MAKING IT WORK:
COOPERATIVE PARENTING AND THE FAMILY LAW AMENDMENT (SHARED PARENTAL RESPONSIBILITY) ACT 2006 AND[1]

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1. INTRODUCTION

This paper examines how far the legislative background casts light on the 'cooperative parenting' provisions of the Family Law Amendment (Shared Parental Responsibility) Act 2006. It is argued that the background documents indicate an intention to remedy a perceived problem, here referred to as 'inadequate parental involvement' following separation. They can therefore assist in the interpretation and administration of the legislation. On the other hand, they reveal the absence of a clear or persuasive account of what the legislature considered was the cause of the problem. The lack of such an account, combined with some provisions of the legislation (notably those relating to 'primary' and additional' considerations in determining the child's best interests), lead to uncertainty about some fundamental aspects of decision-making, as illustrated by the problem of relocation cases.

It is a well-established principle of statutory interpretation that it is useful to identify the purposes of the legislation.[3] To the extent that the legislative language permits different interpretations, one can then favour interpretations that will give effect to that purpose. Although we don't now much talk of the 'mischief rule', it may be relevant to identify the perceived problems the legislation was intended to solve. In

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[1] A paper prepared for the Hunter Valley Family Law Seminar, Newcastle, 19 and 20 October, 2007. This paper is closely based on the article 'Making it Work: the Family Law Amendment (Shared Parental Responsibility) Act 2006' (2007 21 (2) *Australian J Family Law* 143-172. I am indebted to Patrick Parkinson for very stimulating comments on a draft, but of course I accept sole responsibility for the views expressed.

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[3] See Acts Interpretation Act 1901 (Cth), 15AA; and generally the discussion in D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (6th ed, 2006), especially at pp 27-38.

addition, it is arguable that an understanding of the purposes of the legislation can sometimes assist in the exercise of discretion. Thus, in the case of this legislation, an understanding of the origins and purposes of the legislation might arguably be relevant not only to the resolution of ambiguities, but to the exercise of discretion. Further, lawyers' professional obligations require them to adhere to the spirit as well as the letter of the law, and thus it seems important that lawyers adjust all relevant aspects of their practice to accord with the law as it has now been amended.

For all those reasons, so that we can intelligently and faithfully comply with and administer the law, it seems useful to consider carefully the perceived problems, and the purposes, that Parliament had in mind when passing the amendments to the Act in 2006. The task requires a fairly detailed review of the relevant background documents.[4]

2. THE ARCHAEOLOGY OF STATUTORY INTERPRETATION: DIGGING FOR CLUES

Where should we turn for an understanding of the perceived problems and the purposes of the legislation?

Our search does not start with a report from any professional or law reform body, such as the Law Council of Australia, or the Family Law Council, because the starting point seems to have been the Government's decision to hold an inquiry into what the Prime Minister surprisingly called 'joint custody'. That decision, in turn, seems to have stemmed from the lobbying of politicians. So much is clear from the opening words of the committee's report ('the Hull Report'):[5]

> *For many years the community has been extremely concerned about contact and residency issues following marriage and relationship breakdown and their experiences with the Family Court and the Child Support Agency. These have*

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4 See Acts Interpretation Act 1901 (Cth) s 15AB, and the discussion in Pearce and Geddes, above, chapter 3. The source documents are readily available on the Internet. The various parliamentary reports can be found on the parliamentary websites, and the government reports, if not found there, can be found on the Attorney-General's website.

5 House of Representatives Standing Committee on Family and Community Affairs, *Every picture tells a story: Report on the inquiry into child custody arrangements in the event of family separation*, December 2003.

been critical issues brought to the daily agenda of members of parliament by their constituents…

The parliamentary reports, and Government responses

The Hull report', published in 2003, is the start of our paper trail, and is examined in detail below. It is the first of a series of reports and other documents to be produced during the period of public consultation and parliamentary deliberation that ended with the passing of the Act on 1 July 2006. Clearly it may contain some of the clues we are looking for. But where else might we look? In brief, the key events and documents seem to be as follows.

On 29 July 2004 the Prime Minister issued a 'Framework Statement on Reforms to the Family Law System'. This six-page document set out the Government's response to the Report. It indicated that the Government did not accept two of the Hull Committee's recommendations. One was to establish dispute resolution services administered by a government department: instead, the Government decided that they would be based in the community. The other was to create a Families Tribunal, which would decide most of the children's cases that would otherwise have been decided by the Family Court or the FMC. The Framework Statement indicated that, instead, 'the government considers that the Committee's objectives can be addressed through a major change to the family law system focusing on resolving disputes outside the courts'.[6] It also foreshadowed what was to become Division 12A, saying that 'As part of the new family law process, the government will propose changes to the Family Law Act 1975 to make family law cases relating to children less adversarial and less likely to escalate conflict.'

