'fight' and have often seen the effects of conflict on each of their parents (Bagshaw, Campbell, & Jelinek, 2002). Moreover, a growing body of research suggests that children in families where domestic violence occurs are often themselves victims of violence and abuse from one or both parents.

It is sometimes very difficult for adult victims of domestic violence to leave the relationship. Some victims experience significant fear of the consequences, both for themselves and for the children, of leaving, while others do not have the support systems available to assist them once they have left. Many victims of domestic violence simply do not have information about what to do, where to go, how to keep themselves and the children safe and what supports will be available for them when (or if) they leave the violent relationship. The difficulties experienced by victims who have little support and no information can be exacerbated by an assumption that children will spend equal time with each parent after separation, with the victim deciding to remain in the violent situation because s/he sees no way out. Indeed, victims of domestic violence sometimes return to reside with the perpetrator



because of the lack of supports in the community after they leave (Kaye, Stubbs, & Tolmie, 2003).

Having left, a victim relies on safety systems for her/himself and the children. Often, safety means restricting contact between the children and the perpetrator of the violence. A presumption that the children will spend equal time with each parent under these circumstances places both the victim and the children in an unsafe position for several reasons.

*Often, safety means restricting contact between the children and the perpetrator of the violence. A presumption that the children will spend equal time with each parent under these circumstances places the victims in an unsafe position.*

First, a victim of violence will be obliged to inform Courts, counsellors and mediators about her/his fears. Disclosure is often extremely difficult, because victims fear State intervention such as removal of children or further violence from the perpetrator if they disclose (Kaye, Stubbs, & Tolmie, 2003). Sometimes, the very act of divulging this information can place a victim in danger of further abuse from the perpetrator, with victims unable to trust that they will be protected following an admission of violence. Additionally, the legal system in Australia places the burden upon the victim to 'prove' that s/he has been abused and that the children could be in danger if they see the perpetrator in 'uncontrolled' circumstances. This burden of proof can result in the perpetrator putting pressure on the victim to withdraw allegations and agree to the perpetrator's demands.

Second, a presumption that children will spend equal time with each parent has the potential to keep the perpetrator and victim of violence in close proximity to each other without safeguards for the victim. The perpetrator could make unreasonable demands on the victim in relation to the time that the children spend with the perpetrator, and the victim could feel trapped in a situation that they are powerless to change. Children themselves could experience abuse from the perpetrator when frustrations related to contact arrangements surface or when children ask for variations in the regime of contact.

Third, perpetrators will have the ability to control the victim and the children in respect of their activities, friendship groups, financial matters, the children's education, and other issues such as medical care. The victim could potentially remain under the perpetrator's influence and direct control for a significant part of her/his future even though s/he has separated from her/him.

Recommendation 7

*FSA recommends that the Inquiry carefully consider issues of domestic violence in determining the advisability of children spending equal time with both parents following separation.*

**Recommendation 7**  
***FSA recommends that the Inquiry carefully consider issues of domestic violence in determining the advisability of children spending equal time with both parents following separation (section 4.6).***

**4.7. The Practicalities of an Assumption of Equal Time**

When parents separate, there are often major changes to both parents' lifestyles, residence and activities. These changes affect children as well.



Joint parenting has been found to be effective when parents reside closely to one another and are flexible in managing the arrangements. The experience of FSA members has been that the wider the distance between their parents' homes the more difficult it is for children to feel satisfied with spending equal time with each parent. Travel time between each home, the school and venues for sport and other activities, becomes tiring and stressful for children. Additionally, when parents are inflexible in 'enforcing' their time with the children (rather than accommodating the children's activities into the available time), children become disillusioned with the arrangements and express dissatisfaction and even anger over a situation that they find themselves powerless to change.

In a significant number of families, one parent is obliged to move away from the area in which the family lived pre-separation. Financial considerations, family and individual support systems, employment opportunities and other factors often necessitate major changes for one or both parents. It is often not possible for parents to continue to reside closely enough to each other for a joint residence arrangement to work effectively. In rural Australia (such as in Karratha and Weipa), and in Defence Force families, there is often no housing available for a former partner following separation, and one parent is obliged to move out of the town and/or away from the area. In other rural towns, rental properties are simply unavailable. Elsewhere, rental in the area of the former marital home is prohibitively expensive, and a separated parent is obliged to move some distance to find affordable accommodation. In some centres (such as Broome) a separated parent can find him/herself so isolated following separation that s/he must leave the town to move closer to support systems and family of origin. Additionally, many Australians move between cities and towns across the country, and their families of origin may be hundreds or even thousands of kilometres away. The vast distances within the country often make it impossible for children to spend equal time with each parent.

