

House of Representatives Standing Committee
on Family and Community Affairs

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**Submission of the
Human Rights and Equal Opportunity Commission**

**to the
House of Representatives Standing Committee on
Family and Community Affairs**

**Inquiry into child custody arrangements in the event of
family separation**

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Summary

Joint residence

1. The Human Rights and Equal Opportunity Commission (“the Commission”) believes that shared parenting can be encouraged but opposes any proposal to institute a presumption of joint residence in the event of family separation.
2. The principle that in all actions concerning children the best interests of the child shall be a primary or the paramount consideration is incompatible with fixed positions, such as a legislated presumption of joint residence. A presumption cannot reflect the range of individual circumstances and practical difficulties which need to be accounted for in determining the best interests of the child.
3. In order to encourage fathers to be strong role models and active carers of children, the Commission recommends that attention be given to implementing laws and policies that allow fathers time with their children well before relationship breakdown. It is unfair to expect fathers to play a significant and ongoing role in their children’s lives without considering the factors that prevent or permit such involvement. In particular, the Commission believes that changes to workplace laws, policies and practices are needed for fathers to spend adequate time with their children from birth.
4. In its considerations, the Standing Committee on Family and Community Affairs (“the Committee”) must give due weight to the problem of violence against women and children, which is exacerbated at, and following, family separation.

Child support

5. The Commission does not support changes to child support arrangements that would further erode the living standards of children in post-separation families.

1. Introduction

1.1 Overview of submission

The Human Rights and Equal Opportunity Commission (the Commission) welcomes the opportunity to make the following submission to the House of Representatives' Standing Committee on Family and Community Affairs Inquiry into child custody arrangements in the event of family separation.

The Commission's submission addresses, in particular, terms of reference (a) (i) and (b):

- (a) given that the best interests of the child are the paramount consideration:
 - (i) what other factors should be taken into account in deciding the respective time each parent should spend with their children post separation, in particular whether there should be a presumption that children will spend equal time with each parent and, if so, in what circumstances such a presumption could be rebutted; and
- (b) whether the existing child support formula works fairly for both parents in relation to their care of, and contact with, their children.

This submission covers the following material:

- The role, function and expertise of the Commission;
- The best interests of the child;
- Joint residence and shared parenting;
- Fathering in Australian society;
- Violence in family law matters; and
- Child support issues.

The Commission supports shared parenting and joint residence by consent wherever appropriate. The Commission also believes that the Government should encourage greater sharing of parental responsibilities, particularly when they are of benefit to the child. However, the Commission is opposed to changes to the *Family Law Act 1975* (Cth) implementing a presumption of joint residence. Such a presumption conflicts with the vast majority of individual family preferences in parenting arrangements and unnecessarily fetters the discretion of the Family Court to determine the best interests of the child.

1.2. The Role and Functions of the Commission

The Commission administers the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) ("the HREOCA"). The Convention on the Rights of the Child ("CROC") is a "declared instrument" under s.47 of the HREOCA. Under Part IIB of Division 1 of the HREOCA, the President of the Commission has the function of investigating and conciliating complaints lodged with the Commission.

Under s.11(1) of the HREOCA, the following functions (inter alia) are conferred on the Commission:

- (a) such functions as are conferred on the Commission by the Racial Discrimination Act 1975, the Sex Discrimination Act 1984 or any other enactment;
- (aa) to inquire into, and attempt to conciliate, complaints of unlawful discrimination;
- (ac) to deal with complaints lodged under Part IIC;
- (e) to examine enactments, and (when requested to do so by the Minister) proposed enactments, for the purpose of ascertaining whether the enactments or proposed enactments, as the case may be, are, or would be, inconsistent with or contrary to any human rights, and to report to the Minister the results of any such examination;
- (f) to inquire into any act or practice that may be inconsistent with or contrary to any human right, and;
 - (i) where the Commission considers it appropriate to do so – to endeavour, by conciliation, to effect a settlement of the matters that gave rise to the inquiry; and
 - (ii) where the Commission is of the opinion that the act or practice is inconsistent with or contrary to any human right, and the Commission has not considered it appropriate to endeavour to effect a settlement of the matters that gave rise to the inquiry or has endeavoured without success to effect such a settlement – to report to the Minister in relation to the inquiry;
- (g) to promote an understanding and acceptance, and the public discussion, of human rights in Australia;
- (h) to undertake research and educational programs and other programs, on behalf of the Commonwealth, for the purpose of promoting human rights, and to co-ordinate any such programs undertaken by any other persons or authorities on behalf of the Commonwealth;
- (j) on its own initiative or when requested by the Minister, to report to the Minister as to the laws that should be made by the Parliament, or action that should be taken by the Commonwealth, on matters relating to human rights;
- (k) on its own initiative or when requested by the Minister, to report to the Minister as to the action (if any) that, in the opinion of the Commission, needs to be taken by Australia in order to comply with the provisions of the Covenant, of the Declarations or of any relevant international instrument;
- (n) to prepare, and to publish in such manner as the Commission considers appropriate, guidelines for the avoidance of acts or practices of a kind in respect of which the Commission has a function under paragraph (f);
- (o) where the Commission considers it appropriate to do so, with the leave of the court hearing the proceedings and subject to any conditions imposed by the court, to intervene in proceedings that involve human rights issues; and
- (p) to do anything incidental or conducive to the performance of any of the preceding functions.

The Commission also has statutory functions under the *Sex Discrimination Act 1984* (Cth) ("the SDA") which is in part based on and annexes the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW").

Under section 48(1) the SDA, the functions of the Commission are (inter alia):

- (d) to promote an understanding and acceptance of, and compliance with, this Act;
- (e) to undertake research and educational programs, and other programs, on behalf of the Commonwealth for the purpose of promoting the objects of this Act;
- (f) to examine enactments, and (when requested to do so by the Minister) proposed enactments, for the purpose of ascertaining whether the enactments or proposed enactments are, or would be, inconsistent with or contrary to the objects of this Act, and to report to the Minister the results of any such examination;
- (g) on its own initiative or when requested by the Minister, to report to the Minister as to the laws that should be made by the Parliament, or action that should be taken by the Commonwealth, on matters relating to discrimination on the ground of sex, marital status, pregnancy or potential pregnancy or to discrimination involving sexual harassment;
- (ga) to prepare, and to publish in such manner as the Commission considers appropriate, guidelines for the avoidance of discrimination on the ground of sex, marital status, pregnancy or potential pregnancy and discrimination involving sexual harassment;
- (gb) where the Commission considers it appropriate to do so, with the leave of the court hearing the proceedings and subject to any conditions imposed by the court, to intervene in proceedings that involve issues of discrimination on the ground of sex, marital status, pregnancy or potential pregnancy or discrimination involving sexual harassment;
- (h) to do anything incidental or conducive to the performance of any of the preceding functions.

1.3 The provisions of the Sex Discrimination Act

The objects of the SDA are set out in section 3 as follows (emphasis added):

- (a) to give effect to certain provisions of the Convention on the Elimination of All Forms of Discrimination Against Women; and
- (b) to eliminate, so far as is possible, discrimination against persons on the ground of sex, marital status, pregnancy or potential pregnancy in the areas of work, accommodation, education, the provision of goods, facilities and services, the disposal of land, the activities of clubs and the administration of Commonwealth laws and programs; and
- (ba) to eliminate, so far as possible, discrimination involving dismissal of employees on the ground of family responsibilities; and
- (c) to eliminate, so far as is possible, discrimination involving sexual harassment in the workplace, in educational institutions and in other areas of public activity; and
- (d) to promote recognition and acceptance within the community of the principle of the equality of men and women.

1.4 The Commission's expertise in children's rights and sex equality

The Commission, under its functions in HREOCA and the SDA, has conducted a range of legal and policy work in the areas of children's rights and sex equality.

For example, in children's rights the Commission has conducted a range of activities encouraging compliance with the Convention on the Rights of the Child and promoting the interests of children. These activities include:

- producing, with the Australian Law Reform Commission, a comprehensive analysis of children and the Australian legal system: *Seen and Heard: Priority for children in the legal process* (Report of the National Inquiry into Children and the Legal Process ALRC Sydney 1997);
- conducting an *Inquiry into Rural and Remote Education* focusing on the human rights provisions relevant to rural and remote school education;
- preparing a publication outlining the best interests of the child under international law; and
- intervening in cases on the Convention of the Rights of the Child and its application in Australia: *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 and *In the matter of B and B: Family Law Reform Act 1995* (1997) 21 Fam LR 676.

The Commission has also undertaken a wide range of activities aimed at encouraging equality between men and women, particularly in relation to employment and family responsibilities, and encouraging Australia's compliance with its international human rights obligations. Those activities have included:

- on reference from the Attorney-General, undertaking a National Inquiry into Pregnancy and Work involving extensive consultation and research which resulted in the publication of the Commission Report entitled *Pregnant and Productive: It's a right not a privilege to work while pregnant*, 1999 and the publication of guidelines advising employers and employees of their rights and responsibilities in relation to pregnancy in the workplace entitled *Pregnancy Guidelines* 2001;
- preparing and distributing an information package entitled *Woman of the World - Know your international human rights and how to use them* 2001;
- intervening in matters before the Australian Industrial Relations Commission, the NSW Industrial Relations Commission and the High Court, and appearing as amicus curiae in the Federal Magistrates Service and Federal Court regarding issues of equality between men and women;

- preparing guidelines on pay equity issues, sexual harassment and enterprise bargaining; and
- the publication of a discussion paper and final paper on paid maternity leave entitled respectively *Valuing Parenthood, Options for paid maternity leave: Interim paper, 2002* and *A Time to Value: Proposal for a national paid maternity leave scheme 2002*.

2. Best interests of the child

2.1 Introduction

This section of the Commission's submission discusses the best interests principle in matters concerning children, and children's rights in the context of family separation and a presumption of joint residence.

2.2 The Convention on the Rights of the Child

Article 3(1) of CROC provides:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

The Full Family Court has noted that certain provisions of the *Family Law Act 1975* (Cth) ("the Family Law Act") were influenced by article 3(1) of CROC.¹ Indeed, the Full Family Court has more recently held that Parliament's intention, in enacting certain provisions of the Family Law Act, was to implement some of Australia's obligations under CROC.²

The obligation that the best interests of the child be given "primary consideration" has been identified by the United Nations Committee on the Rights of the Child as one of the general principles of fundamental importance for the implementation of CROC.³

In *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh*⁴ a majority in the High Court rejected the argument that the provisions of article 3 were intended to apply only to "actions" that were directed at children and not those that merely have consequences for children.⁵ Their Honours stated that the objects of CROC will best be achieved by giving the word "concerning" a wide-ranging application.

The inclusion of the references to "legislative bodies" and "courts of law" in article 3(1) of CROC makes plain that the "best interests principle" applies to proposals for legislative law reform which have consequences for children.

¹ *In the matter of B and B; Family Law Reform Act 1995* (1997) 21 Fam LR 676 at [3.30] and [9.34].

² *B and B v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] Fam CA 451 at [288] per Nicholson CJ and Ryan J.

³ See eg the Committee's "Reporting Guidelines regarding the form and contents of periodic reports to be submitted by States Parties under article 44, paragraph 1(b), of the Convention", Adopted by the Committee at its 343rd meeting (13th Session) on 11 October 1996. See also United Nations Children's Fund ("UNICEF"), "Implementation Handbook for the Convention on the Rights of the Child" 2002, p39. As UNICEF notes, the concept of "best interests" of children has been the subject of more academic analysis than any other provision of the Convention; op cit, p41.

⁴ (1995) 183 CLR 273.

⁵ In particular, see the decisions of Mason CJ and Deane J at page 289. But note the dissent of McHugh J at 319.

Article 3(1) does not require the best interests of the child to be the sole consideration in actions concerning children. In *Teoh*, Mason CJ and Deane J noted:

The article is careful to avoid putting the best interests of the child as *the* primary consideration; it does no more than give those interests first importance along with other considerations as may, in the circumstances of a given case, require equal, but not paramount, weight.⁶

Later, their Honours stated:

A decision-maker with an eye to the principle enshrined in the Convention would be looking to the best interests of the children as a primary consideration, asking whether the force of any other consideration outweighed it.⁷

This is consistent with the view the United Nations Children's Fund ("UNICEF") has taken of the article, noting that the article does not require that the best interests of the child will always be the single overriding factor to be considered. Rather, there may be other human rights interests to be considered, including those "between children and adults".⁸ For example, in the case of separating parents, the right of one or both parent(s) to determine where they will live may need to be considered.⁹ However, even in such circumstances, the child's interests must be the subject of active consideration.¹⁰

2.3 The best interests of the child and family separation

The "best interests principle" will obviously be centrally relevant in circumstances involving the separation of a child's parents. Articles 9(1) and 9(3) of CROC make more specific provision regarding such circumstances.

