



NADRAC
NATIONAL ALTERNATIVE DISPUTE
RESOLUTION ADVISORY COUNCIL

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House of Representatives Standing Committee
on Family and Community Affairs

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Secretary: _____

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



Dear Sir/Madam

NADRAC SUBMISSION TO INQUIRY

Please find attached a submission by the National Alternative Dispute Resolution Advisory Council concerning the inquiry into child custody arrangements in the event of family separation. An electronic version is provided in the enclosed computer disc.

If you have any questions about the submission or require additional information, please contact the Director of the NADRAC Secretariat, David Syme, on 02 6250 6897 or e-mail david.syme@ag.gov.au

Yours sincerely

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Inquiry by the Standing Committee on Family and Community Affairs into child custody arrangements in the event of family separation

Submission by the National Alternative Dispute Resolution Advisory Council (NADRAC)

1. The National Alternative Dispute Resolution Advisory Council (NADRAC) is an independent body which advises the Attorney-General on various issues concerning alternative dispute resolution (ADR). The Attorney General appoints members to the council on the basis of their individual expertise. Members come from around Australia, and bring to the council a broad range of expertise in dispute resolution, including in the resolution of family disputes.
2. Under its charter, NADRAC may make recommendations to the Attorney-General and, if time and resources permit, may also provide comment on relevant matters to other bodies. The council has provided advice to the Attorney-General on many matters relevant to family law, including the Family Law Regulations, the Federal Magistrates Service, Parenting Plans, the recommendations of the Family Law Pathways Advisory Group, and a review of the PDR provisions in the Family Law Act. It has also made submissions on family law issues directly to the Family Court of Australia, the Federal Magistrates Service and the Attorney-General's Department.
3. NADRAC is making this submission as it believes that the inquiry into child custody arrangements in the event of family separation raises important issues for those assisting in the resolution of family disputes. The submission emphasises the need to:
 - a. clarify terms and concepts concerning child arrangements after separation
 - b. consider the desirability of equal time arrangements
 - c. assess the risks associated with any rebuttable presumption that children spend equal time with both parents
 - d. support alternative (or 'primary') dispute resolution services to deal with issues arising from such a rebuttable presumption, and
 - e. consult with children themselves about such a presumption.



Terms and concepts

4. The public debate concerning this Inquiry indicates a degree of confusion over post-separation arrangements for children and the terms used to describe such arrangements. For example, terms such as 'shared parenting', 'joint custody' or 'residence' and 'equal time', which can mean very different things, are often used interchangeably. It will be important for this Inquiry to clarify these terms and concepts.
5. Shared parenting refers to a wide number of possible arrangements in which both parents maintain continuing involvement in the care and upbringing of their children. This may or may not involve the children spending equal time with each

parent. The concept of 'equal time' itself has many variations. Equal time could refer to equal 'contact hours', in which case a school age child of working parents may have more contact hours with the parent with whom they spend weekends than with the parent with whom they reside during the week. Equal time could also refer to 'symmetrical' arrangements in which children spend an equal number and proportion of weekdays and weekends/holidays with each parent. In some cases, an equal time arrangement involves the children remaining in one residence and the parents taking turns to live in that residence. Such an arrangement, although inconvenient for the parents, minimises disruption to the children.

6. NADRAC notes that the title of this Inquiry and much of the public debate continues to refer to the term 'custody', which was replaced in 1995 by the term 'residence'. At the time of this change in terminology, Parliament considered that the term 'custody' conveyed a sense of ownership of children and an understanding that parents' rights were of greater significance than those of children. The term 'residence' was chosen in order to signify that children were people in their own right and not 'owned' by parents and other adults. NADRAC recommends that this position be made clear in the Inquiry's discussions.

The desirability of equal time arrangements

7. It is impossible to generalise about the desirability of equal time arrangements. As indicated at paragraph 5 above there are many different forms for such arrangements, including the option that the children remain in the one residence and the parents alternate. The periods of time which children spend with each parent could be days, weeks or months. Experts maintain that the appropriate period depends largely on the age of the child concerned, with shorter periods recommended for younger children and longer periods recommended for older children. Arrangements therefore will need to change over time. The situation is complicated where there are children of varying ages. The involvement of new partners, step children and extended families may also need to be considered. Cultural, geographical, social and religious factors also play a part, especially in a country as diverse as Australia.
8. Research suggests that many children find arrangements where they spend alternating periods at different residences very difficult to manage. They are obliged to carry their belongings between homes on a weekly or even daily basis. They are often required to travel long distances between each home. They sometimes do not see their friends on a regular basis because they do not reside permanently in one location, and often their extra-curricular interests are compromised due to the difficulty of getting to sporting and other venues on a regular basis.
9. NADRAC has no doubt that some children have found equal time arrangements satisfactory. Research indicates that for equal time to work effectively, parents should be cooperative, have strong positive communication, reside in close proximity to each other, be flexible in their approach and be committed to ensuring that the children's best interests are paramount.

