UnitingCare Burnside

because children matter

House of Representatives Standing Committee on Family and Community Affairs
Submission No: 521
Date Received: 8-8-03
Secretary: ✓

CENTRAL OFFICE
13 Blackwood Place
North Parramatta
PO Box 6866
Parramatta NSW 2150
Tel: (02) 9768 6866
Fax: (02) 9630 6210
(02) 9630 0664
ABN 33 779 614 962
www.burnside.org.au

6th August 2003

Committee Secretary
Standing Committee on Family and Community Affairs
Child Custody Arrangements Inquiry
Department of the House of Representatives
Parliament House
Canberra ACT 2600

RECEIVED
House of Representatives
8 AUG 2003
Family & Community Affairs Committee

Dear Sir or Madam

Uniting*Care* Burnside (Burnside) welcomes the opportunity to provide a submission to the House of Representatives Family and Community Affairs Committee's inquiry into child custody.

Burnside is an agency of the Uniting Church in Australia and a leading child and family agency in NSW. Our purpose is to provide innovative and quality programs and advocacy to break the cycle of disadvantage that affects children, young people and their families. We strive to work with children and provide services that will be of most benefit to them, to their families, and subsequently to all members of Australian society. In all our services we seek to support healthy family relationships, nurture the capacity for positive outcomes for children and young people, and build strong communities.

Burnside would emphasise that any changes to the legislation should be ones that *increase* people's access to justice in Family Court proceedings in a manner that is safe for all involved. As an agency with a strong focus on the protection of children and young people, we are concerned particularly with the way in which residence and contact arrangements in the event of parental separation impact upon this vulnerable group. It is of paramount importance to reduce, as far as possible, children and young people's exposure to conflict and violence and to ensure that they, and those caring for them, have sufficient access to a safe and secure family environment.

Burnside believes that people most affected by changes to social policy should be consulted and their voices heard in the debate. Responses are based on the comments of those affected by past policy and practice in relation to out-of-home care, as well as staff and management.