On 10 November 2004 the Government published a more substantial Discussion Paper.[7] This set out the Government's proposals in more detail and invited public comment on particular issues.

In June 2005 the Government published the 'Exposure Draft' of the Family Law Amendment (Shared Parental Responsibility) Bill 2005, together with an updated and

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6 Framework Statement, p 1.

7 Discussion Paper, *A New Approach To The Family Law System: Implementation Of Reforms* 10 November 2004.

more comprehensive statement of its proposals ('Government Response of 2005').[8] It set out in some detail the Government's response to the various recommendations of the Hull Report, and it is consistent with the previous two statements.

The bill was referred to the House of Representatives Standing Committee on Legal and Constitutional Affairs for inquiry, and the report of that Committee appeared in August 2005 ('The LACA Report'). On 8 December 2005 the Government published its response to that report ('The Response to the LACA Report').[9]

The bill was then considered by the Senate's Legal and Constitutional Legislation Committee, which published its report on 24 March 2006 ('The LCLC Report'). Again, the Government published a response, tabled on 11 May 2006 ('The Government Response to the LCLC Report').[10]

These documents contain a wealth of information about matters of detail, and various policy decisions that were made as the legislation made its way through the parliamentary process. The Government statements are helpful in identifying what the Government hoped to achieve, and its position on a range of issues relating to the legislation. For example, one finds this in the Government Response of 2005:

> *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. …*
>
> *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.*

These documents, however, do not revisit the nature of the problems that gave rise to the initiatives. This is entirely understandable, given the support for most of the Hull recommendations. It is a reasonable inference that the Government generally

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[8] 'A New Family Law System: Government Response to Every Picture Tells a Story' June 2005

[9] Government Response to LACA Report (H of R), tabled 8 December 2005.

[10] Government Response to LCLC (Senate) Report, tabled 11 May 2006.

accepted the reasoning of the Hull Committee. The various Government documents essentially spell out what the Government proposed to do to implement them.

The Explanatory Memoranda

There have been a number of explanatory memoranda associated with various forms of the bill at various points in its parliamentary progress. They do not contain anything that further specifies the nature of the problem the legislation was intended to address. One would not expect them to do so. The closest they come to this is to re-state the intentions of the legislation, essentially on the lines of the various government statements and press releases, for example:[11]

> *The amendments in Schedule 1 recognise the need for a cooperative approach to parenting. The amendments promote the object of ensuring that children have a right to have a meaningful relationship with both their parents and that parents continue to share responsibility for their children after they separate. The amendments also reinforce the primary importance of the object of ensuring that children live in an environment where they are safe from violence or abuse.*
>
> *The amendments in Schedule 1 also advance the Government's long standing policy of encouraging people to take responsibility for resolving disputes themselves, in a non adversarial manner.*

Press releases and parliamentary debates

As one would expect, the language of the various press releases by the Attorney-General relating to the reforms is close to that of the Government's statements, and they do not require consideration for the purpose of the present discussion.[12] The parliamentary debates do not add significantly to the documents reviewed in identifying the Legislature's view about the nature of the problem or the purpose of the legislation. In particular, Government members' comments about the two 'primary considerations' in s 60CC emphasise their importance, but do not address the issues canvassed later in this paper.[13]

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[11] EM (H of R) to Family Law Amendments (Shared Parental Responsibility) Bill 2005, p 1.

[12] They are available on the Attorney-General website, and are dated 5/2/05, 11/5/05, 23/6/05, 8/12/05, 31/3/06, and 10/5/06.

[13] For example Senator Ellison (Senate, Second Reading, 30/3/2006, Hansard p 123): 'if you can satisfy both of those and the criteria are met then you are well on your way to determining what is in the best interests of the child, and it builds a solid foundation for a finding which is based in the best interests of the child. … when you look at the additional considerations, you can see that they definitely are secondary to those two primary considerations': . The Attorney-General, Mr Ruddock (House of Representatives, 2/3/2006, Hansard p 25): '… the parliament is giving advice for the courts to view these two matters as matters that should be

Conclusion

Broadly speaking, all these parliamentary reports and Government documents build on the seminal work, the Hull Report of 2003. The resolution of particular issues is typically considered in terms of giving effect to what the Hull Committee had in mind. The central importance of the Report is apparent from the Explanatory Memoranda to the bill in its latest form:

> *This Bill amends the* Family Law Act 1975 *(the Act) to implement a significant number of the recommendations of [the Hull Report]…*
>
> *These initiatives represent a generational change in family law and aim to bring about a cultural shift in how family separation is managed: away from litigation and towards cooperative parenting.*
>
> *…The amendments in Schedule 1 recognise the need for a cooperative approach to parenting. The amendments promote the object of ensuring that children have a right to have a meaningful relationship with both their parents and that parents continue to share responsibility for their children after they separate. The amendments also reinforce the primary importance of the object of ensuring that children live in an environment where they are safe from violence or abuse…*

For this reason, in my view the key source of information about the perceived problems, therefore, is the Hull Report, to which we now turn.