9(1) States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence. (emphasis added)

9(3) States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

The *International Covenant on Civil and Political Rights* (the "ICCPR") also imposes obligations upon Australia to:

- protect the rights of children to such measures of protection as are required by their status as minors on the part of the child's family, society and the State;¹¹ and

⁶ At 289.

⁷ At 292.

⁸ "Implementation Handbook for the Convention on the Rights of the Child" 2002, pp 42-3.

⁹ That is, the right to freedom of movement. See article 12 of the *International Covenant on Civil and Political Rights* and article 15(4) of CEDAW.

¹⁰ Ibid.

¹¹ Article 24(1) of the ICCPR

- provide for the “necessary protection” of children upon the dissolution of marriage.¹²

In relation to those obligations and the dissolution of marriage, the United Nations Human Rights Committee has stated:

If the marriage is dissolved, steps should be taken, keeping in view the paramount interest of the children, to give them necessary protection and, so far as is possible, to guarantee personal relations with both parents.¹³

As noted by the Full Family Court,¹⁴ the 1995 reforms to the Family Law Act exceed the standard referred to in article 3(1) of CROC that the best interests of the child shall be “a primary consideration”. Section 65E of the Family Law Act provides

In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration. (emphasis added)

In determining what is in the best interests of the child, the Family Court must have regard to section 68F of the Family Law Act.¹⁵ Furthermore, while article 3(2),¹⁶ of

¹² Article 23(4) of the ICCPR

¹³ General Comment 17, Article 24 (Thirty-fifth session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 23 (1994).

¹⁴ *In the matter of B and B; Family Law Reform Act 1995* (1997) 21 Fam LR 676 at [3.31].

¹⁵ Section 68F of the Family Law Act provides:

(1) Subject to subsection (3), in determining what is in the child's best interests, the court must consider the matters set out in subsection (2).

(2) The court must consider:

- (a) any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's wishes;
- (b) the nature of the relationship of the child with each of the child's parents and with other persons;
- (c) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:
 - (i) either of his or her parents; or
 - (ii) any other child, or other person, with whom he or she has been living;
- (d) the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;
- (e) the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;
- (f) the child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders) and any other characteristics of the child that the court thinks are relevant;
- (g) the need to protect the child from physical or psychological harm caused, or that may be caused, by:
 - (i) being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or
 - (ii) being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person;
- (h) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;
- (i) any family violence involving the child or a member of the child's family;
- (j) any family violence order that applies to the child or a member of the child's family;

CROC refers to the “rights [and duties] of a child’s parents”, the Family Law Act omits all such references but does refer to parents’ duties and responsibilities.¹⁷

2.4 Conclusion

It is plain that the international obligations discussed above **do not** proceed from a presumption that “joint custody” of the child of separated parents will be in the best interests of that child. What is to be guaranteed, unless it is not in a child’s best interests, is the maintenance of personal relationships with both parents. In other words, matters which would be dealt with under a “contact order” made under the Family Law Act.¹⁸

The Family Court’s discretion in assessing what residential arrangements are in the best interests of the child following separation should not be fettered by the imposition of a presumption of joint residence. Consideration of the “best interests” principle should be tailored to the best interests of particular children and not children in general.¹⁹ The imposition of a presumption has the potential to impair inquiry as to what is in the child’s best interests.²⁰ The “best interests” principle is incompatible with fixed positions, such as set presumptions.²¹

(k) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;

(l) any other fact or circumstance that the court thinks is relevant.

(3) If the court is considering whether to make an order with the consent of all the parties to the proceedings, the court may, but is not required to, have regard to all or any of the matters set out in subsection (2).

(4) In paragraph (2)(f):

Aboriginal peoples means the peoples of the Aboriginal race of Australia.

Torres Strait Islanders means the descendants of the indigenous inhabitants of the Torres Strait Islands.

¹⁶ Article 3(2) of CROC provides:

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account **the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her**, and, to this end, shall take all appropriate legislative and administrative measures. (emphasis added)

¹⁷ See paragraphs (c) and (d) of subsection 60B(2) of the Family Law Act:

(c) parents share duties and responsibilities concerning the care, welfare and development of their children; and

(d) parents should agree about the future parenting of their children.

¹⁸ A “contact order” is a “parenting order” made under the Family Law Act which provides for “contact between a child and another person or other persons” (see s64B(4) of the Family Law Act).

¹⁹ *In the matter of B and B; Family Law Reform Act 1995* (1997) 21 Fam LR 676 at [9.53].

²⁰ *In the matter of B and B; Family Law Reform Act 1995* (1997) 21 Fam LR 676 at [9.59].

²¹ G Van Bueren *The International Law on the Rights of the Child* Martinus Nijhoff Publishers Dordrecht 1995, 47-48.

3. Joint residence and shared parenting

3.1 Introduction

The principle that children benefit from healthy and supportive parenting from mothers and fathers is indisputable.

However, it is unfair to expect fathers to play a significant and ongoing role in their children's lives without considering the factors that prevent or permit such involvement.

One of the greatest challenges facing Australia over the next generation is reconciling the conflict between the demands of paid work and family responsibilities. The current regime of paid work and unpaid care impacts detrimentally on the quality of life of mothers, fathers and families.

The work and family debate in Australia has tended to focus on the difficulties faced by working mothers trying to balance commitments to paid employment and their children. However working fathers are equally affected by these competing pressures, albeit in different ways: men not having enough time with their families and women disadvantaged in paid work because of their disproportionate responsibility for care of families.

On relationship dissolution most men have not established patterns of shared care, nor do they necessarily have the kind of relationships with their children that allow a smooth transition to a significant caring role. Given this, a child driven response to residence orders will predominantly nominate the mother as primary carer, because this is the role that she has played and that children are happy and familiar with. It is not family law that is interfering with the relationships between fathers and children, but current patterns of paid and unpaid work that hinder the development of that relationship in the first place.

The Commission contends that considering men's parenting role after separation is too late. It will not influence parenting relationships in intact families, and will only serve to increase conflict in separating families, leading to poorer outcomes for children and generally compromising their best interests.

The Commission believes that families, where possible, should be free to make arrangements that suit their particular circumstances without having "one size fits all" parenting arrangement imposed on them. Successful shared parenting cannot be legislated and joint residence arrangements work best when they are by consent not coercion.

Shared parenting before separation allows strong parenting to continue after separation. The role of separated parents needs to be understood as part of the bigger picture of fatherhood and motherhood in Australian society: in particular, the balancing of paid work and parenting responsibilities of men and women. For this reason, the Committee

could usefully consider some of the ways that shared parenting can be encouraged before relationship dissolution.

This section of the Commission's submission outlines some further problems with a presumption of joint residence, along with some of the steps that should be taken to assist fathers to shift their work and family balance so that they can be more involved parents before and after family separation.

3.2 No presumption of joint residence on family separation

3.2.1 Introduction

The Commission believes that shared parenting can be encouraged, but that joint residence should not be imposed on families through legislated presumptions.

3.2.2 Joint residence works for some families

An intact and healthy parental relationship with children is, of course, the desired post-separation outcome for children. Shared parenting can be achieved through a variety of post-separation arrangements that suit the individual family. Joint residence is a positive option for some separated parents where conflict is not an issue and parents have a reasonably co-operative relationship and respect for each other as parents.

3.2.3 Joint residence works if it is by choice not coercion

Research on joint residence arrangements almost invariably studies families who have made such arrangements by choice. These families are characterised by an ability and willingness to co-operate and by parents who continue to value each other. For example, one study described co-parental relationships in joint residence arrangements as characterised by a devotion to children that took precedence over all other needs, respect and trust for their ex-partner, and valuing their ex-partner as the parent of their child.²²

This research cannot be applied to the situation of couples on whom a presumption of joint residence is imposed,²³ because the imposition of joint residence implies an unwillingness on the part of one or other party. This unwillingness may be reflected in an

²² S Steinman "The experience of children in a joint-custody arrangement: A report of a study" (1981) 51(3) *American Journal of Orthopsychiatry* 403 at 406. See also M Brotsky, S Steinman and S Zimmelman "Joint custody through mediation: A longitudinal assessment of the children" in J Folberg (ed) *Joint Custody and Shared Parenting* Second edition Guilford Press New York 1991, 167 at 169: Parents who successfully negotiated shared custody arrangements and carried them out were characterised as valuing the other parent; empathising with the child and other parent; having high self-esteem and psychological functioning; having low levels of anger and the ability to modulate aggression; being tolerant and having the capacity to self-reflect and problem solve.

²³ See, for example, J Pearson and N Thoennes "Custody after divorce: Demographic and attitudinal patterns" (1990) 60(2) *American Journal of Orthopsychiatry* 233 at 247: "Our research results... failed to justify more aggressive joint custody policies. Because all joint custodians in our sample ultimately opted for joint custody, our data cannot address the experiences of parents who are unable to resolve their custody differences in mediation and are compelled to adopt joint custody over the objection of one party."

unwillingness to cooperate, or a failure to respect and trust their former partner, or a failure to value their former partners as a parent. Imposing joint residence on families where they are unable to reach this decision on their own and in situations of ongoing high conflict suggest poor outcomes for children. In these situations children are generally better served by arrangements that support the child's stability rather than emphasise equal parental involvement.²⁴

Rather than imposing joint residence, the Committee should consider ways that shared parenting can be supported in intact families as well as after separation.

Arguably the goal of future policy, service, and research should be to identify and promote the ingredients of family functioning during and after divorce rather than to focus on the current preoccupation with custody labels.²⁵

Moreover, recognition of the fact that different parental arrangements after separation will suit different families is effectively silenced by the imposition of a legislated presumption in favour of joint residence arrangements.

[J]oint custody can be helpful in families where it has been chosen voluntarily by both parents and is suitable for the child. But there is no evidence to support the notion that 'one size fits all' or even most. There is, in fact, a lot of evidence for the idea that different custody models are suitable for different families. The policy job ahead is to find the best match for each family.²⁶

3.2.4 Shared parenting cannot be legislated

The goal of shared parenting is to provide strong caring relationships between parent and child. There is no evidence that legislative changes designed to encourage courts (and families themselves) to prefer shared parenting will achieve such a goal.

The *Family Law Reform Act 1995* (Cth) (the Reform Act) was implemented in part to encourage both parents to continue to participate in the care of their children following separation. However, a review of the Reform Act after its first three years of operation

²⁴ In a study of families with court-ordered or court-mediated custody arrangements who were in ongoing dispute over these arrangements, Johnson, Kline and Tschann found that: "[Joint custody] is highly related to more frequent access and we found consistent evidence that children who have more frequent access are more emotionally troubled and behaviourally disturbed. In particular, children who share more days each month with both parents are significantly more depressed, withdrawn and uncommunicative, have more somatic symptoms and tend to be more aggressive, according to the perceptions of their parents." J Johnston, M Kline and J Tschann "Ongoing post-divorce conflict in families contesting custody: Do joint custody and frequent access help?" in J Folberg (ed) *Joint Custody and Shared Parenting* Second edition Guilford Press New York 1991, 167 at 182. Note that these families represented entrenched and ongoing divorce disputes. Also see J Wallerstein and S Blakesee *Second Chances: Men, women, and children a decade after divorce* Ticknor and Fields New York 1989, 304: "Sadly, when joint custody is imposed by the court on families fighting over custody of children the major consequences of the fighting are shifted onto the least able members of the family – the hapless and helpless children. The children can suffer serious psychological injury when this happens."

²⁵ J Pearson and N Thoennes "Custody after divorce: Demographic and attitudinal patterns" (1990) 60(2) *American Journal of Orthopsychiatry* 233 at 247.

²⁶ J Wallerstein and S Blakesee *Second Chances: Men, women, and children a decade after divorce* Ticknor and Fields New York 1989, 304.

found no evidence that the law reform efforts had made any impact on shared parenting.²⁷ Mothers remain largely responsible for the care of children following separation, a continuation of their primary care giver role within intact families.

When parents did make arrangements for shared parenting these were generally made without reference to lawyers or the legislation.²⁸

Although there is inadequate research available in Australia on the choices that parents make at separation and the reasons for these choices, there are indications that parents who are willing and able to negotiate private arrangements choose not to make joint residence arrangements.²⁹ This suggests that the small number of joint residence arrangements is not the result of skewed Family Court determinations, but because families continue to see one parent – almost always the mother – as the most appropriate primary carer.

