SUBMISSION TO THE INQUIRY INTO CHILD CUSTODY ARRANGEMENTS IN THE EVENT OF FAMILY SEPARATION

[redacted]

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THIS INQUIRY

I am very concerned with the requirement of this Inquiry which states that "*Given the tight reporting time for this inquiry those making submission are asked to keep their submissions concise*". The matters being considered by the Terms of Reference are of profound consequence to millions of women and children. I believe the 8 August 2003 date for submissions gives insufficient time for all interested persons to prepare adequate submissions, and that the 31 December 2003 deadline is insufficient for the Committee to fully inquire into and contemplate the complexity and repercussions of issues associated with the Terms of Reference.

I firmly believe that the government should draw back from the use of Family Law Act legislation as a tool for community education and use the more exhortatory material in other ways, for example by brochures and education campaigns.

The term 'custody'

The name of this inquiry is *Inquiry into child* ***custody*** *arrangements in the event of family separation.*

Eight years after the introduction of the 1995 Family Law Reform Act which was supposed to eliminate the term 'custody', the community and the Government are still, widely and consistently, embracing and using the term 'custody'.

Therefore, I believe there is strong reason to return to the terms custody and guardianship, as they were prior to the 1995 Reform Act:

> *"Before the passage of the Reform Act, the Family Law Act provided that each of the parents of a minor child was a guardian of the child, and that both parents had 'joint custody' of their children. Custody involved the right to have the child live with the person in whose favour an order was made and responsibility to make decisions concerning the daily care and control of the child, while aspects of guardianship referred to the responsibility for making decisions about the child's long-term welfare. The Family court was empowered to make orders altering this statutorily prescribed situation, for example, by vesting sole custody of the child in one parent, with an order for the other parent to have periodic access to the child."*
>
> - *The Family Law Reform Act 1995: the first three years*

The terms '*responsibility for the day to day care, welfare and development*' and '*responsibility for the long term care, welfare and development*' are too similar. They have created uncertainty and confusion. 'Responsibility for the long term care, welfare and development' should revert to the term 'guardianship', the meaning of which is widely recognised and understood by institutions like Centrelink and schools, hospitals. In New South Wales we do not have a 'Long term care, welfare and development Board .. it is known as the Guardianship Board. The legal meaning of guardianship is clear. The word 'responsibility' is unclear.

The internet has brought the American Legal Terms into our homes. The material and sentiments being presented to the government by Australian father's rights groups is clearly directly from the American internet sites of the American father's rights groups. Whether or not the government reverts to the previous terms, the community is going to continue to think and talk in those terms.

The Terms of Reference of this Inquiry mention:

> **"Having regard to the Government's response to the Report of the Family Law Pathways Advisory Group"**

Page 5 of the government's response states:

Research indicates that parental conflict:

- *Can violate children's core developmental needs, posing serious threat to their psychological growth;*
- *Has a profound influence on adolescent development and future adult behaviour and can be the strongest predictor of violent delinquency;*
- *Is a more potent predictor of poor child adjustment than is divorce;*

These first three points are a very strong case **against** a compulsory rebuttable presumption that children should spend equal time with each parents.

A great deal of 'parental conflict' is generated from family violence situations. Equal time alternating residence for children will increase problems, not solve them; increase litigation, not decrease it, which has been confirmed by Australian research into 1995 *Reform Act*.

and

- *Is detrimental to the fathering role, partly due to the mother's withdrawal from facilitating situations that enhance the father-child relationship*

This statement, without any further reference to fathers' role in parental conflict, or any mention of the enormous role family violence plays in the breakdown of marriage breakdown and contact, displays a blatant bias by the government against mothers. It *implies* mothers are responsible for all parental conflict and shows total disregard for the plight of women and children who are the victims of family violence. A token **de-gendered** reference to the *"special needs of adults and children within the family law system who are the victims of family violence and child abuse"* is made on page 15, thus minimising the reality of family violence on women and children.

When contact is granted to a violent parent after the parties separate, abuse of the other parent may continue, either through physical violence or continuing patterns of dominance and fear set up during the marriage. This can increase the damage to the children. This abuse is frequently why some mothers 'withdraw from facilitating situations that enhance contact' – it is not due to vindictiveness.

Also, In a Response that used only de-gendered language throughout except for that particular comment, it is particularly discriminatory in that it fails to recognise the Australian non-resident mothers who are prevented from having contact with their children by the resident father, but choose not to enforce their contact orders because of the repercussions in terms of their safety.

BEST INTERESTS

(a) given that the best interests of the child are the paramount consideration
(i)what other factors should be taken into account

> ***The 1995 Reform Act introduced Sections 60B*** *(child rights and parent responsibilities),* ***65E and 68*** *(best interests).* ***Section 60B did not create a legal presumption in favour of contact orders, nor does it create rights that are legally enforceable.*** *The Full Court of the Family Court in the appeal case of B and B: Family Law Reform Act 1995[11] has clearly rejected those arguments:*
>
> 60B(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.

60B(2) The principles underlying these objects are that, **except when it is or would be contrary to a child's best interests** :

(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.

65E In deciding whether to make a particular parenting order in relation to a child, a court must regard the **best interests** of the child as the paramount consideration."

"68F(1) In determining **what is in the child's best interests**, the court must consider the matters set out in subsection (2).

68F(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;

(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;;

(i) any family violence involving the child or a member of the child's family;

Extract from: ***In the child's best interest: Managing Family Violence in a Family Court Context; lessons learned and challenges to be faced.*** **Paper delivered at the Columbus Pilot Launch and Symposium, Perth by The Honourable Chief Justice Nicholson Chief Justice, Family Court of Australia Friday 9 November 2001**

"In England several judges have taken a very robust approach by jailing mothers who refused to allow contact because they argued that the child would be at risk.

"Writing in 1999 Bailey-Harris, Barron and Pearce noted: " *We must also conclude that,* ***to date, published research on the correlation between domestic violence and child abuse and on the motivation of violent fathers seeking contact appears to have had little impact in practice on attitudes of judges and legal practitioners"***

"However last year there was something of a jurisprudential breakthrough in England when four appeal cases with similar facts were heard together The similarities were that all cases involved a refusal of contact at first instance to a father in circumstances where there had been violence between the parents. The issue was therefore whether contact with the non-resident father might be refused on that basis.

"The method by which expert evidence in the form of a **psychiatric report** was essentially commissioned by the Official Solicitor acting as amicus curiae was an interesting one. And the contents of that report were enthusiastically received and considered to be of considerable relevance by the Court of Appeal. Indeed **the President of that Court remarked that "*The context of the overall situation was highly relevant to decision making*".** And *"There has, perhaps, been a tendency in*

the past for courts not to tackle allegations of violence and to leave them in the background on the premise that they were matters affecting the adults and not relevant to issues regarding the children. The general principle that contact with the non-resident parent is in the interests of the child may sometimes have discouraged sufficient attention being paid to the adverse effects on children living in the household where violence has occurred. ***It may not necessarily be widely appreciated that violence to a partner involves a significant failure in parenting – failure to protect the child's carer and failure to protect the child emotionally."***

"The psychiatric report referred (inter alia) to research that consistently showed that children continue to be emotionally traumatised, even when they do not remain in the violent situation. The reasons for this include a continuing sense of fear of the violent parent and/or post-traumatic anxieties that can be aroused by proximity to the non-resident violent parent.

"The judges unanimously dismissed the fathers' appeals."

