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Submission No. 33
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05/9032

15 July 2005

WAT
The Secretary
House of Representatives
Standing Committee on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

Review of exposure draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005

Thank you for the invitation to make a submission to your review of the provisions of the draft Family Law Amendment (Shared Parental Responsibility) Bill 2005 (the Bill). I am pleased to provide you with the Family Law Council's submission (**Attachment A**).

The Family Law Council is supportive of the measures in the Bill. A number of the Council's suggestions for reform that were submitted to the House of Representatives Standing Committee on Family and Community Affairs inquiry into child-custody arrangements in the event of family separation have been incorporated in the Bill.

Yours sincerely

Professor Patrick Parkinson
Chairperson

FAMILY LAW COUNCIL

**SUBMISSION TO THE REVIEW OF EXPOSURE DRAFT OF THE FAMILY LAW
AMENDMENT (SHARED PARENTAL RESPONSIBILITY) BILL 2005**

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Comments on the Terms of Reference

The Standing Committee on Legal and Constitutional Affairs has been provided with the following terms of reference in relation to the draft Family Law Amendment (Shared Parental Responsibility) Bill 2005 (the Bill):

The Committee will inquire into the provisions of the draft Bill.

Specifically, the Committee will consider whether these provisions are drafted to implement the measures set out in the Government's response to the House of Representatives Standing Committee on Family and Community Services inquiry into child custody arrangements in the event of family separation, titled *Every Picture Tells a Story*, namely to:

- a) encourage and assist parents to reach agreement on parenting arrangements after separation outside of the court system where appropriate
- b) promote the benefit to the child of both parents having a meaningful role in their lives
- c) recognise the need to protect children from family violence and abuse, and
- d) ensure that the court process is easier to navigate and less traumatic for the parties and children.

The Committee should not re-open discussions on policy issues such as the rejection of the proposal of 50/50 custody in favour of the approach of sharing of parental responsibility.

The Council is of the view that the Bill is likely to achieve the measures set out in the government's response to the *Every Picture Tells a Story* report for the reasons outlined below. However, the Council notes the importance of the government's proposed community education campaign in achieving the objectives underlying the draft Bill. The community education campaign will need to be ongoing.

Encouraging agreement outside the court system where appropriate

Council endorses the provisions in the Bill for increasing use of alternative dispute resolution interventions as they can often provide better, more cost effective and more enduring ways of handling conflict for separating parents. There are two main sets of reforms which should encourage agreement outside the court system where appropriate.

Firstly, the provisions encouraging parents to enter into parenting plans. Parenting plans may provide a number of advantages which were outlined in Council's letter of advice to the Attorney-General in 2000, including:

- dispute resolution and early resolution
- increased cooperation between parents
- flexibility (as plans can be easily changed over time), and
- an alternative to court action.

Parenting plans can no longer be registered under the *Family Law Act 1975*. In a submission to the Attorney-General's Department on the discussion paper, *A new approach to the family*

law system,¹ Council recommended something of a 'half-way house' to registration, which was that parenting plans be included in subsection 68F(2) as a factor the court must take into account when making a parenting order. The intention of this recommendation was to lend some gravitas to the document whilst at the same time enabling the plan to remain a non-legal document which could be easily amended to reflect changing circumstances. This might improve the potential appeal of parenting plans to some clients.

Council notes that reference to a parenting plan has not been included in subsection 68F(2) in the Bill. However, item 23 of the Bill (s.65DAB) inserts a requirement that when making a parenting order, the court have regard to the terms of the most recent parenting plan (if any) that has been entered into between the child's parents to the extent to which the plan relates to the child if doing so would be in the best interests of the child. As this would achieve the same purpose as the Council's earlier recommendation, Council supports this proposed provision in principle. However, Council is of the view that the last phrase, "if doing so would be in the best interests of the child", is more confusing than illuminating and that it unnecessarily weakens the attention that should be given to an existing parenting plan. The section only requires the Court to "have regard to" an existing parenting plan as one of the factors to consider, amongst many others, in determining what court order is in the best interests of the child. It adds an unnecessary step to ask the court to consider whether it is in the best interests of the child to have regard to the existing parenting plan in determining what the best interests of the child should be. **Council recommends that the phrase, "if doing so would be in the best interests of the child", should be deleted.**

Secondly, the provisions in schedule 1 which phase in compulsory attendance at dispute resolution prior to filing an application in court will encourage parties to reach agreement outside court. The exceptions to compulsory attendance are essential to ensure that agreements are only encouraged when appropriate, as there are circumstances when it is not appropriate for parents to attend alternative dispute resolution. Council is supportive of exceptions to the requirement for compulsory dispute resolution before filing in circumstances where there is violence or child abuse, to allow for an urgent application and in applications relating to the flagrant breach of recently made orders. The latter two exceptions were recommended by the Council in a submission to the Attorney-General's Department on the discussion paper, *A new approach to the family law system*.

Promotion of both parents having a meaningful role in children's lives

The object of promoting parents' meaningful involvement in their children's lives has been made prominent by inclusion in the objects of the *Family Law Act 1975* (at item 2). That involvement should be promoted to "the maximum extent consistent with the best interests of the child".

The Council supports the provision in the Bill to implement a presumption in favour of joint parental responsibility at item 11. The Council would like to emphasise the importance of the best interests of the child, especially concerning the safety of the child, remaining the paramount consideration in the court's investigation. It is noted that there are a number of items in the Bill which address this concern, including an explicit statement that the presumption does not apply if there are reasonable grounds to believe a parent has engaged in

¹ A copy of this submission is provided at appendix B.

abuse of the child or family violence (item 11), the proposed revision of subsection 68F(2) (especially at item 26) and the proposed amendment to section 60B (at item 2) (discussed further below).

The provisions in the Bill not only promote the role of parents; the Bill contains a number of amendments to foster increased involvement of grandparents and other relatives in the lives of children, in particular for Aboriginal and Torres Strait Islander children.

Role of grandparents and other relatives

The theme of Council's meeting in March 2005 was *grandparents and extended family and their interaction with the family law system*. Council met with a number of representatives of organisations supporting grandparents in Tasmania and also held discussions with judicial officers and legal practitioners on the needs of grandparents. Following the meeting Council recommended to the Attorney-General that section 65G of the *Family Law Act 1975* be amended to remove some of the hurdles in the way of grandparents and other relatives seeking to become primary caregivers even when they have the consent of the parents. Council notes that item 24 amends subsection 65G(2) to remove the requirement for a report to be prepared by a counsellor or welfare officer. Council welcomes this proposed amendment.

Aboriginal and Torres Strait Islander Children

Council is pleased our recommendations made in a December 2004 report titled *Recognition of traditional Aboriginal and Torres Strait Islander kinship obligations and child-rearing practices* have been incorporated in the Bill. Greater recognition of Aboriginal and Torres Strait Islander children's right to maintain a connection with the lifestyle, culture and traditions of their peoples is an important step and may foster the involvement of extended families and whole communities in the lives of children.

Recognition of the need to protect children from family violence and abuse

The Council has previously expressed the view that the *Family Law Act 1975* should contain a clear statement that the child and the parent (or carers) have a right to be safe, and this right outweighs an arrangement based on shared or significant involvement.² This is an important qualification to the presumption of joint parental responsibility. As noted above, the Bill contains an explicit statement that the presumption does not apply if there are reasonable grounds to believe a parent has engaged in abuse of the child or family violence (item 11).

The Council is pleased that reference to the need for children to be protected from physical or psychological harm is added to the objects in section 60B at item 2, and as a primary consideration when assessing the best interests of the child under the proposed amendment in subsection 68F(1A) (at item 26) and supports these proposed amendments.

Ensuring that the court process is easier to navigate and less traumatic for the parties and children

² Submission to the House of Representatives Standing Committee on Family and Community Affairs child custody arrangements inquiry, p20. Copy provided at appendix C.

The Council supports the amendments in Schedule 3 to the Bill and understands that the provisions have been developed in consultation with the Family Court and the Federal Magistrates Court. In the Council's view, the guiding principles will implement a less adversarial approach to children's cases.

Comments on the Schedules of the Bill

The Council has some comments about specific provisions in the Bill.

Schedule 1 – Shared Parental Responsibility

Objects of Part VII (item 2)

Council recommends one change to item 2 in order to reinforce the importance of grandparents' roles in the lives of children. It is recommended that section 60B be amended to make explicit that 'other people' significant to the child's care, welfare and development includes grandparents. **Council recommends an amendment to proposed subparagraph 60B(2)(a)(ii) in item 2 such that it reads:**

Children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care welfare and development; **such as grandparents and other relatives.**³

The operation of joint parental responsibility

Council is of the view that wherever possible, parents should be encouraged to agree about major long-term issues (as set out in item 6). In the event agreement cannot be reached, a court order will need to be made to decide the issues in dispute or to allocate responsibility to one parent for deciding all major issues.

The Council's only concern is with proposed paragraph (e) in the definition of 'major long-term issues' defined in item 6 (ie. "significant changes to the child's living arrangements"). While it supports the intent behind this provision, Council is concerned that it should not lead to a significant increase in disputes between couples that in all likelihood will need to be dealt with by a court. **To make the application of this provision clearer, Council recommends that para (e) be reworded as follows:**

"changes to the child's living arrangements that make it significantly more difficult for a parent to spend time with the child."

The proposed amendment is consistent with the explanatory statement. This statement notes that the provision is not intended to cover situations where the child relocates to another residence within the same locality unless this produces a significant change. The proposed

³ This amendment was previously recommended by the Council in a submission to the Attorney-General's Department on the Discussion paper, *A new approach to the family law system* in December 2004.

wording makes it clearer what a significant change in the child's living arrangements means and why it is important.

