The Parliament of the Commonwealth of Australia

Every picture tells a story

Report on the inquiry into child custody arrangements in the event of family separation

House of Representatives
Standing Committee on Family and Community Affairs

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Foreword

One of the highlights of committee work for parliamentarians is the people we meet. During this inquiry our greatest delight was hearing from the nine children and five young adults at our final meeting of the inquiry. These children and young adults were a microcosm of what this inquiry was all about.

These 14 young people talked about the important issues of the inquiry - what it was like for them when their parents were separating and how their living arrangements were decided. These children and young adults were articulate, open, funny, serious and sometimes sad. They told us their stories and as a result the real meaning of this inquiry was clearly understood.

Another young boy, Jack, who we were unable to meet with, told us his story through his four drawings. We are so grateful to Jack for the pictures which we have used on the cover and inside cover of our report. Jack's story is a simple and complex one at the same time. It is a story we can all identify with in some way.

‘Every picture tells a story’.

Jack's pictures tell us:

Jack shares his time between mum's house and dad's house.

He loves his mum and he loves his dad.

He doesn't like it when his mum and dad argue.

He's happy when they talk to each other.

It is a tough story because dad lives in one city and mum lives somewhere else.

He likes to see them both all the time but he can't because the distance makes it too hard.

Jack's pictures encapsulate the most important voice of all - the voice of the children.

It has been the committee's task to find a way to make the family law system better for all the children and young adults who find themselves, through no choice of their own, in a situation where their parents cannot live together any

more and must separate. Despite this, their parents are still their parents and should continue to share responsibility for them.

We are convinced that sharing responsibility is the best way to ensure as many children as possible grow up in a caring environment. To share all the important events in a child's life with both mum and dad, even when families are separated, would be an ideal outcome.

Over the past six months many people have assisted the committee with its work. Over 2000 people have contributed to this inquiry through tasks such as making submissions, appearing at a hearing, making a community statement, facilitating the committee's visits to the courts and mediation centres and providing exhibits.

On behalf of the committee I thank all of you for your efforts. We have heard you through these contributions and have appreciated the opportunity to speak with some of you.

During the inquiry there were many tears shed by the general public, witnesses, their families and even by the committee members. It has been an emotional experience for everyone.

We believe that the conclusions and recommendations outlined in the committee's report point to solutions that will make the family law system, including the child support scheme, fairer and better for children in separated families and thereby for both their parents and extended family members, including grandparents.

The outcomes of the report are not revenue neutral however they are offset against the current costs associated with family breakdown, costs of people avoiding child support and the huge expense of entering into the legal system. Estimates of these range from $3 billion to $6 billion a year with no accounting for the social and emotional toll.

As the chairman of the House Family and Community Affairs Committee I always think that every inquiry is the hardest that we have undertaken. However, I can say that this definitely was, and will be the most difficult inquiry any member will ever have to undertake. The committee devoted all of their individual electorate time outside of the parliamentary sittings, to travel to the hearings right across Australia. This meant that many people in the electorates of Riverina, Fowler, Mitchell, Throsby, Aston, Chifley, Dickson, Blair, Makin and Franklin were inconvenienced for much of the past six months. On behalf of your members I thank you for your understanding and patience while we have been away.

Initially there was a divergence of views amongst us that led to some robust debate. However, I have never felt so proud of a group of members of parliament who put political differences aside and worked together to ensure a united outcome. Each member has sincerely and responsibly contributed to this report, and as chairman I thank you for the honour of working with you.

I thank the Australian community, the many professionals who gave freely of their valuable time, the committee members, the committee's secretariat and the many other staff of the Department of the House of Representatives, and its Clerk and Deputy Clerk, who assisted the committee's work. Your hard work and support on this inquiry has been inspirational. It could not have been done without your cooperation. It has been a demanding task all of the time, for all of us. We have worked together and completed the first step - the report. We must now continue to work together to ensure it is implemented.

Kay Hull MP
Chair

Membership of the Committee

Chair	Mrs Kay Hull MP
Deputy Chair	Mrs Julia Irwin MP
Members	Hon Alan Cadman MP
	Mrs Trish Draper MP
	Mr Peter Dutton MP
	Hon Graham Edwards MP (until 19/08/03)
	Ms Jennie George MP
	Mr Chris Pearce MP
	Hon Roger Price MP (from 19/08/03)
	Mr Harry Quick MP
	Mr Cameron Thompson MP

Terms of reference

On 26 June 2003 the former Attorney General, the Hon Daryl Williams MP and the Minister for Children and Youth Affairs, the Hon Larry Anthony MP, jointly referred the following inquiry to the committee.

Having regard to the Government's recent response to the Report of the Family Law Pathways Advisory Group, the Committee should inquire into, report on and make recommendations for action:

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

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

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

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

(c) With the Committee to report to the Parliament by 31 December 2003.

List of abbreviations

ABS	Australian Bureau of Statistics
AIFS	Australian Institute of Family Studies
ALSWA	Aboriginal Legal Service of Western Australia
CSA	Child Support Agency
CSCG	Child Support Consultative Group
CSS	Child Support Scheme
FaCS	Department of Family and Community Services
FCoA	Family Court of Australia
FCWA	Family Court of Western Australia
FLA	Family Law Act 1975
FLC	Family Law Council
FLS	Family Law Section of the Law Council of Australia
FMC	Federal Magistrates Court of Australia
FRSP	Family Relationships Services Program
FTBA	Family Tax Benefit Part A
HILDA	Household, Income and Labour Dynamics in Australia survey
HREOC	Human Rights and Equal Opportunity Commission
NADRAC	National Alternative Dispute Resolution Advisory Council
NATSEM	National Centre for Social and Economic Modelling Pty Ltd
NWRN	National Welfare Rights Network

Pathways report	Family Law Pathways Advisory Group report entitled *Out of the maze: Pathways to the future for families experiencing separation*
SPRC	Social Policy Research Centre, University of New South Wales
UN	United Nations

List of recommendations

2 A rebuttable presumption

Recommendation 1

The committee recommends that Part VII of the *Family Law Act 1975* be amended to create a clear presumption, that can be rebutted, in favour of equal shared parental responsibility, as the first tier in post separation decision making. (para 2.82)

Recommendation 2

The committee recommends that Part VII of the *Family Law Act 1975* be amended to create a clear presumption against shared parental responsibility with respect to cases where there is entrenched conflict, family violence, substance abuse or established child abuse, including sexual abuse. (para 2.83)

Recommendation 3

The committee recommends that Part VII of the *Family Law Act 1975* be amended to:

- provide that the object of Part VII is to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents are given the opportunity for meaningful involvement in their children's lives to the maximum extent consistent with the best interests of the child;
- define 'shared parental responsibility' as involving a requirement that parents consult with one another before making decisions about major issues relevant to the care, welfare and development of children, including but not confined to education – present and future, religious and cultural upbringing, health, change of surname and usual place of residence. This should be in the form of a parenting plan;
- clarify that each parent may exercise parental responsibility in relation to the day-to-day care of the child when the child is actually in his or her care subject to any orders of the court/tribunal necessary to protect the child and without the duty to consult with the other parent;

- in the event of matters proceeding to court/tribunal then specific orders should be made to each parent about the way in which parental responsibility is to be shared where it is in the best interests of the child to do so; and
- in the event of matters proceeding require the court/tribunal, to make orders concerning the allocation of parental responsibility between the parents or others who have parental responsibility when requested to do so by one or both parents. (para 2.84)

Recommendation 4

The committee recommends that Part VII of the *Family Law Act 1975* be further amended to remove the language of 'residence' and 'contact' in making orders between the parents and replace it with family friendly terms such as 'parenting time'. (para 2.85)

Recommendation 5

The committee recommends that Part VII of the *Family Law Act 1975* be further amended to:

- require mediators, counsellors, and legal advisers to assist parents for whom the presumption of shared parenting responsibility is applicable, develop a parenting plan;
- require courts/tribunal to consider the terms of any parenting plan in making decisions about the implementation of parental responsibility in disputed cases;
- require mediators, counsellors, and legal advisers to assist parents for whom the presumption of shared parenting responsibility is applicable, to first consider a starting point of equal time where practicable; and
- require courts/tribunal to first consider substantially shared parenting time when making orders in cases where each parent wishes to be the primary carer. (para 2.86)

Recommendation 6

The committee recommends that the Commonwealth Government develop a wide ranging, long term and multi level strategy for community education and family support to accompany legislative change and to promote positive shared parenting after separation, as was recommended by the Family Law Pathways Advisory Group. (para 2.87)

3 Facilitating shared parenting

Recommendation 7

The committee recommends that in support of the legislative presumption for shared parenting recommended in Chapter 2 the government review the

community's current access to services which can assist those who cannot achieve and sustain shared parenting on their own to:

- develop the skills to communicate effectively around their children's needs and to manage co-operative parenting;
- enable them to resolve their on-going conflict and develop a long term ability to share their parenting responsibilities in the interest of their children; and
- include the perspective and needs of their children in their decision-making, with and without assistance from the family law system. (para 3.70)

Recommendation 8

The committee recommends in particular the significant expansion of the contact orders program beyond the level addressed in the Government's Response to the Pathways Report, to enable separated families in long term conflict to have access to like services in all states and territories and in regional areas. (As a minimum there should be one of these services in each location where there is a Family Court registry.) (para 3.71)

Recommendation 9

The committee recommends that the *Family Law Act 1975* be amended to require separating parents to undertake mediation or other forms of dispute resolution before they are able to make an application to a court / tribunal for a parenting order, except when issues of entrenched conflict, family violence, substance abuse or serious child abuse, including sexual abuse, require direct access to courts / tribunal. (para 3.72)

Recommendation 10

The committee recommends that the funding for the Family Relationships Services Program be increased following a review with respect to the appropriate targeting and adequacy of resources for the service types which will provide the most benefit to families' positive family relationships, before during and after separation.

In this review the committee recommends that consideration be given particularly to a significant further expansion of children's contact services nationally. (para 3.73)

4 A new family law process

Recommendation 11

The committee recommends that a shop front single entry point into the broader family law system be established attached to an existing

Commonwealth body with national geographic spread and infrastructure, with the following functions:

- provision of information about shared parenting, the impact of conflict on children and dispute resolution options;
- case assessment and screening by appropriately trained and qualified staff;
- power to request attendance of both parties at a case assessment process; and
- referral to external providers of mediation and counselling services with programs suitable to the needs of the family's dispute including assistance in the development of a parenting plan. (para 4.156)

Recommendation 12

The committee recommends that the Commonwealth government establish a national, statute based, Families Tribunal with power to decide disputes about shared parenting responsibility (as described in Chapter 2) with respect to future parenting arrangements that are in the best interests of the child / ren, and property matters by agreement of the parents. The Families Tribunal should have the following essential features:

- It should be child inclusive, non adversarial, with simple procedures that respect the rules of natural justice.
- Members of the Families Tribunal should be appointed from professionals practising in the family relationships area.
- The Tribunal should first attempt to conciliate the dispute.
- A hearing on the dispute should be conducted by a panel of three members comprising a mediator, a child psychologist or other professional able to address the child's perspective and a legally qualified member.
- Legal counsel, interpreters or other experts should be involved in proceedings at the sole discretion of the Tribunal. Experts should be drawn from an accredited panel maintained by the Tribunal. (para 4.157)

Recommendation 13

The committee recommends that all processes, services and decision making agencies in the system have as a priority built in opportunities for appropriate inclusion of children in the decisions that affect them. (para 4.158)

Recommendation 14

As discussed in paragraph 4.102, the committee recommends that in the period immediately following separation:

- there be a 6 week moratorium before any obligation to pay child support arises;

- parents be required to access the single entry point and begin the process of mediation (including the commencement of a parenting plan); and
- during the first 6 weeks parents be able to access their full entitlement to social security benefits without penalty, to ensure neither they nor their children are financially disadvantaged. (para 4.159)

Recommendation 15

The committee recommends that all family law system providers, but most particularly the single entry point service, should screen for issues of entrenched conflict, family violence, substance abuse, child abuse including sexual abuse and provide direct referral to the courts for urgent legal protection, and for investigation of allegations by the investigative arm of the Families Tribunal. (para 4.160)

Recommendation 16

The committee recommends that an investigative arm of the Families Tribunal should also be established with powers to investigate allegations of violence and child abuse in a timely and credible manner comprised of those with suitable experience.

It should be clear that the role is limited to family law cases and does not take away from the States' and Territories' responsibilities for child protection. (para 4.161)

Recommendation 17

The committee recommends that after establishment of the Families Tribunal, the role for courts in disputes about parenting matters should be limited to:

- cases involving entrenched conflict, family violence, substance abuse and child abuse including sexual abuse which parties will be able to access directly once the issues have been identified;
- enforcement of orders of the Families Tribunal when the dispute cannot be resolved by a variation of the order of the Tribunal so far as possible by judicial delegation to Registrars;
- review of decisions of the Families Tribunal only on grounds related to denial of natural justice or acting outside its power or authority. (para 4.162)

Recommendation 18

The committee recommends that in parallel with the establishment of the Families Tribunal the current structure of courts with family law jurisdiction be simplified. This should ensure there is one federal court with family law jurisdiction with an internal structure of magistrates and judges to support the delivery of judicial determination in the best interests of the child. (para 4.163)

Recommendation 19

The committee recommends that a longitudinal research project on the long term outcomes of family law judicial decisions should be undertaken and incorporated into judicial education programs. (para 4.164)

Recommendation 20

The committee recommends that there should in future be an accreditation requirement for all family law practitioners to have undertaken, as part of their legal training, undergraduate study in social sciences and or dispute resolution methods. (para 4.165)

Recommendation 21

The committee recommends the immediate implementation of the following additions to contact enforcement options:

- a cumulative list of consequences for breaches;
- reasonable but minimum financial penalties for first and subsequent breaches;
- on a third breach within a pattern of deliberate defiance of court orders, consideration to a parenting order in favour of the other parent; and
- retaining the ultimate sanction of imprisonment. (para 4.166)

Recommendation 22

The committee recommends that in the lead up to the implementation of the recommendations in this chapter to create a Families Tribunal there should be a public awareness campaign to inform the community about the reform and its benefits. (para 4.167)

5 A child's contact with other persons

Recommendation 23

The committee recommends that the Commonwealth Government amend subsections 68F(2)(b) and (c) of the *Family Law Act 1975* to explicitly refer to grandparents. (para 5.65)

Recommendation 24

The committee recommends that the Commonwealth Government:

- include information on grandparents' status in a wider public education campaign on the *Family Law Act 1975*;
- ensure contact with grandparents and extended family members are considered by parents when developing their parenting plan, and if in the best interest of the child, make specific plans for contact with those individuals in the parenting plan; and

■ develop a range of strategies to ensure that grandparents, and extended family members, are included in mediation and family counselling activities when it is in the best interest of the child, in particular the development of a wider family conferencing model. (para 5.66)

6 Child Support

Recommendation 25

The committee recommends that the *Child Support (Assessment) Act 1989* be amended as follows:

■ to increase the minimum child support liability payable under section 66 from $260 per year to $520 per year (that is, from $5 per week to $10 per week);

■ to reduce the 'cap' on the income of the paying parent on which child support is calculated under section 42 to ensure high income payers are not contributing child support at a rate in excess of cost of children by reducing the cap to twice average weekly earnings for full time employees or changing the base to 2.5 times average weekly earnings for all employees;

■ to eliminate any direct link between the amount of child support payments and the time children spend with each parent, amend sections 47 to 49 removing the changes to the formula in relation to levels of care of their children ('109 nights') by non-resident parents, and replacing it with a new parenting payment to non-resident parents with above 10% care;

■ amending the way the payer's child support income is determined by halving the formula percentage applying to income earned from overtime and second jobs worked above a set working week of 38 hours. In the event of a person working more than one job, either part time or casual, only the first 38 hours can be combined to achieve the 38 hour limit; and

■ to give the following additional enforcement powers to the CSA to improve their collection of child support:

⇒ amend Child Support Agency garnishee powers so they can be used to collect current child support from non-salary and wage earners;

⇒ compulsory notification to Child Support Agency from insurers re settlements;

⇒ collection from realised compulsory preserved superannuation;

⇒ possibility of being able to access joint accounts;

⇒ credit reference agencies – use to obtain information;

⇒ cancellation of drivers / other licences;

⇒ deeming the transfer of assets; and

⇒ access to extraordinary lump sum payments and receipts which are not normally included in the child support income base, be included when there is an option of using them to satisfy outstanding debt.

The committee also recommends that section 71C of the *Child Support (Registration and Collection) Act 1988* be amended by raising the limit on prescribed non agency payments from 25% to 30%. (para 6.213)

Recommendation 26

The committee recommends that a detailed re-evaluation of the Child Support Scheme be undertaken by a dedicated Ministerial Taskforce.

- The objectives of the re-evaluation should include:

  ⇒ establishing the costs of raising children in separated households at different income levels that adequately reflect the costs for both parents having significant and meaningful contact with their children;

  ⇒ adequately reflecting the costs for both parents of re-establishing homes for their children and themselves after separation;

  ⇒ ensuring that the Child Support Scheme and the social security system work consistently to support and encourage both parents to continue to be involved in parenting their children after separation and does not act as a disincentive for workforce participation for each parent;

  ⇒ ensuring the Child Support Scheme appropriately reflects significant developments in the taxation system since 1988 including company tax, trusts etc; and

  ⇒ ensuring as a matter of principle that exempt and disregarded income are adjusted to bring them closer together to reflect the changing work and parenting patterns now evident in the community.

- The re-evaluation should be completed by 30 June 2004. (para 6.214)

Recommendation 27

The committee recommends that a Ministerial Taskforce be established to undertake the re-evaluation set out above. The Ministerial Taskforce should include:

- clients of the Child Support Agency;

- child support payer and payee representative groups ;
- researchers with expertise in the costs of children such as National Centre for Social and Economic Modelling, University of Canberra (NATSEM) and the Social Policy Research Centre of the University of New South Wales (SPRC);
- social policy researchers such as the Australian Institute of Family Studies; and
- representatives of relevant government departments and agencies. (para 6.215)

Recommendation 28

The committee recommends that the Child Support Agency, in conjunction with the Commonwealth Ombudsman:

- undertake a review of its strategies for communication with individual clients and the effectiveness of information flow to clients; and
- take whatever steps are required to ensure that clients fully understand all the options available to them in meeting their child support obligations and are enabled to act upon them. (para 6.216)

Recommendation 29

The committee recommends that the Child Support Agency decisions be subject to external review. This could be done by an arm of the Families Tribunal, the Social Security Appeals Tribunal or any other appropriate tribunal. (para 6.217)

1

Introduction

Origin of the inquiry

1.1 For many years the Australian community has been extremely concerned about contact and residency issues following marriage and relationship breakdown and their experiences with the Family Court and the Child Support Agency. These have been critical issues brought to the daily agenda of members of parliament by their constituents. Several major parliamentary inquiries and a number of other inquiries have looked into these matters, but the problems persist.[1] Different solutions are obviously needed.

1.2 In response to these concerns on 24 June 2003 the Prime Minister announced in the House of Representatives the referral of an inquiry to the House Standing Committee on Family and Community Affairs to look at both family law matters and the Child Support Agency.[2] In making the announcement the Prime Minister stressed that no one legislative change or pronouncement can alter the concerns, dealing with the matter is a national responsibility, and implied that it is important to the greatest

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1 Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act, *The Family Law Act 1975: Aspects of its operation and interpretation*, AGPS, Canberra, Nov 1992, xxvii 450p; Joint Select Committee on Certain Family Law Issues, *The operation and effectiveness of the Child Support Scheme*, AGPS, Canberra, Nov 1994, xxxvii 687p; House of Representatives Standing Committee on Legal and Constitutional Affairs, *To have and to hold: Strategies to strengthen marriage and relationships*, CanPrint, Canberra, June 1998, xl 347p; Family Law Pathways Advisory Group, *Out of the maze: Pathways to the future for families experiencing separation: Report of the Family Law Pathways Advisory Group*, Commonwealth Departments of the Attorney-General and Family and Community Services, Canberra, July 2001, xxxv 115p.

2 Howard J MP, *House of Representatives Debates*, 24/6/03, pp 17277-17278.

extent possible, children have the benefit of regular and meaningful contact with both their parents.[3]

1.3 On 26 June 2003 the reference was jointly referred to the committee by the former Attorney General, the Hon Daryl Williams MP and the Minister for Children and Youth Affairs, the Hon Larry Anthony MP.

1.4 The terms of reference for the House Family and Community Affairs Committee inquiry are set out at page xvii. The terms of reference are complex and interrelated and address both family law and child support formula matters.

Background to the inquiry: The Government response to the Pathways Report

1.5 In referring the reference the two Ministers directed the committee to have regard to the recent Government response to the Family Law Pathways Advisory Group report entitled *Out of the maze: Pathways to the future for families experiencing separation* (Pathways Report)[4].

1.6 In summary the Pathways Report, launched in August 2001, concluded that with the current family law system:

- there was not enough focus on the best interests of the child or child inclusive practices in family law services;
- the right sort of help and information was not always available to families at the time and place they needed it most;
- some people managed their separation with little interaction with the system at all whereas others felt frustrated by it, believing in some cases that the system was biased against them;
- there was little assessment of all of the needs of separating families and too much adversarial behaviour;
- some parts of the system worked well, but overall it is not as effective as it could be, or should be; and
- it is clear that a more coordinated and integrated approach to helping families in distress is needed. [5]

3 Howard J MP, *House of Representatives Debates*, 24/6/03, p 17278.

4 Family Law Pathways Advisory Group, xxxv 115p.

5 *Government response to the Family Law Pathways Advisory Group Report*, Attorney-General's Department and Department of Family and Community Services, Canberra, May 2003, pp 7 and 11.

1.7 The Pathways Report made 28 recommendations to deal with those concerns. The Government response addressed implementation of those recommendations under the broad areas of:

- early help involving connecting people to information and services;
- better outcomes for children and young people; and
- an integrated system that meets families' needs.

The recommendations were directed to government, the courts and private professionals and organisations working in the family law system.[6]

1.8 The Government's response to the Pathways Report concluded that:

> The Pathways Report provides government and non-government service providers with a map that will guide future changes to the family law system. The goal is to develop an integrated family law system that builds individual and community capacity to achieve the best possible outcomes for families ...[7]

1.9 In undertaking its work this committee accepted the Pathways Report definition of the family law system, that is:

> The family law system is much broader than the courts. It also embraces the many service providers and individuals who help families to resolve legal, financial and emotional problems, and is centred around the family members themselves.
>
> …
>
> As well as the Family Courts of Australia and Western Australia, the Federal Magistrates Service and State Magistrates courts, they include Centrelink, the Child Support Agency and other government agencies at national and State and local levels, community-based organisations, private practitioners, advocacy groups and volunteers …[8]

1.10 Dealing with families in dispute is a difficult issue and requires cooperation between the parties. Governments cannot legislate for good relationships between people.

1.11 The Pathways Report provided a strong backdrop for the House Family and Community Affairs Committee's work and highlights some important directions for change. However, the Pathways Report, as good and useful as it is, did not address the basic philosophical underpinnings of family

6 *Government response to the Family Law Pathways Advisory Group Report*, pp 7-8.

7 *Government response to the Family Law Pathways Advisory Group Report*, p 15.

8 Family Law Pathways Advisory Group, pp xiii 3.

law as this was not within its terms of reference; is conservative in its solutions; and did not consult as widely with the community as is needed.

Part VII of the Family Law Act

1.12 The legislative basis for family law matters is the *Family Law Act 1975* (FLA) which was significantly amended in 1995.

1.13 Part VII of the FLA relates to children. The object of this Part is set out in subsection 60B(1) as:

> … to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

1.14 The underlying principles also are specified in subsection 60B(2):

(a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and

(b) children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development; and

(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.

1.15 Part VII addresses the concept of parental responsibility; provisions relating to parenting orders, child maintenance orders, and other orders and injunctions relating to children; the principle of the best interest of the child; and includes enforcement orders affecting children.

1.16 Parenting responsibility is defined as all the duties, powers, responsibilities and authority which, by law, parents have in relation to children (section 61B). Subsection 61C(1) states that each of the parents of a child who is not 18 has parental responsibility for the child. This subsection has effect despite any changes in the nature of the relationships of the child's parents, for example parents becoming separated or by either or both of them marrying or re-marrying. In addition, this subsection is subject to court orders.

1.17 These sections of the FLA clearly demonstrate that both parents have ongoing parenting responsibility for their children. However, the practice falls far short of its intention.

'Best interests of the child' are paramount

1.18 The starting point for the committee's inquiry was that the best interests of the child are the paramount consideration. It is the opening statement to the inquiry terms of reference; it is the one irrefutable view held by most participants throughout the committee's inquiry; it is reflected in the United Nations Convention on the Rights of the Child; and it is enshrined as the paramount consideration in the following sections of the *Family Law Act 1975* (FLA) - section 65E (interim and final parenting orders), section 63H(2) (setting aside parenting plan under section 63H(1)(c)), section 65L(2) (assistance or supervision of parenting orders), section 67L (location orders), section 67V (recovery orders), and subsection 67ZC(2) (welfare orders).

1.19 Prior to the *Family Law Reform Act 1995*, the principle of the best interest of the child being paramount was considered to apply to all aspects of proceedings.

1.20 A number of other sections in the FLA mention the best interest of the child without specifically making those interests paramount.[9]

1.21 In a recent paper Justice Chisholm points out that there are two ways of looking at the paramount consideration principle, with debate about which is appropriate. He said first there is the 'strong view' where '… the court does not balance the child's interests against competing interests of other people, but treats the child's interests as determinative.'[10] Second, the 'weak view' where '… the paramount consideration does *not* necessarily require the court to make whatever order it thinks best for the child, regardless of other things.'[11] Justice Chisholm concludes that '…there appear to be two competing approaches, with the tensions between them not easily resolved …' [12]

9 See Chisholm R, 'The paramount consideration': Children's interests in Family Law, *Australian Journal of Family Law*, 88 (2002) 16, p 110.

10 Chisholm R, p 89.

11 Chisholm R, p 93.

12 Chisholm R, p 115.

1.22 Irrespective of who is making decisions about a child's care, welfare and development (that is, the parents or the court or others) the principle should hold.

1.23 However, in any family decision making and in a community context outside the area of parenting orders, by consent orders or by the court, the basis on which decisions about the best interests of the child are made is not known, or indeed if that is the basis of the decision. Only about 6% of decisions in the Family Court of Australia go right through to judicial decision. A judge is required to address the best interests but little is known of the basis for decision making in the majority (94%) of cases (see Figure 1.1).[13]

1.24 In family law the principle of what is in the best interests of the child is applied to the best interest of the individual child – it takes into account the individual circumstances of each child. The facts the courts must take into account in determining what is in the child's best interest when making parenting orders related to that child are set out in subsection 68F(2) of the FLA. The list is open ended in concluding with 'any other fact or circumstance that the court thinks is relevant.'

1.25 These factors may also be considered by the court in making a consent order.

1.26 Other relevant sections in determining a child's best interests include sections 60B, 43 and 68K.

1.27 The Family Court of Australia (FCoA) advised that in the application of subsection 68F(2):

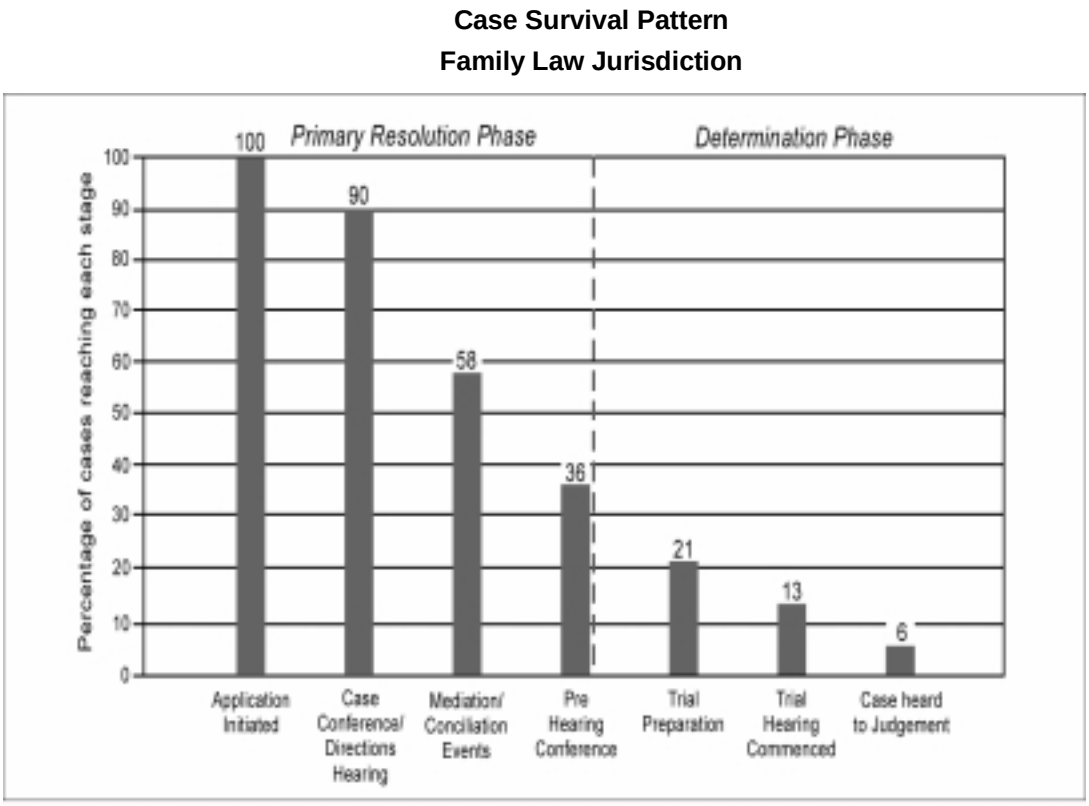
> Judges must consider each factor separately (where it has relevance to the particular facts and circumstances of the case before them), but they have considerable discretion in determining the weight to be given to each factor …[14]

1.28 The FCoA provided an indication of the high or moderate importance of section 68F criteria by undertaking a random sample of six months of cases from January to June 2003 for the FCoA's three largest registries (Sydney, Melbourne and Brisbane). The outcomes of the analysis are shown in Figure 1.2.

13 See Family Court of Australia, sub 1550, p 5.

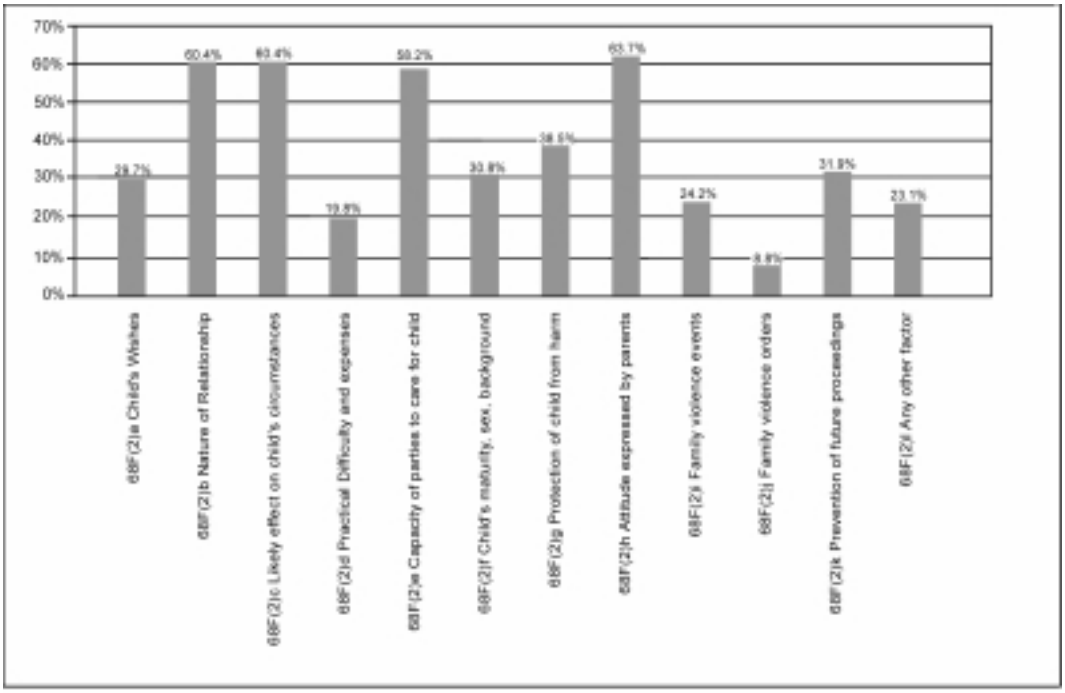
14 Family Court of Australia, sub 751, p 29.

Figure 1.1 Survival Pattern of Applications by Stages—2000–2001



Source: Family Court of Australia, sub 1550, p 5.

Figure 1.2 S68F Criteria of High or Moderate Importance in Judicially Determined Matters



Note: This figure depicts the number of occasions in which the indicated criterion was considered in the judgment to be of moderate or high importance. The percentages are therefore not cumulative.

Source: Family Court of Australia, sub 1550, p 10.

1.29 The best interests of the child are always evolving. Over time a child's needs change as will the relevance of any of the factors listed in section 68F of the FLA.

1.30 However, the committee's attention particularly has been drawn to changes that will occur with child development and age of the child. Children develop different forms of attachments at different ages.

1.31 Evidence from the Pathways Report and to the committee has suggested that there are limited opportunities for children to be influential in decisions affecting them. This is another matter stressed to the committee and it is addressed in more detail later in the report.

1.32 The needs of children are inextricably linked to the needs of their parents. Consideration of the best interests of children inevitably involves some consideration of the needs of the parents. This is perhaps why when presenting evidence to the committee, parents often commenced by pointing to their child's best interests, but quickly moved to discussing their own needs. In addition, if the stress and conflict between parents can be resolved, it enables them to focus better on the needs of their children. Relationships Australia advised that '…The evidence is also quite clear that it is conflict between parents that impacts most adversely on children when families separate.'[15]

The terminology: the words matter

1.33 Given that the terminology of 'custody' and 'access' was abolished by the *Family Law Reform Act 1995*, questions have been raised regarding the use of that terminology in the committee's terms of reference. The committee works with the terms of reference it is given. It accepts that there was a change of terminology in the 1995 legislation. The fact that the earlier terminology was used in the terms of reference perhaps is indicative of the lack of success of the 1995 reforms, which has led the committee to seek new and more appropriate terminology through this inquiry's work. Details of this are outlined in the following chapters. However, until the new terminology is introduced in the report, the 1995 terminology 'residence', 'contact' and 'parental responsibility' are used.

15 Gibson D, transcript, 20/10/03, p 27.

Changing patterns of parenting in Australia

1.34 In evidence the Australian Institute of Family Studies (AIFS) stated:

> Notions about parenting after separation are grounded in attitudes and beliefs about marriage and the roles of men and women as partners and parents. The changing nature of family life and patterns of women's and men's workforce participation has meant that the parenting roles, expectations and responsibilities of mothers and fathers – whether in intact families or separated families – are in transition. These social and attitudinal shifts have prompted re-evaluation of the previously accepted post-divorce (maternal) "sole custody" model of parenting towards encouraging co-parenting after separation.[16]

1.35 Evidence to the committee time and time again has reinforced this view.

1.36 The most reliable and up-to-date data on family characteristics is provided by the Australian Bureau of Statistics (ABS) *Family Characteristics April 1997*[17] published in April 1998. The ABS data reveals the following key statistics on families and children.

Family structure

1.37 Of the 18.1 million people living in private dwellings, 86% lived in family households. Half of Australia's five million families had dependent children present. Of people aged over 15 years, nearly 70% had been or were married. 81.7% of children lived in couple families (see Table 1.1).

Marriage and divorce

1.38 As a result of marriage breakdown many children lived with one natural parent and had another living elsewhere. The ABS *Australian Social Trends 2002* data reveals upward trends in divorce (see Table 1.2). 52.7% of divorces involve children under the age of 18.

1.39 In addition, there are a significant number of de facto relationships that breakdown each year. Many of these relationships also involve children.

16 Australian Institute of Family Studies, sub 1055, p 1.

17 Australian Bureau of Statistics, *Family Characteristics April 1997*, ABS, Canberra, April 1998, 53p, Cat 4442.0.

Table 1.1 Summary of family structure 1997

Family structure	Children '000	%
Couple families		
Intact	3 397.3	73.6
Step	145.2	3.1
Blended	218.6	4.7
*Total (*a)	3 769.6	81.7
One-parent families		
Lone mother	745.3	16.1
Lone father	100.4	2.2
Total	845.7	18.3
Total (a)	4 615.3	100.0

(a) Includes a small number of 'other' families.

Source: Australian Bureau of Statistics. Family characteristics April 1997. ABS, Canberra, April 1998, p 29, Cat 4442.0.

Table 1.2 Marriage and divorce statistics 1990-2000

	Units	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
Registered marriages												
Number of marriages	'000	117.0	113.9	114.8	113.3	111.2	109.4	106.1	106.7	110.6	114.3	113.4
Divorce												
Number of divorces	'000	42.6	45.6	45.7	48.4	48.3	49.7	52.5	51.3	51.4	52.6	49.9
Divorces involving children under 18 (of % all divorces)		55.6	54.2	52.9	52.6	52.4	n/a	53.6	54.0	53.4	53.9	52.7
Children under 18 affected by divorce	'000	44.9	46.7	45.7	48.1	47.5	n/a	52.5	51.7	51.6	53.4	49.6

Source: Australian Bureau of Statistics. Australian social trends 2002: Family – National summary tables. ABS, Canberra, 2002, Cat 4102.0.

1.40 However, recent as yet unpublished research by Professor David de Vaus of the AIFS, suggests that the divorce rate is now no higher than it was in 1981. He also suggested that more children born to sole mothers living without a partner is driving the degree to which children are living with just one parent . Only 3% of children born between 1963 and 1975 were born to a sole mother; by 2001 this proportion had grown to 11.4%. [18]

18 Horin A, High divorce rate? It's just a suburban myth, *Sydney Morning Herald*, 25/10/03.

1.41 Marriage breakdown is costly. In June 1998 the House Standing Committee on Legal and Constitutional Affairs estimated that the direct cost of marriage breakdown in Australia was $2,771 million per annum. They described this estimate as conservative.[19]

Parent's time spent on child care

1.42 Based on the ABS *Time Use Survey* unpublished data for 1992 and 1997, the ABS drew the following conclusions on the amount of time parents spent on child care.

> In 1992, on average, mothers spent 6hrs:46mins per day on child care activities, more than twice as much as fathers (2hrs:31mins). On the other hand, reflecting traditional roles and responsibilities, fathers were far more likely to be employed full-time (83% of fathers compared to 19% of mothers). Nevertheless, the pattern has been changing. As women have been entering the work force, the time they spend with their children has been decreasing (6hrs:7mins in 1997). Little change was evident among fathers (2hrs:24mins per day in 1997) whose involvement in full-time work remained about the same between 1992 and 1997.[20]

1.43 This time data is for all family structures, not just separated families.

Natural parents living elsewhere

1.44 Of the 978,400 children with a natural parent living elsewhere, for 88% (859,900) the absent parent is the father and for the remaining 12% (118,500) the absent parent is the mother.

Parental care and visiting arrangements

1.45 Only 2.6% of children (25,400) were in shared care arrangements (defined as each natural parent looking after the child for at least 30% of the time)[21].[22]

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19 House of Representatives Standing Committee on Legal and Constitutional Affairs, p 50.

20 Australian Bureau of Statistics, *Australian social trends 1999: family – Family functioning: Looking after children*, ABS, Canberra, viewed 26/9/03, http://www.abs.gov.au/Ausstats/abs%40.nsf/94713ad445ff1425ca25682000192af2/875f852f44a61210ca25699f0005d61d!OpenDocument

21 Australian Bureau of Statistics, 1998, pp 7, 31, 37, 50.

22 Other figures on shared care are as follows:
4.1% of cases registered with the Child Support Agency were deemed to have equal (or near equal) care of their children, that is, between 40.0-59.9 % of nights. For parents transferring child support privately (Private Collect) the rate of shared care is slightly higher at 6.1%. (Department of Family and Community Services, sub 1251, pp 13-14);

1.46 Of the children in sole care, 41.2% visited their other natural parent frequently (at least once per fortnight), 21% visited at least once every month to six months, and 36% visited their other natural parent either rarely (once per year, or less often) or never (see Table 1.3). Of those who visited their other natural parent rarely or never, 106,700 children (33% of those aged 2 years and over) had some contact by telephone or letter.[23] Smyth and Ferro also found that of those who do see their other parent, a significant minority (34%), never stay overnight with them.[24]

Table 1.3 Parental care arrangements[(a)]: Frequency of visits

	Number of children ('000)	Proportion of children (%)
Sole care		
Daily	42.3	4.3
Once a week	212.0	21.7
Once a fortnight	148.6	15.2
Once a month	72.6	7.4
Once every 3 months	82.6	8.4
Once every 6 months	50.4	5.2
Once a year	51.2	5.2
Less than once a year/never	291.1	29.8
Total children in sole care arrangements[(b)]	953.0	97.4
Shared care	25.4	2.6
Total[(b)]	**978.4**	**100.0**

(a) For children aged 0-17 who have a natural parent living elsewhere.

(b) Includes a small number of 'not stated' responses.

Source: Australian Bureau of Statistics. Family characteristics April 1997. ABS, Canberra, April 1998, p 37, Cat 4442.0.

4% of the overall Family Tax Benefit customer population have shared care arrangements in place (Department of Family and Community Services, sub 1251, p 25);

6% of children spend more than 30% of the nights per year with the other parent according to Wave 1 of the Household, Income and Labour Dynamics in Australia (HILDA) survey. Data is based on overnight stays of the youngest resident child with the non-resident parent as reported by the resident parent population. It should be noted that more overnight stays are reported by non-resident parents with rates of shared parenting increasing to 6.3%. (Department of Family and Community Services, sub 1251, p 28).

23 Australian Bureau of Statistics, 1998, pp 7, 37.

24 Smyth B & Ferro A, When the difference is night & day: Parent-child contact after separation, *Family Matters*, no 63, Spring/Summer 2002, pp 54-59.

Levels of parental satisfaction with residence and contact

1.47 More recent research, such as that by the Household, Income and Labour Dynamics in Australia (HILDA) survey and Parkinson & Smyth into levels of parental satisfaction with residence and contact, have found that a significant proportion of separated parents, especially non-resident fathers, want more contact with their children (40% resident mothers; 75% non-resident fathers).[25]

Child support

1.48 Of the 597,000 families who had a child with a natural parent living elsewhere, 41% received no child support, 42.3% received cash child support and a further 16.3% received only in-kind child support.

Conclusion

1.49 The statistics presented in this section suggest, that it is no longer appropriate to define parenting roles by gender alone. Rather, it may be more appropriate to focus on the role that each parent performs.

The committee's inquiry

1.50 It is against this background that the committee undertook its inquiry.

1.51 From the announcement of the inquiry it was abundantly clear that the issues being addressed are of great concern to the community and touch the lives of almost all Australians. This was reflected in the numerous contributions to the inquiry from the outset. To an extent this meant that the inquiry promoted itself.

1.52 The committee initially promoted the inquiry and called for submissions on 3 July 2003 when the chair of the committee issued a media release launching the inquiry. The inquiry was advertised through the House of Representatives fortnightly advertisement in *The Australian* newspaper on Wednesday 9 and 23 July 2003. It also was advertised on the committee's website.

1.53 As residence and contact are issues that generate many constituent inquiries to all members of the House of Representatives, the committee invited all members of the House to promote the inquiry within their

25 Australian Institute of Family Studies, sub 1055, p 8; Parkinson P & Smyth B, When the difference is night & day: Some empirical insights into patterns of parent-child contact after separation: Steps forward for families: Research, practice and policy, *8th Australian Institute of Family Studies Conference, 12-14 Feb 2003, Melbourne Exhibition Centre, Southbank, Melbourne,* 19p.

electorates. To facilitate promotion the committee provided members with a shell media alert outlining details of the inquiry. All members of the committee, and many members of the House, responded positively and promoted the committee's work.

1.54 In addition, the committee invited relevant Commonwealth Ministers, all State and Territory Governments and key peak agencies to each make a submission.

1.55 As a result 1716 submissions to the inquiry were received. This is a record for an inquiry by this committee, and amongst the highest ever for a House of Representatives committee. It is about six times the number of submissions (284) received by the Pathways Report inquiry. However, it is about five times less than the number of submissions (6197) received to the 1994 Joint Select Committee on Certain Family Law Issues inquiry that evaluated the Child Support Scheme. [26] A list of the submissions received to this committee's inquiry is at Appendix A.

1.56 The committee also received copies of 15 form letters from a total of 355 contributors (see Appendix B).

1.57 In addition a number of contributors provided copies of their own or other's published works. These were taken as exhibits. 216 exhibits were received and their details are listed at Appendix C.

1.58 The committee undertook a wide ranging public hearing program to meet and hear first hand the views and experiences of the community. All but one of the non-Canberra hearings was held in regional locations and the outer suburbs of capital cities. All states and territories were visited. The hearings were advertised by media releases issued by the committee chair, through details on the inquiry website and through advertisements in local newspapers in many of the hearing locations.

1.59 At these hearings the committee took evidence from individuals and locally based organisations who presented a wide cross-section of views on the terms of reference. As in all parliamentary committee inquiries, not everyone who made a submission could be asked to give evidence in person.

1.60 Due to the confidential nature of some evidence to the inquiry, the committee held eight in camera hearings with 11 witnesses.

1.61 To maximise community opportunities for contributions to the inquiry, the committee decided that at the end of each interstate public hearing of invited witnesses, it would hold a one hour community statements

26 Joint Select Committee on Certain Family Law Issues, xxxvii 687p.

segment. This allowed statements of about three minutes duration to be made by members of the public. On average 13 statements were made at each of the 14 hearing where community statements were made, with 188 statements in total.

1.62 Following the community consultations, the committee commenced hearings with the major policy and operational agencies, and practitioners and key academics in the family law and child support fields. These hearings were predominantly held in Canberra.

1.63 From the hearing program in total, the committee took evidence from 166 witnesses representing 105 organisations or themselves at 21 public hearings. The hearings were held between 28 August and 3 November 2003. Details of the public hearings program and the list of witnesses are at Appendix D.

1.64 On 28 October 2003 inspection visits were undertaken to the Registry of the Family Court of Australia at Parramatta, NSW and Unifam's mediation and counselling centre also at Parramatta, NSW.

1.65 The importance of hearing children's voices has been stressed earlier. Accordingly, the final evidence gathering events were two forums for the committee to hear first hand the views of children and young people who have been or are involved in family separation. These events were held in Melbourne on 12 November 2003.

1.66 One forum was organised and facilitated by Dr Jennifer McIntosh (Family Transitions Pty Ltd) in association with Professor Lawrie Moloney and the Family Mediation Centre. From behind a two way mirror the committee was able to observe and hear the views of nine young children aged 7-13 years. The other forum was organised by Youth Affairs Council of Victoria for the committee to discuss issues with five young people aged 17-23 years. No recordings were taken of these events.

1.67 Due to the sensitive and confidential nature of the inquiry, where appropriate, the committee took particular care to protect the identity of individuals presenting evidence and their families. Parliamentary privilege and section 121 of the FLA also require that the committee ensure it is not identifying matters before the courts. As the committee made its evidence (both submissions and transcripts of hearings) publicly available on the inquiry website, even greater care and sensitivity about identification of an individual were demanded.[27]

27 See http://www.aph.gov.au/house/committee/fca/childcustody/index.htm

1.68 This meant on occasion that there were some delays in making information presented to the committee publicly available as quickly as the committee might have liked to do, and as occurs with less sensitive inquiries. However, the committee does not resile from its decisions in protecting individuals and their families.

1.69 On a number of occasions over the past months there has been debate about the inquiry timeframe. Earlier parliamentary inquiries on related matters, such as the work of the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act and the Joint Select Committee on Certain Family Law Issues, each ran for about 18 months.[28] Such timeframes did not of themselves generate better results. The current levels of knowledge, concern and interest in residence, contact and parenting responsibility issues, facilitated this inquiry's timing.

1.70 The committee is extremely grateful for the community's response to this work. The openness and generosity of the community was at times overwhelming.

1.71 As the committee stressed throughout the information gathering phase of its work, it has approached its task openly, and it did not have preconceived views on the outcomes of the inquiry.

Structure of the report

1.72 The structure of the report parallels the terms of reference for the inquiry. Chapters 2, 3 and 4 address the rebuttable presumption, the associated matters of facilitating shared parenting, and a new family focussed process to address parenting matters outside the adversarial court system; and Chapter 5 looks at the children's contact with other persons, including grandparents. Chapter 6 deals with the fairness of the existing child support formula.

28 Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act, xxvii 450p; Joint Select Committee on Certain Family Law Issues, xxxvii 687p.

2

A rebuttable presumption

Introduction

2.1 This chapter considers the issues raised by the question in the terms of reference about creating a rebuttable presumption that children should spend equal time with each parent after separation. As Chapter 1 confirms, the question is asked on the basis that the best interests of the child remains the paramount consideration but asks what else is relevant to deciding the time each parent should spend with their children.

2.2 The committee's view of a presumption is that it provides a preferred starting point of parental equality for negotiation of potential parenting arrangements after separation outside the courts. It would also be a starting point for court consideration of the same questions when negotiation has been unsuccessful. The presumption is rebutted by evidence or circumstances that make the preferred starting point inappropriate for the family concerned.

Is time the real issue?

2.3 Much of the evidence to the inquiry has reflected a perception that the terms of reference were in effect leading to imposition of equal time arrangements, except when it is proved to be inappropriate.

2.4 What has become apparent to the committee during its inquiry process is that many separated parents – mostly fathers but also mothers – feel excluded from their children's lives following separation. What parents want is to be more involved and for many the equal time argument has become the vehicle for pursuing the connection that their children are entitled to. This has turned the debate away from the benefits for children

of a positive and caring relationship with both parents to all the arguments about why equal time will or will not work. [1]

2.5 The committee believes that the focus must be turned back to the primary issue of how to ensure both parents can, and will, remain involved in caring for their children after separation.

A focus on the majority of families

2.6 The committee believes that a review of the parenting aspect of family law involves looking for strategies to support the needs and aspirations of the vast majority of separated families, where it will be in the child's best interests that both parents continue to be positively involved in their lives. This will include those parents who make their own arrangements either on their own or with a degree of help from the system. The committee acknowledges that there is also a significant minority of families who live with family violence, substance abuse or child abuse or for whom conflict is so entrenched they are incapable of agreement about matters affecting their children. For these families genuine and positive shared parenting may not be possible.

2.7 The committee firmly believes that violence is totally unacceptable behaviour, especially within families. Children should not be exposed to violence either directly or indirectly. The negative impact of family violence on children's emotional stability and future development is widely accepted.[2]

2.8 In developing a new approach, the emphasis should be on enabling the majority of families and children to grow up with meaningful and positive relationships. In so doing, care needs to be taken to ensure that families and children subject to abuse are not exposed to further risk.

Problems with the current system

Confusion

2.9 The Pathways Report described the complexities in the current family law system, its disconnectedness, its cost and delays.[3] The principles on which

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1 National Network of Women's Legal Services, sub 1024, pp 5-7; Domestic Violence Service of Central Queensland, sub 1358, p 4; Women's Legal Service Victoria, sub 19, p 6.