Family Violence/Abuse

A. The Family Law Council's Final Report, September 2002, *"Family Law and Child Protection"* states:

- *"There is no greater problem in family law today than the problems of adequately addressing child protection concerns in proceedings under the Family Law Act. Council's research and consultations on this issue indicate that the problems in the present system are very serious indeed." Through the Family Law Act, the Federal Government has a major responsibility for child protection."*

- *"Dealing with cases involving allegations of child abuse and violence is part of the 'core business' of courts exercising jurisdiction under the Family Law Act 1975. The largest number of such cases involve allegations of violence against women which may raise issues about the safety and emotional well-being of the children. This trend is allied with a greater community awareness of, and institutional responsiveness to, allegations of 'domestic' violence and concerns about child abuse*

- ***"One response to dealing with such cases is to call for a shift from what has been termed a 'relationship breakdown' model to a 'family violence' framework. The 'relationship breakdown' model assumes that the central problem is one of the partners needing to separate because they no longer want to be together, and therefore that any problems existing in the relationship are related to the partnership. Hence dissolving the relationship should dissolve the problems. In contrast, a 'family violence' framework would acknowledge violence as the central issue in relevant cases, and relate this to decisions about the best interests of the child."***

- *"These concerns about domestic violence were reflected in the* ***Family Law Reform Act 1995****. This Act inserted into the Family Law Act a number of new provisions concerned with violence.* ***'Family violence' is defined as***

  "Conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person's family that causes that or any other member of the person's family to fear for, or to be apprehensive about, his or her personal well being or safety."

- ***The risks to children from system failures***

  A 1993 study found that 82% of homicides involving family members had been preceded by a history of violence Another study based on 1989-90 data suggests that in ten percent of all homicide cases in Australia a parent kills his or her child. Between January 1996 and July 1999 ten children (from seven families) died in New South Wales in the context of family dispute and breakdown. The common precipitating factor in all ten deaths was the breakdown of the spousal relationship or conflict between the spouses, leading to the parent killing the child. In some cases, there was a history of domestic violence.

- ***Case Study 5***

In this case in New South Wales, a young child was murdered by his father following an adverse ruling from the Family Court. There was a constellation of warning factors of evident danger to the child. The father had threatened to kill the mother and child if she left the relationship. The father was reported to have been violent since he was 16 years of age. He had been convicted of several Driving Under the Influence offences, and had Apprehended Violence Orders taken out against him by the mother. After the birth of the child, the father became increasingly paranoid and controlling. The Family Court subsequently reduced the father's previous contact arrangements and he became distressed. ***He killed the child on their first contact visit after the Court ruling.***

This case illustrates the grave danger of discounting child abuse concerns because there is a family law dispute.

- ***The notion that child protection concerns should be automatically discounted because they arise in the context of a family law dispute is a dangerous one for children.***

- *In many other cases, there may be no investigation at all of the protective concerns because the parent cannot obtain legal aid and cannot afford the immense cost of private litigation, or because he or she is unable to navigate the complex legal system sufficiently to bring a case under the Family Law Act.* ***That cases do not proceed for these reasons does not mean that the concerned parent takes no action. He or she may well take action, but outside the law.*** *This may take the form of refusing contact, despite orders requiring it, abducting the child, or otherwise going into hiding. Unresolved child protection concerns often lead to desperation.*

- *At times facing the pressure of a stalemate with little supporting evidence, mothers do agree to consent orders for contact with the child and the father. These contact orders soon become unworkable as the mother witnesses the emotional effects on her children who continue to have contact with the alleged abuser. The contact arrangements (whether by consent or otherwise) leave the mother at risk of contravention proceedings in the Family Court, which incur serious penalties.*

- *The experience of this organisation is that mothers are distressed at being caught in this* **Catch 22** *situation. If they have grave concerns about the ongoing safety of their child they withhold contact. The potential breach of court orders places them in a situation where their actions may be seen as equally abusive in terms of them denying their child contact with the other parent.* ***If they agree to contact, it is our experience that they risk having the character of their protective acts attacked in cross-examination for making the child available if they had concerns about their welfare and safety.***

B. At a conference in May 2003, held by the Australian Institute of Criminology, Emeritus Professor Freda Briggs, a child welfare expert and the 2000-01 Senior Australian of the Year, told of hair-raising Family Court cases which went wrong. In one case, the court had delivered a child into the hands of a father with a criminal record for sexual assault. She said:

> ***"When parents contact me, they usually send me the trial documents and, frankly, I'm often shocked by what I read. Again and again, I see a disregard for children's safety and an obsession with the view that all parents have the right to maintain a relationship with their children, regardless of the trauma associated with abuse, regardless of the quality of the relationship or the children's expressed wishes."***

She told of a mother who, before the birth of her child, had separated from her partner after having learnt he was HIV positive, bisexual and had 26 criminal convictions, including two for rape reduced to sexual assault. Subsequently, the mother refused to comply with a Family Court order to hand over her toddler for unsupervised access. As a result, the Federal Police took the child, placed her in temporary foster care, and then handed her to the father she didn't know. For the past four years, the mother has had supervised access for three days a month. Despite numerous reports that the child has been physically, sexually and emotionally abused and neglected by her father and sexually abused by her half brother, child protection services will not act to protect the child because the case is in the Family Court.

Dr. Elspeth McInness, of the University of South Australia, who is familiar with the case, told the conference that over the Easter holidays, the child, now 7, grabbed a knife and begged her mother at the access visit to kill her rather than take her back to her father. See copy of conference paper attached.

In another case cited by Professor Briggs, a Family court judge gave custody to a father who had confessed to a counsellor of having sexually interfered with his 10-year-old daughter. The confession was deemed inadmissible in the Family Court proceedings. The judge castigated the mother for her failure to dissuade her daughter from her belief that sexual abuse had occurred. If the children continued to live with the mother, the judge said, they would continue to believe their father was an abuser and be psychologically damaged. In this case, the Appeal Court concluded the trial judge was wrong but the children by then had lived with the father for two years.

For many children the court process is another experience of abuse. Ordered to spend time with a father who molests them would be a living hell.

The voices of suffering innocent children and their mothers are being drowned out by the cacophony of vocal "father's rights" groups who have the ear of members of parliament. The plight of children being psychologically and sexually abused by contact with fathers, on the on the **incorrect presumption** that contact is prima facie, is a national tragedy which exceeds the enormity of child abuse within the Anglican and Catholic churches which has been disclosed in recent times.

It is a tragic irony that a reform act which specifically introduced mention that women and children were to be protected from family violence has resulted in a presumption amongst professionals and politicians of contact with abusive fathers under any circumstances.

Section 60B did not create a legal presumption in favour of contact orders, nor does it create rights that are legally enforceable. The members of the Standing Committee on Family and Community Affairs have a duty to the children of Australia to recommend a halt to the misuse of the child's "best interests" provision and to recommend against a rebuttable presumption of equal time shared contact time.

A former Governor-General was criticised for not doing more to protect children from sexual abuse when he was head of the Anglican Church in Brisbane, by not keeping suspected child abusers away from children. Family Court professionals – due to legislation approved by the government in 1995 (the reform act) – are ordering contact (supervised and unsupervised) which **forces** children to continue to be exposed to continued psychological, emotional and sexual abuse with known sexual abusers because they are biologically related to them, even when the children are old enough to say they do not want contact.

Children's mental health and development will not be harmed by stopping contact with an abusive parent. Forced contact with an abusive parent will.

As the mother of the 7 year old girl (mentioned earlier) says in her statement to the Australian Institute of Criminology Conference: *(Copy attached)*

> ***"If this is the best that Australia can do to protect our children ... may God help them ... because no one else will."***

C. **Attached is a report** "Child Protection and the Family Court of WA: **The Experiences of Children and Protective Parents** by Alison Hay – Child Consultant, Relationships Australia WA.