Substantial time

Council is supportive of the proposed amendment at item 23 (s.65DAA) in principle. However, Council considers that subsection (2) would be clearer if it provided that subsection (1) does not apply if *the parties agree that* it is not reasonably practicable for the child to spend substantial time with each of the parents. This has the effect that court time does not have to be wasted going over the pros and cons of an option that neither parent believes is reasonably practicable. **Council recommends that the words "if the parties agree that" should be added to subsection (2) of the proposed s.65DAA.**

Schedule 2 – Compliance regime

The Council is of the view that the provisions in schedule 2 should be given a reasonable opportunity to work. Council notes that the provisions would give courts increased flexibility for dealing with contravention of parenting orders by adding new options, such as the power to make an order to compensate a person for time they did not spend with the child as a result of the contravention even if there was a reasonable excuse for the contravention (proposed section 70NEAB at item 3). The provision for a court to take into account a parenting plan when a contravention of a parenting order is alleged is novel idea (item 4). It will be essential to ensure that parties are properly informed about this when entering into a parenting plan and Council notes that there will be an obligation on advisers to inform people that if there is a parenting order in force, the order may be subject to a parenting plan they enter into (proposed paragraph 63DA(2)(c) at item 14 of Schedule 1).

However, there may be cause for concern about the effect of these provisions on the more difficult cases, eg. those involving family violence. If a court has made a parenting order after a defended hearing in such a case (such as for supervision of contact), it is conceivable that a parent may subsequently be pressured by the other parent into agreeing to a parenting plan that overrides the orders and that may put them or their children at risk. Some safeguards to address this scenario may need to be considered. One option is for s.64D to be amended so that it is more explicit that in an appropriate case, a court should be able to make an order that can only be changed by the court making a subsequent order.

The provisions in schedule 2 should be viewed in the context of the other measures. For example, parties will have to attend family dispute resolution prior to filing an enforcement application, unless one of the exceptions applies. Family dispute resolution may assist to resolve misunderstandings about parenting orders and parenting plans and avoid the need for parties to go to court. For example, if a family's circumstances have changed such that their parenting order is no longer workable, family dispute resolution may assist the parties to agree to enter into a more flexible parenting plan.

Schedule 3 – Amendments relating to the conduct of child-related proceedings

Council has no further comments on Schedule 3.

Schedule 4 – Changes to dispute resolution

The Council has considered the issue of the immunity from suit of mediators. This is already the position under section 19M of the *Family Law Act 1975*. Mediators and arbitrators are given the same protection and immunity as a Judge of the Family Court. The Bill would continue this immunity (proposed section 10M, item 32). However, it seems increasingly anomalous. Almost no other professionals are immune from liability for negligence. The recent High Court decision upholding the traditional immunity of barristers attracted public criticism.

The immunity of Family Court mediators makes sense because of their role in court processes and case management, as does the immunity of arbitrators. The question is whether there should be a general immunity for mediators in the community. The Council advises that the present immunity of mediators should be reconsidered.

Schedule 5 – Removal of residence and contact

Council supports the amendments to terminology so that ‘parenting orders’ define what period of time the child should spend living with each parent or other caregiver and what contact persons other than parents should have. These amendments should achieve the purpose of expressing more clearly what ongoing relationships between parents and their children are in terms of the time they spend together and the responsibilities each parent has in relation to decisions affecting the child.

Family Law Council
July 2005

Functions of the Family Law Council

The Family Law Council is a statutory authority which was established by section 115 of the *Family Law Act 1975*. The functions of the Council are set out in subsection 115(3) of the Act as follows.

It is the function of the Council to advise and make recommendations to the Attorney-General, either of its own motion or upon request made to it by the Attorney-General, concerning:

- (a) the working of this Act and other legislation relating to family law;
- (b) the working of legal aid in relation to family law; and
- (c) any other matters relating to family law.

The Council may provide advice and recommendations either on its own motion or at the request of the Attorney-General.

Membership of the Family Law Council (as at 1 July 2005)

Professor Patrick Parkinson, *Chairperson*

Ms Nicola Davies

Mr Kym Duggan

Federal Magistrate Christine Mead

Justice Susan Morgan

Mr Clive Price

Ms Susan Purdon

Justice Garry Watts

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

Australian Institute of Family Studies – Mr Bruce Smyth

Australian Law Reform Commission – Ms Kate Connors

Child Support Agency – Ms Yvonne Marsh

Family Court of Australia – Ms Jennifer Cooke and Ms Dianne Gibson

Family Court of Western Australia – Justice Stephen Thackray

Federal Magistrates Court of Australia – Mr John Mathieson

Family Law Section of the Law Council of Australia – Ms Maurine Pyke



FAMILY LAW COUNCIL

**SUBMISSION TO THE ATTORNEY-GENERAL'S DEPARTMENT
CONCERNING A NEW APPROACH TO THE FAMILY LAW SYSTEM:
IMPLEMENTATION OF REFORMS: DISCUSSION PAPER
(10 NOVEMBER 2004)**

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Recommendations

Recommendation 1 (p 11)

That a National Director of Family Relationship Centres (FRCs) should be recruited as soon as possible to plan the phased roll-out of the FRCs, develop FRC networks, and manage the development of key resources required by the FRCs.

Recommendation 2 (p 12)

That the Government should establish an expert advisory body to support the National Director and to advise the Government on issues arising from the work of the FRCs and the Family Relationships Services Program (FRSP).

Recommendation 3 (p 12)

That religious organisations, Family Support organisations and services provided or funded by State and Territory governments should be given information about the roles of the FRCs and the situations in which a referral will be appropriate.

Recommendation 4 (p 14)

That the Act is amended so that the Court, when making a parenting order, must consider “a parenting plan which is not a registered parenting plan” as one of the matters in s 68F(2).

Recommendation 5 (p 15)

That the legal profession be invited to play an active role in the development of templates for parenting plans and ancillary explanatory material.

Recommendation 6 (p 15)

That the roles of Parenting Advisers and mediators should be clearly distinguished. A Parenting Adviser needs to be suitably qualified, but need not be a family and child counsellor or mediator within the meaning of the Family Law Act.

Recommendation 7 (p 18)

That Family Relationships Services Program procedures include appropriate protocols to deal with the needs of children and in particular to ensure, so far as is appropriate in a particular case, the voice of the child is heard.

Recommendation 8 (p 19)

That culturally and linguistically appropriate service delivery be included in FRC service provision through:

- a all staff in FRCs and FRSP services involved in parenting issues receiving ongoing cultural education
- b development of an employment strategy that includes criteria promoting cultural and linguistic diversity; and
- c provision of interpreters.

Recommendation 9 (p 19)

That FRC procedures include appropriate safeguards to maximise the proportion of clients transferring to referred services.

Recommendation 10 (p 20)

That the FRCs should be permitted to broker out mediation services.

Recommendation 11 (p 20)

That while legal representatives should not normally be involved in a mediation conducted under the auspices of the FRC:

- (a) FRC procedures should canvass the benefits of referring appropriate cases to a mediation model that does include lawyers where for example it is considered that the involvement of lawyers may assist in addressing power imbalance issues, and
- (b) the involvement of lawyers should remain at the discretion of the mediator in consultation with the parties concerned.

Recommendation 12 (p 22)

That the FRCs should provide an advice and support role to parents where face to face mediation is not appropriate because of a history of violence, abuse or any other such reason.

Recommendation 13 (p 23)

That a parent should be able to bring an application to the Court without preconditions if it is alleged that there has been a flagrant breach of a recently made court order.

Recommendation 14 (p 24)

That the Parenting Advisers providing telephone advice through the national advice line should also be engaged in face to face work with clients.

Recommendation 15 (p 24)

That the potential of the Pathways Networks be assessed in terms of their capacity to assist in implementing the new family law system in their local area, and that viable Networks should be given additional support.

Recommendation 16 (p 24)

That appropriately located FRCs be funded for outreach to smaller communities in their region in order to provide some face to face services in those communities at reasonable intervals.

Recommendation 17 (p 28)

That when planning the outreach of FRCs to regional areas, the location of defence force communities be taken into account.

Recommendation 18 (p 29)

That s 60B(2)(b) is amended as follows (in bold):

(b) 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; **such as grandparents.**

Recommendation 19 (p 29)

That the issue of functional recognition of grandparents' role as primary caregivers be referred to the Community Services Ministers Council.

Recommendation 20 (p 32)

That the Act is amended to expressly provide for three options which a Court must consider in cases where there is high conflict. The three options are to:

- adjourn and direct a parent or both parents to attend a service dealing with entrenched conflict families
- make a final order, and direct a parent or both parents to attend an appropriate service, or
- make an order vesting some or all decision-making authority in one parent.

Recommendation 21 (p 34)

That s 118 be amended to allow the Court to dismiss proceedings at any stage if it considers that they have no reasonable prospect of success.

Recommendation 22 (p 35)

That the Act should not require the Court to consider the option of substantially equal parenting time if this is not a proposal advanced by any of the parties, but the Act should make clear that an order for substantially shared parenting time is an option available to the Court in determining a residential schedule for the child.

Recommendation 23 (p 35)

That the Act is amended to expressly define shared parental responsibility as *not* involving any fixed percentage of parenting time.

Recommendation 24 (p 37)

An applicant should not need to demonstrate that he or she has engaged in a process of conciliation prior to filing where delay in filing would render the application nugatory.

Recommendation 25 (p 37)

That s 117 is amended along the following lines so that a court has the power to make a costs order either:

- (a) where an application is filed on one of the grounds that renders it unnecessary to attempt to resolve the dispute before filing, and the court is satisfied that the application has been made without the applicant having a reasonable belief that one or more of those grounds could be established, or
- (b) the court is satisfied that the application is frivolous, vexatious, or had no reasonable prospect of success.

Recommendation 26 (p 38)

In the implementation phase of rolling out the FRCs, the Government should make arrangements with suitable approved counselling and mediation organisations to provide some free mediation services in areas where the FRCs have yet to be established.

Recommendation 27 (p 38)

That the Act is amended so that applications can be filed without certificates by people who do not have Family Relationship Centres or another approved counselling or mediation organisation easily available to them. Legislation along the following lines is suggested:

A person shall be required to file a certificate from a Family Relationships Centre or other approved counselling or mediation organisation if subsection 2 applies.