2 Federation of Community Legal Centres, Violence against Women and Children Working Group, sub 1026, pp 5-6; Australian Domestic & Family Violence Clearinghouse, sub 1630, pp 4-7.

3 Family Law Pathways Advisory Group. *Out of the maze: Pathways to the future for families experiencing separation: Report of the family Law Pathways Advisory Group:* Commonwealth

it operates are not well understood. These findings have been confirmed during this inquiry. Many who provided evidence have outlined their dissatisfaction with their own outcomes, how long it took to get them, the money they have spent and the anger and hurt that remains in their lives.[4]

Unmet expectations

2.10 The *Family Law Reform Act of 1995* was said to have intended to create a rebuttable presumption of shared parenting[5] but the evidence to the inquiry clearly indicates that this is not reflected in what is happening either in the courts or in the community.

2.11 Section 60B of the Family Law Act (FLA) sets out the importance of a child's right to continue to know and be cared for by both parents, but the predominant outcomes in post separation parenting do not support this.

2.12 'Custody' and 'access', terms rejected in that reform to eliminate any sense of ownership of children have merely been replaced by 'residence' and 'contact'. Behaviour has not changed and there is still a common winner/loser scenario. Many individual submitters have said they have acted on legal (and other) advice which appears to have perpetuated this scenario.

Residence orders

2.13 Out of court negotiated outcomes have favoured sole residence because they have been influenced by community perceptions, by experience of women as primary carers[6] and by perceptions and outcomes in court decisions. This has been illustrated by suggestions in evidence to the committee that there is an 80-20 rule in the courts.[7] This is the perception of a common outcome of, usually, the mother with sole residence and the father with alternate weekends and half the school holiday contact. The committee explored this perception with various witnesses during its hearings. From organisations such as the Family Court of Australia (FCoA) and legal services this drew the response that there is no such rule, although they acknowledged that the perception can influence private

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Departments of the Attorney-General and Family and Community Services, Canberra, July 2001, pp 10-11.

4 These issues were common themes in many of the submissions from individuals, individual witnesses and community statements.

5 Duncan P, *House of Representatives Debates*, 21/11/95, p 3303.

6 See Chapter 1; Women's Economic Think Tank, Women's Electoral Lobby, YWCA of Australia & Children by Choice, sub 742, p 3; The National Council of Jewish Women of Australia, sub 302, p 2.

7 Witness 2, transcript Robina, 4/9/03, p 10.

negotiations and will often be influential in decisions to settle.[8] On the other hand, there was a strong community feeling the '80-20 rule' was being used as a barrier to more parenting time with children. Evidence at hearings from individuals, community statements and audience reactions reinforced this view.[9]

2.14 According to data (Figure 2.1)provided by the FCoA from a survey of a large sample of 2000/01 cases across 3 registries undertaken for the assistance of this inquiry, residence is awarded to mothers in 78.4% of consent applications, 75.7% of cases that settle after commencement of litigation and in 69.2% of cases which are tried. Fathers are therefore 'more likely to be the resident parent where the matter goes to trial'.[10] With respect to contact orders (Figures 2.2, 2.3 and 2.4), the findings of the survey were that in just over 40% of consent applications contact was awarded to the non-resident parent (both fathers and mothers) at the level of 51-108 days. This went up to 50% for settled matters and over 70% when determined by a judge.[11] This shows that something close to '80-20' is the most common outcome, a justifiable confirmation for the perception of a rule to that effect.

2.15 Sole residence, whether it be with the father or the mother, is still the result for the majority of separating families, whether this is agreed or ordered by a court. Statistics published by the FCoA demonstrate that since the introduction of the reforms in 1995, the incidence of orders for substantially shared parenting has declined.[12] In 1994-95 5.1% (680) of custody orders were for joint custody. In 2000-01 only 2.5% (329) of residence orders were for joint residence.[13]

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8 For example: Family Law Foundation (Walters J), transcript 26/9/03, p 42; Aboriginal Legal Service of Western Australia (Brajcich T), transcript, 26/9/03, p 55; Family Law Council (Dewar J), transcript, 17/10/03, p 3; National Association of Community Legal Centres (O'Brien L), transcript, 20/10/03, p 73.

9 For example: Witness 1, transcript Coffs Harbour, 27/10/03, p 10; Witness 2, transcript Gunnedah, 27/10/03, p 15; Kevin, transcript Gunnedah, 27/10/03, p 49.

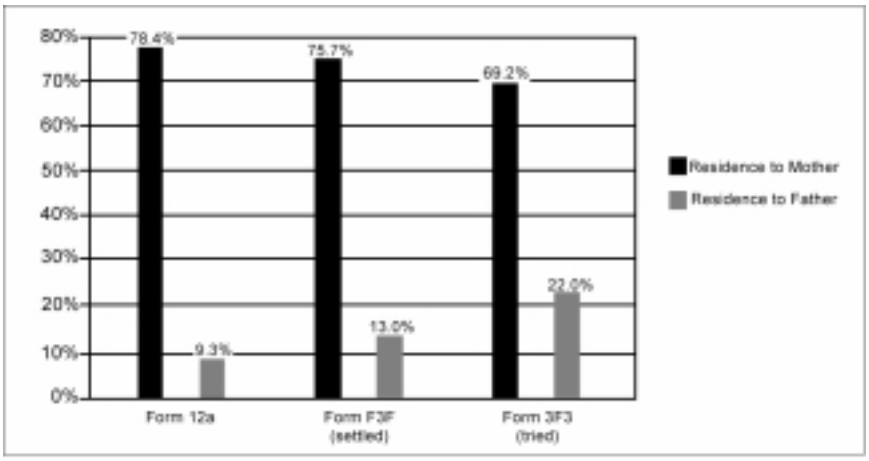
10 Family Court of Australia, sub 1550, p 8.

11 Family Court of Australia, sub 1550, pp 12-14.

12 Joint residence is where the order is for each child to spend some time residing with each parent.

13 Family Court of Australia website, viewed 12/12/03, www.familycourt.gov.au/court/html/residence_orders.html
2000-01 data includes Federal Magistrates Court.

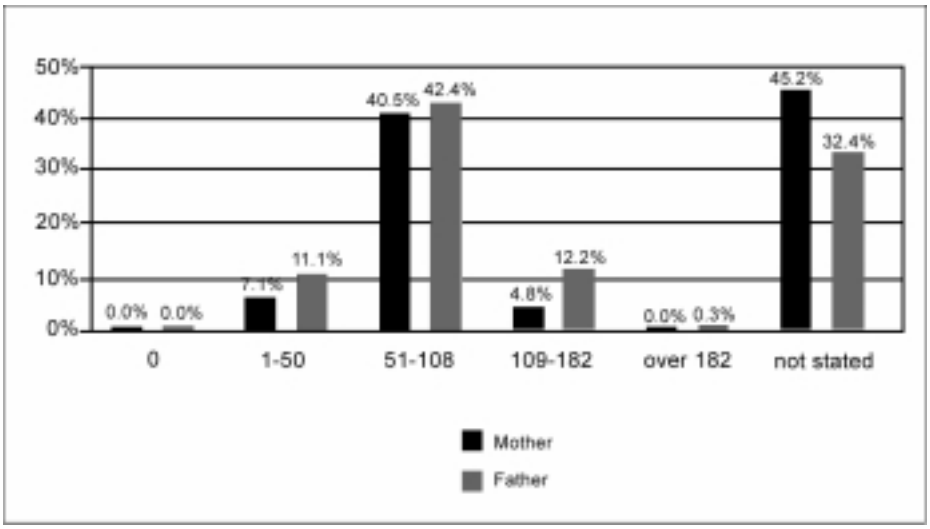
Figure 2.1 Residence to Parents by Type of Application Made 2002-2003



Note: These categories do not sum to 100%. For the purposes of clarity this figure does not depict cases in which the outcome was that the child would live with someone other than a parent, with both parents or residence was split

Source: Family Court of Australia, sub 1550, p 8.

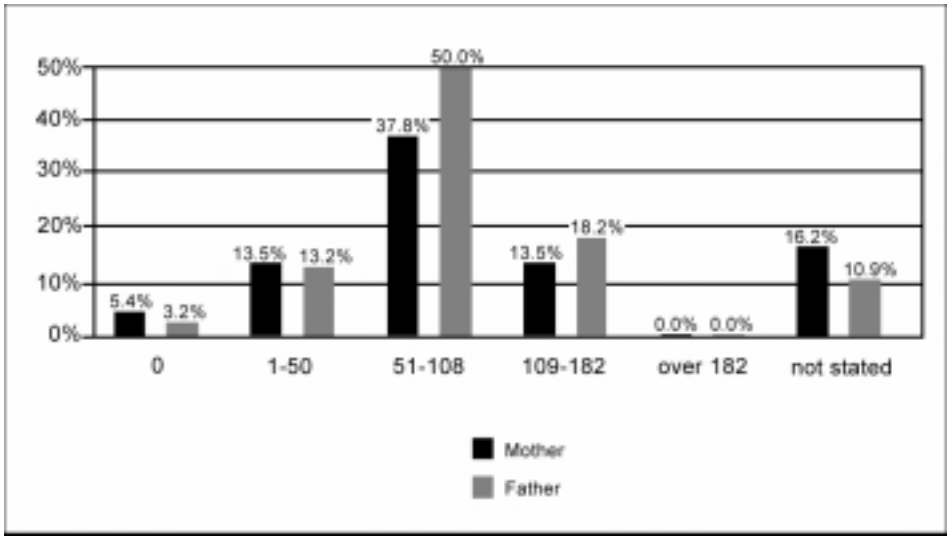
Figure 2.2 Contact Agreed in Consent Applications – 2002-2003



Note: This figure depicts the contact agreed to be granted to the non resident parent. The categories do not sum to 100% due to rounding and code errors.

Source: Family Court of Australia, sub 1550, p 12.

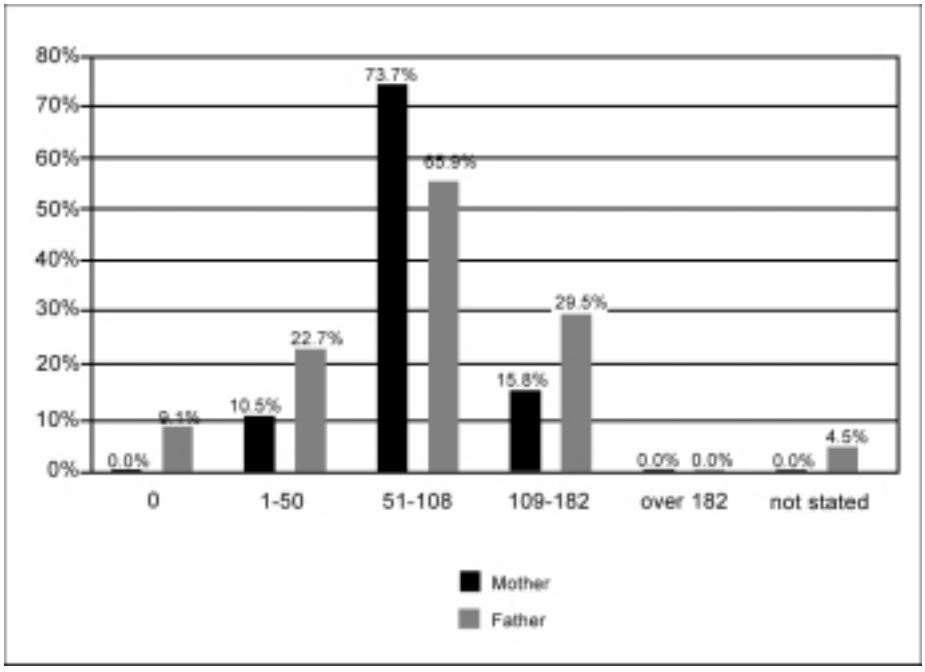
Figure 2.3 Contact Agreed to in Settled Applications – 2002-2003



Note: This figure depicts the contact agreed to be granted to the non resident parent. The categories do not sum to 100% due to rounding and coding errors.

Source: Family Court of Australia, sub 1550, p 13.

Figure 2.4 Contact Ordered Judicially Determined Matters – 2002-2003



Source: Family Court of Australia, sub 1550, p 14.

2.16 The importance of both parents in children's lives has been a key issue for this inquiry. However, in the case of fathers, as indicated above contact time of itself does not guarantee that they will have a positive impact.[14] But:

> … When fathers are involved in nurturing, monitoring, and supporting their children, they have a positive impact on their cognitive and social development and on their behaviour and emotional regulation.[15]

2.17 Child Support Agency statistics about care arrangements within its client population, referred to in Chapter 1 also confirm that shared care is rare (4.1% at May 2003).[16]

2.18 Dissatisfaction does not appear to be confined to those who have pursued their case to a judicial decision. Many have exhausted their resources (financial and emotional) or just given up feeling bitter and resentful of the process and outcomes. The committee also heard from some who had been through costly court processes leading to a judicial decision that did not resolve the situation. Some of these subsequently negotiated a reasonable outcome through other avenues.[17]

Conclusion

2.19 The committee believes that the current experience with sole residence orders results from the distinctions between residence and contact both in the legislation and in community perception. To overcome the common '80-20' outcome, language around shared post separation parenting needs to be devised which is neutral and reflects assumptions that children will be given maximum opportunity of spending significant amounts of time with each parent.

Best interests of the child

2.20 The emphasis on the best interests of the child as the paramount consideration is widely supported in principle but most individuals who have come before the committee focussed on their own needs. A real child focus is not yet a reality in the system or in the behaviour of separating families. Opportunities for children's voices to be heard in the context of decisions that affect them are limited, both in the community and family

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14 See also: Manly-Warringah Women's Resource Centre Ltd, sub 555, p 5.

15 Parkinson P & Cashmore J, sub 743, p 26.

16 Department of Family and Community Services, sub 1251, p 14.

17 Grant, transcript, 24/9/03, p 100; Jan, transcript, 25/9/03, p 46; Witness 2, transcript, 25/9/03, p 10.

setting and the court context.[18] A separate legal representative can be appointed for children in court proceedings[19] to advocate in the child's best interests, but how the role is fulfilled is still variable[20] and they are appointed in a minority of cases. Young adults who met with the committee stressed that in their view the 'child representative' in their own cases had not represented their view, nor from their perspective their best interests, as well as they had expected.

2.21 There may be scope for increased appointment of child representatives, resources permitting, but this may need to be accompanied by redirection of the role they play. Since 1995 this question of better and more involvement of children and improved focus on their position has been given more attention by researchers and practitioners but it is still a developing field.[21]

Family violence and child abuse

2.22 In evidence to the committee many women and women's groups raised concerns about the impact that a presumption of shared residence would have in the lives of women and children who are victims of family violence and child abuse. In that discussion they also raised concerns about deficiencies in the way the current family law system deals with cases where there are serious issues of risk. The committee agrees that violence and abuse issues are of serious concern and is mindful of the need to ensure that any recommendations for change to family law or the family law process provide adequate protection to children and partners from abuse.

2.23 The current legislation recognises that family violence and child abuse are factors that exclude or severely impact on the potential for positive shared parenting. Along with substance abuse these are important aspects for

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18 Family Services Australia, sub 1023, pp 13-16; Witness 1, transcript, 26/9/03, pp 2-8; This was also borne out by informal discussions the committee had with young people in Melbourne on 12/11/03.

19 Family Law Act 1975, s 68L.

20 Family Court of Australia, sub 751, p 45; The Court has recently published guidelines for Child Representatives on its website: http://www.familycourt.gov.au/html/child_representative.html

21 McIntosh J, Child-inclusive divorce mediation: Report on a qualitative research study, *Mediation Quarterly*, vol 18, no 1, Fall 2000, p 55; Mackay M, *Through a child's eyes: Child inclusive practice in Family Relationships Services: A report from the Child Inclusive Practice Forums, held in Melbourne, Brisbane, Newcastle, Adelaide and Sydney from August to September 2000,* Department of Family and Community Services, Canberra, May 2001, ix 49p.

consideration of what is in the best interests of the child.[22] The impact of living with violence on the welfare of children is well documented.[23]

2.24 The interaction between protection orders in State and Territory magistrates courts and family law proceedings has been examined by the Pathways Report and is further addressed in Chapter 4 of this report. Many submitters have drawn attention, however, to cases where despite the safeguards outlined in the legislation, children and adults continue to be exposed to risk even after court intervention.[24] Australians Against Child Abuse said:

> It is disgraceful that children in cases that involve child abuse and family violence have to wait for long periods. It is not unusual for children in those situations to wait four, five or six months, in our experience.[25]

2.25 The National Council for Single Mothers and Their Children Inc added to this concern by drawing attention to the problems which arise from the division of federal and state responsibilities:

> We know that the Family Court does not deal with violence and abuse in a very effective manner. The Family Court itself has acknowledged that in terms of research which has been done. This has shown that because there are federal jurisdictions in the Family Court and state jurisdictions in relation to child protection, there are serious gaps in the ability of the Family Court to deal with child abuse and domestic violence. Cases are not being adequately investigated and evidence is not able to be provided to the court about the extent of exposure to children of abuse ...[26]

2.26 On the relationship between family violence, substance abuse, child abuse and shared parenting, rebuttal of any presumption in cases of 'proven' history of family violence, substance abuse or of child abuse was a unanimously held view in the inquiry. The question of how allegations are dealt with are addressed in Chapter 4.

2.27 The impact of a finding of violence between the parents on future contact between the perpetrator and the child is a critical issue raised by many in this inquiry. Through many submissions and form letters women's groups

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22 Family Law Act 1975, subs 68F(2).

23 McIntosh J, Thought in the face of violence: A child's need, *Child Abuse & Neglect*, 26, (2002), pp 229-241.

24 Briggs F, sub 1152, 3p; Dawn House Inc, transcript, 25/9/03, p 25; Kaye M, Stubbs J & Tolmie J, Domestic violence and child contact arrangements, *Australian Journal of Family Law*, 17, (2003), pp 93-133.

25 Australians Against Child Abuse (Tucci J), transcript, 28/8/03, p 14.

26 National Council for Single Mothers and Their Children (Hume M), transcript, 24/9/03, p 19.

and others have advocated for the adoption in Australia of provisions like those introduced into the New Zealand Guardianship Act in 1995. For example, in evidence the Immigrant Women's Speakout Association of New South Wales said on the New Zealand approach:

> … The New Zealand legislation is a very progressive one and does protect women and children that are in a situation of domestic violence. It recognises that witnessing domestic violence in itself is damaging to children – the length of witnessing domestic violence and perpetrating domestic violence or being a victim of domestic violence in your own relationship when you grow up ...[27]

2.28 In summary, these amendments provide that when there has been a finding of violence against a parent, they are presumed to be an unsafe parent and if seeking contact or residence have to prove to the court that the child will be safe.[28] The exclusion of a violent partner from the child's life should be assessed on individual circumstances providing the child is not placed at risk.

Conclusion

2.29 The committee is of the view that there is a need to add to the principles of Part VII of the FLA, set out in subsection 60B(2) a specific reference to a child's right to preservation of their safety.

Shared parenting

2.30 Differences of language used in this debate about similar concepts causes confusion. Concepts need to be clearly defined to avoid misunderstandings. Chapter 1 has outlined the framework and language of the existing legislation for post separation parenting arrangements in Australia.

2.31 There have been many submissions that have drawn the committee's attention to legislation in the various states of the USA and other countries as examples for Australia to consider.[29] Many of these start with concepts

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27 Immigrant Women's Speakout Association of New South Wales (Mazzone M), transcript Blacktown, 1/9/03, p 25.

28 The New Zealand approach provides a two stage process for parenting disputes involving allegations of violence. The first deals with the allegation of violence and the second with the parenting issue.

29 Lone Fathers' Association (Aust) Inc, sub 1051, pp 11-12; Joint Parenting Association, sub 1153, pp 36-38; Family Court of Australia, sub 751, pp 55-56; Parkinson P & Cashmore J, sub 743, pp 18-23; Attorney-General's Department, sub 1257, pp 21-22.

of 'joint custody' but it means different things in different contexts.[30] Failing to distinguish between legal and physical custody skews the arguments about experiences with, or the prevalence of, a joint custody presumption.[31] Joint physical custody does not usually mean equal division of care. Some submissions point out that in reality (but with one possible exception[32]) no jurisdiction in the English speaking world has created a rebuttable presumption of equal time.[33] However, there is a common emphasis on shared parental responsibility (joint legal custody) with some specifying a preference for shared physical care arrangements that divide time children spend with each parent in substantial proportions (from 30 to 50%).

Parental Responsibility

2.32 Joint decision making is a key feature of sharing parental responsibility in most overseas jurisdictions.[34] Shared decision making needs to be viewed and supported as a valued part of post separation parenting. How much time children should spend with each parent, is a separate consideration.

2.33 Section 61C of the FLA specifies that parental responsibility lies with each parent. In practice this is often ignored. The parent with residence usually assumes the power because this is the practical outcome of living arrangements rather than as the result of legal exclusion. In fact courts do not pay attention to shared responsibility because this is the 'ordinary position'.[35]

2.34 The committee is committed to an approach which is based on a principle that both parents should remain involved in their children's lives and maximises the time children spend with each parent. For example the Iowa Code at 598.41:

> The court, insofar as is reasonable and in the best interest of the child, shall order the custody award, including liberal visitation rights where appropriate, which will assure the child the opportunity for the maximum continuing physical and emotional contact with both parents after the parents have separated or

30 Attorney-General's Department, sub 1257, p 21; Australian Institute of Family Studies, sub 1055, p 9.

31 Shared Parenting Council of Australia, sub 1050, p 51; Lone Fathers' Association (Aust) Inc, sub 1051, p 12.

32 The one exception appears to be Louisiana. See Parkinson P & Cashmore J, sub 743, p 18.

33 Attorney-General's Department, sub 1257, pp 21-22; Parkinson P & Cashmore J, sub 743, p 18; Family Court of Australia, sub 751, pp 53-57.

34 Ryrstedt, E. Joint decisions – A prerequisite or a drawback in joint parental responsibility?, *Australian Journal of Family Law*, 17, (2003), p 155.

35 Family Court of Australia (Chisholm J), transcript, 10/10/03, p 21.

> dissolved the marriage, and which will encourage parents to share the rights and responsibilities of raising the child unless direct physical harm or significant emotional harm to the child, other children, or a parent is likely to result from such contact with one parent.[36]

2.35 The committee has considered the concept of 50/50 shared residence (equal time), raised by the terms of reference, in the context of the evidence referred to above. It has concluded that the goal for the majority of families should be one of equality of care and responsibility along with substantially shared parenting time. They should start with an expectation of equal care. However, the committee does not support forcing this outcome in potentially inappropriate circumstances by legislating a presumption (rebuttable or not) that children will spend equal time with each parent. Rather, the committee agrees that, all things considered, each parent should have an equal say on where the child/children reside. Wherever possible, an equal amount of parenting time should be the standard objective, taking into account individual circumstances.

Conclusion

2.36 The committee's understanding of shared parenting is what is often referred to as 'joint legal custody'. It encompasses shared responsibility as recognised by the Family Law Act and shared decision making about the major aspects of child rearing. Shared parenting of this kind promotes and enables continued involvement of both parents in the lives of their children. With respect to shared decision making, there are many circumstances where the law currently attaches the responsibility to either parent rather than both. Shared parenting will in these situations mean a requirement to consult rather than a requirement that the parents are jointly responsible.

2.37 A particular practical impact of shared parenting which parents and others will need to consider is the fact that normal practices around information sharing after separation will need to change. If parents are to share responsibilities around a child's health, they will both have to have access to medical records and Medicare information. If they are to share in the child's educational development, schools will need to make reports and other school activity information routinely available to both parents.

Parenting time

2.38 The committee believes there is clearly a need to examine ways in which the time children spend with each parent after separation can be

36 Parkinson P & Cashmore J, sub 743, pp 22-23.

maximised. The committee also believes that shared residence arrangements should become the norm, wherever practicable, rather than the current emphasis on sole residence.

2.39 Two aspects of an equal time template have been highlighted. First, there are dangers in a one size fits all approach to the diversity of family situations and the changing needs of children. Secondly, there are many practical hurdles for the majority of families to have to overcome if they are to equally share residence of children. Many have pointed to the increased risk of exposure of children to ongoing conflicted parental relationships[37] and the instability that constant changing would create for children. Family friendly workplaces are rare[38], as are the financial resources necessary to support two comparable households[39]. Some parents lack the necessary child caring capabilities. Distance between households creates problems for transport and for schooling. Second families can also bring complications. Indigenous families' approach to parenting does not fit with the expectations of equal time.[40]

2.40 Some have talked about the factors that support successful equal sharing, such as cooperative relationships, geographical proximity, prior sharing of parental care, good communication, agreement about matters relevant to the child's day to day care, parental commitment to the arrangement and to a focus on the child's interests. [41] The more these characteristics exist, the more likely a shared arrangement will be workable and positive for the child.

2.41 In all this discussion about when equal time will work, and when it will not, there are no black and white answers. The committee heard from a number of people who appear to have been able to manage arrangements of equal or close to equal care in spite of poor communication between parents and even where there has been significant conflict or hard fought court cases.[42] On the other hand, Dr McIntosh said there is a line to be drawn somewhere in that scenario to ensure that shared arrangements where the conflict is high are not more damaging to the children. Dr McIntosh concludes:

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37 McIntosh J, transcript, 20/10/03, pp 6-7.

38 Human Rights & Equal Opportunity Commission, sub 1052, p 17.

39 Harding A, transcript, 3/11/03, p 15.

40 Top End Women's Legal Service (Hughes C), transcript, 25/9/03, p 35; Family Court of Australia, Indigenous Family Consultant Program (Akee J), transcript, 5/9/03, pp 40-41.

41 Family Law Section of the Law Council of Australia, sub 1021, pp 6-7; Family Court of Australia, sub 751, p 25; Relationships Australia, sub 1054, pp 16-17.

42 Grant, transcript, 24/9/03, p 100; Martin, transcript, 24/9/03, p 96; Jan, transcript, 25/9/03, p 46.

> The findings … are unequivocal, and unapologetic regarding parental conflict and impacts on child development. Yes, children are strong, yes, development is robust, no, divorce does not have to be damaging, yes, parents basically want the very best for their children; and, yes, enduring parental conflict places the odds against all children, in all families.[43]

2.42 The AIFS states that '… Each child and each family circumstance is unique, so you need to take each case on its merits'. Decision making rules should encourage '… different and more creative ways that parents can arrange care, so that, if parents separate, they can look at different ways of doing things…'[44]

Conclusion

2.43 A key part of the committee's view of shared parenting is that 50/50 shared residence (or 'physical custody') should be considered as a starting point for discussion and negotiation. The committee acknowledges that there is a weight of professional opinion that stability in a primary home and routine is optimal for young children in particular. The objective is that in the majority of families, parents would consider the appropriateness of a 50/50 arrangement in their particular circumstances taking into account the wishes of their child/children and that each parent should have an equal say as to where the children reside.

2.44 In the end, how much time a child should spend with each parent after separation, should be a decision made, either by parents or by others on their behalf, in the best interests of the child concerned and on the basis of what arrangement works for that family.

Relocation

2.45 Some of the most difficult cases that family law courts have to deal with are those that involve questions of parental relocation following separation and how this impacts on the child's relationship with the other parent. As the FCoA has pointed out in its submission:

> … The opportunities which separation provides for parents to re-partner, to reframe their lives and to put distressing experiences behind them makes them a particularly mobile population.[45]

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43 McIntosh J, Enduring conflict in parental separation: Pathways of impact on child development, *Journal of Family Studies*, vol 9, no 1, April 2003, p 76.

44 Australian Institute of Family Studies (Smyth B), transcript, 13/10/03, pp 11, 25.

45 Family Court of Australia, sub 751, p 39.

2.46 The Court pointed out that decisions in these cases will, like other parenting cases, be made on the basis that the best interest of the child is the paramount consideration. The case of *B and B* [46]which examined the impact of the 1995 amendments on this question confirmed this. Evidence to the inquiry pointed to the fact that geographic distance is a factor that works against shared physical care of children.[47] Relocation obviously creates that distance.

2.47 Shared parental responsibility will necessarily constrain the ability of separated parents to move freely. Moving interstate, overseas or even across to another side of a city is an important decision in the life of the child as well as the parent and should be decided jointly. If the parents cannot agree on it their recourse is to seek a decision by a court. Whilst the best interests of the child remains paramount it is not the sole consideration according to the Full Court of the Family Court[48]. 'To the extent that the freedom of a parent to move impinges upon those interests, that freedom must give way'.

Conclusion

2.48 The committee believes truly shared parental responsibility will inevitably mean that relocation of one parent, whether the primary carer or the other parent, should be less of an option.

Steps to shared parenting

2.49 Essentially the concept of shared parenting the committee has in mind is structured with a number of levels:

- The first is where fully shared decision making is appropriate. It comprises joint decisions about all aspects of post separation parenting, including jointly deciding where the child will live and how much time they will spend with each parent. This is the vision for post separation parenting in the future.
- The second level has joint decision making as the substance of the arrangement but where certain aspects, such as the time they will spend with each parent is separated from joint responsibility and assigned to one or other parent for reasons either agreed between them, or imposed by an external decision maker, and incorporated into a parenting plan (see below).

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46 *B and B (Family Law Reform Act 1995)* (1997) FLC 92-755 at 84,176, see Family Court of Australia, sub 751, p 17.

47 Top End Women's Legal Service (Hughes C), transcript, 25/9/03, p 36; Cashmore J, transcript, 13/10/03, p 35.

48 See Family Court of Australia, sub 751, Appendix 2, p 68.

- The third level would be applicable to families where issues like entrenched conflict, family violence, substance abuse or child abuse mean that joint parental decision making is not possible at the time of separation. A presumption against shared parenting may include referral to parenting programs, anger management, supervised contact services and the like. These opportunities are discussed further in Chapter 3.
- The final level of last resort would be where the circumstances are such that a child would not be safe in the care of a parent as a consequence of past family violence or serious child abuse, including sexual abuse. In such a case, a court may need to determine that contact between the child and that parent should not occur at all for the foreseeable future.

Conclusion

2.50 It is the committee's view that such a four part structure would enable a variety of post separation parenting outcomes that reflect the unique circumstances of each family and at the same time maximise the opportunity for ongoing involvement of both parents in their child's life.

Ways of increasing shared parenting

Create a rebuttable presumption

2.51 Legal experts explained to the committee when a rebuttable presumption in law is usually relevant and how it works.

> Typically a legal presumption is applied where a fact is to be established and rather than impose the costs of proving this fact when it is almost certainly the case, the law says 'take this fact as a given, subject to proof of facts to the contrary which rebut the presumption'.[49]

2.52 In the present context, the Attorney-General's Department stated that:

> should an equal time presumption be introduced into the Family Law Act, one possible outcome of its operation could be that it would effectively replace the principle that the best interests of the child are the paramount consideration ...[50]

But this is not at all clear.

Justice Chisholm stated because this would be a new kind of approach to family law legislation:

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49 Family Law Council, sub 1400, p 6.

50 Attorney-General's Department, sub 1257, p 19.

> … the introduction of such a presumption would be likely to lead to litigation to work out what it meant and how it related to other provisions of the Act ...[51]

2.53 The Attorney-General's Department has said:

> Presumptions in legislation work best where they represent the norm or usual situation. … presumptions of law are convenient methods of proving elusive facts…[52]

2.54 As noted above, only a very small percentage of separated families have equal time arrangements in place. It has been argued that there would be a significant increase of litigation as a result because the majority would not fit the presumption.[53] Others have argued that a presumption would have the opposite effect because it would eliminate the need for litigation for those who currently feel they have to argue against sole residence in order to get the level of contact they seek. [54]

2.55 These arguments relate to the specific presumption that was put to the committee by the terms of reference. They are less relevant to a presumption that both parents share in responsibility for their children. In fact this is the presumption that some have indicated is already implicit in sections 60B and 61C of the FLA. The committee has heard in evidence that in many people's experience this implied presumption is ignored. It has concluded that to increase the chances of truly shared parenting it needs to be made more explicit in the FLA. The committee has concluded from this that the provisions in the FLA need to be further amended to give this intention greater emphasis.

Reinforcing the intention of Parliament

2.56 As discussed above, the disappointment with the implementation of the 1995 reforms to the FLA has been a failure in practice, particularly in court outcomes, to match the expectation of Parliament for shared parenting. The committee believes that the Parliamentary intention could be significantly reinforced if courts were required to consider the presumption of shared responsibility in each case that they consider. Whilst the committee acknowledges that Parliament cannot dictate what orders courts will make, the legislation can provide guidelines for the

51 Chisholm J, sub 1620, p 3.

52 Attorney-General's Department, sub 1257, p 19.

53 This point has been made in numerous submissions; eg. Attorney-General's Department, sub 1257, p 20; Family Law Section of the Law Council of Australia, sub 1021, p 2; Family Law Council, sub 1400, p 13; National Association of Community Legal Centres, sub 836, p 1.

54 Shared Parenting Council of Australia, sub 1050, p 27.

exercise of judicial discretion. Courts can also play an educative role in terms of the legislative intent.

Conclusion

2.57 When courts are making parenting orders under Part VII of the FLA they should be required to provide parties with an explanation of the meaning of shared parental responsibility. This direction could be incorporated into section 61D.

Parenting plans

2.58 If it is assumed that the majority of families will start from a position of equally shared responsibility for their children, the next question has to be, how will that impact on the practical arrangements for the care of the children. Parenting plans were first recommended by the Family Law Council's Report in 1992[55] as a way to shift the focus of post separation parenting away from who is the better parent towards cooperation around sharing parental responsibility.

> The idea of parenting plans has essentially grown out of attempts to resolve the sole custody versus joint custody debate.[56]

2.59 Parenting plans assume a joint decision making capacity and responsibility to sort out and agree upon such things as the physical care of the child, including where they should live and how much time they should spend with each parent, as well as how the parents will allocate their decision making. A parenting plan can be as detailed or as general as the parties to it require, depending on their capacity to communicate and be flexible. For example, a parenting plan may state:

- how much time children will spend with each parent;
- all the practical arrangements to make this work;
- who will be responsible for making decisions about certain listed things;
- that on some specific issues those decisions will be made jointly; and
- when the parents cannot agree, what will happen to resolve the difference, such as referral to mediation, arbitration or to the courts.[57]

2.60 The Family Law Council has more recently recommended that the provisions for registration of parenting plans in the FLA be repealed.[58]

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55 Family Law Council, *Patterns of parenting after separation* : *A report to the Minister for Justice and Consumer Affairs prepared by the Family Law Council, Canberra*, AGPS, Canberra, April 1992, 66p.

56 Family Law Council, April 1992, p 38.

57 This is not intended to be a comprehensive list, purely illustrative of the concept.

This was primarily because this process was cumbersome and made them too inflexible, confusing and unpopular with family lawyers.[59] But they also concluded that parents should be encouraged to develop them, particularly with a mediator, as a means of ensuring the best interests of the child, minimising conflict and taking responsibility, using the legal system as a last resort.[60]

2.61 The advantage parenting plans have over consent orders is that the latter often lead to subsequent expensive disputes over matters of detail. This can be avoided if the detail stays in a plan which can be amended and negotiated over time.

2.62 The binding intentions of the content could be reinforced by requiring courts or other bodies who are called upon to either enforce or vary a parenting plan to be required to have regard to its terms and intent. Registration may therefore be useful, provided the process for doing so is simple and does not compromise flexibility.

Conclusion

2.63 Many witnesses before the committee have said that parenting plans can play a role in helping parents to cooperatively manage their responsibilities.[61] The committee sees parenting plans as part of the package in support of a rebuttable presumption of shared parenting. Mechanisms for putting them in place are discussed in chapter 4.

Consult the children

2.64 The committee considered research about the benefits for children and their long term welfare of having both parents involved in their lives.[62] Several people have also advocated strongly for children to be given a

58 Family Law Council, National Alternative Dispute Resolution Advisory Council, *Letter of advice to the Attorney-General on Parenting plans*. Family Law Council and NADRAC Secretariats, Canberra, March 2000, vii 16p appendices.

59 Family Law Council, NADRAC, Mar 2000, p 15.

60 Family Law Council, NADRAC, Mar 2000, p 15.

61 For example: Muswellbrook Women's and Children's Refuge Inc, transcript Gunnedah, 27/10/03, p 40; Witness 1, transcript Coffs Harbour, 27/10/03, p 4; Law Council of Australia (Dewar J), transcript, 17/10/03, p 11; Parkinson P, transcript, 13/10/03, p 34; Shared Parenting Council of Australia (Greene G), transcript, 24/9/03, p 74.

62 Bauserman R, Child adjustment in joint-custody versus sole-custody arrangements: A meta-analytic review, *Journal of Family Psychology*, vol 16, no 1, (2002), pp 91-102.

greater say about what parenting arrangements they want.[63] Research shows children respond positively to being consulted.[64]

2.65 Some caution has been expressed about laying the responsibility on children to make choices. There are now well researched models for consulting with children which take this into account but enable their views to be influential.[65]

Conclusion

2.66 The committee believes that a requirement to consult with children on these issues may well encourage decision making based on their needs and attachments rather than parental needs. [66]

Education and support

2.67 Many coming before the committee have agreed that there is a need for community education about the objectives of the current family law legislation and the benefits for children of cooperative and involved parenting both before and after separation.[67] For example:

> … a community education and awareness campaign to educate the wider community about the benefits of children having quality relationships with both parents and extended family members, such as grandparents, following separation. … The aim would be to shift community expectations of parenting after separation. Of course, the community includes the workplace, and we hope that they would listen as well ...[68]

2.68 Individuals' actions are often influenced by what they perceive as the norm in the community. An education strategy could provide the opportunity for government to promote the preferred parenting model, including the use of parenting plans and to have an impact on behaviour.

2.69 The committee heard a number of examples of successful shared parenting. [69] But it may not come easily to everybody, especially if the

63 Family Services Australia, sub 1023, p 11; Relationships Australia, sub 1054, p 27; Eyre Peninsula Women's & Children's Support Centre, sub 1163, p 1.

64 Family Services Australia, sub 1023, p 11.

65 McIntosh J, *Child Inclusive Divorce Mediation: a Report on a Qualitative Research Study*, Mediation Quarterly, vol 18, no 1, p 55.

66 Family Services Australia, sub 1023, p 18.

67 Central Coast Domestic Violence Committee, transcript, 26/10/03, p 27; Moloney L, transcript, 20/10/03, p 21; Family Law Council (Dewar J), transcript, 17/10/03, pp 7-8; Top End Women's Legal Service (Hughes C), transcript, 25/09/03, p 42; Bill, transcript, 25/09/03, pp 46-47.

68 Relationships Australia(Gibson D), transcript, 20/10/03, p 27.

69 For example: Witness 3, transcript Blacktown, 1/9/03, pp 39-46.

separation has been painful or acrimonious. There is a different call on parenting skills after separation.

> … It is not that the separating population have worse parenting skills; it is that separation imposes an assault on parenting capacity and it is conflict that drags parents down and compromises sorely their ability to be attuned to their children's needs ...[70]

2.70 Making decisions jointly usually needs effective communication and problem solving skills. Increased access to parenting support services may also increase the capacity for shared parenting for those who are having difficulty dealing with the additional stresses of separation.[71] This is discussed further in Chapter 3.

Conclusions

2.71 Despite the intentions of the Family Law Reform Act of 1995, shared parenting and shared physical care have not become a reality for the vast majority of separated families. There are still winners and losers and children are still treated as the spoils of divorce and separation. Whilst legislation cannot make people behave reasonably or be good parents, it can provide them with a template within which to develop their own approaches to their parenting responsibilities. The principles of the 1995 reforms remain relevant today. The committee believes that shared parental responsibility needs to become the standard. It believes that this can be achieved at least in part by making specific adjustments to the legislation.

2.72 It would be dangerous to impose inflexible models in legislation which impacts on the private lives of the whole diversity of Australian families. Flexibility acknowledges the diversity of family circumstances. The committee believes that a preferred starting point might encourage maximum parental involvement.

2.73 Legislation will not achieve all this on its own and may need to be supported by a range of other initiatives.

Is changing the Family Law Act enough?

2.74 Legislation can have an educative effect on the separating population outside the context of court decisions, if its messages are clear, it is

70 McIntosh J, transcript, 20/10/03, p 6.

71 Relationships Australia, sub 1054, p 25.

accessible to the general public and well understood by those who offer assistance under it. Most separating families reach agreements themselves, some with more help than others. Many will do this within the framework provided in legislation, many will be influenced by perceptions of what that framework is. It is important that the perceptions match the framework if the intended outcomes are to be achieved.

2.75 The committee has concluded that this divergence between the provisions of the Act and community perceptions about it is where the 1995 reforms appear to have failed in achieving a shared parenting presumption.

2.76 Many submitters have offered proposals for legislative amendment which would increase the possibility of shared parenting outcomes. The committee has found these suggestions helpful and taken account of them in drawing together the recommendations below.[72] The committee has made some suggestions for drafting the legislative amendments. It also commends to government the suggestions made in submissions for further consideration.[73]

2.77 The committee has also concluded that community perception of legislation is as critical to its success as its actual content. Any legislative change which the government decides to implement may therefore need to be accompanied by community and professional education. This has been a common practice in other areas of law reform, such as taxation and health.

2.78 Such a strategy should set the community standard of substantially shared post separation parenting along with ways to measure achievement against that standard.

Retrospectivity

2.79 Most of the individuals who contributed to this inquiry have already been through separation or divorce. Many have either made arrangements under the current system or have court orders already in place. The committee is concerned that there may be an expectation that outcomes from this inquiry will be able to make an automatic difference to their situations.

2.80 Given the dynamic nature of families and the capacity for any court orders to be reviewed and varied when there has been a change in circumstances, the committee does not propose retrospective reforms. Clearly existing

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72 See in particular Family Law Council, sub 1400, 25p; Parkinson P & Cashmore J, sub 743, 46p; Aboriginal Legal Service Western Australia, sub 1141, 9p.

73 Key documents are: Family Law Council, sub 1400, 25p; Aboriginal Legal Service of Western Australia, sub 1411, 9p; Parkinson P & Cashmore J, sub 743, 46p.

court orders should not be overturned or amended without agreement between the parties or application to the courts to vary them. All the courts who have submitted to this inquiry have raised concern about the impact of legislative change on their workloads, and that there are signs of this already apparent since the announcement of this inquiry.[74] Legislative change may create a serious increase in workload for the courts whether the provisions are specifically retrospective or not.

2.81 The committee considers that there will need to be a range of possible mechanisms which will enable people to re-negotiate their arrangements in light of the recommended reforms, preferably without the need to return to the courts. The committee strongly believes that the legislation should not be amended without government also addressing the system issues discussed in Chapter 4.

Recommendation 1

2.82 **The committee recommends that Part VII of the *Family Law Act 1975* be amended to create a clear presumption, that can be rebutted, in favour of equal shared parental responsibility, as the first tier in post separation decision making.**

Recommendation 2

2.83 **The committee recommends that Part VII of the *Family Law Act 1975* be amended to create a clear presumption against shared parental responsibility with respect to cases where there is entrenched conflict, family violence, substance abuse or established child abuse, including sexual abuse.**

Recommendation 3

2.84 **The committee recommends that Part VII of the *Family Law Act 1975* be**

74 Family Court of Western Australia, sub 1111, p 2; Family Court of Australia (Nicholson CJ), transcripts, 10/10/03, p 7; Federal Magistrates Court, sub 741, p 2.

amended to:

- **provide that the object of Part VII is to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents are given the opportunity for meaningful involvement in their children's lives to the maximum extent consistent with the best interests of the child;**
- **define 'shared parental responsibility' as involving a requirement that parents consult with one another before making decisions about major issues relevant to the care, welfare and development of children, including but not confined to education – present and future, religious and cultural upbringing, health, change of surname and usual place of residence. This should be in the form of a parenting plan;**
- **clarify that each parent may exercise parental responsibility in relation to the day-to-day care of the child when the child is actually in his or her care subject to any orders of the court/tribunal necessary to protect the child and without the duty to consult with the other parent;**
- **in the event of matters proceeding to court/tribunal then specific orders should be made to each parent about the way in which parental responsibility is to be shared where it is in the best interests of the child to do so; and**
- **in the event of matters proceeding require the court/tribunal, to make orders concerning the allocation of parental responsibility between the parents or others who have parental responsibility when requested to do so by one or both parents.**

Recommendation 4

2.85 **The committee recommends that Part VII of the *Family Law Act 1975* be further amended to remove the language of 'residence' and 'contact' in making orders between the parents and replace it with family friendly terms such as 'parenting time'.**

Recommendation 5

2.86 **The committee recommends that Part VII of the *Family Law Act 1975* be further amended to:**

- **require mediators, counsellors, and legal advisers to assist parents for whom the presumption of shared parenting responsibility is applicable, develop a parenting plan;**
- **require courts/tribunal to consider the terms of any parenting plan in making decisions about the implementation of parental responsibility in disputed cases;**
- **require mediators, counsellors, and legal advisers to assist parents for whom the presumption of shared parenting responsibility is applicable, to first consider a starting point of equal time where practicable; and**
- **require courts/tribunal to first consider substantially shared parenting time when making orders in cases where each parent wishes to be the primary carer.**

Recommendation 6

2.87 **The committee recommends that the Commonwealth Government develop a wide ranging, long term and multi level strategy for community education and family support to accompany legislative change and to promote positive shared parenting after separation, as was recommended by the Family Law Pathways Advisory Group.**

3

Facilitating shared parenting

Introduction

3.1 The terms of reference for this inquiry have asked the committee to have regard to the Government's response to the Report of the Family Law Pathways Advisory Group. That response has made a few key points that have been influential in the committee's consideration of the issues raised in the evidence. First and foremost is the acknowledgement that family separation is associated with conflict, sometimes entrenched and damaging – damaging to the parents and the children. As Catholic Welfare Australia put it in evidence to the committee:

> … in separation conflict is a given in about 98 per cent of the cases. It takes two people to agree to marry or to be in a relationship. It takes only one to say, 'I am over and out'. You start from the basis of conflict. … you can tailor-make around all of these issues but it is going to do nothing about what underlies them because in separation, conflict is a given.[1]

3.2 The Shared Parenting Council agrees with this, stating:

> … the whole problem is that we are addressing family breakdown as a legal issue. It is not a legal issue; it is a human relationships issue. Two parents who are separating are in conflict and it is obvious, isn't it?[2]

3.3 Numerous individual submissions, witnesses and community statements related experiences of pain, loss, anger, hurt and often apparently

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1 Catholic Welfare Australia (Roots M), transcript, 20/10/03, p 34.

2 Shared Parenting Council (Greene G), transcript, 24/9/03, p 81.

vindictive behaviour by ex-partners. The committee has concluded from all of the emotional outpouring from the community during its inquiry that conflict and relationship issues cannot be ignored. They should not be left to fester while emotionally stressed people struggle with the shock of divorce and separation in a confused state about where to go for help. The most common places people turn for help are still lawyers and courts. Legal services, including courts, are neither designed nor resourced to provide therapeutic interventions to repair the emotional damages of separation. People in this state often are incapable of focussing on their own and their children's future needs while they inevitably are still dwelling on the past.

What's already happening

3.4 The Government's response to the Pathways Report has focussed on three themes:

- early help: connecting people to information and services;
- better outcomes for children and young people; and
- an integrated system that meets families' needs.[3]

3.5 There is a strong community interest in managing the many issues arising from family separation without resorting to the formal processes of the courts. However, it was apparent that parents do not always know where to look for the kind of support or services they really need. This is particularly the case for men and for rural and regional families. The Family Pathways group said:

> What is very evident out there is that many men do not know where to turn. There are no support groups for men in particular. They find themselves very isolated. In particular, emotional support in knowing the directions in which they can go, what they can do and how they can get into other services for assistance is not there. They do not know where to go and how to access help. That is a big problem for them.[4]

3.6 The services that do exist are not sufficient across the board to meet the demand nor at the time they are needed.

3.7 The committee heard about and observed a small number of valuable initiatives designed to assist separating families cope with their emotional

3 *Government response to the Family Law Pathways Advisory Group Report,* Attorney-General's Department and Department of Family and Community Services, Canberra, May 2003, p 8.

4 Family Pathways (Bennet P), transcript Gunnedah, 27/10/03, p 31.

and family transition. Many of these initiatives help parents to focus on the needs of their children at this difficult time.

3.8 This chapter briefly looks at what is already happening and some areas where more can be done to assist families to reach their own arrangements in a non-legal environment. Such an approach is more likely to enable families to address their conflict issues, deal with the pain and hurt that often emerges, and move on to positive future child focussed shared parenting.

3.9 The committee believes Government should do everything it can to:

- strengthen the network of what, for the purposes of this report, are referred to as early intervention services which already exist;
- support strategies for encouraging separating families to access them early; and
- expand those which are known to be proving effective but still only available to a very small proportion of separating families.

3.10 The Pathways Report identified that there are parts of the family law system, particularly around counselling and mediation services, that are working well.[5]

3.11 Currently the Family Relationships Services Program (FRSP) funded jointly by the Department of Family and Community Services (FaCS) and the Attorney-General's Department provides a range of services supporting families. In 2003-04 the government has allocated $56m to this whole program. In 2001-02 the program assisted approximately 130,000 clients. The services aim to:

- enable children, young people and adults in all their diversity to develop and sustain safe supportive and nurturing family relationships; and
- minimise the emotional, social and economic costs associated with disruption of family relationships.[6]

3.12 The services address a range of family relationship needs to varying degrees through a range of services providing mediation, counselling, parenting skills, men in family relationships, supervised child contact, and others. Their locations are spread across Australia but the services are still

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5 Family Law Pathways Advisory Group, *Out of the maze: Pathways to the future for families experiencing separation: Report of the family Law Pathways Advisory Group,* Commonwealth Departments of the Attorney-General and Family and Community Services, Canberra, July 2001, p 9.

6 Department of Family and Community Services, sub 1702, p 1. The details of all the elements of the Program are listed in Department of Family and Community Services, sub 1251, p 22, Attachment A.

not comprehensively available.[7] Their location within local communities helps them to be accessible and family friendly but their capacity to meet the need is limited by their resources, especially in rural and remote areas.[8] Most services under the FRSP charge a fee on a sliding scale according to income. Most of the following innovative programs fall under this program.