"Alison Hay: *The right of a child to feel safe is a basic right. Yet the certainty of such a right was removed from the children who participated in this study, involved in the Family Court proceedings. No longer could they rely on their resident parent to protect them, as their protective role was made redundant by court Orders. The children not only had to contend with the abuse of a more powerful parent but also a more powerful system that seemed to them to e attending more to the person they were wanting protection from than their own needs.*

P 25 *"Other authors have also expressed concern at how the idealisation of the family, the desirability of father/child contact, as well as parental rights to have contact with their child (Behrens 1996; Wallbank 1998) influence factors in decision making about what is in a child's 'best interest'.*

"The pro contact stance contained in the majority of the reports endorses the view that the psychological needs of the child in the present can justifiably be endangered to the hypothetical future benefits for that child as an adult. That forced contact may be psychologically endangering a child in the present and future is not considered. Nor is the possible detriment to the protective parent/child relationship considered when a parent is forced to drop the protective stance that their child needs, has often requested and has often been promised by the parent.

P.21 *"[While the Court did not doubt the sexual abuse] the constant thing I got told was that the children would grow up psychologically damaged if they didn't have contact with their father....I mean, I believe that in a* normal *family. But there was no understanding that this was not that sort of situation. They were applying the norm to a case that wasn't. (Emily)*

P.20 ***"The danger of focusing all the attention of the Court in a Family Court case on specific and provable incidents of abuse is that such an analysis of the detail of the alleged abuse may obscure from the view the much large picture of a distorted part-child relationship which is of crucial importance in determining whether contact with that person is in the best interests of the child" - Prof. Patrick Parkinson (1998)***

P.19 *"The Child Representative looked at me and said, 'of course they are going to be traumatised by this access'. And I said, well if you know that why are you recommending that we do this to these children?' 'Well the Court expects us, and once they get over the trauma then it will be alright', (Emily)*

P.13 *"We basically won the court case but he won in another way, like still being able to have contact. Mum says that hardly anyone gets to not have contact at all. But what kind of stupid rule is that? Who made it up? I bet a person who has a perfectly happy upbringing makes up rules like that. Someone who has a perfectly nice father makes up those rules. They are the sort of people that make up those rules because*

they obviously have no understanding of people who have been abused. Or they think they do and they don't...Well they should change the rules or make it for the people. Like if you don't want to have contact you shouldn't have to have it. I mean, I don't think it is important to know your father if he is abusive. You can't pick your family...It doesn't make any sense. (Felicity, 13)

P.11 *"The children spoke of the uncertainly of living with Family Court. For one child Ben who had never felt heard, had experienced Family Court for ten years, most of his life, this left him felling so powerless that at times he felt suicidal*

> *"...Yeah, I feel like giving up and just dying [Ifeel like that] when I am made to go to dad's and stuff ...and when there are all of these Court cases coming up (Ben, 11)"*

"Diana (13) who had also experienced Family Court for most of her childhood life (ten years) spoke of stress, bed wetting, migraines and worry that were a result of living with the stress and uncertainty of Family Court proceedings.

"Seven of the children spoke of the effect of Family Court on their family life. Their primary carer's time became absorbed into preparing legal documents and going to what seemed like endless appointments and meetings, leaving less quality family time. A couple of these children spoke of how their lives were very much affected by witnessing the impact of the Family Court on their residential parent's health. One child Ella (10) was so concerned about the deterioration in her mother's health as a result of the stress when was living under due to the Family court proceedings, that she was worried that she might be forced to live with her father.

"One young person spoke of her experience of not being heard when he concerns about the risk of sexual abuse to her siblings, based on her own experience of being sexually abused by her father, were minimised.

*"He had this consistency to minimise things . He was trying to persuade me to think that dad would learn from (what he had done to me) with all of the counselling. Which he hadn't been to any counselling. Probably [the worst part of the meeting was] when he was just telling me that what I wanted (*supervised access for younger siblings*) wasn't going to happen .. And he was actually saying things like 'sexual abuse that happened in the family should stay in the family and get sorted out.' And I was thinking this is the Court Expert telling me this, I should have had a tape recorder ... The way I got treated by the psychologist, it was just awful (Genavieve, 16)*

***D.*Attached is a copy of a Research Report released in June 2003** "Negotiating Child Residence and Contact Arrangements Against a Background of Domestic Violence" by Miranda Kaye, Julie Stubbs and Julia Tolmie of the Faculty of Law at Sydney University.

E. The <u>Report of the American Psychological Association Presidential Task Force On Violence And The Family</u> *(Copy attached)* **states:**

> *"Tensions exist between children's need for contact with their father and their need to be protected from the physical, sexual and psychological abuse that is common in families where there has been other forms of violence such as woman abuse.*
>
> *"Although most people believe that fathers should have equal access to their children after the termination of a relationship between the parents, the equal-access option is based on the assumption that the fathers will act in their children's best interests.* ***However, that is a naïve assumption in situations where family violence has occurred.***

"Fathers who batter their children's mothers can be expected to use abusive power and control techniques to control he children, too. In many of these families, prior to separation, the men were not actively involved in the raising of their children. To gain control after the marital separation, the fathers fight for the right to be involved. Sometimes the father tries to alienate the child from the mother by using money and other enticements, negative comments, or restricted access to the telephone during visitation with him. Other times, fathers may threaten or actually kidnap the child to punish the mother for leaving.

"Most people, including the battered woman herself, believe that when a woman leaves a violent man, she will remain the primary caretaker of their children. Family courts, however, may not consider the history of woman abuse relevant in awarding custody. ***Recent studies suggest that an abusive man is more likely than a non-violent father to seek sole physical custody of his children*** *and may be just as likely (or even more likely) to be awarded custody as the mother. Often fathers win physical custody because men generally have greater financial resources and can continue the court battles with more legal assistance over a longer period of time.*

"Family courts frequently minimize the harmful impact of children's witnessing violence between their parents and sometimes are reluctant to believe mothers."

F. *"Children who witness parental violence are always affected; they are traumatized by shock, fear, and guilt. Children suffer somatic complaints, such as insomnia, diarrhea, generally higher rates of illnesses as infants, and a higher incidence of colds, sore throats, abdominal pain, asthma, headaches, as well as bed wetting for older children. The effect of parental violence on children is also evidenced by delayed speech, delayed motor and cognitive skills, and poor school performance. In addition to the effects that result from witnessing violence in the home, children are often "accidentally harmed by blows or flying objects aimed at the mother, or are stepped on, or stumbled over, or dropped when the mother is attacked."*

Margaret Martin Barry, Protective Order Enforcement: Another Pirouette, 6 Hast. W. L.J. 339, 341-42 (1995) (citing Effect of Woman Abuse on Children, infra note 127).

G. In recent interviews, Australian government ministers have alluded to anecdotal US reports that in the few states with a presumption of joint physical custody the divorce rate has fallen There seems to be an underlying intention within the Australian government to want to legislate equal 50/50 time with parents after separation to force women to stay in marriage. This would be draconian, turn the clock back to pre-1975, and would be in contradiction to present day recognition of the damage family violence does to children in intact families as well as separated families, as well as the disempowerment of women.

Shared Care

Introduction

An equal time arrangement is all too often extremely disruptive to the children and not practical having regard to the work obligations of the parents and the needs of the children. It is also not a child-focussed solution but one that is focussed upon the needs of the parents.

A large body of research confirms that shared parenting only works where the parties and children are highly co-operative, and families with these friendly dynamics rarely come to the attention of the courts.

It is a logical perception that the problems leading to a divorce would continue within a joint custody relationship to the detriment of the children.

Shared parenting, or even contact, is not a simple matter which can be solved by a single, simplistic or formulaic solution.

If the government wishes to pursue the aim of encouraging parents to share parenting, there need to be developments in other laws and practices that would facilitate this outcome. Specifically, workplace practices should enable men to parent more actively before as well as after separation since **research shows that parenting after separation and divorce is more likely to be cooperative where that has been the practice during the subsisting relationship.**

Encouraging shared parenting after separation is not a realistic option for Family Court clients in dispute over their children. Families with workable shared parenting arrangements tend to arrive at them without resort to the law. For those in the system for whom co-operation is impossible, often because of family violence, the shift in emphasis to shared parenting under the 1995 *Reform Act* has increased the opportunities for dispute and affected children's welfare and often, their safety.