One of the roles of law reform can be to effect behavioural and longer term attitudinal changes in society. Certainly this was one of the concerns of the Reform Act – it was designed as much to change attitudes towards post separation arrangements for children in families that do not proceed to a contested hearing, as it was to change the legal approaches to cases heard by the Family Court.

While this can often be a legitimate legislative approach, care should be taken to ensure attempts to shift attitudes do not have inadvertently negative effects. The legislation should also be focussed at appropriate targets. For example, if the point of law reform is to strengthen relationships between fathers and children, then it is not ideal to focus on families when they are at their most vulnerable and conflicted, without first providing support for strengthening the parent-child relationship before divorce.

The imposition of a legislative presumption of joint residence may also be unfair for fathers. There are some fathers who believe that it would be irresponsible of them to alter their current work arrangements so as to accommodate shared parenting responsibilities. These fathers may view their parental responsibilities as being predominantly met by financially providing for their families. A presumption of 50:50 shared care after separation may place unfair pressure on fathers to enter into an working arrangement which they are not comfortable with as it reduces their earning capacity. Or, in rejecting the option of part time work, for example, fathers may be forced into the situation where they are viewed as inadequate or less worthy parents for electing to make the financial

²⁷ H Rhoades, R Graycar and M Harrison *The Family Law Reform Act 1995: The first three years* University of Sydney and Family Court of Australia Sydney 2000, 1.

²⁸ H Rhoades, R Graycar and M Harrison *The Family Law Reform Act 1995: The first three years* University of Sydney and Family Court of Australia Sydney 2000, 1.

²⁹ For example, Child Support Agency data demonstrate that only 6.1% of parents with private child support arrangements (usually parents who are more able to make arrangements and co-operate) have roughly equal shared care arrangements: 40-60% shared care. This compares to 2% of cases with shared care arrangements where payment is mediated by the Child Support Agency. Data provided by Child Support Agency 1 August 2003 for data current at 30 June 2003.

provision for their children their priority rather than sharing the caring responsibilities with mothers.

If a presumption of joint physical residence is to be pursued the Committee needs to consider the broader systemic and attitudinal aspects of parenting rather than focusing narrowly on a single preferred model of custody.

3.3 Shared parenting: how can it be achieved?

3.3.1 Introduction

Rather than imposing legislative presumptions on families, the Commission advocates measures to encourage shared parenting without coercion. If a greater degree of shared parenting – active, engaged caring work by both parents before and after divorce – is to be achieved men need encouragement and assistance to be involved parents from the birth of their child. This includes examining the barriers that prevent men forming strong ongoing relationships with their children.

There has been long debate about the impact on children of working mothers, but little public debate about the consequences for children when fathers work. As demonstrated in Chapter 4 of this submission, men's commitment to paid work, the long hours they work and their limited use of flexible work provisions mean that they are away from their families for most of the day, week and year. Fathers spend considerably less time in child care, do less housework and spend more time away from children in leisure pursuits than mothers, even working mothers. Not only is this situation taken for granted in our society, it in fact forms the basis of our gender roles and, at least historically, has underpinned the structure of our public and private lives. As a result, fathers miss out on significant aspects of parenting, and because this is so often taken for granted in our society, few ask how this impacts on them and their families.

Historically, the absence of fathers has been acceptable because of the importance of their breadwinner role. However, men's role as sole breadwinners is diminishing and there is a strong and growing perception amongst both men and women that men should ideally share in housework and child care.

3.3.2 Australian men want to be involved fathers

Recent Australian research suggests that fathers see being “involved” and accessible to their children as important “in terms of the impact they have on their children's wellbeing and adjustment”.³⁰ However, 68 per cent of 1,000 Australian fathers surveyed stated that they did not spend enough time with their children.³¹

³⁰ G Russell et al *Fitting Fathers into Families* Department of Family and Community Services Canberra 1999, 40. Unpublished research by the Social Policy Research Centre funded by the federal Department of Family and Community Services confirms both the importance to fathers of having close and involved relationships with their children, and the difficulties they have finding time to be with children because of (real and perceived) work responsibilities: M Bittman, S Hoffman and D Thompson *Fathers' Uptake of*

The gap between men's desired relationship with their children and the time-starved reality is largely explained by external factors. When asked why they could not spend enough time with children, the fathers in one study stated "overwhelmingly... that the major barrier to their being involved as parents were the commitments they had to paid work".³²

Amongst divorced fathers, involvement with children is further reduced, although there are small signs that this may be improving. According to the Australian Institute of Family Studies "...there is some evidence – albeit piecemeal – of increased involvement (or interest) of non-resident parents in their children's lives."³³

3.3.3 What prevents fathers from spending time with their children?

Fathers' work arrangements prevent them from being with their children because of the combined effects of inflexible workplace structures; social and workplace assumptions about male workers; and self-imposed financial and employment expectations.

While many men aspire to become more involved parents³⁴ the world of paid work can appear a more attractive option. Fathers may lack the skills or confidence to believe that they can add value to the role of primary caregiver. They may have learned to be emotionally fulfilled by work. The neutrality of work in institutions with its routine, structure and reward, may imbue a greater sense of achievement and self-worth.³⁵ Many men will also feel financial pressure to provide as much money to the family as possible, believing that this is their key contribution as fathers.

Fathers who attempt to put their time with families before paid work commitments may find that they are treated as second-class employees. Operating parallel to the so-called "mummy track" (where women who put their caring responsibilities first are relegated to a second-class career path, with lower status, lower paid and insecure jobs) is a "daddy track" for men who refuse to work long hours in a workplace where a long hours culture is entrenched.³⁶ Requests to work fewer hours or part time are taken as signals that a male worker is not fully committed to the job, the workplace, or his career.

Family-Friendly Employment Provisions Report forthcoming in the Australian Department of Family and Community Services Policy Research Papers series.

³¹ G Russell et al *Fitting Fathers into Families* Department of Family and Community Services, Canberra, 1999, 40.

³² G Russell et al *Fitting Fathers into Families* Department of Family and Community Services, Canberra, 1999, 41-42.

³³ B Smyth "Research into parent-child contact after parental separation" (2002) 62 *Family Matters* 33 at 35.

³⁴ See G Russell et al *Fitting Fathers into Families* Department of Family and Community Services Canberra 1999, 40.

³⁵ A Burgess *Fatherhood Reclaimed: The making of the modern father* Random House, London, 1997.

³⁶ B Pocock *The Work/Life Collision* The Federation Press Sydney 2003, 146-148.

Some mothers do take on a gate-keeper role or act as the arbiters of “good parenting” when it comes to caring for their children. This also prevents fathers from spending time with their children, as fathers are relegated to a support role in caring for children, or are encouraged not to participate at all. This gate-keeping behaviour impacts adversely on fathers’ competence and confidence as carers of their children. Some women need encouragement to relinquish control of caring responsibilities so that fathers can participate in the caring and rearing of their children.

3.3.4 Promoting a wider range of roles for men

Men’s contemporary roles have not kept pace with changing ideas about the importance of fathers. Despite social changes that have allowed women to take on an unprecedented diversity of roles, men are often trapped within narrow gender roles that emphasise work and business, money making, public status and success. It remains difficult for men to genuinely embrace home-making and child care without being judged or disapproved of for stepping outside the narrow bounds of masculinity.

Sub-section 3(d) of the Sex Discrimination Act provides that one of the objects of the SDA is:

to promote recognition and acceptance in the community of the principle of the equality of men and women.

This includes encouraging the widest range of work and family choices for men and women, so that neither is trapped within traditional gender roles that are unnecessarily restrictive.

3.3.5 Shared parenting means flexible work arrangements for men

Research shows that private arrangements for joint residence after separation are most likely in families where the mother works and the father has flexible work arrangements.

Significantly, the initial findings of the Australian Institute of Family Studies research on shared care found that of the parents in its study with 50:50 shared care, “[a]ll of the men had reduced or relatively flexible work arrangements; and all of the women were in paid work.”³⁷ Several fathers had chosen to work a four day week or less or had changed their jobs to guarantee the flexibility to be with their children. All of the fathers who shared parenting had arranged their work to suit their child care responsibilities.

Fathers who spend equal time with their children need access to family-friendly work patterns.³⁸

³⁷ B Smyth, C Caruana and A Ferro “Some whens, hows and whys of shared care: What separated parents who spend equal time with their children say about shared parenting” *Australian Social Policy Conference* University of New South Wales Sydney 9-11 July 2003, 10.

³⁸ B Smyth, C Caruana and A Ferro “Some whens, hows and whys of shared care: What separated parents who spend equal time with their children say about shared parenting” *Australian Social Policy Conference* University of New South Wales Sydney 9-11 July 2003, 19.

Other studies back up these results.

Most of the fathers [in joint residence arrangements] had some flexibility in their jobs, which allowed them to assume daily child-rearing responsibilities. Most fathers had been actively involved with their children during the marriage, and had made parenting a priority in their lives.³⁹

Another study referred to the prevalence of highly educated and better paid parents amongst those making shared residence agreements, and pointed out that these parents "... generally enjoy greater flexibility in their work schedules than do those in other occupational classifications, and are thus better able to engage in regular child care."⁴⁰

This point is a common sense one, but it is often overlooked. Men will have the most engaged and active relationships with their children when they at least have the opportunity to participate in day to day caring: staying home with a child when he or she is sick; attending school functions; picking children up from school. Men do not have these opportunities if their work arrangements are all-consuming and inflexible.

3.3.6 Shared parenting must start before divorce

There is very little research showing definitively why separated parents do or do not make shared parenting arrangements. However, the research that does exist indicates that shared parenting is only likely to be satisfactorily established after divorce if it is undertaken prior to marital breakdown.

The review of the Reform Act found that shared parenting before separation was one of the indicators of post-divorce shared care.

Significantly, each of these parents [who shared parenting] had exercised their responsibilities jointly and co-operatively before their separation, and each of the men had taken an active caregiving role.⁴¹

Other studies reinforce this finding.

Most [parents in consensual joint residence arrangements] had shared parenting during the marriage to a great extent: the children had been a source of mutual gratification and only rarely of conflict.⁴²

A recent study by the Australian Institute of Family Studies analysed the characteristics of a group of parents with a range of care arrangements, from 50:50 shared care to little

³⁹ S Steinman "The experience of children in a joint-custody arrangement: A report of a study" (1981) 51(3) *American Journal of Orthopsychiatry* 403 at 407. All but one of the women in this study were in paid work, and most had worked during the marriage.

⁴⁰ J Pearson and N Thoennes "Custody after divorce: Demographic and attitudinal patterns" (1990) 60(2) *American Journal of Orthopsychiatry* 233 at 237.

⁴¹ H Rhoades, R Graycar and M Harrison *The Family Law Reform Act 1995: The first three years* University of Sydney and Family Court of Australia Sydney 2000, 1.

⁴² See for example S Steinman "The experience of children in a joint-custody arrangement: A report of a study" (1981) 51(3) *American Journal of Orthopsychiatry* 403 at 407.

or no contact with their child.⁴³ Initial indications of the study are that 50:50 care arrangements were made by parents who lived close to each other, were employed in flexible work places, were financially secure and had co-operative parenting styles.

The study, a preliminary study for a larger research project currently underway, is small and not yet conclusive, but indicates that fathers who are involved with the care of children from an early age are at an advantage when it comes to sharing care after separation.

The earlier fathers become involved in care of their children, the more they feel competent to share parenting after divorce.⁴⁴

3.4 Conclusion

Fathers' patterns of working and parenting mean that they do not have the opportunity to be fully involved parents and role models to their children. Men's relationship to work means that they are also likely to have working patterns that interfere with effective shared parenting: they lack flexible work arrangements, work long hours and are used to putting work first. The commonly held view that mothers make the best parents also undermines the capacity and willingness of men to contribute.

Men do not have the opportunity to spend enough time with their children. This is common in intact relationships as well as after separation. Most men play a minimal role in the early years of child raising and spend a fraction of the time that mothers spend with children throughout child raising years. The statistics on this are detailed in the following chapter of the submission.

Sadly, this is often not by choice but by necessity. Men are often faced with the "choice" of working long hours and earning money to support a family or not working at all. Women, too, often end up working in underpaid part time work or not in paid work at all because they do not have the choice of flexible, family friendly workplaces that adapt to family needs.

To impose a presumption of joint residence after separation is to try to solve the problem at a most difficult time in the life of the family. The Commission considers such an approach is a parent-driven, not child-driven response.

⁴³ B Smyth, C Caruana and A Ferro "Some whens, hows and whys of shared care: What separated parents who spend equal time with their children say about shared parenting" *Australian Social Policy Conference* University of New South Wales Sydney 9-11 July 2003.