3. REVIEWING THE HULL REPORT

Preliminary

The Introduction sets out the background to the Report and gives an account of the inquiry. It also briefly summarises Part VII of the Act, and foreshadows what is to come by concluding that

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

It then refers to the paramountcy principle, noting that it was the starting point for the inquiry, and that 'it is the one irrefutable view held by most participants throughout the committee's inquiry'. After a brief reference to changing terminology, it then sets out some statistical information under the heading 'Changing Patterns of Parenting in

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addressed in priority. The others are factors that can be taken into account, but they are not all equal'.

Australia'. There are six chapters, but Chapter 2 is the essential chapter for present purposes.[14]

The recommendations

To put the Report's discussion in context, it will be helpful to start with an overview of the recommendations. They are set out under five headings, as follows.

'A rebuttable presumption'

Recommendations 1 and 2, which appear under this heading, are that the Act should create 'a clear presumption that can be rebutted, in favour of equal shared parental responsibility'. Recommendation 3 is that the Family Law Act be amended to:

- *provide that the object of Part VII is to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents are given the opportunity for meaningful involvement in their children's lives to the maximum extent consistent with the best interests of the child;*

- *define 'shared parental responsibility' as involving a requirement that parents consult with one another before making decisions about major issues relevant to the care, welfare and development of children, including but not confined to education – present and future, religious and cultural upbringing, health, change of surname and usual place of residence. This should be in the form of a parenting plan;*

- *clarify that each parent may exercise parental responsibility in relation to the day-to-day care of the child when the child is actually in his or her care subject to any orders of the court/tribunal necessary to protect the child and without the duty to consult with the other parent;*

- *in the event of matters proceeding to court/tribunal then specific orders should be made to each parent about the way in which parental responsibility is to be shared where it is in the best interests of the child to do so; and*

- *in the event of matters proceeding require the court/tribunal, to make orders concerning the allocation of parental responsibility between the parents or others who have parental responsibility when requested to do so by one or both parents.*

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14 Chapter 3 ('Facilitating shared parenting') is mainly about services, rather than legal principles. Chapter 4 is about a 'new family law process'. Chapter 5 deals with children's contact with grandparents and other family members, and Chapter 6 with child support.

Recommendation 4 is to remove the language of ‘residence’ and ‘contact’ and replace it with family friendly terms such as ‘parenting time’. Recommendation 5 is that the Act be amended

- to require mediators counselors and legal advisers to assist parents to develop a parenting plan and also ‘*to first consider a starting point of equal time where practicable*’; and
- to require the courts to consider the terms of any parenting plan, and also ‘*to first consider substantially shared parenting time when making orders in cases where each parent wishes to be the primary carer.*’

Recommendation 6 is to the effect that the Government develop a community education strategy.

‘Facilitating shared parenting’

The recommendations under this heading relate mainly to expanding and developing services.[15]

‘A new family law process’

The detail of these recommendations (11-22) need not concern us here. Broadly, they include: a ‘shop front single entry point’ for the broader family law system; the creation of a Families Tribunal (not accepted); opportunities for appropriate inclusion of children in the decisions that affect them; the simplification of courts with family law jurisdiction; longitudinal research on outcomes of family law decisions; accreditation requirement for all family law practitioners; and measures relating to contact enforcement.

‘A child’s contact with other persons’ and ‘Child support’

Recommendation 23 and 24 are mainly about a more explicit reference to grandparents, and recommendations 25-29 deal with child support, both topics outside the scope of this article.

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[15] They refer to the assistance of those who cannot achieve and sustain shared parenting on their own (R7); the Contact Orders Program (R8), the Family Relationships Services program and children’s contact services (R10), and a requirement that separating parents undertake dispute resolution before they are able to make an application to a court or tribunal for a parenting order, except in cases involving ‘entrenched conflict, family violence, substance abuse or serious child abuse…’ (R9).

The issues in Chapter 2

We now proceed to the body of the Report. The opening paragraph of Chapter 2 identifies its subject (‘*the issues raised by the question in the terms of reference about creating a rebuttable presumption that children should spend equal time with each parent after separation*’), and notes that ‘*the question is asked on the basis that the best interests of the child remains the paramount consideration*’.