There is now fairly incontrovertible evidence that what children need to grow up psychologically healthy is continuity, stability and constancy of attachment figures, i.e. primary residence with their primary carer prior to separation and contact of varying amounts depending on the requirements and wishes of the children.

It is all very well for the government to say 'but it will be a rebuttable presumption'. To have an opportunity to rebut, one has to be able to afford legal fees to be adequately represented. Without money you can't rebut anything. Mothers who have been the primary carers for children are those who have the least financial resources. If one is fortunate enough to be eligible for Legal Aid often it is denied because of a presumption in law. At present Legal Aid is denied to mothers to rebut contact, but it is available for fathers to apply for, or enforce, contact.

A. Rendell (et al, 2000) examined evidence that contact with fathers is in children's best interests and claim that such evidence is '***mixed and inconclusive***' (p.44) and showed that there is much stronger evidence that:

> *"...the effectiveness of the residential parent and the protection of children from exposure to parental conflict are clearly related to better outcomes for children"(p44)*

B. I quote Hon. Alastair Nicholson, Chief Justice, Family Court of Australia:

From: *An Address Presented By THE HONOURABLE ALASTAIR NICHOLSON, AO RFD, CHIEF JUSTICE, FAMILY COURT OF AUSTRALIA*
Early Interventions - A Framework for Contact, The Royal Society, London, 27 March 2002

Sharing Responsibilities, Not Halving Time

"It should be understood that in Australian law all parents, whether married or unmarried, have shared parental responsibility unless the Court otherwise orders. However shared parenting does not, and in most cases should not, mean equal time.

"Shared parenting, in my view, only works where the parties and children are highly co-operative, and families with these friendly dynamics rarely come to the attention of the courts.

"An equal time arrangement is all too often extremely disruptive to the children and not practical having regard to the work obligations of the parents and the needs of the children. It is also not a child-focussed solution but one that is focussed upon the needs of the parents.

"In an ideal world, it would be unnecessary to have rigid orders and separated families would amicably work things out as time progresses, circumstances change and children change as they progress through developmental stages. As I have said, many families do approximate this ideal and we should not lose sight of the fact that we are focussing here today on the smaller sharp end of cases who are problematic for themselves and also for the courts.

*"**Contact** is the opportunity for children to know and have a relationship with both of their parents. **This must not become a mantra. This should only happen when the relationship enriches the child. It certainly should not happen when it harms the child.***

"Family Court Judges do not need to be told that children should have a relationship with both of their parents. We know that. The difficulty is that we are so often faced with the more difficult cases, where it becomes doubtful whether the child really derives any benefit from the relationship, and may even be harmed by it.

*"I think that the point that is worth making is that this is important social legislation affecting some of the most important and vulnerable people in our community, namely our children. Is this not the very sort of legislation that cries out for the input of social science and mental health professionals, as well as those of us from the legal profession. **There are no simple solutions or quick fixes. Each family is different, each child is different and the issue must be approached on an individual basis.***

"Some contact parents do not make contact appealing. At best, they may be unable to devise meaningful experiences but there are also parents who resort to bribery, putting the child under cross- examination about the residence parent or their partner, or in a position of feeling guilty and torn in loyalty. Some children are frankly bored with the regime. With younger children, there are special difficulties associated with the anxiety of spending time away from a primary care-giver."

C. I quote from a **report a report entitled *"Some whens, hows and whys of shared care"*** by Bruce Smyth, Catherine Caruana and Anna Ferro of the Australian Institute of Family Studies, presented at the Australian Social Policy Conference, NSW University, **9-11 July 2003:**

"Recently, in the US context, Braver and O'Connell (1998) explored the evidence for a rebuttable presumption of joint residence. They point out that:

> *"...**the issue of joint residential custody being the rebuttable presumption of most divorce cases is often raised by father's rights groups as a panacea. But is this a viable solution?***
>
> ***"Unfortunately...there is simply not enough evidence available at present to substantiate routinely imposing joint residential custody...The limited analyses other researchers have performed don't strongly recommend it be imposed either.***
>
> ***"...A parent overly concerned that he see his child exactly the same amount of time as his ex-spouse becomes more of an accountant than a parent. Furthermore, this strict accounting of time can also set the stage for many future arguments, when arrangements must be changed because of extenuating circumstances, which routinely come up... Joint legal custody and substantial contact – though not necessarily exactly equal – with both parents appears to be an ideal solution for most children (Braver & O'Connell 1998: 223-224)"***

"According to Ricci (1997), the way that parents relate to each other as parents is crucial to how well children adjust to family transitions and change. She argues that:

"if a pattern is destructive, neither equal time nor a traditional every-other-weekend visitation arrangement can protect a child. But when a parenting pattern is constructive, many arrangements can work (p.115)."

"For Ricci (1997:118), ***the "prize" is not a particular timeshare arrangement (such as 50:50 care) but a healthy pattern of parenting since it is this that gives children the chance to develop normally. Other US scholars, such as Johnston, concur.*** *Johnston (2003) is currently pushing to "reframe the agenda" on joint physical custody. She argues that the issue is not how blocks of time are divided or apportioned but how well parents can work together."*

"Each child is unique" (as is each family's circumstances). What one child can deal with, another cannot. The best interests of children should always be paramount in making decisions about contact, with the appropriateness of different patterns of care contingent on a range of factors, including the quality of care, as well as children's individual temperament, resilience, stage of development, and experience."

D. Extract from "Children's Voices": Presented by Carol Smart – Centre for Research on Family, Kinship and Childhood, University of Leeds, UK – at 25th Anniversary Conference, Justice, Courts and Community: The Continuing Challenge, Family Courts of Australia – July 2000:

"Emotional spaces/landscapes:

"The journey between a mother's house and a father's house is also a journey between two emotional zones. Where once the family lived together, the physical separation of the parents symbolises the fact that they now occupy different emotional spheres in relation to one another. One parent may still be grieving the breakdown, one may be angry or irritated with the other; one may be lonely; one may have a new partner and new children. Thus children may be moving not simply from one house to another, but from one emotional landscape t another. Moreover, they are likely to feel the difference acutely and will have their own feelings about these different emotional zones. Some of the children we interviewed had to spend time with aggressive, resentful or depressed parents and this could be a problem for them. Whereas, when their parents still lived together there might be one parent who could mediate the other parent's moods or behaviour (or even protect the child), after separation the co-parented child is obliged to spend time alone *with the problematic parent without the other parent to mediate or deflect some of the problems. For some of the children this meant that they attempted to reduce the time they spent with the problematic parent, but this was not always easy, especially where the problem parent was committed to his or her equal share in the child.*

"The distance between parental homes can create a distance between a child and the parent they feel most safe with or most comfortable with. This means that they can dislike the prospect of moving back and forth intensely. .. Other children found it incredibly emotionally disorienting, sometimes missing days at school after the change over.

"Psychological spaces

"Quite independent of the emotional landscapes of different households and the journey between them, was the issue of psychological space. Different households work in different ways, with different routines, different codes of behaviour, different expectations and so on. Lifestyles and routines in different households might be affected by very different material standards of living and children could find themselves moving between relative affluence and relative poverty. Life in the different households might vary further if one or both parents re-partners, especially if the new partner influences things considerably. In one household the child might be an 'only child' while in the other there might be several other step sibling or half sibling. These differences could be difficult for children to manage.