Cooperative parenting

3.13 If the presumption proposed in Chapter 2 is to be effective at promoting shared parenting after separation and increasing the incidence of it, some means of building capacity for that outcome in families is clearly required. The submission from the Australian Institute of Family Studies (AIFS) referred to research around joint physical custody which showed the personal characteristics with which parents can successfully support shared care as:

- commitment
- flexibility
- mutual co-parental support
- ability to reach agreement on implicit rules.[9]

3.14 The AIFS goes on to discuss the constraints on shared parenting and concludes from the research that:

> With appropriate mediation and counselling assistance to parents, except in the most extreme situations, some of these constraints may be ameliorated or modified to enable some degree of shared parenting of children.[10]
>
> …
>
> The support of alternative interventions to litigation, such as mediation and conciliation, and parent education, may facilitate reaching and implementing the most appropriate parenting arrangement in the best interests of the child.[11]

7 See Department of Family and Community Services website for service details, viewed 12/12/03, www.facs.gov.au/frsp

8 Department of Family and Community Services, sub 1702, Attachment A (location maps).

9 Australian Institute of Family Studies, sub 1055, p 15.

10 Australian Institute of Family Studies, sub 1055, pp 19-20.

11 Australian Institute of Family Studies, sub 1055, p 22.

3.15 Evidence before the committee confirmed that many parents need help to achieve co-operative parenting, especially when they are still coping with the relationship breakdown. Dads in Distress put it as follows:

> Alongside any reform process we need a resourcing mechanism for separating parents. It is our belief that most parents can achieve cooperative parenting relationships. However, they need a framework that supports and assists them. They need time to come to an understanding of their changed roles beyond separation. They need time to process and accept the reality of those changed relationships. They need a place to do it in, and they need people to do it with.[12]

3.16 Organisations like Dads in Distress are able to contribute to this outcome.

3.17 For many parents, arrangements they have in place are fragile. They start off cooperatively but co-operation falls apart over time. There are well-known stressors on maintaining post separation parenting arrangements – new relationships, relocation, change in employment and new children in second families.

3.18 The committee believes that a range of strategies to support separated parents to achieve co-operative shared parenting is likely to be necessary. This is complex social policy with funding implications. Some recommendations were made to the committee by FRSP service providers working in the field.[13] The committee has seen that successful and innovative work is happening but appears to be only available in few locations and achievements appear limited by the resources and funding arrangements.[14]

Contact orders program

3.19 One particularly successful program which the committee has looked at is part of the FRSP and known as the Contact Orders Program. It

> 'helps … very conflicted non-compliant adults move towards a more co-operative stance about child contact with their former partners'. Benefits include learning about the positives of parenting and communication skills.[15]

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12 Dads in Distress (Lenton R), transcript Coffs Harbour, 27/10/03, p 48.

13 Relationships Australia, sub 1054, 31p various app; Catholic Welfare Australia, sub 1022, 13p; Family Services Australia, sub 1023, 26p.

14 Catholic Welfare Australia (Beaver D), transcripts, 20/10/03, p 37.

15 Attorney-General's Department, *The Contact Orders Program: A summary of the independent evaluation of the Contact Orders Pilot, July 2000 to April 2002*, Attorney-General's Department, Canberra, 2003, p 2.

3.20 The most valuable part of the Contact Orders Program has been its focus on children. The evaluation commissioned by the Attorney-General's Department reported that:

> The most powerful activity of all, in creating an impetus for change in the parents, is feeding information back to parents about what their own children have said their worries and feelings are, and about the effect the conflict is having on them.[16]

3.21 The program provides a child inclusive approach to resolving parental difficulties around parenting after separation.

3.22 The components of the program include the facilitated feedback to parents from children previously outlined, mixed gender adult groups and group sessions for children. One provider of this program, Unifam said:

> … staff have been remarkably successful in changing the focus from who lives with whom and for how much of the time, to what are the best interests of the children, and how can parents work to reduce conflict and to ensure improved relationships between the children and both their parents, resident and non-resident.[17]

3.23 Unifam also described it as a program which provides an alternative to courts which 'empowers parents to decide their children's living arrangements'. These are parents who have been unable to resolve their problems even after spending up from $50,000 in legal fees through multiple court visits.[18]

3.24 The committee visited Unifam's service at Parramatta and met with clients who had been in the program. The program works closely with the courts at Parramatta and many clients are referred who the courts have found they can assist no further. The positive impact the program had on their previously entrenched conflict behaviour, so that they could now focus on their children, was patently obvious to the committee.

3.25 This program, which began as a pilot but is now on-going, currently operates from three locations only – Parramatta, Hobart and Perth. During 2002-03 approximately 860 clients used these services and they have significant waiting lists.[19] The government response to the Pathways Report has continued the funding for these and expanded the program to two other locations – Melbourne and South East Queensland.[20] Funding allocated for 2003-04 is $1.2m.

16 Attorney-General's Department, *The Contact Orders Program*, p 6.

17 Unifam Counselling and Mediation, sub 505, p 7.

18 Unifam Counselling and Mediation, sub 505, p 7.

19 Department of Family and Community Services, sub 1702, p 4.

20 *Government response to the Family Law Pathways Advisory Group Report*, p 11.

Conclusion

3.26 The committee has heard from many people whose evidence showed that they would undoubtedly have benefited from this kind of assistance. With the ongoing rate of divorce and separation, and the level of conflict amongst this population previously mentioned, there is clearly a critical need for more of this kind of intervention. The committee strongly urges the government to make the contact orders program available across the whole of Australia as a matter of priority. Given the relevance of the service for families struggling with court orders and their aftermath, it would be appropriate to locate services near each registry of the Family Court.

Post separation parenting skills

3.27 Parenting skills, as mentioned in Chapter 2, are stressed by separation. Catholic Welfare Australia reported that services in this area funded under the FRSP by FaCS are not widespread and funding is very small.[21] In some states similar services are funded by State governments.[22] The Family Relationships Skills Training Program promotes positive parenting and non-violent problem solving by providing families with parenting and family functioning skills. Forty of these services are currently funded under the FRSP - $2.4m in 2003-04. They saw approximately 3000 clients in 2001-02 (45% male, 55% female).[23] The committee is aware that this program is not particularly focussed on post separation parenting skills. However, it may be an appropriate place from which to build such programs in the future.

3.28 Some practical advice on how to manage separated parenting has been made available through a publication developed by the FCoA, FaCS and the Child Support Agency- "*Me and My Kids: parenting from a distance*". This booklet is available free from the agencies involved (and on some of their websites) and is also used by many of the FRSP providers working with separated parents. In correspondence to the committee and in evidence this publication has received mixed reaction.[24]

Child inclusive mediation

3.29 A second area of focus for the Government response to the Pathways Report has been giving more attention to the needs and voices of children

21 Catholic Welfare Australia (Roots M), transcript, 20/10/03, p 40.

22 Catholic Welfare Australia (Beaver D), transcript, 20/10/03, p 40.

23 Department of Family and Community Services, sub 1251, p 23, Attachment A.

24 Val, transcript Blacktown, 1/9/03, p 56.

in post separation parenting decision making processes. Both the Pathways Report and the Government Response to it emphasised the importance of a child focus in the system one of whose principles is that the best interests of the child are paramount. Since the 1995 reforms to the FLA, there has been a growing body of work around developing child inclusive practice in family relationships services, as well as in legal services. The response has defined child inclusive practice as 'explicitly taking into account the needs of children when working with families in conflict.'[25]

3.30 The advancement of child inclusive practice in the FRSP has been incremental. In 2001 a series of practice forums were held to share providers' ideas, experiences and concerns to further develop expertise by examining 'good practice' examples.[26] The work was about the aim for community based family relationships workers to be looking for the best way to 'facilitate the child's voice being heard'.[27]

3.31 A 'Children in Focus' professional development program has been initiated since for counsellors and mediators with funding from the Attorney-General's Department. This was developed by Professor Moloney and Dr McIntosh[28], who described child inclusive mediation as:

> Where the mediation process works exceptionally well is in the child inclusive version of it. In the model that Jen and I have been teaching, a separate child interviewer works with the children and then goes back into the mediation session and talks to the parents about not so much what the children want but how they are doing and how they are seeing the situation. The parents negotiate as well as their own needs, which are typically up on a whiteboard or something, John's needs and Mary's needs, and they become part of the equation. That has a dramatic impact on the way parents cooperate.[29]

25 *Government response to the Family Law Pathways Advisory Group Report,* p 12.

26 Mackay M, *Through a child's eyes: Child inclusive practice in Family Relationships Services: A report from the Child Inclusive Practice Forums, held in Melbourne, Brisbane, Newcastle, Adelaide and Sydney from August to September 2000,* Department of Family and Community Services, Canberra, May 2001, ix 49p.

27 Mackay M, p 5.

28 McIntosh J, transcript, 20/10/03, p 22; Moloney L, transcript, 20/10/03, p 22.

29 Moloney L, transcript, 20/10/03, p 6.

3.32 The skills and training of the people working with the children is critical to its success.[30] Also sensitivity to the children's desire to be involved would be important.

3.33 Clearly as children are the most impacted upon by separation and divorce and by parental conflict it is important that they have an influence in the decisions which affect them. As mentioned elsewhere in this report, the committee heard that there is widespread support for giving children a voice. This is as important in the non-legal setting as it is in the legal setting.

3.34 This model has been described by some as therapeutic mediation.[31]

Children's contact services

3.35 Many parents who have difficulty managing their contact arrangements after separation for reasons of conflict or violence are able to maintain relationships with their children. Some are able to access the assistance of Children's Contact Services. These services provide supervision of contact when parents need help to develop a relationship with the child and sometimes when there are unresolved allegations of child abuse. They also provide facilitated changeovers which enable children to be transferred from one parent to the other in a safe and supportive environment. The services are all child focussed and incorporate the child's views in the way they provide the service.[32]

3.36 There are currently 35 of these services nationally funded under the FRSP. In 2003-04 the government has allocated $4.1m to the program which assisted 6000 clients in 2001-02.[33] There are also an unknown number of unfunded services. Most families who use these services have been through litigation and are referred by courts or lawyers to the service as a way of managing the ongoing conflict in the parental relationship. Essentially these parents have been unable to reach an agreement around contact arrangements. Relationships Australia said of their service:

> Our objective always is to attempt to … have the parents focus back on the needs of their children and to provide role models, where possible. We aim to have contact continue with both parents on a consistent basis regardless of protracted periods of

30 McIntosh J, Child-inclusive divorce mediation: Report on a qualitative research study, *Mediation Quarterly*, vol 18, no 1, Fall 2000, p 59.

31 Family Services Australia (Hannan J), transcript, 20/10/03, p 32; Moloney L, transcript, 20/10/03, p 5.

32 Relationships Australia (Smith J), transcript, 29/8/03, p 5.

33 Department of Family and Community Services, sub 1702, p 2.

> conflict, be it in the courts or outside the courts through other means.[34]

3.37 Courts and lawyers frequently refer families to these services as they provide a valuable support for orders that are likely to cause difficulty, where there are unresolved abuse allegations in the interim stage and where there is some violence the risk of which can be managed in a safe environment.[35]

3.38 Maintaining contact with children in difficult circumstances has been a significant issue for many parents who have given evidence to the committee. Disputes over handovers appear to commonly interfere with the capacity to manage shared arrangements smoothly. Some parents have had to resort to McDonalds or police stations.[36] Often these disputes become problematic for the ongoing relationship between the child and the contact parent. There may be a range of ways, other than Children's Contact Services, in which these disputes can be avoided, such as having one parent drop a child off at school and the other pick them up at the end of the day.

3.39 The Attorney-General's Department suggested there is value in making Contact Services available at an earlier stage.[37] This is likely to expand the client group and increase demand on services which already manage extended waiting times. The Children's Contact Services are a valuable adjunct to the Contact Orders Program.

Conclusion

3.40 It was evident to the committee that Children's Contact Services are invaluable to helping separated families unable to support their own arrangements to maintain parent/child relationships through difficult times.

Aboriginal and Torres Strait Islander family consultant program

3.41 During the committee's hearing in Cairns evidence was presented on the FCoA's Aboriginal and Torres Strait Islander family consultant program. The program employs indigenous staff to provide services which assist peaceful and dignified resolution of family conflict as an alternative to

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34 Relationships Australia (Smith J), transcript, 29/8/03, p 3.

35 Women's Services Network WESNET Inc, sub 159, p 8.

36 Jo, transcript, 29/8/03, p 44; Witness 1, transcript Knox, 28/8/03, p 25; McIntosh J, transcript, 20/10/03, p 7.

37 Attorney-General's Department, sub 1257, p 26.

confrontation and possible litigation, intimidation and violence.[38] The FCoA annual funding to this program is $588,000 serving the indigenous populations of North Queensland and the Northern Territory.[39] Urban aboriginal people do not currently have access to the program, except in the limited way described below. 2001 Census data identifies regions with the largest Indigenous populations as Sydney (37,557), Brisbane (34,809), Coffs Harbour (32,122), Wagga Wagga including Dubbo (20,966) and Perth (20,506).

3.42 A strong focus of the program is building capacity within the communities to manage their own family affairs. The Court provides assistance through this program 'in developing skills and enhancing … existing traditional skills of dealing with family problems.'[40] The aim is to keep families away from the legal court processes. It has been very successful at doing this, but there are only six consultants located in pairs at Cairns, Darwin and Alice Springs. These same consultants assist the rest of the Court in other States as required and usually from a distance.[41] This necessarily limits their achievements in those other locations.

3.43 In North Queensland the consultants have developed the Peacemaker Course which is a generic mediation training program delivered in indigenous communities.[42]

3.44 The committee also heard in Darwin about the good work done by the Indigenous family consultants employed by the Court in the Northern Territory.[43] The Strong Families program there 'aims to promote improved family functioning through relationship education that is founded on community involvement and participation.'[44]

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38 Family Court of Australia, *Nomination for AIJA Excellence in Judicial Administration Award 2002: The Aboriginal and Torres Strait Islander Family Consultant Program*, unpublished, FCoA, Canberra, p 8.

39 The FCoA is unable to provide data on the number of indigenous families assisted by the program, particularly in NT. 29% of the national ATSI population reside in Queensland. The funding covers significant travel and support costs for the outreach and community development work involved.

40 Family Court of Australia (Stubbs J), transcript, 5/9/03, p 42.

41 Family Court of Australia (Stubbs J), transcript, 5/9/03, pp 40-41.

42 Family Court of Australia, *Nomination for AIJA Excellence in Judicial Administration Award 2002: The Aboriginal and Torres Strait Islander Family Consultant Program*, p 12.

43 Top End Women's Legal Service (Hughes C), transcript, 25/9/05, p 39.

44 Family Court of Australia, *Nomination for AIJA Excellence in Judicial Administration Award 2002: The Aboriginal and Torres Strait Islander Family Consultant Program*, p 10.

Conclusion

3.45 The Pathways Report recommended expansion of the program and the committee strongly supports this.[45]

Relationship support

3.46 The FRSP provides some relationship education services – 160 services with 22,000 clients (both male and female) in 2000-01.[46] This inquiry has made it obvious to the committee that relationship breakdown is having a significant negative impact on communities and individuals. It is becoming more important that relationship support is needed before relationships are formed and while they are intact, as well as when they are going through separation and after.

Men and family relationships

3.47 Substantial evidence was presented to the committee about the impact of separation and loss of contact with their children on fathers. The Lone Fathers Association and others have suggested that the rate of male suicide in Australia is associated with family breakdown problems.

> A large proportion of male suicides are associated with family law related problems.[47]
>
> … 5.5 men a week commit suicide …[48]
>
> There is no doubt that separation, and everything that goes with separation, does influence suicide rates in males …[49]

3.48 The committee considers that male suicide is an issue that goes beyond the reach of this inquiry as there are no reliable statistics available on why men commit suicide. The committee has made considerable efforts to obtain this information but it is not available. However, what is clear is that there are vulnerable men who need targeted support, especially when their relationships break down. Strategies that help them to keep connected with all their family members and particularly with their children are vital.

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45 Family Law Pathways Advisory Group, p 75.

46 Department of Family and Community Services, sub 1251, p 23.

47 Lone Fathers' Association (Aust) Inc, sub 1051, p 11.

48 Dads in Distress (Lenton R), transcript Coffs Harbour, 27/10/03, p 52.

49 Department of Family and Community Services (Sullivan M), transcript, 17/10/03, p 34.

3.49 More particularly, many fathers also have difficulties maintaining their relationships with their children through the current family law system and this is distressing for them. Dads in Distress reported:

> Those [dads] are telling us that the difficulties faced in gaining access, through the present system is the source of much animosity. Fathers feel locked out of their children's lives. Many lose all contact with their children by the time their children reach their early teens … the emotional issues of separation grief, and recovery, are made ten times more difficult as a direct result of the physical isolation from children[50]

3.50 The FRSP includes 85 services who provide support targeted to men helping them to manage their family relationships, including with their children.[51] The Men and Family Relationships program evaluation report published in November 2002 indicated that it had been 'very successful in providing innovative services which take into account men's particular needs.'[52] With respect to separated men, the report sums up as follows:

> Men who are living with the pain of separating from their partners, and particularly separated fathers, are at an extremely vulnerable point in their lives. The men's services have demonstrated that this group of men can benefit greatly from service intervention. Separated fathers are particularly interested in gaining information and skills around maintaining close relationships with their children.[53]

3.51 As a result of the findings of the evaluation the program has now been given on-going funding. In 2001-02 funding was $2.2m, assisting 7500 clients, and this was increased in 2003-04 to $6.1m. Mr Sullivan (FaCS) reported:

> … The interesting issue that came out of the evaluation is that, with good counselling and good support services, you see a decrease in the suicide rate of males who are maintaining their child support payments. That is not conclusive but it is more suggesting that it is the issue of separation and the trauma of separation which probably needs to be addressed most significantly. We are seeing, out of those 10 or so services, significant positive results and certainly enough for the

50 Dads in Distress, sub 974, p 1.

51 Department of Family and Community Services, sub 1251, p 7.

52 O'Brien C & Rich K, Evaluation *of the Men and Family Relationships Initiative: Final report and supplementary report*, Department of Family and Community Services, Canberra, Nov 2002, p 4.

53 O'Brien C & Rich K, p 63.

> government to decide to now put in place continued funding for those services ...[54]

Conclusion

3.52 The committee is disturbed that the preventative area of family relationship service provision has such a low priority. The committee believes more could be done to prepare people better for marriage and parenthood and to support relationships throughout their continuum.

Defusing conflict

3.53 In Chapter 4 the committee looks more closely at reshaping the family law system to ensure families are helped to resolve their separation disputes in ways that minimise their need for lawyers and courts. When people separate there is inevitably some conflict, what is required is help for them to resolve it and move on, and not make it worse. Addressing the conflict and hurt of separation enables parents to move on and focus on their future responsibilities for their children. This is what the Contact Orders Program appears to be achieving. However, earlier, possibly therapeutic interventions, such as counselling are important as well.

Mediation before litigation

3.54 The idea of mediation as a way of resolving family disputes appears to be widely favoured. Evidence to the inquiry also supported the suggestion that it be made compulsory.[55]

3.55 Once a person commences proceedings in the FCoA, mediation is compulsory in parenting matters.[56] However, by this stage they are possibly already too far down the litigation track. The committee is convinced that mediation would be more effective if it happened before litigation commenced.

3.56 National Legal Aid advised that legal aid commissions provide mediation or primary dispute resolution for their eligible clients.[57] It is largely conducted in-house early in their case and before the Commission will grant them aid to litigate. The availability of further aid is dependent on the convenor's conclusions about the client's reasonable participation in

54 Department of Family and Community Services (Sullivan M), transcript, 17/10/03, p 34.

55 For example: Tony, transcript Coffs Harbour, 27/10/03, p 58; Lone Fathers' Association (Aust) Inc, sub 1051, p 16.

56 Family Court of Australia, sub 751, Appendix 1, Case Management System.

57 National Legal Aid (Reaburn N), transcript, 20/10/03, p 58.

that mediation.[58] So effectively for legal aid clients it is mandatory before litigation.

3.57 Historically the primary dispute resolution sector has resisted moves to make mediation compulsory but the ground may be shifting.[59] In addition to the Legal Aid Commissions' approach, the FCoA is attempting to introduce some compulsion for pre-filing dispute resolution through the work it is doing on new rules:[60] The Attorney-General's Department advised:

> … Generally, alternative dispute resolution literature suggests that … primary dispute resolution, in the family law context, works best where parties agree to attend. By making it compulsory, it does not have the same outcomes. Having said that, you might be interested in some proposals that the Family Court … has drafted. The court is proposing in its new rules—I hasten to add, they are not new rules, they are draft proposed rules—to introduce what are called pre-action procedures. … parties would have to go through certain steps before they litigate. That would almost certainly include counselling or mediation prior to filing in the court. It is not an unheard of suggestion but it would clearly be a matter for government. We point to the fact that the court is thinking along similar lines in that respect.[61]

Conclusion

3.58 The committee believes that it is imperative that this be implemented by a provision in the Family Law Act which prevents the filing of a court application without having previously attempted mediation or other forms of dispute resolution. As noted in other chapters of this report, there would need to be a qualification with respect to those families for whom violence or child abuse are issues. However, this does not mean that an appropriate form of mediation would not be available to them.

3.59 Mediation should be directed towards the best interests of the child with the outcome being the development of parenting plans wherever possible.

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58 Family Law Pathways Advisory Group, pp 38, 41-42.

59 Attorney-General's Department (Pidgeon S), transcript, 15/9/03, p 22.

60 An annotated exposure draft of the rules appears on the FCoA web-site at, viewed 12/12/03, http://www.familycourt.gov.au/html/newrules.html

61 Attorney-General's Department (Duggan K), transcript, 15/9/03, pp 7-8.

Mediation instead of lawyers

3.60 The committee believes that people must be encouraged to turn to mediation and other means of dispute resolution or support as the first step instead of seeking a legal solution. Lawyers should assist clients into mediation and ensure good links to these kinds of intervention as has been highlighted already in the Pathways Report and the Government Response. Ideally, when people separate they should not be thinking 'first I need a lawyer' but 'where do we find a good mediator?'

3.61 There has to be a greater acceptance that it is critical to address the relationship issues at separation rather than through the legal system. Changing behaviour and expectations may be the solution.

Conclusions

3.62 The committee has concluded through this inquiry that addressing choices and expectations and behaviours around managing separation issues and maximising the chances of real shared parenting is a complex problem. The Pathways Report has taken development of a comprehensive approach a long way. The committee endorses this work.

3.63 During this inquiry the committee has identified four particular areas that need to be given greater attention:

- giving children a say;
- helping parents who are stuck in conflict to put aside their relationship conflict and focus on their parental role to the benefit of their children;
- diversion of families from starting with legal options; and
- addressing community attitudes through broad based education strategies as recommended in Chapter 2.

3.64 Adequately resourcing the services identified in this chapter will inevitably require government commitment of funding. The committee has not attempted to assess what level of funding that might be. However, in the face of the obvious costs to the community and to future generations of children of separation and conflict, there is not any choice.

3.65 Many service providers and others commented to the committee on the change that has occurred in the ability to provide adequate pre litigation mediation assistance to families since the FCoA has withdrawn from this area. Traditionally family lawyers have referred their clients to this service. As National Legal Aid said:

> I think that family law practitioners have been united in dismay at the lack of Family Court counselling now, because pre-filing counselling was very much a part of the everyday practice of family lawyers. You would refer people to see the counsellor and see if they could sort it out first. It was only if they could not resolve it that you would say, `Come back and we'll start negotiating formally for you.'[62]

3.66 The FCoA itself has expressed regret at the fact it was no longer able to provide this service before filing, although mediation is a requirement of the pathway for a parenting dispute in the Court.[63] Since 2001, the community sector is now funded by the Attorney-General's Department to the annual amount of $1.7m to provide the voluntary pre-filing conciliation services previously provided by the Court. The issues since that time have been around sufficiency of this funding and the limited referrals by the legal profession.[64]

3.67 The committee is convinced that money spent on early intervention and preventive relationship services will save money at the crisis end of service delivery. Early intervention will either assist more people to maintain harmonious relationships or provide them with the relationship skills that will enable them to focus on the needs of their children and resolve their parenting responsibilities themselves in the event of separation. Many service providers drew the committee's attention to the pressures on funding for these essential services and raised issues about whether the funding was being appropriately directed.

> The cost of delivering services under the FRSP has significantly increased over the past 7 years. Funding has not kept pace with increases in professional salaries, insurance, property rental and other expenses incurred in delivering services. In real terms the FRSP funding has been reduced over time, especially in relation to its core service, family and relationship counselling. Not only has this meant that the level of service cannot meet demand, but that professional staff salaries are much lower than in other cases of the family relationships field.[65]

3.68 The committee considers that an increase in funding to the FRSP is of priority importance but should be preceded by a proper examination of where the areas of need are, what services are of highest demand in terms

62 National Legal Aid (Hughes K), transcript, 20/10/03, p 63.

63 Family Court of Australia (Nicholson CJ), transcript, 10/10/03, p 3.

64 Family Court of Australia (Nicholson CJ), transcript, 10/10/03, p 3; *Government Response to the Family Law Pathways Advisory Group Report*, p 10.

65 Relationships Australia, sub 1054, p 5.

of waiting lists and provide the best value in terms of investment. Value is not measured by number of clients served. The committee is aware that services at the crisis end, such as contact orders programs are resource intensive and will require more funds per client outcome than is usually the case at the early intervention end.

3.69 The committee acknowledges that committing expenditure to support separating families may be seen by some as a sign that divorce and separation are acceptable characteristics of today's society. However, strengthening families of the future requires ensuring that children of today's separated families are given the best chance for successful parenting. It is well known that exposure to ongoing conflict is damaging. Helping separated parents to resolve their conflict so they can nurture and care for their children positively and cooperatively will undoubtedly reap savings in the future.

Recommendation 7

3.70 **The committee recommends that in support of the legislative presumption for shared parenting recommended in Chapter 2 the government review the community's current access to services which can assist those who cannot achieve and sustain shared parenting on their own to:**

- **develop the skills to communicate effectively around their children's needs and to manage co-operative parenting;**
- **enable them to resolve their on-going conflict and develop a long term ability to share their parenting responsibilities in the interest of their children; and**
- **include the perspective and needs of their children in their decision-making, with and without assistance from the family law system.**

Recommendation 8

3.71 **The committee recommends in particular the significant expansion of the contact orders program beyond the level addressed in the Government's Response to the Pathways Report, to enable separated families in long term conflict to have access to like services in all states**

and territories and in regional areas. (As a minimum there should be one of these services in each location where there is a Family Court registry.)

Recommendation 9

3.72 **The committee recommends that the *Family Law Act 1975* be amended to require separating parents to undertake mediation or other forms of dispute resolution before they are able to make an application to a court/tribunal for a parenting order, except when issues of entrenched conflict, family violence, substance abuse or serious child abuse, including sexual abuse, require direct access to courts/tribunal.**

Recommendation 10

3.73 **The committee recommends that the funding for the Family Relationships Services Program be increased following a review with respect to the appropriate targeting and adequacy of resources for the service types which will provide the most benefit to families' positive family relationships, before during and after separation.**

In this review the committee recommends that consideration be given particularly to a significant further expansion of children's contact services nationally.

4

A new family law process

Introduction

4.1 It became obvious very early in the inquiry and throughout the committee's deliberations that there was widespread community dissatisfaction with the current family law process. The committee felt compelled to investigate this. To give full effect to its terms of reference the committee could not look at the issues of a rebuttable presumption and child support without also looking at the family law process.

4.2 Despite the directions set for the family law system in the Pathways Report, Australia's system for resolving family disputes remains primarily a legal one, based around legal rights and responsibilities, and seeking to resolve disputes with the assistance of lawyers and, if necessary, through litigation. Ever since the Family Court of Australia (FCoA) was established in 1976, there has been an emphasis on alternative (or primary) dispute resolution, but this has mainly occurred within the framework of court proceedings. In recent times there has been a growing interest in, and use of, voluntary diversion from litigation pathways. This was discussed in the Pathways Report and in Chapter 3 of this report.

4.3 The litigation system is an adversarial one which has evolved from where it started in England several centuries ago, although modified in family law.[1] It has become very clear to the committee during this inquiry that the dynamics and emotions of family separation make adversarial litigation inappropriate. It does not work because it tends to be uncooperative and

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1 Family Court of Australia, sub 751, pp 49-50.

combative at a time when future cooperation for successful shared parenting is so critical. It is predicated on a win/lose outcome.

4.4 People who have given evidence in this inquiry appear to have been unwittingly caught up in it. Often this has been through the attitude of their ex partner. It seems that the present system can do nothing about one party dragging the other through drawn out and repeated court battles for purely vindictive reasons. Many within the legal fraternity appear to exacerbate this by their adversarial approach. This experience becomes extremely expensive (over $200,000 for one witness)[2] and the process seems to destroy families and escalate disputes rather than enable them to put aside their conflict and concentrate on the interests of the children.

4.5 This chapter sets out the committee's conclusions about how to change this experience of family dispute resolution by radically reshaping the system so that cooperation and agreement replace confrontation, decision making in a legal context is non-adversarial and litigation is avoided as much as possible. As the Pathways Report emphasised, the family law system's primary focus should be about empowering family members to make their own decisions that are creative and meet their own and their children's specific needs, and are lasting but flexible.[3] Some strategies for achieving this are addressed in Chapter 3. The committee has concluded, however, that only a new non-adversarial administrative tribunal specifically established for determining disputes about future parenting arrangements will bring about any real change to the current domination of lawyers and courts in family disputes.

The current Family law jurisdiction in Australia

4.6 There is currently a number of courts doing family law work in Australia. The Family Court of Australia and the Family Court of Western Australia (FCWA) are specialist courts. The majority of work of the Federal Magistrates Court (FMC) is also in family law. Other State and Territory magistrates and children's courts have a limited jurisdiction relevant to family law. There is currently little scope for decision-making bodies other than courts in family law. For decisions about determination of existing

2 Witness 1, transcript, 26/10/03, p 2.

3 Family Law Pathways Advisory Group, *Out of the maze: Pathways to the future for families experiencing separation: Report of the family Law Pathways Advisory Group*, Commonwealth Departments of the Attorney-General and Family and Community Services, Canberra, July 2001, p 3, Recommendation 1.

rights by a Commonwealth body to be binding the Commonwealth Constitution requires them to be made by a judge, appointed under Chapter III, or by delegation from a judge with respect to more minor decisions. Until a constitutional change to the contrary, therefore, courts will continue to play a role in the family law system.

4.7 The question for this inquiry has been how can the role of family courts and the decision making process be made more amenable to the particular characteristics of family law disputes.

Courts

Family Court of Australia

4.8 The FCoA is a superior court of record[4] established by the Family Law Act (FLA) as a court under Chapter III of the Constitution with jurisdiction over matters arising under the FLA. A superior court of record is one which is presided over by judges and whose proceedings are recorded and published. [5] It is comparable to a State Supreme Court. This implies a level of formality and rules about procedure that bring with them additional cost. It was initially conceived as a 'helping court', with its unique in-house counselling and mediation service. Over the years the look and feel of the Family Court has become more formalised. This was partly in response by the Court to violent attacks on the Court and its judges in the early 1980s. The Court has been limited to an extent in its attempts to move to a less adversarial approach by High Court decisions.[6]

4.9 The most important feature of case management in the FCoA is the division of its case management pathway into the resolution and determination phases. [7] In the resolution phase counsellors and lawyers are assigned to assist people to reach mediated agreements. Many disputes are resolved by consent during this stage (see Figure 1.2). Parties can also apply to have consent orders registered which have been negotiated outside the FCoA.

4.10 Cases only move into the determination phase and preparation for trial when mediation (or negotiation) has not resolved all the issues in dispute.

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4 Family Law Act 1975, subs 21(2).

5 Section 121 of the Family Law Act contains certain restrictions on the publication of Family Court proceedings.

6 Eg. *In re Watson; ex-parte Armstrong* (1976) FLC 90-059, see Family Court of Australia, sub 751, p 50.

7 Family Court of Australia, sub 751, Appendix, p 60.

Trials in the FCoA are still conducted in an adversarial way.[8] The evidence is controlled by the parties, and strict rules of evidence apply. There are, in effect, competing interests about which a judge has to make a decision.

4.11 To effectively manage an application in this formalised legal environment people who wish to access the services of the Court usually need to be legally represented. To benefit from the mediation services available in the Court an application has to be filed. The procedures required to be followed create often significant costs for applicants and respondents both in terms of filing fees and solicitors fees.

Family Court of Western Australia

4.12 The Family Court of Western Australia was the only State court established under the FLA. It is presided over by judges and magistrates. It is vested with State and Federal jurisdiction in matters of family law and deals with divorce, property of a marriage or de facto relationship, residence, contact and other matters relating to children, maintenance and adoptions.[9]

4.13 Like the FCoA, FCWA trials are adversarial in type. Also like the FCoA, the FCWA has its own specialised in-house counselling service.

Federal Magistrates Court of Australia

4.14 The Federal Magistrates Court of Australia was established by the Commonwealth Government in 2000 to provide a faster, cheaper, simpler forum for determination of family law disputes. It is a lower court with federal jurisdiction in a number of federal law areas. 80% of its workload is in family law disputes[10] and it has the same jurisdiction as the FCoA, subject to certain limitations. The FMC does not provide a process for registration of consent orders.

4.15 Parents may choose to file an application in the FMC because their dispute is less complex. It is also cheaper than the FCoA to initiate certain proceedings. Otherwise the choice of court is not obvious. Professor Parkinson has said:

> In terms of the Federal Magistrates Court and the Family Court, essentially we have two competing courts with overlapping jurisdiction. There is a difference in property but that only matters in Sydney or possibly in Melbourne, where $700,000 is not

8 Family Court of Australia (Nicholson CJ), transcript, 10/10/03, p 4.

9 Family Court of Western Australia website: www.familycourt.wa.gov.au

10 Federal Magistrates Court of Australia, sub 741, p 2.

> uncommon. In other parts of the country they almost have complete jurisdiction. In children's matters they have the same jurisdiction. So we have two rival courts, in a sense, who cooperate well but who are both trying to achieve the same thing.[11]

4.16 The major difference in practice is that the FMC does not list cases expected to last longer than two days. In November 2003, the FMC assumed responsibility for divorces.

4.17 The FMC does not exercise family law jurisdiction in Western Australia.

4.18 Like the other courts, procedure in the FMC is primarily adversarial. Referral to dispute resolution services is emphasised in its legislation[12] and its clients can access these services either from contracted providers in the community or from the FCoA's mediation service.

State and Territory magistrates courts

4.19 State and Territory magistrates courts also have roles in family law disputes. For many separating families in rural and regional areas, local magistrates courts are the most accessible court option. Federal courts tend to be available on irregular circuits and only in selected locations. The jurisdiction of State and Territory magistrates courts is limited by consent of the parties, except for making interim orders.[13] If they are in dispute the matter is transferred to the Family Court or (after current policy for relevant amendments has been enacted by the Parliament) to the Federal Magistrates Court. State courts have no direct access to mediation or counselling services although referrals could be made to community based family relationship services where they exist. These services are often not available in rural and regional communities.

Division of Commonwealth/State responsibilities for families

4.20 Family law jurisdiction dealing with separation, divorce and related matters lies with the Commonwealth, but child protection and domestic violence jurisdiction remains with State and Territory governments. Commonwealth agencies are neither funded nor do they have the expertise to investigate and respond to allegations of child abuse or family violence and yet these are issues that are affecting some families involved

11 Parkinson P, transcript, 13/10/03, p 46.

12 Federal Magistrates Act 1999, Part 4.

13 Family Law Act 1975, subs 69N(3) and (4).

in the family law courts system. Even in the Family Court of Western Australia the jurisdictions have not been effectively fused. [14]

4.21 Protection against family violence is covered by State and Territory laws which make provision for protection orders (variously named) to be taken out, usually in a magistrates court, when a person is in fear for their safety. Practices vary from State to State, in particular with respect to the way in which the need for urgency is dealt with through orders made in the absence of the other party (ex parte).[15] This can remain in place for some time, before the other party can answer the allegations raised in court. The committee heard evidence about the apparent ease with which an apprehended violence order (AVO) can be obtained through this system. Variations across jurisdictions in data collection methods and definitions mean it is not possible to determine from the available data on AVOs what the magnitude of the issue is for family law disputes. However, as an indicator, in New South Wales in 2002, 18,926 domestic violence orders were granted. [16] If an AVO is in place prior to making an application in the FCoA, it is required to be included in the application documentation.[17]

4.22 Evidence about investigations by state authorities, if any, may or may not be available to courts deciding matters under the FLA, depending on the priority given to the case by the state authorities. Often no report of an investigation by state authorities is available to assist the court. States are responsible for child protection and each State and Territory child welfare authority has responsibility to investigate allegations of abuse. If an allegation is made in the context of a family law dispute there is a requirement for notification to the State body under section 67Z and 67ZA of the FLA. As has been highlighted in a number of previous reports, including the Family Law Council's report on Family Law and Child Protection of September 2002[18], many of these cases are not investigated or only to a preliminary stage. The Council's report has noted:

> State and Territory child protection authorities need to prioritise also because in many jurisdictions, the numbers of child abuse incidents reported to the authorities are far greater than their

14 Family Law Council (Dewar J), transcript 17/10/03, p 16.

15 Family Law Pathways Advisory Group, p 64.

16 Bureau of Crime Statistics and Research, Local Courts Statistics, viewed 30/9/03, http://www.lawlink.nsw.gov.au/bocsar1.nsf/pages/lc_2002_avo

17 For an example of the problems in this interaction, see Domestic Violence Advocacy Service, sub 513, p 7.

18 Family Law Council, *Family Law and Child protection: Final report*, Commonwealth of Australia, Canberra, Sept 2002, v 113p.

> capacity to handle. … A child protection investigation is intrusive and worrying. It should not be initiated unless there are sufficient concerns about the safety or well being of a child. Even among the cases which do meet this threshold of seriousness, child protection authorities are often reported to be overwhelmed by the numbers of reports and must establish criteria for allocating investigatory resources.[19]

4.23 Often when the child protection authority is aware that matters are proceeding in the Family Court they will decide not to investigate, leaving the question to that court to decide on the issues.[20] However, the Family Court is not resourced to investigate such matters. The children involved then fall through the jurisdictional gaps.

4.24 The Family Law Council has considered this split of jurisdiction in its Report and made a number of recommendations for addressing the consequences. In evidence the Family Law Council said:

> … the split of jurisdiction between the states and the Commonwealth over child and family law matters. We have taken as a given that that split will continue ... We regard the split in jurisdiction as one of the most pressing matters affecting children in Australia. There is evidence suggesting that it can lead to terrible outcomes for children ...[21]

4.25 Effective management of disputes in families living with these issues is made much more difficult by this division of responsibility and requires much greater commitment at a case by case level to cooperation and information and resource sharing across the constitutional boundaries than to date has been achieved, except by the Magellan and Columbus projects in the FCoA and FCWA respectively.[22] Justice Nicholson commented:

> … There have been cooperative efforts between the states and Commonwealth … in relation to the reference of powers over ex-nuptial children. I think there is still a significant amount of work

19 Family Law Council, Sept 2002, p 33.

20 Family Law Council, Sept 2002, p 33.

21 Family Law Council (Dewar J), transcript, 17/10/03, p 16.

22 Family Court of Australia, sub 751, p 38 outlines Magellan, which is a special case management pathway for cases involving serious allegations of child abuse. In FCWA Magellan has been adapted through Columbus to include family violence.

> that could and should be done to try to have the two systems operating more as a unitary system than we have at the moment.[23]

4.26 The relationship between a new Commonwealth tribunal and the State based authorities to whom these families may be referred is a complex one and will need to be considered carefully. The committee notes that a Federal Child Protection Service has been recommended by the Family Law Council in its Family Law and Child Protection Report.[24] The committee believes that child protection should remain the responsibility of State and Territory governments but is concerned that the services required to protect children are under resourced. The committee strongly supports the development of nationally consistent child protection laws. The committee is aware that the Standing Committee of Attorneys-General has established a working party to look at ways of better coordinating family law and child protection, with particular attention to a principle of one court[25] to avoid duplication of legal proceedings.

Conclusion

4.27 It has become apparent to the committee that in both the areas of family violence and child protection there are significant risks where gaps and duplication will also emerge when family law issues are involved as well. In the context of its later recommendations for establishing a Families Tribunal the committee believes there are opportunities to address these problems. Implementation must ensure that there is a proper co-operative process for investigation of allegations of family violence and child abuse (including sexual abuse) when they are raised in family law matters. The Tribunal or court must be guaranteed access to the evidence it needs to make its decision. Attaching an investigative arm to the Tribunal is a viable option. However, it should also be clear that the role is limited to family law cases and is not taking anything away from the States' responsibilities for child protection.

Judicial education & accountability

4.28 In the current court based system, generally, an adversarial trial process leads to a judicial decision after one trial event. The judge has to make final orders, but as Professor Parkinson said:

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23 Family Court of Australia (Nicholson CJ), transcript, 10/10/03, p 9.

24 Family Law Council, Sept 2002, p 58.

25 Under the one court principle, a separating family should be able to deal with all of their family law and child protection issues in one court rather than dealing with a number of different courts in different jurisdictions.

> … We have an assumption that we can make a thing called `final orders'—orders the court makes at the end of the hearing—but no family law order can be final in regard to children ...[26]

4.29 Given this situation, the committee has been interested to find out what mechanism there might be for judges to understand better whether, apart from the normal appeal process, their judgments have worked to help the family to effectively parent in the future. 'Is there any process that exists within the court system where a judge can learn from their determinations in order to try and make better determinations in the future?'[27] Justice Chisholm's response was:

> … It would be wonderful … to be able to have access to information about the consequences of our decisions. It might be painful in some cases to look at them, but as an educational thing … it would be very good.[28]

4.30 He went on to point out that privacy issues would need to be considered and that a research project which enabled litigants to consent up front to being approached over a period of time might be possible. However, he added a qualification about what inferences could be drawn from results.

4.31 When asked the same question the Attorney-General's Department had this to say:

> With respect, I think that the Family Court judges are as accountable for their judgments as are any other judges in the federal system or the state system, with the possible exception of … publication of judgments of the court. … In terms of the formal process of review and accountability, the Family Court judges are subject to the same processes as all other judges in this country. If we were to attempt to interpose some other form of accountability, it would have significant implications for the separation of powers, the doctrine under the Constitution. You will, of course, have been aware of the ongoing debate about whether there should be judicial commissions and that sort of thing where judges are subject to significant misconduct, but they are generally limited to situations where there has been serious and grave misconduct of judges, not about whether someone has a different view about a judgment they may or may not have made. Going down that road, particularly under the Commonwealth

26 Parkinson P, transcript, 13/10/03, p 31.

27 Pearce C MP, transcript, 10/10/03, p 14.

28 Family Court of Australia (Chisholm J), transcript, 10/10/03, pp 14-15.

> Constitution, brings you up against this issue of the separation of powers. [29]

4.32 Whilst there may be constitutional limits to judicial accountability the committee believes that family law judges, possibly more than others, need to be much more conscious of the societal and non-legal consequences of the decisions they make in a broader sense. This should be addressed by continuous and widely focussed judicial education. The Chief Justice said:

> … In my view, the process of judicial education in this country has not been adequate over the years. There have been changes in the sense that the Australian Judicial College was set up for the first time last year and it is engaged in judicial education approaches. My own court has a regular judicial education program, which we introduced several years ago on the basis that one-third of the court will spend a week attending a seminar dealing with all the various issues that come before the judges. I think that has been very successful. That is attended usually by child psychiatrists and experts of various sorts ...[30]

4.33 In addition, the committee notes the establishment of the Australian Judicial College in May 2002. The College is funded by Commonwealth and State and Territory governments. It provides professional development programs to all judicial officers in Australia, focussing on their legal and practical judicial skills.[31]

4.34 Dr Mary Hood of the Australian Association of Infant Mental Health, South Australian Branch, in her evidence to the committee, confirmed that members of the Association are ready and able to provide workshops for judges to inform them about research in the area of attachment relationships.[32]

Conclusion

4.35 The committee has concluded that while courts remain the primary arbiter of family disputes more attention should be given by the Family Court and the Federal Magistrates Court to significantly broadening judicial education programs to include developments in research about post

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29 Attorney-General's Department (Duggan K), transcript, 15/9/03, pp 19-20.

30 Family Court of Australia (Nicholson CJ), transcript, 10/10/03, p 14.

31 Attorney-General's Department, sub 1710, p 10.

32 Australian Association of Infant Mental Health, South Australian Branch (Hood M), transcript, 24/9/03, p 59.

separation parenting outcomes and community expectations and perceptions. A longitudinal research project on the long term outcomes of family law judicial decisions should be undertaken and incorporated into judicial education.

Impact of an adversarial process

4.36 The committee has heard a vast amount of evidence about the animosity that adversarial legal proceedings create between separated parents. Many witnesses have complained about the adversarial behaviour of lawyers working in the system. Also, as the Sole Parents Union said, people who turn up before the courts are adversarial, looking to get 'justice' from the system by exacting revenge for the hurt that has been done to them by the other party.[33] This makes it much more difficult for litigation and other processes to be focussed on reaching agreements in the best interests of the child. Importantly, at the same time a legal system which focuses on past behaviour does not allow the issues that led to the relationship breakdown to be appropriately aired. People feel unable to contribute actively in the decision making process. Neither does it enable the process to focus on what will be best for the child/ren in the future.

4.37 It has been made very clear to the committee that disputes in family law need to be dealt with in the context of relationships that cannot be dissolved. Parenting is a life long responsibility. Yet the adversarial ethic pits people against each other to determine a winner and loser. It pushes them apart when they need to be brought together around their children's needs. It trawls over the past when they need to be looking to the future. Professor Parkinson set the issue out in his evidence to the committee:

> … the court system has not changed. The court system is fundamentally predicated on the idea that there is one major issue to resolve sometime after separation: where the children will live. It is an inflexible system. It is an adversarial system. … The system is not well attuned to the fact that families are dynamic ...[34]

4.38 A decision made by a court reflects the circumstances at a certain point in time when the decision is made. As circumstances change in the lives of either parent or the children, so there may be a need for changes in orders if the parents cannot agree. The family law system needs to be flexible and

33 Sole Parents' Union (Swinbourne K), transcript, 26/10/03, p 46.

34 Parkinson P, transcript, 13/10/03, p 31.

accessible enough to be able to deal with these post-order conflicts reasonably promptly and without undue expense.

4.39 The limitations of adversarial processes in child related disputes has also been recognised by the FCoA which, largely as a result of recent growth in numbers of self represented litigants but also following its own assessment of the limitations of the case management system, has begun to explore less adversarial approaches. The FCoA's submission recommends:

> … that a significantly less adversarial process would facilitate the most appropriate solution to parenting proceedings based on the best interests of the child rather than considering changes to the substantive law.[35]

4.40 The FCoA has noted that the High Court's directions in regard to how far the FCoA can diverge from adversarial processes have recently been more supportive[36] and it is currently exploring the possibility of piloting a new approach based on European systems where, particularly in parenting matters, lawyers play a very minor role.[37]

4.41 The overwhelming impression from the evidence before the committee shows the time is ripe for a significant reform of legal processes for parenting disputes. [38]

4.42 To be confident of a sufficient impact, the committee believes that change may need to be more radical than diverting people to alternative dispute resolution and making less adversarial changes to court processes alone. Only a small percentage of people get to trial before a judge, but since dispute resolution processes often occur within a framework of adversarially based litigation, and because the judge is the final arbiter, the courts significantly influence how the rest of the process works.

4.43 The committee is mindful of the constraints of the Constitution, but does not see any reason in principle why the system should not explore fully the options for less adversarial processes and alternative sources of authority for orders about parenting. The committee recognises that the Constitution requires there to be a role for courts when issues of adjustment of existing legal rights are involved. However, most parenting

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35 Family Court of Australia, sub 751, p 52.

36 *U v U*, (2002) FLC 93-112 at 89, 102, see Family Court of Australia, sub 751, p 50.

37 Family Court of Australia, sub 751, pp 49-52; Family Court of Australia (Nicholson CJ), transcript, 10/10/03, p 4.

38 Attorney-General's Department (Duggan K), transcript, 15/9/03, p 10; FLC (Dewar J), transcript, 17/10/03, p 15.

orders are in reality about future arrangements for how the relationship between children and their parents will be after they have separated. The committee has received advice that such decisions can appropriately be dealt with by an administrative tribunal. The committee sees the future role for courts and lawyers as being limited to subsequent breaches of parenting orders in accordance with constitutional limitations.

4.44 The goal ought to be that primary dispute resolution processes are attempted before filing any application for an order, whether in a court or a tribunal. In this way, the available processes of primary dispute resolution, such as mediation will routinely occur before filing, rather than being included with a framework of court proceedings and court orders in a process managed by the courts.

Role of the legal profession

4.45 As mentioned in Chapter 2, legal advice is frequently given based on perceptions of likely court outcomes. Legal services are provided, including settlement negotiations, in a context of preparation for litigation. This is what lawyers are trained to do, they assist their clients 'in the shadow of the law'. They interpret both the legislation and case law in light of the facts presented to them by their clients. On the other hand, they play a significant role in assisting resolution of the 94% of cases that do not proceed to a judge.[39] However, the committee has also heard numerous examples of lawyers whose adversarial approach to representing their client has exacerbated the dispute and cost the client a lot of money.

4.46 In a system where the aim should be to keep people away from courts as much as possible and help them to reach agreement, it might be argued that it is better to ignore the law at first (outside of questions of safety of parents and children) and concentrate on the family's future circumstances and work out what arrangements will be practical for them.

4.47 The committee's objective is to devise a system where the involvement of lawyers is the exception rather than the rule.

4.48 However, the committee acknowledges that there are also other options for changing the role of the legal profession which have been considered in this inquiry. Some creative developments in the practice of family law are emerging. Changing the way family lawyers practise might require more training in non-adversarial dispute resolution and methods for

39 Family Law Section of the Law Council of Australia, sub 1021, p 3.

helping their adult clients to focus on the needs of the children involved.[40] Those who are appointed as child representatives obviously would need specialist skills in working with children.

4.49 The committee is aware that, since the Pathways Report was published the Family Law Council and the Family Law Section of the Law Council of Australia have been developing new best practice guidelines for family lawyers.[41] This is a step in the right direction.

4.50 Dads in Distress posed some critical questions to the committee about the qualifications and expertise of family law practitioners. Mr Lenton said:

> … Why do we have solicitors practising in this area of family law, which is such a crucial area of human behaviour and so dynamic and difficult to deal with, whose first degree is not in behavioural sciences? Why do we let those people in? Why isn't it the standard that your first degree is in either human services or behavioural sciences before you can practise in family law? I think that would go a long way to resolving some of your issues ...[42]

4.51 The government response to the Pathways Report notes that a professional development program for family law practitioners, 'Changing the Face of Practice' aims at 'promoting skills for achieving child-focussed practice when working with separating parents'.[43]

4.52 Also the committee has heard evidence about the approach to practice in the United States and Canada, known as Collaborative Law, which a group of family law practitioners in Queensland is interested in piloting in Australia.[44] This involves seeking to resolve legal disputes in a non-adversarial way to avoid the polarisation that emerges from court-based dispute resolution. The approach focuses on working with the psychological needs of emotionally stressed clients. Its primary aim is to achieve settlement through a four way conferencing model. If this is unsuccessful then, by agreement in advance, those lawyers and experts involved are excluded from subsequent litigation.

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40 Family Law Pathways Advisory Group, pp 21-23.

41 *Government response to the Family Law Pathways Advisory Group Report*. Attorney-General's Department and Department of Family and Community Services, Canberra, May 2003, p 15. Draft guidelines appear at: http://www.ag.gov.au/www/flcHome.nsf/ , viewed 15/12/03,

42 Dads in Distress (Lenton R), transcript Coffs Harbour, 27/10/03, p 50.

43 *Government Response to the Family Law Pathways Advisory Group Report*, p 12.