⁴⁴ B Smyth, C Caruana and A Ferro "Some whens, hows and whys of shared care: What separated parents who spend equal time with their children say about shared parenting" *Australian Social Policy Conference* University of New South Wales Sydney 9-11 July 2003, 20. Fathers taking on shared care may go through a period of adjustment and doubt on commencing the role: G Russell *The Changing Role of Fathers?* University of Queensland Press St Lucia 1983, 101; 125-126.

4. A “snapshot” of men as workers and fathers

4.1 Introduction

The following section of the Commission’s submission provides a “snapshot” of men’s work and family patterns in Australia today to demonstrate that both structural and attitudinal change is necessary for fathers to be involved parents both prior to, and after parental separation.

4.2 The decreasing prevalence of the male breadwinner/female carer family model

One of the most enduring and emblematic socio-economic and cultural institutions in Australian society is the “male breadwinner/female carer” family model. This model was premised on the traditional gender roles that men and women played in post-industrial society: men went out to work to provide for the family, while women stayed at home, caring for the children and family home.⁴⁵

The socio-economic realities of the late twentieth century have altered the distribution of family types over the past 20 years. The dominance of the breadwinner/homemaker model has waned.⁴⁶ For couple families with children, the prevalence of the sole breadwinner model in Australia has significantly diminished from the start of the 1980s. Between 1981 and 2000 the proportion of couple families with children with a single full time earner decreased from 51 per cent to 31 per cent.⁴⁷ The 2001 Census showed that only 28 per cent of all couple families with children aged less than 15 years had only one parent employed.⁴⁸ Couple families where both parents were employed were the most common of all couple families with children aged less than 15 years in 2001, constituting 43 per cent.

This shift from the traditional family structure is reflected in the values people hold. In the Australian Institute of Family Studies *Australian Family Life Course Study* only 23

⁴⁵ The federal wage fixing system in Australia recognised and partly entrenched this archetypal family model in its *Harvester* decision of 1907: *Ex parte HV McKay* (1907) 2 CAR 1. In the course of his judgment, Higgins J defined a “fair and reasonable wage” as that which would be necessary to sustain an “average employee regarded as a human being living in a civilised community” in a “condition of frugal comfort”: *Ex parte HV McKay* (1907) 2 CAR 1 at 3-4. The “average employee” was assumed to be an unskilled male worker with a dependent wife and three children: B Creighton and A Stewart *Labour Law: An Introduction* The Federation Press Sydney 2000, 41.

⁴⁶ The male breadwinner model was officially discarded by the Australian Industrial Relations Commission in the *National Wage Case* decision of 1974 when the commission rejected the continuance of a family welfare rationale for minimum wage determination: Department of Family and Community Services and Department of Employment and Workplace Relations *OECD Review of Family Friendly Policies: The reconciliation of work and family life – Australia’s background report* Commonwealth of Australia Canberra 2002, 14.

⁴⁷ I Watson et al *The Future of Work: Source material on trends and challenges in Australian workplaces* ACTU 2003, 5 (based on an abridged version of chapters 2-10 of *Fragmented Futures: New challenges in working life* The Federation Press Sydney 2003).

⁴⁸ ABS 4102.0 *Australian Social Trends 2003* Commonwealth of Australia Canberra 2003, 41.
<http://www.abs.gov.au/Ausstats/abs@.nsf/94713ad445ff1425ca25682000192af2/745de>

per cent of both men and women agreed with the statement: "A husband's job is to earn the money, a wife's is to look after the home and family". Sixty-five per cent of men and 69 per cent of women agreed that: "Both partners should contribute to the household income".⁴⁹

Underlying this waning of the dominance of the male breadwinner/female carer model has been the significant increase in the labour force participation rate of women, particularly in couple families with children. The proportion of women in the paid workforce has increased from 36 per cent in 1966⁵⁰ to almost 57 per cent in February 2003.⁵¹ This growth in labour force participation has been especially marked for women aged 20 to 54 years (the prime childbearing and rearing years).⁵²

A growing proportion of women in couple families are in paid work when their children are young, with participation increasing with the age of the youngest child. Whereas only 35 per cent of mothers are in paid work when their youngest child is less than one year old, the participation rate for mothers increases to 59 per cent when the youngest child reaches pre-school age (four to five years) and to 75 per cent when the youngest child is aged between 14 to 18 years.⁵³

4.3 Fathers spend less time in child care

Men want to spend more time with their children. However, it is established that fathers, on average, spend considerably less time in child care than do mothers.⁵⁴ There are a number of ways to measure this time investment. When childcare is measured as a main or primary activity, fathers spend about an hour a day while mothers spend about three hours a day. When childcare is measured as either a primary or secondary activity (for example, minding children is undertaken simultaneously with preparing a meal), fathers spend about two hours a day, while mothers spend over six hours a day. When childcare

⁴⁹ H Glezer and I Wolcott "Work and family values, preferences and practice" *Australian Family Briefing* No 4 Australian Institute of Family Studies, Commonwealth of Australia Melbourne September 1997. Note however, in relation to public attitudes towards paid work for mothers of young children, 69 per cent of Australian women surveyed in the 2001 *International Social Science Survey* indicated that women should stay at home and not participate in the paid workforce when they have pre-school age children at home: M D R Evans and J Kelley "Employment for mothers of pre-school age children: Evidence from Australia and 23 other nations" (2001) 9(3) *People and Place* 28-40. This indicates that there is a gap between what Australian mothers of small children should do and what they actually do. See also M D R Evans and J Kelley "Changes in public attitudes to maternal employment: Australia, 1984 to 2001" (2002) 10(1) *People and Place*; B Pocock *The Work/Life Collision* The Federation Press Sydney 2003, 76.

⁵⁰ B Pocock *The Work/Life Collision* The Federation Press Sydney 2003, 19.

⁵¹ ABS 6203.0 *Labour Force, Australia* Commonwealth of Australia Canberra 2003, 13 Table 3.

<http://www.abs.gov.au/Ausstats/abs@.nsf/lookupMF/D5DD1464CE5BCFFCCA256A95008176E2>

⁵² B Pocock *The Work/Life Collision* The Federation Press Sydney 2003, 19.

⁵³ B Pocock *The Work/Life Collision* The Federation Press Sydney 2003, 72-73.

⁵⁴ See G Russell et al *Fitting Fathers Into Families: Men and the Fatherhood Role in Contemporary Australia* Department of Family and Community Services Canberra 1999.

is measured as being “in the company of children” fathers spend about eight hours a day, and mothers spend more than 13 hours a day with children.⁵⁵

Fathers also spend much less time than mothers alone with children. Fathers employed on a full time basis were alone with their children an average of 32 minutes a day, or seven per cent of the total time that they spend in the company of children. In contrast, mothers employed on a full time basis were alone with their children an average of two hours a day, or 22 per cent of the total time they spend with children.⁵⁶ This suggests that to the extent that fathers are involved in child care, they typically assist in the tasks rather than take responsibility for the job. Going further, this implies that men’s relationships with children are usually mediated through the mother. This phenomenon has far reaching consequences for fathers after separation.

Significantly, the time that fathers spend alone with their children varies very little (from an average of 32 minutes a day to 46 minutes a day) regardless of whether fathers worked full time or part time, were unemployed or not in the labour force. This suggests that men who were employed on a part time basis or not in the labour force were not substituting for their partners in a way that could give her the opportunity to engage in other activities, such as paid work.⁵⁷

There is also a discrepancy in the amount of secondary child care undertaken during leisure time by mothers and fathers. When the youngest child is a pre-schooler, 65 per cent of mothers’ leisure time is enjoyed without having to do child care at the same time, compared to 80 per cent for fathers. When the youngest child is school-aged, 78 per cent of mothers’ leisure is spent not doing child care simultaneously, compared to 86 per cent of fathers’ leisure time. This suggests that during leisure time, mothers are monitoring children for a substantially higher proportion of the time than fathers are.⁵⁸

Using a sub-sample of parents with children under five years from the Australian Bureau of Statistics (ABS) *Time Use Survey 1997*, Craig shows that mothers in paid work with children under five years appear to get no child-free leisure or recreation time at all (0.006 of a minute a day). The average child-free recreation time of fathers in paid work with children under five years of age is an hour and 12 minutes a day, while the average for mothers not in the workforce is 24 minutes a day.⁵⁹

⁵⁵ L Craig “Do Australians Share Parenting? Time-diary evidence on fathers’ and mothers’ time with children” *Australian Institute of Family Studies 8th Annual Conference* Melbourne 12-14 February 2003. Note that this paper is based on an analysis of the ABS’ 1997 *Time Use Survey*.

⁵⁶ Lyn Craig *Caring Differently: A time-use analysis of the type and social context of child care performed by fathers and by mothers* SPRC Discussion Paper No. 116 September 2002, 13.
<http://www.sprc.unsw.edu.au/dp/index.htm>

⁵⁷ Lyn Craig *Caring Differently: A time-use analysis of the type and social context of child care performed by fathers and by mothers* SPRC Discussion Paper No. 116 September 2002, 13.
<http://www.sprc.unsw.edu.au/dp/index.htm>

⁵⁸ Lyn Craig “Do Australians Share Parenting? Time-diary evidence on fathers’ and mothers’ time with children” *Australian Institute of Family Studies 8th Annual Conference* Melbourne 12-14 February 2003.

⁵⁹ L Craig “How Do They Find the Time? A time-diary analysis of how working parents preserve their time with children” *Australian Social Policy Conference “Social Inclusion”* University of New South Wales Sydney 9-11 July 2003. <http://www.sprc1.sprc.unsw.edu.au/aspc2003/abstract.asp?PaperID=67>

Thus, while fathers are eager to spend more time with their children, their current patterns of child care participation indicate that they are more likely to be engaged in play-based activities than mothers as a proportion of the time that they spend with children, and they are more likely to be assisting with child care rather than taking responsibility for it, regardless of their employment status. This suggests that an attitudinal shift in relation to the role of fathers in caring responsibilities is required in conjunction with structural changes to paid work to enable fathers to equally share the parenting workload.

4.4 Men are working longer hours

Between 1982 and 1994 average working hours for full time workers in Australia increased from 42 to 45 hours per week. This trend levelled off during the late 1990s, and since 2000, average hours have fallen back to 44 hours per week (45 hours for men and 41 hours for women).⁶⁰ However, a growing number of full time workers are working very long hours (50 hours or more per week). As a proportion of full time workers, those working 50 hours or more increased from 20 per cent in 1982 to 30 per cent in 2002. Breaking down these proportions by gender, full time men are more likely to work very long hours than full time women. In 1982 10 per cent of full time females and 23 per cent of full time males worked 50 hours or more per week. This increased to, respectively, 19 per cent for females and 35 per cent for males in 2002.⁶¹

This increase in the proportion of men working very long hours is more striking for men aged between 35 and 54 years, despite a slight decline in the labour-force participation rate of men aged 45 to 54 years. This is particularly pertinent when the median age for first time fathers is 32.3 years.⁶² By 1998-99, 47.2 per cent of 45 to 54 year old men were working more than 45 hours per week compared with 35.8 per cent of 45 to 54 year old men in 1986-87. For men aged 35 to 44 years the proportion working more than 45 hours per week has increased by 6.3 per cent from 1986-87 to 1998-99.⁶³

This trend towards longer working hours for men in these age groups was not confined to professional/managerial workers, although those with managerial and administrative responsibilities were more likely than other employed men to work 49 hours or more. For example, the proportion of men employed as tradespersons and plant and machine

⁶⁰ ABS 4102.0 *Australian Social Trends 2003* Commonwealth of Australia Canberra 2003, 119.
<http://www.abs.gov.au/Ausstats/abs%40.nsf/94713ad445ff1425ca25682000192af2/f46f5073e7cd46e4ca256d39001bc354!OpenDocument>

⁶¹ ABS4102.0 *Australian Social Trends 2003* Commonwealth of Australia Canberra 2003, 120.
<http://www.abs.gov.au/Ausstats/abs%40.nsf/94713ad445ff1425ca25682000192af2/f46f5073e7cd46e4ca256d39001bc354!OpenDocument>

⁶² ABS "National Families Week and Mother's Day 2003: ABS facts and figures" *Media Release* 9 May 2003
<http://www.abs.gov.au/Ausstats/abs%40.nsf/5f1e01afb32859f9ca25697500217f48/f70acf3834fe074eca256d2800005baf!OpenDocument>

⁶³ E Healy "The shift to long working hours: A social and political crisis in the making" (2000) 8(1) *People and Place* 38 at 41.

operators working more than 49 hours per week increased from 16.3 per cent and 20.9 per cent respectively in 1986-87 to 23.2 per cent and 28.6 per cent in 1995-96.⁶⁴

Men are more likely to work overtime regularly than women. Forty-four per cent of full time male employees in 2000 regularly undertook either paid or unpaid overtime, compared to 36 per cent of full time female employees. Men also worked more overtime hours than women. Forty-seven per cent of those male full time employees who regularly worked overtime in 2000 usually worked 10 hours or more overtime per week compared with 33 per cent of females. However, women were more likely than men to work unpaid overtime. Forty-five per cent of full time female employees who regularly worked overtime in 2000 had not been paid for their most recent period of overtime, compared with 28 per cent of males.⁶⁵

A corollary of longer working hours for full time male workers is a pervasive workplace culture where long hours are entrenched and refusals to work them are regarded dubiously. The ability of the individual to resist such a workplace culture is often very weak, due to the individual's fear of negative reprisals, such as being tainted a "bad" worker, or not a "team player", resulting in possible negative treatment, lack of promotion and pay rises, redundancy, or even termination.