Subsection 2:

a person shall file a certificate from a Family Relationships Centre or other approved counselling or mediation organisation:

- (i) if the application is to be filed in a registry of a court which is prescribed by the regulations; or
- (ii) if the services of a Family Relationships Centre or other approved counselling or mediation organisation are not available within a

distance prescribed from time to time by the regulations from the person's place of residence or employment.

Recommendation 28 (p 39)

That the Government defer decision about amending the Act to require the court to consider changing the parenting order in cases of multiple deliberate and intentional breaches of orders, until the results of other initiatives are assessed.

Recommendation 29 (p 42)

That a broad-based community education campaign be developed on the basis of a 5-10 year plan with the long term goal of bringing about cultural change concerning the way the community thinks about parenting after separation.

Recommendation 30 (p 42)

That each FRC be given a budget for local advertising and be encouraged to make regular contributions to local press and radio in order to make known the services and resources that can assist families in each locality.

Recommendation 31 (p 42)

That State and Territory governments be requested to examine their school curricula, especially legal studies, as well civics/citizenship/society/relationship type courses, with a view to ensuring that they reflect the key structures of the new family law system.

Introduction

1 The Family Law Council (the Council) is very supportive of the general thrust of the Discussion Paper. It believes that the proposed reforms have great potential to bring about positive change in the family law system. It welcomes in particular the development of Family Relationship Centres (FRCs), the proposed procedural reforms in relation to children's cases, and the common entry point for family law cases through the creation of a combined registry.

2 A consistent theme evident in Council's consideration of the Discussion Paper is the need to ensure that expectations are not created in the community that exceed the capacity of the FRCs to deliver on the funding provided to them. The Discussion Paper envisages that the FRCs will play a key role both in assisting parents who have recently separated and those who separated some time previously but have fresh disputes. In addition, they will assist grandparents and have a role in supporting intact relationships.

3 In the course of time, there will be no shortage of proposals for extending their functions or the groups that they service. Council considers that the advertising campaign for these Centres will need to be carefully targeted in the establishment phase in order to ensure, as far as possible, that the demands on the FRCs do not exceed their capacity to deliver services in a timely manner. It is essential that FRCs are not presented as all things to all people. Care should therefore be taken that their core function remains at the forefront of any public presentation and that this vision remain their operational driving force.

4 The FRCs need to be highly visible and highly effective from the outset in order to fulfil their mandate and to inspire confidence in the community. Not only will the FRCs need to be located, funded and staffed appropriately but there will need to be adequate provision of services to which the FRCs can refer.

5 At the conclusion of its submission to the House of Representatives Standing Committee on Family and Community Affairs Inquiry into child custody

arrangements in the event of family separation, Council made some suggestions for reform. It suggested that:

“These reforms might contribute to promoting the best interests of children and contribute to reducing the amount of anger, frustration, and hopelessness of parents dealing with family breakdown, whilst at the same time recognising that the fundamental focus of the law should be the promotion of the best interests of children and ensuring the safety of all members of the family.”¹

6 Council notes that the initiatives outlined in the Discussion Paper pick up several of the key suggestions made by Council. It suggests that the total package of reforms outlined in the Discussion Paper could be characterised in similar terms to those used in the excerpt above.

7 Council comments are set out below. They generally follow the order of the headings used in the Discussion Paper.

A NEW SYSTEM

8 Council sees the FRCs as the centrepiece of the new system. As such it will be critical to the new system's success that the FRCs have high quality national leadership providing strategic direction as well as effective day-to-day management at individual FRCs.

A National Director

9 Council recommends that a National Director of FRCs should be recruited as soon as possible. The National Director would, with a small Secretariat and an advisory committee, be involved in:

¹ <http://www.apf.gov.au/house/committee/fca/childcustody/subs/sub1400.pdf>

- planning the phased roll-out of the 65 FRCs,
- fostering good working relationships between the FRCs and Family Relationships Services Program (FRSP) organisations, relevant State and Territory government service providers, the legal profession and the courts,
- developing standard resources for use in FRCs around Australia and
- ensuring consistency of national service standards.

Recommendation 1

That a National Director of FRCs should be recruited as soon as possible to plan the phased roll-out of the FRCs, develop FRC networks, and manage the development of key resources required by the FRCs.

A phased roll-out of FRCs

10 One approach to the phased roll-out is to establish the initial FRCs as centres of excellence. The tender process could differentiate these centres by providing an explicit mentoring and training role with respect to later FRCs. These initial centres would be at the hub of a network of FRCs in a region and would assist in the development of resources for use nationally. They would also take the lead in meeting local requirements, for example a service protocol for a particular State or Territory.

Advisory structures and governance arrangements in the Family Relationships Services Program

11 Council also recommends that it is an opportune time to consider the advisory structures and governance arrangements in the FRSP in the light of the role it needs to play in the new system centred on the FRCs. Council's concern is whether the additional demands arising from the new system can be adequately catered for by the governance arrangements currently existing for the non-government sector in its relationship with Federal Government services.

12 Council recommends that there should be an expert advisory body that can assist the National Director in his or her work and provide a monitoring role in relation to the new system. That body should promote national best practice, encourage coordination between service providers and support the development of nationally available resources, as well as providing advice to the Government on issues arising from the work of the FRCs and the FRSP.

Recommendation 2

That the Government should establish an expert advisory body to support the National Director and to advise the Government on issues arising from the work of the FRCs and the FRSP.

Encouraging referrals

13 Religious groups and Family Support organisations also need to be targeted as possible sources of referral. They will need information about the roles of the FRCs and the situations in which a referral will be appropriate. Services provided or funded by State and Territory governments should also be kept in mind as sources of referral.

Recommendation 3

That religious organisations, Family Support organisations and services provided or funded by State and Territory governments should be given information about the roles of the FRCs and the situations in which a referral will be appropriate.

Parenting plans

14 It is perhaps helpful to set out the history of Council's previous involvement with this topic.

15 In August 1998, the Council was asked, in cooperation with the National Alternative Dispute Resolution Advisory Council, to look into issues arising from parenting plans made under the Family Law Act 1975 including the continued need for s 63E of the Act. Council had already provided a letter of advice on the same topic dated 31 January 1997.

16 In its Letter of Advice in 2000 Council remained of the view that parenting plans were a valuable means for some parents to set out their agreement on their responsibilities as parents, but concluded that the registration provisions in the Act were unnecessary. In essence, Council advised repeal of the registration provisions.² This recommendation was subsequently accepted. Some points made in that Letter of Advice in 2000 remain particularly pertinent to the issues examined in the Discussion Paper and informed Council's thinking on this topic. Relevant excerpts are at Appendix 2.

17 Council remains strongly supportive of the use of parenting plans as outlined in its 2000 Letter of Advice, and as set out in the Discussion Paper. In particular Council emphasises that the benefits of developing a parenting plan accrue at two levels. While at a primary level the task is to develop a plan tailored to suit the particular circumstances of the particular family there is also considerable benefit in having the family learn the skills necessary to resolve issues in a constructive and child-focussed manner.³ The proposed inclusion of PDR mechanisms in parenting plans, also noted at 4.11 in Appendix 2, is one overt aspect of this secondary educative function. The Act was changed (effective 14 January 2004) to remove the ability to give provisions in parenting plans the same status as court orders by registration. The Council recognises that there may be a small number of parenting plans registered between 1995 and January 2004 which have the force of court orders (see s 63F(3) Family Law Act).

Parenting plans as a s 68F(2) factor

18 While not favouring registration, as something of a 'half-way house' Council recommends that parenting plans be included in s 68F(2) as a factor the court must take into account in making a parenting order. It suggests that this would lend some gravitas to the document, and thereby improve its potential appeal to some clients, without making it any more determinative of a parenting decision than any other

² Available at <http://www.law.gov.au/flc>.

³ See Lye, D. (1999), 'Scholarly research on post-divorce parenting and child wellbeing', Report to the Washington State Gender and Justice Commission. Available at: <http://www.courts.wa.gov>

factor in s 68F(2). It would also enable the plan to remain primarily a non-legal document which can be easily amended to reflect changing circumstances. This flexibility would reflect the fact that post-separation parenting arrangements need to be responsive to the changing circumstances of parents and children as the months and years go by. The following recommendation reflects the fact that only the provisions in parenting plans which have been registered have effect as if they were orders made by the court. Those types of registered parenting plans have a higher status than simply being a matter which must be taken into consideration pursuant to s 68F(2).

Recommendation 4

That the Act is amended so that the Court, when making a parenting order, must consider "a parenting plan which is not a registered parenting plan" as one of the matters in s 68F(2)

Use of parenting plans by the legal profession

19 Council notes that the use of parenting plans by the legal profession has always been limited by the comparative advantages of consent orders. It appears that lawyers will always tend to use consent orders because of the client's need for certainty, typically after a history of 'breaches' of previous arrangements, and their ease of use.

20 Some of the negative factors previously associated with parenting plans may be addressed by the advent of FRCs and aids such as parenting plan templates. Council sees value in involving the legal profession in the development of parenting plan templates. It also supports the provision of appropriate resources to aid in the greater use and acceptance of parenting plans by the legal profession. The active encouragement of parenting plans should include the wide dissemination of information to the legal profession.⁴

⁴ The Council and Family Law Section of the Law Council of Australia have recently distributed *Guidelines for Family Lawyers doing family law work*. This is to be updated electronically and would be one suitable vehicle for encouraging the greater use of parenting plans.

Recommendation 5

That the legal profession be invited to play an active role in the development of templates for parenting plans and ancillary explanatory material.

The Staffing Of FRCs

21 The Council envisages a different role for Parenting Advisers to that set out in the Discussion Paper. The key difference is that their role would not normally include undertaking mediation, and hence they would not necessarily be qualified or accredited mediators. Rather, the primary role of Parenting Advisers will be the critical task of assessing clients as they present with problems of varying complexity and urgency, providing initial information and advice to parents, and assisting them to access the services most relevant to their needs.

22 There is of course no reason why a qualified family and child counsellor or mediator should not take on the role of a Parenting Adviser, but Parenting Advisers need not be family and child counsellors or mediators within the meaning of the Family Law Act. Furthermore, it would not be the best use of the qualifications and skills of family and child counsellors or mediators to have them trying to fulfil the triaging and advice role required in the Centres as well as engaging in mediation when parents are in dispute.