10. Under the current provisions, parents are free to choose at mediation, conciliation or counselling among a variety of arrangements for their children, including the option whereby the children spend equal time with each parent. The decisions reside primarily with the parents, who are presumed to know their family situation and children's needs better than any other person. Parents who wish their children to spend equal time with them can agree to an arrangement that facilitates this in an appropriate manner for them.
11. In recent years, government funded family services (including those providing family mediation and counselling) have developed child inclusive practices which seek the direct involvement of children in decision-making processes that directly impact on them. These practices have also been considered by the Family Court, which is currently moving to work more closely with children within the provisions of the *Family Law Reform Act 1995*. Mediation, conciliation and counselling services assist families to reach appropriate decisions on arrangements for children that include a consideration of the most effective ways for the children to have maximum contact with each parent. NADRAC recommends that the Inquiry consider the work of these services in assisting parents to agree on arrangements that are tailored to the specific needs of their children.

Risks of a rebuttable presumption

12. Whether there should be a rebuttable assumption of equal time is a different issue from whether equal time is a desirable arrangement. A rebuttable presumption implies that it will be applied to every family in the first instance and that those who do not wish to operate in the manner specified will be obliged to seek changes, that is, to rebut the presumption. This presumption raises a number of risks.
13. Currently, families who can make equal time arrangements work have the opportunity to implement them. A rebuttable presumption may lead to such arrangements being applied to situations in which equal time is unworkable or undesirable for both the children and the parents concerned.
14. A rebuttable presumption may increase concerns for those adults and children who experience domestic violence. A requirement for children to spend equal time with each parent has the potential to increase manipulation, power abuse and intimidation because it can keep a victim in close proximity to the perpetrator. Moreover, research demonstrates that, as many victims do not disclose violence for fear of reprisal, they could be reluctant to take action to rebut the presumption. A presumption that children will continue to spend time with a violent person can place the victims of violence (including the children) in a vulnerable position that is untenable.
15. The presumption of equal time may create a norm whereby any departure is seen as reflecting parental failure, even where such an arrangement is unsatisfactory for all concerned. As a result, parents may feel obliged to fight any variation in order to maintain face and may feel aggrieved if unsuccessful in that fight. Children also may feel obliged to spend equal time with each parent as to do otherwise could be

taken as a sign of disloyalty to one or other parent.

Use of litigation and alternative dispute resolution services

16. The requirement to rebut the presumption will require parties to seek agreement with the assistance of alternative (or 'primary') dispute resolution services. If they are unable to reach agreement, they may need to litigate. Demands on dispute resolution services, legal aid and the court may therefore increase. The obtaining of a successful outcome that avoids litigation is likely to lessen.
17. If parents litigate, conflict is likely to increase and possibly destroy any potential to cooperate for the benefit of their children. The concept of children spending equal time with each parent in these circumstances is then unlikely to be appropriate and the result could be a destruction of the children's relationship with either or both parents.
18. An increased emphasis on alternative dispute resolution services therefore would be desirable. Such services have the potential to increase understanding and cooperation between parents. An increase in their use following the introduction of a rebuttable assumption would place significant pressure on existing services. NADRAC recommends that the Inquiry consider the valuable work already being done by these services and the ways in which these services could be better supported and resourced across the country. The impact of a rebuttable presumption on alternative dispute resolution services would need to be monitored and consideration given to additions or changes to existing services.

The need to consult with children

19. In 1990 Australia signed the United Nations Convention on the Rights of the Child. Both that instrument and the *Australian Family Law Reform Act 1995* discuss the paramountcy of the best interests of children in any decisions that directly relate to them.
20. If a general rule is to be established, such as a rebuttable presumption of equal time, it will be important to hear from children to ascertain their understanding of their best interests. NADRAC recommends that the Inquiry speak to children themselves (both those who have been involved in joint residence arrangements and those who have not) to gain their perspective on the proposed rebuttable presumption.

Conclusion

21. NADRAC has doubts that a rebuttable presumption would be in the best interests of children or parents.
22. It ignores the uniqueness of different families within Australian society. It is imperative that the needs of specific children in specific contexts be considered rather than applying a general rule to every child. If a general rule were to be introduced, it will be important to consult with children as well as with adults.

23. Those families who can make equal time arrangements work already have the opportunity to implement such an arrangement. There is no need for a rebuttable presumption in these circumstances. Those parents who go to litigation may lack the qualities or circumstances to make such an arrangement work.
24. NADRAC recommends that the role of alternative dispute resolution services be acknowledged and supported, both to assist with arrangements under the current system and to address significant issues that will be a consequence of the introduction of a rebuttable presumption.