

LEGISLATING SHARED PARENTING
THE *FAMILY LAW AMENDMENT (SHARED PARENTAL*
RESPONSIBILITY) BILL 2005

RICHARD CHISHOLM¹

1. INTRODUCTION

On 23 June 2005 the Government released the exposure draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005 (“the bill”). It was referred to the Standing Committee on Legal and Constitutional Affairs (“the Standing Committee”), which tabled its report, entitled *Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005*, on Thursday 18 August 2005. The current state of things is that we are waiting for the Attorney-General’s next move, which will presumably be to publish a revised bill.

Of course, we do not yet know what will be in the next bill. However broadly speaking the Standing Committee approved the bill, so it seems likely that we will see something rather similar. I will indicate in this paper some of the main modifications suggested by the Standing Committee.

In this paper I will not attempt to cover the whole of this lengthy bill, but will focus on what I see as the key elements relating to “shared parenting”.

2. BACKGROUND

Steps to legislation

This legislation had been much foreshadowed. In 2001 we had seen the ‘Pathways’ Report, which was referred to in the Terms of Reference² of the Parliamentary Committee of 2003, and which considerably influenced that Committee. Many of the themes of the Pathways Report are echoed in the Parliamentary Report. The Pathways Advisory Group had found, among other things, that there was not enough “emphasis on agreement and ongoing parenting, or guidance to make agreement easier, and not enough

focus on the best interests of the children, or on child-inclusive practices in services”. There was too much “unnecessary litigation”; and “adversarial behaviour”; and public and private costs were too high.

The immediate history involved the following steps:

- On 29 December 2003 the House of Representatives Standing Committee on Family and Community Affairs published the report, of its inquiry into what was astonishingly called “Child Custody”,³ entitled ‘*Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation*’. I will call this “the 2003 Report”.
- On 29 July 2004 the Government announced its reform proposals following the publication of the Report. They are contained in a two page Press Release from the Prime Minister, and a supporting and more extensive ‘Framework Statement’
- On 10 November 2004, the Government released the Discussion Paper, *A New Family Law System: Implementation of Reforms*. That paper indicated the approach the Government was proposing to take, and invited comment on some aspects.
- On 23 June 2005 the Government released the exposure draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005. There are two supporting documents that accompany the bill: the Explanatory Statement, and the most recent statement of the Government’s policies,⁴ which I will for convenience call the “Government Response”.⁵

Public pressure

The sort of public pressure that appears to have led to the 1995 amendments was very much in evidence at the time of the “joint custody” inquiry. An editorial in *The Age* said: ‘The Prime Minister initiated the review of family law in response to the anger of fathers who felt disadvantaged by the present system’.⁶ Press reports had indicated that fathers’ contact with their children after divorce had ‘become a hot-button political issue -

particularly in key seats’, and politicians on both sides had described ‘custody complaints’ as the most common and heated of those raised by their constituents.

The 2003 Committee Report and the Government’s response

The Committee’s terms of reference particularly focused on “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”. But the Committee made far-reaching recommendations about the law and a new process for dealing with parenting disputes. The main recommendations, for present purposes, were in three main areas.

Shared parenting

The first area related to ‘shared parenting’ in its various meanings. The Report rejected a presumption that children should spend equal time with each parent, but embraced shared parenting in other respects. It is worth recalling the reasons the 2003 Committee gave for resisting much pressure to recommend an “equal time” presumption:

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 the equal time will all will not work.*
- 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.*

The Committee went on to point to the dangers of a ‘one size fits all’ approach to the diversity of family situations and the changing needs of children. It also pointed to the ‘many practical hurdles for the majority of families to have to overcome if they are to equally share residence of children’. It referred to the facts that support successful equal

sharing, ‘such as cooperative relationships, geographical proximity, prior sharing of parental care, good communication, agreement about matters relevant in the child’s day-to-day care, parental commitment to the arrangement and a focus on the child’s interests’. It said that the more of these characteristics existed, the more likely it would be that shared arrangement would be workable and positive for the child.

Thus, the Committee did not recommend a presumption of equal time. However, it did use the language of presumptions, in relation to the different concept of shared parenting, apparently meaning shared responsibility for decision making. Here are the key recommendations on this topic:

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 decisionmaking.

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.

These recommendations were accepted by the Government, and since then much effort has gone into drafting something that would give effect to these recommendations. It has been an agonisingly difficult task, and is not yet completed. I think these recommendations are a crucial part of the background to the 2005 bill (which is of course why I have set them out).

Process

The second area relates to the *process* of dealing with post-separation parenting. The Report recommended various changes, notably the creation of a new body, the Families Tribunal, to resolve most parenting disputes.

In my view, this was by far the weakest part of the Report, perhaps because it was outside the Terms of Reference and most of those who originally made submissions would not have had a chance to address the issue. The case made for having a Tribunal rested very largely on a remarkably strong criticism of lawyers. But it is naïve to identify adversarial

behaviour with the availability of lawyers: I have often seen the most extreme forms of adversarial behaviour in *unrepresented* parties. The argument failed to come to grips with the problems people would have in presenting their cases without legal assistance, and failed to identify any real benefits that would flow from creating a new decision-making body, consisting of a panel of three, to handle most of the cases that come to the Family Court and the Federal Magistrates Court.

In the event, the Families Tribunal proposal did not find favour with the Government. However the emphasis on process was taken up, and is now reflected in legislation that will implement the approach of the Family Court's *Children Case Project*.

Counselling and mediation services

The third relates to counselling and mediation services. The Report recommended a single entry point for each separating family, where they would find expert assistance; these points were to be attached to a new Government agency, or existing ones.

These recommendations were adopted, and are being implemented; except that the agencies are to be located in the private sector. However this part of the new developments will not be considered in this paper.

3. THE STATED PURPOSES OF THE 2005 BILL

General

The history I have sketched is important in understanding what the bill is supposed to achieve. It is necessary now to quote the Government's own statements, in the "Government Response" to the 2003 Report, published in June 2005. The opening sentences are:

The Australian Government recognises the impact of family breakdown on Australian families, as well as the wider community. There is too much long term conflict and too many children growing up without the involvement of both their parents in their lives.

The Government has responded, we are told,

...with the biggest investment in the family law system ever and the most significant changes to family law in 30 years. In doing so the Government has adopted the great majority of the committee's recommendations, in full or in part.

The Government agrees a new approach to the family law system is needed – one that helps prevent separation and, where separation does occur, helps parents agree on what is best for their children rather than fighting in the courtroom.

Of course, family lawyers know perfectly well that these have been the central objectives of the law since 1975, if not before, but the rhetoric of family law change always seems to suggest that they are new discoveries.

But the recent developments are not just more of the same. There are, perhaps, three new elements: the new provisions to encourage shared parenting (the subject of this paper), the substantial investment in new services, and the new provisions governing procedure in children's cases. Although the third aspect is outside the scope of this paper, because of its importance I have added an Appendix giving an overview of the legal provisions.

The Government's summary of the legal changes is as follows:

Changes to the Family Law Act 1975 will recognise the importance of children having the opportunity for both parents having a meaningful involvement in their lives and will include a new presumption of joint parental responsibility, except in cases involving child abuse or violence. Other changes will:

- *require parents to attend dispute resolution, such as mediation, before taking a parenting matter to court (with exceptions including child abuse or violence);*
- *require the courts to consider substantial sharing of parenting time in appropriate cases;*
- *encourage parents to consider substantially sharing parenting time when developing parenting plans outside the courts; and*
- *better recognise the interests of the child in spending time with grandparents and other relatives.*

The changes to the law will emphasise the best interests of the child.

When deciding the best interests of a child, the primary factors that the court must consider will be the benefit to the child of having a meaningful relationship with both parents and the need to protect the child from physical or psychological harm. Among other factors to be considered will be the capacity of each parent to provide for the needs of the child and the willingness and ability of each parent to facilitate a continuing relationship between the child and the other parent.

The Government recognises the important role grandparents and other extended family members play in children's lives. In addition to legal changes, the Government will be providing resources to legal aid commissions to facilitate the involvement of

grandparents or other extended family members in family conferencing. Family conferencing is a form of mediation which includes family members, rather than just the parents, in the dispute resolution process. Staff of Family Relationship Centres will also be trained in family conferencing.