Yours sincerely

Jane Woodruff

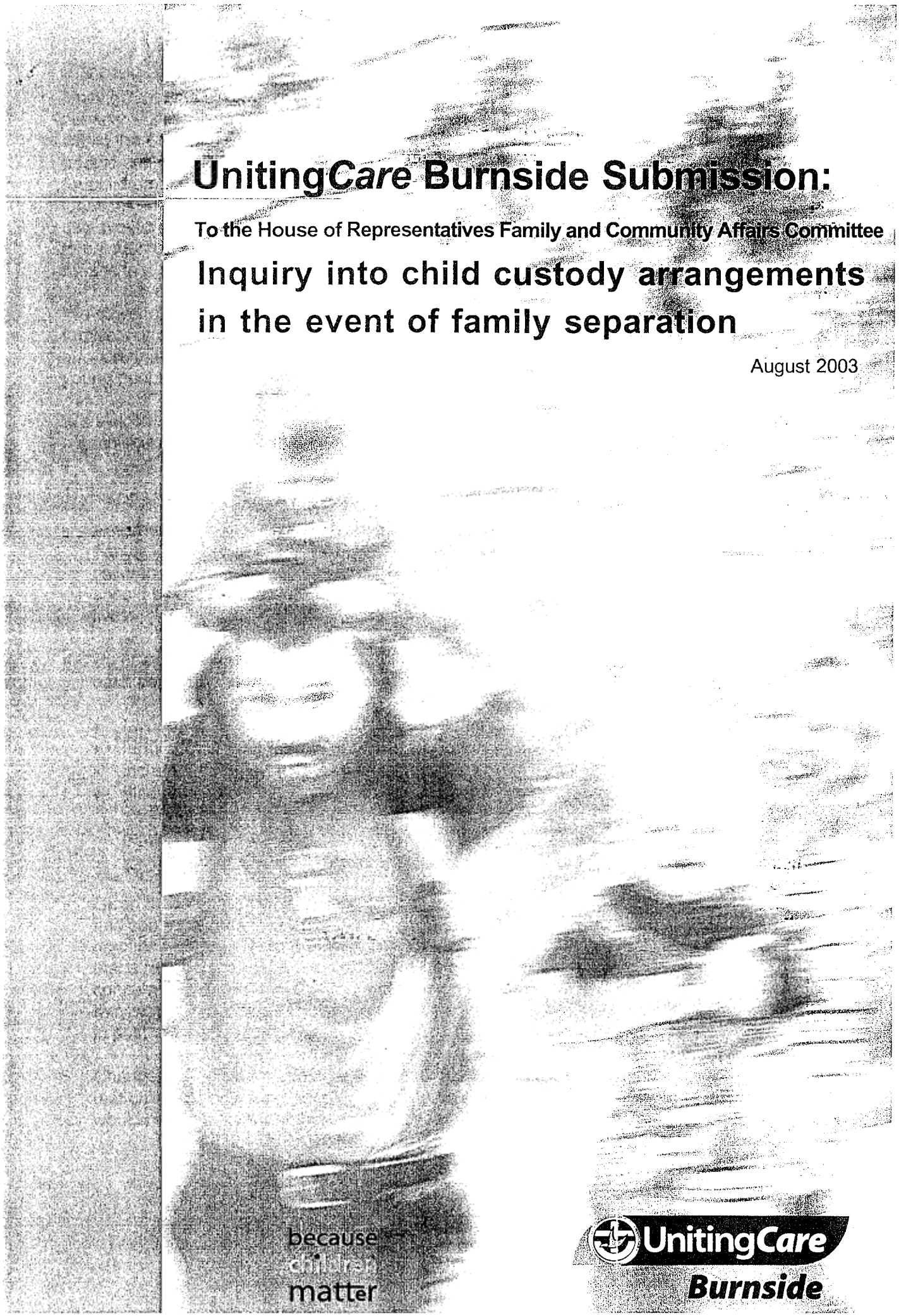
Jane Woodruff
Chief Executive Officer

UnitingCare Burnside Submission:

To the House of Representatives Family and Community Affairs Committee

Inquiry into child custody arrangements in the event of family separation

August 2003



UnitingCare Burnside

Executive Summary

Uniting*Care* Burnside (Burnside) is one of the largest non-government providers of child and family services in New South Wales. As an agency of the Uniting Church in Australia, Burnside stands within the Church's concern for justice, particularly in relation to disadvantaged children, young people and families. Through services such as family support and family centres, out-of-home care for children and young people, and educational support and development in both urban and rural locations, Burnside aims to protect children from abuse and neglect, breaking cycles of disadvantage and improving life opportunities. A major focus is for Burnside's research and policy to be sourced from practice, informed by and of benefit to service users. Research-based practice means that practice is informed by what is known 'to work'.

We strive to work with children and provide services that will be of most benefit to them, to their families, and subsequently to all members of Australian society. In all our services we seek to support healthy family relationships, nurture the capacity for positive outcomes for children and young people, and build strong communities.

We welcome the opportunity to provide a response to the Federal Government's request for submissions into child custody arrangements in the event of family separation.

RECEIVED
House of Representatives
3 AUG 2003
Family & Community Affairs Committee

The key points in our submission are as follows:

- Any changes to the legislation should be ones that *increase* people's access to justice in Family Court proceedings in a manner that is safe for all involved. Seeking the opinions of children and young people is fundamental to working in their best interests. Consideration should be made of them and their varied needs when making decisions that will affect their lives.

- Burnside is concerned that a 'rebuttable presumption' of equal time to be spent by children with each parent in the event of family separation will:

    - favour the rights of adults as more important than the rights of children
    - further ignore the unique and complex needs of children and young people
    - increase some parents' powerlessness to protect their child/ren
    - place the situation of the child or young person in a legal climate where children's safety and needs are often ignored in favour of those of the adults involved
    - result in increased disruption to the health, wellbeing and development of the children and young people involved.