44 Witness 3, transcript Keperra, 4/9/03, p 25; Tesler PH, Collaborative law: What it is and Why family law attorneys need to know about it, *American Journal of Family Law*, vol 13 no 4, (1999), p 215; Gamache S, Collaborative separation & divorce, *The Collaborative Review*, Spring 2002, p 6.

> The stated advantages of the process are speed, cost, better settlements, and less stress for clients, children and lawyers. The perceived disadvantages include a lack of scrutiny and accountability; an increase in costs associated with the four-way meeting process; and the engagement, where necessary, of a range of experts, …[the costs of which] … are thrown away if there is no settlement and alternative representation has to be found. There are also some concerns about ethical issues.[45]

4.53 Whilst this approach has a lot of appeal, it is still based on some agreement between the parties and common commitment to the collaborative process. It does not provide any way to prevent a vindictive party from dragging the process out and still proceeding to litigation at more cost to themselves and, more importantly, to the other party. The committee's preference is to keep separating families away from lawyers as much as possible but it would encourage the development of such practices by family lawyers as an option. This might usefully occur through a pilot program.

4.54 The committee notes that the Family Law Pathways Advisory Group 'encourages an interdisciplinary or sociolegal approach in undergraduate family law studies'.[46] They also noted that many law students do combined degrees, sometimes with a social science base. This committee believes that for family law practitioners there should be a much greater emphasis in their training on social sciences and on dispute resolution.

Conclusion

4.55 The committee notes and supports ongoing cooperation with the Family Law Section of the Law Council of Australia in developments for further education and training of family law practitioners in the way considered by the Pathways Report. In addition, the committee favours a future accreditation requirement for all family law practitioners of undergraduate study in social sciences and or dispute resolution methods.

Self represented litigants

4.56 Both the FCoA and the FMC confirm that there are now a significant proportion of litigants who are self represented, either all or some of the time, who face particular difficulties in managing the adversarial process

45 Witness 3, transcript Keperra, 4/9/03, p 26.

46 Family Law Pathways Advisory Group, p 22.

in their courts.[47] Many of these people access legal assistance or advice along the way from Community Legal Centres[48] or Legal Aid Offices.

4.57 Reasons for self representation vary. Some have failed to qualify for legal aid, either on means or merit grounds, some prefer not to engage a lawyer and consider they can do a better job themselves.[49]

4.58 For the FCoA this experience has led to them questioning the role of the adversarial system (see above), particularly with respect to parenting proceedings.

Conclusion

4.59 The committee believes resolving family law disputes should be simplified to the extent that the lawyers' involvement is the exception rather than the rule. The FCoA has done much to improve its information for self represented clients and to provide procedural assistance to self represented litigants.[50] However, so far it has not yet effected any significant change to its processes with a specific view to making them simpler for unrepresented clients.

Courts as a last resort

4.60 The Pathways Report regards litigation as a last resort and the least preferred pathway. [51] It stopped short of replacing the court system or preventing people from accessing courts – or making it more difficult. It said that for some families, what they need is rapid access to a decision maker, particularly those with entrenched conflict or those where safety is at risk. Instead of going down the path of new infrastructure, the Pathways Report's primary message was about building a more integrated family law system, the many parts of which should collectively aim to divert people from litigation as much as possible.

4.61 The committee has noted that the Government's response to the Pathways Report has endorsed this direction (see Chapter 1). However, the committee has concluded that to make a real difference to the way

47 Family Court of Australia (Nicholson CJ & Chisholm J), transcript, 10/10/03, p 28; *Family Court of Australia annual report 2002-2003*, FCoA, Canberra, 2003, p 5; *Federal Magistrates Court 2002-2003 annual report*, FMC, Canberra, 2003, p 15.

48 National Association of Community Legal Centres (Budavari R), transcript, 20/10/03, p 70.

49 Hunter R, Giddings J & Chrzanowski A, *Legal aid and self-representation in the Family Court of Australia*, Socio-Legal Research Centre, Griffith University, unpublished, May 2003, 71p.

50 Family Court of Australia, *Self represented litigants A challenge: Project Report December 2000–December 2002*, FCoA, Canberra, 2003, vi 70p.

51 Family Law Pathways Advisory Group, p 61.

separated families and the stakeholders in the current system behave in relation to post separation disputes, the directions started by the Pathways Report need to be taken further. This should be achieved by first redesigning the pathways in the family law system for separated families to direct them to mediation as recommended in Chapter 3, and then to a non-adversarial tribunal when an order is required.

4.62 The role for courts should be limited to:

- enforcement of tribunal orders, when required;
- appeals from the tribunal on specified matters of law only; and
- issues like entrenched conflict, violence, substance abuse and child abuse, including sexual abuse. In these cases urgent and legal intervention to ensure the safety of children and partners requires that they should be dealt with expeditiously.

Redesigning the legal system for family friendly outcomes

4.63 In the light of all the evidence the committee believes that all disputes about post separation parenting responsibilities not involving entrenched conflict, family violence, substance abuse and child abuse, including sexual abuse, must be removed from adversarial court processes. As Professor Parkinson said:

> … So I think we have some fundamental rethinking to do, not only about the law – maybe that is the easiest part – but also about the systems by which we adjudicate and resolve ongoing conflict between parents and children ...[52]

4.64 He went on to suggest some possible direction for that 'fundamental rethinking', drawing upon an approach to adjudication which is more administrative than adversarial:

> … Look at how we have dealt with the child support issue. Where there is a dispute about the formula, we have child support review officers who will sit in a room, talk with mum, talk with dad, and maybe talk over the telephone if that is needed, and they can make a decision cheaply, quickly and easily. That is then appellable to a court and can [be] reviewed by a court. My research overseas

52 Parkinson P, transcript, 13/10/03, p 31.

> suggests that a model like that would be much better for the ongoing conflicts that some parents have ...[53]

4.65 Professor Moloney, Director, Department of Counselling and Psychological Health, La Trobe University, added two further important but quite distinct dimensions to this thinking. First, he suggested that in light of the importance of focus on the children, the committee consider, for the families not dealing with violence issues, the need for:

> … a less formal tribunal system that would be chaired by one or more individuals who have an in-depth understanding of child development and family dynamics and who, whilst retaining their authority, can engage directly and respectfully with family members.[54]

4.66 His second point related to involvement of lawyers:

> … I think family members need to feel that they have been heard and that they can say what they need to say, not in a manner filtered by a barrister through legally modified language but directly and in their own language, to a decision maker who has the skills to check that he or she has indeed heard accurately.[55]

4.67 The committee has explored the idea of establishing an administrative tribunal during its inquiry at some length. In principle the concept has been widely supported, but reservations have been raised about the constitutional limits of the idea. Professor Parkinson suggested that a new kind of decision-making process should be restricted to contact disputes, at least initially. The Attorney-General's Department and the Family Law Council had similar views. [56] In a supplementary submission by the Family Law Council a proposal for a new process for dealing with contact disputes after court orders (including consent orders) was developed.[57]

4.68 The committee is concerned that separation of contact disputes from other parenting issues would not be optimal to the delivery of cohesive and comprehensive resolution of all parenting issues. Also in light of the evidence about problems with adversarial behaviour the committee doubts that a partial solution at a relatively late stage in the process would

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53 Parkinson P, transcript, 13/10/03, p 31.

54 Moloney L, transcript, 20/10/03, p 3.

55 Moloney L, transcript 20/10/03, p 2.

56 Attorney-General's Department (Duggan K), transcript 15/9/03, p 8; Family Law Council, sub 1400, p 18, sub 1699, 9p and transcript, 17/10/03, pp 14-15.

57 Family Law Council, sub 1699, 9p.

sufficiently change behaviour in family law dispute resolution, particularly at the early stages in separation.

Conclusion

4.69 The committee's view is that a comprehensive and radical solution is required to effectively ensure the majority of families are able to reach solutions for their future parenting responsibilities first through mediation and then through a non-adversarial tribunal process. The outcome should be a practical parenting plan devised prior to any application in the FCoA or FMC.

Tribunals and administrative decision-making – some examples

Human Rights and Equal Opportunity Commission

4.70 The Human Rights and Equal Opportunity Commission (HREOC) is an administrative body which undertakes investigation and attempts resolution of complaints about breaches of human rights and anti-discrimination legislation.

4.71 The process is:

- A complaint is lodged in writing to the President of the Commission.
- The material provided is reviewed and further inquiries are made, possibly seeking further material.
- The President or a commissioner contacts the respondent to the complaint and attempts to conciliate between the parties by convening a conference to attempt to negotiate an agreement.
- If the President determines the complaint not to be suitable the commissioner terminates the complaint in writing and with reasons.
- HREOC has power to call for evidence and examine witnesses but has no enforcement power.
- If the complainant is not satisfied then the matter can be commenced as an action for determination in the Federal Court or Federal Magistrates Court within 28 days of the notice of termination. Court hearings are *de novo.* [58]

4.72 The powers of the Commission to make decisions binding by registration in the Federal Court were removed after the High Court's decision in

58 A hearing *de novo* is a re-hearing when the matter is heard afresh, all the evidence given previously may be given again before the Judge. (FCoA web-site: www.familycourt.gov.au).

Brandy's case.[59] As a consequence, in effect HREOC offers little more than mandated primary (alternative) dispute resolution. It has no determinative effect.

State based tribunals

NSW Guardianship Tribunal

4.73 The NSW Guardianship Tribunal is a tribunal which appoints guardians for people who are incapable of making their own decisions and need a legally appointed substitute decision maker.

> The Guardianship Tribunal is here as a last resort and works with the community and family to provide a legal remedy.[60]

4.74 Staff of the Tribunal's Investigation and Liaison Branch assess applications received, and seek to resolve matters informally where possible. If the matter cannot be resolved it will be scheduled for a hearing before a Tribunal whose members will include a legal practitioner, a professional member such as a doctor, psychologist or social worker, and a community member who has experience with adults with disabilities. There is usually no fee involved in making application to the Tribunal.

Queensland Small Claims Tribunal

4.75 The Queensland Small Claims Tribunal provides a low cost way to make a small claim without using lawyers. A referee who is usually a magistrate presides over the Tribunal, and the referee will encourage the parties to reach agreement privately wherever possible. The referee's decision is final and can be enforced by a Magistrates Court. Filing fees are between $12.50 and $68.00.[61]

ACT Residential Tenancies Tribunal

4.76 The ACT Residential Tenancies Tribunal is an independent body with jurisdiction to hear and determine all matters arising from tenancy agreements. The Tribunal aims to facilitate dispute resolution which is just, prompt and economical. Pre-hearing conferences may be conducted, or the matter may be referred to a Member of the Tribunal for hearing, at which the parties may be legally represented. The Tribunal may make orders which can be registered for enforcement with the Magistrates

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59 *Brandy v HREOC* (1995) 183 CLR 245.

60 http://www.gt.nsw.gov.au/PDF/general_info_2003.pdf , viewed 15/12/03.

61 http://www.justice.qld.gov.au/courts/factsht/factsheet1.htm , viewed 15/12/03.

Court. Filing fees apply, and the amount of the fee depends on the nature of the dispute.[62]

Denmark

4.77 The committee has noted an administrative approach to contact disputes which is operating in Denmark.[63] Contact disputes are dealt with separately from other parenting issues but within the context of a 'normal package' of contact arrangements which is promoted by the Danish government. Courts resolve the major issue of custodial responsibility.

4.78 An aggrieved parent can initiate a complaint with the County Governor's office in writing. A lawyer in that office will contact the other parent for a response. A meeting will be held and the parties can be referred to mediation. If it cannot be resolved the lawyer will determine the issue by an order that is enforceable in court. There is a right of appeal to the Ministry of Justice. Enforcement is a very simple, non-adversarial but still court based process, with a meeting with a judge often resolving the matter. Penalties are available.

> The system has many advantages over the current court-based approach in Australia. … there are no procedural hurdles … [it] is not adversarial … The role of the lawyer … and … of the judge in an enforcement process, is to work out what the dispute is all about and to reach a decision, if the parties cannot reach their own agreement after counselling. The environment of an office is much more conducive to non-adversarial processes than a courtroom.[64]

4.79 Other advantages appear to be that it is a quick and cheap process. One disadvantage is the separation of contact from other parenting issues. Another more significant disadvantage may be that the Danish model is not replicable in Australia for constitutional reasons.[65]

4.80 These models provide some valuable insight into how family dispute determination processes can be non-adversarial, and relatively simple, but still apply the requirements of procedural fairness.

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62 http://www.courts.act.gov.au/magistrates/tribunals/rtt/rtt.html, viewed 15/12/03.

63 Parkinson P, sub 1698, 7p.

64 Parkinson P, sub 1698, p 5.

65 Parkinson P, sub 1698, p 7.

What can be achieved within the Australian constitution?

4.81 A number of people with whom the committee has discussed a proposal for an administrative tribunal were supportive because of the benefit of moving away from the traditional adversarial processes to something less formal and more user friendly.[66] Some expert advice has been that there are limits to what can be achieved by such a body primarily to do with its capacity to enforce its decisions.[67] The committee received expert constitutional advice with respect to how a tribunal could be established in a way that would be constitutionally valid.

4.82 It has been suggested by some that such a new body may just add another layer to the system which would just increase the time and costs involved for families and government.

> … If you had a tribunal that was a decision making tribunal, it would still be part of a formal legal system. Its decisions would still have to be, to some extent, subject to review by a higher authority; it would still be operating within a framework of legal rules. … If it were making decisions about where children should spend their time and with whom, it is hard to see how it would do that without doing it within the framework set by the Family Law Act ...[68]

4.83 The major constraint of the Constitution is that the judicial power of the Commonwealth – to make enforceable orders – must be exercised by a court established in accordance with the requirements of Chapter III of the Constitution. The judges and magistrates of those courts, and any officers to whom responsibility is delegated, must act judicially. However, the committee has been advised that, while this is the position with respect to decisions about adjusting existing legal rights, decisions which are essentially about adjustment of rights in the future, based on what is in the best interests of the child, can be made administratively. The committee is proposing that this be done by a new Families Tribunal.

4.84 In Chapter 2 of this report the committee has recommended a new framework of post separation parenting responsibilities, at the top of which sits a presumption that parents are jointly responsible for their

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66 Dads in Distress (Lenton R), transcript Coffs Harbour, 27/10/03, p 49; Moloney L, transcript, 20/10/03, pp 3, 26.

67 Family Law Council (Dewar J), transcript, 17/10/03, p 1; Attorney-General's Department (Duggan K), transcript, 15/9/03, pp 8-9; Family Law Council, sub 1699, pp 2-5.

68 Family Law Council (Dewar J), transcript, 17/10/03, p 14.

children, except in circumstances of rebuttal. Those rebuttal circumstances are listed in Chapter 2 and decisions with respect to those issues remain matters for judicial determination. The committee understands that a new Families Tribunal could be given the power by statute to deal with the majority of the parenting decisions that sit beneath the shared responsibility, when parents cannot agree themselves even after mediation. This will include decisions about all matters of shared responsibility including, how much time the child/ren will spend with each parent, education, health, religious and cultural upbringing, relocation and so on.

4.85 The Tribunal would have to be set up by statute and would have defined jurisdiction to make certain decisions under the Family Law Act. The committee believes that there are a number of aspects of the Australian Industrial Relations Commission which could be used as precedent for this new body. The *Workplace Relations Act 1996* says that decisions of the Commission are binding and that penalties for breach of those orders or injunctions to enforce them may be granted by a court.[69]

4.86 Courts would retain a role in matters where the presumption of shared parenting is rebutted as outlined in Chapter 2, in enforcement of Tribunal orders, and in a range of other matters that relate to existing legal rights, such as disputes over parentage. In light of this, ways to modify court processes, to make them less adversarial, simple and straightforward enough to make lawyers the exception rather than the rule should continue to be explored. A key to this work is avoiding the procedural complexities involved in applying the usual rules of evidence and procedure associated with adversarial litigation as far as possible. The court processes should also be as accessible and low cost as the Tribunal. The committee has already noted the work the FCoA is undertaking in this area.

Creating a new family law pathway– an outline of the concept

4.87 The committee believes that there is a range of options for reforming the family law system which could minimise adversarial behaviour between parents and assist more of them to reach agreements about their future parenting responsibilities. Some reforms could be built on to existing infrastructure, such as creating a single visible entry point into the system, providing improved contact dispute resolution mechanisms and other

69 See Workplace Relations Act 1996, ss 170VV and 170VZ.

post order support[70]. Using available options which continued to rely on a court as the primary body for decision making when the parties cannot agree, in the committee's view, would only have a limited impact on adversarial behaviour especially at the early stage.

4.88 The committee has concluded that a completely new infrastructure with a new child inclusive, non adversarial decision making body at its centre would provide a sufficiently radical reform to have a real impact on changing behaviour and expectations for post separation outcomes. The tribunal should be clearly identifiable as the Families Tribunal and be set up with as wide a geographical spread as possible.

4.89 Courts will, firstly, enforce the decisions of the tribunal when they are breached, and secondly deal with cases where the safety of the parties or the children has to be protected and some other matters not within the jurisdiction of the Tribunal.

4.90 In addition, the pathway through the new system must have mandated mediation and this pathway must be widely known. The tribunal process must be simple and lawyers should only be permitted when the Tribunal determines that they are necessary.

4.91 When orders are made by the Families Tribunal they should be recorded in a parenting plan. The Tribunal will also have power to amend its orders if subsequent changes in the circumstances of the family so require.

4.92 When orders are breached, the first step should be to return to the Tribunal to consider whether the dispute involved in the breach can be resolved by a variation in the order, such as awarding extra parenting time to make up for what has been lost. Subsequent breaches, where the tribunal concluded that further variation was not going to address the behaviour of the party in breach, would be referred to a court for enforcement action.

4.93 The statute which creates the Families Tribunal would make it clear that orders made by the Tribunal are to have binding effect. The statute would also confirm the Tribunal's ability to vary its own orders on the basis of changes in circumstances. The courts' enforcement processes would then be confined to determining whether there had been a breach of the Tribunal's order and imposing a penalty when appropriate. [71]

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70 See Family Law Council, sub 1699, 9p.

71 The committee received legal advice that the High Court's *Brandy* decision does not affect the proposed Tribunal because the original decision of the Tribunal does not relate to determination of whether there has been a past breach of a law but rather on making future arrangements in the light of the principles enunciated in the Family Law Act.

4.94 There is considerable scope for the Parliament to allow judges and magistrates to dispense with the rules of evidence and procedural complexity if it thought fit. The constitutional constraint is that judges and magistrates (and anyone exercising delegated authority) should act judicially. This allows room for the government to work with the FCoA and FMC to explore different ways of acting judicially in dealing with the parenting cases remaining within their post Families Tribunal jurisdiction, including the enforcement role. This would allow for non-adversarial and more user-friendly processes across the whole range of parenting disputes. To act judicially does not require courts and judges to operate in the usual manner dictated by common law tradition if Parliament legislates to allow different approaches.

4.95 Clearly any significant reshaping of the family law system will require careful and detailed consideration by governments and by other stakeholders. The committee has not developed all the detail of its vision but outlines its conclusions about what are the key characteristics for a system to achieve the objectives it is seeking. The legislation necessary to support the objectives will need to identify the legal and constitutional details to ensure a properly integrated and valid solution.

Step one – single entry point

4.96 It is important for there to be a well-recognised and available source of assistance for parents following separation to work out their parenting arrangements initially without the need to either apply to the Tribunal or litigate in a court. At the present time lawyers and the courts are the most widely recognised sources of assistance when parents cannot work out their own arrangements. Mediation services provided by community organisations are typically accessed by referral from lawyers and courts, whom parents usually first approach to resolve their parenting disputes. Establishing a new single entry point to access help is an indispensable first step in moving away from a legal framework.

4.97 A single entry point into the family law system would go a long way towards effectively steering people down the best path. In the committee's view this is likely to be more successful in integrating the system and helping people to access the services they need than the approach of the Pathways Report. That Report relies on the commitment of all the existing services, many of whom are in competition with each other.

4.98 This single entry point to the system would be most cost effectively established if it were located in or attached to an existing Commonwealth agency that already has a wide geographic spread and existing

infrastructure, such as Medicare (or Centrelink). However, it should be identifiable separately within the host agency.

4.99 Alternatively, a new agency could be created which is given a 'shop front' presence in the same way as other government agencies serving a significant number of people in the general population. It should be a condition for filing an application for a parenting order in the Tribunal that there has first been an attempt to resolve the dispute through accessing this ready source of advice and assistance. An exception to this would be matters of imminent danger, which are of substance and which are not mere allegations, may have direct access to the court.

4.100 Any new agency of the kind envisaged would involve some new costs being incurred to support parents going through separation. However, such costs need to be evaluated against the cost of relationship breakdown, especially where children are involved. Cost-effective early intervention to help parents, especially in the first few months of separation, has potential for significant savings to government and the community in the longer term. It would also promote the welfare of children at a vulnerable time in their lives, by significantly reducing their exposure to family conflict.

4.101 This single entry point would have close administrative and operational links with the Families Tribunal but would be created separately from it. It is not a front door to the Tribunal but to the full range of dispute resolution options available across the family law system.

4.102 This first step in the process is designed to diffuse the tension and distress of separation. There needs to be an incentive to encourage parents to focus on the needs of their children first and foremost, before issues of property division or child support fix their thinking on parenting. Accordingly, the committee believes that there should be a six week moratorium before any parents begin to pay and receive child support. This would avoid the risk of fixing parenting arrangements, which impact on child support, that parents have not had the chance to properly consider. During this period parents will be assisted to enter counselling and to focus on the needs of their children. There are a range of policy and administrative issues that will need to be addressed, such as a process by which staff of the single entry point are able to advise the Child Support Agency of the date on which child support should commence. In addition, the committee believes that additional social security benefits should be available to parents to ensure that children are not financially disadvantaged during the six week period on the basis of evidence that they had commenced this process.

4.103 The new procedure of mediation, followed, if necessary, by a decision by the Families Tribunal, is not a mechanism designed to promote delaying tactics by any party. It is the committee's intention for an agreed interim arrangement to be entered into by the parents, for the benefit of children, at the earliest opportunity. The committee considered that a parenting plan should not take longer than six months to prepare.

Step two – information about parenting after separation

4.104 The immediate aftermath of separation can be a very confusing and stressful time for both parents and children. If parents can receive appropriate help to establish workable and appropriate shared parenting arrangements in the early part of separation this will do much to reduce conflict and facilitate ongoing parental involvement in their children's lives. Traditionally, Family Court counsellors, during their first contact with the client, provide parents with information about children's needs and possible appropriate parenting arrangements and about options for resolving disputes.

4.105 Building upon this experience and proposals set out in Chapter 3, the committee believes it is imperative to bring such information processes to a point in the separation process before the parents have approached the Tribunal or the courts. The new agency's intake processes (described below in paragraph 4.107-4.109), importantly, should include provision of information which will help parents to focus on their children's needs very soon after separation.

4.106 This would be an important point at which information and education about shared parental responsibility as discussed in Chapter 2 would be made available. The agency would play a pivotal role in the community education campaign also recommended in that chapter.

Step three - assessment of needs

4.107 The single entry point should be staffed by appropriately trained and qualified gender balanced teams to act as parenting support advisers. They should have the capacity to meet with both the parties and make an assessment on the needs of the dispute and the parties. While an agency of this kind could not compel attendance by both parties, an incentive to cooperate would be if there is any subsequent Tribunal application or litigation, a failure to participate could lead to an adverse view of the parent's willingness to focus on the best interests of the children.

4.108 Parenting support advisers should also assist parents to reach an early agreement (which could then be filed as consent orders at the Tribunal or

as a parenting plan). If this is not possible then they could be assisted by the advisers to develop time-limited temporary arrangements to obviate the need for application to the Tribunal about this. This would allow time for the issues in dispute to be resolved.

4.109 An initial assessment should quickly identify those cases where immediate access to a court process is necessary, for example, for protection of a child or a party in the circumstances listed in Chapter 2 of entrenched conflict, family violence, substance abuse, and child abuse including sexual abuse. Case assessment conferences now happen in the FCoA at a very early stage in the Court's pathway. It is the first event after an application is filed. With this new pathway, this kind of process would be brought forward to a pre-application stage. This does not preclude a further intake process if litigation commences in the courts. But the subsequent intake would build on the initial assessment by the agency, rather than duplicate it.

4.110 Families for whom entrenched conflict, family violence, substance abuse, or child abuse, including sexual abuse, is an issue which could be identified at this stage and referred to the proposed investigative arm of the Families Tribunal to ensure direct access and prompt investigation when these issues are raised during the Tribunal's process.

Step four – dispute resolution

4.111 The case assessor should be able to refer the parents to mediation or counselling services in the community or at courts (where there are services available) as appropriate. Alternatively, they could refer them directly to a court if there are issues of imminent danger, which are of substance and are not mere allegations, to be addressed and which make the mediation process inappropriate. If mediation is unsuccessful the parties could return to the single entry point and then be assisted with information about how to commence a Tribunal process.

Step five – parenting plans

4.112 The mediation processes as well as the Tribunal's conciliation processes would aim to deliver a parenting plan, as discussed in earlier chapters. The plan should then be registrable at the Tribunal and become binding in the same way as Tribunal orders will be binding but subject to a relatively simple procedure for variation. This would also facilitate the use of the parenting plan as evidence in any future dispute about things covered in it, in contrast to the current rigidity of interim and final orders.

Step six – the Families Tribunal

4.113 As outlined previously in the report, when mediation and other dispute resolution options have failed to help the parents reach an agreement, the next step will be to commence an application in the Families Tribunal for a decision. The processes in the Tribunal are envisaged to be as informal as possible, with very little documentation, but consistent with the rules of natural justice. It is anticipated that Tribunal members would be appointed from the ranks of professionals working in the family relationships field. First, the Tribunal would attempt to conciliate the issues in dispute. This could be undertaken by a single member. If this does not resolve it, the hearing of the dispute and the decision making function of the Tribunal could be performed by a panel of members comprising a mediator, a child psychologist/other person able to address the child's needs and a third person with appropriate legal expertise.

4.114 The outcome of the hearing would be a binding order, confirmed by the relevant legislation.

4.115 The statute should totally exclude legal representation for parties appearing in a Families Tribunal application. The statute should allow the Tribunal at its sole discretion to appoint legal counsel, interpreters or other experts to assist the Tribunal. These experts should be drawn from an accredited panel maintained by the Tribunal. The committee anticipates that the Tribunal will be able to deal with the overwhelming majority of its clients without the need for the services of these experts. In addition as children's voices are to have a significant role, there may be a need to provide separate representation, especially for young children.

Step seven – enforcement

4.116 Whilst the orders of the Tribunal will be binding, by force of the relevant statute, it is inevitable that there will be subsequent breaches, especially if relationship conflict issues have still not been resolved.

4.117 The committee envisages that first allegations of breach of an order could be appropriately dealt with by the Tribunal in the first instance. If, as is often the case, the breach is in reality a symptom of a need to vary the original order to make it more workable, the Tribunal would have the power to vary its own order.

4.118 Subsequent breaches would be dealt with by a court. This function could be performed by a magistrate either in the Federal Magistrate's Court or attached to the Tribunal. Alternatively it could be performed by delegation from a judge or magistrate within a court to a Registrar or Judicial Registrar attached to the FCoA. In some instances the first breach

may be referred by the Tribunal to the court if it is apparent that a variation will not be effective to resolve the dispute.

The future role for courts

4.119 There will be a protective role, an enforcement role and a limited review role that will remain with the courts. The committee believes that, even with a new Tribunal in place, it is in the interests of the parties going before courts that the court processes be as non adversarial as possible.

4.120 There will also need to be provision for judicial review of the decisions of the Families Tribunal but in very limited circumstances also set out in the relevant statute. The committee believes that the potential for review should be as far as possible excluded. It should be limited to issues of denial of natural justice and with respect to the Tribunal acting outside its statutory jurisdiction.

4.121 Court decisions when required, should be based therefore on the following approach:

- a significantly simplified, speedy and low cost process for making decisions;
- specifically designed for appropriate non-adversarial deliberation of relevant matters;
- rules of evidence should be eliminated or at least significantly limited;
- forms and affidavits should be minimised;
- procedures should be easily understood and manageable without the need for lawyers;
- formalities for the admission of relevant documents should be simple and user-friendly;
- the court should be able to adopt an investigative approach and decide what information it needs and does not need to make a decision;
- a hearing process should avoid undue formality and be investigative in character rather than adversarial; and
- consideration should be given to the design of rooms used for making parenting decisions, especially where the decision-maker does not need to be a judicial officer.

Step eight – post order support

4.122 If a conflict about compliance with a Tribunal order is one that lies in the court's jurisdiction, this function could be performed by Registrars with an enforcement role who would be attached to courts. The first instance

breach would have been handled within the Tribunal, so the primary role of this person would be to determine an appropriate penalty. Their power would come from delegation by judges and be as wide as the constitution allows them to be.

4.123 In addition, this court attached function should be linked strongly to services in the community (such as the contact orders program referred to in Chapter 3) that can provide more intensive interventions for highly conflicted families where the problems are really about conflict in the relationship that is the primary cause of repeated breaches of the relevant order. They should have power to order parents to attend appropriate programs. When people are not satisfied with a decision of the Registrar, including a decision to impose a penalty, they would need to have access to a hearing *de novo* in court as a matter of constitutional validity.[72]

4.124 The enforcement Registrar's role could be modelled on that of Special Masters known to operate effectively in California.[73]

4.125 All of the above processes would be underpinned by a commitment to natural justice[74] and due process. Registrars with enforcement jurisdiction would need to act in a manner consistent with the exercise with judicial functions.

Cost

4.126 It is critically important for all services provided by the family law system to be accessible according to need. Resources need to be sufficient to avoid delays, as this can often exacerbate a dispute. Cost to clients should not be prohibitive. Also actions with respect to breaches of orders should not be at the cost of the aggrieved party. The Family Law Council has recommended a new court related contact enforcement process that includes public support for litigants/complainants where there is a wilful and serious violation of court orders.[75] Under the committee's model that function would be shared across the Tribunal and the courts. Access to either place for enforcement, if legal representation is necessary, should be supported by public funds. It should also be possible to proceed without representation.

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72 A hearing *de novo* is a re-hearing when the matter is heard afresh, all the evidence given previously may be given again before the Judge. (FCoA web-site: www.familycourt.gov.au)

73 Relationships Australia (Bickerdike A), transcript, 20/10/03, p 53; Family Law Pathways Advisory Group, p 51.

74 The key principles of natural justice are opportunity to be heard, knowing the case against you and being given reasons for decisions made.

75 Family Law Council, sub 1400, p 18.

4.127 The committee agrees that after a parenting plan has been agreed upon, or Tribunal orders have been made, support for families to maintain the all important on-going relationship between children and parents should be provided at minimal cost to the parents. However, it is also recognised that some fees may be necessary to avoid vexatious or frivolous applications or to discourage over reliance on the system.

Simplifying the choices of last resort

4.128 At the beginning of this Chapter is a brief outline of the different courts currently working in family law. The committee has concluded that an essential aspect of the new pathway described above will be that for those families who need to access a court because they require possibly urgent access to a legal process which will provide the protection they need, the way to access a court should be simple and the choice of starting point should be transparent. There should be one way into family courts, when they are needed, and a coherent hierarchy of decision makers available according to specific case needs. This is particularly critical if families are in crisis due to issues of violence or child protection.

4.129 The superior court jurisdiction of the FCoA has a role in complex property disputes and in complex parenting disputes (eg. cases involving serious child abuse). The simplified less adversarial processes discussed above would logically be handled by magistrates. The FMC and the FCoA operate a very similar jurisdiction in family law.[76]

4.130 To make the way into family law courts simpler and to enable a proper assessment of the needs of each case followed by a coordinated referral to the appropriate decision maker, the committee believes there should be one court. One way to achieve this is to remove family law jurisdiction from the FMC and create magistrates in the Family Court (as happens in the FCWA) to provide a fully co-ordinated and resourced hierarchy of judicial decision makers.[77]

4.131 Another way would be to better link Federal Magistrates with the case management processes of the FCoA so that (while their formal appointment to a separately established court continues) they exercise family law jurisdiction within a co-ordinated system of case and file management. For litigants and practitioners, they are for all intents and

76 Federal Magistrates Court, sub 741, p 1.

77 Family Court of Australia currently has 45 judges, 6 Judicial Registrars & 3 Registrars, largely engaged in interim applications, viewed 15/12/03, http://www.familycourt.gov.au; FMC has 19 magistrates, viewed 15/12/03, http://www.fms.gov.au

purposes part of the same court. This would still allow Federal Magistrates to operate in a way separate and distinct from the FCoA in matters other than family law. The committee believes that, with the establishment of the Families Tribunal, there will obviously be a need to re-examine and streamline the roles of each court in any event. This option would be the simplest in that situation.

4.132 A way of achieving this would be for Federal Magistrates to hold dual appointments, the second appointment being as a Magistrate within the FCoA. Where the FMC sits side by side with the FCoA in metropolitan areas, the Magistrates should exercise their jurisdiction as Magistrates within the FCoA. When they are on circuit in regional areas where there is no FCoA presence or where exercising non-family law jurisdiction, they should do so as the FMC.

4.133 It is essential to a co-ordinated scheme that ordinarily interim proceedings are dealt with by magistrates and Judicial Registrars in a way which allows for proper evaluation of the issues where family violence and or child protection are relevant.

A voice for children

4.134 The FLA acknowledges the need to pay attention to children's views through appointment of a separate representative under section 68L and as an element of their best interests in subsection 68F(2). Separate representation is currently by order of the court. Guidelines on that role have recently been promulgated by the FCoA.[78]

4.135 The committee was privileged to be able to observe the interaction of a group of children in Melbourne who had previously been engaged in child inclusive mediation at the Family Mediation Centre. The focus group was facilitated by Dr Jennifer McIntosh. This experience confirmed for the committee that children of any verbal age can and should be consulted in important decisions about their lives.

4.136 The committee also met with some young people, in a facilitated forum organised by the Youth Affairs Council of Victoria, whose families had been through separation. The strongest message from this group was that the representation they had did not meet their needs and that they felt they had not had enough of a say in what was put to the courts in their own cases.

78 Family Court of Australia, *Guidelines for child representatives: Practice Directions and Guidelines*, viewed 23/11/03, www.familycourt.gov.au/html/child_representative.html

4.137 Some witnesses who are children of separated parents have expressed to the committee a dissatisfaction with the limited opportunities they currently have to be heard in decisions about parenting after separation that affect them so directly.[79]

4.138 The UN Convention on the Rights of the Child states in Article 12 the following:

> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.[80]

4.139 The new Families Tribunal processes should be designed around maximising opportunities for children to participate. The same should be the case for all of the services in the family law system and the committee has identified in Chapter 3 a strong need to build up these opportunities. The simpler court processes proposed also need to be child friendly and the services which come both before and after that process should all have the capacity to involve children in age appropriate ways. Child focussed practice such as has been developed in the community sector family relationships organisations should be adopted as widely as possible.[81]

Enhanced contact enforcement

4.140 There has been a lot of evidence about a perception of an imbalance in the current system between the enforceability of child support through the Child Support Agency and of contact through the courts.[82] Alongside the development of a new Tribunal and enforcement Registrars in the courts, the committee has considered the need for strengthening the enforcement options around contact in the current Family Law Act.

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79 Witness 1, transcript, 26/9/03, p 2; the young people the committee met with on 12 November 2003.

80 United Nations: "Convention on the Rights of the Child", viewed 23/11/03, http://www.unhchr.ch/html/menu3/b/k2crc.htm

81 Moloney L, transcript 20/10/03, pp 5-6.

82 Family Law Council, sub 1400, p 18.

4.141 The committee is aware that in 2000 the government added provisions to the FLA in response to recommendations from the Family Law Council[83] which created a three stage parenting compliance regime.[84] The emphasis of these reforms was the interposing of mandatory referral to post separation parenting courses in advance of applying punitive measures. The evidence is that the impact of these measures has been minimal. The primary reason appears to have been the limited availability of appropriate programs.[85]

4.142 The committee has concluded that there is scope for further strengthening the enforcement provisions in the FLA in a number of ways.

- The Families Tribunal and the enforcement Registrars or a current Judge or Magistrate attached to the court, when established, should be able to make orders for compensatory parenting time and for referral to parenting programs. This would allow them at least to deal with some issues arising out of post-order disputes in a way which would satisfy an aggrieved party without undue cost or delay. Punitive options would have to be a matter for the court or the Registrar, reviewable by rehearing before a judge or magistrate.
- The consequences of a deliberate breach of an order should be as serious for the parent who fails to make themselves available in accordance with an order as it is for a parent who wilfully refuses to make the children available without reasonable excuse.[86] Parents do not need to govern their post-separation parenting arrangements through court orders. They can make informal arrangements or develop a parenting plan. But if they do want court orders, then those orders create obligations as well as rights.
- Consequences should be cumulative for subsequent breaches. Capacity to vary an order where this is seen to be appropriate should be retained as should the capacity to order compensatory time[87] and all the other sentencing options including the imposition of fines or a term of imprisonment.

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83 Family Law Council, *Child Contact Orders: Enforcement and penalties. A report to the Attorney-General by the Family Law Council: The interim report Penalties and enforcement (March 1998) should be read in conjunction with this report,* Commonwealth of Australia, Canberra, June 1998, xvi 79p.

84 Attorney-General's Department, sub 1257, p 8.

85 Attorney-General's Department, sub 1257, p 12.

86 Reasonable excuse is defined in section 70NE of the Family Law Act.

87 See Family Law Act 1975, sub par 70NG(1)(b).

- Reasonable but minimum financial penalties should be imposed for first and subsequent breaches.
- A third breach, if found to demonstrate a pattern of deliberate defiance of court orders, should require the court to give serious consideration to making a new parenting order in favour of the other parent (unless this is contrary to the best interests of the child).[88] This would in effect be overruling the decision of the Tribunal.
- The ultimate sanction of imprisonment should be retained.[89]

4.143 This should be supported by the adequately resourced enforcement Registrar process. Enforcement proceedings should be easily accessible and not incur cost to the aggrieved parent if there is a prima facie case of a deliberate and serious breach of court orders.[90]

4.144 These suggestions are equally and immediately applicable to the current FLA and current court based enforcement mechanisms. The committee sees these as changes that should be implemented with or without a new pathway or redesigned court process. If the changes to the system as recommended are subsequently implemented, the intention of these enforcement changes should be retained but some adjustment may be necessary to make them fit the new structure.

4.145 For a schematic representation of the proposed new family law process see Figure 4.1.

Transitional arrangements

4.146 As was discussed in Chapter 2, the committee is conscious of the level of discontent in the community around experiences of and outcomes from the current family law system, including existing orders issued by the FCoA or the FMC.

4.147 When the changes to the legislation set out in Chapter 2 are implemented it is likely to create a demand for reconsideration of parenting arrangements or orders on the basis of a change in circumstances brought about by the change in the legislation.

4.148 One issue that raises complex legal issues is the impact a change of the law on parenting responsibilities may have on existing court orders. There

88 For example, the contact parent may have no capacity to take care of the child.

89 Family Law Act 1975, sub par 70NJ(3)(e).

90 Family Law Council has recommended in its submission that a public body should take up the responsibility for enforcement. This has been developed further in the Council's supplementary submission, sub 1699, 9p.

seems no reason why a change of the law cannot apply to any application to a court to vary existing court orders. The more difficult issue is whether an administrative tribunal can be given power to make new parenting orders based on the new law contrary to existing court orders. The Tribunal could not be given power directly to set aside or vary the court orders. However, legislation may be able to make clear that any future adjustment of existing contact arrangements is to be determined in accordance with the new legal regime, even where there are existing court orders. New applications would then be required to be made to the Tribunal, and any decision of the Tribunal would supersede for the future existing court orders because of the effect of the change in the law.

4.149 Initial legal advice indicates that it may be possible to make legislative provision to this effect.[91] The committee received the best advice available, however, the issues raised are complex and need to be further investigated.

4.150 Further detailed consideration of this issue will need to occur with a view to devising constitutionally sound transitional provisions that can, to the greatest extent possible, allow the new legal framework to apply to situations already covered by existing court orders.

4.151 As is the case for families who need to access a decision maker, any strategy for implementation will need to heavily emphasise the preference for parents working out these issues for themselves.

4.152 Implementing the legislative changes in Chapter 2 without a new system to support them would inevitably create a critical workload issue for the courts. Establishing a new Families Tribunal will take some time, including the passage of legislative requirements, infrastructure and recruitment of appropriately qualified personnel across the country. The government may need to consider a staged roll out on a state by state basis.

4.153 As with past experience (eg, in 1976 with the introduction of no-fault divorce), it is likely that the prospect of such a major reform as this Report proposes will encourage some separating parents to delay their applications until the Tribunal commences operation. This could create a peak workload at the start. In such circumstances the Tribunal would commence with a backlog and the risk would be that this would add to the discontent in the community and extend the conflict between parents in the queue rather than reduce it.

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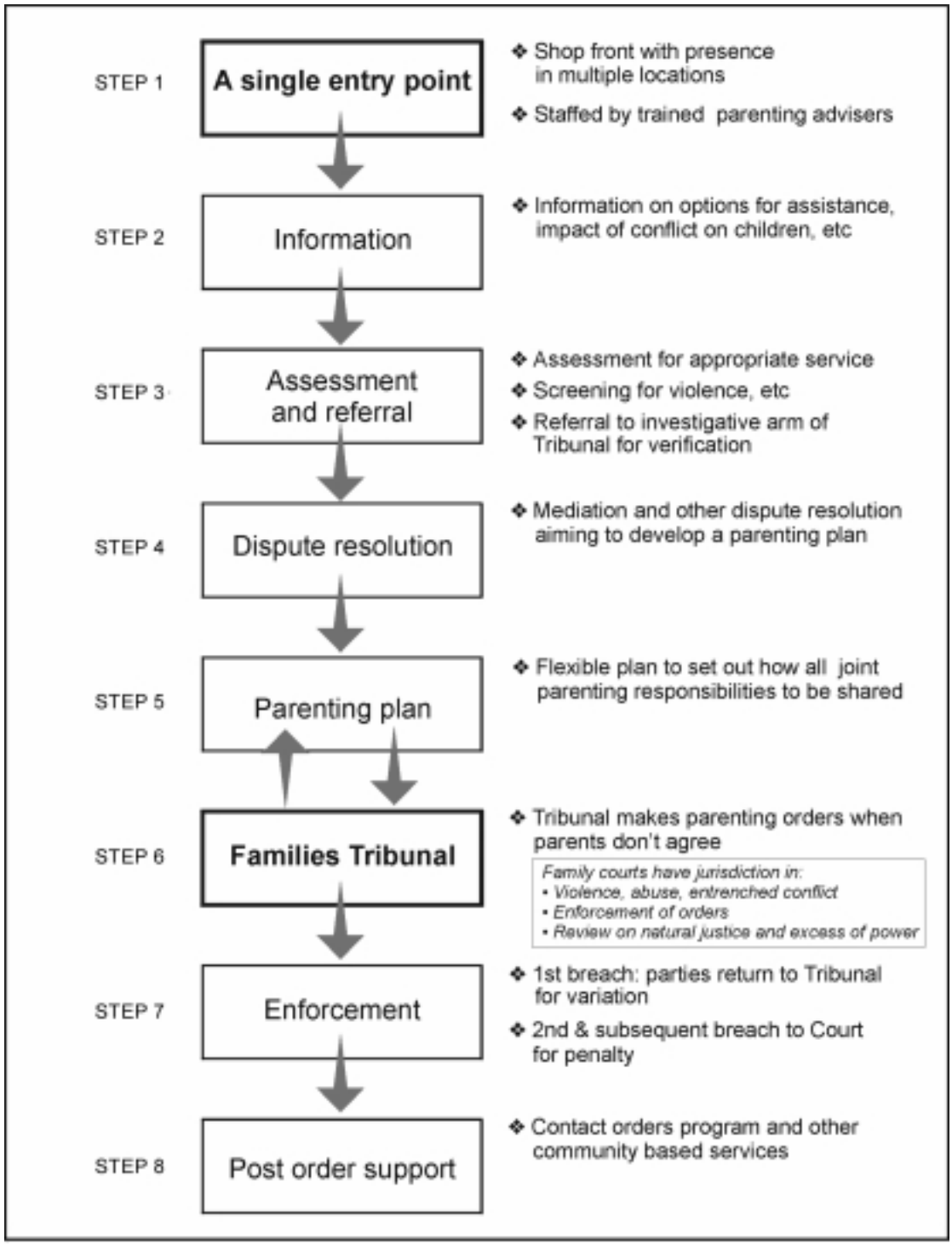
91 Private briefing from Henry Burmester QC, Chief General Counsel, Australian Government Solicitor.

Figure 4.1 A new family law process: A schematic representation



4.154 To address this concern, as well as the transitional issue, an option to consider might be to create a new incentive for parents to reach agreement, by allowing already separated parents with existing court orders, who both agree, to take their case to the Tribunal. For those who do not agree some delay may need to be built in to spread the workload more manageably for the Tribunal.

4.155 The committee acknowledges that the Families Tribunal will also require injection of considerable additional funds in the first years particularly. The committee has not quantified this but is convinced that over time, savings will be able to be recouped from expenditure on courts and legal aid, as fewer families will need to access the current legal system. For example, the Commonwealth currently expends $50m per annum on legal aid in family law disputes. The committee believes savings in this area would emerge directly as a result of establishing the Tribunal.[92] However, it would be dangerous to make reductions in those areas before the new Tribunal had sufficient time to prove its success.

Recommendation 11

4.156 **The committee recommends that a shop front single entry point into the broader family law system be established attached to an existing Commonwealth body with national geographic spread and infrastructure, with the following functions:**

- **provision of information about shared parenting, the impact of conflict on children and dispute resolution options;**
- **case assessment and screening by appropriately trained and qualified staff;**
- **power to request attendance of both parties at a case assessment process;**
- **referral to external providers of mediation and counselling services with programs suitable to the needs of the family's dispute including assistance in the development of a parenting plan.**

92 Attorney-General's Department, sub 1710, p 2.

Recommendation 12

4.157 **The committee recommends that the Commonwealth government establish a national, statute based, Families Tribunal with power to decide disputes about shared parenting responsibility (as described in Chapter 2) with respect to future parenting arrangements that are in the best interests of the child/ren, and property matters by agreement of the parents. The Families Tribunal should have the following essential features:**

- **It should be child inclusive, non adversarial, with simple procedures that respect the rules of natural justice.**
- **Members of the Families Tribunal should be appointed from professionals practising in the family relationships area.**
- **The Tribunal should first attempt to conciliate the dispute.**
- **A hearing on the dispute should be conducted by a panel of three members comprising a mediator, a child psychologist or other professional able to address the child's perspective and a legally qualified member.**
- **Legal counsel, interpreters or other experts should be involved in proceedings at the sole discretion of the Tribunal. Experts should be drawn from an accredited panel maintained by the Tribunal.**

Recommendation 13

4.158 **The committee recommends that all processes, services and decision making agencies in the system have as a priority built in opportunities for appropriate inclusion of children in the decisions that affect them.**

Recommendation 14

4.159 **As discussed in paragraph 4.102, the committee recommends that in the period immediately following separation:**

- **there be a 6 week moratorium before any obligation to pay child support arises;**
- **parents be required to access the single entry point and begin**

the process of mediation (including the commencement of a parenting plan); and

- **during the first 6 weeks parents be able to access their full entitlement to social security benefits without penalty, to ensure neither they nor their children are financially disadvantaged.**

Recommendation 15

4.160 **The committee recommends that all family law system providers, but most particularly the single entry point service, should screen for issues of entrenched conflict, family violence, substance abuse, child abuse including sexual abuse and provide direct referral to the courts for urgent legal protection, and for investigation of allegations by the investigative arm of the Families Tribunal.**

Recommendation 16

4.161 **The committee recommends that an investigative arm of the Families Tribunal should also be established with powers to investigate allegations of violence and child abuse in a timely and credible manner comprised of those with suitable experience.**

It should be clear that the role is limited to family law cases and does not take away from the States' and Territories' responsibilities for child protection.

Recommendation 17

4.162 **The committee recommends that after establishment of the Families Tribunal, the role for courts in disputes about parenting matters should be limited to:**

- **cases involving entrenched conflict, family violence, substance abuse and child abuse including sexual abuse which parties will be able to access directly once the issues have been identified;**
- **enforcement of orders of the Families Tribunal when the**

dispute cannot be resolved by a variation of the order of the Tribunal so far as possible by judicial delegation to Registrars;

- **review of decisions of the Families Tribunal only on grounds related to denial of natural justice or acting outside its power or authority.**

Recommendation 18

4.163 **The committee recommends that in parallel with the establishment of the Families Tribunal the current structure of courts with family law jurisdiction be simplified. This should ensure there is one federal court with family law jurisdiction with an internal structure of magistrates and judges to support the delivery of judicial determination in the best interests of the child.**

Recommendation 19

4.164 **The committee recommends that a longitudinal research project on the long term outcomes of family law judicial decisions should be undertaken and incorporated into judicial education programs.**

Recommendation 20

4.165 **The committee recommends that there should in future be an accreditation requirement for all family law practitioners to have undertaken, as part of their legal training, undergraduate study in social sciences and or dispute resolution methods.**

Recommendation 21

4.166 **The committee recommends the immediate implementation of the following additions to contact enforcement options:**

- **a cumulative list of consequences for breaches;**
- **reasonable but minimum financial penalties for first and subsequent breaches;**

- **on a third breach within a pattern of deliberate defiance of court orders, consideration to a parenting order in favour of the other parent; and**
- **retaining the ultimate sanction of imprisonment.**

Recommendation 22

4.167 **The committee recommends that in the lead up to the implementation of the recommendations in this chapter to create a Families Tribunal there should be a public awareness campaign to inform the community about the reform and its benefits.**

5

A child's contact with other persons

Introduction

5.1 The second term of reference to the inquiry examines the circumstances in which a court should order that children of separated parents have contact with other persons, including their grandparents.

5.2 In the first instance the answer to this question is simple and straightforward, that is, when it is in the best interests of the child. However, how this is put into practice is not as straightforward.

5.3 'Other persons' are usually taken to mean extended family members (including grandparents) and other persons concerned with the care, welfare or development of the child.

5.4 There are some particular considerations for indigenous people. The Aboriginal Legal Service of Western Australia (ALSWA) pointed out that:

> … even more so than the Australian community generally, many Aboriginal people have a cultural responsibility to raise, or assist in raising, children who are not their own.[1]

The National Network of Indigenous Women's Legal Services Inc also stressed that:

> It is a traditional practice and role of Grandparents or Aunties and Uncles to also care for and raise children ...[2]

5.5 Indigenous families may have four generations living in a single residence or community as the norm. In contrast, often non-indigenous family

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1 Aboriginal Legal Service of Western Australia Inc, sub 1141, p 6.

2 National Network of Indigenous Women's Legal Services Inc, sub 1144, p 5.

breakdown results in three generations living in the one household when a child moves home with their child, a situation that may be far more difficult than two generations living together.[3]

5.6 This means looking beyond the nuclear family of the parent-child relationship to a wider range of relationships in the extended family which may be significant and sometimes critical to children.

5.7 From the outset it is important to stress that the focus is on what is in the best interest of the child, not what parents want, or what grandparents or extended family members want.