Breaches of court orders are a major source of conflict and distress. The Family Relationship Centres will have an important role to play in helping parents to resolve such issues outside the courts. The expansion of the Contact Orders Program will also help where entrenched conflict has led to a breakdown in contact between a parent and child. However the Government recognises that in some cases the court needs to take firm action to deal with breaches. The Government proposes to strengthen the enforcement provisions in the Act. New provisions will include:

- a requirement that the court consider ‘make up’ contact (such as another weekend) where contact has been missed through a breach of an order;*
- a power to award compensation for reasonable expenses incurred by a party (such as airfares wasted or other tickets purchased but not used);*
- where there has been a series of breaches or a serious disregard of court orders, a presumption that legal costs will be awarded against the party who has breached the order, unless it is not in the best interests of the child; and*
- a discretion to impose a bond for all breaches of orders.*

Adversarial processes tend to escalate and prolong conflict. As part of this response, the Government intends to reduce the adversarial nature of court processes for parenting matters. The Government has also asked the Family Court of Australia and the Federal Magistrates Court to establish a combined registry for family law matters. The two courts are working together to implement this reform.

The Government has heard the community concerns about the need to ensure the reforms do not increase the risk of violence or child abuse. These concerns have been taken into account in the drafting of the amendments to the Act. Moreover, screening for violence and child abuse will be a very important role of the Family Relationship Centres. The centres will be able to provide information and advice to victims of family violence about their options and about support services available, and will help them to access those services.

Six “shared parenting” components

As already indicated, I do not propose to cover all these aspects but only those that seem to be most important in relation to the ideal of shared parenting. The provisions attempt to ensure that both parents remain involved with their children after separation, and that they do so in a co-operative way. I want to examine six specific measures that are to be found in the bill:

1. The new version of s 60B

2. The proposed two-tier structure of s 68F
3. The requirement that the court consider substantial time with each parent
4. The requirement that parents agree on serious matters
5. Compulsory counselling before litigation
6. Parenting plans overriding court orders

4. THE NEW VERSION OF S 60B

The present s 60B is as follows:

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.*

The proposed new version of s 60B is as follows (I have emphasised the more important of the new bits):

60B Objects of Part and principles underlying it

- (1) *The objects of this Part are:*
 - (a) *to ensure that children receive adequate and proper parenting to help them achieve their full potential; and*

- (b) *to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children; and*
 - (c) ***to ensure that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child.***
- (2) *The principles underlying these objects are:*
- (a) *except when it is or would be contrary to a child's best interests:*
 - (i) *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*
 - (ii) ***children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development; and***
 - (iii) *parents jointly share duties and responsibilities concerning the care, welfare and development of their children; and*
 - (iv) *parents should agree about the future parenting of their children; and*
 - (v) ***children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture); and***
 - (b) *children need to be protected from physical or psychological harm caused, or that may be caused, by:*
 - (i) *being subjected or exposed to abuse or family violence or other behaviour; or*
 - (ii) *being directly or indirectly exposed to abuse or family violence or other behaviour that is directed towards, or may affect, another person.*
- (3) *For the purposes of subparagraph (2)(a)(v), an Aboriginal child's or Torres Strait Islander child's right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right:*
- (a) *to maintain a connection with that culture; and*
 - (b) *to have the support, opportunity and encouragement necessary:*
 - (i) *to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and*
 - (ii) *to develop a positive appreciation of that culture.*

The Standing Committee's view

The Standing Committee's recommended that the objects set out in proposed subsection 60B(1) of Part VII be amended to "make more explicit reference to the need for consistency and the paramountcy of the best interests of the child".⁷ This reflects the Standing Committee's "concern that the best interest principle is not clearly stated in the objects provision of Part VII", and draws on submissions by the Family Court's submission, the Family Law Section, and the Attorney-General's Department.⁸ The Standing Committee also recommended that paragraph (b) of proposed subsection 60B(2) be amended to provide that children need to be protected from physical or psychological harm from exposure to abuse, neglect or family violence, and that this should become an object of Part VII rather than a principle.⁹

Comments on s 60B

The origin of some of the bill's changes to s 60B is fairly clear. Paragraphs (1)(c) and (2)(a)(ii) reflect the politics of the shared parenting debates. Having accepted the 2003 Committee's sensible view that an equal time presumption was inappropriate, and thereby disappointing those who were pressing for that change, the Government has obviously decided to insert provisions that reinforce shared parenting in other ways.

This must have posed a problem for the drafters of the new s 60B, since it was hard to see how that section could stress shared parenting more than it already does. One can understand why politically it was felt necessary to "strengthen" the shared parenting theme of s 60B, but it seems to me that paragraph (c) hardly does more than state the logical consequence of paragraphs (a) and (b), and paragraph (a)(ii) is an elaboration of the existing "right of contact" provisions.

On the other hand, the origin of the new provision about children's rights to enjoy their culture is not obvious, at least to me. The various "shared parenting" provisions reflect the public debate and the Government's response. I am not aware of any public criticism to the effect that the law undervalues children's cultural rights, or any deficiency in the reference to these things in s 68F. Thus I do not know why it was thought necessary to add the new provisions about culture to the increasingly over-burdened s 60B.

It seems inevitable that every time anyone looks at the Act, they want to add something to s 60B. This pattern can be seen in the Standing Committee's discussion. The Committee understood the paradoxical feature of the bill, namely that what seems to be the fundamental proposition, that the child's best interests are paramount, does not even get a mention in the high-profile s 60B. So it is natural enough to propose, as the Family Court did in its submission, that this fundamental principle should find a place, indeed an honoured place, in s 60B.

My own view, however, is that while this proposal has a lot of merit considered in isolation, it is a superficial response to an underlying problem of drafting. I think that the whole process of trying to express principles, and degrees of importance, has gone awry, and it is necessary, as a matter of drafting, to make a fresh start. I will return to this theme later, but I will introduce it here, since the problem is well illustrated by s 60B

The amendments appear to be based on some view that s 60B was insufficiently clear, or insufficiently elaborate. But this was never the problem. The problem with s 60B is that Court must treat the child's interests as paramount (s 65E), and that requires taking everything into consideration. All this was explained at great length in *B and B: Family Law Reform Act 1995*.¹⁰ Against that background, it seems unlikely that the proposed amendments to s 60B will do more than remind us of things that we should know already, and which are anyway (in my view) already crystal clear in the Act.

Consider, for example, whether the proposed s 60B would make a difference to the results in relocation cases. It might be thought that it would make relocation more difficult. However, look at the *existing* s 60B(2)(b): strong stuff, whose introduction was much more dramatic than the wordier variations wrought by the new proposals. But the Full Court said in *B and B*, in substance, that this sort of provision does not lead to major change so long as the child's best interests remain the paramount consideration.¹¹ That view, I think, remains applicable.

I don't think it can be said that this interpretation fails to accept the will of parliament. There is a huge international debate about what legal principles should govern relocation cases. So far as I know, the current round of changes is not based on any criticism of

actual relocation decisions, and it's not at all clear to me, as an observer, that those involved in the changes actually would wish the court to refuse permission to relocate in circumstances in which it now gives such permission.¹² As I suggest in the conclusions, if the legislature really wants to change *outcomes* in relocation cases or other types of cases, it will need to identify for itself just what it wants to achieve, and then tackle the serious drafting problems involved.

5. THE PROPOSED TWO-TIER STRUCTURE OF S 68F

Introduction

The proposed amendments to s 68F would create a two-tiered structure, of “primary” and merely “additional” considerations. The primary ones may be thought of as shared parenting, and protection from ill-treatment. This contrasts with the existing form of s 68F, which, as you know, simply says that in determining what is in the child's best interests, the court must consider the list of matters set out in subsection.

The proposed s 68F is, in part, like this (you can see the changes in this version: the new bits are in bold):

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 subsections (1A) **and** (2).*

(1A) *The primary considerations are:*

(a) *the benefit to the child of having a meaningful relationship with both of the child's parents; and*

(b) *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.*

(2) *~~The court must consider~~ Additional considerations are:*

- (a) *any ~~wishes~~ **views** 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~~ **views**;*
- (b) *the nature of the relationship of the child with each of the child's parents and with other persons (**including any grandparent or other relative of the child**);*
- (ba) *the willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent;*
- (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 (**including any grandparent or other relative of the child**), with whom he or she has been living;*
- (d) *the practical difficulty and expense of a child ~~having contact~~ **spending time with and communicating** 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 (**including any grandparent or other relative of the child**), to provide for the needs of the child, including emotional and intellectual needs;...*

The Standing Committee's consideration

The Standing Committee found that the proposed two-tier structure of s 68F was controversial. It noted concerns "that the two tiers may conflict with each other and about how a hierarchy would operate",¹³ and that it would cause confusion.

The case for the two-tier structure was made primarily by the Department:

The government believes that elevating the two considerations to become the primary factors will lead to clearer decisions by the courts, based principally on these considerations.