Nevertheless, in a 1998 Australian Bureau of Statistics survey, 27 per cent of full time workers indicated that they would prefer to work fewer hours. The proportion wanting fewer working hours was greatest amongst Managers and Administrators (39.4 per cent) and Professionals (28.9 per cent), but was also significant amongst Tradespersons (19.4 per cent), Advanced Clerical and Service Workers (20.1 per cent), Intermediate Clerical and Sales Workers (17.1 per cent), and Intermediate production and Transport workers (17.4 per cent).⁶⁶

Long working hours for men tend to reinforce the gendered nature of the pattern of unpaid work, often exaggerating the traditional breadwinner/ carer family model. Long working hours deny men the opportunity to be active parents.

4.5 Men are not accessing flexible working arrangements

There is a range of flexible working arrangements available to some men and women to assist them in balancing the demands of both paid work and unpaid caring responsibilities. There is anecdotal evidence that suggests that men who have access to these entitlements, are reluctant to participate in, or take up flexible arrangements for fear of having their commitment to work questioned, thereby threatening career advancement. It has been shown that unless senior executives in larger organisations participate in

⁶⁴E Healy "The shift to long working hours: A social and political crisis in the making" (2000) 8(1) *People and Place* 38 at 47.

⁶⁵ ABS 4102.0 *Australian Social Trends 2003* Commonwealth of Australia Canberra 2003, 122.
<http://www.abs.gov.au/Ausstats/abs%40.nsf/94713ad445ff1425ca25682000192af2/f46f5073e7cd46e4ca256d39001bc354!OpenDocument>

⁶⁶ ABS 6359.0 *Forms of Employment: Australia* Canberra 2000, 11, 24, Table 12.

flexible working initiatives, it is highly unlikely that lower level male employees will take part. There is also evidence showing that men are often not aware of their industrial entitlements relating to their caring responsibilities.

4.5.1 Unpaid Parental leave

Under the *Workplace Relations Act 1996* (the “WRA”) male and female permanent full time and part time employees who have 12 months continuous service with their employer have a minimum entitlement to 52 weeks of shared unpaid parental leave following the birth or adoption of a child.⁶⁷ State legislation generally mirrors the federal provision. Legislation in two States, Queensland and New South Wales, also covers casual employees who have regular/continuous service with one employer for 12 months and casual employees under federal awards may also have access to unpaid parental leave.⁶⁸

Australian Bureau of Statistics data suggests that 83.9 per cent of full time permanent male employees, 73.7 per cent of part time permanent male employees, 64.2 per cent of full time casual male employees, and 46.8 per cent of part time casual male employees would be eligible for unpaid parental leave based on 12 months service with their current employer.⁶⁹

However, eligibility for unpaid parental leave does not provide a reliable guide to the numbers of fathers taking it. Australian Bureau of Statistics data suggest that only 10 per cent of fathers use unpaid parental leave when a child is born, and 96 per cent of fathers return to work within six weeks of their child’s birth. Nearly 70 per cent of fathers use recreation or holiday leave when a child is born.⁷⁰ An old study using 1984 data conducted by the Australian Institute of Family Studies found that on average, fathers took 9.7 days leave and this was most likely to be taken as recreation leave.⁷¹

Reasons suggested for men’s low take-up of parental leave in Australia include that men perceive the taking of such leave will damage their career prospects. They believe that managers may view them as less committed or productive, and that their work will be undervalued as presence in the workplace is often valued over actual performance and

⁶⁷ Sch 14 cl 12 *Workplace Relations Act 1996* (Cth)

⁶⁸ In May 2001, an Australian Industrial Relations Commission decision granted access to unpaid parental leave to federal award-covered casual employees employed on a “regular and systematic basis for several periods of employment or on a regular or systematic basis for an ongoing period of employment during a period of at least 12 months, and has a reasonable expectation of on-going employment”. These provisions will be inserted into federal awards on application by the award parties on an award-by-award basis: *Re Parental Leave – Casual Employees Test Case* Print 904631 31 May 2001 (2001) EOC 93-144, para 8.

⁶⁹ ABS 6254.0 *Career Experience, Australia* Commonwealth of Australia Canberra 1999, 10-11.

⁷⁰ ABS 6254.0 *Career Experience, Australia* Commonwealth of Australia Canberra 1999, 23 Table 13. See also “ABS figures boost push for longer maternity leave” *Australian Financial Review* 30 April 2003, 7.

⁷¹ Australian Institute of Family Studies *Maternity Leave in Australia: Employee and employer experiences – Report of a survey* Commonwealth of Australia Melbourne 1988, 39.

output.⁷² Household finances also often dictate the need for men to be in continual paid work.

Men are also far more reluctant than women to use unpaid parental leave entitlements. Generally, they prefer to use whatever paid leave is available. Reasons for this reluctance to take unpaid leave include that: (i) fathers generally have the highest earning capacity resulting in couples in dual income households deciding to structure men's time in ways that maximise this income; (ii) fathers' paid work tends to accumulate when they are on leave because employers rarely hire replacement labour for men absent on parental leave; (iii) men fear an adverse impact on their career prospects; and (iv) men often feel inadequate and excluded among the predominantly female social networks they encounter when they are primary carers.⁷³

4.5.2 Paid paternity leave

A proportion of Australian employers also provide some form of paid paternity leave. Entitlement to such leave may be available under awards, enterprise agreements, or individual agreements, company policies, or legislation covering public sector employees.

In August 2002, 18.83 per cent of male employees had access to paid paternity leave. Full time male employees were more likely to have a paid paternity leave entitlement than part time male employees (21.39 per cent compared with 4.84 per cent respectively). Public sector employees were more than twice as likely than private sector employees to have access to paid paternity leave (40.99 per cent compared with 14.73 per cent).⁷⁴

Men are also less likely to be aware of their entitlements to paid parental leave than women are. Unpublished data from the Australian Bureau of Statistics' Survey of Employment Arrangements and Superannuation conducted in 2000 found that while 33.7 per cent of male employees were entitled to some form of paid paternity leave, 29 per cent did not know.⁷⁵ This compares with 18 per cent of female employees not knowing whether they were entitled to some form of paid maternity leave.⁷⁶

⁷² Department of Employment, Workplace Relations and Small Business *Work and Family: State of play*, Work and Family Unit Canberra 1998. See also Australian Centre for Industrial Relations Research and Training *Work-family balance: International research on employee preferences* Working Paper 79, September 2002.

⁷³ Australian Centre for Industrial Relations Research and Training *Work-family balance: International research on employee preferences* Working Paper 79 September 2002, 34.

⁷⁴ ABS 6310.0 *Employee Earnings, Benefits and Trade Union Membership* Commonwealth of Australia Canberra 2003, 1.

<http://www.abs.gov.au/Ausstats/abs@.nsf/Lookup/88F55138D00A58E4CA2568A9001393B9>

⁷⁵ ABS 6361.0 *Survey of Employment Arrangements and Superannuation* April – June 2000 unpublished data.

⁷⁶ ABS 6361.0 *Survey of Employment Arrangements and Superannuation* April – June 2000 unpublished data.

4.5.3 Part time work

The availability of regular part time jobs with secure conditions is important in helping families to combine work and family responsibilities. Permanent part time employment provides employees with reasonably predictable work patterns, continuity of employment and access to pro-rata conditions associated with permanent full time employment...⁷⁷

Part time work patterns are highly gendered. In 2001-02, 85.5 per cent of male employees worked full time compared with 54.8 per cent of female employees. Part time work was most prevalent amongst the youngest and oldest age groups with 56.9 per cent of male employees aged 15 to 19 years working part time, and 44.8 per cent of male employees aged 65 years and over working part time. Male employees aged between 25 and 54 years were the least likely to work part time. For example, 7.3 per cent of male employees aged 35 to 44 years worked part time.⁷⁸

A high proportion of part time work is insecure. In 2002, of the almost 2.4 million part time workers, only 934,200 (or 40 per cent) had either paid holiday leave or paid sick leave in their main jobs.⁷⁹ However, many of the part time jobs that are termed "casual" are, in fact not short-term and unpredictable in terms of earnings.⁸⁰

These statistics, however, do not provide any evidence of fathers using part time employment as a tool to better balance their work and family responsibilities. In dual income couple families with children under 12 years in 1999, 2.1 per cent of fathers made use of permanent part time work in order to care for their children compared with 34.3 per cent of mothers.⁸¹

The failure of fathers to take up part time employment opportunities is in part the result of the inflexible and gendered nature of the world of paid work. In a study based on a sample from the *Australian Workplace Industrial Relations Survey 1995*, Gray and Tudball analysed inter alia the availability of permanent part time employment. They found that full time employed females are estimated to be 8.5 per cent more likely to report being able to get permanent part time work in their current workplace if needed than are full time male employees.⁸²

⁷⁷ Department of Family and Community Services and Department of Employment and Workplace Relations *OECD Review of Family Friendly Policies: The reconciliation of work and family life – Australia's background report* Commonwealth of Australia Canberra 2002, 43-43.

⁷⁸ ABS 1301.0 *Year Book Australia 2003* Commonwealth of Australia Canberra Labour: Full time and part time employment
<http://www.abs.gov.au/Ausstats/abs%40.nsf/94713ad445ff1425ca25682000192af2/bd2460e62b9ce02eca256cae00057fc9!OpenDocument>

⁷⁹ ABS 6310.0 *Employee Earnings, Benefits and Trade Union Membership Australia* Commonwealth of Australia Canberra 2003, 1-2.
<http://www.abs.gov.au/Ausstats/abs@.nsf/lookupMF/88F55138D00A58E4CA2568A9001393B9>

⁸⁰ B Pocock *The Work/Life Collision* The Federation Press Sydney 2003, 164.

⁸¹ ABS *Australian Social Trends 2003* Commonwealth of Australia Canberra 2003, 43.

<http://www.abs.gov.au/Ausstats/abs%40.nsf/94713ad445ff1425ca25682000192af2/745de481644ddb93ca256d39001bc33e!OpenDocument>

⁸² M Gray and J Tudball *Family-Friendly Work Practices: Differences within and between workplaces* AIFS Research Report No. 7 Commonwealth of Australia Melbourne 2002, 23.

Moreover, part time employment tends to be peripheral employment, as in it is not part of the employer's "core" business. Part time workers who were formerly "fully committed" professional workers are often relegated to dead-end, back-room jobs once their caring responsibilities impinge on their ability to work full time hours. For both men and women, taking on a part time job means just that, a job, not a career.

Social and workplace expectations of fathers as "providers" committed to full time work impacts negatively on fathers who wish to decrease their work hours so as to engage with their families. Daniel Petre writes in his book *Father Time*:

Some years ago when I first started to question the work ethic in the business environment and attempted to discuss the need for a more balanced approach my actions were interpreted as meaning that I wanted to give up and no longer had the drive or energy to focus on the company. Even more recently, when I changed from full time to part time work, I noticed that people automatically assumed that I had given up and lost my drive.⁸³

Advocating a preference for part time employment for most men is a clear signal to their employer and their colleagues that they are no longer "serious" about their career.

If fathers are to be encouraged to make use of part time work as a mechanism for redressing their current work and family imbalance, the conditions (and pay) for part time workers must improve and part time jobs must be better integrated within workplace structures. For example, making part time work permanent rather than casual and improving access to training and promotion may remove some of the stigma attached to part time work.