5.8 It is clear that:

> Parents are not the only ones whose relationships with their children can suffer after a marriage breaks down …
>
> …
>
> Divorce leaves its mark on the entire kinship system as relatives, particularly grandparents, adjust to the changes incurred by parents leading separate lives …[4]

5.9 Given the prominent role of grandparents, their strong voice in the community and their specific identification in the inquiry terms of reference, they have more focus in this chapter than other people significant to the child's welfare, however, the principles in this discussion apply to other extended family members.

Role of grandparents

5.10 With the greater incidence of divorce in Australia and with greater longevity of the population, potentially more grandparents are faced with possible contact difficulties.

5.11 Research in the United Kingdom and the United States has indicated that the issue of grandparents is significant because grandparents are an important resource in childcare and the continuing provision of education and support for children. In the United Kingdom grandparent pressure groups and lobby groups continue to argue for greater legal recognition for grandparents and promote the visibility of grandparents.[5]

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3 KinKare, transcript Robina, 4/9/03, pp 26-27; National Network of Indigenous Women's Legal Services Inc, sub 1144, p 5.

4 Weston R, Families after marriage breakdown, *Family Matters*, no 32, Aug 1992, p 41.

5 Douglas G & Ferguson N, The role of grandparents in divorced families, *International Journal of Law, Policy and the Family*, 17, (2003), pp 42-43; Kaganas F & Piper C, Grandparents and the limits of the law, *International Journal of Law and the Family*, 4, (1990), pp 27-28; Kaganas F &

5.12 In evidence to this committee a number of grandparents and their representative groups raised issues concerning the care of their grandchildren both pre- and post- parental separation. KinKare pointed out that it is important to recognise that often grandparents, or an extended family member, will become the carer for the children especially in cases where the parents are involved with drug addiction or are suffering from a mental illness.[6] Statistics on the number of grandparents in this situation are not available.[7]

5.13 This is usually an issue of residence, however, in keeping with the inquiry terms of reference, emphasis in this chapter is on contact issues.

5.14 The role grandparents play in their grandchild's life varies. Both evidence to the committee and research indicates that the role is usually positive but can be negative.

5.15 In their research on the role of grandparents in divorced families in the United Kingdom, Douglas and Ferguson reported that 'The value of a grandparents' relationship with their grandchildren, and in particular the value of contact, must turn to a significant extent on the *content* of that relationship …'[8] They go on to say that the things grandparents do with their grandchildren include activities, confiding, support, provision of childcare, and support of parents through the legal process of divorce.[9]

5.16 They state that the most significant finding is that '…the nature and style of grandparenting in a given family seemed to be established *before* the parents divorced … '[10]

5.17 In evidence to this committee grandparents pointed to similar roles. For example:

In speaking about their 3.5 year old grandson two paternal grandparents said:

Piper C, Grandparents and contact: 'Rights v welfare' revisited, *International Journal of Law, Policy and the Family*, 15, (2001), pp 250-255.

6 KinKare, transcript Robina, 4/9/30, pp 22-25; see also Name withheld, sub 81, 2p.

7 KinKare, transcript Robina, 4/9/30, p 25; See also: *Grandparents raising grandchildren: A report of the project commissioned by the Hon Larry Anthony MP, Minister for Children & Youth Affairs and carried out by COTA National Seniors*, July 2003, 61p, viewed 23/11/03, http://www.facs.gov.au/internet/facsinternet.nsf/VIA/grandparents/$File/GrandparentsRaisingGrandchildrenReport.pdf

8 Douglas G & Ferguson N, p 50.

9 Douglas G & Ferguson N, pp 50-55.

10 Douglas G & Ferguson N, p 61.

> … we can contribute to his upbringing, training and what the child learns through life. Having another family there to care for him and love him is very important to the child …[11]

Another paternal grandmother said:

> Grandparents have a major role in a child's life, especially if they have been the child's carer while the parents work …[12]

And another paternal grandmother commented that if contact doesn't occur it:

> … deprives the children of an important part of their normal development and forming of relationships.[13]

Other paternal grandparents said:

> … Whilst the children will not necessarily accept all that they learn from the Grandparent due to the age difference at that time, they will still retain the knowledge imparted and use it when required …[14]

KinKare stated:

> So many times the grandparents are the ones the children confide in. They are often the best source of knowledge about the emotional state of the children …[15]

5.18 Despite difficulties with the child's father, one resident mother spoke of the great role model that the paternal grandfather provided for her son and of Pop being her son's greatest mate.

Some views of grandchildren

5.19 The views of grandchildren on grandparents were suggested through the two forums the committee held with children and young adults. The comments from the younger children ranged from: one child saying he and his mother lived with maternal grandparents; to others saying they did not see their grandparents because they lived too far away; and to another commenting that 'grandparents understand kids better', whereas parents are 'power mad'.

5.20 The young adults also described a range of relationships with grandparents: one said she and her siblings did not have a good

11 Witness 2&3, transcript, 5/9/03, p 11.

12 Witness 2, transcript Wollongong, 1/9/03, p 12.

13 Wendy, transcript, 29/8/03, p 40.

14 Name withheld, sub 1372, p 4.

15 KinKare, sub 949, p 3.

relationship with dad, and his parents supported him, so the relationship with the paternal grandparents was not good; another said that if you saw each parent enough, you are able to see grandparents when with them; another young adult commented that he saw maternal grandparents and did not want to, but wanted to see paternal grandparents and could not; another saw their maternal grandfather as a good male role model because their father wasn't around as much; and another described a good relationship with both sets of grandparents but they lived a distance away.

Legislative framework

5.21 It has always been possible under the *Family Law Act 1975* (FLA) for grandparents or 'any other person concerned with the care, welfare or development of the child' to make an application to the court for the residence of, or contact with, the child involved. However, the committee recognises from the inquiry evidence that this is not well known or publicised.

5.22 In 1995 the legal position of grandparents was strengthened by amendments to the FLA by specific reference to grandparents, along with the parents of the child and the child themself, as a person who may apply for a parenting order (section 65C).

5.23 Grandparents and any other person concerned with the care, welfare or development of the child also are specifically listed in the Act as persons who may apply for: a child maintenance order (section 66F), a location order (section 67K), a recovery order (section 67T) and may institute proceedings (section 69C).

5.24 However, in determining contact and residence orders (section 68F(2) (b) (c)), there is no specific reference to grandparents, they are only included as one of 'other persons'.

5.25 Some, such as the Australian Institute of Family Studies (AIFS), have suggested that:

> By elevating the status of grandparents in this way, it could be argued that the legislature is acknowledging the (potentially) pivotal role that grandparents can play in children's lives.[16]

5.26 What the legislature seems to be saying is that a grandparent could be a significant figure in a child's life and recognises that he or she can make a particular contribution to the child's well-being.

16 Australian Institute of Family Studies, sub 1055, p 26.

5.27 Similar legislation to that in Australia exists in the USA where all 50 states have legislation providing for grandparent visiting. In 1998 Germany introduced specific rights of grandparent's access subject to the welfare of the child. In contrast, in the United Kingdom the *Children Act 1989* removed the express legal recognition of grandparents and treated them in the same way as most other non-parents seeking legal recognition of their relationship with a child. They are required to seek the leave of the court before they can apply for orders thus enabling the court to prevent unnecessary litigation and disruption to the child.[17] Since that change, grandparents groups have been lobbying to change the legislation to give greater recognition to grandparents.[18]

5.28 It is also important to recognise that in the majority of cases the relationship between grandparents, parents and grandchildren are worked out informally without resorting to the law. The FLA, however, does provide the framework within which these decisions are made.

Contact between children and grandparents and extended family

5.29 The AIFS pointed out that there is limited Australian research on grandparent-grandchild contact post divorce.[19]

5.30 The main work that has been done was undertaken by Weston in 1992.[20] Despite the time gap, Weston's main findings and conclusions generally appear to be consistent with evidence taken by the committee during this inquiry. A recent small survey by Douglas and Ferguson in the United Kingdom revealed similar results.[21]

5.31 Weston's most relevant findings were that :

- more than 80% of both resident and non-resident parents (measured separately) reported that their children had contact with at least one set of grandparents at least weekly or monthly;
- the amount of contact with maternal or paternal grandparents is shaped by the living arrangements of the children, that is, children living with their mother were much more likely to have frequent (that is, weekly or

17 Douglas G & Ferguson N, pp 42-43.

18 See Douglas G & Ferguson N, p 43; Kaganas F & Piper C, 2001, pp 250-275.

19 Australian Institute of Family Studies, sub 1055, p 26.

20 Weston R, pp 41-45.

21 Douglas G & Ferguson N, pp 41-67.

monthly) contact with their maternal grandparents than with their paternal grandparents and vice versa;

- paternal grandparent contact mirrored paternal contact;
- non-resident parents play an important role in the maintenance of contact between their parents and their own children;
- in the view of both resident and non-resident parents surveyed the damaging effects of divorce were more likely to be perceived for relationships with grandparents on the non-resident parent's side; and
- living arrangements strongly influence which set of extended family is important, for example, where children live with their mothers the pre-existing bias towards maternal relatives continues and may be strengthened and vice versa.[22]

5.32 A considerable number of grandparents who provided evidence said that the resident parent had denied them contact with their grandchild or that contact was precarious. Perhaps the most disturbing cases were those where grandparents said they had no explanation for why this happened or did not know where their grandchild was located.[23]

5.33 Reasons given by resident parents for denying access to grandparents related to claims of emotional intimidation of a grandchild as a way of getting back at the resident parent.

5.34 What Weston's findings suggest, as does evidence to the committee, is that as paternal grandparents' contact with their grandchild tends to lessen after their own child's divorce, contact issues become particularly important to this group of grandparents and therefore to the children.

5.35 A number of grandparents reported that they see their grandchild when the child is visiting the non-resident parent and that this is an easier solution to contact.[24] Unfortunately, one set of grandparents said that they have to do this without the resident parent's knowledge for fear of getting that parent off-side with the non-resident parent. [25] Others have said that

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22 Weston R, pp 43-45.

23 Name withheld, sub 1102, p 1; Name withheld, sub 1290, p 1; Name withheld, sub 1291, p 2; Name withheld, sub 1372, p 1; Butler F&Z, sub 1399, p 1; Olsson G, sub 999, p 6; Name withheld, sub 147, p 1; Name withheld, sub 148, p 2; Name withheld, sub 1479, p 2; Name withheld, sub 696, p 1; Armstrong J, sub 24, p 1; Name withheld, sub 688, p 3; Name withheld, sub 168, p 1; Witness 2&3, transcript, 5/9/03, pp 10, 11; Wally, transcript, 26/10/03/, pp 60-61; Rosemary, transcript, 26/10/03, p 68; Maria, transcript, 29/8/03, p 41; Witness 2, transcript Wollongong, 1/9/03, p 11.

24 Aboriginal Legal Service of Western Australia, sub 1141, p 6; Gray L, sub 1485, p 3; Hannan H, sub 1491, p 3; Name withheld, sub 881, p 1; Jan, transcript, 25/9/03, p 46.

25 Witness 2&3, transcript, 5/9/03, pp 10, 11.

the non-resident parent has so little time with the child that they do not want to reduce that, so they minimise their time with the grandchild or miss out.[26]

5.36 In discussing their indigenous clients the ALSWA said:

> In many cases, and ideally, children get to spend time with grandparents and other significant people within the time they spend in the care of one or other parent, making specific orders unnecessary. However, in many cases this does not happen, and so ALSWA regularly represents grandparents and other family members in obtaining orders in respect of children.'[27]

Awareness of legal status

5.37 Given the status of grandparents and other persons under the FLA previously outlined, the committee is concerned that a number of grandparents, other persons and related lobby groups appear unaware of grandparents' current status at law, or at least the detail of that status.[28] For example, one set of paternal grandparents said:

> … We have not been to the court, but we have asked the solicitors that my son has been using, and they have never given us any indication that there was a group that could help grandparents or of whether or not we had any rights whatsoever …[29]

5.38 This is perhaps not surprising given the committee's findings on the limited knowledge in the community of parents' legal status. The National Council of Single Mothers and their Children Inc suggested a public education campaign to redress this situation with grandparents.[30]

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26 Name withheld, sub 697, p 2; Staggard D, sub 845, p 1; Name withheld, sub 1427, p 1.

27 Aboriginal Legal Service of Western Australia, sub 1141, p 6.

28 Name withheld, sub 184, p 3; KinKare, sub 949, pp 2, 3, 5 and transcript Robina, 4/9/03, p 25; National Council of Single Mothers and their Children Inc, sub 1311, p 10; Witness 2&3, transcript, 5/9/03, pp 12-13; Maree, transcript, 25/9/03, p 45; Witness 2, transcript Wollongong, 1/9/03, pp 13-14; Witness 2, transcript Blacktown, 1/9/03, p 34.

29 Witness 2&3, transcript, 5/9/03, p 13.

30 National Council of Single Mothers and their Children Inc, sub 1311, p 10.

Accessing legal avenues

5.39 Factors reported in evidence to the committee that hinder grandparents and others in pursuing legal avenues for contact were an unwillingness to make matters worse, the cost of court cases and the system. Research supports similar findings.[31]

5.40 In evidence some parents of the non-resident parent said they were unwilling to antagonise the resident parent in case the matter became worse for the non-resident parent. Other grandparents did not act because of a belief that they should not interfere in their own children's lives. In cases where the parent was subject to abuse or domestic violence, no action was taken by grandparents out of fear of exacerbating that situation. Some grandparents reported having AVOs (or worse, allegations of sexual abuse) taken out against them by the resident parent which was a significant deterrent to further action. And in other cases the stereotypes of problematic relationships between mothers-in-law and daughters-in-law came into play. [32]

5.41 High legal costs, as previously discussed in relation to court cases, are also a significant deterrent with grandparents. Grandparents often have retired and may be on fixed incomes and so do not have the funds to meet court costs. A number of grandparents reported they had used substantial portions of their savings to assist their children during the divorce and/or in pursuing their contact claims, and just did not have money left to consider pursuing their own case. [33]

5.42 KinKare advised that there is no legal aid for grandparents as the eligibility criteria do not allow for older people who are asset rich to access such services. As well, they said it is often a choice between legal aid paying for the child's solicitor or the grandparents' solicitor and the grandparents often give way. [34]

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31 For example see Douglas G & Ferguson N, p 48.

32 Witness 2&3, transcript, 5/9/03, p 14; KinKare, transcript Robina, 4/9/03, p 25; Grandparents in Distress, sub 1658, p 1 and transcript Coffs Harbour, 27/10/03, p 63; Wally, transcript, 26/10/03, pp 60-61; Rosemary, transcript, 26/10/03, p 68; Chantel, transcript, 24/9/03, p 85; Pauline, transcript, 24/9/03, p 89.

33 Name withheld, sub 1089, p2; Name withheld, sub 1199, p 1; Name withheld, sub 1372, p 2; Witness 2&3, transcript, 5/9/03, p 13; Wally, transcript, 26/10/03, p 60; Rhonda, transcript Blacktown, 1/9/03, p 55.

34 KinKare, sub 949, p 4.

5.43 KinKare also suggested that 'More and more the Family Court is being asked to rule on cases involving grandparents, and is ill equipped to do so.'[35]

5.44 Another consideration is what messages lawyers are giving to grandparents who may seek their advice on whether to pursue contact. In evidence one paternal grandmother reported:

> When my late husband and I consulted with a lawyer with the intention of applying for access, he advised us not to proceed. This was because our son had encountered so many difficulties within the system and it would cause us too much distress and cost a lot of money.[36]

5.45 KinKare also noted that older people may be physically less able to pursue a case.[37]

Court orders

5.46 The ALSWA reported that despite the 1995 reforms to the FLA, such orders are generally not made by the court unless they are specifically sought by the grandparent/other family member.[38]

5.47 As judges act on the application of a party, the court cannot make orders that bind people who are not party to the proceedings. Therefore, if a grandparent wants to pursue contact in court proceedings, they have to make an application themself.[39]

5.48 The ALSWA also submitted that if evidence about the pros and cons of making such an order is not presented to the court and because it is not a specified factor in section 68F(2) the court is not proactive in seeking it.[40] This is another consequence of the adversarial model.

5.49 In making a decision on contact the judge will consider the child's best interest under subsection 68F(2)(b) and (c). Factors that will be applicable in relation to grandparents include the nature of the relationship with the child and likely effect of any change in the child's circumstances,

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35 KinKare, sub 949, p 2.

36 Wendy, transcript, 29/8/03, p 41.

37 KinKare, transcript Robina, 4/9/03, p 27.

38 Aboriginal Legal Service Western Australia Inc, sub 1141, p 7.

39 For example see Allen D&J, sub 1680, p 1.

40 Aboriginal Legal Service Western Australia Inc, sub 1141, p 7.

including the likely effect on the child of any separation from the grandparent with whom he or she has been living.

5.50 The Family Law Section of the Law Council of Australia, pointed to the unreported case of *Michalos and Theakos*[41] where, despite the wishes of the father, the judge awarded in the grandparents' favour to see their grandchild.[42]

Enhanced legal status for grandparents?

5.51 Opinion varies on the adequacy of the current legislation for facilitating contact between grandparents and their grandchildren. Diverse groups such as the Family Law Section of the Law Council of Australia and the National Council of Single Mothers and their Children Inc, see no need for legislative change.[43] Others who fear intimidation and harassment from former partners and their family urge no change.

5.52 On the other hand, grandparents groups such as KinKare seek specific mention of grandparents in factors for determining contact (section 68F) rather than being included with 'significant others' and grandparents having more legal standing than any non-related party.[44] The ALSWA also supports such a change but seeks to include ' … a person who is not a parent, including but not limited to a grandparent or other member of the child's extended family'.[45]

5.53 The impact of subsection 68F(2) is that the family dynamics need to be supportive of extended family involvement and intergenerational conflict can interfere with this.

5.54 Additional legal recognition for grandparents would assist in changing social attitudes so that further involvement is more readily acceptable. If they were added specifically to subsection 68F(2) and there was an explicit onus on the courts to consider grandparents, they may be able to avoid the costs and difficulties of undertaking court action.

5.55 Against this is the argument put by Kaganas and Piper's research which suggests that several people competing for a child's time and attention

41 *Michalos and Theakos* Appeal No.EA113 of 2002, see Family Law Section of the Law Council of Australia, sub 1021, p 18.

42 Family Law Section of the Law Council of Australia, sub 1021, p 18.

43 National Council of Single Mothers and their Children Inc, sub 1311, p 10; Family Law Section of the Law Council of Australia, sub 1021, p 17.

44 KinKare, sub 949, p 4 and transcript Robina, 4/9/03, p 25.

45 Aboriginal Legal Service of Western Australia, sub 1141, p 7.

could become unmanageable even if legislation is restricted to grandparents. The problem could be accentuated by parents and grandparents divorcing and perhaps remarrying. This would bring in several sets of grandparents.[46] It could also mean more lawyers.

Grandparent's and extended family members involvement in mediation and family counselling

5.56 The Government response to the Pathways Report placed considerable emphasis on early intervention in possible areas of conflict with families. This issue has been discussed in some detail in Chapter 3. KinKare requested that:

> … the definition of "family" be extended to include grandparents as too often they are left to pick up the pieces for the sake of the children.
>
> We believe that the inclusion of grandparents in the resolution of family conflict would have a positive effect in maintaining civility and improve the plight of the children.[47]

5.57 The success of a wider family conferencing model already has been demonstrated through the Aboriginal and Torres Strait Islander Family Consultant program run by the Family Court of Australia in the Northern Territory and North Queensland. More detail on this program has also been presented in Chapter 3. Incorporating wider family members into all dispute resolution processes may deliver more family oriented solutions to post separating parenting. The Aboriginal and Torres Strait Islander experience in the Family Court of Australia has shown the positive effect this can have, with respect to maintaining relationships between children and grandparents and others without the need for court proceedings.

Conclusion

5.58 The committee accepts that grandparents can and do play a significant, and often critical, role in many grandchildren's lives.

5.59 This role is already explicitly set out in several sections of the FLA and is implied in subsection 68F(2) and, when relevant, considered by judges in

46 Kaganas F & Piper C, 1990, p 33.

47 KinKare, sub 949, p 4.

making decisions on the best interest of the child. Including grandparents explicitly in subsection 68F(2)(b)(c) will reinforce the message that specific consideration should be given to grandparents.

5.60 Given the lack of awareness of grandparents' current status in the FLA, the inclusion of this information as part of a wider long term public education campaign on the FLA should assist.

5.61 The earlier recommendations that the committee has made about shared parenting should have a flow-on effect for grandparents, because children will spend more time with both parents and extended family.

5.62 The part grandparents and extended family members should play in the children's lives should be specifically addressed in parenting plans.

5.63 Similarly, the recommendations made about including grandparents and extended family in mediation and family conferencing should also have positive benefits.

5.64 All of these conclusions apply to the indigenous community, but even more so, given Aboriginal people have a cultural responsibility to raise, or assist in raising, children who are not their own.

Recommendation 23

5.65 **The committee recommends that the Commonwealth Government amend subsections 68F(2)(b) and (c) of the *Family Law Act 1975* to explicitly refer to grandparents.**

Recommendation 24

5.66 **The committee recommends that the Commonwealth Government:**

- **include information on grandparents' status in a wider public education campaign on the *Family Law Act 1975*;**
- **ensure contact with grandparents and extended family members are considered by parents when developing their parenting plan, and if in the best interest of the child, make specific plans for contact with those individuals in the parenting plan; and**
- **develop a range of strategies to ensure that grandparents, and extended family members, are included in mediation and**

family counselling activities when it is in the best interest of the child, in particular the development of a wider family conferencing model.

6

Child Support

Introduction

6.1 The third term of reference for the inquiry examines whether the existing child support formula works fairly for both parents in relation to their care of, and contact with, their children after separation.

6.2 The Child Support Scheme (CSS) is administered by the Child Support Agency (CSA), which is part of the Commonwealth Department of Family and Community Services (FaCS).

6.3 The committee is deeply concerned by the level of community dissatisfaction and distress associated with the CSS. These are some of the principal reasons why the Attorney-General and the Minister for Children and Youth Affairs referred this inquiry to the House Standing Committee on Family and Community Affairs.

6.4 The committee notes that the CSS has a number of complex interrelated components, so any change in one part could impact significantly on other parts of the scheme. Changes to payers will have consequences for payees and vice versa.

6.5 This chapter begins with an outline of the CSS as it currently operates, particularly in relation to parents' care of and contact with their children, then focuses on significant criticisms of the formula and the way it applies to individual circumstances. In this context fairness is a particularly difficult issue to determine as many payees will inevitably think they are not being paid enough, and payers will think they are paying too much. Achieving the balance is a delicate act. There has been no attempt in this chapter to pick up the new terminology in Chapter 2 as this would make discussion of the detail of the current CSS confusing.

6.6 As with all other aspects of this inquiry, the focus of the committee's consideration is the best interests of the child.

The current Child Support Scheme – how it works

6.7 The CSS was introduced in 1988 with the bi-partisan support of Parliament to:

> … strike a fairer balance between public and private forms of support [for children] to alleviate the poverty of sole parent families and to achieve some constraint on Government outlays on sole parent payments …[1]

6.8 The objectives of the scheme are that:

- parents share in the cost of supporting their children according to their capacity;
- adequate support is available to all children not living with both parents;
- Commonwealth involvement and expenditure is limited to the minimum necessary for ensuring children's needs are met;
- work incentives for both parents to participate in the labour force are not impaired; and
- the overall arrangements are non-intrusive to personal privacy and are simple, flexible and efficient.[2]

The current child support formula

6.9 The amount of child support payable is calculated according to a formula set out in the *Child Support (Assessment) Act 1989*. The formula was developed by the Child Support Consultative Group (CSCG), a group appointed by the Government on 22 May 1987, whose functions included:

> … to act as a mechanism for consultation with major interest groups and to advise the Government on a legislative formula and the administrative assessment of child support …[3]

6.10 The formula is expressed in percentage terms in relation to the payer's income. The other parent's income is also taken into account. The formula is applied to taxable income after deducting an amount for personal

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1 Cabinet Sub-Committee on Maintenance, *Child Support: A discussion paper on child maintenance*, AGPS, Canberra, Oct 1986, p 14.

2 *Child Support Scheme facts and figures 2001-2002*, Child Support Agency and Attorney-General's Department, Canberra, 2003, p 7.

3 Child Support Consultative Group, *Child Support: Formula for Australia: A report from the Child Support Consultative Group*, Department of Social Security, Canberra, May 1988, p 3.

support ('exempt income'). The percentage varies according to the number of children.[4] The formula is based on taxable income rather than on expenditure on children.

6.11 The formula is adjusted to recognise a range of different circumstances, including when a parent has another child as part of a new relationship (see 'Second families' later in the chapter), or where children spend 30% or more time with each parent (see 'Levels of care' later in the chapter). Thus the formula itself links time spent with children and money.

6.12 The formula is expressed as:

$$\{ (A - B) - (C / 2) \} \times D = E$$

where

- A is the payer's child support income amount (taxable income)
- B is the exempted income amount
- C is the amount of payee income above the disregarded income amount
- D is the child support percentage
- E is the amount of child support payable by the payer.[5]

6.13 An examination of several overseas jurisdictions (New Zealand; United Kingdom; Canada - Ontario; USA - New York State, Wyoming State, Washington State, Wisconsin and Delaware; France; Germany and the Netherlands) revealed in each jurisdiction the child support formula calculation is linked to the taxable or net income of one or both parents. [6]

Levels of care[7]

6.14 The CSA's data shows that few families currently share the care of their children equally (see Table 6.1).

6.15 The child support formula recognises four ways in which parents share the care of their children:

- Sole care – a parent has sole care of the children when they live with that parent most of the time (256 nights or more) and are in the other parent's care for less than 30% of the time;

4 Child Support (Assessment) Act 1989, s 37. The child support percentages payable are 18% for 1 child, 27% for 2 children, 32% for 3 children, 34% for 4 children and 36% for 5 children or more.

5 *Child Support Scheme facts and figures 2001-2002*, p 8.

6 Department of Family and Community Services, sub 1700, pp 15-16.

7 Child Support (Assessment) Act 1989, s 8 ss 47 – 49.

- Major care – a parent has major care of the children when the children are in their care for between 60% and 70% of the time (220 to 255 nights);
- Shared care – the parents share care when they each have care of the children for between 40% and 60% of the time (146 to 219 nights); and
- Substantial care – a parent has substantial care of their children when the children are in their care between 30% and 40% of the time (110 to 145 nights).

Table 6.1 CSA Caseload by care (May 2003)

Time children spend with payee		CSA Collect		Private Collect		Total	
Care code	*% of nights*	*Number*	*%*	*Number*	*%*	*Number*	*%*
Substantial	30.0 – 39.9	953	0.3	2 105	0.6	3 058	0.5
Shared	40.0 – 59.9	6 349	2.0	20 500	6.1	26 849	4.1
Major	60.0 – 69.9	5 661	1.8	10 629	3.2	16 290	2.5
Sole	70.0 and over	308 263	96.0	301 465	90.1	609 728	93.0
Total		**321 226**	**100.0**	**334 699**	**100.0**	**621 871**	**100.0**

Source: Department of Family and Community Services sub 1251, p 14.

6.16 Where the parents each have care of the children for at least 30% of the time both parents are assessed as liable to pay and are also eligible to receive child support, and the calculations are offset. In addition, the exempt income and the percentages used to calculate child support change. This is to recognise that there are costs associated with having care of the children, and that where a child is living in two households the overall costs are greater than for a child living in only one household.[8]

6.17 It follows that there are financial consequences, for both non-resident parents who are child support payers and resident parents who are child support payees, of decisions on contact with their children. Contact above the threshold of 30% will reduce the payer's liability to pay child support and reduce child support payments available to the payee, except where the payer is on a minimum assessment of $260 per year or $5 per week.

Change of assessment[9]

6.18 Either parent can apply to have their child support assessment changed if they believe it does not accurately reflect their circumstances or those of

8 Department of Family and Community Services, sub 1251, p 13.

9 Child Support (Assessment) Act 1989, Part 6A.

the other parent. The CSA can only change the assessment if one or more of ten identified reasons is established.

6.19 Of the ten reasons, Reason 1 is particularly relevant to issues of care and contact with children:

> … the costs of maintaining a child are significantly affected by either parent's high costs of contact with the child …[10]

6.20 A parent's contact costs are considered to be high if they are more than 5% of the parent's income for child support purposes. Of the 54,110 applications for change of assessment made in the year ending June 2003, 4,124 applications related to Reason 1, and changes were made to the assessment in 1870 of those cases.[11]

The child support population

Who pays, who receives?

6.21 The CSA estimates at November 2003 that 85% to 90% of separated families with children have some involvement with the CSS.[12] Parents can make their child support arrangements in three ways:

- Self-Administration: an entirely private arrangement between the parents, which includes cases where child support is not sought;
- Private Collect: registration with the Child Support Agency but with payment made directly between the parents; or
- CSA Collect: registration and collection by the Child Support Agency.[13]

6.22 The CSA's caseload as at 30 June 2003 consisted of 711,541 cases, representing 640,707 paying parents and 636,694 payee parents, with responsibility for the financial support of almost 1.1 million children. Of this caseload, 50.6% were Private Collect cases and 49.4% were CSA Collect cases.[14]

6.23 Around 91% of CSA Collect payers are male and 9% are female. Likewise, around 9% of CSA Collect payees are male and 91% of CSA Collect payees are female.[15]

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10 The Guide: CSA's online technical guide, viewed 12/10/03, http://www.csa.gov.au/guide/2_6htm#r1
Child Support (Assessment) Act 1989, s 117 (2)(b)(i)(A)

11 Department of Family and Community Services, sub 1605, p 40.

12 Child Support Agency, unpublished data, Nov 2003

13 *Child Support Scheme facts and figures 2001-2002*, p 10.

14 Department of Family and Community Services, sub 1251, p 11.

15 Department of Family and Community Services, sub 1605, p 9.

How much do parents pay?

6.24 In July 2003 the average child support payable was $57.23 per week,[16] and over 50% of payers paid $40 or less per week (see Table 6.2).

Table 6.2 How much do parents pay? (June 2003)

Proportion of CSA payers		Weekly child support
Cumulative %	*%*	
39.7%		$5 or less
56.2%		$40 or less
78.5%		Less than $100
	21.5%	$100 or more

Source: Department of Family and Community Services sub 1251, p 12, Based on CSA Client Research Dataset, June 2003.

6.25 The low levels of child support paid reflect the low incomes of child support payers. Over 40% of payers have child support incomes of $20,000 or less (see Table 6.3).

Table 6.3 Child support income of payers and payees [June 2003]

Income Range	Payer		Payee	
$	*Number*	*Percentage*	*Number*	*Percentage*
0-10 000	217 808	31.8	*506 466	*74.0
10 001-20 000	125 245	18.3		
20 001-30 000	129 117	18.9	97 843	14.3
30 001-40 000	85 468	12.5	42 218	6.2
40 001-50 000	55 910	8.2	20 485	3.0
50 001-60 000	31 890	4.7	9 984	1.5
60 001-70 000	16 240	2.4	3 644	0.5
70 001-80 000	8 275	1.2	1 432	0.2
80 001-90 000	4 585	0.7	729	0.1
90 001-100 000	2 651	0.4	413	0.1
100 001-110 000	1671	0.2	265	0.0
110 001 and over	5290	0.8	669	0.1
All	684 150	100.0	684 148	100.0

* This number and percentage for payees relates to the income range $0 – 20 000.

Source: Department of Family and Community Services, sub 1605, p 8.

16 Department of Family and Community Services, sub 1605, p 8.

The formula

6.26 There is broad acknowledgment that parents should accept responsibility for the financial support of their children. However, it is clear from this and other inquiries that there is a widespread community perception that the CSS does not work fairly for parents. Significant criticisms of the major components of the child support formula follow.

The cost of children

6.27 The formula uses the following percentages to calculate the paying parent's child support liability (see Table 6.4):

Table 6.4 Child support formula percentage by number of children

One child	Two children	Three children	Four children	Five or more children
18%	27%	32%	34%	36%

Source: *Child Support Consultative Group, Child support: Formula for Australia: A report from the Child Support Consultative Group, Department of Social Security, Canberra, May 1988, p 67.*

6.28 The starting point for the CSCG in determining those percentages was available evidence that might indicate the proportion of family income normally devoted to children in a two parent family. Additional factors considered were: costs of rearing a child where parents do not live together; indirect costs of children to resident parents, such as loss of workforce participation; contact costs incurred by non-resident parents; retention of appropriate incentives to earn for non-resident parents; and the views of the community on what would be considered a fair level of child support.[17]

6.29 The CSCG stated that:

> … The fundamental precept of the Consultative Group is that all children of a parent share equally in that parent's income …
>
> … The Consultative Group has been concerned to design the formula so as to ensure fairness between the parents and equal responsibility for contribution to their children's financial support, according to their capacity to do so.[18]

6.30 In commenting on the formula Professor Parkinson explained:

> There are two basic ways, as I understand it, to structure a child support scheme. The first is to look at costs and allocate the costs

17 Child Support Consultative Group, p 68.

18 Child Support Consultative Group, p 7.

> … The second is to look at incomes and allocate incomes. We [Australia] made a policy choice, whether consciously or not, to go down the second route and say, 'A percentage of your income should be made available.' So the higher the living standard of the parent, the higher the living standard of the child and the other family.[19]

6.31 There appears to be a perception that the formula is related to previous lifestyles of the intact family because the concept of capacity or income is often translated as standard of living.

6.32 As the CSCG pointed out 'Separating the discrete costs of children from total family costs is a problem confronting all studies in this area … '[20] The following facts revealed from research available at that time were highlighted by the CSCG in developing the formula:

- as the number of children in the family increases the per child costs decline;
- more money is spent on children as they grow older;
- an average percentage of family income devoted to a first child was about 20%. When the Australian data was separated from the international data a lower figure of about 16% was arrived at;
- shares of income devoted to the second and third child were each about half the first, and shares devoted to subsequent children were about half that for the second and third;
- it costs less to maintain an intact family at a given standard of living than it does to maintain the same family after parents separate; and
- the share of income devoted to a child in a one parent family is higher than in a two parent family.[21]

6.33 Age of the child was rejected for inclusion in the original formula to avoid undue complexity. Apparently a similar decision had been made in most states in the USA.[22]

6.34 In developing the formula percentages a wide range of overseas research on the cost of children was considered but there was limited comparable Australian data. It was not explained how the overseas research was used, nor how it translated into the Australian taxation and social security context.[23] In addition, the committee notes in comparison to today,

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19 Parkinson P, transcript, 13/10/03, p 51.

20 Child Support Consultative Group, p 69.

21 Child Support Consultative Group, pp 70-72.

22 Child Support Consultative Group, p 70.

23 Department of Family and Community Services, sub 1605, p 20.

computing technology available precluded detailed analysis of data for the formula.

6.35 In 1993/1994 a review of the formula by the Joint Select Committee on Certain Family Law Issues found the formula percentages to be arbitrary and recommended research into the cost of children in Australia be conducted to determine whether the percentages correctly reflected the true costs of children.[24]

6.36 Both the Social Policy Research Centre, University of New South Wales (SPRC) and the National Centre for Social Economic Modelling Pty Ltd, University of Canberra (NATSEM) undertook research for the then Department of Social Security and/or FaCS to establish a methodology to calculate the cost of children.[25]

6.37 The Budget Standards estimates produced by SPRC, and later updated by FaCS, estimates what parents need to spend to provide a particular standard of living for their children. NATSEM's research estimates the actual average spending on children by Australian families using Australian Bureau of Statistics (ABS) 1993-94 Household Expenditure Survey data.[26]

6.38 Limitations on NATSEM's estimates are that they are for intact families, not separated families, at selected income levels and are constrained by the quality of the ABS sample survey data. Limitations of the SPRC estimates are the highly subjective assessments of the expenditure required to deliver a particular standard of living. Both estimates are constrained by not taking account of indirect costs of children especially for those exercising substantial care of children.[27] The committee believes that the SPRC research examined during this inquiry was not realistic in terms of the costs associated with raising a child. In particular, the

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24 Joint Select Committee on Certain Family Law Issues, *The operation and effectiveness of the Child Support Scheme*, Parliament of the Commonwealth of Australia, Canberra, Nov 1994, p 303.

25 Saunders P et al, *Development of Indicative Budget Standards for Australia*, Social Policy Research Centre, University of New South Wales, Sydney, Mar 1998, pp xxxiv 633p, Policy Research Paper Number 74; Percival R, Harding A & McDonald P, *Estimates of the costs of children in Australian families 1993-94*, Report prepared for the Department of Family and Community Services by the National Centre for Social and Economic Modelling (NATSEM), University of Canberra, FaCS, Canberra, Mar 1999, vi 82p, Policy Research Paper No 3.

26 See: Department of Family and Community Services, sub 1605, p 21; McHugh M, *The costs of children: Budget standards estimates of the Child Support Scheme*, Social Policy Research Centre, University of New South Wales, SPRC, Sydney, July 1999, 22p app, SPRC Discussion Paper No 103; National Centre for Social and Economic Modelling, University of Canberra, All they need is love… and around $450,000, *AMP-NATSEM Income and Wealth Report*, Issue 3, Oct 2002, 11p.

27 Department of Family and Community Services, sub 1605, p 27.

committee was concerned with the scope of the expenditure items considered in the analysis.

6.39 A summary of findings from this research[28] is:

- costs for one child are considerably more than the amount that the majority of child support payers pay (see Table 6.2);
- NATSEM's research found that it is only at higher income levels that the research shows current child support liabilities can exceed basic costs (see Table 6.5);
- costs of children generally increase with age of the child (which suggests parents with older children do less well than those with younger children);
- NATSEM research found that while the costs of children rose in line with rising family incomes, at the same time they were found to fall as a proportion of income; and
- both pieces of research state there are economies of scale for a second child, however, not to the extent that they are only half the cost of the first child as is reflected in the formula assessment (18% for one child, 27% for two).

Table 6.5 AMP NATSEM Estimated average costs of children, by number of children & family income, March 2002

Level of Income	Average Income	Number of Children		
	$pw	*1 child $pw*	*2 children $pw*	*3 children $pw*
Low income	$567	111	196	266
Middle income	$1 195	173	295	390
High income	$2 426	281	467	606
Average	$1 324	183	310	410

Source: AMP NATSEM Income and Wealth Report, Issue 3, Oct 2002, Table 2, p 4.

6.40 Despite this research there are many child support payers who believe that they pay far more than the cost of raising their children.[29] They believe that any excess to these costs is in effect spousal maintenance. For example, a father said:

> … I am a father who has joint residency of my eight-year-old daughter…[The child support formula] is a ridiculous method that

28 McHugh M, pp 19-20; NATSEM, pp 3-5; Harding A & McHugh M, transcript, 3/11/03, 25p; Department of Family and Community Services, sub 1605, p 27.

29 Witness 1, transcript, 5/9/03, p 3; Brown D, sub 1611, p 3; Astle C, sub 913, p 5.

> we have a percentage based on assessable annual income that is just taken out of net income and I do not think it really has any relevance to the standard costs of raising children…I do not see where that percentage really comes into play…Those parents who are paying parents who have an income in excess of, say, $55,000 a year are going to be paying more than the costs of providing for their children in terms of child support. That money…will be considered as de facto spousal maintenance.[30]

6.41 A number of contributors to the inquiry believe that child support payments should be directly related to the cost of children.[31] Whether the formula should be based purely on the cost of children or, as it currently is, on the principle of 'parents sharing in the cost of supporting their children according to their capacity' is a contentious one.

6.42 Professor Parkinson suggested that '… So I think we can go down a cost model as long as we find some balance for lower income families … '[32]

Conclusion

6.43 Unfortunately after all of the valuable work of the SPRC and NATSEM the committee finds itself in a similar position to the Joint Select Committee on Certain Family Law Issues on the question of the cost of children. Some analysis has been done, but for intact families only, not separated families. After some seven years the answers needed to accurately evaluate the formula percentages are still not available. Key researchers from both NATSEM and SPRC agreed that modelling the cost of children in separated families is needed.[33] The committee concludes that all available research portrays what intact families spend on children not what children cost.

6.44 Substantial complaints about the cost of child support continue to be made very forcibly. The anger and frustration amongst child support payers and payees continues.

6.45 The committee believes it is imperative that independent modelling of the cost of children in separated families should be undertaken and published to establish what the impact would be if child support payments were based upon those results. In any event, the results of the study should be used to determine the basis of future child support payments.

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30 Peter, transcript Robina, 4/9/03, pp 36-37.

31 Allan, transcript, 24/9/03, p 98.

32 Parkinson P, transcript, 13/10/03, p 51.

33 Harding A, transcript, 3/11/03, p 4.

Taxable income or after tax income

6.46 The child support formula currently uses the parents' taxable income from the most recent tax assessment plus any supplementary income which includes overseas employment income that is exempt from Australian tax, less rental property losses and reportable fringe benefits.

6.47 In devising the child support formula the CSCG recommended it apply to taxable income (before tax) rather than after tax (net income). This was done because:

- this was consistent with placing child support as a primary responsibility equivalent to paying tax;
- before tax income is readily identifiable during the year, thus allowing a non-resident parent to more easily predict their liability, compared with after-tax income that is not certain until after a tax assessment;
- a before tax base impacts less heavily on lower income earners because lower marginal tax rates apply at lower income levels;
- it is easier for the CSA to calculate;
- using taxable income would not add to the difficulties likely to be encountered in calculating more complex cases (such as self-employed persons); and
- administrative assessment under a formula which takes into account a tax liability could not apply to recent years of income figures for provisional taxpayers.[34]

6.48 Subsequent reviews of the formula by the Child Support Evaluation Advisory Group in 1991 and the Joint Select Committee on Certain Family Law Issues in 1994 supported the use of taxable income.

6.49 However, many non-resident paying parents provided evidence that suggested child support should be calculated on after tax income, rather than taxable income.[35] For example, the Lone Fathers Association (Aust) Inc said:

> If the present Child Support Scheme continues, the Child Support formulae should calculate child support payable, at appropriate flat or declining percentage rates, on the basis of net income after tax rather than gross taxable income. This should be done in order

34 Child Support Consultative Group, p 90.

35 Witness 4, transcript, 5/9/03, p 16; Jo1, transcript, 29/8/03, p 45; Dennis, transcript Wollongong, 1/9/03, p 50; Lone Fathers Association SA, transcript, 24/9/03, p 68; Name withheld, sub 128, p 1; Name withheld, sub 699, p 1; Giraldi F, sub 503, p1.

> to base the formulae on a truer assessment of actual capacity to pay.[36]

DADs Australia stated:

> To take child support on gross wage is ridiculous. It should be based on the cost of raising the child.[37]

One father with shared care said:

> We need a fair child support system to be based on the minimum wage, not gross income.[38]

6.50 One witness noted while there is no tax consideration for the payer, payee child support is tax free.[39] Consideration was given by the committee to the possibility of allowing a tax deduction for child support payers.

6.51 Professor Harding of NATSEM prefers the formula based on after tax income because it currently takes no account of tax scale changes. She noted there has been a significant change in the tax system since 1988 when the formula was developed.[40]

6.52 FaCS suggested that payers have criticised the taxable income approach because payers believe:

> … after tax income more realistically reflects the resources available to payers from which to pay child support, and other parents support their children from after tax income … [and] that a payee on social security is financially better off than a low earning payer, considering the net value of disposable income available to them.[41]

6.53 Similar criticisms were raised by the Joint Select Committee on Family Law Issues as part of its review of the CSS.[42]

6.54 From the outset the CSCG stressed that:

> … a formula that operates on income without deducting income tax will have lower percentage figures and a higher disregard for the custodial parent's income than would a formula that operated on income after deducting income tax.[43]

6.55 FaCS advised that using after tax income:

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36 Lone Fathers' Association (Aust) Inc, sub 1051, p 36.
37 DADs Australia (Hardwick R), transcript Blacktown, 1/9/03, p 18.
38 Martin, transcript, 24/9/03, p 96.
39 Witness 1, transcript, 5/9/03, p 3.
40 Harding A, transcript, 3/11/03, p 7.
41 Department of Family and Community Services, sub 1251, p 19.
42 Joint Select Committee on Certain Family Law Issues, pp 350-351.
43 Child Support Consultative Committee, p 89.

> … may disadvantage paying parents earning lower incomes, as they pay lower levels of tax, and would therefore pay a higher proportion of their after-tax income in child support …[44]

6.56 In other words assessing child support on the basis of after tax income with different percentages in the formula would not necessarily change the overall amount of child support paid.

Conclusion

6.57 The committee agrees that:

- after tax income gives a more accurate indication of the income available to non-resident parents to pay child support;
- the impact of the critical changes in the taxation system since 1988 on the application of the child support formula needs to be determined as a priority with a view to deciding whether the income base should be moved to after tax income; and
- if after tax income were used to calculate income in the formula, the percentages would need to be re-examined, together with the relationship between such a change and the results of the cost of children modelling.

Exempt income and disregarded income[45]

6.58 In establishing the formula the CSCG included a self support component of income for the non-resident parent

> … below which there could reasonably be said to be no capacity to pay without impoverishing the non-resident parent and any second family ...[46]

6.59 This is now called exempt income and is described as:

> … an allowance for living expenses and is deducted before the child support percentage is applied. It is based on 110% of the single rate of social security pension. If the payer has care of other natural or adopted children, the exempt amount is increased to 220% of the partnered pension rate plus an allowance for each child depending on their age.[47]

6.60 The current exempt income is $12,315. If the paying parent has more children from a second family, the amount increases to $20,557 plus $2,235

44 Department of Family and Community Services, sub 1251, p 20.

45 Child Support (Assessment) Act 1989, ss 39 and 46.

46 Child Support Consultative Committee, p 73.

47 *Child Support Scheme facts and figures 2001-2002,* p 9.

for a child under 13 years, $3,119 for a child aged 13 to 15 years and $4,672 for a child aged 16 years and older.

6.61 One of the key issues raised with the committee is that the level for exempt income is too low.

6.62 In evidence to the Joint Select Committee on Certain Family Law Issues there were concerns that since it is based on the pension rate, it fails to take account of the costs of going to work; appears to be creating serious work disincentives for some non-resident parents; and it does not include the extra concessions that pension recipients are entitled to receive. In response the Joint Select Committee recommended an increase in the allowance of 20%.[48] This recommendation has not been implemented.

6.63 In comparison, the resident or payee parent can earn up to $36,213 before their income is taken into account in calculating child support. This amount is called the 'disregarded income' and it equals the average weekly earnings figure for all employees. The disregarded income reflects that the resident parent's income is already directly shared with their children through expenditure on things like food and clothing as well as through general household items like housing, furnishings, utilities and transport. If the resident parent earns more than the disregarded income amount, the paying parent's child support income is reduced by 50% of the amount over the disregarded income. It cannot reduce the child support by more than 75%.

6.64 The major criticisms of the disregarded income are that the amount is too high especially compared with the non-resident parent's exempt income,[49] and that it is calculated on average weekly earnings while the exempt income is linked to the pension rate. As over 88% of payees have incomes of $30,000 or less the disregarded income is not relevant to the calculation of child support for the vast majority of CSA clients (see Table 6.3).

6.65 The Joint Select Committee on Certain Family Law Issues believed that there are inequities and recommended that: the level of disregarded income be reduced to the applicable pension cut off point; that the withdrawal rate of child support from the resident parent who earns more than the applicable pension cut off point be reduced to 50 cents in the dollar; and because of government childcare assistance and childcare rebates, the childcare component of the disregarded income be abolished.[50] The second recommendation was introduced in July 2000 as part of the legislative package for a new tax system and the third

48 Joint Select Committee on Certain Family Law Issues, pp 319-320, 346.

49 Witness 1, transcript, 5/9/03, p 5; Gabriele J, sub 547, p 4.

50 Joint Select Committee on Certain Family Law Issues, pp 331, 336.

recommendation took effect when the disregarded income amount was set at average weekly earnings for all employees with effect from 1 July 1999.

6.66 With the inception of the scheme the CSCG pointed out that these two concepts are not comparable as they are designed to fulfil different functions. Exempt income is designed to ensure that the non-resident parent has sufficient income to support themself and any other dependent children before child support is deducted. Disregarded income is designed largely to avoid inequities in cases where a resident parent is already receiving a relatively high income. The CSCG went on to say disregarded income must be set at a significantly higher level than exempt income because it must recognise the economic contribution already being made by the resident parent to the support of children and it must not seriously impair workforce incentives for the resident parent. [51]

6.67 Despite that explanation people still ask why the levels of exempt income and disregarded income are different. [52] This matter was raised with the committee, for example, the Lone Fathers' Association stated:

> … The first issue is that any parent's first responsibility is to maintain themselves. If they cannot do that, they are not going to be able to help anyone else, and they need sufficient income to do that – that is … [where] the exempt level comes in. We would say that it should be the same for both parents ...[53]

A non-resident mother requested that:

> The exempted amounts should be the same for both parties when performing a calculation for child support payments. It is ridiculous to have the individual who is paying the amounts, being exempted a lesser amount than the person who is actually in receipt of money. In particular, this is so because the payments are 'tax free to the recipient'![54]

Conclusion

6.68 The committee agreed that given the changing patterns of work and child care by women and men, the fact that often in property settlements after divorce the resident parent keeps the family home, and the links between second families and exempt income, there is less justification for the large differences between the levels of the exempt and disregarded incomes.

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51 Child Support Consultative Group, pp 81-82.

52 Brett, transcript, 29/8/03, p 43.

53 Lone Fathers' Association (Carter J), transcript, 17/10/03, p 61.

54 Drewitt-Smith J, sub 778, p 3.

6.69 The low exempt income should be raised because it creates work disincentives.

6.70 The committee rejects the notion of the primacy of the children of the first family. Children of both families should be treated alike.

6.71 As a matter of principle the committee believes exempt and disregarded income should be adjusted to bring them closer together to reflect the changing work and parenting patterns now evident in the community.

Minimum payment[55]

6.72 When the child support formula was introduced no universal minimum payment was included. This occurred because the CSCG believed that: such a payment may push some non-resident parents into poverty; the amount would be so low as to be of little help to the child; it may lead to further demands on the social security system to avoid poverty by the non-resident parent; and it would not be cost effective to collect. At that time welfare groups and non-resident parents opposed even a nominal payment. On the other hand, the positive outcome of such a payment was seen as being consistent with the principle that '… there is an obligation on a parent to share income with the child however low that income may be …' [56]

6.73 Resting on the latter consideration, in 1994 the Joint Select Committee on Certain Family Law Issues recommended such a minimum be introduced at $260 per annum where the formula results in an assessment less than that amount and that the Child Support Registrar waive the minimum in special circumstances.[57]

6.74 The minimum liability of $260 per year or $5 per week was introduced in the *Child Support Legislation Act 1998* with effect from 1 July 1999. It ensures that most parents, even those who are unemployed, have the obligation and the opportunity to contribute to the financial support of their children post separation.

6.75 At 30 June 2003 almost 40% of child support payers paid the minimum of $5 per week or less (see Table 6.2).

6.76 By comparison with other jurisdictions, Australia has one of the lowest minimum payments (see Table 6.6).

55 Child Support (Assessment) Act 1989, s 66.

56 Child Support Consultative Group, p 85.

57 Joint Select Committee on Certain Family Law Issues, p 341.

Table 6.6 Minimum annual child support payable based on income within the jurisdiction: Calculation for one child

	Jurisdiction					
	AUS	**NZ**	**UK**	**NY State**	**Wyoming**	**Washington**
	AU$	NZ$	GB£	US$	US$	US$
Income						
Minimum	260	677	260	300	600	300

Source: Department of Family and Community Services, sub 1700, p 20.