The intention of separating these factors into two tiers is to elevate the importance of the primary factors and to better direct the court's attention to the revised objects of Part VII of the Family Law Act 1975. The government considers it important to link the objectives of Part VII into operative provisions. This will lead to a more consistent focus on the court achieving the key elements of the objects of Part VII.

The elevation of these considerations, particularly that relating to ensuring a meaningful ongoing relationship between parents and children, is consistent with the proposal to introduce a presumption in favour of joint parental responsibility.

This change will almost certainly have an impact on how cases are decided. For example, it is likely that the outcome in relocation cases will be affected as there will now be more importance placed upon the ongoing relationship with both parents than there has been in the past.¹⁴ ...

...what we would say is that it is not unusual for the court to have to weigh various factors and to give some greater priority than others. It is something it does all the time. The government's view is that the particular two factors that are mentioned as primary factors are indeed the factors that the court should give most weight to – and that is the intention. ...

Where both considerations apply to a particular matter, the government anticipates that the court will then give consideration to the additional factors in subsection 68F(2) in order to determine what is in a child's best interest. For example, the willingness and ability of a parent to facilitate a close and continuing relationship between the child and the other parent or any views that may be expressed by the child.

Having reviewed the arguments, the Standing Committee decided to support the two-tier structure, saying that “the primary factors do draw appropriate attention to the objects provisions in a positive way and will assist to focus the attention of the court to those objects particularly in relocation cases.”

Comments

Would the two-tier structure of s 68F be desirable? I think not.

Not soundly based?

The two-tiered provision conveys a view about what is important for children. The view is that what they mainly need is “having a meaningful relationship with both of the child's parents”, and protection from abuse and ill-treatment; other things might be relevant, but are of lesser importance. I want to raise the rather fundamental question whether this hierarchy is soundly based.

Of course children are ordinarily better off having a good relationship with their parents, and not being abused and ill-treated, just as they are ordinarily better off having enough to eat, a roof over their heads, educational opportunities, and so on. But I don't know of any evidence or research that indicates that the two things identified by the bill as

“primary” are always or inherently more important for children than other things. Rather than reflecting some coherent view about children and their needs, the formulation seems to reflect something quite different, namely a political desire to be even-handed between the two opposing adult views or concerns that have pervaded the public debate: the men’s concerns to stay involved with the children, and the women’s concerns that this may expose the children to violence. I would have hoped that the Parliament would be able to go beyond these familiar battle lines and really try to focus on the children’s interests.

Secondly, I think that the two components of the “primary” matters, (a) and (b), are of a different order. The second, (b), can be seen as a way of stating children’s rights to bodily integrity, or physical safety, something that is based on their needs. But the first, (a), is quite different. If it spoke of children’s needs for nurturing, or love, or something like that, it would be comparable to (b): a different but equally important fundamental need. But it is not about this; it is about a relationship *with parents*.

I think the difference is subtle, but extremely important. In most cases, parents provide the essential love and nurturing the child needs, and so we can speak of the child’s need for *parenting*, a word that works well when the parents are the ones providing the love and nurturing. A relationship with parents is also important for other reasons, I think. For all sorts of reasons I won’t digress to explore, it matters to children to have a good relationship with their parents; in some ways, getting love and nurturing from others is not the same, especially if the children are troubled by knowing that the parent is alive, but not in contact.

Child development theory provides a famous analogy, namely Bowlby’s use of the phrase “maternal deprivation”. This runs together various matters, including what I have called love and nurturing, and the specific relationship with a biological mother. But in some circumstances, these things don’t go together. Thus, as later research was to show, children who are separated from a mother by the mother’s *death* may not suffer from the package of things that “maternal deprivation” involved (Bowlby focused particularly on children who were put into institutional care). And children also have important attachments to other people, such as fathers. And research on adoption shows that

children adopted as babies generally develop very well, although some of them, when adult, want very much to trace their biological mother and other relatives.

So it seems to me that children have a need for two things: nurturing (from somebody), and a relationship with people they identify as their *parents*. The conceptual difference between the two is important in situations where the child's need for love and nurturing is not going to be met by a parent, but could be met by someone else, for example a grandparent, as where the parent is unable to provide love and nurturing because of illness, addiction, or other circumstances. Such situations are no doubt uncommon in general, although unfortunately they are fairly common in cases that go to trial in the Family Court.

Now let us return to paragraphs (a) and (b) of the "first tier". Paragraph (b) is not a problem: children need, among other things, protection from abuse and harm, by anyone.

But paragraph (a) is a problem. Children's needs for what I have called love and nurturing can be found in s 68F, eg in paragraph (e), but they are relegated to the category of "other".¹⁵ Thus, the two-tier formulation, as drafted in the bill, says that the child's need for a meaningful relationship with both parents is inherently more important (because it is in the first tier) than the child's needs for nurturing and love.

This seems to me quite wrong. In these sad and difficult cases where circumstances compromise a parent's ability to provide for the children's needs, the system should be trying to work out ways of accommodating two things (among many others): the child's need for a good relationship with both parents (itself a complex and many-faceted need) and the child's need for nurturing and love - adequate *parenting*. I can see no proper basis for saying that meeting a child's need for a relationship with a parent is somehow inherently more important than meeting other developmental needs of the child.

Let me be specific. Take a case where a father suffers from mental ill-health. When with the child for contact as a contact centre, he is unable to relate warmly or responsively to the child, and instead tends to criticise the child and the other parent, and to focus on his own needs for vindication rather than respond to the child. The child gets upset with the

contact visits and wants them to cease. This is a difficult and sad case, because - to put it one way - there is a choice to be made between the child's need for nurturing and the child's needs to have a relationship with the father. The answer will depend on a careful assessment of the whole situation; and under the law, ultimately the decision-maker will have to work out what is best for the child (the "paramount consideration" principle). I think it is profoundly misguided to suggest that the solution to this difficult case will be found by the legislature saying that the court should give more importance to the child's need for a relationship with the father than for the child's needs for love and nurture.

So, I have a fundamental reservation about the two-tier structure, namely that I do not think there is a sound basis for the elevation of those two factors above others in working out what might be best for a particular child.

Not necessary

It is not clear that there is a need for the two-tier approach in s 68F. The two matters emphasised in tier one, namely the child's need for parents and the child's need for protection from ill-treatment, are both already given a great deal of emphasis elsewhere in the Act (eg ss 43, 60B, 68F, 68K), and it is difficult to see what practical benefit would be achieved by re-stating them in this fashion. I can't see, therefore, what gains might be achieved by the two-tier proposal.

Downgrading the importance of children's views

The report "Every Picture Tells a Story" emphasises the importance of attending to children's views. Recommendation 13 was

"that all the 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".

Elsewhere, too, the Committee emphasised this matter: for example, the title of the Report refers to children's drawings, and Recommendation 7 refers to including "the perspective and needs of children" in decision-making. This theme appears to be reflected in the Exposure Draft's proposed change from children's "wishes" to children's "views".

The proposed amendment to s 68F appears to be contrary to these developments. The relegation of the views of children to a mere “additional consideration”, seems to suggest that that they would commonly be outweighed by one of the “primary” considerations. For example, in a case where a child wishes to have contact with a parent, notwithstanding some violent incident, the proposed change to s 68F would appear to mean that the child’s views should be given less weight. In short, the proposed draft seems to be demoting the views of children to a status of lesser importance than they presently have in the structure of the Act. I can see nothing in the background documents to indicate that this was intended, and it appears contrary to the approach of the Committee, whose Report implies, I believe, that the views of children would have no less standing than other considerations.

Additional complexity and possible confusion

It seems likely that there will be different interpretations of the significance of the two tiers. It might be argued, for example, that any primary consideration must necessarily outweigh any additional consideration: anything in tier one must “trump” anything in tier two. It might be argued that if the court has to compare a situation that involves a risk of failure to care adequately for a child against one that involves a risk of physical harm — for example, where one parent lives in a less safe suburb than another — the risk of physical harm must be given more weight, regardless of the relative likelihood, and the relative seriousness, of the two factors.

Such an interpretation could obviously have capricious results, and was presumably not intended. But what *was* intended? Under the new two-tier system, how is the Court to go about the process of weighing up cases that involve competing factors involving both tiers (which will be required in virtually every case)? Do the “primary” considerations automatically have more weight than the “additional” ones?

If so, how much? Suppose a child is bored when with her father, and wants to undertake extra swimming or Arabic language classes, with a small reduction of time with her father. Under the existing law, the court has to weigh up the pros and cons, giving each factor whatever weight seems appropriate in all the circumstances. Under the proposed

two-tier system, is the court to attach less weight to the child's wishes (now only an "additional" consideration) than it would otherwise do? Or would the court give some extra weight to the Arabic classes, because of the new s 60B(2)(a)(v)? If a child's grandparent came from France, would French lessons get an extra tick? Will someone argue that for a child from a famous footballing family, extra football practice could come within s 60B(2)(a)(v)?