"Equal Shares

"Perhaps one of the most dispiriting consequences of the growth in interest in shared parenting or shared residence is the tendency for this to mean an exact division of children's time so that each parent gets equal amounts. In some instances these arrangements were completely inflexible and children had no choice about them, nor control over them.

> *Colette (13) I just want to be normal ... it feels like I haven't got a proper home really. Whenever anyone asks me for my phone number or address or something I always give them two and they're like, 'Which one do I phone?" and I don't know and they're like, 'Well which one are you at the most?' and I don't know that either 'cos [my parents have] got this stupid thing that ... most of the week I'm at one house and then most of the next week at the other house. And I always have to ask them where I'm going to be. I've always hated it. I always get in trouble at school as well 'cos I don't have the right books sometimes and stuff.*

"The problem with apportioning time however, especially if it is decided upon by the courts, is that it is more likely to organised to suit parents than to suit children. In many cases this is unavoidable because of parents' working commitments, but sometimes the insistence on an exactly equal division of time between parents seemed a long way away from the interests of their children.

"The majority of children who were being co-parented knew how important this equal apportionment of time was for their parents and the extent to which it was heavily invested with both an ideology of gender neutrality and emotional equivalence. But this made it particularly hard for children to alter the arrangements if they did not suit them. They found that they had to take a stand against a powerful philosophy which insists that equal shares are fair, and also against the emotional strain of upsetting the balance between their parents. ***In this respect, being co-parented could become uniquely oppressive. This was reflected in Karl's (age 15) response when we asked him what he would wish for if a wish could be granted. He replied that he wished that one parent would just disappear after divorce.***

"Some children reported that time passed more slowly when they were with one parent rather than the other. Thus they expressed the frustration of boredom if they were with a parent who was inattentive, absent a lot, who had a home without creature comforts, or who lived a long way away from their friends. In some instances friends preferred coming to one house rather than another, and this too had consequences for how children would spend their time when they were with different parents.

"One of the problems that the children we interviewed had to manage was finding time for themselves so that they could be alone or spend time with their friends. This became an issue for children as they got older and wanted to spend less time with parents per se and more time with friends or just 'chilling out'. These children 'lost' free time in moving between households, in having to relate to parents anew each week or fortnight, and in having to plan and organise themselves especially if they had a long way to travel. Some of them wanted to be able to 'stay still' so that they could enjoy doing nothing or so that they could be free of the expectation to be somewhere else. These feelings did not arise only in cases where children disliked one parent, they could be present even where relationships were good. In a situation of co-parenting the children could not simply allow time spent with parents to diminish because for so many parents, too much was at stake in having their share of the child's time.

"Time and sharing

"The dimension of sharing was, for the children, less to do with the apportionment of time than the quality of relationships. The key element in the success of these arrangements was not the time but the caring. Expressed slightly differently, it was the way in which the parents 'did' the relationship that created the sense of well-being, love and security for their children. It

was not the formal structure of residence and contact, counted in hours or days, that produced happy or contented children. What was more important to the children was how their relationships were sustained and managed.

"It is hard to see the wisdom in seeking to resolve family strife through the simple regulation of space and time rather than emphasising the quality of relationships."

E. -- **Judith Wallerstein**, in Unexpected Legacy (A Twenty-Five Year Landmark Study, Hyperion 2000, p 181-2.

> ***"The children... whose lives were governed by court orders or mediated parental arrangements all told me that they felt like second-class citizens who had lost the freedoms their peers took for granted.*** *They say that as they grew older and craved independence, they had even less say, less control over their schedules and less power to determine when and where they could spend their time -- especially precious vacation time."*

F. ***"A study of family interactions*** *spanning three generations and comparing the adult relationships of children from single mother households with those from two parent households* ***found that children who had warm, supportive relationships with their single mothers formed satisfying, committed relationships with equal success to those who had similar parent-child relationships in two-parent homes. It depends upon the parents."***

> *--Iowa State University College of Agriculture 8-Feb-01, http://www.newswise.com/articles/2001/2/ROMANTIC.IAG.*

G. Government philosophy of individual choice for mothers

The following was reported in the Sydney Morning Herald on 4 August 2003:

Comments made by Prime Minister John Howard in his article in the latest issue of "*Options*", a policy journal published by the federal Liberal MP Christopher Pyne.

> ***"Of all the principles that are at the foundation of the Liberal Party, none is more important than individual choice.*** *It is in this context that the Government has focused its attention on the issue of work and family.*
>
> *"Our work suggests women tend to fall into one of three groups: home-centred women, who prefer to be at home full time looking after children; work-centred women, whose priority is overwhelmingly career-oriented; adaptive women, whose hopes and aspirations are in work and family. The most common family configuration is the one-and-quarter-income family.*
>
> ***"One vital lesson that governments need to draw from the research is that no one policy will fit all families.*** *Over the past seven years we have made considerable progress in enhancing the choices available."*

I believe this philosophy supports the contention that there should be no legislation mandating a rebuttable presumption of equal time for children post separation.

The purpose of government is to help families make choices rather than to mandate a particular behaviour and to encourage without heavy-handed legislation

Government does not mandate how parents should share the care of their children during marriage and there should be no heavy-handed one-size-fits-all mandated 50/50 shared residence leglislation to children when a marriage ends.

Families make choices during the course of the marriage about the care of their children and those choices should be allowed to continue post separation.

A presumption of equal shared care after separation would create a notion that children are a piece of property to be divided down the middle and an expectation by non- primary caregivers (mostly fathers) that they are giving up something if the primary caregivers (mostly mothers) attempt to rebut the 50% presumption. It will create more litigation, or mothers will be pressured to agree to unworkable shared time arrangements for their children, or trade-off some of their share of the property settlement to enable the mother to continue to be the primary caregiver.

One must also ask the question: How would mothers who are currently primary caregivers survive financially if they have been out of the workforce for years, or only working part time or casually to fit around their primary caregiving duties? Would Centrelink automatically cut the Parenting Payment as it would be legislated that she automatically only has the children 50% of the time? Would Family Tax Benefit now be cut in half, and automatically given to the father? And would Child Support be eliminated? Fathers would argue that the mother should pay for her half of the time as he is paying for the other half, and everything and everyone is now equal.

Next would come the argument by father's rights groups that children's "best interests" would be best served by living full time with the parent who could best provide a home and support them financially (mostly fathers, as they would have the whole of their full time salaries to themselves now). Many primary care-giving mothers would be forced to let the father have the children as it would not be possible to earn enough money to provide a roof over their heads.

Some would say 'Good, there will be less divorces". That ignores the plight of women and children in family violence/abuse situations and the plight of women whose husbands end the marriage because they form a relationship with another woman.

If there is not 50/50 equal time primary carer parenting prior to separation there should not be a presumption of that after separation. It would be contrary to the best interests of children. Saying that a rebuttable presumption would be not be *automatic* is wrong. It would be considered by fathers and legal professionals as prima facie. Until there is a revolution in the work place and fathers and mothers can work and care for children in equal amounts during marriage such equal time legislation for families coming out of marriages is harmful for children and discriminatory against the majority of mothers who are still the primary caregivers in society at this time.

H. In the United States 'joint custody' has multiple meanings:

- Joint **Legal** Custody is the most common form of joint custody order by the courts. Joint legal custody means that both parents rather than a sole custodian have legal responsibility for major decisions related to the child, including medical, schooling, and religious instruction. (*equivalent to Australia's day-to-day and long term responsibility for care, welfare and development*). Joint legal custody is usually considered appropriate when the parents appear willing to cooperate in raising their children.*)*.

- Joint **physical** custody refers only to an arrangement where children live primarily with one parent and have visitation with the other according to an agreed or ordered schedule. It does not mean exactly 50% of their time with each parent. (*equivalent to Australia's residence and contact)*

Often one parent may have sole legal custody with a joint physical custody schedule.