- Given these concerns, it is clear that before setting any other matter in relation to residence and contact issues into legislation, there needs to be increased clarity in and improvements in practice with regards to the "best interests of the child" principle. Burnside is also concerned that a rebuttable presumption of joint custody is not grounded in research evidence. Our major concern with this is that children and young people involved will experience more harm than they would if more was known about what works in relation to shared parenting arrangements in post-separation families.

- Changes to legislation must be done after full examination of the implications of the changes so that children and young people are not further harmed and disadvantaged than they already would be in the event of their parents separating.

Introduction

Children benefit from the ongoing and consistent involvement of caring, loving and competent adults in their lives, particularly when these adults are their parents. Benefits of such parenting in the lives of individuals can range from being financial and educational to emotional, developmental and a whole range of other areas. There are also benefits to the society and wider community from such parenting.

Parenting that results in positive outcomes for children is a skill that needs to be learned. Some people acquire these skills through experiencing positive parenting themselves but others need to learn them in more formal settings. Settings where parenting skills are taught is increasingly becoming a necessity in Australian society. Measurements of social trends indicate increasing levels of isolation for many people from formal and informal supportive mechanisms. These in turn result in many kinds of negative impacts on child development, and subsequently on family, community and social development.

Although it is not always possible for the family unit to consist of children and two parents, children benefit from both parents remaining involved in their lives. Being in a family that consists of separated parents throws up a new set of challenges for parents to both remain involved. Despite these additional challenges, the children still require that their parents are caring, loving and competent.

Burnside maintains that this could be best done by providing supports to all parties, before and after separation, so that decisions can be made in a more equitable environment and with the emphasis on 'the best interests of the child'. Burnside would like to see greater effort on the part of governments in relation to supporting mechanisms, such as parent and child support, mediation, and cooperation between State, Territory and Commonwealth systems rather than making rules and setting these in legislation.

Burnside strongly argues that there should be no legal presumption that children spend equal time with each parent, not even one that is rebuttable. There is no guarantee that legislating in such a way will always result in the best interests of the child, particularly when people are involved who cannot easily and equally access mechanisms to refute the decision. Additionally, if legislation related to this matter is to be written, and such a policy is to be implemented, then it should only occur after a period of in-depth research and review into the issues. When legislating such matters benefit could be derived from setting the legislation up on the basis of objectives similar to the NSW Children and Young Person's (Care and Protection) Act 1998, which state:

> The objects of this Act are to provide:
>
> (a) that children and young persons receive such care and protection as is necessary for their safety, welfare and well-being, taking into account the rights, powers and duties of their parents or other persons responsible for them, and
>
> (b) that all institutions, services and facilities responsible for the care and protection of children and young persons provide an environment for them that is free of violence and exploitation and provide services that foster their health, developmental needs, spirituality, self-respect and dignity, and
>
> (c) that appropriate assistance is rendered to parents and other persons responsible for children and young persons in the performance of their child-rearing responsibilities in order to promote a safe and nurturing environment.

Burnside would emphasise that any changes to the legislation should be ones that *increase* people's access to justice in Family Court proceedings in a manner that is safe for all involved. As an agency with a strong focus on the protection of children and young people, we are concerned particularly with the way in which residence and contact arrangements in the event of parental separation impact upon this vulnerable group. It is of paramount importance to reduce, as far as possible, children and young people's exposure to conflict and violence and to ensure that they, and those caring for them, have sufficient access to a safe and secure family environment.

Material for this submission is drawn from Burnside's research and policy development work as well as the direct experience of workers and service users in Burnside programs. It also includes information and ideas drawn from papers and submissions produced at Burnside over the past few years.