One can imagine an undignified scramble for legislative pegs on which to hang arguments, with parties eager to find factors that will gain some enhancement from being included to as "primary" consideration in s 68F, or being a child's "right" in s 60B, or something of the kind. The task of presenting a case, it seems, will involve identifying the relevant factors and trying to place them in the hierarchy of importance. If so, however well-intentioned the proposed amendments might be, there seems to be a danger that they may create additional complexity and perhaps confusion, and encourage complex legal argument and appeals.

Conclusion

I can see little merit in the two-tier approach to s 68F. I do not think it is soundly based in children's needs. It is difficult to see what benefits it could have. And it may have adverse consequences, notably by causing confusion and unhelpful legal complexity, and downgrading some important principles, such as respecting children's views. I see the two-tier approach to s 68F as essentially misguided, and likely to frustrate rather than advance the stated objectives of this legislation.

6. THE REQUIREMENT THAT THE COURT CONSIDER SUBSTANTIAL TIME WITH EACH PARENT

The bill reflects the 2003 Committee's views in 2003 about the much-publicised proposal that there should be a presumption that children should spend equal time with both parents. In short, as indicated earlier, the Committee thought that such a presumption was not a good idea, but that the possible benefits of such an arrangement should not be overlooked.

So here is the bill's provision, the legislative version of that idea:

65DAA Court to consider child spending substantial time with each parent in certain circumstances

(1) If:

(a) a parenting order provides (or is to provide) that a child's parents are to have parental responsibility for the child jointly; and

(b) both parents wish to spend substantial time with the child;

the court must consider making an order to provide (or including provision in the order) for the child to spend substantial time with each of the parents.

Note: The effect of section 65E is that in deciding whether to go on to make a parenting order for the child to spend substantial time with each of the parents, the court will regard the best interests of the child as the paramount consideration.

(2) Subsection (1) does not apply if it is not reasonably practicable for the child to spend substantial time with each of the parents.

The Standing Committee's view

The Standing Committee considered the matter in some detail. Its conclusions were:

2.56 *The Committee has sympathy with the submissions and witnesses who expressed concern that the substantial time provisions may not operate to facilitate shared parenting. The Committee does not consider that a requirement to consider 'substantial' time adequately implements the recommendations of the FCAC report which was accepted in principle by the Government.*

2.57. *Accordingly the Committee recommends that section 65DAA be amended to provide that the court shall, in making parenting orders in situations where there is equal shared parental responsibility, consider whether equal time with both parents is in the best interests of the child and reasonably practicable.*

2.58 *The Committee does not consider that this recommendation reopens the debate on a rebuttable presumption of 50/50 custody, which was rejected by the FCAC Committee. The term 'custody' encompasses both parental responsibility and time. If this recommendation is implemented the Bill will provide a rebuttable presumption about equal shared parental responsibility (or decision making) and, if that applies, a requirement then to consider whether equal time is in the best interests of the child and reasonably practicable.*

Accordingly, the Standing Committee recommended:¹⁶

The Committee recommends that section 65DAA be amended to provide that the court shall, in making parenting orders in situations where there is equally shared parental responsibility, consider whether equal time with both parents is in the best interests of the child and reasonably practicable.

Comments

In my view, the legislature is entitled to reach and act on the view that the family law system has not given sufficient attention to the benefits that many children will gain through spending substantial time with both parents. Unfortunately, in my view on this and many other matters the present draft makes life unnecessarily complicated, and undermines the effectiveness of the amendment, by choosing clumsy and distracting methods of conveying a simple and sensible idea.

It is possible that a somewhat simpler version of this provision will appear in the next draft bill. But I would suggest a much simpler approach. We already have a list of things the court has to consider: s 68F. We could add to the list:

“whether the child would benefit by spending substantial [or “equal”, if the Standing Committee’s views are to be adopted] time with each parent”

I can see nothing in s 65DAA that is lost by this simple amendment. There is no need to say anything about whether it is practicable or not: this would inevitably be considered.

7. THE REQUIREMENT ON PARENTS TO AGREE ON SERIOUS MATTERS

Section 65DAC is entitled “Effect of parenting order that provides for joint parental responsibility”. It applies

... if, under a parenting order:

- (a) 2 or more persons are to have parental responsibility, or a component of parental responsibility, for a child jointly; and*
- (b) the exercise of parental responsibility, or that component of parental responsibility, involves making a decision about **a major long-term issue** in relation to the child.*

The substance of the provision states what such an order requires:

- (2) The order is taken to require the decision to be made jointly by those persons.*

Note: Subject to any court orders, decisions about issues that are not major long-term issues are made by the person with whom the child is spending time without a need to consult the other person (see section 65DAE).

- (3) *The order is taken to require each of those persons:*
- (a) *to consult the other person in relation to the decision to be made about that issue; and*
 - (b) *to make a genuine effort to come to a joint decision about that issue.*
- (4) *To avoid doubt, this section does not require any other person to establish, before acting on a decision about the child communicated by one of those persons, that the decision has been made jointly.*

Sharp lawyers will want to know the meaning of “major long-term issue” (which I have emphasised above). Here it is:

60D(1) ... major long-term issues, in relation to a child, means issues about the care, welfare and development of the child of a long-term nature and includes (but is not limited to) issues of that nature about:

- (a) *the child’s education (both current and future); and*
- (b) *the child’s religious and cultural upbringing; and*
- (c) *the child’s health; and*
- (d) *the child’s name; and*
- (e) *significant changes to the child’s living arrangements.*

Sub-section (2) is absurd.¹⁷ Orders create enforceable obligations on those subject to them. It is absurd to create an enforceable obligation on a person which the person cannot perform. Neither parent can perform the obligation to agree, unless they happen to take the same view, or one gives in to the other. It is therefore unjust to make it an obligation on parents to do so.

The other obligation, to consult (sub-s (3), is not at all absurd. On the contrary, as a general principle it is right and proper, and in children’s interests, that parents consult. Similarly, the legislature is entitled to take the view that failure to consult should attract sanctions for breach of the order for joint parental responsibility. If compliance

proceedings are brought, the parent who failed to consult can defend himself or herself by saying there was a reasonable excuse. Fair enough.¹⁸

The scope of the topics on which parents must consult is rather large. Attention has focussed particularly on paragraph (e), “significant changes to the child’s living arrangements”. That would obviously include a decision to relocate, and was intended to do so. It would also include, I suppose, a decision that the parent’s new partner, or a grandparent, should move into the parent’s home. Since such decisions could easily have a serious impact on the children, the requirement to consult can be defended. It is not entirely clear whether the wide scope of paragraph (e) was appreciated, however. The Explanatory Statement somewhat blandly states:

This will include any substantial changes to the type and location of the residence in which the child usually lives. This last factor is not intended to cover situations where the child relocates to another residence within the same locality unless this produces a significant change.

The Standing Committee’s view

The Standing Committee was persuaded that the bill went a bit too far. Adopting a suggestion from the Family Law Council, it recommended that paragraph (e) of the definition of “major long term issues”, be amended to ‘*changes to the child’s living arrangements that make it significantly more difficult for a child to spend time with a parent*’ and that a note be added to this provision to make it clear that major long term issues do not include decisions that parents make about their new partners.¹⁹

8. COMPULSORY COUNSELLING BEFORE LITIGATION

Section 60I states that its object is

“to ensure that all persons who have a dispute about matters that may be dealt with by an order under this Part (a Part VII order) attempt to resolve that dispute by family dispute resolution before the Part VII order is applied for”.

In Phase 1, ie until June 2007, this is to be implemented by making the Family Law Rules applicable. The rules directly apply, of course, to the Family Court, and by force of subsection (3), the dispute resolution provisions of the *Family Law Rules 2004* will apply,

“with such modifications as are necessary”, to applications for parenting orders to courts other than the Family Court of Australia.

It follows that we won’t have to deal with the new provisions for a little while. In those circumstances, I won’t go into a lot of detail.

The essence of the new regime is, to quote sub-section (7), that “a court exercising jurisdiction under this Act must not hear an application for a Part VII order in relation to a child” unless the applicant files a certificate by a family dispute resolution practitioner. The certificate must be to the effect that the applicant and the other party have attended family dispute resolution with the family dispute resolution practitioner; or that the applicant did not attend, but his or her failure to do so “was due to the refusal, or the failure, of the other party or parties to the proceedings to attend”.