4.5.4 Flexible working hours

Even where both parents are in the paid workforce, mothers are more likely than fathers to organise their work around child care responsibilities. In 1999, in dual income couple families with children aged less than 12 years, over two-thirds (69.8 per cent) used mothers' working arrangements to care for children and a third (33.1 per cent) used fathers' working arrangements.⁸⁴ Of these working arrangements, the most commonly used was flexible working hours, with 37.7 per cent of mothers in dual income couple families taking advantage of flexible hours compared with 22.7 per cent of fathers.⁸⁵

Female employees in Queensland in 2002 were more likely to use work arrangements (42 per cent) than males (31.2 per cent) to manage their caring responsibilities. However, this difference was more significant in the private sector than in the public sector. In the

⁸³ D Petre *Father Time: Making time for your children* Macmillan Sydney 1998, 39-40.

⁸⁴ ABS 4102.0 *Australian Social Trends 2003* Commonwealth of Australia Canberra 2003, 43.
<http://www.abs.gov.au/Ausstats/abs%40.nsf/94713ad445ff1425ca25682000192af2/745de481644ddb93ca256d39001bc33e!OpenDocument>

⁸⁵ ABS 4102.0 *Australian Social Trends 2003* Commonwealth of Australia Canberra 2003, 43.
<http://www.abs.gov.au/Ausstats/abs%40.nsf/94713ad445ff1425ca25682000192af2/745de481644ddb93ca256d39001bc33e!OpenDocument>

private sector, 39.1 per cent of female employees used work arrangements to care for another person compared to 27.5 per cent of male employees. In the public sector, 47.6 per cent of female employees compared with 44 per cent of male employees used working arrangements to care for others.⁸⁶

In the Queensland survey it was also found that males were more likely than females to use paid leave (52.7 per cent compared to 40.6 per cent), while female employees were more likely than male employees to temporarily work reduced hours (21.2 per cent compared to 9.5 per cent) and take unpaid leave (20.8 per cent compared to 9.1 per cent) to manage their caring responsibilities.⁸⁷

However, the ability to elect to use flexible hours arrangements to care for children is dependent on an employee's access to such arrangements. According to the *Australian Workplace Industrial Relations Survey 1995* a significant number of employees do not even have any influence over their start and finish times for work. Thirty-two per cent of male carers had no influence over their start and finish times compared with 35 per cent of female carers.⁸⁸

4.5.5 Working from home

Working from home is an infrequent solution to the problem of balancing paid work and caring responsibilities for both mothers and fathers, however, mothers were more likely than fathers to work from home. In 1999 9.6 per cent of fathers compared with 16.9 per cent of mothers in dual income couple families with children aged less than 12 years used work from home arrangements to cater for their caring responsibilities for their children.⁸⁹

4.5.6 Job-sharing

Job-sharing is even more rare than working from home. A mere 0.5 per cent of fathers in families with an employed father in 1999 utilised job sharing as a tool to manage the demands of work and caring for children, compared with 3.5 per cent of mothers in families with an employed mother in 1999.⁹⁰

⁸⁶ ABS 4903.3 *Managing Caring Responsibilities and Paid Employment, Queensland* Commonwealth of Australia Canberra October 2002, 2.
<http://www.abs.gov.au/Ausstats/abs%40.nsf/e8ae5488b598839cca25682000131612/55313b32628bb7eaca256d1500833dba!OpenDocument>

⁸⁷ ABS 4903.3 *Managing Caring Responsibilities and Paid Employment, Queensland* Commonwealth of Australia Canberra October 2002, 2.
<http://www.abs.gov.au/Ausstats/abs%40.nsf/e8ae5488b598839cca25682000131612/55313b32628bb7eaca256d1500833dba!OpenDocument>

⁸⁸ A Morehead et al *Changes At Work: The 1995 Australian Workplace Industrial Relations Survey* Longman Melbourne 1997, 560 Table A12.6a.

⁸⁹ ABS 4102.0 *Australian Social Trends 2003* Commonwealth of Australia Canberra 2003, 43.
<http://www.abs.gov.au/Ausstats/abs%40.nsf/94713ad445ff1425ca25682000192af2/745de481644ddb93ca256d39001bc33e!OpenDocument>

⁹⁰ ABS 4402.0 *Child Care Australia June 1999* Commonwealth of Australia Canberra 2000, 42 Table 30.

4.6 Conclusion

For fathers to undertake shared care of their children after parental separation, they need flexible work practices which allow them to fit work around their children, and a level of competence in caring work.

Attempting to achieve these goals after relationship breakdown is fraught with risk for the well-being of both parents and children. Involved fathering, which includes doing the caring work for children, ideally needs to start after the child's birth. Caring work also takes time, a commodity that most working fathers lack. Thus, in order for fathers to take up their dual roles as carers for children and participants in the paid workforce, work practices and workplace culture need to adapt to allow for more flexibility for all workers with family responsibilities.

The Commission submits that the imposition of a rebuttable presumption of joint residency after parental separation (assuming that this means a presumption of shared caring of children) seeks to impose shared parenting without addressing the structures which have severely limited the capacity of parents to share the care of their children while the family is still intact. While the goal of shared care of children is admirable, this proposed pathway to attain that goal cannot be supported.

5. Violence against women and children

5.1 Introduction

Protecting a child from violence must be a central concern of the family law system. In addition, women need protection from violence, both in their own right and in order to protect children from abuse through witnessing domestic violence. Women and children have particular rights, under international law, to protection from violence, in recognition of their ongoing history as victims of physical, sexual and emotional violence.⁹¹

This section discusses the incidence and seriousness of violence in separating families and before the Family Court, and argues that a presumption of joint custody would not allow the Family Court to give adequate consideration to the issue of violence in individual cases.

5.2 Incidence of violence in Family Court cases: the “core business” of the Court

There are no comprehensive data on the incidence of violence in cases going to hearing before the Family Court. However, there are some important studies on violence and the family law system, which provide enough evidence to suggest that violence in such situations may be the norm rather than the exception.⁹²

The Commission urges the Committee to recommend further research.

5.3 Incidence of violence within separating families

There is evidence to indicate that violence is at its most pervasive and serious in separating families.⁹³

⁹¹ See *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) Article 1 read with Committee on the Status of Women General Recommendation No. 19 (11th session, 1992) *Violence against women*; *Convention on the Rights of the Child* Article 19(1): “States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.”

⁹² T Brown with R Sheehan M Frederico and L Hewitt *Resolving Family Violence to Children* Family Violence and Family Court Research Program Monash University 2001, p1: “Child abuse and other family violence issues had become a major component of the court’s workload, its core business in effect.”; H Rhoades R Graycar and M Harrison *The Family Law Reform Act 1995: The first three years* University of Sydney and Family Court of Australia Sydney 2000. See also T Brown “Children and Family Violence in the Family Court: Research into action” *Changing families, challenging futures 6th* Australian Institute of Family Studies Conference, Melbourne 25-27 November 1998, accessed at <http://www.aifs.gov.au/institute/afrc6papers/brown.html>

⁹³ Australian Institute of Family Studies *Unpublished data* 2000 cited in T Brown with R Sheehan M Frederico and L Hewitt *Resolving Family Violence to Children* Family Violence and Family Court Research Program Monash University 2001, 2, 6. See also L Laing *Children, Young People and Domestic Violence* Issues Paper 2 Australian Domestic and Family Violence Clearinghouse University of New South Wales Sydney 2000, 19; G Sheehan and B Smyth “Spousal violence and post-separation financial outcomes” (2000) 14 *Australian Family Law Journal* 102 at 109; M Hume “The Relationship Between

5.3 Allegations of violence in the Family Court are substantiated

Acts of violence against women and children are often subjected to claims of falsity or exaggeration. This is particularly so in the family law arena.

However, data on substantiation of abuse by State child protection services show that the rate of abuse substantiation in Family Court cases was higher than the rate of abuse substantiations generally.⁹⁴ These are high rates of substantiated abuse among any group of people. In these circumstances, cases involving violence, or even allegations of violence, of any sort, including a past history of abuse, should not be subject to a presumption of joint residence.

Where violence is an issue it is important that cases be decided on their facts and that the Family Court is able to make a determination that addresses their particular circumstances. Child abuse cases are particularly difficult to determine and require the full discretion of the Court.⁹⁵ Any sort of presumption about residence arrangements in cases involving violence or child abuse would be inappropriate.

The Commission urges the Committee to recommend further research.

5.4 Conclusion

Levels of violence in cases before the Family Court appear from the available research to be very high and of a serious nature.

In these circumstances, the Commission believes that a presumption of joint residence is ill advised, that the court should retain its discretion in all cases to order the residence arrangements best suited to the particular case and that there is an increased risk of violence within separating families if such a presumption is introduced. It is, of course,

Sexual Abuse, Domestic Violence and separating families" Paper presented at the *Child Sexual Abuse: Justice responses or alternative resolution* Conference Australian Institute of Criminology Adelaide 1-2 May 2003, 2, 4; J Mouzos and C Rushforth *Family Homicide in Australia* Trends and Issues in Crime and Criminal Justice No. 255 Australian Institute of Criminology Canberra 2003, 2, 3; J Mouzos *Homicidal Encounters: A study of homicide in Australia 1989-1999* Research and Public Policy Series No 28 Australian Institute of Criminology Canberra 2000.

⁹⁴ T Brown with R Sheehan M Frederico and L Hewitt *Resolving Family Violence to Children* Family Violence and Family Court Research Program Monash University 2001, 41, 44; M Hume *Child Sexual Abuse and the Family Court* unpublished thesis University of South Australia 1996, cited in T Brown with R Sheehan M Frederico and L Hewitt *Resolving Family Violence to Children* Family Violence and Family Court Research Program Monash University 2001, 41; T Brown M Frederico L Hewitt R Sheehan *Violence in Families Report Number One: The management of child abuse allegations in custody and access disputes before the Family Court of Australia* Monash University Clayton and Australian Catholic University Canberra 1998, 89; Australian Law Reform Commission *Equality Before the Law: Justice for women* Report No 69 Part I Commonwealth of Australia Sydney 1994, 27, 28-29; T Brown M Frederico L Hewitt R Sheehan *Child abuse and the Family Court* Trends and Issues in Crime and Criminal Justice Australian Institute of Criminology Canberra 1998, 2.

⁹⁵ See, for example, P Parkinson "Family law and child-parent contact: Assessing the risk of sexual abuse" *Family Court of Australia Third National Conference* Melbourne 20-24 October 1998.

unacceptable that separated parents be required to continue to suffer violence at the hands of their ex-spouse, but, further, it can not be considered to be in the best interests of the child to require continued contact between the parents and potentially allow continued violence.

6. Child support

6.1 Introduction

This section addresses part (b) of the terms of reference, “whether the existing child support formula works fairly for both parents in relation to their care of, and contact with, their children”.

First, an overview of divorce and lone parenting statistics in Australia is provided by way of background.

Secondly, the coverage and level of child support paid is examined with the Commission being of the view that the level of child support paid by non-resident parents is generally insufficient to prevent resident parents (predominantly women) and their children living in poverty post separation. The Commission is opposed to any policy suggestion which would further reduce the level of child support paid to resident parents and children.

Thirdly, the nexus between non-resident parents’ contact with their children and the payment of child support is critically analysed. The Commission questions the evidentiary basis behind this policy driver which already results in child support payments being reduced where children spend 30 per cent of the nights with their non-resident parent. The Commission opposes any policy proposal which extends these provisions.

Finally, the Commission considers two of the more common criticisms levelled at the Child Support Scheme: that it provides a disincentive for parents to either enter the paid workforce or increase their earnings; and that enforcement of child support is more strict than enforcement of contact orders where contact with the child is withheld by the respondent parent.