Recommendation 6

That the roles of Parenting Advisers and mediators should be clearly distinguished. A Parenting Adviser needs to be suitably qualified, but need not be a family and child counsellor or mediator within the meaning of the Family Law Act.

Individual interviews with a parenting adviser

23 Council considers that the general advice role of Parenting Advisers may not have been given sufficient weight in the Discussion Paper. Getting the parents into mediation about the parenting arrangements is only one successful outcome of the personal interview. It may be that many of the clients will not move onto the mediation track after the personal interview. They may decide to pursue avenues to help them restore the relationship, or need other kinds of services and supports as a

priority at that stage of coming to terms with the separation. Sometimes problems about the post-separation parenting arrangements only arise some time after the separation, at which point an agreed parenting plan may need to be worked out. In the aftermath of separation, a parent may need other kinds of information and support. The FRCs need to meet clients where they are at the stage they come to the Centre, and to respond to the needs and priorities as perceived by the clients.

24 Since the first critical interaction that clients will have will be with Parenting Advisers –whether in person or over the phone – these staff will need to be selected on the basis of particular skills, knowledge, and experience to properly deal with the range of FRC clients.

25 In addition there will be a high need for specialist support and supervision services for the Parenting Advisers. And because of the novel role of Parenting Advisers a formal training program would need to be developed. This could in time, as a second order priority, lead to a formal accreditation program.

26 It follows that a key to the success of the FRCs is properly defining the duty statements and selection criteria for the Parenting Advisers. Council would reiterate the importance of quality staffing in providing the one-to-one interviews. The following matrix sets out the key criteria that should be considered:

FRC Parenting Advisers: Key criteria

<p>1 Qualifications</p> <ul style="list-style-type: none"> • A degree or diploma in social services, education, counselling, mediation, PDR or equivalent <p>Skills training</p> <ul style="list-style-type: none"> • PDR/Conflict resolution • Counselling • Case Management 	<p>2 Specialist Training</p> <ul style="list-style-type: none"> • Impact of divorce and separation on children • Family violence • Child protection • Mental health issues (including suicide) • Diversity (CALD and ATSI) • Family law issues and processes
<p>3 Skills / Competencies</p> <ul style="list-style-type: none"> • Listening skills • Empathy • Sensitivity to clients' needs • Ability to contain clients distress and anxiety • Knowledge of wide range of services • Assessment regarding Domestic Violence and Child Protection • Ability to refer to appropriate services • Ability to work with wider Family Law System networks • Communication skills (verbal and written) • Competent literacy skills 	<p>4 Personal Qualities and Attributes</p> <ul style="list-style-type: none"> • Maturity • Ability to manage, cope with and withstand interactions with distressed, anxious, angry clients • Robust, able to manage stress and pressures of work and client population

Legal protections and customer focus

27 Consideration will also need to be given to:

- Parenting Advisers' legal status with respect to the extension of the protections afforded under the Family Law Act to 'counsellors and mediators' (see for example s 70NI Family Law Act), and
- the development of a complaints mechanism, as part of a broader customer charter, based on industry best practice.

Responding to children's needs at FRCs

28 Council recommends that appropriate guidelines be established to deal with children in this process.⁵ It is important that parents are encouraged to take into account their children's needs, perceptions and attachments in reaching appropriate parenting arrangements and, within that context, be sensitive to their children's voices. In order to ensure that children are not 'used' by one party or the other, clients should be informed that children will not normally be seen as part of the services provided by the FRC, although some mediation services will engage in child-inclusive practice. Where clients bring children with them they will have to be appropriately looked after.

Recommendation 7

That Family Relationships Services Program procedures include appropriate protocols to deal with the needs of children and in particular to ensure, so far as is appropriate in a particular case, the voice of the child is heard.

Needs of a culturally and linguistically diverse community

29 Given the linguistic diversity of clients, linkages with the Department of Immigration and Multicultural and Indigenous Affairs should be developed. It will be desirable for local FRCs to employ culturally and linguistically diverse staff as appropriate to their catchment areas. Indigenous staff, with appropriate skill sets, will

⁵ Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, (ALRC 84, 1997)

also be needed. The capacity of the FRC to employ an appropriately diverse range of staff will of course depend on the availability of people who are suitably qualified and experienced.

Recommendation 8

That culturally and linguistically appropriate service delivery be included in FRC service provision through:

- a all staff in FRCs and FRSP services involved in parenting issues receiving ongoing cultural education
- b development of an employment strategy that includes criteria promoting cultural and linguistic diversity; and
- c provision of interpreters.

Minimising client loss at point of transfer

30 Council recommends that the FRCs procedures take account of the high risk of 'losing' clients at the time of transfer if there are delays or other impediments to clients taking up the referral.

Recommendation 9

That FRC procedures include appropriate safeguards to maximise the proportion of clients transferring to referred services.

Mediation in joint sessions

FRCs capacity to broker out mediation services

31 Council suggests that the FRC model should encompass the capacity to broker out mediation services rather than necessarily providing in-house services. The key role which must be provided at the Centre is that of the Parenting Adviser. Once the parents are engaged to try to resolve a parenting plan by negotiation, it is less critical whether the venue for that is the FRC or that it be conducted by a person directly employed by the FRC management. Mediators from different organisations could be rostered to conduct mediations at the FRC or some mediations could take place at other premises. The best mix of services could be a matter for each FRC to determine,

dependent upon local conditions, such as geographic location, other local service providers and the like.

Recommendation 10

That the FRCs should be permitted to broker out mediation services.

Accreditation

32 Council concluded that the timely implementation of the new Accreditation system being managed by the Attorney-General's Department will be a critical contributor to the success of the FRCs. Given the magnitude of the expansion of services that will be necessary it will be important that accreditation is managed so as to not dilute the quality of services currently offered.

Role of lawyers at Family Relationship Centres

33 Council agrees that normally lawyers should not be involved in mediation conducted under the auspices of an FRC. However there may be some mediation services that allow lawyers to attend their sessions. There will be occasions when a mediator decides that a lawyer's involvement would be beneficial in the mediation process. This should remain at the discretion of the mediator and the parties concerned. Council notes that the Legal Aid Conferencing model includes lawyers.

Recommendation 11

That while legal representatives should not normally be involved in a mediation conducted under the auspices of the FRC:

- (a) FRC procedures should canvass the benefits of referring appropriate cases to a mediation model that does include lawyers where for example it is considered that the involvement of lawyers may assist in addressing power imbalance issues, and
- (b) the involvement of lawyers should remain at the discretion of the mediator in consultation with the parties concerned.

Screening

34 Council posits two propositions about screening for violence procedures:

- i. Nothing should prevent or impede the grant of urgent Court based orders relating to the safety of the client/family. The existence of a *present fear* for one's personal safety or the safety of a child should be sufficient to get into Court without having first attempted to resolve the parenting issues through conciliation, and an applicant would not require a certificate from an FRC or other approved organisation to file an application in the Court.
- ii. When a determination has been made that the mediation service may not be suitable because of violence issues the FRC should still have a role to play in referring clients to appropriate services.

35 Elaborating upon the second point, the menu of FRC services should include a pathway for clients 'screened out' for violence which includes the provision of, or referral to other services by the FRC. However, the *kind* of service provided will be different from the more straightforward mediation referral. For example this might include a referral to a Domestic Violence Service, or a lawyer. In short, in terms of service delivery there should not be two distinct client categories – those with violence issues and those not presenting with violence issues. All clients will receive appropriately tailored, and in the case of violence, appropriately prioritised services.

36 The FRCs should also take account of the needs of clients who have gone down the court pathway. While this may involve a period between resolution and determination phase of up to a year, these clients may nevertheless still require advice and assistance from the FRC in the interim. At the other end of the spectrum there are also cases which require urgent court intervention, for example recovery orders or PACE alerts, but once the immediate problem is addressed and the position secured, may be amenable to mediation.

37 In mapping out their service delivery options in the context of an integrated family law system the FRCs will therefore need to ensure that the role of lawyers and the courts are taken account of. In particular, there will often be a direct FRC interface

with both lawyers and courts. In the case of courts this suggests the desirability of having clear protocols dealing with clients who may be going to court for interim residence applications, or its equivalent under the amended legislation, or injunctions and returning to the FRC for appropriate advice and assistance in dealing with other aspects of the separation.

Recommendation 12

That the FRCs should provide an advice and support role to parents where face to face mediation is not appropriate because of a history of violence, abuse or any other such reason.

When agreements break down

38 Council supports the role of FRCs in relation to situations where an arrangement under an order (or other informal agreement) has broken down. However, it should not be necessary for someone to obtain a certificate from an FRC or other approved organisation before an application can be filed in court where he or she contends that there has been a flagrant breach of a recently made court order.

39 Council supports the new approach of using the FRCs to deal with other 'low-level' breaches. It agrees that the sanctions set out in s 70NJ(3) are not appropriate to deal with breaches of that nature.⁶

40 In the event that an FRC or other approved counselling or mediation organisation concludes that there is a serious disregard for one party's obligations

⁶ At the current time the Family Law Act Division 13A – consequences for failure to comply with orders and other obligations that affect children have what are known as “stage 2” and “stage 3” contraventions of orders. Put simply stage 2 is the first breach of an order. The intent of the legislation (s 70NG) is to direct people who have breached orders for a first time to an appropriate parenting program. The court at its discretion can also ask the “non offender” to go. The court also has the option of granting compensatory contact or otherwise varying the original order. A second breach of an order (unless the court deems the breach trivial) has to be dealt with under stage 3. The penalties through a stage 3 breach are quite serious and are set out in s 70NJ(3). A court does have the power to deal with a first time breach under stage 3 if it is satisfied that a person has behaved in a way that showed a serious disregard for his or her obligations under the order (s 70NJ(1A)(b)).

under a current order (even though that order is not recent) then a certificate to go to court should be provided to allow an aggrieved party to access that remedy quickly.