Terms of Reference

A 'rebuttable presumption' of equal time to be spent by children with each parent in the event of family separation

Best interests of the child

The term "best interests of the child" raises issues as to the role of the advocate in courts and tribunals. Under Article 12 of the United Nations Convention on the Rights of the Child (UNICEF 2002), the child or young person has the right to express his or her opinion freely and to have that opinion taken into account in any matter or proceeding affecting them. Accordingly, provision should be made, in all matters affecting the rights or interests of children and young people, so that their views are heard by the decision makers.

Consideration of the views of the child/young person

Over recent years in Australia much evidence has been collected on the benefits of actively engaging children and young people in decision-making in relation to matters affecting them. It has recently been argued that a joint residence model can be highly disruptive for the children and young people involved (see, Smythe, Caruana & Ferro 2003). Given that it is a commonsense notion that people are happier with outcomes of events when they have been consulted, it makes sense that engaging children and young people in decision-making in relation to such a disruptive event can assist with ensuring success.

Although the Family Law Act 1975 (FLA) provides for decisions being made with regard to the best interests of the child (FLA, section 68F), an important part of which is consideration of any wishes expressed by the child (FLA, section 68F(a)), in practice this is quite often not the case. Often the child or young person's advocate decides what is in his or her best interests.

In some circumstances this is appropriate, but in others it means that the child/young person's views are not heard by the court/ tribunal determining the matter. This can result in further pain and harm for the children and young people involved.

> Children's participation within the Family Court in its current form is not a genuine attempt by the Court at promoting participation by children. This was evidenced by a situation we had where 2 children, aged 10 and 12 years, were clearly expressing their desire to reside with their non-resident parent, as they were being abused by their step-resident parent in the defacto relationship.
>
> The children participated in Family Court counselling and were appointed a Child Representative. They were adamant in their wishes to live with their non-resident parent and expressed these desires and the reasons why on several occasions.

> The Child Representative did not interview the children but drew on reports to make recommendations that were, in their opinion, in the best interests of the children. The expressed wishes of the children were not put to the Court.
>
> The Child Representative also negotiated to put into the parenting agreement that no further notifications of abuse would be made to DoCS [NSW Department of Community Services] by the non-resident parent or members of the non-resident parent's extended family. The Child Representative deemed any further notifications would be stressful to the children's resident parent. The grandparent challenged this and a notation was made on the parenting agreement rendering it not enforceable....child abuse should never be negotiated and notations such as these should never be on parenting or any other agreements made in the Family Court.
>
> (Manager, UnitingCare Burnside Hastings Family Support Centre & Hastings Women's Domestic Violence Court Assistance Scheme, 2003)

At Burnside we understand that children are citizens, and as such should be recognised as holding an equal investment and involvement in society as adults. Childhood is a time when children actively construct their social experience and community. Children are regularly excluded from decision-making and are not recognised and valued as being active social participants. Seeking the opinions of children and young people is fundamental to working in their best interests. Children and young people should be actively engaged in decision-making in relation to matters that affect their lives.

In concentrating only on the needs of parents in relation to residence and contact decisions there is a high chance that children and young people will be left out of the decision-making equation.

Recommendations

1. That before finalising a decision on the issues the Government:

- investigate and explore with the children and young people involved in shared parenting experiences post-parental separation, their experiences of these matters and of the FC in its present form
- consult with children and young people to determine what they feel they need, how they would like to be consulted, and what they feel is in their best interests

Practice in relation to child abuse and neglect and family violence

In addition to the principle of the "best interests of the child", there are provisions in the FLA that state that the Court must also consider a number of other factors where parents cannot agree, including:

- the capacity of each parent to provide for the needs of the child (section 68F(e))
- the need to protect the child from physical and psychological harm (section 68F(g))
- any family violence which has occurred (section 68F(i))

Research demonstrates that there is a high incidence of domestic violence in cases going to the FC and that domestic violence against women continues after separation. A 2002 study found that of the 35 resident mothers, 86% described violence during contact changeover or contact visits (Kaye, Stubbs & Tomie 2003). A rebuttable presumption of joint residency will place women and children who are victims of violence at increased risk of further violence. There are concerns that presumption will force some children to live with violent fathers and will force mothers to have to regularly negotiate with, and be in the presence of, violent ex-partners. Burnside is concerned that this will provide abusive men, who wish to control their women partners after separation, the chance to continue behaviour. It may also lead parties to re-open finalised cases in the belief that

a joint residence presumption law will bring them a different outcome. In the experience of Burnside workers it already appears that community agencies are reporting contact from women whose former partner is threatening to take them to court, or back to court to get new arrangements for the children as a result of recent increased speculation around this issue in the media.