6.2 Overview of divorce and lone parenting in Australia

While the divorce rate changed little between 1986 and 2001 (fluctuating at under three divorces per 1,000 population per annum), the number of divorcees in Australia almost doubled from 600,000 in 1986 to 1.1 million in 2001.⁹⁶ Just over half of all divorces involve children under the age of 18 years.⁹⁷ Lone mothers comprised 83 per cent of lone parents in both 1986 and 2001. In 2001, 22 per cent of lone mothers had at least one child under five living with them, compared with nine per cent of lone fathers, whereas 56 per

⁹⁶ ABS 4102.0 *Australian Social Trends 2002* Commonwealth of Australia Canberra 2002, 31.
<http://www.abs.gov.au/Ausstats/abs%40.nsf/94713ad445ff1425ca25682000192af2/ea57eeffc3a6f5ebca256bcd008272e6!OpenDocument>

⁹⁷ ABS 4102.0 *Australian Social Trends 2002* Commonwealth of Australia Canberra 2002, 31.
<http://www.abs.gov.au/Ausstats/abs%40.nsf/94713ad445ff1425ca25682000192af2/ea57eeffc3a6f5ebca256bcd008272e6!OpenDocument>

cent of lone fathers had children aged over 15 years living with them, compared with 39 per cent of lone mothers.⁹⁸

In 1997, 18 per cent of Australia's 4.6 million children were in one-parent families and eight per cent were in step or blended families. Three per cent of children who had a natural parent living elsewhere, had parents who shared the care between them (that is each parent cared for the child for at least 30 per cent of the time), while the vast majority (88 per cent) were in the sole care of the parent with whom they resided.⁹⁹

Children of all ages were more likely to live with their mother than their father when their parents separated. In April 1997, 96 per cent of 0-4 year olds, 89 per cent of 5-11 year olds and 82 per cent of 12-17 year olds whose parents had separated, lived with their mother. The proportion of boys aged 12-17 years living with their fathers was higher than the proportion of girls the same age living with their fathers (21 per cent of boys compared with 15 per cent of girls).¹⁰⁰

6.3 Women, children and poverty

Early Australian studies indicate that, in general, women (and by association, their children) are more likely than men to experience financial hardship after divorce¹⁰¹, and that repartnering remains a major way out of financial difficulties for women and children post divorce.¹⁰² These conclusions continue to hold true. More recent research by the Australian Institute of Family Studies indicates that:

...a range of factors combine to effect post-divorce economic disadvantage, but ... the most significant of these is having had throughout the marriage, and continuing to have, the primary caregiver responsibility for young children. Inadequate recognition of the financial consequences of caring for family members impacts not only on financial settlements on divorce, but also on a range of social and economic pathways out of disadvantage.¹⁰³

⁹⁸ ABS 4102.0 *Australian Social Trends 2003* Commonwealth of Australia Canberra 2003, 39.
<http://www.abs.gov.au/Ausstats/abs%40.nsf/94713ad445ff1425ca25682000192af2/ea563423fdbffd30ca256d39001bc33c!OpenDocument>

⁹⁹ ABS 4442.0 *Family Characteristics, Australia* Commonwealth of Australia Canberra
<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/E6A9286119FA0A85CA25699000255C89>

¹⁰⁰ ABS 4102.0 *Australian Social Trends 1999* Commonwealth of Australia Canberra 1999, 43.
<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/A790FF34BB1F14EACA25699F0005D616>

¹⁰¹ P F McDonald *Settling Up: Property and Income Distribution on Divorce in Australia* Australian Institute of Family Studies and Prentice-Hall of Australia Sydney 1986; K Funder, M Harrison and R Weston *Settling Down: Pathways of Parents After Divorce* Australian Institute of Family Studies Melbourne 1993.

¹⁰² P F McDonald *Settling Up: Property and Income Distribution on Divorce in Australia* Australian Institute of Family Studies and Prentice-Hall of Australia Sydney 1986; K Funder, M Harrison and R Weston *Settling Down: Pathways of Parents After Divorce* Australian Institute of Family Studies Melbourne 1993.

¹⁰³ G Sheehan and B Fehlberg "Families, divorce and family law" *Family Matters* No. 55 Autumn 2000, 5. See also B Smyth and R Weston *Financial living standards after divorce: A recent snapshot* Research paper No. 23 Australian Institute of Family Studies December 2000.
<http://www.aifs.gov.au/institute/pubs/RP23.html>

Further evidence of the financial distress borne by lone parents in particular is provided by the Australian Bureau of Statistics. In 1998-99, 72 per cent of lone-parent households with dependent children experienced financial stress, with 41 per cent experiencing higher levels of financial stress. This compares with 38 per cent of couple families with dependent children experiencing financial stress.¹⁰⁴

Research in the US and elsewhere has found that the single most important determinant of child well-being after divorce is living in a household with adequate income.¹⁰⁵ One study found that approximately one half of the disadvantage experienced by children in one-parent families is attributable to the lower income of one-parent families compared to two-parent families.¹⁰⁶

The Commission considers that Australia's Child Support Scheme is based on sound social policy principles – private responsibility for the care of children (with a public safety net) and parental capacity to pay. In fact, however it appears that the current coverage of the child support system and levels of child support are insufficient to provide children with a satisfactory standard of living post-separation.

In 1997, 42 per cent of families with at least one child with a parent living elsewhere (199,200 one-parent families and 53,700 step and blended families) received cash child support from the other parent. A further 16 per cent received support such as clothing, pocket money and assistance with school fees. However, 41 per cent of these families received no child support from the other parent.¹⁰⁷

Recent changes to the child support formula introduced following the recommendations of the Joint Select Committee on the Operation and Effectiveness of the Child Support

¹⁰⁴ ABS 4102.0 *Australian Social Trends 2002* Commonwealth of Australia Canberra 2002, 173.
<http://www.abs.gov.au/Ausstats/abs%40.nsf/94713ad445ff1425ca25682000192af2/7da12563487b9a89ca256bcd0082730b!OpenDocument>

¹⁰⁵ P R Amato "Children's adjustment to divorce: Theories, hypotheses, and empirical support" (1993) 55 *Journal of Marriage and the Family* 23-38; L M Argys et al "The impact of child support on cognitive outcomes of young children" (1998) 35 *Demography* 159-173; K F Folk, J W Graham, and A H Beller "Child support and remarriage: Implications for the economic well-being of children" (1992) 13 *Journal of Family Issues* 142-157; I Garfinkle, D Oellerich and P K Robins "Child support guidelines: Will they make a difference?" (1991) 12 *Journal of Family Issues* 409-429; M S Hill "The role of economic resources and remarriage in financial assistance for children of divorce" (1992) 13 *Journal of Family Issues* 158-178; D R Meyer "Child support and welfare dynamics: Evidence from Wisconsin" (1993) 30 *Demography* 45-62; D R Meyer and J Bartfield "Compliance with child support orders in divorce cases" (1996) 58 *Journal of Marriage and the Family* 201-212; J D Teachman "Contributions to children by divorced fathers" (1991) 38 *Social Problems* 358-371; J D Teachman "Who pays? Receipt of child support in the United States" 53 *Journal of Marriage and the Family* 759-772; E Thomson, T L Hanson and S McLanahan "Family structure and child well-being: Economic resources versus parental behaviours" (1994) 73 *Social Forces* 221-242 cited in Washington State Courts *What the Experts Say*
http://www.courts.wa.gov/newsinfo/newsinfo_reports/index.cfm?fa=newsinfo_reports.display&folder=parent&file=chap4#A12

¹⁰⁶ S McLanahan and G Sandefur *Growing Up With A Single Parent: What hurts, what helps* Harvard University Press Cambridge 1994.

¹⁰⁷ ABS 4442.0 *Family Characteristics, Australia* Commonwealth of Australia Canberra 1998, 1.
<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/E6A9286119FA0A85CA25699000255C89>

Scheme in 1999 and 2001 to the child support formula have seen most child support liabilities fall because of increases in the exempt income amount.¹⁰⁸ The exception is where payers previously had no liability because their taxable income was below the child support threshold – most now pay the minimum amount of \$260 per annum.

Child support payer parents are predominantly fathers while payee parents are predominantly mothers. Of the payer parents who use the Child Support Agency to collect child support payments, 90.3 per cent are male and 9.6 per cent are female. Of the payer parents who pay child support via private arrangements, 89.4 per cent are male and 10.5 per cent are female.¹⁰⁹

The majority of parents registered with the Child Support Scheme have relatively low incomes.¹¹⁰ Even so, the median taxable incomes for child support payers (\$30,111) are significantly greater than the median taxable incomes for payees (\$18,372).¹¹¹ This pattern holds true using a more comprehensive measure of income.¹¹²

¹⁰⁸ The exempt income amount – the amount deducted from the payer's child support income to allow for the payer's personal living and self-support costs – is currently set at \$12,315 where the payer has no dependent children in his/her care and increases to \$20,557 where the payer has one or more dependent children. See Child Support Agency *Child Support Formula* <http://www.csa.gov.au/parents/formula.htm>

¹⁰⁹ Of the payee parents who use the Child Support Agency to receive child support payments, 9.4 per cent are male and 90.5 per cent are female. Of those payee parents who receive child support payments via personal arrangements 10.4 per cent are male and 89.6 per cent are female. See Attorney-General's Department *Child Support Scheme Facts and Figures 2000-2001* Commonwealth of Australia Canberra April 2002, 19.

¹¹⁰ Recipients of government benefits, such as Family Allowance, who have children from a previous relationship must take reasonable action to obtain child support as part of the conditions for receiving benefits. This means lodging an application for assessment under the child support formula and either having the payments collected by the Child Support Agency, privately collecting the assessed amount, or lodging a child support agreement that meets the assessed amount of child support. Thus, a large number of parents registered with the Child Support Agency are low income earners.

¹¹¹ This information is derived from the Tax Returns Data Base. The data is for all parents who have lodged a tax return. See Attorney-General's Department *Child Support Scheme Facts and Figures 2000-2001* Commonwealth of Australia Canberra April 2002, 19. As at June 2001, the median taxable income (excluding family tax benefits) of payer parents was \$30,111 compared with \$18,372 for payee parents. Attorney-General's Department *Child Support Scheme Facts and Figures 2000-2001* Commonwealth of Australia Canberra April 2002, 20-21, Tables 4.9 and 4.11.

¹¹² Some parents are exempted from lodging a tax return where their income is received from Centrelink. Data derived from the Child Support System includes both parents who have lodged a tax return and parents who have not. Thus it provides a more comprehensive coverage of payer and payee parents' income. Again, using this measure of median income, child support payers are significantly better off than child support payees. The median Child Support System income of payer parents was \$18,367 as at June 2001. This compares with the median Child Support System income of payee parents of \$9,487. See Attorney-General's Department *Child Support Scheme Facts and Figures 2000-2001* Commonwealth of Australia Canberra April 2002, 20-21, Tables 4.8 and 4.10.

The average amount¹¹³ of child support paid by the payer parent is not high relative to the low median incomes of most payer parents.¹¹⁴ For a parent earning a taxable income of \$20,000 per annum, for example, child support liability for one child constitutes less than seven per cent of his/her taxable income (or \$27 per week).¹¹⁵ As at June 2001, 39 per cent of payer parents paid \$5 or less per week child support, 54 per cent of payer parents paid less than \$38 per week, and 80 per cent of payer parents paid less than \$100 a week child support.¹¹⁶

These amounts of child support are considerably less than the estimated costs of rearing a child. The Social Policy Research Centre calculated that at a low cost standard,¹¹⁷ the "cost of one child" is between 20 per cent and 33 per cent of the expenditure relative to a couple without children (\$381.60 per week).¹¹⁸ This equates to between \$77 and \$126 per week.¹¹⁹ If this amount is divided in two, the cost of one child for each parent is between \$38.50 and \$63 per week, significantly more than a majority of payer parents are contributing to child support payments.

The Commission is opposed to any recommendation which would further reduce current levels of child support to resident parents and children.

¹¹³ The average weekly child support liability (including those cases where the annual liability is \$260 or less) is \$62.50 as at June 2001. See Attorney-General's Department *Child Support Scheme Facts and Figures 2000-2001* Commonwealth of Australia Canberra April 2002, 25, Table 5.3. The average weekly child support liability by number of eligible children as at June 2001 was \$45.50 for one child, \$82.52 for two children, and \$97.15 for three children. See Attorney-General's Department *Child Support Scheme Facts and Figures 2000-2001* Commonwealth of Australia Canberra April 2002, 25, Table 5.4.

¹¹⁴ As at June 2001 39 per cent of child support payer parents paid \$260 or less per annum in child support. See Attorney-General's Department *Child Support Scheme Facts and Figures 2000-2001* Commonwealth of Australia Canberra April 2002, 23, Table 5.1

¹¹⁵ The payer parent in this example is single and has no relevant dependents. See Child Support Agency *Do parents really pay 18% of their taxable income in supporting one child?* Information Sheet, yet to be published.

¹¹⁶ These statistics provide a rather crude analysis of child support liability because they do not provide for the number of children supported by those amounts.

¹¹⁷ "The low cost budget standard is one which may require frugal and careful management of resources but would still allow social and economic participation consistent with community standards and enable the individual to fulfil community expectations in the workplace, at home and in the community. It describes a level below when it becomes increasingly difficult to maintain an acceptable living standard because of the increased risk of deprivation and disadvantage. In round terms, the low cost standard represents what is achievable at about one-half of the median standard in the community." M McHugh *The Costs of Children: Budget standards estimates and the child support scheme* Social Policy Research Centre Discussion Paper No. 103 July 1999, 5.

¹¹⁸ P Saunders et al *Development of Indicative Budget Standards for Australia* Social Policy Research Centre Research Paper No. 74 March 1998. See also M McHugh *The Costs of Children: Budget standards estimates and the child support scheme* Social Policy Research Centre Discussion Paper No. 103 July 1999, 10 Table 1.