- All states permit parents to have joint legal custody of their children after a divorce.
- As of 1996, 43 States and the District of Columbia have statutes that specifically authorize the courts to order joint legal custody, and 11 of those states and the District of Columbia declare a presumption in favour of joint legal custody.
- In addition, eight states declare a presumption in favour of joint legal custody if both parents agree to it.
- The remaining 24 states with joint legal custody statutes make joint custody an explicit option without any presumption for or against joint legal custody.
- Seven states do not have joint legal custody statutes, but can order joint legal custody in appropriate circumstances.

*Copy of American Bar Association website page "How many states allow divorcing parents to have joint **legal** custody of their children? How many states have a presumption in favour of joint **legal** custody? Attached.*

I. Margaret Martin Barry - Assistant Professor at the Columbus School of Law at The Catholic University of America, 1997:

- *"The primary caretaker preference eliminates much of the bickering and confusion inherent in custody determinations by awarding custody to the parent who has been most responsible for raising the child. Furthermore, even though the primary caretaker is likely to be the mother, the choice is not inherently discriminatory and it encourages both husband and wife to assume greater co- parenting roles during marriage.*

- *"All too often in this area of law, legislatures swing from one preference to another without requiring solid evidence in support of the approach considered. The maternal preference, for example, reinforces the notion that mothers are responsible for children while fathers are not. Joint legal or physical custody, on the other hand, forces mothers who in fact have been responsible for the children to make concessions in order to continue to raise them. Joint legal custody reinforces the notion that fathers have a decision-making, as opposed to a caretaking, role in the family.*

- *"Although most statutes do not indicate a preference for the form of joint custody awarded, currently most orders award joint **legal** custody. Seven jurisdictions have statutes that specifically favor joint legal custody. In these jurisdictions one parent has the bulk of the responsibility for providing the day to day nurturing of the children and must negotiate with the absent parent with regard to decision-making. In essence, the absent parent has the benefit of wielding authority without undertaking the responsibility for its execution. This imbalance not only is unfair to the physical custodian, but can undermine that parent's role in child rearing since decisions are subject to negotiation with a parent who is not otherwise functioning in the daily life.*

- *"The primary caretaker presumption most accurately meets the objective of giving courts some guidance in applying the best interest of the child standard with a minimum of error. Such a presumption has the benefit of rewarding the parent who has been most consistently and directly involved in child rearing, while assuming that the child will continue to reap the benefits of such effort. It should not be so difficult for the law to acknowledge that children need clarity, consistency, and nurturing, and this comes most reliably from the parents who have a record of providing it. Joint custody often leaves the issue of structure continually on the table, with location or decision-making constantly in flux.*

- *"By giving priority to the child care relationships that existed prior to separation, a primary caregiver presumption avoids forcing new, tenuous arrangements upon all involved.*

- *"Acknowledging that a joint custody presumption is unwise does not mean that children do not need nurturing from both parents. It simply reflects the deduction that if a co-parenting relationship did not exist prior to separation, or has been severed as a result of parental conflict, the court is not likely to create or re-establish it by edict.*

- *"Joint custody should certainly be available to parents who freely commit to co-parenting. Such commitment has the potential to overcome economic and social barriers that may otherwise defeat it. Too much is at stake, however, to embark on this particular variety of social engineering without both parents being vested in its success.*

- *"Financial, organizational, and emotional stresses directly related to orchestrating joint custody anticipate commitment and resources. It is shortsighted to presume that poor families have the resources and that broken families possess the commitment. In fact, requiring collaboration can perpetuate abusive relationships, even under a statute such as the District's that specifically exempts cases in which there is a history of domestic violence, child abuse and neglect, or parental kidnapping. The language does not reach emotionally abusive relationships, and may not reach poorly documented abusive situations that do not fit within the statute. In such situations, joint custody can defeat the salvation sought by parent and child through a separation."*

- Transcript of the Twenty-first Meeting of the Council of the District of Columbia, at 260, Dec. 5, 1995 [hereinafter Twenty-First Transcript]. Councilmember William Lightfoot stated:

  "Children are not chattel. They don't belong to the man. They don't belong to the woman. They should not be regarded as being some pawn that we divvy up between two warring spouses. We should arrange the best that we can, so they can grow up in a loving and nurturing community and not allow us to think that in some ideal situation we can create a legal fiction where both parents are going to be together, but, in fact, they're going to harm the child as they stay together.
  Id.
  He later stated:
  The reason I have opposed this rebuttable presumption in favor of joint custody is because it does not put the best interest of the child first. It really does treat children as if they were property that was acquired during the marriage ....

  ... "Now we can talk about a Pollyanna world and the ideal word, about how we'd love for things to be, but that's not the way they are, and, once again, ... we ought to ask ourselves what is it that's got us on the far extreme? Is it some theoretical notion we have of what's good? Is it some theoretical notion we have of our good intentions ...?"

J. U.S. Commission on Child and Family Welfare, 14 June 1995:

After reviewing all introduced research data and testimony, the U. S. Commission come out against a presumption for joint custody.

The **MAJORITY** Report heard testimony that invalidated joint custody, including ..

- Gerald Nissenbaum, President of the American Academy of Matrimonial Lawyers, who recommended that there be no presumption of any form of custody.

- Judith Wallerstein, Founder and Senior Consultant at the Centre for the Family In Transition, told the Commission that she has seen no evidence that any particular form of custody was uniformly helpful to the post-divorce adjustment of children.

- Sally Brush, Director of the Beech Acres' Aring Institute, cautioned the Commission to avoid making general assumptions about the appropriateness of particular custody and visitation arrangements in favour of arrangements that are responsive to the circumstances of individual cases.

- Katherine Bartlett, Professor of Law at Duke University, agreed that decisions about how children are to be raised following a divorce should be tailored to individual situations.

- Trish Wilson, http://members.aol.com/asherah/sb571.html

K. Washington State Parenting Act Study, Report to the Washington State Gender and Justice Commission and Domestic Relations Commission, Diane N. Lye, Ph.D, 1999:

"Research indicates that joint physical custody and frequent child-nonresidential parent contact have adverse consequences for children in high-conflict situations. Joint physical custody and frequent child-nonresidential parent contact do not promote parental cooperation."

L. Chapter 4: What the Experts Say: Scholarly Research on Post-Divorce Parent and Child Well-being – Report to the Washington State General and Justice Commission and Domestic Relations Commission – Diane N. Lye, Ph.D. June 1999:

"The circumstances of each family are unique, and recognition of their unique circumstances is central to make good post-divorce parenting choices. Moreover, as will be discussed below, ***the leading experts in the field agree that "one size fits all" approaches to developing post-divorce parenting arrangements are inappropriate and may be harmful to some families."***

M. From the Liz Page in the United States:

"Psychological researchers *who have expressed negative opinions about joint custody include, among others, Anna Freud and Judith Wallerstein. In short, a major problem is the child's, in Wallerstein's words, living a life in "no man's land."* ***Having children routinely shift as a temporary resident between two households that have other permanent members who "really" live there presents a destructive outlook for a child, damaging of identity and self-esteem.***

"Young children form a sense of identity from their family base, and, ***notwithstanding the fiction, joint custody does not give the child a whole family, nor does it approximate a two-parent intact home. The child, in fact, is central and permanent to no home,*** *which only reinforces the trauma of the divorce split. It would be far better for the child to have one stable one-parent "intact" home and for the other parent to visit in a complementary way, rather than create the conflict of a competing "home."*

"Professor David Chambers has written articles from the legal standpoint, recommending primary caretaker presumptions and the forbidding of physical joint custody over the objection of one parent.