Evidence such as this is all the more concerning given that, in a submission to the Family Violence Committee in the 'Family Court of Australia Review of Family Violence Consultation' (September 2002), Burnside argued that generally speaking:

- Family Court staff appear to have only a very basic understanding of family violence, and that office staff have even less.
- there seems to be a low level of understanding amongst Court staff and judicial officers of the effects of family violence on children.
- there appears to be a lack of awareness of the processes that must be undertaken to change Care Orders under the Children and Young Person's (Care and Protection) Act 1998. This refers to local magistrates, Court staff, solicitors and Department of Community Services staff.
- there appears to be lack of awareness about the ways in which the Contact decisions can sometimes increase risk of harm to the children, and that this has regularly resulted in Burnside staff having to deal with child protection issues that arise out of Family Court ordered Contact arrangements.

> A service user's ex-partner was granted permission in a Family Court arranged parenting agreement that he could call his son every day. This was despite the child saying that he did not want to speak to his father. It was also agreed that if, when he rang, the mother and child were not home, the mother had to call the father back.
>
> This agreement left it open for the father to verbally abuse the mother. Each time the child's father called he made comments to the child's mother like, 'Make him come to the f..... phone you slut'. On these occasions he would also abuse the child's mother, accusing her of 'sleeping around', if a male adult answered the phone.
>
> This became a form of control used by the child's father and supported by the Family Court via a parenting agreement. If the mother refused to answer the phone or return calls she was taken back to Court for breaching the arrangements. This continued until the mother taped phone calls and secured an Apprehended Violence Order. The Burnside staff member involved with the woman in this circumstance feels that this type of arrangement worked to make the child's mother feel she was a prisoner in her own home. She was forced to stay home to wait for a phone call as she did not wish to call the child's father herself.
>
> (Court Support Worker, UnitingCare Burnside Hastings Family Support Centre & Hastings Women's Domestic Violence Court Assistance Scheme, 2002)

This clearly shows how the 'best interest of the child ' principle is being negated in practice. It also shows how other important factors related to the health and wellbeing of the children are not being taken into consideration, including:

- the attitude to the child and to the responsibilities of parenthood
- any family violence which has occurred
- the need to protect the child from physical or psychological harm

Burnside is concerned that a 'rebuttable presumption' of equal time to be spent by children with each parent in the event of family separation will:

- favour the rights of adults as more important than the rights of children
- further ignore the unique and complex needs of children and young people
- increase some parents' powerlessness to protect their child/ren
- place the situation of the child or young person in a legal climate where children's safety and needs are often ignored in favour of those of the adults involved
- result in increased disruption to the health, wellbeing and development of the children and young people involved.

As is the case with adults, children do not exist as a homogeneous group of people. Since this is the case, consideration should be made of their diversity and varied needs when reflecting upon them as a group.

Given these concerns, it is clear that before setting any other matter in relation to residence and contact issues into legislation, there needs to be increased clarity in and improvements in practice with regards to the "best interests of the child" principle.

Burnside would like the Committee to consider the following issues/concerns:

- What mechanisms will the FLC put in place to improve and ensure the best interest of the child remains the paramount consideration and not further exacerbate difficulties and unacceptable environments for children should there be a presumption that children will spend equal time with each parent?