There are then a string of exceptions. Curiously (but typically), these are expressed by saying that the subsection “does not apply” in particular situations, rather than saying, for example, that in such situations the court can hear the application, or that it may grant leave for the application to proceed, or something of the sort.

One exception is simple: applications for consent orders. But the others are quite tricky:

(8) Subsection (7) does not apply to an application for a Part VII order in relation to a child if:

- (a) the applicant is applying for the order:*
 - (i) to be made with the consent of all the parties to the proceedings; or*
 - (ii) in response to an application that another party to the proceedings has made for a Part VII order; or*
- (b) the court is satisfied that there are reasonable grounds to believe that:*
 - (i) there has been abuse of the child by one of the parties to the proceedings; or*
 - (ii) there would be a risk of abuse of the child if there were to be a delay in applying for the order; or*
 - (iii) there has been family violence by one of the parties to the proceedings; or*

- (iv) *there is a risk of family violence by one of the parties to the proceedings; or*
- (c) *all the following conditions are satisfied:*
 - (i) *the application is made in relation to a particular issue;*
 - (ii) *a Part VII order has been made in relation to that issue within the 6 months before the application is made;*
 - (iii) *the application is made in relation to a contravention of the order by a person;*
 - (iv) *the person has behaved in a way that showed a serious disregard for his or her obligations under the order; or*
- (d) *the application is made in circumstances of urgency; or*
- (e) *one or more of the parties to the proceedings is unable to participate effectively in family dispute resolution (whether because of an incapacity of some kind, physical remoteness from dispute resolution services or for some other reason); or*
- (f) *other circumstances specified in the regulations are satisfied.*

The Standing Committee's views

This well-intentioned proposal may work out well, but raises numerous difficulties. The Standing Committee engaged in a detailed discussion of these provisions, and I will only note its conclusions. The recommendations were

21. (a) *The exception to attendance at dispute resolution on the basis of family violence and child abuse in proposed paragraph 60I(8)(b) be permitted upon the swearing and filing of an affidavit asserting the existence of family violence or child abuse; and*
 - (b) *the provision that contains this exception expressly state the penalties to be applied if the court is satisfied on reasonable grounds that a false allegation was knowingly made in the above affidavit.*
22. *The Committee recommends that the time limit in proposed paragraph 60I(8)(c) be removed so that all cases involving serious disregard for court orders are exempted from compulsory attendance at dispute resolution under proposed subsection 60I(7).*
23. *The Committee recommends that proposed paragraph 60I(8)(c) be amended to provide that the court be satisfied on reasonable grounds that a person has showed serious disregard for his or her obligations under the order.*
24. *The Committee recommends that proposed section 60J be redrafted to provide that the Rules of Court will contain a provision requiring an applicant to file, in the preliminary stage of a proceeding, a certificate by a family counsellor or family*

dispute resolution practitioner to the effect that the family counsellor or family dispute resolution practitioner has given the applicant information about the issue or issues relating to the orders sought by the applicant.

25. *The Committee recommends that the government amend the commencement provisions contained in the scheme for implementation of Phases 2 and 3 in proposed section 60I by replacing references to time with references to outcomes, in particular that:*

- *Phase 2 is to commence once 40 Family Relationship Centres are operational; and*
- *Phase 3 is to commence after all 65 Family Relationship Centres are operational.*

Many submissions pointed out an important practical problem, namely that under this approach the court may have to conduct a separate preliminary hearing to see if the facts exist to support the exception relied on.²⁰ This would be an additional drain on the courts' resources, and paradoxically, could increase litigation. However the Committee believed that its recommendation to make the exception in cases of family violence and child abuse available upon the filing of a sworn statement would significantly reduce the likelihood of a major increase in litigation flowing from proposed section 60I.²¹ Let's hope so.

The problem of getting the frisky horses of litigation to drink at the limpid waters of counselling has always been difficult, and the success of the approach in the Exposure Draft remains to be seen.

9. PARENTING PLANS OVERRIDING ORDERS S 64D²²

Section 64D provides as follows:

64D Parenting orders subject to later parenting plans

Unless the court determines otherwise, a parenting order in relation to a child is taken to include a provision that the order is subject to a parenting plan that is:

- (a) entered into subsequently by the child's parents; and*

(b) agreed to, in writing, by any other person (other than the child) to whom the parenting order applies.

The effect of this is that normally a parenting order will be in effect suspended to the extent that it is inconsistent with a later parenting plan.

The Explanatory Statement sets out the reasoning behind this provision:

This provision recognises that the party's circumstances may change and encourages parents to agree on new arrangements in a parenting plan, rather than return to court. Where the subsequent parenting plan affects third parties other than the parents, the agreement in writing of those parties will be required.

In addition, in Schedule 2 where the court does not include this provision in a parenting order and there is a contravention, the court will be required to consider the subsequent parenting plan when considering whether to vary the parenting order.

These provisions will allow maximum flexibility for parties to come to an agreement, even where there is a parenting order in force and will give parenting plans increased legal status.

The proposed s 64D addresses a common problem. As circumstances change, parenting orders become unworkable in particular respects. For example, a parenting order might provide that contact should occur at a grandparent's home. The grandparent becomes ill, and the parties agree that contact should occur somewhere else, eg at an aunt's home. It would be possible for the parties to obtain a consent order making the necessary variation, but this would take time and money, and, where there is no dispute, the parties may simply adopt the new practice and leave the order alone.

The new practice is not in accordance with the court order. Does this matter? Only, I think, if someone wants to enforce the order. There are two possibilities. One is that a party will bring contravention proceedings complaining that the other did not comply with the order, by not taking the child to the grandparent's home. However once the respondent proves the changed circumstances and the changed arrangements, it would be apparent that the respondent would have a "reasonable excuse" for not providing contact at the grandparent's house. The contravention application would clearly be hopeless, possibly mischievous, and the court would no doubt make a costs order in favour of the respondent.

The second possibility is that a party wants to enforce the new arrangements, for the handover to be at the aunt's home. They can't, because the order does not require this. (The situation would be the same whether or not the new practice was contained in a parenting agreement, since parenting agreements can no longer be registered.) So they will need to get a new order embodying the current practice, or, perhaps, expressing the obligations relating to contact without specifying the location. The court could do this in the context of a contravention application: s 70NG(1)(ba) and (c). In the simple example given, the court would obviously do so.

Although in my view the problem presented under the existing law is not a serious one, one can see why the Government might have thought it desirable to make the law more obviously accommodating to post-order adjustments. The Government wants to encourage "parenting plans", and the proposed s 64D is an understandable measure.

The Standing Committee's views

There were various criticisms of this provision. The Family Court's submission pointed to some drafting problems and also to the difficulty that because of its paradoxical nature - a parenting plan that does not itself create legal obligations is capable of overriding a court order that does so - the approach of s 64D could lead to confusion.

The Standing Committee reviewed the submissions and concluded:

- 3.243 *The Committee is concerned that the operation of proposed section 64D may create expectations that parenting plans have a greater legal status than is the case, particularly in cases that involve a significant power imbalance, family violence or abuse.*
- 3.244 *Explaining the effect of parenting plans will be an important role for advisers situated in Family Relationship Centres, approved organisations and operating as sole practitioners. Ensuring that the effect of parenting plans is properly understood will also need to be a significant component of the proposed community education campaign that will accompany these changes.*
- 3.245 *The Committee endorses the suggestion by the Family Law Council and the Family Court that proposed section 64D should be redrafted to make clearer the power of the court to include an explicit provision in a*

parenting order where it would be inappropriate for a subsequent parenting plan to make a court order unenforceable.

Recommendation 34

The Committee recommends that proposed section 64D should be amended to expressly provide that in exceptional cases the court could make orders that could only be changed by the subsequent order of the court and not by a subsequent parenting plan.

Comment

There is merit in the Standing Committee's recommendations. But I wonder if there is a simpler and more satisfactory to the relatively minor problem that s 64D addresses. As we have seen, the problem is that there may be a tension between the need for flexibility and the need for legal regulation by court orders. Problems are mainly likely to occur if one party seeks to enforce the court order. It may be sufficient simply to provide in the compliance provisions, that the court may have regard to any parenting plan when considering whether to vary a parenting order, determining whether there is a reasonable excuse for a contravention, or making a contravention order.

10: REFLECTIONS

I want to conclude by reflecting briefly on two matters this discussion, or debate, or whatever it is, relating to the role of parents, and of fathers in particular; and the problems of drafting legislation in this difficult area.