6.77 In evidence to the committee people raised concerns about the low amount.[58]

6.78 The committee strongly supports section 3 of the *Child Support (Assessment) Act 1989* which states that a parent's responsibility to support his or her child / children takes priority over all other financial obligations, other than that necessary to support themselves and any other legally dependent children. This obligation is not affected by any other person's responsibility to the child.

Conclusion

6.79 The committee endorses the introduction of the minimum payment but considers that the amount of $260 per year is too low to provide a meaningful contribution to the cost of raising a child. However, in considering higher amounts the committee would not wish to create hardship for any low income or unemployed person who was unemployed through no fault of their own. Some means of averting such hardship may need to be considered.

6.80 The committee believes that a fairer amount would be closer to twice the current weekly rate, that is, an increase from $5 per week to $10 per week or from $260 per annum to $520 per annum, independent of the number of children involved.

6.81 If the minimum payment were increased to $10 per week, the children of 217,000 payees would benefit from more child support.[59]

Maximum payment - the income 'cap'[60]

6.82 When the formula was introduced the CSCG recommended a maximum income base (a cap) where income above this level was not taken into account when calculating child support.

58 Frederick, transcript Blacktown, 1/9/03, p 47.

59 Child Support Agency, unpublished data, Dec 2003.

60 Child Support (Assessment) Act 1989, s 42.

6.83 Since the inception of the scheme the amount of income on which child support is payable has been capped at 2.5 times the yearly equivalent of average weekly earnings for full time employees[61], currently $119,470. This means that if a paying parent earns more than $119,470, their child support is calculated on the cap amount, not their actual income.

6.84 The decision to set a cap reflected evidence that: while expenditure on children increases in direct proportion to income, costs of children plateau at relatively high incomes; expenditure on children above the plateau is often discretionary and it was argued that non-resident parents should retain some capacity to control discretionary expenditure and contribute support directly to the child, rather than as part of a child support payment to the former partner; a perception that high levels of child support at high income levels could be perceived as transfer of income to the former partner rather than child support; and to some extent could reduce incentives for child support avoidance by high income earners.[62]

6.85 The CSCG linked the maximum base level to average weekly earnings to ensure that as earnings rise the maximum level would be automatically adjusted, thus removing the need for frequent amendments to the legislation. The CSCG set the amount at an income level twice average weekly earnings.

6.86 However, when introduced the amount was 2.5 times average weekly earnings for full time employees. The Joint Select Committee on Certain Family Law Issues reported that the amount was set to ensure that most families post separation were covered by the formula and to minimise the number of resident parents who would seek a departure from the formula.[63]

6.87 In 1994 the Joint Select Committee on Certain Family Law Issues sought to reduce the cap to twice average weekly earnings as evidence suggested that the cap had been set too high and acted as a disincentive to work; the introduction of the no-cost administrative review of child support assessments meant that departure from the formula was not costly; and the fact that as very few non-residential parents earn more than twice

61 That is, full-time adult average weekly total earnings (Child Support (Assessment) Act 1989 section 5 Interpretation definitions.*)* Note: Weekly total earnings of employees is equal to weekly ordinary time earnings plus weekly overtime earnings. Weekly ordinary time earnings refers to one week's earnings of employees for the reference period attributable to award, standard or agreed hours of work.

62 Child Support Consultative Group, p 83.

63 Joint Select Committee on Certain Family Law Issues, p 338.

average weekly earnings, reducing the level would have minimal impact.[64] The recommendation was not accepted by government.

6.88 As previously outlined subsequent research by NATSEM on costs of children suggested that '… the maximum payer income used to calculate child support (the 'cap') can result in non-resident parents paying more than the measured costs of children in high-income families …'[65]

6.89 A proposal to reduce the cap to 2.5 times the average weekly total earnings amount for all employees was included in schedule 2 of the *Child Support Legislation Amendment Bill (No. 2) 2000*. This schedule was not passed by Parliament. The schedule sought to reduce the amount by using a different average weekly earnings base from full time employees to all employees rather than by reducing the multiplier applied.

6.90 Using the income limit for Family Tax Benefit was considered as another option by this committee, but rejected, as this calculation varies with the numbers and ages of the children involved which adds complexity. Also at higher levels of Family Tax Benefit the income limit exceeds the current child support income cap. For example, the income limit for one child aged 0-17 years is $85,702, while for three children aged 0-17 years and three children aged 18-24 years the limit is $126,473.[66]

6.91 Of the measures considered, using 2.5 times average weekly earnings for all employees results in a slightly lower cap than using 2 times average weekly earnings for full time employees. On August 2003 figures, the amount for the first measure is $95,420, while for the latter the amount is $101,327. [67]

6.92 Notwithstanding the cap, many paying parents on higher incomes who have made submissions or appeared as witnesses to this inquiry believe that the child support they are assessed to pay, is too high.[68]

Conclusion

6.93 The committee believes that the issue of fairness must be looked at for all categories of payers and payees. Research by NATSEM has suggested for higher income families the cap is set at too high a level. Accordingly, the

64 Joint Select Committee on Certain Family Law Issues, pp 338-339.

65 Department of Family and Community Services, sub 1605, p 27.

66 *A guide to Commonwealth Government payments 20 Sept – 31 Dec 2003*, p 3, viewed 6/12/03, http://www.centrelink.gov.au/internet/internet.nsf/publications/co029.htm
Note children over 18 years would not normally be included for child support purposes.

67 Average weekly earnings figures taken from ABS website http://www.abs.gov.au

68 Peter, transcript Robina, 4/9/03, p 37; Witness 1, transcript, 5/9/03, p 3; Giraldi F, sub 503, p 1.

committee would be seeking to reduce the cap to a figure that is more in line with the available data on the costs of raising children.

6.94 The committee is interested in the principle of fairness. It is not so relevant whether it is achieved by reducing the cap to 2 times average weekly earnings for full time employees or changing the base to 2.5 times average weekly total earnings for all employees. On the basis of fairness the level should be lowered.

Child support and contact – what are the links?

6.95 The committee heard evidence about the interaction between contact and child support. In summary the issues non-resident parents have raised are:

- recognition of how much it costs a non-resident parent to have contact with their children, particularly out of pocket costs such as travel;
- having to pay child support to the other parent while the children are with the paying parent;
- the inability to negotiate shared care because of the impact of '109 nights'; and
- having to pay child support even when contact has been denied for no apparently good reason or in contravention of an order.

6.96 Whilst the legal position is that child support and contact are not connected, as mentioned in Chapter 4, in the lives of parents in the scheme the connections are practical and real and are seen as having unfair consequences for them. Some examples of what people have said about these issues follow.

The cost of contact

6.97 There are two issues about the cost of contact that were raised in evidence. One is about recognising that having contact creates costs for the non-resident parent and the second is how the burden of child support can make it difficult to meet those costs (especially if the child lives interstate).[69] Two examples follow. The Family Pathways Group at the Gunnedah hearing stated:

> The financial circumstances that it may put them in can be difficult—and I can go into my own situation—particularly with the cost of travelling from one spot to another for contact. If the contact is not there, the cost of going to court can be very high—solicitors just say, `Give me $3,500 and I will do something for

69 Michael, transcript Knox, 28/8/03, p 39; Fathering After Separation (Pearson R), transcript, 5/9/03/ p 37; Witness 1, transcript, 5/9/003, p 3; Name withheld, sub 167, p 3.

> you.' If they are broke from the child support, they have no chance of covering the money needed to travel from one point to another for contact.[70]

6.98 The second was a father from Cairns whose ex-partner and child had moved to Townsville and he reported that the CSA had taken some costs into account under the avenue of financial hardship. He said:

> I was paying child support privately to my ex-partner. Because I travel once a month to Townsville to see my son. I keep saying to her, 'Look it is costing me as much to travel to see my son as I am paying in child support.' She refused to come to an agreement. I currently use the Child Support Agency. I go in to them and say, 'I want you to take charge of this and I will pay through you.' In doing that they assess my situation and take into account the fact that it costs me money for accommodation to travel to see my son.[71]

6.99 The problem of how to fairly allow for the inevitable added cost of separating families into two households is not easily solved. In his submission Dr Paul Henman notes:

> … the reality [is] that children cost more to support and raise in separated households than in intact households…In short, to maintain the same standard of living, the households must jointly spend more on their children than they did prior to separation.[72]

6.100 Dr Henman goes on to note that his research has found that:

> … maintaining 20 per cent contact with one child incurs costs of between 39% and 56% of the cost of raising a child full time in an intact couple household…The reasons for this disproportionate cost, relative to the level of contact, results [from] the requirement in providing basic infrastructure for the child/ren…and in telecommunication and travel costs to organise and transfer children between households.[73]

6.101 He also adds:

> The critics are, however, right to state that reducing a resident parent's contact from 100% to 80% does not result in a proportional reduction in their cost of caring. Indeed, costs may remain constant or increase…the research remains to be done. Only after a more complete understanding of the changes in the

70 Family Pathways Group (Bennet P), transcript Gunnedah, 27/10/03, p 36.

71 Fathering After Separation (Pearson R), transcript, 5/9/03, p 37.

72 Henman P, sub 1307, p 4.

73 Henman P, sub 1307, p 4.

> costs of raising children, including costs of contact, as a result of family separation can an informed and fair child support policy be devised.[74]

Conclusion

6.102 The committee agrees that:

- there is little recognition of the costs for contact;
- however, to attempt to have all the costs incurred by the non-resident parent for contact directly deducted from the amount of child support payable to the resident parent, would produce unfair results; and
- the introduction of a non-resident parenting payment could be a partial the solution (see below).

Paying while caring for the children

6.103 One non-resident father put the issue in these terms:

> The system for payments now is unbelievably unfair. You pay 18 per cent of your gross income in child support for one child and 27 per cent for two children. It is usually worked out on a day's basis, but the percentage is only reduced if you have the children for 110 nights. … We still have to pay for these 90 days that we usually get on every second weekend and half of the school holidays…Why should we pay for these nights as well as paying for when the custodial parent has the children? …[75]

6.104 This situation of paying when caring for the children would seem inequitable, especially when finances are tight and when periods of contact are extended over one or more payments of child support.[76] On the other hand, many payee parents are also in difficult financial circumstances and need to rely on regular child support payments to meet their own parenting expenses, many of which do not go away while the children are away. The Brisbane Women's Legal Service said:

> Being the resident mother of children is still the most likely predictor of poverty in Australia. Research over the past two decades has consistently shown that women are more likely to experience financial hardship following marital dissolution.[77]

6.105 The committee recognises that to stop or reduce payments during periods of contact could have a negative impact.

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74 Henman P, sub 1307, p 7.

75 Dennis, transcript Wollongong, 1/9/03, p 51.

76 Individual A, transcript Robina, 4/9/03, p 41.

77 Women's Legal Service Brisbane, sub 904, p 32.

A barrier to shared care – '109 nights'

6.106 There are many examples in evidence to the committee of people who have suggested that the current formula adjustment for shared care above 109 nights in the year has impacted on how parents negotiate parenting arrangements.[78] Two examples come from a non-resident father and a partner of a non-resident father:

> … I have my son every second weekend and every other Monday night after the weekend I do not have him…I asked my ex recently if I could have my son on a Sunday night so that we could pick him up from school Friday night and take him to school Monday…She said 'Yes, you can have him on one condition – you deduct the Monday night. If I have him on the Monday night as well as every second weekend, it puts us over the threshold of days per year and my child support drops'.[79]
>
> As it turned out my partner had his children more than 110 nights per year, this made him a substantial parent and thus his child support was reduced. The day his payments were reduced, the mother decided that Tuesday night access unsettled the children, and told the court that he was an unfit father …[80]

6.107 These comments illustrated to the committee the policy dangers in turning the practical links between how much child support is paid and how much time children spend with each parent into legal ones. Parents disagreeing about these circumstances are unlikely to be focused on the needs of their child to have a meaningful relationship with each parent.

6.108 Family Court of Australia (FCoA) data shows a clear preference for contact arrangements below 110 nights in both consent and court ordered arrangements (see Figures 2.2, 2.3 and 2.4).[81] Whether the statistics reflect the reality is not known. Contact during the day is not recognised, only if the child stays overnight.

6.109 The committee has concluded however that for many who have given evidence to the inquiry this aspect of the formula may have created a barrier to shared care for them.

6.110 The committee has noted that proposed amendments to the child support legislation to recognise patterns of care between 10% and 30% of the time by reducing the child support percentages were included in the *Child Support Legislation Amendment Bill (No. 2) 2000*. These amendments were

78 Michael, transcript Knox, 28/8/03, p 39; Witness 1, transcript, 24/9/03, p 8.

79 Brett, transcript, 29/8/03, p 43.

80 Name withheld, sub 1625, p 2.

81 Family Court of Australia, sub 1550, pp 11-14.

not passed by Parliament. However, it is believed that the Parliament may have agreed to the Bill if there had been accompanying compensation to the payee and children.[82] The committee does not believe that this amendment sufficiently addresses the issues discussed above. In addition, as the Pathways Report asks, "Are financial incentives in child support or family payments an appropriate way to address lack of contact with non resident parents?"[83]

Denial of contact

6.111 Successive governments have taken the view that there should be no link between a parent's child support liability and actual contact with a child. This view is supported by the Family Law Council:

> The council is strongly of the view that contact and child support obligations should not be formally linked, the assessment of child support should not be linked more than it is currently, to levels of contact. However, we recognise that dynamics are at work that do link those in the minds of people, which would probably have to be understood in any enforcement system.[84]

6.112 However, the committee is concerned that there is widespread distress in the community among non-resident parents who meet their child support obligations but are denied contact with their children.[85] Similarly, there are significant concerns among resident parents whose former partners choose not to meet their child support commitments, however, still insist on contact with their children[86]:

> The existing child support system does not work fairly for those who like to blackmail and manipulate the system. I would take the children to the father, but once he started putting a price on contact visits I could no longer take them to him. I then left it up to him to pick them up – and he really could not make the effort.[87]

6.113 There are many cases where contact is denied for legitimate reasons such as genuine fear of violence or abuse. These reasons are recognised by the Family Law Act, under the reasonable excuse for breaching an order in the parenting compliance provisions referred to in Chapter 4. Decisions about these matters should quite rightly be made by courts rather than be dealt

82 Evans C Senator, *Senate Parliamentary Debates*, 6/11/00, p 19169.

83 Family Law Pathways Advisory Group, p 79.

84 Family Law Council (Dewar J), transcript, 17/10/03, p 21.

85 Leo, transcript Robina, 4/9/03, p 37; Witness 4, transcript, 5/9/03, p 16; Name withheld, sub 1696, p 1.

86 See Tracey, transcript Knox, 28/8/03, p 33.

87 Name withheld, sub 262, p 2.

with by administrative consequences such as non payment of child support.

6.114 Research by the Australian Institute of Family Studies and Parkinson and Smyth suggests that many resident mothers would welcome greater contact by their former partners with the children.[88]

Conclusion

6.115 A parent has a liability to pay child support regardless of the level of contact. What we want to do is to minimise all impediments to the level of contact.

6.116 The committee does not believe there should be any link between the lack of parenting time and child support payments. Other recommendations to improve enforcement of contact are set out in Chapter 4. Enforcement of child support is discussed later in this chapter.

6.117 The committee believes that the impact of the child support formula on decisions parents make around care and contact with children is significant. Similarly, the committee does not believe that the formula adequately reflects what it actually costs separated parents to care for their children. Both these issues need to be re-evaluated in the light of more specific research into the cost of contact and modelling of alternative treatment of contact arrangements.

6.118 The introduction of a non-resident parenting payment by the Commonwealth Government could be considered. This payment would be paid to payers who have met their obligations in relation to previous payments to payees (child support obligations). The payment would commence when 10% of nights was achieved. This would mean no reduction in the transfer of monies from the payer to payee, but would involve an unquantified expenditure by the Commonwealth Government. The aim of this measure is to reduce conflict between parents about the issue of care being sought or denied where money may be the motivator.

6.119 Ultimately, strategies to support parents' capacity to focus on the interests of their children separately from financial issues are more likely to resolve the dilemma than a simplistic legislative reform (see Chapter 3).

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88 Australian Institute of Family Studies, sub 1055, p 8; Parkinson P & Smyth B, When the difference is night & day: Some empirical insights into patterns of parent-child contact after separation. *8th Australian Institute of Family Studies Conference, Steps forward for families: Research, practice and Policy, Melbourne Exhibition Centre, Southbank, Melbourne, 12-14 Feb 2003,* 19p.

Client experience and understanding of child support

6.120 The CSA has a legal obligation to inform its clients about the operation of the scheme. This is done largely by way of community information strategies, including fact sheets like *Child Support at a Glance*. It was apparent to the committee that many of the individuals who raised the concerns which have been set out in this chapter and their impact on their own situation had limited knowledge about the details of the scheme that were relevant to them. Also they often appeared unaware of, or had failed to take advantage of, opportunities available to them to vary its application in their individual circumstances through the change of assessment process.

6.121 While the committee recognises that the CSA has improved its performance over the years, it needs to examine more closely the ways in which it provides information and assistance to its clients. One resident mother client of CSA said:

> CSA appears to have the opinion that they are severely understaffed and so are not able to cross reference information and so it is the 'paid' parent's responsibility to pursue the matter if they are not satisfied.[89]

6.122 The CSA has a comprehensive web-site and distributes many publications and fact sheets aimed at informing the community and their clients about the CSS. In addition, community education activities of the CSA are regularly held, often in collaboration with other agencies in the family law system.

6.123 Many submissions related unhappy experiences with the CSA. It is not possible to draw conclusions which separate discontent with the legal position people find themselves in from discontent with the process. It is predictable that CSA clients will be experiencing emotional stress that may influence their perceptions of the process and more importantly their ability to absorb information and make good use of it. A more individualised service may improve the situation.

6.124 A few illustrations from hearings as to how clients of the CSA have reflected on their interaction with the CSA:

> They say: 'you can afford the commitment. It is your responsibility.' I understand that, but—as has been said today—every case is individual but they treat everybody the same way with the same formula. I think that is very unfair. [90]

89 Name withheld, sub 1139, p 2.

90 Gary, transcript, 26/10/03, p 60.

> … They have a derogatory attitude to those people who are liable parents … [91]
>
> … The kid gets sent over with shoes falling to pieces and holes in their socks. And you know what? You cannot do anything about it … The Child Support Agency is just not interested. They say it is not their department. They are a child support agency and they are not interested …[92]
>
> Initially, we had a case manager. His name was Bruce. We never met him, but at least we had a phone number. We could ring Bruce and we knew that he knew something about us and that he was responsible for us. Now, when you ring the Child Support Agency, nine times out of 10 you speak to three or four different people and get put on hold. You have to set aside an hour to ring Child Support. Then they transfer you to somewhere else because they cannot help you.[93]

6.125 Given the emotional upheaval that has gone with the events in people's lives that leads them into dealing with the CSA, a responsive and personalised client service is likely to be more necessary than may be the case with other similar government agencies. The evidence before the committee confirms that clients feel something that is as intrinsically personal to their lives as their financial support for their children is, in their experience, institutionalised.

6.126 Complaints to the Commonwealth Ombudsman about child support amongst other things include a '… range of complaints relating to the provision of advice by the CSA to its clients. The complaints canvas the failure to provide appropriate advice, and the reasonableness of advice.'[94]

Conclusion

6.127 The committee concluded that the CSA needs to develop more effective strategies for providing specific information about the application of the CSS to each of its clients. One mechanism for this would be through more face to face and individualised communication between clients and case officers.

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91 Peter, transcripts Robina, 4/9/03, p 37.

92 Leo, transcript Robina, 4/9/03, pp 37-38.

93 Witness 2, transcript, 29/8/03, p 36.

94 *Commonwealth Ombudsman, Annual Report 2002-03*, Commonwealth Ombudsman, Canberra, Oct 2003, p 32.

6.128 As stated discussed later (paragraph 6.133) the committee is committed to an external review of the CSA's decisions by the Families Tribunal, the Social Security Appeals Tribunal or other tribunal.

Fairness to both parents - variations

Introduction

6.129 The committee heard many accounts of paying parents who believe that the child support formula has created a financial hardship for them and from which they conclude they are paying too much to support their children.[95] Some examples from the hearings were provided by two non-resident fathers and a resident father:

> I have had a lot of dealings with the CSA in regard to hardship and trying to make ends meet. I have tried to provide a place for my daughter to come and stay. I have bought my own home. My mortgage and my child support payments account for more than 50 per cent of my take-home pay every month, so I am living on the breadline. I cannot afford to take holidays, and there are a lot of things I cannot do, so I feel penalised by the Child Support Agency … [96]

> … This is a system that depletes so much of my salary in child support that I literally struggle to survive. I walk around with painful teeth, I avoid medical treatment, I have to sleep in cars at times, I drive unsafe vehicles and I shop at St Vincent de Paul. There is no light at the end of the tunnel. I will be 52 years old when I finish paying child support and before I can start saving again.[97]

> … For four years I paid 32 per cent of my income and I was trying to live off $20 a week after paying the mortgage, which was really hard ...[98]

6.130 Separation inevitably will cause a change in financial circumstances, generally for the worse. For some, re-partnering may help, for others it may not. The AIFS pointed out the results of the Australian Divorce Transitions Project found that a minority of separated people were

95 Ann, transcript Knox, 28/8/03, p 41; Witness 1, transcript, 24/9/03, p 3; Justin, transcript, 29/8/03, p 39; Gary, transcript, 26/10/03, p 60; Michael, transcript Coffs harbour, 27/10/03, p 57; Lake R, sub 938, 2p; Name withheld, sub 167, 6p; Seager P, sub 975, p 1.

96 Gary, transcript, 26/10/03, p 60.

97 David, transcript Coffs Harbour, 27/10/03, p 56.

98 Craig, transcript, 26/10/03, p 66.

repartnering. It was more common for men to repartner than women (44% of men were repartnered compared with 29% women) and that was about six years after divorce.[99]

6.131 Dads in Distress said the financial situation following separation will be worse when the starting point is one of low income:

> … I had a fellow on the phone a couple of weeks ago who told me that he had a rope hanging off the ceiling. He was on $36,000 a year and was paying $81 a week in child support and he could not live, because he had a second family. I wonder if that was an issue of child support and separated living or whether it was just a general issue of the cycle of poverty in this country.[100]

6.132 It was put to the committee many times during the inquiry that the hardship often increases with the costs of establishing a new home after providing the children and the other parent with the former family home or with trying to support a new family. Many witnesses have related how they have struggled to earn extra money to support all this through overtime and second jobs but still seem not to have enough[101] and have in the end decided they would be better off relinquishing their income altogether.

6.133 The introduction of the change of assessment process was an improvement particularly on the previous court based processes. However, the committee believes that this is an internal review process. The committee believes that there should be a proper external review process similar to the Social Security Appeals Tribunal processes.

Second families[102]

6.134 The child support formula recognises second family responsibilities in two ways. First, as previously outlined if a paying parent has children from a new relationship, their exempt income amount is increased from 110% of the single pension rate to 220% of the partnered pension rate, plus an additional amount for each child. In dollar terms, the exempt income increases from $12,315 to $20,557 plus $2,235 for a child under 13 years, $3,119 for a child aged 13 to 15 years and $4,672 for a child aged 16 years and over.

6.135 Second, since 2001 the change of assessment process allows a parent to apply to have child support assessment changed because:

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99 Australian Institute of Family Studies (Sanson A), transcript, 13/10/03, p 20.

100 Dads in Distress (Lenton R), transcript Coffs Harbour, 27/10/03, p 49.

101 For example: Witness 2, transcript, 24/9/03, pp 39-44.

102 Child Support (Assessment) Act 1989, s 39.

> … an amount…of a liable parent's child support income amount was earned, derived or received by the liable parent for the benefit of a resident child or resident children of the liable parent.[103]

6.136 In other words, it recognises additional income that is earned specifically for the purpose of supporting children of second families. There is a limit of 30%, however, on how much the child support liability can be reduced under this reason.[104]

> … When you are the partner of a non-custodial parent and you also have children with the non-custodial parent, the second family is very disadvantaged and it is very upsetting.
>
> I saw what my sister went through. She went through a review. They had a $600 net wage coming in and they had to pay $110 to his ex. She had two children—one was new—and the Child Support Agency in the review took the two new children into consideration but not that my brother-in-law was supporting my sister … [105]

6.137 Many parents have complained that the treatment of children from subsequent families makes them feel these children are treated as less important than those in the first family. This is seen as unfair, as one paying father said:

> Current exempted income amounts for new dependant children of a payer are inaccurate when compared with the amount of child support payable to the major carer for other child / children of the assessment. The net payments of child support are greater than the net amount available to spend on the welfare and development of new dependant children.[106]

6.138 In developing the formula the CSCG stated '… The basic aim of the Group was to treat all children and all parties involved as equitably as possible.'[107] The committee does not believe this basic aim has been achieved.

Conclusion

6.139 The committee notes that the community is not aware of the provisions that currently exist in the CSS to recognise the place of second families in the change of assessment process. Even with these adjustments the impact

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103 Child Support (Assessment) Act 1989, s 117 (2) (c) (iii).

104 Bowen J, *Child support: A practitioner's guide*, 2nd ed, Lawbook Co, Sydney, 2002, p 69.

105 Jane, transcript Robina, 4 / 9 / 03, p 39.

106 Gabriele J, sub 547, p 4.

107 Child Support Consultative Group, p 73.

still seems to create hardship for second families. The committee concludes that this is a symptom of the inadequacy of the level of the exempt income for second families discussed previously, as well as the adjustments made for second families. Ultimately this may also come down to the limit to which finances can be spread in post separation family circumstances and determining where priorities should lie.

Overtime and second jobs

6.140 Some parents commented that their efforts to get ahead financially by taking on higher paying jobs, overtime or second jobs were thwarted because of the effect of tax and child support on the additional income. They felt that the effort they have had to make did not improve their own situation but all went into paying child support. One non-resident father said:

> I acknowledge and agree with the need for child support, and that both parents are financially responsible for their children. What I do not agree with is the fact that overtime is included in the calculation for child maintenance. The current formula which is based on the payers gross income may be applicable for the self employed (such as contractors, sub-contractors etc) who do not generally work to an hourly rate, but it does not take into account the person who is on an average 38 hour pw base wage, such as myself. I currently work a substantial amount of overtime to make ends meet and start afresh after my divorce, i.e. establish and pay for a home…It frustrates me to hear stories of some people hiding their income to avoid paying maintenance while the rest (myself included) have to include their overtime component …[108]

6.141 For many non-resident parents the working of overtime or taking on a second job is necessary just to help them support themselves in their new circumstances and meet their child support obligations. A parent of a paying father told the committee:

> … He has the opportunity to work plenty of overtime but when you are paying 50c for each dollar in tax and 18c a dollar in child support, is it worth while working for 32c per dollar?[109]

A father sharing care put it similarly:

> … I have not had a weekend off in six years; my ex-wife benefits from my overtime, annual leave and sickies, so I feel trapped. My

108 Name withheld, sub 378, p 1.

109 Witness 4, transcript, 27/10/03, p 25.

> basic right to achieve and better myself for the kids' sake and mine has been taken away.[110]

6.142 Several people have suggested that overtime should be left out of the assessment of income for the formula altogether and that it be calculated on the payer's base wage, especially if the overtime earned was not a regular part of pre-separation income. In principle, the same argument could be applied to second jobs taken up for the same reasons. A witness speaking on behalf of several workmates who were separated fathers said:

> … The suggestion is that child support should be calculated on a person's base rate of pay. Any overtime worked, penalty rates, shift allowance et cetera should not be taken into consideration. This way the person receiving the child support gets money, and the person paying the child support has a chance to save money and start a new life with another partner. As it now stands, any person paying child support has little or no incentive to work any longer than they have to, knowing that any extra money earned is going to increase their child support payments ...[111]

6.143 The other possible argument for excluding overtime in income assessment is that, for many, it can be irregular in nature. There will inevitably be a lag between assessment, change of income and re-assessment as the income fluctuates with overtime.

6.144 There may be technical and administrative difficulties to be overcome in excluding income from overtime and penalty rates from the calculation of child support as these amounts are not separately identified in taxation records. The committee believes this could be overcome by a simple administrative process by the CSA having a document for employers to sign.

Conclusion

6.145 The committee is persuaded by arguments that after families have separated there should be capacity for each subsequently formed family to build its own future, while still meeting obligations to support biological children of the previous family. Exclusion of some income from post separation overtime and second jobs from the calculation of child support for the prior family would help address the issue. Undertaking the change of assessment process may be necessary, however, to ensure that the application was based on appropriate facts and intent.

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110 Martin, transcript, 24/9/03, p 96.

111 Witness 4, transcript, 5/9/03, p 16.

6.146 The committee is mindful of the impact of the changes on payees. It therefore supports amending the way the payer's child support income is determined by halving the formula percentage applying to the income earned from overtime and second jobs, worked above a set working week of 38 hours. In the event of a person working more than one job, either part time or casual, hours can be combined to achieve the 38 hour limit.

Cost of re-establishing a home after separation

6.147 As has been recognised from the beginning of the CSS, the cost of having two households creates financial pressure in separated families independently of the care arrangements discussed in Chapter 2. Most parents need accommodation no matter where the children live. When they acquire second families, setting up a new residence becomes even more necessary and usually more costly.

6.148 Many paying parents have commented that, after meeting their obligations to pay tax and child support, they don't have enough money to re-establish a home after separation.[112] They particularly highlight the need to provide suitable accommodation for when their children are with them. A non-resident father said:

> On child support side, when I wanted to support my children and have accommodation for them after a property settlement I applied for a home loan. I was working full time—and still am—… As soon as I mentioned the words `child support of 34 per cent', the recalculation of a home loan went from $70,000 maximum to a princely amount of $2,800. That was the amount that they were prepared to lend me because of my commitment on child support.[113]

6.149 Under the change of assessment process a parent may apply to have their child support assessment changed if:

> …the parent's necessary expenses significantly affect their capacity to support the child.[114]

6.150 The CSA's online technical guide notes that:

> The costs of setting up a household or servicing a debt immediately after separation may also be a necessary commitment. A parent leaving a former marital home will often

112 Men Again Inc (Jerrett R), transcript, 5/9/03, p 22; Richard, transcript, 26/10/03, p 63.

113 Val, transcript Blacktown, 1/9/03, p 56.

114 The Guide: CSA's online technical guide, viewed 12/12/03 http://www.csa.gov.au/guide/2_6.htm#r7, Child Support (Assessment) Act 1989 s 117 (2)(a)(iii)(A)

> incur costs in establishing a new residence or obtaining new accommodation. There may also be a variety of debts and obligations incurred during the former relationship which must be paid in spite of separation, and which continue to be paid by a parent…The costs necessarily incurred by a recently separated parent in establishing a new home are unlikely to be a long term consideration.[115]

6.151 The Secretary of FaCS said some administrative improvements to make the change of assessment provisions better known and more easily accessible may be required. [116]

Conclusion

6.152 The committee's analysis of evidence throughout the inquiry revealed the high level of dissatisfaction within the community with the change of assessment process. It is considered to be very machinery oriented.

6.153 The committee believes that the change of assessment provisions of the CSS are not well understood among separated parents whose financially difficult situation may be eased by their application. However, the existing provisions may not be sufficient to recognise the often considerable one-off expenses non-resident parents may face after separation. The committee would urge FaCS to undertake the necessary promotional improvements without delay. In all assessment material and correspondence sent out by the CSA promotional material should be included.

Options for payment of child support

6.154 Many non-resident parents complained that the regulated method of paying child support made them feel excluded from any influence as to how the money was directed to the child's needs.[117] One non-resident father said:

> … There are problems when the formula results in a large amount of a paying parent's income being transferred to that parent and the paying parent seems to have little influence over how their hard-earned money is spent. Speaking personally, if I can identify ways of making voluntary payments that are going to benefit my

115 The Guide: CSA's online technical guide, viewed 12/12/03 http://www.csa.gov.au/guide/2_6.htm#r7

116 Department of Family and Community Services (Sullivan M), transcript, 17/10/03, pp 25-26.

117 Individual A, transcript Robina, 4/9/03, p 42; Michael, transcript Knox, 28/8/03, p 39; Leo, transcript Robina, 4/9/03, p 38; Witness 1, transcript, 26/10/03, pp 3, 5; Alex, transcript, 26/10/03, p 59; England I, sub 735, p 3; Name withheld, sub 1625, p1.

> child—as opposed to not having influence in it being spent by my former partner on things perhaps not so important to my child—I think that is the way to go.[118]

6.155 These concerns were greatest when the paying parent believed that the child support was being used by the resident parent for their own personal needs or that of a new partner rather than for the benefit of their children.[119] A partner of a non-resident father advised:

> … But I do have an issue with how the money is spent—how my money will be spent. Once it has gone to the mother there is no guarantee about how the money is spent on the child. An example is that on a recent excursion the child did not have the full school uniform; whereas my partner and I have everything for her—we have to—and we also pay for her mother to buy everything for the child. She did not have a full school uniform for the child but I am sure she does not go without her cigarettes—I am positive of that.[120]

6.156 The committee sees these issues as impacting on how the obligation to financially support the child is viewed and accepted by the non-resident parent. The solution to this is not easy, as the administration of a scheme which monitored the spending in the hands of the resident parent would create some policy challenges. It would raise sensitive issues about the level of involvement parents should have in each other's lives after separation. It would raise similar concerns about the even higher level of involvement of the CSA in separated parents' lives. Any process to monitor or account for how money paid as child support is spent would also involve significant administrative expenses.[121]

6.157 However, the CSS does already contain some provision for paying parents to direct their child support payments to particular goods or services. Options are:

- Child Support Agreements. If the parents agree about how their children should be supported they can make a child support agreement that sets out how child support will be provided. This could be in ways other than by regular payments, including lump sums, irregular payments, payments to third parties, by transfer of property or 'in kind'.[122]

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118 Witness 3, transcript Geelong, 28/8/03, p 36.

119 John, transcript Wollongong, 1/9/03, p 50.

120 Shelley, transcript Wollongong, 1/9/03, p 51.

121 Refer Department of Family and Community Services (Sullivan M), transcript, 15/9/03, p 45.

122 Child Support (Assessment) Act 1989, Part 6.

- Non Agency Payments. If the paying parent normally pays their child support through the CSA they can still make some payments directly to the payee parent or to a third party. These can include such things as school fees, medical expenses or insurance, mortgage or car payments.[123] These payments are called 'non agency payments' and they can be counted as child support where the parents agree that they were intended as child support (up to 100%).
- Prescribed Non Agency Payments. Some non agency payments for particular purposes can be counted as child support without the resident parent's agreement. These cover expenses such as child care costs, school or preschool fees, essential medical and dental fees and prescribed school uniforms and books, rent, mortgage, utilities and rates and some motor vehicle costs. Up to 25% of the child support liability can be paid in this way. If it is more than 25% of the monthly payment, the remaining amount can be credited each month.[124]

6.158 During this inquiry it became evident that a significant number of non-resident parents are not aware of these options.[125] The CSA provides information on these options by fact sheets and the website. The take up rate for prescribed non agency payments is growing slowly. From a caseload of 657,332 in 2002[126] there were 1664 applications' (or 0.25%), in the last financial year[127]. The committee considers this to be a very low rate.

Conclusion

6.159 Why the take up rate of non agency payments and prescribed non agency payments is so low is not known, but the committee has concluded from the evidence it has heard that lack of awareness of its availability is likely to be one reason.

6.160 The committee has also concluded that more should be done to promote these options amongst both payer and payee clients of the CSA.

6.161 In light of the common lack of confidence amongst paying parents that the child support they pay is actually benefiting their children, the committee has also concluded that government should consider expanding the list of possible items for prescribed non agency payments and raising the level to which prescribed non-agency payments can impact on child support liability to 30%. The implications of such a change on the cash flow of low

123 Bowen J, p 44.

124 Child Support (Registration and Collection) Act 1988, s 71, 71A, 71B, 71C, 71D.

125 Men Again Inc (Jerrett R), transcript, 5/9/03, p 23; Witness 1, transcript, 24/9/03, p 7.

126 *Child Support Scheme facts and figures 2001-02*, p 13.

127 Department of Family and Community Services (Bird S), transcript, 17/10/03, p 39.

income resident parents would need to be considered. The committee considered increasing the level to 50% but, due to the lack of awareness of the option and the low take-up rate, selected 30%.

6.162 The committee also discussed at length the proposal of increasing the percentage of child support prescribed payments as a penalty for denial of contact.

Self employed non-resident parents

6.163 The committee heard from a number of resident parents who were concerned that the CSS did not contain sufficient safeguards if paying parents seek to avoid their child support responsibilities by manipulation of their taxable income.[128] One resident mother said:

> My ex worked privately as well as being self-employed. His wages have been garnisheed since November 1994. However, in November 2000 my maintenance was reduced to $21.67 per month. I knew about his business and his private work so I appealed. The appeal process involves the other party being notified and any supporting documentation being sent to the other party. The reason for the decrease was his taxable income. For the financial year his gross income was $930,000. He managed to write all the income down to $18,900. Subsequently my maintenance was reduced to the minimum of $21.67. He fought against this and felt he was justified in paying only $20 per month due to his taxable income.[129]

A paying father said:

> When it goes to self-employed, they generally pay less tax than people who work for a company.
>
> …
>
> And they can drop their taxable income as well, not just their net income. It is just that we get into that 48½ per cent bracket and, in my case, paying 27 per cent child maintenance. I am left with less than she is and she is not the one doing 12-hour Sundays.[130]

6.164 The apparent inequities in the way the scheme applies to PAYE wage earners compared with self employed people or business people have been highlighted by these and other examples. Paying parents who are

128 Tracey, transcript Knox, 28/8/03, p 33; Dennis, transcript Blacktown, 1/9/03, p 55; Witness 1, transcript Knox, 28/8/03, p 23; Witness2, transcript Knox, 28/8/03, p 28; Witness 2, transcript Coffs Harbour, 27/10/03, p 12; Name withheld, sub 1656, pp 1-2.

129 Witness 2, transcript Coffs Harbour, 27/10/03, p 12.

130 Witness 2, transcript, 24/9/03, p 39.

self employed have the capacity to minimise their taxable incomes – often quite legitimately so far as the taxation system is concerned – to reduce their child support liabilities. One contributor to the inquiry put it as follows:

> Many fathers use the taxation system in which to minimise their incomes. The following is a factual example. I know of a professional in his own business who shows a 'nil' income It is virtually impossible for the other parent to 'prove' the existence of income and assets of an ex-partner.[131]

From a partner of a non-resident payer parent:

> …I said to my partner, 'No way are you getting a wage earning job'. So I opened a business, made us joint partners and, with all the tax deductions, we were earning the same wage and getting the same income coming in, but we were paying $5 a week [for child support]. I felt justified in doing that because I saw what the child support system was doing to other families and I felt my family should come first. I had no qualms about the fact that my partner's first family was only getting $5 a week, as she had got 75 per cent of the property settlement. I would suggest to any non-custodial parent, given the unfairness of the Child Support Agency, that they open up their own business, not become a wage earner, and do the same thing.[132]

6.165 FaCS Secretary Mr Mark Sullivan notes that:

> …the child support arrangements…work best where we can use the taxation system to enforce compliance where there is not voluntary compliance…It tends to…set out where the basic compliance issues are. They might be where the taxation system is not capable of enforcing compliance either through people who do not lodge tax returns or people who do not correctly state their income to the tax office.[133]

6.166 One witness commented:

> … Self-employed people need to be looked at. Laws for companies and that sort of thing need to be looked at. People can wind down a business and then a family member will take on the lease of the business and the existing partner of that business will be back operating the new company. That is how you get this cover-up of a person who is not employed or unemployed or registered or

131 Name withheld, sub 121, p 7.

132 Jane, transcript Robina, 4/9/03, p 39.

133 Department of Family and Community Services (Sullivan M), transcript, 15/9/03, p 19.

> putting in a tax return. They are never to be found. They can sell a business and set up a new one and just keep going like that. Something needs to be in place to monitor that.[134]

6.167 The clear implication is that if the taxation system is unable to successfully deal with taxpayers who are exploiting opportunities to avoid their taxation responsibilities, then the child support system will also be compromised.

6.168 However, a more equitable solution - but more difficult to administer – may be to calculate child support liability on a different basis for self-employed payers. The objective would be to ensure the obligation to support children is met. The CSA's data at June 2002 shows the average earnings of payers whose incomes are derived from salary and wages was $35,457 while the average from net income or loss from business was $19,419. Average earnings from partnerships and trusts was $16,124.[135] 87.5% of payments came from the first category, while the latter two were 9.6% and 6.9% respectively. Some payments come from more than one category.

6.169 Minimising taxable income is legitimate for taxation purposes, however, it is inequitable for child support assessment. This means that it is undermining the viability of the child support scheme as a universal system.

6.170 FaCS said that:

> …self employed parents are subject to the same formula assessment and collection and enforcement methods as those on salary and wages, however, self employed parents have greater opportunity to manipulate their taxable income.[136]

6.171 Particular methodologies relevant for self-employed payers include:

- registrar initiated change of assessment;
- using ABS data on incomes in a particular industry;
- using information about income prior to arrangements changing; and
- Australian Taxation Office data such as 'Business Activity Statements'.

6.172 Enforcement powers are standard and FaCS has listed some additional ones for consideration.[137] These are included in the broader discussion of enforcement issues below.

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134 Witness 1, transcript Knox, 28/8/03, p 23.

135 *Child Support Scheme, facts and figures 2001-02*, table 4.12. p 22.

136 Department of Family and Community Services, sub 1700, p 22.

137 Department of Family and Community Services, sub 1700, p 23.

6.173 The 1994 Joint Select Committee on Certain Family Law Issues made a series of recommendations for inclusions in the child support income base to redress the imbalance discussed above and to examine the extent to which minimisation of child support responsibilities is achieved. They also recommended research into minimisation of income (see recommendations 142 to 151). Some of these recommendations have been partly implemented.[138]

Conclusion

6.174 The above data on sources of payment indicates the likelihood of continuing inequities in this area. The committee was critical of FaCS for not completing the research recommended by the Joint Select Committee on Certain Family Law Issues regarding minimisation of taxable income in relation to child support payments. As a matter of urgency this whole issue should be examined by FaCS and the Attorney-General's Department in conjunction with the Australian Taxation Office.

Non-resident parents leaving employment

6.175 The committee heard evidence of a number of examples of non-resident parents leaving jobs or refusing better paid work in order to avoid their child support responsibilities.[139] The Fairness in Child Support group put the case on this issue.[140] Two non-resident mothers said:

> Unlike my ex-husband I take responsibility for my life but if I had any sense I would be on welfare just like him, as there is no motivation for me to work. The more I earn the more I will pay in child support.[141]

> … There is no room in my life for anything else on top of work and children ... I have done the sums: if I left my job, declared myself bankrupt, got rid of those joint debts and got income support, yes, the sums are that I would be quite a lot further ahead. Of course, it is not an option because my kids would then do without.[142]

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138 *Government response to the Report by Joint Select Committee on Certain Family Law Issues, An examination of the operation and effectiveness of the Child Support Scheme,* Attorney-General's Department & Child Support Agency, unpublished, Nov 1997, pp 62-67, 104.

139 Marina, transcript Wollongong, 1/9/03, p 48; Val, transcript Wollongong, 1/9/03, p 52; Gary, transcript, 26/10/03, p 60; Name withheld, sub 917, p 1.

140 Fairness in Child Support, sub 548, Attachment, pp 2-3.

141 Name withheld, sub 687, p 1.

142 Witness 3, transcript Coffs harbour, 27/10/03, p 25.

6.176 Committee members also noted numerous reports of similar actions from constituents presenting at electorate offices.

6.177 According to information provided by the CSA, child support payers at any income level are financially worse off if they choose to give up paid employment to reduce their child support liability.[143] CSA data shows that the proportion of payers who are on Newstart is disproportionate to the general community. However, this may be more related to the socio-economic characteristics of the separating population than to the possible motives of unemployed people. FaCS also advised that there are no statistics from Centrelink which support the claim that paying parents are choosing to go onto Newstart in order to avoid child support.[144] The number of unemployed payers in the CSS is 15.8% (112,748) compared with the unemployment rate for the whole population of 5.6% (575,100 persons) seasonally adjusted estimates.[145]

6.178 However, there is a clear community perception that some parents either choose to exercise this option or contemplate it. A non-resident father said:

> I think the system in its current form encourages non-custodial parents who are overcommitted in a lot of areas to go on the dole, to be dishonest and to work for cash, which they do not pay tax on. The system in its current form is letting a lot of people down—both parents and children—and it sets the wrong example for everybody in the community.[146]

6.179 If either parent believes that their child support assessment is unfair because of the earning capacity of the other parent, they can apply for a change of assessment under Reason 8:

> If the [non-resident] parent is unemployed, the CSA will look at why the employment ended, including whether it was voluntary or the result of a redundancy. The parent's ability and willingness to get a job will also be considered, taking account of their age, health and job-seeking efforts.[147]

The CSA may determine a more appropriate income for either parent on which to base the child support assessment.

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143 *Child support at a glance: better off on the dole?* CSA Form no. 1131, 30 June 2003.

144 Department of Family and Community Services (Sullivan M), 17/10/03, p 29.

145 Child Support Agency, unpublished data, Nov 2003; Australian Bureau of Statistics, 6202.0 *Labour Force, Australia,* viewed 8/12/03, http://www.abs.gov.au/Ausstats/abs%40.nsf/e8ae5488b598839cca25682000131612/9ff2997ae0f762d2ca2568a90013934c!OpenDocument

146 Gary, transcript, 26/10/03, p 60.

147 Bowen J, p 67.

6.180 In the year ended June 2003, almost 24,000 or over 60% of all change of assessment applications were made under Reason 8, and in over 14,000 of these a change was made to the assessment.[148]

Conclusion

6.181 It is apparent from the evidence heard by the committee that there is a proportion of paying parents leaving paid employment to avoid child support.

Enforcement of child support obligations

6.182 The CSA has an increasing debt recovery responsibility. Annually published figures confirm this. The cumulative gross child support maintenance debt[149] has increased from $516.6m in 1997 to $758.7m in 2002. 43.5% of this debt is attributed to 2.6% of payers whose debt is over $10,000.[150] In commenting on this matter late this year the Minister reported that '… The CSA had not collected $844.1 million out of a total $14.3 billion in child support liabilities as at the end of June 2003. This means that 5.9 per cent of liabilities have not been collected since Scheme inception.'[151]

6.183 This trend of increasing debt has caused some concern amongst the payee population and services assisting them. The Illawarra Legal Centre said "… the Child Support Agency does not take adequate action to collect child support from non-paying parents."[152] In evidence they expanded on this:

> … We see significant problems with the Child Support Agency in a failure to collect child support, resulting in the accumulation of arrears of almost $700 million to date, based on the Child Support Agency's own figures. That is a huge amount, representing many thousands of children who are not being properly supported by the non-carer parent. It also represents thousands of non-carer

148 Department of Family and Community Services, sub 1605, p 40.

149 Debt figures refer to gross child support maintenance debt for CSA Collect cases – that is, the amount of debt before any debt write-off by the CSA. These figures exclude late payment penalty debts and assumes that Private Collect cases have zero debt. (Australian National Audit Office, *Client service in the Child Support Agency: Follow-up audit, Department of Family and Community Services*, ANAO, Canberra, Sept 2002, p 85, The Auditor-General Audit Report No 7 2002-03 Performance Audit.)

150 *Child Support Scheme facts and figures 2001-2002,* p 30.

151 Anthony L MP, *House Hansard*, 7/10/03, p 20757.

152 Illawarra Legal Centre Inc, sub 238, p 3.

> parents who have successfully avoided their child support responsibilities.[153]

6.184 The National Association of Community Legal Centres and others in the community sector have supported this view. [154]

6.185 The committee believes the trend of increasing accumulated debt is cause for some concern but notes that the government has allocated further funding of $31 million over four years to CSA in 2003-04 to increase its resources to collect this debt.[155]

6.186 Each year the CSA writes off a certain amount of debt. In 2002 $85.1m was written off.[156] Concern about the impact such decisions have on payee parents was raised in evidence to the committee.[157]

6.187 The issue was also raised by others pointing to the impact of this on individual resident parents. Concern was often driven by the fact that many resident parents are on very low incomes and their child support is an important part of their household income.

> … In 2000, a survey conducted of Child Support Agency (CSA) clients revealed that only 28% of payees reported always receiving payments on time, while 40% reported that payment was never received ... [158]

6.188 There were a number of specific examples of this in evidence to the committee. One resident mother said:

> … I have not received ANY CHILD SUPPORT THIS YEAR despite the fact that the father, who runs his own business earns in excess of $70,000 per year. The child support agency have limited powers over a parent who is self employed and refuses to make "Voluntary Contributions."[159]

6.189 For some people the inequities that exist in the system are seen to be open to manipulation by which people can avoid obligations without accumulating debt. This time from a non-resident mother:

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153 Illawarra Legal Centre Inc (Bartholomew K), transcript, 1/9/03, p 34.

154 National Association of Community Legal Centres, sub 836, p 2.

155 Department of Family and Community Services, sub 1251, p 13; *Budget measures 2003-04,* Circulated by the Hon P Costello MP, Treasurer, CanPrint, Canberra, 13 May 2003, p 140, 2003-04 Budget Paper No 2.

156 *Child Support Scheme facts and figures 2001-02,* p 30.

157 Top End Women's Legal Service (Hughes C), transcript, 25/9/03, p 40; Witness 2, transcript Keperra, 4/9/03, p 4.

158 Women's Legal Service, Brisbane, sub 904, p 32.

159 de Geest S, sub 754, p 1.

> … basically, my concerns with the Child Support Agency are that it can be easily manipulated. It does not work in the cases of professional individuals like me where people have company structures and can leave part of their income in that structure or, alternatively, provide spouses with income in order to reduce their own gross income. [160]

6.190 Table 6.3 shows that 74% of payee parents have incomes of $20,000 or less. Other submissions highlight the ongoing risk of financial hardship or poverty of single mothers. For example the National Council of Single Mothers and their Children Inc stated:

> Mothers are already more likely than fathers to experience persistent financial hardship after divorce (Weston and Smyth 2000). Mothers who sacrificed career and education opportunities during the marriage to stay at home as primary parents to their children, tend to have lower earning skills and capacities after separation … [161]

6.191 The 1994 report of the Joint Select Committee on Certain Family Law Issues made a number of recommendations with respect to debt management and additional enforcement powers. [162] In evidence to the committee FaCS provided a list of additional powers which have been suggested, some of which were included in the 1994 report.[163] These are:

- Amend CSA garnishee powers so they can be used to collect current child support from non-salary and wage earners;
- Compulsory notification to CSA from insurers re settlements (similar to HIC and Centrelink);
- Collection from [realised] compulsory preserved superannuation;
- Possibility of being able to access joint accounts;
- Credit reference agencies [CRA] – use to obtain information about parents and reporting of delinquent child support accounts to CRA's; and
- Cancellation of drivers / other licences.