"When we're talking about children, there just is no time to "muckaround" in the absence of stability and permanency while trying this and that and different combinations of counseling, etc., etc. This is no life for children, who should be spending life focusing on growing and learning -- not juggling schedules and paraphernalia for packing and constantly moving. For every rare couple (usually unremarried) who professes satisfaction with a shared custodial arrangement, fifty now-sole custodial fathers or mothers will admit

"Yeah, we tried that for X number of years while we still lived in the same town, and it was a nightmare... NOW we get along pretty good."

COMMENTS BY MARTHA FINEMAN:

"What may have started out as a system which, focusing on the child's need for care, gave women a preference solely because they had usually been the child's primary caretaker, is evolving into ***a system which, by devaluing the content or necessity of such care, gives men more than an equal chance to gain the custody of their children*** *after divorce if they choose to have it, because biologically equal parents are considered as equal in expressive regards. Non-nurturing factors assume importance which often favor men. For example, men are normally in a financially better position to provide for children without the necessity of child support transfers or the costs of starting a new job that burden many women."*

"... the ***unwillingness to accept the fact of mothers' role in childrearing within the context of custody policy conforms to the popular gender neutral focus at the expense of reality...*** *even if the ultimate goal is gender neutrality, the imposition of rules embodying such a view within the context of family law issues is disingenuous since the effect is to the detriment of those who have constructed their lives around 'genderized' roles."*

> *Fineman, Martha and Anne Opie, "The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce," Wisconsin Law Review, Vol. 1987, Number 1.*

"The primary caretaker rule has been criticized as being merely the old maternal preference in gender neutral terms... it seems to me that the fact that this is offered as a criticism shows how far we have strayed in the United States from real concern for children to a desire to adhere to simplistic notions of equality between spouses at divorce. ***The primary caretaker rule IS gender neutral on its face, and men can change their behavior if they want to have an opportunity to get custody. The rule values nurturing and caretaking and rewards it. This is appropriate."***

> *Fineman, Martha, "The Politics of Custody and the Transformation of American Custody Decision Making" for the UC Davis Law Review (Spring 1989, Vol. 22, No. 3)*

"Perhaps the most significant factor that helps us to understand why custodial mothers lack a discourse with which to voice their concerns... is that they must fight against a dominant discourse that controls all the terms of the modern custody debate. The professional language of social workers and mediators has progressed to become the public, then the political, then the dominant rhetoric. It now defines the terms of contemporary discussions about custody and effectively excludes or minimizes contrary ideologies and concepts."

"Social workers view divorce as occasioning the birth of an ongoing, albeit different, relationship, with mediators and social workers as its midwives and monitors. ***'Let's talk about it' seems to be the ideal, and the talk is envisioned as continuing for decades. The continued involvement is not only with each other but with the legal system as well.*** *This ideal is obviously very different from the traditional legal system, which seeks an end or termination of a significant interaction at divorce: a division, distribution, or allocation of the things acquired during marriage -- an emancipatory model -- and with its 'ending,' the permission for a 'new life' for the participants and the withdrawal of active legal interference in their relationship."*

"Lost in the rhetoric of the social worker are real concerns -- ***There is little or no appreciation of the many real problems that joint custody and the ideal of sharing and caring can create...***

"This [primary caretaker] test implicitly recognizes that no one can confidently predict the future, and that the past may in fact be the best indication we have of future care and concern. I think it is essential that only the past performance of the parents be considered. *Helping professionals should not speculate about which parent would be able to produce the best future environment for the child.* ***The only relevant inquiry should be which parent has already adapted his or her life and interests to accommodate the demands of the child."***

Fineman, Martha, "Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking," Harvard Law Review, Vol. 101, No, 4, February 1988.

The Current Family Law Act

I quote Justice Alastair Nicholson:

From: *An Address Presented By THE HONOURABLE ALASTAIR NICHOLSON, AO RFD, CHIEF JUSTICE, FAMILY COURT OF AUSTRALIA*
Early Interventions - A Framework for Contact, The Royal Society, London, 27 March 2002

> ***"It should be understood that in Australian law all parents, whether married or unmarried, have shared parental responsibility unless the Court otherwise orders.***
>
> ***"Australian law mandates an individualised approach*** *to the resolution of disputes about children, using the best interests of the child as the paramount consideration.* ***Presumptions do not operate.*** *Each case and each proposal concerning the child within each case must be examined and evaluated on its merits.*
>
> *"To the extent that the legislation speaks about rights of contact, it is the right of the* ***child*** *not the right of a parent, and the right of the child is a qualified one which is subject to the child's best interests. This principle was established prior to 1995 legislative amendments and still continues to apply.*
>
> *"About half of all separating families do not come near to a court to seek the adjudication of contact or any other family law dispute - they work it out for themselves. Of the other 50% who do approach a court, (only some of which involve contact disputes), roughly 95% manage to resolve their disputes in a consensual way. That is not to say that those agreements work out perfectly or even at all, particularly where the parties have been ill-advised or pressured into ill-fated regimes. But nevertheless, the upshot is that the cases that present problems are a very small percentage of the relevant population. I think that this is important to keep firmly in mind, because the admitted deficiencies the system offers in relation to these difficult and small number of cases are all too often used as a springboard to attack the family law system as a whole.*
>
> ***"The Family Law Reform Act 1995 (Cth)***
>
> *"A raft of significant changes were made in 1996, as a result of the Family Law Reform Act 1995. There is little doubt that that Act was a genuine attempt at some reform, for example, the changes in terminology were intended to dissuade parents from thinking in terms of "winning or "losing" in children's matters. A number of the changes that were made were, however, cosmetic and designed to create the effect that there had been more reform than was in fact the case.*

"The most significant change contained in that Act was to rename the terminology of family law so far as children were concerned. In this regard the Parliament borrowed heavily from the Children Act (UK) 1989:

- *The package of responsibilities which were collectively known as "guardianship" became known as parental responsibility for the long term care, welfare and development of the child.*
- *The prior concept of "custody" was dissected into two separate orders:*
    - *First, the responsibility for the child's "residence" is limited to that matter only and does not carry with it additional authority;*
    - *Secondly, the responsibility for the day to day care, welfare and development of the child.*
- *Access became contact.*
- *The whole bundle of orders affecting children became parenting orders.*

"Three provisions introduced by the Reform Act are of particular significance.

"Section 60B

*"In setting out a **philosophical guide** to decision-making about children, the Reform Act introduced a new provision which was not found prior to the amending Act. Section 60B sets out the object of the part of the Family Law Act 1975 (Cth) dealing with parenting orders, including contact and sets out the principles underlying the Part:*

"60B(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.

*"60B(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. "*

"This piece of legislation is a classic example of the danger of extracting words from an international human rights covenant in a piecemeal fashion and putting them into domestic legislation.

"In the first place such Conventions are rarely drafted in a style that enables such incorporation, and secondly a piecemeal approach can in fact have the effect of changing the intended meaning of the Convention when it is incorporated into domestic law.

"These provisions pick up some of the words of the United Nations Convention on the Rights of the Child. Section 60B lays emphasis on a child's right to contact with both

parents unless this is determined to be contrary to the child's best interests. ***Section 60B did not create a legal presumption in favour of contact orders, nor does it create rights that are legally enforceable.*** *The Full Court of the Family Court in the appeal case of B and B: Family Law Reform Act 1995[11] has clearly rejected those arguments.*

"However the enactment of this section promoted an explosion of contact applications from fathers who thought that the law had changed. It had not done so, but the Government, for political reasons, endeavoured to convey the impression that it had.

"Worse still, the section caused a significant increase in applications by non-resident parents (usually fathers) seeking to restrain the residence parent from relocating elsewhere. These applications raise difficult issues, but the volume of work meant that the Court could not deal with these matters in a speedy fashion.