SHARED PARENTING: THE GENERAL POLICY

...what we are seeing around the Western world is a cultural shift in fathers' attitudes towards post-separation parenting, with many more fathers seeking to be actively involved in their children's lives than might have been the case about twenty or thirty years ago. This reflects a greater involvement in parenting within intact relationships. Over time, there have been significant changes in the ideal of fatherhood, with a greater emphasis on emotional closeness and active involvement with the children.²³

Quite apart from the macro world of inquiries and reports, in my experience this theme has already become influential in the actual practice of family law in recent years, perhaps especially since the Family Law Reform Act 1995. It is my impression that the consent orders that people now ask for are more likely to include larger chunks of time

for the non-residential parent to be with the children: extended weekends (Friday to Monday), and some mid-week overnight contact, as well as half school holidays, seem much more 'normal' than they did a few years ago. And in contested cases, especially since the 1995 amendments, I suspect that judicial officers are generally more willing than they were to make orders for extended time with the non-resident parent in contested cases.

Of course, judges are constantly exposed to reports by Court counsellors and expert psychiatrists and psychologists, and – quite apart from any other reading they might do, or seminars they might attend – they are exposed to the latest informed thinking about what is best for children.

In all this, I think that family law is responding – some would say too slowly, others might say excessively – to the increasingly held view that it is generally best for children that both parents continue to be involved in a serious parenting role, not merely for weekend and holiday outings and fun.

Why this theme, now?

I suspect that there are a number of reasons why this theme looms so large at the present time. While in some ways child support and child contact are legally separate, many feel that it is unfair that the non-custodial parent should have to pay child support and yet be denied contact with the child: perhaps the impact of the child support legislation has been to increase fathers' desires to maintain contact with their children. Again, the increased participation of women in the paid workforce over recent decades has obviously created a situation in which there are more opportunities for fathers to spend more time with children.

Research on post-separation parenting

We now have good Australian evidence about the diverse patterns of relationships between parents and children, and about the wishes of children and parents.²⁴ It seems that many *children* want to see more of their non-resident parents (mainly fathers); not surprisingly, many *fathers* want to see more of their children; and, interestingly, many

mothers want the father to see more of the children.²⁵ Patrick Parkinson summarises some of this research as follows (footnotes omitted):²⁶

*The desire by fathers for much more involvement in their children's lives after separation is reflected in attitudinal surveys... These trends were confirmed in analysis of a nationally representative survey conducted in Australia in 2001 and involving more than 1000 separated parents concerning contact with their youngest child. Nearly three-quarters (74%) of non-resident fathers wanted more contact with their child, with 55% indicating that they felt there was nowhere near enough contact... The research indicated that it is only a small proportion of non-resident fathers who appear to be disinterested in contact or who have emotionally disengaged from their children.*²⁷

The desire for more contact was not confined to fathers. In addition, 41% of resident mothers wanted increased contact between their children and the non-resident father, with 26% saying that there was nowhere near enough contact...

Recent research emphasises the importance to children of the *quality* of the relationship with each parent, something nicely expressed by the 2003 Parliamentary Committee, quoted earlier.²⁸ A very recent paper by Bruce Smyth provides an excellent and thought-provoking review of insights from recent research.²⁹ In the paper to which I have already referred, Patrick Parkinson acknowledges the need to protect children from violence and high conflict, and other risk factors. In that context, there seems to be merit in his view that

On the whole, the greater willingness of non-resident fathers to be involved in their children's lives is a very positive development in terms of children's wellbeing. Parental separation and divorce is a significant risk factor for children both in terms of long-term emotional wellbeing and educational performance.³⁰ Greater involvement of fathers in post-separation parenting has at least the potential to ameliorate these risks.

The “80:20 rule” and the critique of the family law system

Pervading the submissions for equal time is an ideal of parents playing an equal and supportive and co-operative role in the lives of their children. Some submissions seem to suggest that if it were not for the present law, or the Family Court, this would be the usual arrangement after separation. One of the persistent criticisms of the system – often put as a criticism of the Family Court – was that it imposed what was referred to as “the 80:20 rule”.³¹ (The figures refer to the time children spend respectively with the mother and

the father.) Indeed, the Committee looked at some figures and concluded that something like 80:20 was, indeed, the most common outcome.

There of course no 80:20 rule as a rule of law, or any other rule or presumption about what outcome is likely to be in the interests of the children. Nor is it true that people come to the Court wanting arrangements other than 80:20, but find that the Court refuses to make consent orders in those terms, and tells the parties that it has to be 80:20. Nor is it true, I believe, that the Court commences each children's case hearing with the view that the outcome should necessarily or ordinarily be that the children should be with one parent 80% of the time and with the other 20% of the time.

If the 80:20 pattern is not imposed by the law, then, why has it come about? I think it is fairly clear that the 80:20 pattern, to the extent that it exists, is not imposed by the law, or the Family Court, in any simple way. There are other explanations that seem quite persuasive, having to do not so much with the law but with the way our society functions and what people choose to do.

Research summarised in the report includes ABS figures relating to "all family structures". In 1992, on average, mothers spent about six and three quarter hours a day on child care, and fathers about two and a half. In 1997, fathers spent about the same amount, and mothers significantly less (but still much more than fathers): six hours seven minutes. Not a Family Court or a law in sight: just families; and nothing like equal time with each parent.

Why? One part of the answer at least seems clear:³²

Reflecting traditional roles and responsibilities, fathers were far more likely to be employed full-time (83 percent of fathers prepared to 19 percent of mothers).

What was the pattern of arrangements following separation? If one takes as a "shared care" arrangement a situation where each parent looks after the child for at least 30% of the time, about 2.6% of the children were in shared care. About 41% of the children in "sole care" visited the other parent at least once a fortnight, the balance less frequently. These things can be counted in different ways, and if you count days *or* nights per year, you might find that about 10% or 11% of children spend a third of their time or more

with each parent.³³ Without going into the details, the research is consistent with ordinary experience: it is unusual for children to spend equal time, or something approaching equal time, with each parent following separation.

I do not want to go into the details of the research about arrangements and distribution of parenting activities during relationships and after separation. It is true, of course, that children most commonly live with their mother and spend less time with their father after separation. It is also true that this pattern is reflected in court orders, especially court orders made by consent. In fact, there is great variety in the arrangements parents make for their children, and the details seem to reflect, as a major recent report states, “family dynamics, in tandem with several demographic factors (most notably material resources, and the quality of the co-parental relationship, physical distance between parents’ households, and the repartnering status of parents)”.³⁴

And yet... I think it likely that the law (or perceptions of the law) plays some part in how parents arrange their time with the children. There may be a grain of truth in the idea of the 80:20 rule, however misleadingly expressed. Take the law out of the word “rule”, and think of it as a *pattern*. So the critique becomes something like this: the legal system tends to assume that the likely and ordinary outcome will be that the children spend most time with one parent, make that parent’s home their main home, and spend much less time with the other parent.

Is there any truth in this? I would start with what seems an obvious point, namely that when parents separate, they often live at least a little distance apart, and often the parent who does not have the children, mostly the father, is in full-time work while the residence parent, the mother usually, may be occupied full-time with the children or have part-time work. Typically, I assume, the separation imposes financial difficulties for both spouses, and typically the father will need every cent of his income: it will be difficult for him to scale down his employment. Most employment tends to be during the week. So the most convenient time for the children to be with the father is likely to be on weekends. But if they go to him *every* weekend, they will have no weekend activity with their mother, and perhaps little weekend contact with children from their neighbourhood and their school;

so it makes sense that they might spend one weekend with mum and the other with dad. The same problem arises with school holidays – it seems wrong for them to have *no* holiday time with mum – so school holiday times tend to be shared: equally seems as good as anything else. So, it must have seemed to many families, while it would perhaps be nice for the children to see more of their father, as a practical matter alternate weekends and half school holidays was an acceptable outcome. Because it seemed to fit a commonly-occurring pattern, perhaps it came to be seen as a “normal” arrangement.³⁵

My guess, therefore, is that this traditional pattern became familiar, and perhaps “normal”, because it seemed to be a sensible way of managing: not too much disruption for the children, who stayed with mum (who had been their main carer during the relationship); regular contact with dad, at least each fortnight; and dad could keep up his income.

In recent times, the desirability of that traditional solution has been challenged. It seems from recent research that quite a lot of children want to see more of their father than that; and most fathers want to see more of their children; and a lot of the mothers want the children to spend more time with their fathers, too. Further, the researchers now tell us that it is important for children that both parents continue to be *parents*, not just entertainers; and so there is an emphasis on overnight stays, and involvement of the father during the week, times when parenting happens: bedtimes, preparation for the next days, homework, all that: not just weekend entertainment.