41 Council supports the proposition in the Discussion Paper that making the Contact Orders Program more accessible will be crucial. It can be expected that the Contact Orders Program will play a very useful role in assisting high conflict families and will be a valuable option available to the courts.

Recommendation 13

That a parent should be able to bring an application to the Court without preconditions if it is alleged that there has been a flagrant breach of a recently made court order.

National advice line and website

42 Council considers that the service provided by the national advice line should, as far as practicable, be the same as that provided 'over the counter'. It follows that the expertise of the staff providing the service will need to be at the same high standard as that of other Parenting Advisers.

43 Consideration could be given to including the provision of telephone advice as part of the FRC tender specification, with calls being directed to the caller's nearest FRC, rather than setting up a Call Centre independent of the FRC network.

44 Council notes two broad resource issues that will need to be considered:

- i. After hours service: this would be for advice on how to deal with an emergency only, and it is expected that staff answering an out of hours call would deal with the issues mainly by providing information on emergency response options such as calling the State child protection authorities or the police.
- ii. In-hours service: if FRC staff are providing this service their staff should have a mix of telephone and face-to-face duties. This will contribute to maintaining similar standards of service between the two client groups, by offering a mix of tasks, and also aid in staff retention.

Recommendation 14

That the Parenting Advisers providing telephone advice through the national advice line should also be engaged in face to face work with clients.

Implementing the new system*Pathways Network*

45 During its consultations around Australia Council has been impressed by the dynamism of Pathways Networks in some areas, while in other areas an effective network has yet to develop. Council concluded that the Pathways Networks offer one means of promoting the reforms set out in the Discussion Paper, but cannot be relied on as the only means of achieving interagency co-operation without additional targeted support and direction.

Recommendation 15

That the potential of the Pathways Networks be assessed in terms of their capacity to assist in implementing the new family law system in their local area, and that viable Networks should be given additional support.

Rural and remote services

46 Council is of the view that the national advice line and website on their own will provide an insufficient service to meet the needs of people in rural and regional areas, as they will only be able to offer initial information and support.

47 A primary means of offering some services to regional areas where there is no standing FRC would be for appropriately located FRCs to be funded for outreach to smaller towns and communities in their region. In this way, they could at least provide some face to face services in these places at reasonable intervals.

Recommendation 16

That appropriately located FRCs be funded for outreach to smaller communities in their region in order to provide some face to face services in those communities at reasonable intervals.

48 In addition to this, Council suggests that a number of other rural and regional service delivery models could be considered to extend the reach of FRCs from their immediate locations.

49 One option is the provision of similar material in correspondence and online formats to that which will be provided to people in person through information sessions at the FRCs. In the United States, mandatory post-separation parenting programs are sometimes delivered in correspondence mode to people who cannot attend programs in person. Such resources may provide a model for how to deliver a comparable service to people in rural and remote locations. It needs to be backed up with telephone calls to people after they have had time to study the package in order to provide an opportunity to ask questions and to clarify issues.

50 In terms of the distribution of other information one model that was drawn to Council's attention was the Legal Information Access Centre (LIAC) model in New South Wales. Another is the system of Community Access Points used by Legal Aid in Queensland.

(i) NSW LIAC model

51 The Legal Information Access Centre (LIAC) of New South Wales provides a model of a network that makes information accessible through an existing network in order to reach a broader cross section of the community.

52 The primary LIAC centre operates from the State Library of New South Wales in Sydney, providing an in-depth research service and specialist expertise to assist the community to locate and understand relevant legal information. There are 76 LIAC regional service points that operate in public libraries around New South Wales. The regional service points have a small library of selected legal information and staff trained in assisting community members to access the complex legal information. LIAC distributes key legal information tools to all 382 local public libraries around New South Wales, thereby enabling communities in all corners of the State to have

initial access to legal resources, and a referral to the larger regional service points if required.

53 LIAC has arrangements in place to distribute brochures and information sheets of state and federal government agencies, thereby ensuring that these reach all 382 public libraries and the communities using those libraries.

(ii) Community Access Points: Legal Aid Queensland

54 In communities that do not have a regional office, Legal Aid Queensland maintains collaborative working relationships with specific local community organisations. In rural communities there are often one or two organisations people identify as the place they turn to for support. The support needed may include legal services. Examples of these organisations include neighbourhood centres, Queensland Government Agents, hospitals and courthouses. Staff of these organisations are often called upon to provide a wide range of services and to be up to date on every new government development. Often this is required in an environment with limited professional support. Legal Aid Queensland acknowledges the valuable role these organisations play and tries to effectively support these organisations in their work.

55 A Community Access Point is an organisation in a community which provides a range of support services and:

- i. has current information about the services Legal Aid Queensland provides
- ii. is in regular contact with Legal Aid Queensland and
- iii. will assist people to access legal advice.

56 Community Access Points have a folder of Legal Aid Queensland fact sheets; some have Internet access, others videoconferencing. In some cases Legal Aid Queensland has accessed funding to resource organisations with videoconferencing units. The two videoconferencing networks are called Women's Justice Network (in southwest Queensland) and Western Queensland Justice Network (in western Queensland).

- 57 Community Access Points provide
- i. information about services provided by Legal Aid Queensland including fact sheets and kits
 - ii. links to free telephone legal advice, and
 - iii. feedback to Legal Aid Queensland about local needs and opportunities to provide community legal education.

Need for client choice

58 Council also notes that there is an important issue of choice in offering services in rural and regional locations. Service delivery will need to recognise that there may be personal reasons for not accessing a particular service if it is associated with a particular denomination, organisation, or personality. While FRCs may enter into various partnerships with other services this should not be at the cost of depriving clients of choice. It follows that how physical outreach programs are implemented is important.

59 The need for adequate infrastructure to support the FRC referral activities will be crucial to their success in rural and regional areas. If there are no back up services the FRC will be compromised.

60 Council also notes the development of teleconference technologies may be able to be integrated into the FRC service delivery model in appropriate circumstances.

The needs of the Defence forces

61 Council recently had discussions with representatives from the Defence Community Organisation.⁷ There are some 53,000 serving members in the Australian Defence Forces, 50% of whom are married or in de facto relationships. Hence, Council decided to examine how family relationships are dealt with, and in particular

⁷ Family Law Council Canberra meeting: 18-19 November 2004.

what post-separation support services are provided to these personnel and how the family law system can be responsive to their needs.

62 On the basis of these discussions Council concluded that there is a need to specifically consider the unique circumstances of defence force staff when planning the provision of family law information and advice services, in particular through the FRCs. An allied point is that there is a need to expand the coverage of existing family law services to take account of large military bases, for example by arranging more formal liaison with Courts and integration in Pathways Networks.

Recommendation 17

That when planning the outreach of FRCs to regional areas, the location of defence force communities be taken into account.

Help for grandparents

63 Council supports the more explicit recognition of the role of grandparents in providing support in the parenting of children after separation. However, it is concerned that a practice will develop of dividing a child's time into ever more regimented schedules, with grandparents' contact being formalised in a similar way to that of the non-resident parent. A balance needs to be found to ensure that the law remains child-focussed and not driven by the demands of competing adults.

64 Council considers that the best way of assisting grandparents to maintain a relationship with their grandchildren is through the services of the FRCs and other counselling and mediation organisations, rather than through litigation.

65 If the Government wishes to reinforce the importance of grandparents' roles through further amendment to the Family Law Act, it is suggested that this can be done by amendment to s 60B, making what is implicit in the section explicit.

Recommendation 18

That s 60B(2)(b) is amended as follows (in bold):

(b) 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; **such as grandparents.**

Functional recognition of grandparents as primary caregivers

66 Council also notes that there needs to be a whole of government approach to the functional recognition of grandparents when they take on the role of being primary caregivers, without the necessity of seeking a formal recognition of their parental responsibility through the courts. Functional recognition would involve different government agencies, Commonwealth, State and Territory arms of government, adapting legislation and policy so that grandparents are able to qualify for relevant benefits, concessions and entitlements, and to be recognised as exercising de facto parental responsibility for specific purposes, such as consents required by schools. In the Commonwealth sphere, there is already functional recognition under the Child Support scheme of a grandparent who is a principle provider of ongoing daily care for his or her grandchild. This type of functional recognition should also encompass Family Tax Benefits and Centrelink payments.

67 Council notes that the issues concerning functional recognition of primary caregivers are not confined to grandparents. In its Letter of Advice to the Attorney-General concerning recognition of ATSI parenting practices, Council draws attention to the need for functional recognition of kinship caring practices in the Aboriginal and Torres Strait Islander communities.

Recommendation 19

That the issue of functional recognition of grandparents' role as primary caregivers be referred to the Community Services Ministers Council.

CHANGES TO THE LAW TO SUPPORT SHARED PARENTING

Equal shared parental responsibility

68 Council supports the intention to amend the Act as outlined in the Discussion Paper under this heading, and notes that this reflects proposals concerning shared parental responsibility contained in its submission to the House of Representatives Standing Committee on Family and Community Affairs Inquiry into child custody arrangements in the event of family separation.

69 Council notes that the concept of equal parental responsibility is already enshrined in s 61C of the Family Law Act, and that consequently the primary goal of legislative amendment should be to spell out the meaning and effect of this to parents. It also notes that the Parliamentary Committee recommended that while the concept of equal parental responsibility should be given much more substance in the legislation by spelling out what it means, it is not always appropriate that parental responsibility be shared and that there are circumstances where it is in the best interests of the child that decision-making authority on some or all matters be vested only in the primary caregiver.

Entrenched conflict

70 Council agrees that entrenched conflict should be a basis upon which the court can make an order for sole parental responsibility in relation to long term decisions about the care, welfare and development of a child.

71 The council suggests two options in relation to the definition of entrenched conflict.

Option A: To provide no definition at all.

Option B: To define entrenched conflict to mean 'a history of conflict between the parents which leads a court to find that it cannot reasonably be anticipated

that the parents can jointly reach a decision relating to a child's long term care, welfare and development.'