"This general statement of principle has encouraged a view among professionals that contact with both parents is prima facie in the child's best interests, even in instances where, for example, one of the parents had been abusive or violent. This presumption exists even though there are express references to violence in determining the "best interests of the child" and thus scope for the argument under section 60(2)(b) that contact with a violent parent might not be in the child's best interests. *Eriksson and Hester have argued that under similar legislative provisions in the UK and Sweden* ***'the child's right appears in practice to be parent's right and most a child's obligation.***

"Section 65E

"Section 65E expresses the well- known paramountcy principle using the phraseology of "best interests" whereas the provision it replaced spoke in terms of the "welfare" of the child:

"65E In deciding whether to make a particular parenting order in relation to a child, a court must regard the ***best interests*** *of the child as the paramount consideration."*

"Section 68

"The Act has always long contained guidance as to the matters that must be considered by a court in determining what will be in the welfare of the child. Section 68 was modified by the Family Law Reform Act 1995 (Cth) to incorporate a reference to "best interests" rather than "welfare" consistent with section 65, and the list of factors which must be considered was augmented to include pars 68F(2)(d),(f),(g),(i) and (j) as they appear below:

68F(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.

"68F(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)."

"The reform provisions concerning family violence served to highlight what had already evolved as law in the court and ***were supposed to provide a useful beacon*** *to ensure that the community and the court understand the need to protect children from every aspect of family violence.*

"The Legal Interaction of Sections 60B, 65E and 68F

"The inter-relationship of the new provisions was considered by the Full Court in B and B: Family Law Reform Act[13].The relevant portion of the decision is found in pars 9.53 and 9.54, where the Court said:

"9.53 The wording of s 68F(2) makes that clear the Court "must consider" the various matters set out in (a)-(l) of that sub-section. That sub-section sets out a list of matters

which the Court is required to consider to the extent that they are relevant to the particular case. The weight which is attached to any one consideration will depend upon the circumstances of the individual case and is a discretionary exercise by the trial Judge. The list is similar to the list contained in previous legislation but with the additions previously referred to. The list is not intended to be exhaustive. That is made clear by par (l) "any other fact or circumstance that the court thinks is relevant" . ***This simply underlines the circumstance that the facts in individual cases may vary almost infinitely, that the inquiry is a positive one tailored to the best interests of the particular children and not children in general,*** *and that the Court is required to take into account all factors which it perceives to be of importance in determining that issue."*

It seems to me that in 2003 that the light of that beacon his been dimmed and it is my hope that this Parliamentary Inquiry re-energise and refocus that beacon.

(ii) court ordered contact with other persons, including grandparents is already provided for under the Family Law Act:

> *"60B(2) The principles underlying these objects are that,* ***except when it is or would be contrary to a child's best interests*** *:*
>
> > *(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*

I believe the law should be left as it is.

The court should only order that children of separated parents have contact with other persons, including their grandparents:

- when those persons have previously had a substantial regular primary carer role for those children and the children have a close emotional attachment to that person.
- Only if those persons are relatives of a parent and that parent is deceased. If a parent has a contact order then the contact parent can facilitate contact with relatives on their side of the family during that contact time.
- If the father has been abusive to the mother and children and does not have contact, then relatives of the father should only be granted contact with the child/ren if the mother is agreeable.

Children should not have multiple contact orders in place.

No clear grandparent's rights should be created.

Existing child support formula

I believe that the existing child support formula works fairly for both parents in relation to the care of , and contact with, their children.

The existing formula already has built into it an allowance for up to 30% of the year contact. It should not now be double discounted.

For a resident parent on Centrelink benefits who is the primary carer, any further reduction in the formula would result in children being further disadvantaged and falling further into poverty. Fixed overhead costs of the primary resident parent do not reduce in direct proportion to the amount of contact. It would be particularly discriminatory against the primary resident parent and the children if a father was on a taxable income of $50,000 or more per annum and the mother's only income was from Centrelink benefits.

An example of my personal situation:

2 Children = Child Support Formula of 27% of TAXABLE income, minus exempted income amount of $11,740 :

Father

Father's Gross Income:	$80,000 pa / $1,538 per week *(sometimes $2,000 pw)*
Est Taxable Income:	$75,000 pa (after deductions for self-education etc)
Less exempted child support amount:	- 11,740 pa
Adjusted Income Amount: (for calculating child support formula)	$63,260 pa

Therefore: Child Support Amount is 27% of $63,260 = $17,080.20 or **$328.46 per week.**

Father's Actual Income in the hand:

Gross Income:	$80,000 pa / $1,538 per week
Less: Tax on $75000	-$ 445 per week
Net Income	$1,093 per week
Less: Child Support Amount	-$ 328 per week
Fathers net income	**$ 765 per week**

Mother

Sole Parenting payment	$ 223 per week ($11,596 pa)
+ Children:	
Child Support	$ *328 per week*
Family Tax Benefit A *(reduced to min due to Child Support)*	$ *40 per week* (2 children 12 & 14)
Family Tax Benefit B	$ *40 per week*
Total income for Children	$ 408 per week
Total Household Income (mother and 2 children)	$ **631 per week**

Therefore, a father on $80,000 would have $765 per week to provide for himself only. The mother would have $631 per week to provide for three people.... A more than fair and equitable situation and supportive of the fact the child support formula should remain unchanged. If the father had contact for 29% of the time the mother's fixed overheads are not going to decrease (school fees and uniforms, shoes clothes, rent, only a very small amount of food. The father in this situation much more disposable income to more than cover the costs of food for a few days.

I can only dream of receiving this weekly child support for the children. The actual costs of schooling and providing a reasonable standard of living for the children are actually higher than $408 per week, but it would provide a much better life for them than their present circumstances of $235 per week ($160 per week Family Tax benefit A&B + $77 per week child support when he pays **OR** only $180 per week Family Tax benefit A&B when he does not pay child support). I could still not afford for them to have the music lessons and other activities they wish to do.

If the father in this instance was in PAYE employment as he was during our marriage The Child Support Agency would be able to ensure that this amount was provided to the children. However, in the accounting profession – like many others – contracting opportunities have become very prevalent. The father has changed to working as an accountant on a contract basis through employment agencies. He has a choice of being paid as a contractor or as a PAYE employee. He chose to work as a contractor and has his earnings deposited into a friend's $1 shell company which he claims only pays $500 flat per week. The remainder of his earnings from the employment agencies is paid to him 'under the table' by his friend. They are in effect laundering his money but it may take the Tax Office years to catch up with them, if ever.

I have a child support determination on an estimate of his real earnings as I was able to provide some documentary proof to the CSA. He is supposed to pay $300 per week. He sometimes pays about $77 per week as he maintains he is only receiving $500 per week. Documentary evidence proves otherwise. I have gone for 12 months and 5 months without any payments of child support. The father has all his cash assets in a relative's name. The CSA has insufficient powers to pursue non-PAYE earners who put all their assets in another's name, even if in a joint account. The children are the ones who suffer.

- There are many avenues for non-PAYE earners to avoid paying child support. The CSA should be given increased legislative powers to pursue this growing area of income earners.

- **Mothers receiving Centrelink income support benefits should not have the amount of Family Tax Benefit A or B paid to her reduced under any circumstances.**

- The original purpose of the Child Support Act must not be forgotten. It is to ensure that fathers meet the responsibility they have under the Family Law Act towards their children **accordingly to their ability to pay**. Many mothers and children are living below the poverty line. Taking money away from them and giving it to fathers is robbing Pauline to give to Paul. Children should not have to live at a standard substantially below that of the nonresidential parent.

- The government does not grant taxpayers a reduction in tax because of their living expenses.

- The child support act does not worry about the resident parent's (usually the mother) level of net income for her to survive on support the children when it takes away some of the family allowance and child support amount and gives it back to the contact parent (the father).

- Any further amendment of the Child Support Act to lessen the enforcement and/or amount of child support to mothers and children will eventually result in a return to pre 1988.