In addition, the committee considers it appropriate to add to the list the following powers:

- deeming that assets which have been transferred to avoid liability can be included in income, or assets for recovery of debt purposes; and

160 Witness 1, transcript, 26 / 10 / 03, p 3.

161 National Council of Single Mothers and their Children Inc, sub 1311, p 6.

162 See recommendations 90 to 110 (Joint Select Committee on Certain Family Law Issues, pp 245-265.

163 Department of Family and Community Services, sub 1700, p 23.

- access to extraordinary lump sum payments and receipts which are not normally included in the child support income base, should be included when there is an option of using them to satisfy outstanding debt.

6.192 On 25 November 2003 the parliament passed the *Family and Community Services and Veteran's Affairs Legislation Amendment (2003 Budget and Other Measures) Bill 2003* which restored CSA's access to the AUSTRAC database.[164]

6.193 Given the additional resources the CSA has received to deal with debt the committee believes that the CSA should improve its reporting on this issue in the FaCS annual report. The committee will review the CSA's performance on debt recovery in the next 12 months.

Conclusion

6.194 While recognising the improvements by the CSA, it is evident that the CSA is not keeping on top of the accumulating debt in the scheme. The committee notes that the government has resourced the CSA to pursue the debt and believes that extended enforcement powers may be necessary to put this resource to good use.

Relationship between child support and social security

6.195 In the course of the inquiry the inconsistencies between the requirements of the CSS and the social security system, and the effect both of these can have on the ability of parents to reach shared parenting arrangements became increasingly clear. The most significant links revolve around how care arrangements impact on various income and family support benefits. There are also financial consequences for social security payments when there are fluctuations in child support.

6.196 As the National Welfare Rights Network (NWRN) noted:

> … It is the contention of the NWRN that there are a significant number of anomalies and inconsistencies under the current arrangements.[165]

6.197 The anomalies identified by the NWRN primarily are about the impact of increases in shared care arrangements and how that relates to eligibility of parents for various benefits such as Parenting Payment, Newstart, Carer Payment, Youth Allowance and Family Tax Benefit. These anomalies

164 Bishop M Senator, *Senate Hansard*, 25/11/03, p 17771.

165 National Welfare Rights Network, sub 207, p 1.

could act as a disincentive to parents to more equally share the care of their children. The Women's Economic Think Tank, Women's Electoral Lobby Australia, YWCA of Australia and Children by Choice stated:

> … Once the primary carer is dependent on a payment from government, the government pressures them into paid work but this does not start formally until the child turns thirteen. Government policies assume that children need to have a primary carer available with limited other demands on her time for well over their first decade and offer support to make this obvious …[166]

The NWRN made a number of recommendations to address this, in particular the capacity for both parents to apply for Parenting Payment. This view has been supported by others such as the Shared Parenting Council.[167] Ultimately, as shared parenting becomes a more significant part of future post separation parenting, these implications will need to be addressed, along with the implications for expenditure of revenue in family support benefits.

6.198 In the particular context of child support, the committee notes that there is also an inconsistency between the way shared care of children is regarded for the purpose of child support and for family assistance purposes. Care of children for more than 10% of the time is recognised for the purposes of adjustments in Family Tax Benefit, but not until 30% of the time for child support purposes. This inconsistency was also identified by the Pathways Report.[168] This is confusing for parents. As the committee has said elsewhere the aim should be to eliminate any direct connection between the time children spend with a parent after separation and financial payments between them. There may be legitimate arguments, however, for government support to take this into account.

6.199 Family Tax Benefit Part A (FTBA) also has a number of complex interactions with child support. First the maintenance income test for FTBA takes account of child support as income in the hands of the payee. The test does not apply to Parenting Payment. FTBA reduces by 50 cents for every dollar of child support received over $1,127.85.[169] This is a problem commonly complained about.

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166 Women's Economic Think Tank, Women's Electoral Lobby Australia, YWCA of Australia and Children by Choice, sub 742, p 13.

167 Shared Parenting Council of Australia, sub 1050, pp 46-48.

168 Family Law Pathways Advisory Group, *Out of the maze: Pathways to the future for families experiencing separation: Report of the family Law Pathways Advisory Group*, Commonwealth Departments of the Attorney-General and Family and Community Services, Canberra, July 2001, pp 11, 79.

169 Department of Family and Community Services, sub 1251, p 32.

6.200 In addition, to receive FTBA at an amount above the base rate a separated parent is required to take 'reasonable maintenance action'.[170] This is the maintenance action test. An applicant has 28 days in which to take this action. [171] This raises a very different issue about the dynamics of the relationship between the two schemes and the flow on effect to relationships between parents.

6.201 The committee heard evidence from people who had amicable arrangements for sharing care of their children and agreed child support without the involvement of the CSA. They related how, when circumstances changed, one or other parent needed income support and applied to Centrelink. They then had to make their child support arrangements consistent with the formula.

> … Everything is straight down the middle, yet we have the Child Support Agency now interfering in our lives. I have recently been required to resign from my job. You can call that what you like. I have had to go to Centrelink and apply for Newstart, because I cannot get parenting allowance.
>
> Previously, I was wanting some assistance with my rent. … They required that I go and apply for child support. In circumstances where I had 50 per cent shared parenting, I had to apply for child support just to get some rent assistance.[172]

6.202 For some parents this kind of outcome impacted on their previously amicable arrangements.

6.203 When child support becomes irregular those amicable arrangements can become even more complicated. The implications for the rate of FTBA are complicated in practice. When child support received is less than the usual rate, FTBA will be paid at a higher rate. When arrears come in those arrears become relevant to the maintenance income test and the FTBA payment is not only reduced accordingly but Centrelink may find there has been an overpayment and take recovery action. This is explained with some examples in documents provided by FaCS.[173]

Conclusion

6.204 The interaction between child support and social security is complex and confusing. The Pathways Report identified inconsistencies in the

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170 A New Tax System (Family Assistance) Act 1999, Schedule 1, Clause 10 .

171 Department of Family and Community Services web-site, viewed 12/12/03, www.facs.gov.au/faguide/guide/31530.htm

172 Grant, transcript, 24/9/03, p 100.

173 See: Department of Family and Community Services, sub 1700, pp 27 -28.

legislation for these two areas as requiring review to identify amendments for consistency.[174] The committee believes that this review is essential and it should also consider whether there are rigidities in both social security and child support law and administration which act as disincentives to shared parenting as recommended in Chapter 2.

Retrospectivity

6.205 The committee has considered the question of timing of reforms which follow this report, both with respect to family law and child support. All the proposals are intended to be considered as a package but it is recognised that some will be able to be implemented more quickly than others. The committee believes there are legitimate arguments for reaching a different conclusion about implementation of child support reforms from those for retrospective change for family law.

6.206 Many families remain clients of the CSS for many years – until the last dependent child / children turns 18. Should adjustments be made to redress the fairness issues raised, all clients in the system at the time should be able to benefit from those changes. The committee has made some recommendations for change in the short term and these should be fully applicable as soon as they are implemented. However, importantly, there should be no suggestion that adjustments to payment levels as a result should be applied retrospectively for existing debt or overpayments.

6.207 With respect to a more significant re-evaluation of the basis on which the formula is calculated, the committee also believes that any resultant reforms should be made applicable to all CSA clients at the time. The impact of any changes from the re-evaluation is not expected to change the client base of the CSS. Changes will only ultimately impact on the amounts paid. Adjustments like this have happened since the beginning of the scheme, so there would be no equity or administrative arguments against blanket application.

Conclusions

6.208 The committee notes that the issues surrounding child support are numerous and complex. There are also a number of interactions with the social security system which are often overlooked. The committee believes the current CSS has serious flaws and produces inequities for a high

174 Family Law Pathways Advisory Group, p 79.

number of payees and payers. The committee strongly recommends that an overhaul of the CSS needs to be undertaken as soon as possible. The committee acknowledges that this process may take several months. However, due to the gravity of this issue, the committee strongly urges the Government to implement the following changes immediately.

6.209 These are:

- increasing the minimum child support liability;
- reducing the 'cap' on the maximum amount of child support income on which it is payable;
- amending the way the payer's child support income is determined by halving the formula percentage applying to the income earned from overtime and second jobs, worked above a set working week of 38 hours. In the event of a person working more than one job, either part time or casual, hours can be combined to achieve 38 hour limit;
- eliminating any direct link between the amount of child support payments and the time children spend with each parent, by removing the changes to the formula in relation to levels of care of their children ('109 nights') by non-resident parents and replacing it with a new parenting payment to non-resident parents with above 10% care;
- raising the limit on prescribed non agency payments from 25% to 30%; and
- giving the following additional enforcement powers to the CSA to improve their collection of child support:
  - ⇒ amend CSA garnishee powers so they can be used to collect current child support from non-salary and wage earners;
  - ⇒ compulsory notification to CSA from insurers re settlements;
  - ⇒ collection from realised compulsory preserved superannuation;
  - ⇒ possibility of being able to access joint accounts;
  - ⇒ credit reference agencies – use to obtain information;
  - ⇒ cancellation of drivers / other licences;
  - ⇒ deeming the transfer of assets; and
  - ⇒ access to extraordinary lump sum payments and receipts which are not normally included in the child support income base, should be included when there is an option of using them to satisfy outstanding debt.

6.210 Beyond these short term measures, the committee believes the time is right for a comprehensive re-evaluation of aspects of the CSS.

6.211 Given the committee's extensive work in establishing the wide ranging nature of the problems with the CSS, the focus is now on the detailed research and modelling tasks needed to backup the re-evaluation.

6.212 This re-evaluation should include economic modelling of elements of the CSS which are out of step with emerging patterns of parenting post separation. This re-evaluation should take into account:

- updated research into the cost of raising children in separated families;
- the need to ensure that the CSS does not act as an incentive to residential parents to restrict the contact that non-resident parents have with their children;
- research into the costs for both parents of establishing homes after separation which will facilitate the shared care of children;
- the impact of critical changes in the taxation system since 1988 on the application of the formula with a view to deciding whether the income base should be moved to after tax income;
- ensuring as a matter of principle that exempt and disregarded income are adjusted to bring them closer together to reflect the changing work and parenting patterns now evident in the community; and
- an examination of the rigidities in the child support system and the social security system which contradict the objective of increased shared parenting with a view to reversing the dynamic towards its support and encouragement.

Recommendation 25

6.213 **The committee recommends that the *Child Support (Assessment) Act 1989* be amended as follows:**

- **to increase the minimum child support liability payable under Section 66 from $260 per year to $520 per year (that is, from $5 per week to $10 per week);**
- **to reduce the 'cap' on the income of the paying parent on which child support is calculated under section 42 to ensure high income payers are not contributing child support at a rate in excess of cost of children by reducing the cap to twice average weekly earnings for full time employees or changing the base to 2.5 times average weekly earnings for all employees;**
- **to eliminate any direct link between the amount of child**

support payments and the time children spend with each parent, amend sections 47 to 49 removing the changes to the formula in relation to levels of care of their children ('109 nights') by non-resident parents, and replacing it with a new parenting payment to non-resident parents with above 10% care;

- **amending the way the payer's child support income is determined by halving the formula percentage applying to income earned from overtime and second jobs worked above a set working week of 38 hours. In the event of a person working more than one job, either part time or casual, only the first 38 hours can be combined to achieve the 38 hour limit; and**
- **to give the following additional enforcement powers to the CSA to improve their collection of child support:**
  - ⇒ **amend Child Support Agency garnishee powers so they can be used to collect current child support from non-salary and wage earners;**
  - ⇒ **compulsory notification to Child Support Agency from insurers re settlements;**
  - ⇒ **collection from realised compulsory preserved superannuation;**
  - ⇒ **possibility of being able to access joint accounts;**
  - ⇒ **credit reference agencies – use to obtain information;**
  - ⇒ **cancellation of drivers/other licences;**
  - ⇒ **deeming the transfer of assets; and**
  - ⇒ **access to extraordinary lump sum payments and receipts which are not normally included in the child support income base, be included when there is an option of using them to satisfy outstanding debt.**

The committee also recommends that section 71C of the *Child Support (Registration and Collection) Act 1988* be amended by raising the limit on prescribed non agency payments from 25% to 30%.

Recommendation 26

6.214 **The committee recommends that a detailed re-evaluation of the Child**

Support Scheme be undertaken by a dedicated Ministerial Taskforce.

- **The objectives of the re-evaluation should include:**
  - ⇒ **establishing the costs of raising children in separated households at different income levels that adequately reflect the costs for both parents having significant and meaningful contact with their children;**
  - ⇒ **adequately reflecting the costs for both parents of re-establishing homes for their children and themselves after separation;**
  - ⇒ **ensuring that the Child Support Scheme and the social security system work consistently to support and encourage both parents to continue to be involved in parenting their children after separation and does not act as a disincentive for workforce participation for each parent;**
  - ⇒ **ensuring the Child Support Scheme appropriately reflects significant developments in the taxation system since 1988 including company tax, trusts etc;**
  - ⇒ **ensuring as a matter of principle that exempt and disregarded income are adjusted to bring them closer together to reflect the changing work and parenting patterns now evident in the community.**
- **The re-evaluation should be completed by 30 June 2004.**

Recommendation 27

6.215 **The committee recommends that a Ministerial Taskforce be established to undertake the re-evaluation set out above. The Ministerial Taskforce should include:**

- **clients of the Child Support Agency;**
- **child support payer and payee representative groups;**
- **researchers with expertise in the costs of children such as National Centre for Social and Economic Modelling, University of Canberra (NATSEM) and the Social Policy Research Centre of the University of New South Wales (SPRC);**
- **social policy researchers such as the Australian Institute of Family Studies; and**

- **representatives of relevant government departments and agencies.**

Recommendation 28

6.216 **The committee recommends that the Child Support Agency, in conjunction with the Commonwealth Ombudsman:**

- **undertake a review of its strategies for communication with individual clients and the effectiveness of information flow to clients; and**
- **take whatever steps are required to ensure that clients fully understand all the options available to them in meeting their child support obligations and are enabled to act upon them.**

Recommendation 29

6.217 **The committee recommends that the Child Support Agency decisions be subject to external review. This could be done by an arm of the Families Tribunal, the Social Security Appeals Tribunal or any other appropriate tribunal.**

Kay Hull MP
Chair

5 December 2003

A

Appendix A – List of submissions[1]

1	Mr Harold L Craig
2	Mr John Sibilant
3	Mr John Ventnor
4	Ms Elvira Martin
5	Ms Ruth Fisher
7	Ms Deanne Walters
8	Mr Errol Hunt
9	Mr Henry Gordon-Clark
10	Mr Les Blackstock
11	Ms Jane Kugelman
12	Mr Timothy Harrison
13	Mr / s M Giles
14	Dr Brian Ronthal
15	Dr Brian Ronthal (supp)
16	Mr Dennis Brown JP
17	Mr Shane Walsh
18	Ms Carmel Penglis
19	Women's Legal Service Victoria Inc.
21	Shoalcoast Community Legal Centre Inc.
22	Ms Jane Sutton
24	Mrs Joan Armstrong
26	Mr Ross Leach
27	Mr Michael Sobb
28	Centre Against Sexual Assault
29	Women's Information & Referral Exchange Inc. (WIRE)
30	Mr W G Shailer
31	Mr Norman C Ingersole
32	Women's Legal Centre (ACT & Region) Inc.
34	Ms Kay McNair
35	Mr Glen Gordon
36	Mazengarb Barralet Family Lawyers
37	Professor Alexander LA Reid
38	Mr Michael Green QC
39	Mrs Helen Hannah
40	Mr Matthew Meurer
41	Mr Eric Somerfield
42	Mr Evan Carson
43	Ms Beverley Sutherland
46	Mrs Lois Best
48	Mr & Mrs Ray & Deidre Phelps
49	Ms Helga Green
51	Mr Valdamar McEwan
53	Mr Ian Best
54	Mr Robert Danes

1 In above list (supp) indicates supplementary submission

55 Mr Philip Craig
56 Mr Malcolm McCulloch
59 Mr Jason Prismall
60 Ms Diane Parker
65 Mr & Mrs Stan & Joan Leske
69 Mr Ron Bryant
89 Mr Richard Somers JP
96 Mr R E Scoffell
101 Mr Peter Daniel
110 Mr L Potent
111 Ms Susan Taylor
112 Mr John Armstrong
113 Mr Peter Ede
115 Ms Ljiljana Mitru
119 Mr Ron Harvey
124 Mr David Hunt
129 Ms Louise Goderie
138 Mr Adrian Rumsey
140 Mr and Mrs Jock Leys
151 Ms Bev Golding
157 Mr Carlos Garcia
158 Mr Matthew Brouwer
159 Women's Services Network Inc. (WESNET)
160 Mr Tony Donadini
162 Mr David Harvey
169 Name withheld
171 Mr Nikolaus Okle
176 Mr Brian Ross Lumsden
182 Ms Teresa Webb
185 Mr Adam Sellars
186 Mr Andre van der Zwan
188 Mr Robert Garrett
189 Mr Marcelo Villafane
191 Australian Family Support Services Association Inc.
192 Mr Mik Whitecross
193 Mr Julian Crooke
195 Mr & Mrs Iris & Peter Sophocleous
198 Mr Ian Aulsebrook
199 Mr & Mrs RN & BA Pierson
200 Ms Maureene Makings
201 Muswellbrook Women's & Children's Refuge Ltd
202 Mr Altricio Tan
203 Mr Richard Nancarrow
204 Mr Mark R Dunnett
205 Ms Helena Gale
206 Mr Stephen Mackenzie
207 Illawarra Legal Centre on behalf of the Welfare Rights Network
208 Mr Tony Dix
209 Mr Bruce Murray
210 "F.N.F" - Relationship & Family Law Consultants
211 Dr Danny Shub
212 Mr G Hale
213 Mr Tony Iannello
214 Mr Ian Cramer
215 Ms Ann T Zwarts
216 Cr Shirley Willcocks
217 Hornsby Women's Domestic Violence Court Assistance Program
218 MacGillivrays Solicitors
219 Mr Mark Williams
222 Mr Bryan Rodgers
224 Mr Patrick Edgerton
225 Mr Craig Job
226 Mr David Dehlsen
227 Mr Maurice Mok
228 Mr Chris Webb
231 Mr A T Kenos
232 Ms Elena Nesci
234 Manning District Emergency Accommodation Committee Inc.
235 Family Pathways & Family Mediation Services
237 Ms Paula Rowlands
238 Illawarra Legal Centre Inc.

239	Centre for Child & Family Development
240	Mrs Lorraine Somerfield
241	Mr Valdamar McEwan (supp)
244	Mr Graham Anderson
245	PIR Independent Research Group
246	Mr Graham Bell
248	Murray Lyons Solicitors
249	Mr Rob Thomas
250	Mr & Mrs A & A De Vries
251	Mr David McCreath
252	Ms Lesley Gurney
253	Mr Terry Bogie
254	Mr John L Cardno
255	Mrs Irene Stevenson
257	Women's Electoral Lobby
258	Mr Steve Brabeck
259	Mrs Sharon Tinacci
260	Domestic Violence & Incest Resource Centre Inc.
261	Mr Kevin B Butler
263	Ms Angela Dreibergs
264	Mr & Mrs J & P Brabeck
265	Ms Judith Anne Wielandt
266	Mr Tempe Macgowan
267	Footscray Community Legal Centre Inc.
268	Katherine Women's Information & Legal Services Inc.
300	Ms Judy Birt
302	National Council of Jewish Women of Australia
303	Mr Paul Johnston
304	Mr Ian R Danes
305	Mr John Oats
306	Ms Linne Pattenden
307	Mr Neil Riethmuller
309	Mrs Eileen Clark
310	Fishburn Watson O'Brien Solicitors
311	Mrs Angie-Lee Carey
312	Mr Noel Jensen
313	Mr Robert Logue
314	Mr Boy Hilton
315	Ms Julianne Ivins
317	Ms Desleigh T Murray
318	Lone Fathers' Association of Australia
319	Ms Alice Bailey
320	Grandparents in Distress
321	Mr Brian Saunders
322	Mr Peter Harrison
323	Mr Ian Whittaker
324	Ms Leonie Parsons
325	Ms Carolynn Newport
326	Mr Michael Wenzel
327	Mr Eric Sanders
328	Mr Chris Andersen
329	Mr David J Hyde
331	Mr Stephen Gray
334	Mr & Mrs Lester & Claudette Smith
335	Mr Michael Keayes
336	Mr Wayne Butler
341	Ms Brooke Clayton
351	Mr Anton Heyneke
352	Mr John Snedden
354	Mr William Owers
356	Mr & Mrs Frank & Zoe Butler
358	Mr Russell Minett
360	Mr Donald Bruce Edwin JP
361	Ms Eunice Curron
365	Mr Michael Gall
366	Mr Kornel de Toerkenczy
367	Ms Desley Spies
376	Ms Emina Torrisi
377	Ms Julie Sangster
379	Mr Russell Minett (supp)
381	Ms C Byrne
383	Ms Tobina Sharp

384 Mr Matthew Shields

390 Mr Rom Springall

391 Mr Geoff Lewis

394 Ms Nola Roberts

395 Mr Stephen West

397 Mr Andrew Porter

398 Mrs Palita Van Bennekom

400 Armidale Domestic Violence Steering Committee

401 Mr & Mrs Ian & Valerie Clark & Ms Janet Dench,

402 Mr Jim Corran

403 Lone Fathers' Association of Australia, Shepparton Branch, VIC

404 Ms Pauline Davis

407 Mr Rajiv Samson Solomon

408 Goldfields Community Legal Centre

409 Law Society of the Australian Capital Territory

410 Mr Volker Hartmann

411 Australian Coalition of Women Against Violence (ACWAV)

412 South West Brisbane Community Legal Centre Inc.

414 Kempsey Women's Domestic Violence Court Assistance Scheme

415 Redfern Legal Centre

416 Ms Shirley Prout

417 Mr Michael Carmody

418 Mrs S Westerling

419 Taree Women's Domestic Violence Court Assistance Scheme

421 Dr Gwyneth Findlow

422 New South Wales Bar Association

423 Albury Wodonga Women's Refuge

424 Mr Allan Roberts

425 Child Abuse Support Victims Group

426 Mrs Judi Adams

428 Peninsula Community Legal Centre Inc.

429 Mr David Butler

431 Dr Jennifer McIntosh, Family Transitions Pty Ltd

432 Mr Gordon Macmillan

433 Ms June Page

434 Mr Lindsay Gordon

435 Relationships Australia Tasmania

437 Tweed Shire Women's Service Inc.

438 Manning District Emergency Accommodation Committee Inc.

442 Mr Dominic Gomez

447 Ms Dianne Ley

449 Mr Grant J Roberts

452 Mr Andrew Thompson

454 Mr Alexander Peniazev

455 Mr Robert Connor

456 Ms Clare Taylor

457 Mr & Mrs Bruce & Helen McDonald

479 Hume Domestic Violence Network

480 Warrina Women's & Children's Refuge Co-operative Society Ltd

481 Murray Mallee Community Legal Service

482 Macquarie Legal Centre Inc

483 Mrs Win Leslie

484 Dr Renata Alexander

485 Marrickville Legal Centre

486 Mr John William Westendorp

487 Grafton Concerned Parents Group (GCPG)

488 Mr Warick Ingold

489 Ms Anoinette E Ryan

490 Mr Lloyd Symonds

492 Women's Legal Resources Centre

493 Mr Richard Torning

494 DAD's Australia Inc.

495 Sutherland Shire Family Support Service Inc (SSFSS)

496 Logan Women's Health Centre

497 Ms Debbie McAdam

498 Mr Roy Arneman

499 Mr Roland Foster

500 Mr Robin Verity

501 Mr John A Grice

502 Mr Larry P Cairns

503 Mr Frank Giraldi

504 Mr Wayne Nicholson

505 UnitingCare Unifam Counselling & Mediation

507 Mr Stephen Graham

508 Ms Jennifer Huxley

509 NSW Women's Refuge Resource Centre

510 University of Sydney, Faculty of Law

511 Manly Warringah Women's Domestic Violence Court Assistance Scheme

512 Botany Migrant Resource Centre

513 Domestic Violence Advocacy Service

514 Sydney Lone Fathers Association

515 Mr Jonathan Field

516 Mr Michael Hardy

517 Mr Colin Defries

518 Peninsula Community Legal Centre Inc. (supp)

519 Ms Delicia Griffin

521 Uniting Care Burnside

522 North West Community Care Inc (NWCC)

523 Central Coast Community Legal Centre

524 Ms Judith Law

525 Grandparents Rights Need Support (GRaNS)

526 Mr M K Solanki

528 Mr Dennis Brown JP (supp)

529 Mr & Mrs N W Hambly

530 Mr Walter Munro

533 Ms Jo Smith

534 Mr / s B Rapley

535 Ms Cheryl Nutt

536 Mr Keith Mackenzie

537 Mr William Karney

538 Mrs Rosemary Foot AO

539 Mr W R Pryor

540 Penrith Women's Refuge Inc.

542 Ms Karla Lee Moors

543 Mrs Una Zwarteveen

545 Mr & Mrs W B & DJ Greenland

546 NSW Women's Refuge Resource Centre

547 Mr John Gabriele

548 Fairness in Child Support

549 Anglican Diocese of Sydney

551 Family Law Reform Association NSW Inc.

552 Mr Greg Bennett

553 Youth Advocacy Centre Inc.

554 Mr & Mrs Don & Joan Kelly

555 Manly Warringah Women's Resource Centre Limited

556 Marian Villa-Society of St Vincent De Paul

557 Mr & Mrs Jim & Jenny Nesbit

558 Ms Gail Geoghegan

560 Mrs Virginia Epthorp

561 Dr Beata Rumianek

562 Mr Paul McConnell

563 North & North West Community Legal Service Inc.

564 Mr Roger Truscott

565 Ms Narelle Handcock

566 Mr Michael Hobbs

567 Ms Teresa Moore

568 SCALES Community Legal Centre

569 Family Law Reform Association QLD

570 Mr Laurie Bagnall

571 Mr Malcolm Olden

572 Mr N Chadwick

573 Mr Rick Harris

574 Mr Robert Stephens

575 Northern Family & Domestic Violence Services

576 The Talera Centre: Child & Family Therapy
577 Rockhampton Women's Shelter Inc.
578 Cairns Community Legal Centre Inc.
581 National Children's & Youth Law Centre
582 Ms Lyn Wakeling
583 Mr Ray Steele
584 Ms Roslyn Flanagan
585 Sonshine Sanctuary Association Inc.
586 Citizens Concerned For Kids
588 Women's Health in the South East
589 Caston Centre for Human Rights Law, Monash University
590 Mr Warren Krause
591 Law Institute Victoria
592 Nuance Exchange Network
594 Mr John Van Klaveren
595 Joan's Place Women's Refuge
596 Northern Centre Against Sexual Assault
597 St Kilda Legal Service Co-Op Ltd
598 Grans Vic
599 Mr Brendan Griffin
681 Mr Greg Roberts
682 Ms Anika Leib
683 Mrs G J Scholes
684 Ms Katrina Haller
686 Mrs Lula Boreham
690 Mr V F Bond
698 Mr Andrew Fleisher
702 The Salvation Army
703 Australians Against Child Abuse Ltd.
704 Mr Justin Digney
705 Mr Tony Gee
709 Coburg-Brunswick Community Legal Centre
710 Mr Simon Baker
711 Mr Garry Maiden
712 University of Melbourne, School of Social Work
713 Western Suburbs Legal Service Inc.
715 Fatherhood Foundation
716 Men Again Inc.
717 Australian Psychological Society Ltd
718 Ms Elsie Stokie
719 Mr Richard Morris
722 Mr Alan McGettigan
724 Mr Greg Cairns
725 Mr Wayne Perry
726 Mr Robert Zink
727 West Pennant Hills Community Church
729 Mr Kelvin Warburton
735 Mr Ian England
737 Mr Mohammed Ali Sahib
738 Mr Robert Weekes
740 Mr Tony Watkins
741 Federal Magistrates Court of Australia
742 WETTANK, WEL Australia, YWCA, & Children by Choice
743 Professor Patrick Parkinson, Professor of Law, & Judy Cashmore, Associate Professor, Faculty of Law, University of Sydney
744 Australian Council of Social Service (ACOSS)
745 Legal Aid Commission of NSW
746 Macarthur Legal Centre Inc.
747 NSW Young Lawyers Family Law Committee
748 Professor Lawrie Moloney, La Trobe University
749 Victorian Bar & Victorian Family Law Bar Association
750 Mrs Chanta Bock (supp)
751 Family Court of Australia
752 Murray Mallee Child Contact Service
753 Federation of Community Legal Centres (Vic) Inc.
754 Ms Sandra de Geest
755 Family Mediation Centre

756	Victorian Women's Refuges & Assoc. Domestic Violence Services Inc.
757	Mr John Bader
758	West Heidelberg Community Legal Service
759	Citylife Women, Women's Network Coordinator
760	Ms Anne Hoolahan
761	Mr/s Akiva Quinn
762	Mr Barry Staggard
763	Mr Richard Truter
768	Ms Jan Roberts
769	Mr Drue Bissaker
778	Dr Janet Drewitt-Smith
779	Mr James O'Dea
785	Dr Lesley Laing, School of Education & Social Work, University of Sydney
786	Ms Susan Kerridge
791	WRISC Domestic Violence Support Service
792	Immigrant Women's Speakout Association
793	ASCA (Advocates for Survivors of Child Abuse)
794	Dr Beata Rumianek (supp)
795	Mr Ron Curran
796	Mr Gary Clark
797	Northern Rivers Community Legal Centre
798	Ms Christel Mex
799	Mr Micheal Woods
800	Ms Nelke Willow
801	NSW Attorney Generals Department
802	Mr Dwayne Woods
804	Mr Neil Johns
805	Mrs Marie Rees
806	Sole Parents' Union
807	Ms Maggie Walter, Lecturer, University of Tasmania
808	Mr Robert Schlesinger
809	Mr Leigh Wallis
810	Mr Grahame Marks
811	Lismore Women's & Children's Refuge Inc.
812	Mr Michael McKee
813	Mr Rod Steet
814	Country Women's Association of NSW
815	Mr David Olsson
816	Dr Aman Khan
817	Mr Terry Agar
818	Mr Derek Stack
819	Law Society of New South Wales
820	Central Coast Community Women's Health Centre Ltd
821	Ms Heather Godden
822	The Hon Jackie Kelly MP
823	Aboriginal & Torres Strait Islander Women's Legal & Advocacy Service
824	Central Coast Domestic Violence Committee Inc
825	Community Legal Service, Albury-Wodonga
826	Mr Ken Phelps
827	Ms Bridget Tehan
828	Mr Paul Lee
829	Mrs Louise Brosnan
830	Ms Margaret Small
831	The Gunedoo Centre
833	Mr Peter Vogel
834	Newcastle Domestic Vilence Committee
835	Mr Greg Firn
836	National Association of Community Legal Centres
837	Mr Alan Tomlinson
838	Ms Genevieve Affleck
840	Marian Centre, NSW
841	Mr Bill Healey
842	Ms Christine Levy
843	No To Violence (NTV)
844	Ms Laura De Bernardi & Mr Ross Smith
845	Ms Dawn Staggard

846 Mr Kenneth Matthews

847 Western NSW Community Legal Centre Inc

848 Mr David Wright

849 Ms Bernadette O'Connor

850 Mr David Gray

851 Southern Sydney Women's Domestic Violence Court Assistance Scheme

852 Mr John Treloar

853 Mr David Bowtell

854 Southern Cross University

856 Mr Brian Meilak

857 South Sydney Domestic Violence Liaison Committee

858 Forbes Women's Refuge

859 Tanderra Women & Children's Refuge Ltd

860 Tasmanian Men's Health & Wellbeing Association, Inc.

861 Youth Affairs Council of Victoria Inc.

862 Elandra Women & Children's Service

863 Mr Robert Hetherton

864 Ms June Claney

865 Women Helping Women Inc

866 Mr Steve Ulrich

867 Mr Greg Devine

868 Mr & Mrs Francis McClintock

869 Mr Terry Newman, Farrellys

877 Mr Ted Foster

888 Ms Sue Hennessy

890 Women For Action

892 Citylife Women, Coordinator

894 Family Law Reform & Assistance Association Inc.

895 Mr Ron Bercene

896 Mr R G Tyrrell

897 Mr Paul Fitzgerald

899 Springfield Legal Service

900 Ms Shoko Takahashi

901 Families, Law & Social Policy Research Unit, Socio-Legal Research Centre, Griffith University

902 Caxton Legal Centre Inc.

903 Dr Travis Gee

904 Women's Legal Service Inc.

905 Queensland Law Society

906 Family Law Foundation

908 Sandgate & Bracken Ridge Action Group Inc.

909 Men's Rights Agency

910 Mr David Eyles

911 Mr Wayne Caldwell

912 Project Family Welfare

913 Mr Clive Astle

914 Ms Lynette Lablack

915 Building Bridges Together

916 Mr Len Warrener

919 Mr Wayne Scott

922 Rona Joyner Life & Liberty Literature Centre

923 Ms Bernardine Symss

925 Mr & Mrs Ken & Yvonne Rebetzke

928 Mrs Meryll Wilkinson

929 Mr Doug Minnis

930 Ms Michele Thomas

932 Mr Stephen Medcalf

933 Dr Robert Kelso, Faculty of Business and Law, Central Queensland University

936 Mr Peter Hunter

938 Mr Ralph Lake

939 Mr Jason Falcongreen

942 Ms Danielle Norris

943 Mr & Mrs Derek Webb

944 Mr Jeffrey Gurney

945 Mr Neil Storey

946 Mr Greg McPherson

948 Welcome Australia Limited

949 KinKare, Eagleby Branch, auspiced by Connect the Coast Assoc. Inc.

955 Mr & Mrs Ross & Kelly Hurford

962 Ms Jacqueline Walker

963 Mr Stephen Robinson

964 Women's Action Alliance (Australia) Inc

965 Mr Howard Learmouth

966 Ms Judith Newbery

974 Dads In Distress Inc

975 Mr Paul Seager

980 Mr Anthony Unger

981 Ms Kate Miller

982 Ms Gail Middleton

985 Ms Nicole Capper

986 Mr Simon Challenor

990 Mr A.A Hardy

994 Mr Allen Chang

995 Mr Mark Mieth

997 Mr David Honeycombe

999 Mrs Gwendoline Olsson

1004 Mr Michael Silverson

1020 National Alternative Dispute Resolution Advisory Council (NADRAC)

1021 Law Council of Australia, Family Law Section

1022 Catholic Welfare Australia

1023 Family Services Australia

1024 National Network of Women's Legal Services

1025 Family Law Practitioners Association of Tasmania

1026 Federation of Community Legal Centres (CLC), Violence Against Women and Children Working Group

1027 Victorian Women's Trust

1028 Mr Mark Franzi

1029 Mr Jerry Himelfarb

1050 Shared Parenting Council of Australia Inc.

1051 Lone Fathers' Association (Aust.) Inc.

1052 Human Rights and Equal Opportunity Commission

1053 National Legal Aid

1054 Relationships Australia

1055 Australian Institute of Family Studies

1057 Muswellbrook Women's and Children's Refuge Ltd. (supp)

1058 Ms Kaylene Doré

1059 Refugee Council of Australia

1070 Pine Rivers Neighbourhood Centre

1071 Essie Women's Refuge Incorporated

1072 Mr Allan V. Green

1075 Robina Family Lawyers

1077 Mr Stephen Parengkuan

1078 Fathering After Separation

1079 Mr Tom Urban

1080 Ms Joanne Carmody

1082 Mr A Lewis

1083 Mr John Forrester

1085 Mr Wayne Doss

1098 Shared Parenting Council of Australia Inc. (supp)

1110 Canberra Fathers' and Children Service (CANFaCS)

1111 Family Court of Western Australia

1112 Men's Information and Support Association Inc.

1113 Gosnells Community Legal Centre

1114 Men's Confraternity WA Inc

1115 Youth & Family Services (Logan City) Inc.

1116 MacLeod Women's Refuge

1117 Council of Single Mothers and their Children (Qld) Inc.

1118 Mr Alan Sambell

1119 Mr Wayne Larsen

1130 Mr Paul Hewitt (supp)

1131 Mr Paul Hewitt (supp)

1132 Women's Law Centre of WA

1133 Women's Law Centre of WA (supp)

1134 Mr Steve Gray

1135 Mr & Mrs Paul Davies

1136 Mr Kevin Morgan

1138 Ms Kim Hamilton

1140 Mr Glyn Taylor

1141 Aboriginal Legal Service of Western Australia, Inc. (ALSWA)

1142 Mr Kym Wade

1143 Reliable Parents Inc.

1144 National Network of Indigenous Women's Legal Services Inc.

1145 Victorian Aboriginal Legal Service Co-operative Ltd.

1146 Broadmeadows Community Legal Service

1147 Council of Single Mothers and their Children Inc. (Victoria)

1148 Focus on the Family Australia

1149 Mr & Mrs Patrick Robles

1150 Australian Association for Infant Mental Health, SA Branch

1151 Festival of Light Australia

1152 Professor Freda Briggs, University of South Australia

1153 Joint Parenting Association

1154 Southern Community Justice Centre

1155 Mr Claude Memma

1156 Ms Chris Davis

1158 Australian Federation of University Women (SA) Inc.

1159 Womens Lawyers' Committee of the Law Society of SA

1160 Dr Jeff Trahair

1161 Women's Legal Service (SA) Inc.

1162 Mr Philip Morton

1163 Eyre Peninsula Women's and Children's Support Centre

1164 SPARK Resource Centre Inc.

1165 Mr Barry Wakelin MP, Federal Member for Grey

1166 Thirty something

1167 Family First Party

1168 Dr Colin James

1169 Mr Mark Millard

1170 Men's Advisory Network

1171 Lifeline WA

1172 Legal Aid Queensland

1173 Ms Elizabeth Tobal

1174 Lone Fathers' Association Inc., South Australian Branch

1176 Richard Hillman Foundation Inc. - Mr John Abbott

1177 Richard Hillman Foundation Inc. - Mr Pavel Muckarovski

1178 Richard Hillman Foundation Inc. - Mr Mark Bourne

1179 Richard Hillman Foundation Inc. - Mr Shane Kelly

1200 Mr & Mrs Robert & Glenys Cherry

1203 Mr Anthony Howden

1207 Mr Barry Haase MP

1210 Law Society, Northern Territory

1211 Mr Claude Chase

1212 Mr Ray Jenner

1213 Mrs Vivian Jenner

1214 Ms Szabina Horvath

1215 Top End Women's Legal Centre

1216 Ms Tracey Masterton

1217 Dawn House Inc.

1218 Mr Richard Jacobson

1219 Darwin Community Legal Service Inc.

1220 Lone Fathers' Association NT Inc.

1221 Mr Glen Dooley

1222 Mr Marcus Cherry

1223 Mr Pavel Muckarovski

1224 Royal Australian and New Zealand College of Psychiatrists (RANZCP), NSW Branch

1226 Farrar Gesini & Dunn, Family Lawyers

1227 Good Process ACT

1228 Ms Josephine Thomis

1229 Ms Rosemary Budavari

1249 Kempsey Women's Domestic Violence Court Assistance Scheme (supp)

1250 Domestic Violence Crisis Service Inc.

1251 Commonwealth Department of Family & Community Services (FACS)

1253 Family Law Foundation

1255 Dr Michael Flood, The Australia Institute, Australian National University (supp)

1256 Australian Association of Social Workers

1257 Commonwealth Attorney-General's Department

1258 Mr Jason Söderblom

1259 Blue Mountains Community Legal Centre

1260 Tasmanian Government

1261 Mr L B Loveday

1263 Mr L B Loveday (supp)

1264 Mr L B Loveday (supp)

1266 South Australian Government

1267 Ms Julia Pitts

1268 Ms Kaylene Doré (supp)

1270 Victims of Crime Assistance League Inc. NSW

1272 Lone Fathers of Brisbane

1274 Delvena Women & Children's Shelter

1275 Bathurst Family Support Service Inc.

1278 Ms Anne Roser

1282 Ms Angela Iris Tate

1283 Macarthur Local Domestic Violence Committee

1284 NSW Attorney General's Department

1285 Manly Warringah Family Support Service

1294 Mr Michael Hendy

1299 Mr Tomas Vrevc

1302 Dr Richard Millicer

1305 Mr Joe Wright

1307 Dr Paul Henman, Department of Sociology, Macquarie University

1310 John Toohey Chambers

1311 National Council of Single Mothers & their Children Inc.

1313 Ms Lynda Yelland

1314 Ms Lynda Yelland (supp)

1315 Ms Lynda Yelland (supp)

1316 Ms Lynda Yelland (supp)

1317 Ms Lynda Yelland (supp)

1318 Dads On The Air Team

1319 Dr Robert Kelso (supp)

1320 Ms Ellen Mills

1321 Mr Ken Morgan

1322 Senator Brian Harradine

1323 BPW Australia

1324 Centaur Public School, Principal

1326 Mr Stephen Hatch

1327 Ms Anna Blackburn

1328 Mr Nik Wyman

1329 Mr David Hosking

1331 Mr Shaun Christian

1332 Grafton Women's Refuge Co-Operative Society Ltd

1333 Mr Larry Cairns

1334 Ms Felicia Fitzgerald

1335 Mr Bruce Hawthorne

1336 Mr Kerrin Brown

1337 Ms Judy Atkinson

1338 Mr Gerard Bawden

1339 Mrs Cherie Puglisi

1340 Hunter Domestic Violence Court Assistance Scheme

1341 Eva's Project Inc.

1342 Mr James Sizer

1343 Mr John Gray

1344 Mr Anthony Farr

1345 Ms Anne-Marie Elias

1346 Mr Graham Dyer

1347 Ms Trish Rowney

1348 Mrs Melanie Clark

1349 Mr Bill van Brakel

1350 Mr Rene Wesolowski

1351 Department for Women, NSW Government

1352 Mr Brian Roberts

1353 Mr / s Sigrun Baldvinsdottir
1355 Mr Robert Patrech
1356 Mr David McDonnell
1357 Mr Paul Enders
1358 Domestic Violence Service of Central Queensland
1360 Mr John Medina JP
1361 Mr Peter Parkinson
1362 Professor Anne McMurray
1363 Mr Tony Hardman JP
1364 Mr Ken Ticehurst MP, Federal Member for Dobell
1365 Mr Allen J Gilligan
1366 Mr George T Lewis
1367 Mr G K Baggs
1368 Mr Martin Schoonder
1370 Mr Mik Whitecross (supp)
1371 Mr Paul Snowsill
1373 Mr & Mrs David Dare
1374 Ms Aileen Duke
1375 Graeme Jackson Pty Ltd
1376 Cr Gilbert Wilson
1377 Mr / s Lee Nifin
1378 Ms Ilsa Evans
1379 Mr D H Melville
1380 Women's Information, Support & Housing in the North
1381 Mr / s J Stanley
1382 Mr & Mrs Murray Treyvaud
1383 Stepfamily Association of Victoria Inc.
1384 The Blackshirts
1385 Macarthur Legal Centre Inc. (supp)
1386 Mr Paul Hodgkinson
1387 Mr Anthony Roberts
1388 Mr Geoff Webster
1389 Mr Neal Vickers
1390 Mr Garry Hawthorne (supp)
1392 Mr Luke Berry
1393 Ms Julie Harrington
1394 Ms Arna Lissette
1395 Mr Andrew Koerber
1397 Mr Steven Garland
1398 National Council of Single Mothers & their Children Inc. (supp)
1399 Mr & Mrs Frank Butler
1400 Family Law Council
1402 Mental Health Legal Centre Inc.
1403 Men's Educational Support Association
1404 Mr Mark Overington
1405 Mr John Medina JP (supp)
1406 Eastern Community Legal Centre Inc.
1407 Mr W G Lomas
1412 Ms Jillian Sullivan
1428 Mr Lars Elers
1432 Ms Linda Gleeson
1436 Mr Leo Goggins (supp)
1438 Mr David Lincoln
1442 Ms Leeanne Hilton-Butt
1471 Mr Tony Windsor MP, Federal Member for New England
1481 Mr Michael Murphy
1482 Mr Peter Marsh
1485 Mrs Lurline Gray
1490 Mr Kev Johnstone
1491 Mrs Helen Hannan
1492 Mrs Rachel Gillies
1493 Mr Craig Grant
1494 Ms Kay Boulden
1495 Mr Colin Hayward (supp)
1496 Mr Stephen Davie
1497 Mr Brian Clarke
1499 Centacare - Catholic Diocese of Rockhampton
1507 Mr Greg Smith
1530 Mr Jarrod Dawson
1531 Mr Howard Kajewski
1532 Mr Darren Powierski

1533 Lone Fathers' Association NT Inc. (supp)

1534 Mr Tony Dyson

1535 Mr Tony Howden

1536 Mr Volker Hartmann (supp)

1537 Mr David Markey (supp)

1538 Mr Edward Dabrowski

1539 Mr Geoff Lewis (supp)

1550 Family Court of Australia (supp)

1551 Mr Damian Speers

1554 Mr D Ryan

1555 Relationships Australia NT

1558 Lone Fathers' Association, South Australian Branch (supp)

1559 Lone Fathers' Association, South Australian Branch (supp)

1560 Mr Michael Organ MP, Federal Member for Cunningham

1561 Joint Parenting Australia (NSW)

1563 Mr David Hawker MP, Federal Member for Wannon

1565 Ms Janenne Kornfeld

1567 Mr Michael Niddrie (supp)

1568 Mr Philip Manuel

1579 Mr Jeff Threlfall (supp)

1580 Mr Rob Salmon

1587 Mr Paul Neville MP, Federal Member for Hinkler

1588 Mrs Joanna Gash MP, Federal Member for Gilmore

1590 Mr David Smith

1591 Mr Colin Andersen (supp)

1592 Mr Andrew Mason

1593 Western Women's Domestic Violence Support Network

1594 Ms Jeannette Tsoulos

1595 Mr Peter Carroll

1596 Horizons Central Coast Family Services Inc.

1597 Ms Narelle McDonald

1598 Mr Denis Stewart

1605 Commonwealth Department of Family and Community Services (FACS) (supp)

1606 Mensline Australia

1607 Goodwood Community Services Inc.

1610 Mr Julian Fitzgerald

1611 Mr David Brown (supp)

1612 Ms Sara

1614 Mrs Coral Slattery

1615 Ms Barb Crossing (supp)

1617 Talera Centre: Child & Family Therapy (supp)

1620 Justice Richard Chisholm (supp)

1621 Dr Brian Ronthal (supp)

1622 Dr Brian Ronthal (supp)

1623 Mr Michael Keayes (supp)

1624 Mr Lachlan Clark

1627 Mr R B Horsburgh (supp)

1628 Ms Pamela Schooling

1629 Ms Kathy Smith

1630 Australian Domestic & Family Violence CLEARINGHOUSE

1634 Mr & Mrs David Dare

1635 Mr David Buck

1637 Mr Jonathan Pearson

1640 Ms Olga Fairfax

1642 Mr A R Batten-Smith (supp)

1643 Mr T Angus

1644 Ms Barbara Roberts

1646 Mr Giles Acford

1647 Mr Giles Acford (supp)

1650 Ms Heather Godden (supp)

1654 Grafton Concerned Parents Group (GCPG) (supp)

1658 Grandparents in Distress (supp)

1659 Mr Murray Willis

1660 Mr Pete Granger

1662 Mr John Clarke

1663 Mr Andrew Davis

1667 Mrs Marion Bennet

1668 Family Pathways & Family Mediation Services (supp)

1670 Law Society of New South Wales (supp)

1671 Mr Benjamin Williams

1675 Ms Angela Dreibergs

1676 Ms Leah Bray

1677 Mr Peter Callen

1678 Ms Sarah Rososinski

1679 Mr Matthew Campbell (supp)

1680 Mr & Mrs Jeff Allen

1682 Mr Eddie Rolet (supp)

1683 Mr James Hickey (supp)

1684 Women's Legal Service Inc. (supp)

1686 Mr Christos Raskatos

1689 Ms Kristine Clement

1690 Ms Donna Walker (supp)

1693 Commonwealth Department of Family and Community Services (FACS) (supp)

1694 Dawn House Inc. (supp)

1695 Ms Jennifer Neoh

1697 Illawarra Legal Centre Inc. (supp)

1698 Professor Patrick Parkinson, Professor of Law, University of Sydney (supp)

1699 Family Law Council (supp)

1700 Commonwealth Department of Family and Community Services (FAC) (supp)

1701 Commonwealth Department of Family and Community Services (FACS) (supp)

1702 Commonwealth Department of Family and Community Services (FACS) (supp)

1704 Illawarra Legal Centre Inc. (supp)

1706 No To Violence (NTV) (supp)

1707 Mr Geoff Webster (supp)

1709 Ms Marilyn McHugh

1710 Commonwealth Attorney-General's Department (supp)

1711 Lone Fathers' Association Australia (Inc) WA Branch

1712 Australian Association for Infant Mental Health (supp)

1713 Professor Freda Briggs, University of South Australia (supp)

1714 Mr Ian Monk

1715 Lone Fathers' Association NT Inc (supp)

In addition, 380 confidential submissions and 450 submissions with the name withheld from publication were also received. For details of name withheld submissions, see the inquiry website.