72 In defining entrenched conflict in terms of option B the words "a child's long term care, welfare and development" should be defined as set out in the second dot point in recommendation 3 in the House of Representatives HR Family and Community Affairs Committee's report *Every Picture tells a Story*.⁸ The sorts of matters that constitute 'long term decisions relating to the welfare of the child(ren)' are noted in the Discussion Paper at p 10.⁹ The fact that parties are litigating should not be determinative of the question as to whether entrenched conflict exists or not.

73 Council agrees that while a finding of entrenched conflict could rebut the presumption of equal shared parental responsibility, the Court should be encouraged to consider a range of options in dealing with high conflict families. Entrenched conflict in and of itself should not mean equal shared parenting arrangements are deemed automatically unsuitable, or that appropriate therapeutic services should not be provided. The rationale of the Contact Orders Program is that couples with entrenched conflict can, over time, and with appropriate interventions be helped to avoid the behaviours characterised as entrenched conflict.

74 It is suggested that to have couples divided into one category – entrenched conflict or the other – no entrenched conflict – may encourage binary thinking in terms of accessing services and service delivery. If there is entrenched conflict then there may be no appropriate services provided.

75 Three options that Council would see as being most appropriate for families with very high conflict would be to either adjourn and direct a parent or both parents to attend a service dealing with high conflict families prior to making final orders, to order attendance at a Contact Orders Program after making final orders, or to make an order vesting some or all decision-making authority solely in one parent.

⁸ House of Representatives Family and Community Affairs Committee, *Every Picture Tells a Story*, Parliament of Australia, December 2003, 42

⁹ This reflects the recommendation in Council's submission to the House Inquiry.

76 Council recommends clearly setting out these three options in legislation. This would provide signals to the judiciary, assist self-represented litigants better understand possible outcomes, and shape the community's expectations about the nature of the proceedings.

77 While the power to adjourn is an inherent power of a court, Council suggests there are benefits in setting this out as part of a step-by-step procedure for dealing with entrenched conflict.

Recommendation 20

That the Act is amended to expressly provide for three options which a Court must consider in cases where there is high conflict. The three options are to:

- adjourn and direct a parent or both parents to attend a service dealing with entrenched conflict families
- make a final order, and direct a parent or both parents to attend an appropriate service, or
- make an order vesting some or all decision-making authority in one parent.

Enhanced protection against abuses of court processes

78 While the Council strongly supports the intention that the idea of joint parental responsibility should be spelled out in the legislation (indeed it proposed this to the Parliamentary Committee), it is concerned about a small but nonetheless significant minority of parents who drag the other parent through dispute resolution processes and court applications over relatively minor matters concerning the exercise of parental responsibility.

79 The power to dismiss frivolous and vexatious proceedings is contained in s 118:

- (1) The court may, at any stage of proceedings under this Act, if it is satisfied that the proceedings are frivolous or vexatious:
 - (a) dismiss the proceedings;
 - (b) make such order as to costs as the court considers just; and

(c) if the court considers appropriate, on the application of a party to the proceedings—order that the person who instituted the proceedings shall not, without leave of a court having jurisdiction under this Act, institute proceedings under this Act of the kind or kinds specified in the order.

And Rule 11.04 of the Family Law Rules is directed to frequent applications and provides:

RULE 11.04 Frivolous or vexatious case

(1) If the court is satisfied that an applicant has frequently started a case or appeal that is frivolous, vexatious or an abuse of process, it may:

(a) dismiss the applicant's application; and

(b) order that the applicant may not, without the court's permission, file or continue an application.

(2) The court may make an order under subrule (1):

(a) on its own initiative; or

(b) on the application of:

(i) a party;

(ii) for the Family Court of Australia — a Registry Manager; or

(iii) for the Family Court of a State — the Executive Officer.

(3) The court must not make an order under subrule (1) unless it has given the applicant a reasonable opportunity to be heard.

Note Under section 118 of the Act, the court may dismiss a case that is frivolous or vexatious and, on application, may prevent the person who started the case from starting a further case. Chapter 5 sets out the procedure for making an application under this rule.

80 The option that a parent will be declared a vexatious litigant is rarely exercised. If the power under s 118 is limited in practice to situations where an applicant has “frequently started a case” it may not be broad enough in practice to deal with the situations where matters should be dismissed at an early stage.

81 In order to ensure that the time of the Court is not wasted over minor issues, and that one parent is not harassed by threats of litigation without any reasonable prospect of success, it is recommended that the Court be given stronger powers under s 118 to deal with applications early on in the process of case management which are not only frivolous or vexatious, but which have no reasonable prospect of success. Such a power could of course only be exercised by a judge, magistrate or officer of the Court carrying delegated authority, and only after giving the applicant a chance to be heard. An application may have no reasonable prospect of success and yet not be regarded as 'frivolous' or 'vexatious', since these terms imply something about motive.

Recommendation 21

That s 118 be amended to allow the Court to dismiss proceedings at any stage if it considers that they have no reasonable prospect of success.

Equal shared parenting time

82 Council supports the proposal that courts be required to consider substantially shared parenting time in appropriate cases, but it considers that the Court should not be required to consider this possibility unless the parents themselves put it in issue as an option that one or both would like to be considered. If a matter goes to trial, the Court needs to respond to the case as presented by the parties, although it is not bound by the options proposed by the parties (*U v U*).¹⁰ If both parties are seeking a residence order or its equivalent under the amended legislation and neither believes that substantially equal parenting time is appropriate in their circumstances, they should not have to lead evidence to demonstrate to the Court why an equal time arrangement would be inappropriate. This can only add to the cost and length of trials without appreciable gain, since the parties would feel the need to lead evidence in relation to a matter on which they do not disagree.

¹⁰ (2002) 209 Fam LR 74

83 Nonetheless, there may be value in making it clear that one option available to the Court in determining a residential schedule is for substantially shared parenting time. A change of this kind may be helpful in terms of making the law better understood by, and more easily explained to self-represented litigants.

Recommendation 22

That the Act should not require the Court to consider the option of substantially equal parenting time if this is not a proposal advanced by any of the parties, but the Act should make clear that an order for substantially shared parenting time is an option available to the Court in determining a residential schedule for the child.

84 Partly for the same reason, Council recommends that to remove all doubt the legislation should clearly define shared parental responsibility as *not* involving any fixed percentage of parenting time. This would ensure there is no possible confusion about the connotations of the term.

Recommendation 23

That the Act is amended to expressly define shared parental responsibility as *not* involving any fixed percentage of parenting time.

85 Council suggests that the key outcome to be achieved is that parents, and the broader community, are brought to an appreciation that the critical point in post separation parenting is not the *number* of hours set out in a particular parenting plan, but the *quality* of the relationship that ensues.

Compulsory dispute resolution

86 As noted in the Discussion Paper, the requirement for compulsory dispute resolution before filing will not apply in two situations, namely where there is family violence or child abuse. Council would add two further categories. The third category is applications relating to the flagrant breach of recently made orders (see recommendation 13). The fourth category would be to allow an urgent application where delay in the filing of the application would render the application nugatory.

87 With respect to applications where delay in filing the application would render the application nugatory, the court system currently has a well tried and effectively operating procedure where urgent applications can be listed on “short notice”. Leave to file on “short notice” has to be granted by a Deputy Registrar of the Family Court, or a Federal Magistrate in the Federal Magistrates Court. Deputy Registrars carefully consider the evidence supporting the claim for urgency before granting leave. Lawyers understand these cases have to be exceptional and do not lightly bring an application for listing on short notice. Only applications which have an appropriate level of urgency are let through.

88 The following examples are situations where a party should have access to the court without a certificate from an FRC or other approved organisation.

Example 1

A parent has applied for a recovery order under s 67V following the abduction of their child within Australia. This parent wishes to have the order so that police are authorised to search for and apprehend an abducted child.

Example 2

A parent seeking to have a passport issued for a child cannot locate the other parent to obtain their consent, and so applies to the Court seeking to dispense with the need for consent of the other parent.

Example 3

A parent has reasonable grounds to believe a child is about to be removed from the jurisdiction. This parent wishes to seek an urgent parenting order.

Example 4

A parent had agreed in a parenting plan that a child could go with the other parent on a 10 day trip to Disney World in Florida. The costs of the trip are paid. The parent with whom the child ordinarily lives, at the last moment, indicates that they do not intend to make the child available.

Recommendation 24

An applicant should not need to demonstrate that he or she has engaged in a process of conciliation prior to filing where delay in filing would render the application nugatory.

89 This 'fast-track' access to court should be 'policed' by way of providing the court with a power in s 117 to make a costs order where an application has been made without having reasonable grounds to do so.

90 At the same time provision should be made to ensure that high conflict parents that may seek to abuse the court process by serial applications are deterred not only by having such cases dismissed under s 118 – frivolous or vexatious proceedings - but also by the prospect of costs being awarded against them.

Recommendation 25

That s 117 is amended along the following lines so that a court has the power to make a costs order either:

(a) where an application is filed on one of the grounds that renders it unnecessary to attempt to resolve the dispute before filing, and the court is satisfied that the application has been made without the applicant having a reasonable belief that one or more of those grounds could be established, or

(b) the court is satisfied that the application is frivolous, vexatious, or had no reasonable prospect of success.

Compulsory dispute resolution during the phased implementation

91 Council notes that a critical issue, in terms of making allowances for transition issues, will be when the compulsory element of the reform is to commence. As a transitional issue the legislation will need to recognise that as a result of the FRCs' phased roll-out there will be many clients who are not able to access a FRC. However, this is not a complete bar to the roll-out of compulsory dispute resolution before filing if mediation can be provided by other approved counselling and mediation organisations on the basis that the first three hours are free, or funded pursuant to other arrangements.

Recommendation 26

In the implementation phase of rolling out the FRCs, the Government should make arrangements with suitable approved counselling and mediation organisations to provide some free mediation services in areas where the FRCs have yet to be established.

92 The Regulations could prescribe the Court registries where a Certificate is needed to file an application.

Recommendation 27

That the Act is amended so that applications can be filed without certificates by people who do not have Family Relationship Centres or another approved counselling or mediation organisation easily available to them. Legislation along the following lines is suggested:

A person shall be required to file a certificate from a Family Relationships Centre or other approved counselling or mediation organisation if subsection 2 applies.