- How will the FLC ensure *'the capacity of each parent to provide for the needs of the child'* in relation to the parents emotional, physical health, financial and parenting abilities. For example:

    - undiagnosed mental health, alcohol and other drugs and disability issues
    - post separation, where one parent does not have a fixed address or one parent shares accommodation or rents a room, or where the activities of a parent may expose a child to risk of harm
    - which parent will take responsibility for following up children's ongoing medical, health, education, sporting and other recreational activities

Recommendation

2. That greater scope and weight is given in relation to residence and contact matters to the child/ren's views and history of child abuse and neglect and family violence.
3. That more effort is made in the practice of the Family Court to determine the child/ren's views, particularly in relation to child abuse and neglect and family violence.
4. Increased coordination between the family law system and child protection systems in each State and Territory to ensure consistency in risk of harm assessment and decision making, thus maximising a safe environment for children and young people.

Research-based practice

Important drivers of improvements in legislation and practice has been increased adoption of seeking evidence through research. Using a research-based approach is about informing and improving practice by looking at, and making critical judgements about, the research evidence available and then using this to inform future practice.

In recent times there have been increased expectations placed on practitioners in social work and welfare to provide reasons explaining why they intervene in the ways that they do (eg Pecora 2002; Tomison 2002). Workers have been increasingly required to demonstrate their capacity to care, identify the theoretical foundations of their practice and support the interventions they choose

to apply with evidence. This is in order to show it is the best use of resources and will provide the most optimal outcomes for individuals and members of the society. There have also been increased expectations that intervention will result in actual and beneficial change in people's lives. Consequently practitioners are increasingly required to give evidence for this change, what interventions to apply, the purpose of applying these and measurements of rates of success and beneficial change for people.

Prior to working from research evidence approaches to intervention were broadly made on the basis of the particular ideology of the decision maker. For example, if the practitioner was committed to the arguments of attachment theory, the child would most likely be placed with the mother, but if they were influenced by an inter-generational model of abuse, the child would be more likely be removed from the family. Through the use of research and a growing emphasis on the most optimal use of resources and least intrusive intervention, approaches have become clearer and it has become more obvious when intervention approaches have caused more harm than good.

This argument holds for this issue. Residence and contact arrangements in the event of family separation invoke strong emotions. Decisions made on the basis of emotions can lead to more harm than good. Burnside is concerned that the suggestion of rebuttable joint custody is not based on research evidence and that the legislation being suggested will subsequently not be in the best interests of Australians - children, adults and young people alike.

According to a recent study completed at the Australian Institute of Family Studies (Smythe, Caruana & Ferro 2003), very limited research been conducted into post-separation families, or into what enables or impedes success in shared parenting arrangements. The small amount of research that has been conducted indicates that there are certain significant variables that must be present for shared parenting to work in such a way that the children and young people are not harmed. For example, the findings of a recent Australian study into the conditions considered important to make shared parenting arrangements viable (Smythe, Caruana & Ferro 2003: 21) are:

- geographical proximity
- the ability of parents to get along in terms of a business-like working relationship as parents
- child-focused arrangements (with children kept "out of the middle", and with children's activities forming an integral part of the way in which the parenting schedule is developed)
- a commitment by everyone to make shared care work
- family-friendly work practices – especially for fathers
- a degree of financial independence – especially for mothers
- a degree of paternal competence

The formulation of legislation with regards to this issue should consider and take account of such conditions at the very least. Even a cursory glance at how this might be set in legislation and implemented raises a number of serious logistical and ethical issues. It is obvious that this is a complex area and that social policy decisions in relation to this issue will have major implications for a number of other social policy areas. If the government is going to legislate for changes in this area then they must be prepared to make other social policy changes to enable the readjustments that will inevitably need to occur for people.

Some of these issues are already being discussed by Burnside workers and questions are being raised about them. For example, during consultations with staff in relation to this Inquiry one worker raised the following points and questions:

> It is becoming more evident that there are difficulties with the present Family Law Act decisions that have prevented the resident parent with the day-to-day care of the children from moving to another area.