B

Appendix B – List of letters submitted

Letter 1

Mr R C Mallard
Mrs G Mallard

Letter 2

Ms N Graves
Ms L Welsh
Ms M Begolo
A Magee
C Brandt
D Baker
Ms J Brand
Ms J Buckler
Ms K Netschitowsky
Ms M Tucker
Ms J Marshall
D Daniels

Letter 3

Ms C Andrews
Ms S Haraszti
Ms J Lerace
Mr P Pana
Ms G Umrigar
Ms S Fieldes
Ms C Wellings
Ms L Lee
Ms K Clay
Ms K Walmsley
Dr M J O'Neill
Mr P Willey
Ms L Pound
Ms C Karpfen
Ms L Andrews
Ms J Thomson
Ms E Owers
Mr K N Bell
Mr P Willey
Ms H Cooper
S Franzway
Ms J Trezise &
Ms F J Ward
Ms E McVeigh
Ms K Nester
Ms C Kershaw
Mr G Andrews
Mr P O'Leary
Ms K A Stiffe
Ms A K Diamond
Ms R Reed
Ms M Ellis
Ms F Oldfield

- Ms K Dawson (The Woman's Centre, Campsie)
- Ms J Johnson (Eastern Domestic Violence Outreach Service)
- Ms D Murray (Woy Woy Womens' Refuge)
- Ms S Wagner (Women and Childrens' Domestic Violence Crisis Accommodation and Support Service, East Maitland)
- Ms L Dean (Moruya Woman's Refuge)
- Ms C Nelson (Bega Womens' Refuge)
- Ms L Nechvoglod (de Lissa Institute of Early Childhood and Family Studies, University of South Australia)
- Associate Professor J Gill (President, AARE, University of South Australia)
- Ms M Bremner (Eastlakes Womens' and Childrens' Refuge Inc)

One copy with the following signatures:- Dr D Chung, Dr P O'Leary, Dr L Zannettino, Ms D Colley, Ms R North, Ms K Birchmore (The Research & Education Unit on Gendered Violence, School of Social Work & Social Policy, University of South Australia)

Letter 4

Mr J T Titmus
Ms J Lopresti
Ms D Walters
C Allen
Mr J Horner
Ms S Leipold
Mr A Iannello

Letter 5

Ms M Cumming
P Blake
J McLaughlin
Ms C L Jones
Anon

Letter 6

Mr R Murray
S Salter
C Catchpool

Letter 7

Mr D S Graham
Mr J Svanfelds
R Macdonald

Letter 8

Ms J Harrington
Ms L Dunn

- Ms C Alexander (Penrith-Mt Druitt Women's Domestic Violence Court Assistance Scheme

Letter 9

Mr R C Mallard
Ms G Mallard

Letter 10

Ms S Jones
Ms M Dakin JP
Ms A Kelly
Ms E Callaghan
Hearts of Strength
Ms M Miller
Ms T Moore
Ms N Lane
Ms S Hill
Ms L Batiste
Ms S Martin
Ms T Filippini
Ms S Knight

Letter 11

Mr J Waldron
Mr A M Bourne
Mr A V Green
Mr S Fewster
Mr P Hewitt
Ms R Wood

Letter 12

Mr S Monostori
Ms B Heyllar
V Rupa
Mr R Weihart
Ms R Wurramarrba
Ms D Riley
Ms V Johnson
Mr P Karamanakis
E Parsons
F Ferro
Mr I Watt
Mr A Kinna
Ms L Caisley
Ms S HoyPoy
Ms M Green
Ms B Hussey
M Cribb
A J Howden
Mr S Maddalozzo
Ms J Bloem
Mr A Urodos
Ms T McCall
Mr T Ingham
Ms K Kuman
Ms B Kuman Jorcogba
Mr P Johnson
Mr J Karamanakis
Mr J Lambrinidis
Ms S M Bath
Ms D Keeping
Ms M Jenkins
Mr N Hashins
Mr R HoyPoy
Mr P Hempstoch
Mr D Green
Mr R Hussey
A J Walsh
P Newcombe
Y Lear
Ms J Taheny
Mr T Callaghan
Ms L Rupa
Ms S Picken
Mr R Kuman
Ms M Manzie
Ms S Johnson
Ms F Karamanakis
Mr S Lambrinidis
H Chamings
Ms T Cunningham
Ms M Hockey
Mr K O'Brien
Ms C Wakefield
B Palmer
Ms S Freind
N Ordonez
D Pennicott
Mrs R Maddalozzo
Ms C Jackson
K Paterson

P Graham
Mr P Mather
S Ginis
Mr G Cunningham
Ms N Smith
M C Bennett
B J R Smith
Ms M Goldsmith
Ms H Hatfield
Ms KA Sugden
Mr J Peric
Mr R McMillan
Ms M Scott
Ms B Stephan
Ms E Green
Mr C Wharton
Ms A Wilson
Ms S Deichmann
Mr P Boon
Ms K Hughes
Mr K Hordern
Mr R McGorman
R Mongoo
S King
Mr C Baldwin
W Orgill
D Young
Mr I Patch
Mr P Garget
G M Davis
Mr R Pearce
Mr I Arnott
Mr J O'Neill
Ms J Heath

Ms M Schmidt
Mr J Bradley
Ms S Marros
Mr F Sebastian
Ms T Smith
K M Brown
Mr A Leigh
Mr R Pryce
Mr B Hannay
Ms L Burman
Mr S F Bailey
J Wynn
Mr L Gibson
Ms S Pullen
Ms A Heath
Ms A Wharton
Mr S Geaney
Mr J Hilliard
Ms K Wileman
B Franklin
Ms S Stoleman
S Trewin
Ms T Whalan
M Loughhead
K P Kuhn
D A Duke
Mr M Munnich
Ms H Richardson
T Griffin
Mr S Griffin
V Harris
Mr P J Ristau
C Walton
Ms M Green

Mr R Schmidt
Ms J Bradley
G C Short
Mr N Smith
Mr D Smith
Ms S Brown
G Butler
Ms F Collins
G M Christio
J Horton
Mr P Roy
Mr B Ward
Mr B Woodford
Mr R Rich
Ms M Bailey
J Delaney
Mr J Broughton
Mr G Murdoch
Ms J Jolley
Mr W Cook
Mrs J McGorman
B Rinaldi
K Wann
Mr P Adamson
E Gotts
P Wannonell Lothi
S Hancock
S Nichols
P Hallen
Mr D Barrett
H Anderson
T Winter
Mr A Widdall
Mr D Smith

Mr M Pearce	S J Lee	Mr P Barnes
Mr R Cunningham	Ms J Cunningham	Mr D Leer
Ms F Leer	Mr S Newland	Ms C Burnett
Ms K Kyne	Mr C Davis	Mr B Cheshire
R Kennedy	Ms R C Topalov	Mr B A Welsford
Ms M M Cochrane	Mr T Robinson	Ms K Vegera
Mr J Fauntleroy	V Momot	Mr B Griffiths
Mr G Cooper	Ms J Brunette	Ms C Cummins
S Graham	R Hocking	E M Tobin
Mr J Law	A Groom	Ms T Groom
A Momot	J Burgess	Ms K Solowski
Mr B Isitt	Mr A Kirhew	Mr S Culhane
Mr G Llozli	Mr F SooHoo	G Rolfeil
Mr P Andrew	Mr G Neutert	C Larmi
M A Walt	Mr G Nitsdufe	Ms F Angyal
Mr G Bechill	Mr E te Loose	C Doidge
Mr J W Coles	P Chan	D J Ayton
B Berk	P Thomsen	D L Roberts
J A Dewar	E Andrade	Mrs V Twil
Ms E Andrade	Mr J Baharis	Mr J Andrade
Mr M Pilos	Mr E P Milliken	Ms L The
L H The	Ms B Peak	Anon x 4

Letter 13

One copy with the following signatures:- Ms J Page, Ms S Page, M Smith, R Thomassen, L Thomassen, H Thomassen, R Cleece, C Page

Letter 14

Mr D McLachlan	Mr P Manuel	Mr D Manera
Mr R Wells	Mrs M Champion	Mr FG Flavel
Mr P Bennett	Mr P Canavan	Mr J Flanagan
Mr R Croce		

Letter 15

Mr J Flanagan	Mr D Cole

C

Appendix C – List of exhibits[1]

1 Walter M, 2002, 'Labour market participation and the married to sole mother transition' in Eardley, T. and Bradbury, B. (eds), *Competing Visions: Refereed Proceedings of the National Social Policy Conference 2001*, SPRC Report 1/02, Social Policy Research Centre, University of New South Wales, Sydney, p. 411-421 (Provided by Dr Maggie Walter)

2 Walter, Maggie, 2002, 'Private collection of child support: back to the future?', *Just Policy*, No. 26, p. 18-27 (Provided by Dr Maggie Walter)

3 Rendell, Kathryn; Rathus, Zoe; Lynch, Angela, 2002, *An unacceptable risk: a report on child contact arrangements where there is violence in the family*, Women's Legal Service, Brisbane, 142 p (Related to: Pine Rivers Neighbourhood Centre, sub 1070)

4 Meri,Tiina and Soderberg, Maria, 2003, *Children first: growing up in Sweden*, The Swedish Institute, Sweden, 82 p (Provided by Katarina Prime Linmarker, Information Officer, Embassy of Sweden, Canberra)

5 Comments on newspaper article in the Daily Telegraph, July 2003 and three case studies (Provided by Mr Trevor Bock)

6 *Shared parenting*, from www.dadsontheair.com, 4 p (Provided by Mr Trevor Bock)

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1 The list of exhibits has been compiled by Kay Richardson, Informed Sources Pty Ltd.

7 Hosking, Marion, *What does happen to the children*, 19 p (Related to: Manning District Emergency Accommodation Committee Inc, sub 438)

8 McIntosh, Jennifer, 2003, 'Enduring conflict in parental separation: pathways of impact on child development', *Journal of Family Studies*, Vol. 9 No. 1, p. 63-80 (Related to: Dr Jennifer McIntosh, sub 431)

9 McIntosh, Jennifer, 2000, 'Child-inclusive divorce mediation: report on a qualitative research study', *Mediation Quarterly*, Vol. 18 No. 1, p. 55-69 (Related to: Dr Jennifer McIntosh, sub 431)

10 McIntosh, Jennifer, 2002, 'Thought in the face of violence: a child's need', *Child Abuse & Neglect*, Vol. 26, p. 229-241 (Related to: Dr Jennifer McIntosh, sub 431)

11 Appendices to submission 499.

Appendix 1(c) Foster, R, *Family Reports?*, 2 p

Appendix 1(b) Foster, R, *The inquisition*, 2 p

Appendix 2 *Cost of Child Support*, 2002, Property Investment Research, 2 p

Appendix 3 Whitehead, Barbara Dafoe, 1993, *The Atlantic Monthly*, p. 47-84

(Related to Mr Roland Foster, sub 499)

12 Lee, Paul, 2003, *Child support 2002*, Unpublished, 4 p (Provided by Mr Paul Lee)

13 Mouzos, Jenny and Rushforth, Catherine, 2003, 'Family homicide in Australia', *Trends and Issues in Crime and Criminal Justice*, No. 255, 6p (Provided by Mr Adam Graycar)

14 Logue, Robert, 2001, *Family breakdown service providers: bad legislation, poor administration or both?*, Unpublished, 11 p (Provided by Lone Fathers' Association, Newcastle Branch, Mr Robert Logue)

15 Four brochures promoting the courses of the Centre for Child and Family Development, Camberwell, Victoria (Related to: Centre for Child and Family Development, Camberwell, Victoria, Ms Ruth Schmidt Neven, Director, sub 239)

16 Fehlberg, Belinda and Smyth, Bruce, 2000, 'Child support and parent-child contact', *Family Matters*, No. 57, p. 20-25 (Provided by Belinda Fehlberg, Associate Professor and Reader, Associate Dean (Research), Faculty of Law, The University of Melbourne)

17 Baker, Ron and Bishop, Brian, 2003, 'Non-residential parents: the forgotten partners in children's education', *Nuance*, Vol. 36 No 14, 13 p (Provided by Mr R Baker)

18 Hickey, James, 2002, *Just being a bitch can be deadly*, Unpublished, 3 p (Provided by Mr James Hickey)

19 Weening, Mike L., *Why do men lose in family court*, from www.fathersrightsinc.com, 5 p (Provided by Mr James Hickey)

20 McElroy, Wendy, 2003, *In the best interest of the children*, from www.ifeminists.net, 2 p (Provided by Mr James Hickey)

21 Gunnoe, Marjorie Lindner and Braver, Sanford L, 2001, 'The effects of joint legal custody on mothers, fathers, and children controlling for factors that predispose a sole maternal versus joint legal award', *Law and Human Behavior*, Vol. 25 No. 1, p. 25-43 (Provided by Prof Sanford L. Braver, Professor and Principal Investigator, Prevention Research Center, Arizona State University)

22 Solchik, Sharlene A; Braver, Sanford L; Sandler, Irwin N, 1985, 'Maternal versus joint custody: children's postseparation experiences and adjustment', *Journal of Clinical Child Psychology*, Vol 14 No. 1, p. 5-10 (Provided by Prof Sanford L. Braver, Professor and Principal Investigator, Prevention Research Center, Arizona State University)

23 Braver, Sanford L; Cookston, Jeffrey T; Cohen, Bruce R, 2002, 'Experiences of family law attorneys with current issues in divorce practice', *Family Relations*, Vol 51, p. 325-334 (Provided by Prof Sanford L. Braver, Professor and Principal Investigator, Prevention Research Center, Arizona State University)

24 Fabricius, William V. and Braver, Sanford L., 2003, 'Non-child support expenditures on children by non-residential divorced fathers: results of a study', *Family Court Review*, Vol. 41 No. 3, p. 321-336 (Provided by Prof Sanford Braver, Professor and Principal Investigator, Prevention Research Center, Arizona State University)

25 Fabricius, William V; Braver, Sanford L; Deneau, Kindra, 2003, 'Divorced parents' financial support of their children's college expenses', *Family Court Review*, Vol. 41 No. 2, p. 224-241 (Provided by Prof Sanford Braver, Professor and Principal Investigator, Prevention Research Center, Arizona State University)

26 Braver, Sanford L. and O'Connell, Diane, 1998, *Divorced dads: shattering the myths*, Chapters 8,9,10,11,12, New York, Jeremy P. Tarcher / Putnam (Provided by Prof Sanford L. Braver, Professor and Principal Investigator, Prevention Research Center, Arizona State University)

27 Handbook on family law, 1998, Maxwell King (ed), Unpublished, (Provided by Dr Maxwell King)

28 'Lesbian custody cases in Australia', in *Lesbian Mothers' Legal Handbook*, 1986, 5 p, London, The Women's Press (Provided by Dr Maxwell King)

29 Caldwell, Wayne, 2003, *Scam of the century: the Australian Child Support Scheme*,[Video recording] 55 mins, (Provided by Mr Wayne Caldwell, sub 911)

30 Walter, Maggie, 2000, 'Parental involvement of unwed non-resident fathers', *Family Matters*, No. 57, p. 35-39 (Provided by Dr Maggie Walter)

31 United Nations Convention on the Rights of the Child, 1989, Article 3, (Provided by Fairness in Child Support, Mr John Flanagan, Assistant Secretary)

32 Klein, R and Waller, B (eds) 2003, *Gender, Conflict and Violence*, Vienna, Studien Verlag Wien (Provided by National Council of Single Mothers and their Children Inc, Dr Elspeth McInnes)

33 Dickenson, Jane … [et al] 1999, *Sharing the care of children post-separation: family dynamics and labour force capacity*, Unpublished, 36 p (Provided by Dr Maggie Walter)

34 *Breaking point*, 2003, Case study (Related to: Men's Information and Support Association, Ms Sandra Bennett, Coordinator of Counselling, sub 1112)

35 Joint custody legislation in the United States (Provided by Rob during community statements segment of Child Custody Inquiry public hearing, Keperra, Brisbane, 4/9/03)

36 *Family Court of Australia: Services in Far North Queensland and the Torres Strait*, [Video recording] Melbourne, Family Court of Australia, 19 mins (Provided by Family Court of Australia, Indigenous Family Consultant Program, Ms Josephine Akee, Indigenous (Torres Strait Islander) Family Consultant)

37 Two information brochures on the Family Court Mediation and Counselling Services for Aborigines and Torres Strait Islanders, Cairns; Alice Springs, Family Court of Australia (Provided by Family Court of Australia, Indigenous Family Consultant Program, Ms Josephine Akee, Indigenous (Torres Strait Islanders) Family Consultant)

38 *Aboriginal services: Family Court of Australia* [Video Recording] 1997, Melbourne, Family Court of Australia, 12 mins, (Provided by Family Court of Australia, Indigenous Family Consultant Program, Ms Josephine Akee, Indigenous (Torres Strait Islander) Family Consultant)

39 McInnes, Elspeth, 2003, 'Single mothers, social policy and gendered violence', *Women Against Violence*, Issue 13, p. 18-24 (Related to; National Council of Single Mothers and their Children Inc, Dr Elspeth McInnes, sub 1311)

40 Stone, Catherine. Letter to Alan Jones, 2GB, re child support and noncustodial fathers, 2003 (Provided by Ms Catherine Stone)

41 *Children and family break-up*, Policy statement 2003, Early Childhood Australia, 2 p (Provided by Early Childhood Australia, Pam Cahir, National Director)

42 McMurray, Anne and Blackmore, A. M. 'Influences on parent-child relationships in non-custodial fathers', *Australian Journal of Marriage & Family*, Vol 14 No. 3, p. 151-159 (Related to: Prof Anne McMurray, Professor of Nursing, Faculty of Nursing and Health, Griffith University, sub 1362)

43 McMurray, Anne, 'Influences on parent-child relationships in non-custodial mothers', *Australian Journal of Marriage & Family*, Vol. 13 No. 3, p. 138-147 (Related to: Prof Anne McMurray, Professor of Nursing, Faculty of Nursing and Health, Griffith University, sub 1362)

44 Farr, Anthony and Buurman, Gary, 2003, 'Application of equity to child support', *Agenda*, Vol. 10 No. 2, p. 113-128 (Related to: Mr Anthony Farr, sub 1344)

45 Seventeen fact sheets containing opinions, research and bibliographies (Related to: Name Withheld, sub 1237)

46 *The family: a proclamation to the world*, 1995, The Church of Jesus Christ of Latter-day Saints (Provided by The Church of Jesus Christ of Latter-day Saints, Mr Graeme Cray, Victorian Director of Public Affairs)

47 Najman, Jake M. …[et al] 1997, 'Impact of family type and family quality on child behaviour problems: a longitudinal study', *Journal of the American Academy of Child and Adolescent Psychiatry*, Vol. 36 No. 10, p. 1357-1365 (Related to: Men's Information and Support Association, sub 1112)

48 Several newspaper articles related to the Inquiry (Provided by Mr Noel Sharp)

49 Carlson, Allan, March 2002, 'The real rights of the child', *Australian Family Association Bulletin*, p. 3-10 (Provided by Mr Brian Clarke)

50 Frum, David, July 2002, 'Modern marriage, modern trouble', *Australian Family Association Bulletin*, p. 24-29 (Provided by Mr Brian Clarke)

51 Henderson, Sarah, Sept 24, 2003, 'Dads fight for fairness', *The Melbourne Sun* (Provided by Mr Brian Clarke)

52 Bock, Trevor, 2003, *The cost of the child support system to Australia*, Unpublished, 2 p (Provided by Mr Trevor Bock)

53 Feedback on story re fathers' custody, 8 July 2003, *Daily Telegraph* (Provided by Mr Trevor Bock)

54 List of websites for UK references on child custody arrangements, The Cheltenham Group (Provided by Mr B. Worrall)

55 Layton, Robyn, 2003, *Our best investment: a state plan to protect and advance the interests of children'*, Adelaide, Dept of Human Services, South Australia (Related to: Government of South Australia, sub 1266)

56 *Children learn what they live*, 1 p (Provided by Ms Wendy Shailer)

57 Pilgrim, Volker Elis, *Mothersons*. Book review by Regine Ruppelt (Provided by Mr Regine Ruppelt)

58 Marsh, Warwick. Speech to the National Strategic Conference on Fatherhood August 2003, 3 p (Provided by Fatherhood Foundation, Mr Warwick Marsh)

59 Open letter to the Prime Minister, the Hon John Howard from the Fatherhood Foundation (Provided by Fatherhood Foundation, Mr Warwick Marsh)

60 *Father's Day: it's time for a change.* Media release by the Fatherhood Foundation (Provided by Fatherhood Foundation, Mr Warwick Marsh)

61 Case study of a father, Josel A. Tamaliunas, Perth, Unpublished (Provided by Fatherhood Foundation, Mr Warwick Marsh)

62 Case study of a mother, Ellen, Unpublished (Provided by Fatherhood Foundation, Mr Warwick Marsh)

63 Collection of items from Fatherhood Foundation website www.fathersonline.org (Provided by Fatherhood Foundation, Mr Warwick Marsh)

64 Kelso, Robert. Transcript of address to the Fatherhood Conference, 3 p (Provided by Fatherhood Foundation, Mr Warwick Marsh)

65 Strategy statement from the National Strategic Conference on Fatherhood, Canberra, August 2003, 2 p (Provided by Fatherhood Foundation, Mr Warwick Marsh)

66 Fatherhood Foundation launch of the 12 pt plan, 26 June 2003. Comments by Warwick Marsh, Larry Anthony, Mark Latham,

Senator Harradine and Ross Cameron, 13 p (Provided by Fatherhood Foundation, Mr Warwick Marsh)

67 *The 12 pt plan: strengthening & supporting Australian fathers*, 2003, prepared by the National Fathering Forum, 10 p, Wollongong, Fatherhood Foundation (Related to: Fatherhood Foundation, Mr Warwick Marsh, sub 715)

68 Mathias, Malcolm, 1999, *A new and equitable beginning for members of 'broken families'*, 7 p, Unpublished (Provided by Fairness in Child Support, Mr John Flanagan)

69 14 brochures and 5 bumper stickers published by Dads Australia (Provided by Dads Australia Inc, Mr Rod Hardwick, President)

70 Wade, John, 2003, 'Legal presumption that children spend equal time with separated parents in Australia: a flawed reform proposal?', *Legal Eagle,* 6 p (Provided by Professor John Wade, Dispute Resolution Centre, School of Law, Bond University)

71 Henman, Paul, 2001, 'Current concerns in Australian child support policy', *Benefits*, p. 16-19 (Related to: Dr Paul Henman, Research Fellow, Department of Sociology, Macquarie University, sub 1307)

72 Henman, Paul and Mitchell, Kyle, 2001, 'Estimating the cost of contact for non-resident parents: a budget standards approach', *Journal of Social Policy*, Vol. 30, p. 495-520 (Related to: Dr Paul Henman, Research Fellow, Department of Sociology, Macquarie University, sub 1307)

73 Harvey, David, *Divorce report*, [Former title: Internet report on divorce, lawyers and the Child Support Agency], 51 p, www.motzamarketing.com, (Related to: Mr David Harvey, sub 162)

74 Hose, Brendan, 2003, *Gender inequality relating to the suicide of separated men*, 6 p, Unpublished (Provided by Mr Brendan Hose)

75 Kruk, Edward, 2003, *Autonomy, equality and harm reduction: a proposed model of Canadian child custody law reform*, 14 p, Unpublished (Provided by Dr Edward Kruk, Associate Professor, School of Social Work and Family Studies, University of British Columbia)

76 Kruk, Edward, 2002, *Autonomy, equality and harm reduction: a proposed model of Canadian child custody law reform*, 17 p, Unpublished (Related to: Mr Peter Vogel, sub 833)

77 Kruk, Edward, *Promoting cooperative parenting after separation: a therapeutic/interventionist model of family mediation*, 14 p, Unpublished (Related to: Mr Peter Vogel, sub 833)

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In addition, 33 confidential exhibits were also received.

D

Appendix D - Public hearings, informal consultations & visits

Public Hearings

Thursday, 28 August 2003 - Geelong, Victoria

Individuals
Witness 1
Witness 2
Witness 3

Domestic Violence and Incest Resource Centre Inc.
Ms Alice Bailey, Training, Development and Consultancy

Family Law Working Party, Federation of Community Legal Centres (Vic) Inc.
Ms Belinda Lo, Member
Ms Helen Yandell, Member

No to Violence, The Male Family Violence Prevention Association Inc.
Mr Anthony Kelly, Coordinator, Men's Referral Service

Women's Information Referral Exchange
Ms Louise Mitchell, Development Coordinator

15 community statements

Thursday, 28 August 2003 - Knox, Melbourne

Individuals
Witness 1
Witness 2

Australian Family Support Services Association Inc.
Mr Geoffrey Brayshaw, Founder

Australians Against Child Abuse
Mr Joseph Tucci, Chief Executive Officer

Youth Affairs Council of Victoria Inc.
Ms Georgie Ferrari, Executive Officer
Ms Paula Grogan, Policy Officer

13 community statements

Friday, 29 August 2003 - Launceston

Individuals
Ms Maggie Walter (Private capacity)
Witness 1
Witness 2

Relationships Australia, Tasmania
Mr Joseph Smith, Manager, Services North, and Coordinator, Children's Contact Service

Tasmanian Men's Health and Wellbeing Association, Inc.
Mr Ian Hickman, Southern Representative

8 community statements

Monday, 1 September 2003 - Wollongong, NSW

Individuals
Witness 1
Witness 2
Witness 3

Fairness in Child Support
Mr John Flanagan, Assistant Secretary

Fatherhood Foundation
Mr Warwick Marsh, Founder

Illawarra Legal Centre Inc.
Ms Karyn Bartholomew, Acting Principal Solicitor

13 community statements

Monday, 1 September 2003 - Blacktown, NSW

Individuals
Witness 1
Witness 2
Witness 3

DAD's Australia Inc.
Mr Rodney Hardwick, National President

Immigrant Women's Speakout Association of NSW
Ms Monica Mazzone, Domestic Violence Policy Officer

Uniting Care Burnside
Ms Elizabeth Reimer, Policy Officer

Ms Jane Woodruff, Chief Executive Officer

16 community statements

Thursday, 4 September 2003 - Robina, Gold Coast

Individuals
Witness 1
Witness 2

KinKare
Ms Miriam Denton, Treasurer
Ms Maree Lubach, Secretary
Ms Danni Pope, Chair

Men's Rights Agency
Ms Sue Price, Director

Women's Legal Service
Ms Rachel Field, Member, Management Committee
Ms Pamela Godsell, Social Worker
Ms Angela Lynch, Solicitor

16 community statements

Thursday, 4 September 2003 - Keperra, Brisbane

Individuals
Witness 1
Witness 2
Witness 3

Men's Information and Support Association Inc.
Ms Sandra Bennett, Coordinator of Counselling
Mr John Swann, Administration Officer

Pine Rivers Neighbourhood Centre
Ms Dianne Bushnell, Coordinator, Family Support Program
Ms Sandy Dore, Coordinator

13 community statements

Friday, 5 September 2003 - Cairns

Individuals
Witness 1
Witness 2
Witness 3
Witness 4

Family Court of Australia
Ms Josephine Akee, Indigenous (Torres Strait Islander) Family Consultant
Ms Judy Stubbs, Registry Manager, Townsville

Fathering After Separation
Mr Simon Adamson, Spokesman
Mr Derek Dovey, Participant
Mr Edwin James, Participant
Mr Richard Pearson, Participant

Men Again Inc.
Mr Tony Fahey, Treasurer
Mr Richard Jerrett, Chairman

6 community statements

Monday, 15 September 2003 - Canberra

Attorney-General's Department
Mr Kym Duggan, Assistant Secretary, Family Law Branch, Family Law and Legal Assistance Division
Ms Philippa Lynch, First Assistant Secretary, Family Law and Legal Assistance Division
Ms Sue Pidgeon, Assistant Secretary, Family Pathways Branch, Family Law and Legal Assistance Division

Commonwealth Department of Family and Community Services
Ms Catherine Argall, General Manager, Child Support Agency
Ms Sheila Bird, Assistant General Manager, Child Support Agency
Mr Tony Carmichael, Assistant Secretary, Family and Children's Services Branch
Ms Lynne Curran, Assistant Secretary, Family Payments and Child Support Policy Branch
Mr Wayne Jackson, Deputy Secretary
Mr David Kalisch, Executive Director, Family and Children
Mr Mark Sullivan, Secretary

Wednesday, 24 September 2003 - Modbury, Adelaide

Individuals
Witness 1
Witness 2

Australian Association for Infant Mental Health, South Australian Branch
Dr Mary Hood, Committee Member

Joint Parenting Association
Mr Yuri Joakimidis, Director

Lone Fathers Association, South Australian Branch
Mr Thomas Smith, President
Mr Robert Tuddenham, Publicity Officer

National Council of Single Mothers and their Children Inc.
Ms Marie Hume, Volunteer
Ms Heather Joy, Member, Secretariat

Dr Elspeth McInnes, Convenor
Ms Yvonne Parry, Executive Officer

Richard Hillman Foundation
The Hon. Peter Lewis, Patron

Shared Parenting Council of Australia Inc.
Mrs Matilda Bawden, National President
Mr Geoffrey Greene, Federal Director

18 community statements

Thursday, 25 September 2003 - Darwin

Individuals
Witness 1
Witness 2

Dawn House Inc.
Ms Sue Brownlee, Coordinator

Lone Fathers Association NT Inc.
Mr Robert Kennedy, Coordinator

Top End Women's Legal Service
Miss Patricia Brennan, Solicitor
Ms Angela Dowling, Coordinator
Ms Camilla Hughes, Principal Solicitor

15 community statements

Friday, 26 September 2003 - Joondalup, Perth

Individuals
Witness 1
Witness 2
Witness 3
Witness 4
Witness 5

Aboriginal Legal Service of Western Australia Inc.
Ms Tonia Brajcich, Managing Solicitor, Family Law Unit
Mr Mark Cuomo, Director of Legal Services

Family Law Foundation
Mr Gordon Melsom, Co-Convenor
Ms Jennifer Walters, Co-Convenor

Women's Law Centre of Western Australia Inc.
Ms Lea Anderson, Manager
Ms Kate Davis

16 community statements

Friday, 10 October 2003 - Canberra

Family Court of Australia
Justice Richard Chisholm
Ms Jennifer Cooke, General Manager Client Services
Mr James Cotta, Principal Mediator
Mr Richard Foster, Chief Executive Officer
The Hon Justice Alastair Nicholson, Chief Justice

Monday, 13 October 2003 - Canberra

Australian Institute of Family Studies
Dr Ann Sanson, Acting Director
Mr Bruce Smyth, Research Fellow

Faculty of Law, University of Sydney
Dr Judy Cashmore, Associate Professor
Professor Patrick Parkinson, Professor of Law

Wednesday, 15 October 2003 - Canberra

Mrs Joanna Gash MP
Federal Member for Gilmore

Mr Barry Haase MP
Federal Member for Kalgoorlie

Mr Paul Neville MP
Federal Member for Hinkler

Mr Barry Wakelin MP
Federal Member for Grey

Friday, 17 October 2003 - Canberra

Department of Family and Community Services (including Child Support Agency and Centrelink)
Ms Catherine Argall, General Manager, Child Support Agency
Mr Keith Bender, Business Manager, Families, Centrelink
Ms Sheila Bird, Assistant General Manager, Child Support Agency
Ms Lynne Curran, Assistant Secretary, Family Payments and Child Support Policy Branch
Mrs Teresa Hurry, Business Manager, Family Payments and Child Support, Family and Child Support Segment, Centrelink
Mr David Kalisch, Executive Director, Family and Children
Mr Mark Sullivan, Secretary

Family Law Council
Professor John Dewar, Chair

Lone Fathers Association Inc.
Mr James Carter, Member
Mr Barry Williams, National President

Monday, 20 October 2003 - Canberra

Family Relationships Services Program - Industry Representative Bodies
Mr David Beaver, Chair, Catholic Welfare Australia
Dr Andrew Bickerdike, Senior Family and Child Mediator / Manager, Relationships Australia
Ms Libby Davies, Executive Director, Family Services Australia
Mr David Foster, Deputy Director, Uniting Care UNIFAM, Family Services Australia
Ms Dianne Gibson, National Chief Executive Officer, Relationships Australia
Ms Jennifer Hannan, Executive Clinical Manager, Anglicare WA
Ms Margaret Roots, Director, Quality and Network Support, Catholic Welfare Australia

Focus on Children's Perspective
Dr Jennifer McIntosh, Family Transitions Pty Ltd
Professor Lawrie Moloney, Director, Department of Counselling and Psychological Health, La Trobe University

Focus on Legal Services
Ms Rosemary Budavari, Treasurer and Australian Capital Representative, National Association of Community Legal Centres
Mr Philip Dicalfas, Convenor, Child Support Network, National Association of Community Legal Centres
Mr Michael Foster, Chairman, Family Law Section of the Law Council of Australia
Ms Kate Hughes, Solicitor and Member, Family Law Working Group, National Legal Aid
Ms Liz O'Brien, Convenor, National Association of Community Legal Centres
Mr Norman Reaburn, Chair, National Legal Aid
Ms Judith Rees, New South Wales Barrister Representative on Executive, Family Law Section of the Law Council of Australia

National Welfare Rights Network Inc.
Ms Genevieve Bolton, National Liaison Officer
Ms Julia Priest, Welfare Rights Advocate

Sunday, 26 October 2003 - Wyong, NSW

Individuals
Witness 1
Witness 2
Witness 3

Central Coast Domestic Violence Committee
Ms Christine Smith, Regional Violence Prevention Specialist, Violence Against Women Strategy (New South Wales Attorney-General's Office)

Human Rights and Equal Opportunity Commission
Ms Prudence Goward, Sex Discrimination Commissioner

Sole Parents' Union
Ms Kathleen Swinbourne, President

14 community statements

Monday, 27 October 2003 - Coffs Harbour, NSW

Individuals
Witness 1
Witness 2
Witness 3

Coffs Harbour Women's Domestic Violence Court Support Service
Miss Wendy Brodbeck, Coordinator

Dads in Distress Inc.
Mr Raymond Lenton, Sydney Metropolitan Coordinator
Mr Tony Miller, Founder and National Coordinator

Kempsey Women's Domestic Violence Court Assistance Scheme
Ms Maria Reason, Coordinator

Warrina Women and Children's Refuge
Mrs Charlotte Young, Coordinator

15 community statements

Monday, 27 October 2003 - Gunnedah, NSW

Individuals
Witness 1
Witness 2
Witness 3
Witness 4
Witness 5

Family Pathways
Mrs Marion Bennet, Partner
Mr Paul Bennet, Partner

Muswellbrook Women's and Children's Refuge Ltd.
Mrs Jennifer McGrath, Team Member / Manager

10 community statements

Monday, 3 November 2003 - Canberra

National Centre for Social and Economic Modelling, University of Canberra
Professor Ann Harding, Director

Social Policy and Research Centre, University of New South Wales
Ms Marilyn McHugh, Senior Research Officer and Research Scholar

Informal Consultations

Wednesday 13 August 2003, Canberra

Federal Magistrates Court
Mr Peter May, Chief Executive Officer

Monday 18 August 2003, Canberra

Child Support Agency
Ms Catherine Argall, General Manager
Ms Sheila Bird, General Manager

Family Court of Australia
Justice Sally Brown, Administrative Judge, Melbourne
Ms Jennie Cook, General Manager, Client Services
Mr Richard Foster, Chief Executive Officer
Ms Margaret Harrison, Senior Legal Associate

Wednesday 20 August 2003, Canberra

Attorney General's Department
Ms Janet Douglas, Director, Family Pathways Branch
Mr Kym Duggan, Assistant Secretary, Family Law Branch
Mr Joshua Faulks, Assistant Advisor to the Attorney General
Mr Jamie Louve, Departmental Liaison Officer
Ms Philippa Lynch, First Assistant Secretary, Family Law and Legal Assistance Division
Ms Sue Pidgeon, Assistant Secretary, Family Pathways Branch

Family Relationships Services – Industry Representative Bodies
Mr Alan Campbell, Consultant, Family Services Australia
Ms Libby Davies, Executive Director, Family Services Australia
Ms Dianne Gibson, Executive Director, Relationships Australia
Mr Walter Ibbs, Mediation Practice Leader, Relationships Australia, Victoria
Ms Dianne Keogh, Director Family Services, Centacare Sydney
Mr Clive Price, Vice President, Family Services Australia, Chief Executive Officer, UnitingCare Unifam
Ms Margaret Roots, Manager, Family Relationships Services Program, Catholic Welfare Australia

Visits/Inspections

Tuesday 28 October 2003, Parramatta

Family Court of Australia, Parramatta NSW
Ms Lorraine Macnamara, Client Service Manager
Ms Gail Passier, Manager Mediation
Justice Purdy
Mr Hugh Sanderson, Senior Deputy Registrar
Justice Stevenson
Justice Waddy
Mr Garry Wilson, Registry Manager

Unifam Counselling and Mediation Centre
Mr Clive Price, Chief Executive Officer

Wednesday 12 November 2003, Melbourne

Listening to the voices of children and young people
Dr Jennifer McIntosh, Family Transitions Pty Ltd
Professor Lawrie Moloney, Director of Counselling and Psychological Health, La Trobe University
Family Mediation Centre, Moorabbin
Ms Cathy Holmes, Parent Adolescent Manager

Youth Affairs Council of Victoria
Ms Felicity Sloman, Board Member

E

Appendix E - Legislative references: Family Law Act 1975

The following are key sections of the *Family Law Act 1975* which are relevant to, or specifically referred to, in the recommendations in this report.

Family Law Act 1975

Part VII - Children

SECTION 60B

Object of Part and principles underlying it

(1) The object of this Part is to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

(2) The principles underlying these objects are that, except when it is or would be contrary to a child's best interests:

(a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and

(b) children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development; and

(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.

SECTION 61B

Meaning of parental responsibility

In this Part, parental responsibility, in relation to a child, means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.

SECTION 61C

Each parent has parental responsibility (subject to court orders)

(1) Each of the parents of a child who is not 18 has parental responsibility for the child.

(2) Subsection (1) has effect despite any changes in the nature of the relationships of the child's parents. It is not affected, for example, by the parents becoming separated or by either or both of them marrying or re-marrying.

(3) Subsection (1) has effect subject to any order of a court for the time being in force (whether or not made under this Act and whether made before or after the commencement of this section).

SECTION 61D

Parenting orders and parental responsibility

(1) A parenting order confers parental responsibility for a child on a person, but only to the extent to which the order confers on the person duties, powers, responsibilities or authority in relation to the child.

(2) A parenting order in relation to a child does not take away or diminish any aspect of the parental responsibility of any person for the child except to the extent (if any):

(a) expressly provided for in the order; or

(b) necessary to give effect to the order.

SECTION 63B

Parents encouraged to reach agreement

The parents of a child are encouraged:

(a) to agree about matters concerning the child rather than seeking an order from a court; and

(b) in reaching their agreement, to regard the best interests of the child as the paramount consideration.

SECTION 64B

Meaning of parenting order and related terms

(1) A parenting order is:

(a) an order under this Part (including an order until further order) dealing with a matter mentioned in subsection (2); or

(b) an order under this Part discharging, varying, suspending or reviving an order, or part of an order, described in paragraph (a).

(2) A parenting order may deal with one or more of the following:

(a) the person or persons with whom a child is to live;

(b) contact between a child and another person or other persons;

(c) maintenance of a child;

(d) any other aspect of parental responsibility for a child.

(3) To the extent (if at all) that a parenting order deals with the matter mentioned in paragraph (2)(a), the order is a *residence order*.

(4) To the extent (if at all) that a parenting order deals with the matter mentioned in paragraph (2)(b), the order is a *contact order*.

(5) To the extent (if at all) that a parenting order deals with the matter mentioned in paragraph (2)(c), the order is a *child maintenance order*.

(6) To the extent (if at all) that a parenting order deals with any other aspect of parental responsibility for a child, the order is a *specific issues order*. A specific issues order may, for example, confer on a person (whether alone or jointly with another person) responsibility for the long-term care, welfare and development of the child or for the day-to-day care, welfare and development of the child.

(7) For the purposes of this Act:

(a) a residence order is *made in favour* of a person, or the person, with whom the child concerned is supposed to live under the order; and

(b) a contact order is *made in favour* of a person, or the person, with whom the child concerned is supposed to have contact under the order; and

(c) a specific issues order is *made in favour* of a person, or the person, on whom the order confers duties, powers, responsibilities or authority in relation to the child concerned.

(8) For the purposes of this Act:

(a) a person *has a residence order* in relation to a child if a residence order made in favour of the person is in force in relation to the child; and

(b) a person *has a contact order* in relation to a child if a contact order made in favour of the person is in force in relation to the child; and

(c) a person *has a specific issues order* in relation to a child if a specific issues order made in favour of the person is in force in relation to the child.

(9) In this section:

this Act includes:

(a) the standard Rules of Court; and

(b) the related Federal Magistrates Rules.

SECTION 68F

How a court determines what is in a child's best interests

(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;

(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.

Parenting compliance regime Stage 2

SECTION 70NG

Powers of court

(1) If this Subdivision applies, the court may do any or all of the following:

(a) make an order in respect of the person who committed the current contravention, or (subject to subsection (2)) in respect of both that person and another specified person, as follows:

(i) directing the person or each person to attend before the provider of a specified appropriate post-separation parenting program so that the provider can make an initial assessment as to the suitability of the person concerned to attend such a program;

(ii) if a person so attending before a provider is assessed by the provider to be suitable to attend such a program or a part of such a program and the provider nominates a particular appropriate program for the person to attend—directing the person to attend that program or that part of that program;

(b) make a further parenting order that compensates for contact forgone as a result of the current contravention;

(c) adjourn the proceedings to allow either or both of the parties to the primary order to apply for a further parenting order under Division 6 of Part VII that discharges, varies or suspends the primary order or revives some or all of an earlier parenting order.

(1A) In deciding whether to adjourn the proceedings as mentioned in paragraph (1)(c), the court must have regard to the following:

(a) whether the primary order was made by consent;

(b) whether either or both of the parties to the proceedings in which the primary order was made were represented in those proceedings by a legal practitioner;

(c) the length of the period between the making of the primary order and the occurrence of the current contravention;

(d) any other matters that the court thinks relevant.

(2) The court must not make an order under paragraph (1)(a) directed to a person other than the person who committed the current contravention unless:

(a) the person brought the proceedings before the court in relation to the current contravention or is otherwise a party to those proceedings; and

(b) the court is satisfied that it is appropriate to direct the order to the person because of the connection between the current contravention and the carrying out by the person of his or her parental responsibilities in relation to the child or children to whom the primary order relates.

(3) If the court makes an order under paragraph (1)(a) that a person is to attend before the provider of a program for assessment, or is to attend a program, the court must cause the provider of the program to be notified, in accordance with the applicable Rules of Court, of the making of the order.

SECTION 70NJ

Powers of court

(1) Subject to subsection (2), this Subdivision applies if:

(a) an order under this Act affecting children (the *primary order*) has been made, whether before or after the commencement of this Division; and

(b) a court having jurisdiction under this Act is satisfied that a person has, whether before or after that commencement, committed a contravention (the *current contravention*) of the primary order; and

(ba) the person does not prove that he or she had a reasonable excuse for the current contravention; and

(c) either of the following applies:

(i) no court having jurisdiction under this Act has previously determined that the person has, without reasonable excuse, contravened the primary order but the court dealing with the current contravention is satisfied that the person has behaved in a way that showed a serious disregard of his or her obligations under the primary order;

(ii) a court having jurisdiction under this Act has previously determined that the person has, without reasonable excuse, contravened the primary order.

Note: For the standard of proof to be applied in determining whether a contravention of the primary order has been committed, see section 140 of the *Evidence Act 1995*.

(2) This Subdivision does not apply if the court dealing with the current contravention is satisfied that it is more appropriate for that contravention to be dealt with under Subdivision B.

(2A) If this Subdivision applies, the court must make, in respect of the person who committed the current contravention, the order or orders available to be made under subsection (3) that it considers to be the most appropriate in the circumstances.

(2B) This section applies whether the primary order was made, and whether the current contravention occurred, before or after the commencement of this Division.

(3) The orders that are available to be made by the court are:

(a) if the court is empowered under section 70NK to make a community service order—to make such an order; or

(b) to make an order requiring the person to enter into a bond in accordance with section 70NM; or

(c) if the person has contravened a parenting order—subject to subsection (5), to make an order varying the order so contravened; or

(d) to fine the person not more than 60 penalty units; or

(e) subject to subsection (6), to impose a sentence of imprisonment on the person in accordance with section 70NO.

(4) If a court varies or discharges under section 70NM a community service order made under paragraph (3)(a), the court may give any directions as to the effect of the variation or discharge that the court considers appropriate.

(5) When making an order under paragraph (3)(c) varying a parenting order, the court, in addition to regarding, under section 65E, the best interests of the child as the paramount consideration, must, if any of the following considerations is relevant, take that consideration into account:

(a) the person who contravened the parenting order did so after having attended, after having refused or failed to attend, or after having been found to be unsuitable to take any further part in, a post-separation parenting program or a part of such a program;

(b) there was no appropriate post-separation parenting program that the person who contravened the parenting order could attend;

(c) because of the behaviour of the person who contravened the parenting order, it was not appropriate, in the court's opinion, for the person to attend a post-separation parenting program, or a part of such a program;

(d) the parenting order was a compensatory parenting order made under paragraph 70NG(1)(b) after the person had contravened a previous order under this Act affecting children.

(6) The court must not make an order imposing a sentence of imprisonment on a person under this section in respect of a contravention of a child maintenance order made under this Act unless the court is satisfied that the contravention was intentional or fraudulent.

(6A) The court must not make an order imposing a sentence of imprisonment on a person under this section in respect of:

(a) a contravention of an administrative assessment of child support made under the *Child Support (Assessment) Act 1989*; or

(b) a breach of a child support agreement made under that Act; or

(c) a contravention of an order made by a court under Division 4 of Part 7 of that Act for a departure from such an assessment (including such an order that contains matters mentioned in section 141 of that Act).

(7) An order under this section may be expressed to take effect immediately, at the end of a specified period or on the occurrence of a specified event.

(8) When a court makes an order under this section, the court may make any other orders that the court considers necessary to ensure compliance with the order that was contravened.

F

Appendix F – Legislative references: Child Support Scheme

Legislative references: *Child Support (Registration and Collection) Act 1988* and *Child Support (Assessment) Act 1989*

The following are key sections of the *Child Support (Registration and Collection) Act 1988* and the C*hild Support (Assessment) Act 1989* which are specifically referred to in the recommendations in this report.

CHILD SUPPORT (REGISTRATION AND COLLECTION) ACT 1988

SECTION 71C

Other payments of up to 25% of child support liability

(1) Subject to subsections (3) and (5) and section 71D, in relation to any payment period entered in the Register under paragraph 26(2)(b) or initial period entered in the Register under paragraph 26(2)(a) for which the payer of an enforceable maintenance liability has an uncredited amount, the Registrar must, in spite of section 30, credit:

(a) if the uncredited amount does not exceed 25% of the payer's enforceable maintenance liability for the period—that uncredited amount; or

(b) if it exceeds 25% of that liability—so much of that uncredited amount as does not exceed 25% of that liability;

against the liability of the payer to the Commonwealth in relation to the amount payable under the liability in relation to that period.

(2) If:

(a) the payer has made a payment, to the payee of the enforceable maintenance liability or to another person, that is a payment of the kind specified in the regulations; and

(b) the amount of all such payments made by the payer in respect of the liability exceeds the sum of all the amounts credited under this section against the liability in relation to all the payment periods, and any initial period, preceding the period in question;

the payer has an *uncredited amount* equal to the amount of that excess.

(3) Subject to subsection (4), the Registrar must not credit an amount under this section in relation to a period for which the payer has not paid to the Commonwealth an amount equal to the difference between:

(a) the amount payable by the payer to the Commonwealth under the enforceable maintenance liability in relation to that period; and

(b) the amount that is to be credited under subsection (1), or that would be so credited but for this subsection, in relation to that period.

(4) If the payer:

(a) did not pay that difference to the Commonwealth within the time required under section 66; and

(b) subsequently pays the amount of that difference to the Commonwealth;

the Registrar may credit against the liability of the payer in relation to the amount payable under the enforcement maintenance liability in relation to that period the amount that, but for subsection (3), would have been credited under subsection (1).

(5) This section does not apply in relation to a liability covered by section 18.

CHILD SUPPORT (ASSESSMENT) ACT 1989

SECTION 42

Cap on child support if child support income amount exceeds 2.5 times yearly equivalent of relevant AWE amount

If a liable parent's child support income amount in relation to the days in a child support period exceeds 2.5 times the yearly equivalent of the relevant AWE amount

for the child support period, the liable parent's adjusted income amount in relation to any day in the child support period is the amount calculated using the formula:

2.5 times yearly equivalent of the relevant AWE amount – Exempted income amount

SUBDIVISION E — CHILDREN SHARED OR DIVIDED BETWEEN PARENTS

SECTION 47

Cases in relation to which Subdivision applies

(1) This Subdivision applies in relation to the parents (in this Subdivision called the *relevant parents*) of a child or children in respect of whom an assessment has been made if either or both of the following paragraphs applies or apply:

(a) both of the parents are eligible carers of the child or of one or more of the children;

(b) one of the parents is an eligible carer of one or more of the children and the other parent is an eligible carer of another or other of the children.

(2) This Subdivision applies in relation to the relevant parents whether or not both relevant parents have applied for administrative assessment of child support against each other.

SECTION 48

Application of the basic formula etc.

(1) In working out the annual rate of child support that would, apart from section 49, be payable, in relation to a day in a child support period, by either of the relevant parents to the other (or would, apart from that section, be payable, in relation to that day, by either of the relevant parents to the other if each of the relevant parents were a liable parent in relation to the other):

(a) Division 1 (The basic formula) and, to the extent that it is applicable, Subdivision C of this Division (which deals with Liable parents with high child support income) are to be applied to each of the relevant parents in turn, but with the modifications made by paragraphs (c), (d), (da) and (e); and

(b) Subdivision D (Carer parents with child support income of more than disregarded income amount) is not to be applied in relation to the relevant parents; and

(c) each of the relevant parents is to be taken to be a liable parent in relation to each of their children who is a child eligible for administrative assessment and for whom the other parent is an eligible carer, and the other parent is to be taken to be a carer entitled to child support in relation to each such child; and

(d) if the relevant parents are both liable parents of a shared care child or children, the exempted income amount of each parent is to include an additional amount, worked out under subsection 39(2), for the child, or for each of the children; and

(da) in determining the exempted income amount of a parent, a child with whom the parent has substantial contact is to be disregarded; and

(e) the child support percentage of either of the relevant parents is the percentage ascertained using the following table (with the number attributed to each child with whom a parent has major contact taken to be 0.65, the number attributed to each child with whom a parent has substantial contact taken to be 0.35 and the number attributed to each shared care child taken to be 0.5):

Table 1f Modified table of child support percentages

Number of children for whom either of the relevant parents is a liable parent in relation to the other	Child support percentage
Less than 0.35	*Not Applicable**
0.35	8
0.50	12
0.65–0.70	14
0.85	16
1.00	18
1.05	19
1.15–1.20	20
1.25–1.35	22
1.40–1.45	23
1.50–1.55	24
1.60–1.70	25
1.75–1.90	26
1.95–2.05	27
2.10–2.20	28
2.25–2.40	29
2.45–2.60	30
2.65–2.85	31
2.90–3.20	32
3.25–3.70	33
3.75–4.20	34
4.25–4.70	35
4.75–5.0 or more	36

*If a child is in the care of a parent for less than 30% of the nights, no allowance is made in the formula.

(2) In working out an additional amount under subsection 39(2) for the purposes of paragraph (1)(d) of this section, the reference to a relevant dependent child of the liable parent is to be read as a reference to a shared care child of a relevant parent.

SECTION 49

Offsetting of child support liabilities

The annual rate of child support that would, apart from this section, be payable, in relation to a day in a child support period, by either of the relevant parents to the other is to be reduced (but not below 0) by the annual rate of child support that would, apart from this section, be payable in relation to that day by the other (or would, apart from this section, be payable in relation to that day by the other if each of the relevant parents were a liable parent in relation to the other).

SECTION 66

Minimum rate of child support

(1) Subject to section 66B, if, in relation to a day in a child support period, the total annual rate of child support payable for a child or children by a liable parent to one or more carers entitled to child support would, apart from this section, be assessed as an amount per annum less than $260, the total annual rate of child support in relation to the day is to be assessed as $260.

(2) In working out for the purposes of subsection (1) whether or not the total annual rate of child support in relation to a day in a child support period is less than $260, account must not be taken of an annual rate of child support:

(a) payable by a person in his or her capacity as a parent of the kind referred to in subsection 66B(1); or

(b) arising out of an order made under Division 4 of Part 7 (Orders for departure from administrative assessment in special circumstances); or

(c) arising out of provisions of a child support agreement that have effect, for the purposes of this Part, as if they were such an order made by consent.

(3) If:

(a) child support is payable by a liable parent to 2 or more carers entitled to child support; and

(b) an assessment is to be made under subsection (1) in relation to any one or more of those carers;

the annual rate, or each annual rate, is to be assessed by apportioning a notional total annual rate of $260 per annum between the carers, in accordance with the regulations, and taking into account the total number of children of the liable parent who are in the care of each of the carers mentioned in paragraph (a).