Subsection 2:

a person shall file a certificate from a Family Relationships Centre or other approved counselling or mediation organisation:

- (iii) if the application is to be filed in a registry of a court which is prescribed by the regulations; or
- (iv) if the services of a Family Relationships Centre or other approved counselling or mediation organisation are not available within a distance prescribed from time to time by the regulations from the person's place of residence or employment.

Changes to enforcement provisions in the Family Law Act

93 Council has four major concerns about the proposal to amend the Act so that 'where there has been more than one deliberate and intentional breach of orders, the court must consider changing the parenting order in relation to which parent the child lives with and with whom the child spends time.'

94 First, while the Discussion Paper notes that the best interests of the child would still be the most important factor in making decisions, it is difficult to reconcile what appears to be an adult focus on punishment with the application of the best

interests of the child principle.¹¹ Moreover, the proposal may be seen by some as using the child as a pawn or a weapon in the parental dispute.

95 The second ground for concern is that this may create an expectation in some quarters that even if a parent has been rejected by the court with respect to the child's residence there would be an opportunity to achieve this if two breaches can be established.

96 The third concern is a corollary of the increased expectations that may arise in the community. By appearing to offer the prospect of changing a court order in a sense 'by the backdoor', this will increase the focus on litigation as an avenue for dispute resolution, and hence the prospect of increased litigation costs.

97 Finally, taking action now would seem to be premature as a number of other initiatives have been taken, or are planned, in this area. In particular the Contact Orders Program is undergoing significant expansion, and the Attorney-General has recently asked Council to develop better models in the family law system for dealing with contravention or variation issues involving children's cases.¹² It would seem prudent to give time to the initiatives already underway and which are already delivering promising preliminary results.¹³ Council draws attention in this context to its recommendation 13 (above) concerning prioritisation of flagrant breaches of recent orders.

Recommendation 28

That the Government defer decision about amending the Act to require the court to consider changing the parenting order in cases of multiple deliberate and intentional breaches of orders, until the results of other initiatives are assessed.

¹¹ Council is about to distribute a Discussion Paper: *The 'Child Paramountcy Principle' in the Family Law Act*. The Discussion Paper invites comment on specific questions, such as whether the present approach of the Act should be retained, or whether it should be modified.

¹² Letter to Council, 16 November 2004. The reference is titled *Improving family processes for dealing with post-parenting order conflict*.

¹³ Council understands that the Evaluation of the Contact Order Program shows a high level of success.

98 However, if despite these concerns Government decides to proceed, it may be possible to mitigate adverse impacts by either specifying that the breaches must be of a serious nature (which raises definitional issues of its own), or by having the court look behind the actual breaches and determine whether the nature of the breach(es) can be characterised as flagrant or continuing, and if so, whether this indicates a failure of parental concern for the child, or disregard for the other parent's relationship with the child.

99 In practical terms, the main significance of flagrant breaches of Court orders is likely to be that it will constitute a change of circumstances within the *Rice and Asplund*¹⁴ test that justifies the Court reopening the issue of residence on the application of a parent. It should not be given any stronger legislative significance than that. The residence issue needs to be determined on all the evidence available and in accordance with the principle that the child's best interests are paramount. Evidence of unwillingness to comply with court orders may well reflect on the parent's claim to be the preferred primary caregiver, but it is only one of the aspects a court would need to consider.

Provisions from overseas models

100 With respect to the two proposals based on Florida legislation, Council has concerns that the first element - the introduction of a requirement that courts have regard to circumstances where the residence parent is more likely to provide the other parent with frequent contact with the child - may give rise to adverse unintended consequences. In particular it was critiqued on the basis that:

- it focuses on the quantum of time rather than the quality of the relationship
- it may suggest that there is an element of voluntariness about complying with a court order
- it detracts from the central tenet that the child's best interests determine parenting arrangements rather than a parent's presumed intention to comply with a court order

¹⁴ (1978) 6 Fam LR 570.

- arrangements based on an assessment of a parent's state of mind at a particular point in time are not necessarily going to be durable. Parents may change their minds and new family circumstances may impede the anticipated frequency of contact
- problems of definition arise relating to 'frequency'.

101 On the other hand Council notes that the second point - the introduction of a requirement that courts have regard to the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the child and the other parent - places the proper emphasis on the quality of the emotional relationship rather than a narrow time-based view of parenting arrangements. While courts already consider the willingness and ability of parents to facilitate and encourage the relationship with the other parent under s 68 F(2)(h) with respect to attitudes to the child and to the responsibilities of parenthood, more explicit guidance may be beneficial.

COMMUNITY EDUCATION

102 What communication or education programs need to be put in place to make the FRCs a 'first stop shop' in terms of the general community's awareness?

103 Council agrees that a broad-based community education campaign is a critical component of the reforms. Any such campaign needs to be ongoing and have a high-profile if it is to have any reasonable prospect of contributing to the long term goal of bringing about cultural change concerning the way the community thinks about parenting after separation. A realistic time frame for bringing about such a cultural change may be 5-10 years.

104 In the initial phases of the development of the FRCs, the target groups for the community education campaign need to be carefully chosen so that expectation and demand can be met by the supply of available services. These education and awareness programs should target the same groups that were in mind when the costings for the Centres and the expansion of FRSP services were done.

Recommendation 29

That a broad-based community education campaign be developed on the basis of a 5-10 year plan with the long term goal of bringing about cultural change concerning the way the community thinks about where to get help in organising parenting arrangements after separation.

105 Local FRCs need to support a national campaign with regular contributions to local press and radio. These contributions should not only be about explaining the services of FRCs but also publicising other services and programs which are available in the community to help families. Such local advertising will supplement the referral role of the FRCs for people who drop in seeking assistance. To achieve this, each FRC needs a modest advertising budget.

Recommendation 30

That each FRC be given a budget for local advertising and be encouraged to make regular contributions to local press and radio in order to make known the services and resources that can assist families in each locality.

106 Council also recommends that school curricula, especially legal studies, civics and relationship type courses, should reflect the key structures of the new family law system. This will assist in 'embedding' the new approach in the minds of the next generation who will be prime users of the new family law system in terms of parenting after separation.

Recommendation 31

That State and Territory governments be requested to examine their school curricula, especially legal studies, as well civics/citizenship/society/relationship type courses, with a view to ensuring that they reflect the key structures of the new family law system.

Family Law Council

December 2004

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Family Law Council

The Family Law Council (the Council) is a statutory body whose function is to advise and make recommendations to the Attorney-General on the working of the *Family Law Act 1975* and other legislation relating to family law. The Attorney-General appoints members to the Council and provides references to the Council.¹⁵ The Attorney-General has given his permission for this submission to be lodged with the Inquiry. The content of the submission is, however, the independent view of the Council.

Members of Council are:

Professor Patrick Parkinson, University of Sydney, New South Wales

(*Chairperson*)

Ms Josephine Akee, Indigenous Consultant, Family Court of Australia, Cairns, Queensland

Mr Kym Duggan, Assistant Secretary of the Family Law Branch, Attorney General's Department, Australian Capital Territory

Ms Nicola Davies, Senior Legal Consultant (Family Law), Legal Aid Queensland

Ms Christine Mead, Federal Magistrate, Federal Magistrates Court, Adelaide, SA

Justice Susan Morgan, Judge, Family Court of Australia, Melbourne, VIC

Mr Clive Price, Executive Director, Uniting Care Unifam Counselling and Mediation, NSW

Ms Susan Purdon, practising family law lawyer, Hopgood Ganim Lawyers, Brisbane, Qld

Mr Garry Watts, practising family law lawyer, Watts McCray, Sydney, NSW.

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

¹⁵ Section 115 *Family Law Act 1975*. For further information see <www.law.gov.au/flc>

Australian Institute of Family Studies – Mr Bruce Smyth

Australian Law Reform Commission – Ms Lani Blackman

Child Support Agency - Ms Yvonne Marsh

Family Court of Australia - Ms Jennifer Cooke, and Ms Di Gibson

Family Law Section, Law Council of Australia –Ms Maurine Pyke

Family Court of Western Australia –Judge Stephen Thackray

Federal Magistrates Court – Mr Peter May (note that Mr May did not attend the Canberra Council meeting which formulated this submission)

**EXCERPTS FROM LETTER OF ADVICE TO THE
ATTORNEY-GENERAL
ON PARENTING PLANS**

16 MARCH 2000

RECOMMENDATIONS

Recommendation 1 Amendment of the Family Law Act 1975

Division 4 of Part VII of the Act be amended to:

- encourage the use of parenting plans, and the use of consent orders where a party requires an element or elements of the plan to be enforceable; and
- repeal the registration provisions.

Recommendation 2 Encouragement of an integrated package

The use of an integrated parenting plans/consent orders package be encouraged through information and education through existing funded services, such as counselling and mediation services, legal aid bodies and community legal services and through other appropriate means, for example, clinical legal education.

Recommendation 3 Review of existing kits

To assist parties to develop parenting plans (and obtain consent orders, if required), the existing kits and information be reviewed and modified to reflect the above recommended approach.

Excerpt from Letter of Advice:

The intention of parenting plans

4.2 Parenting plans in Australia were first suggested by Council in the POPAS Report, in which Council said:

Parenting plans form an ideal basis for discussion in a mediation or conciliation setting by focussing on the details of parenting rather than on legal concepts such as custody and access.[22]

4.3 Dispute prevention and early resolution. Arguments for promotion of the use of parenting plans are based on the assumption that the process of developing a parenting plan, preferably in a structured way assisted by a kit, will encourage joint parental responsibility and prevent future disputes arising by ensuring that all potentially contentious issues have been identified and dealt with in as positive a way as possible.

4.4 Where conflict over some issues is anticipated, the assistance of a skilled neutral third person/mediator to facilitate the development of the parenting plan may ensure that such issues are identified and dealt with before there is opportunity for them to escalate into a legal dispute. The aim is to prevent unnecessary involvement in the Court system and its adversarial process. The mediator can: assist the parties to decide which key elements may need to be legally enforceable; focus the parents on the best interests of the children; and, ensure that the parenting plan incorporates a dispute resolution process, such as mediation, for any future problems.