Will the legal rebuttable presumption of joint residency reduce the families ability to make their own decisions about parenting arrangements depending on children's needs, parents capacities, geographical distance between them, parent's work patterns, finances and housing?

Would it destablise current parenting practices of co-operative parents where the resident parent is the primary carer? If parents are forced to accept joint residency then the environment of the child may significantly change due to legislative requirements, so as not to be in the best interests of the child.

It may also force practical difficulties for many separated parents and children, and financial burdens on parents to run two households. It may lead to both parents needing to pay increase housing cost such as rent to provide accommodation for their children. That is, the parent will need to increase the size of their accommodation and therefore pay higher rents in the private market. Plus there will be additional strain added to the private rental market, which may lead to substandard housing and living arrangements. Travel costs will be increased for parents and children to maintain joint residency. Also an unacceptable responsibility may be placed on the child to remember what items are required, and force children to anticipate future needs and be prepared for any issues that could arise.

If the presumption of a rebuttable joint residency is enacted, the Government will need to legislate that all workplaces are family friendly and that all parents may take reasonable time off from the workplace to provide for the care and nurturing of their children. Anecdotal evidence demonstrates:

- traditionally male full time work does not provide for in-home care of children
- traditionally, women are in part-time positions where they are able to provide the in-home care that children need
- Women are still predominantly the primary carers of children and undertake most of the domestic work.

(Worker, UnitingCare Burnside Hastings Family Support Centre & Hastings Women's Domestic Violence Court Assistance Scheme, 2003)

Burnside is concerned that a rebuttable presumption of joint custody is not grounded in research evidence. Our major concern with this is that children and young people involved will experience more harm than they would if more was known about what works in relation to shared parenting arrangements in post-separation families.

Burnside is also concerned that changes to legislation that are made without full examination of the implications of the changes will further harm and disadvantage children and young people.

Recommendations

5. That in-depth review is completed of research that has already been conducted into shared parenting in post-separation families.
6. That further research into shared parenting in post-separation families is conducted in an Australian context, and that children and young people are included in the groups involved in the research. This research should include examination of risk of harm and the principle of 'best interests of the child'.
7. That any social policies and legislation related to shared parenting in post-separation families that is formulated be grounded in research-evidence.

References

Family Law Act 1975, Act No. 53/1975, prepared 1 January 2003 incorporating amendments up to Act No. 121/2002, URL: http://www.austlii.edu.au/cgi-bin/download.cgi/download/au/legis/cth/consol_act/fla1975114.txt [accessed 31/7/2003]

Kaye, M., Stubbs, J. and Tolmie, J., (2003) *Negotiating Child Residence and Contact Arrangements against a Background of Domestic Violence*, Families, Law and Social Policy Research Unit, Griffith University: Queensland

NSW Government (1998) *Children and Young Persons (Care and Protection) Act 1998 No 157*, Government Information Service: Sydney

Pecora, P (2002) 'The challenge of achieving evidence-based practice in child and family services', Presentation at *What works? Evidence-based Practice in Child and Family Services, Association of Children's Welfare Agencies Biennial Conference*, Bondi Beach, NSW, September 2002

Smyth, B., Caruana, C. & Ferro, A. (2003) *Some whens, hows and whys of shared care: What separated parents who spend equal time with their children say about shared parenting*, paper presented at the SPRC Social Policy Conference, University of New South Wales, July 2003: Social Policy Research Centre, University New South Wales: Sydney

Tomison, A. M. (2002) 'Evidence-based practice in child protection: what do we know and how do we better inform practice', Presentation at *What works? Evidence-based Practice in Child and Family Services, Association of Children's Welfare Agencies Biennial Conference*, Bondi Beach, NSW, September 2002

UNICEF (2002) *Full Text of the Convention on the Rights of the Child*, http://www.unicef.org/crc/crc.htm (accessed 24/7/2002)

Uniting*Care* Burnside (2002) *Submission to the Family Court of Australia Family Violence Consultation*, Uniting*Care* Burnside: Sydney