Flexibility is a significant indicator of the success of a joint residence arrangement. When one parent is so inflexible that children cannot attend weekly activities because they don't fit with that parent's schedule, the child begins to suffer. Flexibility also applies to changeover arrangements and the ability of children to spend time with friends and extended family.

Routine is very important to children and parents with disabilities, and shared care arrangements may not offer such routine. Children with disabilities often require specific support services which may not have the flexibility to 'follow' the child from parent to parent. Also, service providers need to liaise regularly with the primary carer of a child with a disability. If the situation involves equal care, then there will be issues of communication that may adversely affect the quality of services the child receives from external support services.

*Flexibility is a significant indicator of the success of a joint residence arrangement. When one parent is so inflexible that children cannot attend weekly activities because they don't fit with that parent's schedule, the child begins to suffer.*



**Recommendation 8**  
***FSA recommends that the Inquiry consider the issues relating to parental flexibility, level of communication between the parents, and parents' residence arrangements when determining the advisability of a presumption of equal time (section 4.7).***

A further strong indicator of joint residence success is the ability of parents to communicate effectively together on issues relating to the children's welfare. In a family where the children were spending equal time with each parent, one parent expressed concern about the weight of one of the children. This parent took the child to a dietician without prior consultation with the other parent. Conflict then developed between the parents that led to the breakdown of the joint parenting arrangement. This type of situation is further exacerbated when the parents are those of a child with a disability. Also, when one or both *parents* have a disability, the concept of equal time becomes more complicated. One parent may be better equipped to offer the support that their child needs, and concerns about automatic shared care may lead to some families remaining together for 'convenience'.

Parents whose children experience positive joint parenting arrangements have developed strong communication patterns between each other and are usually in agreement about how to address issues that arise between them about the children.

**Recommendation 8**  
*FSA recommends that the Inquiry consider the issues relating to parental flexibility, level of communication between the parents, and parents' residence arrangements when determining the advisability of a presumption of equal time.*

#### **4.8. Cultural Issues**

A rebuttable assumption that children will spend equal time with each parent ignores the diversity of the people of this nation. Cultural traditions, including those of the dominant Western culture, require a more sensitive approach to the issue of parenting after separation.

Mainstream Australian culture (based on Western traditions inherited from Great Britain) has assigned specific roles for individuals within family structures. In this cultural tradition, men are perceived as 'bread winners' while women traditionally assume the role of caregiver, mother and home maker (Schaffer, 1988). This has resulted in men being absent from the home for long periods and women assuming the majority of parenting tasks. The result is a strong attachment between children and their mothers and a less significant attachment between children and fathers. Even when women have worked, they have often structured their day differently from men because of the expectation for them to consider the needs of the children in their care. Children may therefore often identify more with the mother and receive a greater sense of security from her than from the father. The perception that children are lacking positive male role models, as recently described by the Prime Minister in the House of Representatives (24 June 2003), may not be related so much to the absence of fathers following separation, but to their general absence during the growth of children due to cultural demands that they work while mothers take responsibility for the care of



*The experiences of those working in these programs, as well as evaluations of these programs such as the Evaluation of the Men and Family Relationships Initiative 2002 (Phoenix Report), indicate that men are now seeking to attend parenting programs to learn more effective parenting approaches. Women, too, have been requesting easier access to parenting programs and support services than have been generally available. This encouraging trend demonstrates the needs of both fathers and mothers to build stronger relationships with children through developing their own parenting skills.*

**Recommendation 9**  
**FSA recommends that the Inquiry consult widely with different cultural groups within Australia to determine the applicability of an assumption of joint residence to their own value and belief systems (section 4.8).**

children. These issues must be considered in any discussion of residence of children following parental separation.