4.5 Cooperation between parents. Parenting plans were intended to "give each parent the opportunity to consider the nature of their parenting responsibilities"[23] and to "increase the likelihood of shared parenting".[24] They were intended to be "flexible and capable of easy alteration to meet the changing needs of the child".[25] The proposal for parenting plans was consistent with the overall aim of the POPAS Report to maximise the opportunity for both parents to take full responsibility for decision making about the ongoing care of their children after separation.

4.6 The capacity of the separating parents to cooperate in relation to their ongoing parenting responsibilities was seen by Council as having pivotal significance. This matter is further discussed below.[26]

4.7 Flexibility. Parenting plans were an important aspect of Council's proposals. Council's original intention, as set out in the POPAS Report,[27] was that parenting plans would be flexible arrangements which would vary widely in scope, detail and content. Such plans were considered to be workable where there was an appropriate degree of cooperation between the parents involved.

4.8 It was Council's intent that parenting plans would enable the parties, if they wished, to commit their arrangements to writing so that both would understand their responsibilities and the children could have a reasonable degree of certainty about arrangements affecting them. However, the aim was not inflexibility or finality. Parenting plans would acknowledge the realities of changing needs over time: changes which occur in education, personal needs, health needs, living arrangements and financial support between birth and 18 years of age.

4.9 Alternative to court action. Parenting plans were seen as offering an alternative to the processes of the Family Court. It was not Council's intention that parenting plans would become formal agreements, capable of registration in a court. In fact, parenting plans contrasted with court orders and agreements in several respects, especially in relation to:

(i) the process by which the plans were to be drawn up;

(ii) flexibility of arrangements;

(iii) the costs to the parties; and,

(iv) the resolution of disputes about what had been agreed to between the parties.

4.10 The costs to the parties of taking a matter to a fully defended court hearing were considered to be high, from both financial and emotional viewpoints,

whereas parenting plans would involve minimal financial and emotional costs to the parties.

4.11 Dispute resolution. One of the major advantages which Council envisaged was that parenting plans would allow the parties to decide how they would resolve disputes over the detail of arrangements. They could thus avoid the winner/loser or loser/loser results of other options. Arrangements would be capable of meaning different things to different people or be capable of requiring elaboration as specific situations arose. Disputes about such matters, particularly those relating to children, were seen as an ongoing feature of the family law system. When such disagreements arose, a dispute resolution mechanism in a parenting plan would enable the parties to get together and try to find a solution which would be acceptable to them both.

4.12 This contrasted with the dispute resolution options of a court order or agreement under which either the problem remained unresolved and added to the gathering list of grievances between the parties, or an externally determined and enforceable solution was imposed on the couple. That solution may not have been acceptable to either party or may have been acceptable to one of them only.¹⁶

¹⁶http://agnet.ag.gov.au/agd/WWW/flcHome.nsf/Page/Letters_of_Advice_Letters_Parenting_Plans

Footnotes omitted.

House of Representatives Standing Committee
on Family and Community Affairs

Submission No: 1400

Date Received: 24-9-03

Secretary



Chairperson: Professor John Dewar

Family Law Council

Members: Ms Josephine Akee
Mr Kym Duggan
Ms Tara Gupta
Ms Susan Holmes
Ms Kate Hughes
Professor Patrick Parkinson

24 September 2003

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



Dear Mrs Hull

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

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

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

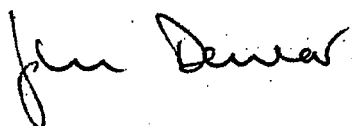
You will note that while the Council concludes that an equal time presumption has significant disadvantages there are never-the-less several initiatives that are in a similar vein which it may be worthwhile exploring further.

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

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

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

Yours sincerely

A handwritten signature in black ink, appearing to read "John Dewar". The signature is written in a cursive style with a large initial "J" and a long, sweeping underline.

John Dewar

ATTACHMENT A

FAMILY LAW COUNCIL

SUBMISSION TO

THE INQUIRY INTO CHILD CUSTODY ARRANGEMENTS

IN THE EVENT OF FAMILY SEPARATION

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Family Law Council

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

Members of Council are:

Professor John Dewar, Pro-Vice-Chancellor, Business and Law, Griffith University, Gold Coast, Queensland (*Chairperson*)

Ms Josephine Akee, Indigenous Consultant, Family Court of Australia, Cairns, Queensland

Mr Kym Duggan, Assistant Secretary of the Family Law Branch, Attorney General's Department, Australian Capital Territory

Ms Tara Gupta, Director of Legal Services, Department for Community Development, Western Australia

Ms Susan Holmes², Executive Director, Relationships Australia, Tasmania

Ms Kate Hughes, Head of Family Law, Legal Aid Office, ACT

Professor Patrick Parkinson, University of Sydney, New South Wales

¹ Section 115 *Family Law Act 1975*. For further information see <www.law.gov.au/fic>

² Ms Holmes contributed to the first draft of this submission but was unable to participate in its finalisation.

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

Australian Institute of Family Studies - Ms Ruth Weston³

Australian Law Reform Commission – Mr Jonathan Dobinson

Child Support Agency - Ms Sheila Bird⁴

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

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

Family Court of Western Australia – Acting Judge Stephen Thackray

Federal Magistrates Court – Mr Peter May

³ Mr Bruce Smyth attended the meeting which formulated this submission.

⁴ Ms Yvonne Marsh attended the meeting which formulated this submission.

Introduction

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

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

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

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

(i) what other factors should be taken into account in deciding the respective time each parent should spend with their children post separation, in particular whether there should be a presumption that children will spend equal time with each parent and, if so, in what circumstances such a presumption could be rebutted;

General Comments

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

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

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

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

The Presumption – Uncharted Territory

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2 Family Violence and Child Abuse

Council is concerned that a presumption of this kind could have the unintended adverse consequence of jeopardising the safety of a parent and children in circumstances where there has been domestic violence or child abuse.

The presumption's adverse effects may operate differently before and after separation:¹¹

(a) Pre-separation:

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

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

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

(b) Post-separation:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4 The Presumption devalues the Child's Voice

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

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

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

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

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

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

6 The presumption will increase litigation

Increased litigation will result from two sources:

- (a) litigation to rebut the presumption;
- (b) litigation to enforce the equal time arrangement.

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

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

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

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

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

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

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

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

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

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

¹⁸ See section 65C which provides that grandparents may apply for a parenting order and section 68(F) (2) which is expressed in inclusionary language allowing for grandparents and other persons having a relationship with the child to be considered.

¹⁹ Family Law Council meeting, Gold Coast, 10-11 May 2001

Council comments with respect to Terms of Reference (b)

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

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

- a) parents have the primary duty to maintain their children, and they should share in the support of their children according to their capacity; and
- b) a parent's willingness to have the children live with or have contact with them does not detract from their obligation to provide financial support for the children. Limited contact or no contact with a child should not detract from the parent's obligation to provide financial support for the child.

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

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

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

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

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

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

Council's Suggestions for Reform

General Comments

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

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

- (1) Family members should not be placed in situations where their safety may be compromised.
- (2) Currently the law provides that the best interests of the child is the paramount consideration in parenting order cases.²² Council believes it is appropriate to retain a 'child focussed' perspective when determining the issue of parenting.
- (3) The limits of the law must be acknowledged. The law can only do so much to manage the conduct of adults towards each other and to moderate the fallout where those relationships deteriorate and eventually break-down completely.

1 Enhanced Contact Enforcement Process

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

²² Section 65E *Family Law Act 1975*.

²³ *Child Contact Orders: Enforcement and Penalties*, June 1998, Family Law Council.

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

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

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

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

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

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

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

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

2. Legislating for changes

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

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

ii) The language of parenting.

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

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

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

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

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

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

- a) The *Family Law Act* could be amended to make clear that parents and children have reciprocal interests in active parenting and meaningful parenting time. A statement of principle about active parenting could say for example that the best interests of children are promoted by 'the significant involvement of both parents in the care and upbringing of their child(ren) unless there are exceptional reasons why both parents should not have such involvement'.
- b) The *Family Law Act* could contain a clear statement that the child and parent (or carers) have a right to be safe, and this right outweighs an arrangement based on shared significant involvement.
- c) The language of Part VII of the *Family Law Act* could provide simply for the making of parenting orders. These parenting orders would define:
 - What periods of time the child should spend living with each parent or other caregiver²⁵
 - What contact persons other than parents should have

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

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

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

- d) The Act (and if orders need to be made, the Court orders) should spell out what joint parental responsibility means. It means:-
- i) Parents should, if possible, talk about decisions that are necessary to be made about a child's care, welfare and development and, if possible, agree about all those decisions²⁶.
 - ii) Parents must consult and agree about the more major issues affecting a child that will impact upon the child's long term future, such as:-
 - Education
 - Health (particularly serious operations)
 - Religious upbringing
 - Undertaking of tertiary education and career
 - Change of surname
 - Change of where a child usually lives with a parent
 - iii) In the event that parents cannot agree about major issues, an order will need to be made to decide the issue in dispute or to allocate responsibility to one parent for deciding all major issues.
- e) In relation to day to day decisions, in an absence of agreement between parents, the parent (or carer) who is actually caring for the child at that time should make all the decisions about where the child goes and what a child does. This parental autonomy would not be interfered with by a court unless some limit needs to be placed on these day to day decisions to protect the welfare of the child²⁷.

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

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

²⁶ This is a slight embellishment on what is currently set out in Section 60B(2)(d) Family Law Act

²⁷ Judge made law current recognises this proposition. See the decision of the Full Court of the Family Court in VR v RR (2002) FLC 93-099 at 88,942. The Council recommends that this proposition be explicitly stated as a principle in the Act.

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

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

The Family Law Pathways Advisory Group in *Out of the Maze* made much of getting clear and useful information to litigant parents and children as soon in the litigation pathway as possible. The Pathways initiatives directed to early intervention work are strongly supported³⁰.

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

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

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

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

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

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

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

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

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

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

Family Law Council
September 2003

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