But it is possible that some lawyers may have lagged behind, and continued to treat the traditional alternate weekend and half holidays model as the norm; perhaps they didn't really explore whether it would be practical for the children to spend some weekdays with the father, or have some mid-week overnight contact, or the like. Perhaps some lawyers, without giving it too much thought, may have assumed that they would find it difficult to persuade the court to do anything other than make the standard orders. Perhaps they advised fathers that it might be useless, or unwise, to ask for more. Perhaps they assumed in negotiations that their client would not want more, and that the other party would not accept more. And maybe the children were not consulted as much as

they might have been. Perhaps these things were more likely to happen when the lawyers were not experienced in family law. And, for the parents and their advisers, having an expected outcome might have had the advantage of avoiding the need for a detailed consideration of difficult issues.

All this, I admit, is speculation. But I can see how, especially in a profession influenced by the idea of precedent, the traditional pattern may have come to have a place as a norm, or default position. If so, it is possible to see why parents dissatisfied with this outcome might see it as imposed by the law, or by the Family Court. In short, while it would be easy to argue that the alleged “80:20 rule” is simply a myth, the truth might be that some of us in the family law system have been a bit slow to see that in many situations the traditional pattern of contact may not be optimal for the child.³⁶ Perhaps we need to do more to encourage parents to consider a range of options, and to make it clear that the law will facilitate whatever arrangement is most likely to benefit the children.

THE DRAFTING PROBLEMS

The most obvious characteristic of the proposed legislation is size and complexity. I think there is now general agreement that Part VII (indeed the whole Act) needs complete re-writing. I think that in this exercise it would be wise to put a lot of energy into making it as short and simple as possible. But I do want to refer to what I think is an underlying problem that affects, in particular, the proposed changes to s 60B and 68F.

There is a problem here, I think, that is rather subtle, and needs careful thought. The principle that the child’s best interests are paramount requires the court to take everything into account, and also to assign weight or importance to the relevant matters. How can the legislature take this any further?

One thing it can do is provide a checklist of matters that should be taken into account. A checklist says: “Hey, don’t forget about...” the various items. In its present form, s 68F is essentially a checklist. It doesn’t contain presumptions, or say what is good for children. It just says to *pay attention* to things. For example, it draws attention to children’s relationship with family members. In some cases - most, I hope - these will be valuable, and the court will look at ways to nurture them. In a few cases, they will be

harmful, as where a person has abused a child. The relationship is important, and court will also look at it, but in this case to ensure that the child is protected.

In my experience, s 68F is a very useful checklist: structuring a judgment on it is a very useful way of ensuring that nothing important is overlooked.

But in the 1995 amendments, and again in this new bill, the legislature seems to be trying to do something more. It is saying that *some things are particularly important*. I can entirely understand why a legislature would want to do this, and of course the courts have a duty to implement the law. But as the experience of the 1995 amendments shows, providing such guidance seems inherently difficult.

As a result, legislation such as the 1995 amendments tends to be frustrating. Those who pass it, or successfully lobbied for it, wonder why it has not had the impact they intended, and perhaps think that somebody must be actively frustrating the legislature's intention. Those who have to operate the law do their best with essentially obscure provisions, and perhaps complain to each other that the legislature should make up its mind what it wants, and clearly say so.

I suspect that the reasons for the difficulty are multiple and complex. But I suspect that two factors play a part: imprecise objectives and problems of drafting.

It might seem offensive to suggest, after so many reports and recommendations and announced government policies, that the objectives are imprecise. But I think it's true. It is one thing to re-phrase and re-emphasise generalities about the importance of parents, children's needs for protection against violence, and so on. But as far as I can see nothing in the whole body of public statements actually identifies the extent to which the legislature wants different outcomes in contested children's cases. It is striking that in the whole debate, unless I am mistaken, despite the availability of innumerable recorded court decisions, one cannot actually find a single instance where the reformers have identified a result in a case and indicated that they wish to achieve a different result. This makes a remarkable contrast with other areas of reform. For example, you can see immediately how the third party property amendments were intended to reverse the

results of the High Court decision in *Ascot Investments*, and of the more recent decision in *ASIC v Rich*.

If you ask, for example, what different outcomes are intended to result from the new provisions in relocation cases, there is no answer. We simply don't know whether those in the legislature, or even those on the committees, expected that there would be a change in outcomes, or what that change would be. Thus, it is not surprising that those who read the provisions and have to apply them face an awful task of trying to work out what difference, in actual outcomes, all these new legislative words are expected to achieve. This was exactly the problem with the 1995 amendments.³⁷

The second source of the problem is technical, a problem in drafting. The discussion of s 68F shows, I think, that it is not easy to provide guidance by putting different needs of children categories, some being more important than others. In practice, the importance of different things varies a great deal: different things interact with each other in complex ways. Some things will be very important for some children in a family and not for others. How can the legislature intelligibly provide guidance on such matters? What has happened, over the years, is that different methods have been tried. We have introduced, and are now fiddling with s 60B; also with s 68F. But there are other attempts to identify principles elsewhere in the Act: eg s 43, or 68K. Such provisions attempt in various ways to say what is important in children's matters, but they do not amount to a coherent whole, and read together, they tend to make the eyes glaze and the head ache.

It seems to me that these two underlying problems, namely imprecise objectives and drafting problems, have for some years now bedevilled those who try to improve this area of children's law. They have not been solved, or even identified. I fear that until we really grapple with these problems the outcome of these efforts to reform children law may be as frustrating as those of 1995.

If this is right, the way forward will be to identify whether the parliament wants to change the actual outcomes in the difficult cases that actually get to be adjudicated in the courts. Perhaps some intended changes will be identified. Or perhaps it will be decided that the intention is not to change outcomes but to educate the public through legislation.

Whatever the answer, asking the question seems an essential first step to a really useful and coherent reform.

Once the objective is identified, then it will be necessary to address the technical tasks of drafting. The red pencil will be the instrument of choice: we should be prepared to jettison much that is now in the Act and to start afresh. Solving the problem will require careful attention to concepts and techniques of drafting. It will be useful to look at legislation in other jurisdictions. We will need to focus on basic concepts and look for a coherent way of expressing them. The present Exposure Draft, and the surrounding debate illustrates that the legislature wants to make some contribution to the resolution of children's cases, but has not yet worked out how this can be satisfactorily done. Doing so is no easy task, but attempting to "reform" the law without addressing the underlying issues has led to the mess that is now Part VII of the Family Law Act. Those underlying issues need to be tackled if we are to have any chance of really improving the coherence and effectiveness of family law relating to children.

APPENDIX: THE CONDUCT OF CHILDREN'S CASES

In the beginning, there was s 97: “The court shall proceed without undue formality and shall endeavour to ensure that the proceedings are not protracted”. But the Family Court was a court, and the ordinary rules of procedure and evidence applied. Section 97 was not a sufficient base on which to erect a really different way of dealing with family cases, even children’s cases. The legislation has provided for significant specific modifications to the adversary procedure in children’s cases (child representatives, modifications of rules of evidence). But attempts by some judges to introduce a really different approach foundered on the rocks of traditional rules and traditions of evidence and procedure, and standards of procedural fairness.³⁸

In recent times, we have had statements from the appellate benches that proceedings in children’s cases are not purely adversary proceedings.³⁹ But nobody quite knew what to make of these statements in practical terms.

Then, as recently as the last couple of years, we have a real change: the Children’s Cases Program. Since this has been much explained and is now old news, little needs to be said. I only note that it really does involve a departure from the adversary system in a serious and not merely cosmetic way; in the absence of specific legislative backing, this change was essentially built on the agreement of the parties to subject themselves to the new approach.

The Children’s Cases Program started as an interesting innovation, but a cautious one: a pilot, to be assessed carefully before a wider implementation was considered. But it got caught up in the politics of the time. The Government had - for excellent reasons - rejected the Parliamentary Committee’s surprising recommendation for a Families Tribunal, but obviously saw the Children’s Cases Program as something of a blueprint for the way things should be done. Political urgency left no time for such things as pilots and careful research: the Children’s Cases Program was on the crest of the wave, and in an instant, it seems, is now (almost) on the statute books. I will summarise the more important of the new provisions.

60KB states “Principles for conducting child-related proceedings” as follows:

The first principle is that the court is to consider the needs and concerns of the child or children concerned in determining the conduct of the proceedings.

The second principle is that the court is to actively direct, control and manage the conduct of the proceedings.

The third principle is that the proceedings are, as far as possible, to be conducted in a way that will promote cooperative and child-focused parenting by the parties.

The fourth principle is that the proceedings are to be conducted without undue delay and with as little formality, and legal technicality and form, as possible.