¹¹⁹ M McHugh *The Costs of Children: Budget standards estimates and the child support scheme* Social Policy Research Centre Discussion Paper No. 103 July 1999, 10 Table 1.

6.4 The contact/child support nexus

There is scant data available in Australia or overseas on the monetary costs of contact for the non-resident parent, and the relationship of these costs (such as transport, food, leisure activities, energy and medicines) to those incurred by the resident parent.¹²⁰

It has been estimated in the US that a reduction in the financial costs of caring for children for resident parents probably does not occur until near-equal sharing of care (around 40 to 50 per cent shared care).¹²¹

The debate on the nexus between contact and child support in Australia has tended to focus on the costs of contact for non-resident parents, such as establishing the infrastructure necessary for children to stay overnight with their non-resident parent (for example, the non-resident parent providing accommodation that has separate bedrooms for children), while paying little attention to investigating at what point the resident parents' costs of caring for children start to decrease. Of course, non-resident parents do incur costs while caring for their children. However, it is not appropriate to instead reduce child support payments to resident parents, without first being able to demonstrate that the resident parents' costs have decreased.

It should also be kept in mind the lumpiness of the costs of caring for children after separation. For example, the more time a child spends with a non-resident parent, costs such as food and power for a resident parent will reduce, however fixed costs such as school expenses and rent will not.

Despite the scarcity of Australian data on these issues,¹²² child support payments received by the payee resident parent start to reduce¹²³ once the child or children spend more than 30 per cent of nights with their non-resident payer parent. Very few parents have taken

¹²⁰ B Smyth "Research into parent-child contact after parental separation" *Family Matters* No.62 Winter 2002, 35.

¹²¹ M S Melli "Guideline review: Child support and time sharing by parents" (1999) 33 *Family Law Quarterly* 219-234 cited in B Smyth "Research into parent-child contact after parental separation" *Family Matters* No.62 Winter 2002, 35.

¹²² Note that the Australian Institute of Family Studies is currently undertaking the *Caring for Children after Separation* project as part of its Family and Marriage Program. See B Smyth "Research into parent-child contact after parental separation" *Family Matters* No.62 Winter 2002, 33-37.

¹²³ The percentage at which the payer pays child support for one child decreases from 18 per cent of the payer's "adjusted income" where the payee is classified as having 'sole' care of one child, to 14 per cent where the payee is classified as having 'major' care of one child, to 12 per cent where the payee is classified as having 'shared' care of one child, and to 8 per cent of the payer's adjusted income where the payee parent is classified as having 'substantial' care of one child. These percentages vary with the number of children. "Adjusted income" is arrived at by subtracting the payer's exempted income (that set aside for self-support which is determined by the number and age of children in the payer's care) and 50 per cent of the payee's 'excess income' (the amount of the payee's income above \$36,213 for 2003) from the payer's 'child support income' (the payer's taxable income plus any supplementary amounts such as foreign income exempt from tax, rental property losses, and reportable fringe benefits). See Child Support Agency *Child Support Formula* <http://www.csa.gov.au/parents/formula.htm> and Child Support Agency *Care Arrangements Fact Sheet* <http://www.csa.gov.au/pubs/fact/3072.htm>

advantage of this policy. As at June 2001, “sole care”¹²⁴ parenting arrangements constituted 94 per cent of the Child Support Agency’s caseload.¹²⁵ This remains the case as at June 2003.¹²⁶

The proposal to further reduce the child support payable by non-resident parents whose children stay with them for between 10 and 29 per cent of nights per year contained in the Child Support Legislation Amendment Bill 2000 (No. 2) was rejected by the Senate in 2001. It was argued by the Child Support Consultative Group at the time of developing the child support formula that the costs of contact of less than 30 per cent of the time for non-resident parents were factored into the development of the formula.¹²⁷

Applying the current child support legislation outlined above, a rebuttable presumption of joint parenting will lower the child support payments received by resident parents (who are usually mothers), without necessarily putting women in a position where they can earn more income from paid employment. The nature of the shared care arrangements is obviously a crucial factor in determining carers’ labour force participation.¹²⁸

Since the purpose of the Child Support Scheme is to facilitate financial support for the child after separation, the child support formula needs to be administered in such a way that the net support to the child remains unchanged.

It should also be kept in mind that, without significant change to work practices, the same limitations impacting on the capacity of parents with sole care of children to participate in the labour market, namely the age and number of children, the parent’s skills, qualifications and experience, and the availability of affordable child care will also impact on the labour force capacity of both parents sharing care.¹²⁹

The Commission believes that the best interests of the child are not served by linking the amount of contact the non-resident parent has with his or her child and the amount of

¹²⁴ “Sole care” refers to where the child spends more than 70 per cent of the nights with the payee parent.

¹²⁵ As at 2001, 2.2 per cent of the Child Support Agency’s caseload is classified ‘major’ care (the child spends between 60 and 69 per cent of the time with their payee parent), 3.5 per cent are classified ‘shared care’ (where the child spends between 40 and 59 per cent of the time with the payee parent), and 0.3 per cent are classified as ‘substantial care’ (where the child spends between 30 and 39 per cent with the payee parent). See Attorney-General’s Department *Child Support Scheme Facts and Figures 2000-2001* Commonwealth of Australia Canberra April 2002, 16, Table 3.5.

¹²⁶ As at June 2003, 93 per cent of the Child Support Agency’s caseload is classified as ‘sole’ care, with 4.1 per cent classified as ‘shared care’, an increase of 0.6 per cent in two years. See Child Support Agency, unpublished data, 1 August 2003.

¹²⁷ *Child Support: Formula for Australia* May 1988, 68 cited in C Argall “Briefing Paper for the Family Law Council” Child Support Agency November 2001.

¹²⁸ M Baker “New employment policies, poverty and mothering” *Family Matters* No. 55 Autumn 2000, 46-51.

¹²⁹ F Carberry “Parents sharing care of children – family law and income support” paper presented at the 6th Australian Institute of Family Studies Conference *Changing families, challenging futures*, Melbourne, 25-27 November 1998 <http://www.aifs.gov.au/institute/afrc6papers/carberry.html>

child support provided by the non-resident parent for the child.¹³⁰ It is unlikely that many of the costs of caring for children would be shifted from the resident parent to the non-resident parent unless significant levels of contact are undertaken by the non-resident parent because separation usually duplicates the costs of caring for children.

6.5 Criticisms of the Child Support Scheme

Critics of the Child Support Scheme allege that it provides a disincentive on the part of both payer and payee parents to participate in the paid workforce. This criticism is without foundation. There are a number of interrelated factors that parents need to consider when moving from unpaid work into the paid workforce or to earn additional income. These include reduced Centrelink benefits, increased taxation, and changes to child support and childcare arrangements and costs.

Take for example a single income family prior to separation with a taxable income of \$20,000.¹³¹ After tax, the family is left with \$17,770. Add to this the following family benefits, \$5,453 of Parenting Payment (PP), \$3,402 of Family Tax Benefit A (FTB A) and \$949 of Family Tax Benefit B (FTB B), the total household income is \$27,574.

Post-separation, the payee parent (assuming that the payer parent had no relevant dependents and was not in the paid workforce) would receive \$11,599 of PP, \$3,275 of FTB A, \$2,037 of FTB B, and \$1,383 of Child Support per annum, giving a total household income of \$18,294.

The total household income of the payer parent would be \$16,387 (after tax income of \$17,770 minus Child Support payment of \$1,383).

Should the payer parent have a partner and one relevant dependent living with him or her, the payee's total household income falls to \$17,298, as the payer's child support liability drops to \$260. This is partially offset by an increase of \$127 in FTB A for the payee parent, but still leaves the payee parent \$996 worse off per year. Comparing the total household income of the payer's new blended family (\$27,314) with the total household income of the original family prior to separation (\$27,574) indicates that the payer's new blended family is only \$260 per year worse off. The \$260 will have gone in contribution to the welfare of the child from the original family and is much less than half the annual cost of raising that child.

This trend holds true for families on other levels of taxable income but with the household income gap between the payee and the payer increasing with the payer's taxable income. For example a single earner family with taxable income of \$35,000 prior to separation has a total household income of \$32,269. Post separation the payee's total

¹³⁰ See also Joint Select Committee on Certain Family Law Issues *Child Support Scheme: An Examination of the operation and effectiveness of the scheme* Australian Government Publishing Service Canberra 1994, 383.

¹³¹ The following examples are based on unpublished tables provided by the Child Support Agency, July 2003.

household income (assuming that the payer has no relevant dependents) is \$19,644 of which \$4,083 is child support, while the payer's total household income is \$23,720.

A single earner family with taxable income of \$75,000 prior to separation has a total household income of \$54,940. Post separation the payee's total household income (again assuming that the payer has no relevant dependents) is \$26,014 of which \$11,283 is child support, while the payer's total household income is \$40,535.

As evidenced by the examples above, while both the payer parent and the payee parent are less well off financially after separation, the child support liability based as it is on the payer's capacity to pay does not provide a disincentive for the payer parent to earn less or leave the paid workforce altogether.

Another criticism levelled at the Child Support Scheme relates to payer parents' perception of the strict enforcement of child support payments via the administrative functions of the Child Support Agency compared with the perceived 'lax' enforcement of breached contact orders by the Family Court. It is argued that the Government provides assistance to payee (resident) parents to enforce payment of child support, but there is no Government-provided assistance to payer (non-resident) parents if contact with the child is withheld.

This linkage tends to support the construction of contact with the child as a parental right, a right that they have paid for by the provision of child support.

The Family Law Act provides for the imposition of penalties where a parent has breached a parenting order without reasonable excuse ("contravention applications"). Contravention applications are generally brought by non-resident parents alleging a failure by the resident parent to make the children available for contact. The number of these applications more than doubled from 786 in 1995-96 to 1,976 in 1999-2000. A review of contravention judgments from 1998-99 found that 95 per cent of the applications were brought by contact parents (89 per cent of them fathers), and that 62 per cent of cases were found to be without merit. "Make-up" contact orders (that is, additional contact arrangements to compensate for missed contact time) were ordered in only 10 per cent of cases, implying that this was not the primary aim of most applications.¹³²

Doubts have been raised about the reliability of contravention judgments, which the Commission does not share. If however, the Committee wished to pursue this matter further, the Commission urges it to conduct a reliable review of contravention judgments as a first step.

¹³² H Rhoades, R Graycar and M Harrison *The Family Law Reform Act 1995: The First Three Years* University of Sydney and Family Court of Australia Sydney 2000, 9, 85.

6.6 Conclusion

The Commission submits that there is no evidence to suggest the child support formula is unfair. Generally, resident parents have lower income levels than non-resident parents and they face ongoing workforce disadvantage.

7. Conclusion

7.1 Joint residence

There is widespread agreement that having fathers more often and more directly involved in parenting would make a lot of men happy and in most cases benefit children. Nobody disagrees that it is always preferable for boys and girls to have positive relationships with their fathers and for them to benefit from family life and the love and attention of both parents, including after marriage breakdown.

However, a presumption of joint residence, with its attendant inflexibility, is not in the best interests of children. It also seeks to legislate parent-child relationships, rather than providing families with the support to form strong caring relationships that survive relationship breakdown through consent not coercion.

Certainly, Australia's international obligations require that, where it is in a child's best interests, personal relationships with both parents are maintained. However, the "best interests" principle does not suggest that any one form of residence is preferred for children. In fact, it is important that the Family Court retain its full discretion to decide on the best residential arrangements for children in individual cases. The "best interests" of the child in any individual case should not be overridden by fixed presumptions about what is best.

The issue of violence in Family Court matters is one example of the general need for discretion so that complex individual cases can be considered on their facts.

Where families are able (as they are able now, except in a small minority of cases) to work out the best residence arrangements for them, they should be permitted to do so without having "one size fits all" parenting arrangement imposed on them.

While joint residence should not be imposed on families through legislated presumptions, there is a place for encouraging shared parenting before relationship breakdown. This will help to ensure that fathers have strong and continuing relationships with their children throughout their lives.

Fathers need assistance to establish caring roles with their children before separation, through flexible work arrangements and encouragement to take on wider roles in the family and society than simply that of worker and "breadwinner".

Considering men's parenting role after separation is too late. It may also serve to increase conflict in separating families, leading to poorer outcomes for children and generally compromising their best interests.

7.2 Child support

The current child support legislation is an important protection of the financial position of children post-separation, when they are vulnerable to diminished socio-economic status and poverty. The current child support formula should not be changed to satisfy parents' financial preferences, particularly where this would result in further vulnerability for children.