FSA acknowledges that this situation is changing for Australian families. Over the past two decades many men have assumed strong parenting roles, with some acting as full-time parents. FSA's member organisations include many that offer programs under the Men and Family Relationships Services Program. The experiences of those working in these programs, as well as evaluations of these programs such as the *Evaluation of the Men and Family Relationships Initiative 2002 (Phoenix Report)*, indicate that men are now seeking to attend parenting programs to learn more effective parenting approaches. Women, too, have been requesting easier access to parenting programs and support services than have been generally available. This encouraging trend demonstrates the needs of both fathers and mothers to build stronger relationships with children through developing their own parenting skills. However, the increasing demand for appropriate parenting programs and skills training is placing a burden on existing services in meeting the demand. FSA agrees with the findings of recent Inquiries and reports, including the *To have and to hold – Strategies to strengthen marriage and relationships 1998 (the Andrews Report)*, the *Delivery of Primary Dispute Resolution Services in Family Law 1997*, and *Out of the Maze – Pathways to the Future for Families Experiencing Separation 2001*, that more parenting training and support services must be developed. However, FSA notes with dismay that little has been done to address these issues.

In other cultures, there are specific expectations of the role of fathers and mothers that may differ from the dominant Western culture. Indigenous families, for example, have a view of children that places them in a position of social significance different from the children of Western parents. Intricate kinship systems place children in relation to a number of significant adults, apart from their birth parents. An assumption that children will spend equal time with only their parents ignores the deep emotional ties with others in the kinship system, and is inappropriate for Indigenous children.

Some Middle Eastern cultures are patriarchal, where children will reside with fathers following parental separation. Families whose religion or cultural values are different from the dominant Western culture will consider a presumption of equal time with each parent as a denial of their strong cultural values and even insulting to their traditional customs.

**Recommendation 9**  
*FSA recommends that the Inquiry consult widely with different cultural groups within Australia to determine the applicability of an assumption of joint residence to their own value and belief systems.*



## 5. Conclusion

In line with the Australian *Family Law Reform Act 1995*, FSA supports the concept that the child's 'best interests' be paramount in family law proceedings. A move to rebuttable joint *custody* retrogressively shifts the philosophical ground to the parents' rights in dividing up the children, rather than the children's rights. This philosophical shift reverts to the pre-1995 notion of ownership of, rather than responsibility for, children. This is not a direction that would be supported by FSA.

FSA agrees with the Inquiry that, in many cases, children and non-resident parents desire more quality contact time and better relationships, however a mandated change in residency arrangements would not necessarily meet these needs. Increased resources to support families develop the skills to manage their relationships and contact pre and post separation is proving to be very effective and offers a more tangible solution to this issue.

Above all, ensuring that children are consulted and involved in residence decisions must remain the primary focus of the family law system. Supporting children and their families to maintain contact, and providing parents with the skills to facilitate post separation relationships with the child, remain the critical issues.

Changing the law to a rebuttable presumption of shared *custody* will not address the issue at the core of this Inquiry – maintaining effective and nurturing contact with children post separation. What has been shown to be working are programs such as the Contact Orders Program where *the Program helps very conflicted adults move towards a more co-operative stance about child contact with their former partners. Benefits include learning about the positives of parenting and communication skills. Even in a situation where the child contact outcome is not what a parent wants, the Program helps that parent move on to another stage in life where further litigation is unlikely. Clients describe the Program as 'a lifeline' and as having 'saved our lives'. Many are in favour of the Program being made mandatory for separating parents.* (Evaluation of the Contact Orders Program, Executive Summary, May 2003)

FSA member organisations submitting individually to this Inquiry provide additional material in support of the FSA submission.

### Recommendation 10

*FSA recommends that the Inquiry recognises the need for expanding the delivery of services which have proven to be effective in assisting parents post divorce or separation to establish effective, nurturing, shared parenting.*

(over)

**Recommendation 10: FSA recommends that the Inquiry recognises the need for expanding the delivery of services which have proven to be effective in assisting parents post divorce or separation to establish effective, nurturing, shared parenting.**



**Recommendation 11**

***FSA recommends that the Inquiry carefully consider the development of further effective parenting skills programs and support services, and seek funding for these programs to be developed as a matter of urgency. Programs should be available for parents from the time of pregnancy through the family and child life cycle, and especially both pre- and post-separation (section 4.8).***

**Recommendation 11**

*FSA recommends that the Inquiry carefully consider the development of further effective parenting skills programs and support services, and seek funding for these programs to be developed as a matter of urgency. Programs should be available for parents from the time of pregnancy through the family and child life cycle, and especially both pre- and post-separation.*





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