In the current fashion (in which the word “must” suggests an irate diner shouting and stamping his foot when asking someone to pass the salt), the legislation provides:

60KE General duties

(1) In giving effect to the principles in section 60KB, the court must:

- (a) decide which of the issues in the proceedings require full investigation and hearing and which may be disposed of summarily; and*
- (b) decide the order in which the issues are to be decided; and*
- (c) give directions or make orders about the timing of steps that are to be taken in the proceedings; and*
- (d) in deciding whether a particular step is to be taken—consider whether the likely benefits of taking the step justify the costs of taking it; and*
- (e) make appropriate use of technology; and*
- (f) if the court considers it appropriate—encourage the parties to use family dispute resolution or family counselling; and*
- (g) deal with as many aspects of the matter as it can on a single occasion; and*
- (h) deal with the matter, where appropriate, without requiring the parties’ physical attendance at court.*

Section 60KF provides in effect that the court can make findings and determinations and orders at any stage of the proceedings.

Section 60KG deals with the application of the rules of evidence. Since this has been the subject of some excitement (thought not on my part, as it happens), I will set it out:

60KG Rules of evidence not to apply unless court decides

(1) The following provisions of the Evidence Act 1995 do not apply to child-related proceedings:

(a) Divisions 3, 4 and 5 of Part 2.1 (which deal with general rules about giving evidence, examination in chief, re-examination and cross-examination) (other than sections 26, 30, 36 and 41);

Note: Section 26 is about the court's control over questioning of witnesses. Section 30 is about interpreters. Section 36 relates to examination of a person without subpoena or other process. Section 41 is about improper questions.

(b) Parts 2.2 and 2.3 (which deal with documents and other evidence including demonstrations, experiments and inspections);

(c) Parts 3.2 to 3.8 (which deal with hearsay, opinion, admissions, evidence of judgments and convictions, tendency and coincidence, credibility and character).

(2) The court may apply one or more of the provisions of a Division or Part mentioned in subsection (1) to an issue in the proceedings, if:

(a) for an issue relating to proceedings under this Part—the court considers it necessary in the best interests of the child or children concerned to do so; and

(b) for an issue relating to proceedings that are not under this Part—the court considers it necessary in all the circumstances to do so.

(3) Subsection (1) does not revive the operation of a rule of common law that, but for subsection (1), would have been prevented from operating because of a provision of a Division or Part mentioned in that subsection.

Section 60KI gives the court a series of “duties and powers” relating to evidence, mainly powers to give directions about how things are to be done.

NOTES

- ¹ BA, LLB, BCL; Honorary Professor of Law, University of Sydney; formerly a judge of the Family Court of Australia. An earlier version of this paper (written before the Standing Committee's report, was given at the College of Law, Sydney on 14 August 2005. It draws partly on the valuable experience of being involved as an honorary consultant in the preparation and presentation of the Family Court's submission to the Standing Committee's inquiry. Some of the passages in this paper draw on the Court's submission: the extent of this can readily be seen from the College of Law paper, and of course the Court's Submission is a public document: in these circumstances I have not troubled to specify the extent of overlap in this paper.
- ² *'Out of the Maze': Pathways to the Future for Families Experiencing Separation* (Report of the Family Law Pathways advisory Group, 2001).
- ³ It is ironic that in 2003, when setting up an inquiry intended to encourage both parents to be more involved with their children, the Government used the outmoded term 'custody', which had been seen as contributing to a "win/lose attitude", and which had been abandoned precisely in order to encourage both parents to be more involved with their children.
- ⁴ "A new family law system: Government Response to *Every picture tells a story*" (June 2005).
- ⁵ A new family law system Government Response to *Every picture tells a story* (June 2005)
- ⁶ *The Age*, 2 August 2004.
- ⁷ Recommendation 17(a).
- ⁸ Paragraph 2.175.
- ⁹ Recommendation 18, para 2.179.
- ¹⁰ *B and B: Family Law Reform Act 1995* (1997) 21 Fam LR 676 at 727; FLC 92-755.
- ¹¹ *B and B: Family Law Reform Act 1995* (1997) 21 Fam LR 676 at 727; FLC 92-755.
- ¹² The most authoritative decision on relocation cases is the High Court's decision in *U v U* (2002) 29 Fam LR 74; FLC 93-112.
- ¹³ 2.183.
- ¹⁴ Attorney-General's Department, *Submission 46*, p.7.
- ¹⁵ Incidentally, it seems to me that the wording of the section is unsatisfactory. In a division between two categories, one being "primary", logic requires that the other is *secondary*; but the weasel-word "other" obscures the nature of what is being done. If this provision goes through, Parliament will have effectively said that the matters in sub-s (2) are *secondary*.
- ¹⁶ Recommendation 4.1.
- ¹⁷ The Family Court's Submission also points this out, though more politely.
- ¹⁸ It is not entirely clear, however, whether this was intended. The Explanatory Statement does not refer to compliance consequences, but says: "Parents will be required to consult and to make a genuine effort to come to a joint decision. Where there has been no genuine attempt to consult about a major long-term decision, a party will be able to make an application to the court to deal with the dispute, subject to the dispute resolution process requirements."
- ¹⁹ Recommendation 2.

20 This point is stressed in the Court’s submission.

21 Paragraph 3.73.

22 This discussion is closely based on the Court’s submission, much of it word-for-word.

23 Prof Patrick Parkinson, ‘Family Law and the Indissolubility of Parenthood’ (Paper for ISFL conference, Eugene, Oregon, June 28th 2003) (citations omitted).

24 For a recent and illuminating study, see Bruce Smyth, ed, *Parent-Child Contact and Post-Separation Parenting Arrangements*, Research Report No 9, AIFS, June 2004.

25 There is emerging detailed research on children’s views, notably Parkinson, Cashmore and Single, “Adolescents’ views on the fairness of parenting and financial arrangements after separation” (2005) 43 (3) *Family Court Review* 429-444.

26 Prof Patrick Parkinson, ‘Family Law and the Indissolubility of Parenthood’ (Paper for ISFL conference, Eugene, Oregon, June 28th 2003) (citations omitted).

27 The research did indicate that repartnering had some impact on contact patterns. Only 51% of repartnered mothers reported that the biological father had contact with their children and only 61% of repartnered fathers reported contact with their children (compared with 66% of single mothers and 80% of single fathers).

28 Smyth, for example, makes this point in the 2004 AIFS study, page 7, citing Amato and Gilbreth (1999) and Priory and Rodgers (2001). And see Bren Neale, Jennifer Flowerdew and Carol Smart, ‘Drifting Towards Shared Residence?’ (2004) 17 (2) *Australian Family Lawyer* 12-16.

29 Bruce Smyth, “Time to rething time? The experience of time with children after divorce” (2005) 71 *Family Matters* 1-10.

30 P. Amato and A. Booth, *A Generation at Risk* (Harvard UP, Cambridge, Mass 1997); P. Amato, ‘The consequences of divorce for adults and children’ (2000) 62 *Journal of Marriage and the Family* 1269.

31 Report, paragraph 2.14.

32 Report, paragraph 1.42 (the figures are about the same for 1992 and 1997).

33 See Lawrie Moloney’s submission, page 4, discussing Parkinson and Smyth, “When the difference is day and night: some empirical insight into patterns of parent-child contact after separation” (2003).

34 Bruce Smyth, ed *Parent-Child Contact and Post-Separation Parenting Arrangements* (Australian Institute of Family Studies, Research Report No 9, 2004), at 128.

35 The recent AIFS study suggests that for at least some people – especially mothers, perhaps - the “standard” pattern of alternate weekend contact was undertaken somewhat casually, as what was seen as “the norm” or “what most people do”: see *Parent-Child Contact and Post-Separation Parenting Arrangements*, above, Ch 7, eg at 91.

36 For a thoughtful self-examination by a practising and academic lawyer, see Dr Tom Altobelli, ‘Contact cases involving young children: Have we been getting it wrong?’ (paper to Parenting after Separation Seminar, Sydney Law School, 23 April 2004).

37 For details see R Chisholm, “Assessing the Impact of the Family Law Reform Act 1995” (1996) 10 (3) *Aust J Family Law* 77-197.

38 See, eg, *In the Marriage of Lonard* (1976) 2 Fam LR 11,116; *In the Marriage of Ahmad* (1979) 5 Fam LR 15; *Re JRL; Ex parte CJL* (1986) 10 Fam LR 917.

³⁹ See, eg: “Proceedings for custody or access are not to be viewed as adversary proceedings in the ordinary sense, but as an investigation of what order will best promote the welfare of the child”: *M v M* (1988) 166 CLR 69 at 76; 82 ALR 577 at 581; 12 Fam LR 606; FLC 91-979; *Separate Representative v JHE and GAW* (1993) 16 Fam LR 485; FLC 92-376.