Under the heading ‘***Is time the real issue?***’ the report then strongly makes the point that what matters is parental involvement rather than time as such:

> *2.4 What has become apparent to the committee during its inquiry process is that many separated parents – mostly fathers but also mothers – feel excluded from their children’s lives following separation. What parents want is to be more involved and for many the equal time argument has become the vehicle for pursuing the connection that their children are entitled to. This has turned the debate away from the benefits for children of a positive and caring relationship with both parents to all the arguments about why equal time will or will not work.*
>
> *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.*

This passage looks forward to the Committee’s conclusion, that there will be a presumption about shared parental responsibility, but not about equal time. The report continues:

> ***A focus on the majority of families***
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> *2.6 The committee believes that a review of the parenting aspect of family law involves looking for strategies to support the needs and aspirations of the vast majority of separated families, where it will be in the child’s best interests that both parents continue to be positively involved in their lives. This will include those parents who make their own arrangements either on their own or with a degree of help from the system. The committee acknowledges that there is also a significant minority of families who live with family violence, substance abuse or child abuse or for whom conflict is so entrenched they are incapable of agreement about matters affecting their children. For these families genuine and positive shared parenting may not be possible. […]*
>
> *2.8 In developing a new approach, the emphasis should be on enabling the majority of families and children to grow up with meaningful and positive relationships. In so doing, care needs to be taken to ensure that families and children subject to abuse are not exposed to further risk.*

Pausing here, we can note that the Report has focussed on parental involvement in the majority of families, as distinct from the minority of families, namely those ‘*who live*

with family violence, substance abuse or child abuse or for whom conflict is so entrenched they are incapable of agreement about matters affecting their children.' Paragraph 2.8, above, neatly summarises the Committee's objective.

'Problems with the current system'

The next heading is '***Problems with the current system***'. What follows needs careful examination, because this, it would seem, is the place where we are most likely to find a description of the perceived problem the legislation was intended to remedy. I will indicate the four sub-headings, and the discussion under each.

'Confusion'

The Report briefly notes that the Pathways Report described 'the complexities in the current family law system, its disconnectedness, its cost and delays'. It continues:

> *2.9 …The principles on which it operates are not well understood. These findings have been confirmed during this inquiry. Many who provided evidence have outlined their dissatisfaction with their own outcomes, how long it took to get them, the money they have spent and the anger and hurt that remains in their lives.*

The reader might wonder whether the Committee really meant what it said in the first sentence, since a more obvious conclusion from the material might be that people don't *implement* the principles. However, as will be seen, the Committee's later discussion indicates that it really did mean what it said.

'Unmet expectations'

Under this heading the Report indicates that the Committee believed that what was happening fell short of what they saw as indicated in the legislation. This is an important passage and needs to be quoted:

> *2.10 The Family Law Reform Act of 1995 was said to have intended to create a rebuttable presumption of shared parenting but the evidence to the inquiry clearly indicates that this is not reflected in what is happening either in the courts or in the community.*
>
> *2.11 Section 60B of the Family Law Act (FLA) sets out the importance of a child's right to continue to know and be cared for by both parents, but the predominant outcomes in post separation parenting do not support this.*
>
> *2.12 'Custody' and 'access', terms rejected in that reform to eliminate any sense of ownership of children have merely been replaced by 'residence' and 'contact'. Behaviour has not changed and there is still a common winner/loser scenario. Many individual submitters have said they have acted on legal (and other) advice which appears to have perpetuated this scenario.*

The Committee seems to be saying that what is happening in the courts and the community does not reflect shared parenting; that post-separation parenting outcomes are not consistent with the child's right to know and be cared for by both parents; and that there is still a common winner/loser scenario, which has been perpetuated by legal and other advice.

'Residence orders'

The discussion under this heading reviews evidence given to the Committee, and statistical evidence, about outcomes of residence orders. The opening passage is important:

> *2.13 Out of court negotiated outcomes have favoured sole residence because they have been influenced by community perceptions, by experience of women as primary carers*[6] *and by perceptions and outcomes in court decisions. This has been illustrated by suggestions in evidence to the committee that there is an 80-20 rule in the courts. This is the perception of a common outcome of, usually, the mother with sole residence and the father with alternate weekends and half the school holiday contact. The committee explored this perception with various witnesses during its hearings. From organisations such as the Family Court of Australia (FCoA) and legal services this drew the response that there is no such rule, although they acknowledged that the perception can influence private negotiations and will often be influential in decisions to settle. On the other hand, there was a strong community feeling the '80-20 rule' was being used as a barrier to more parenting time with children...*

Despite its use of the phrase 'the '80-20 *rule*'', the Committee did not seem to believe that there was a rule of law to this effect. Its focus was on *outcomes*. The key finding seems to be in the last sentence, that

> *… there was a strong community feeling the '80-20 rule' was being used as a barrier to more parenting time with children.*

This finding leaves open a number of questions. We do not know whether the Committee accepted that the strong community feeling was soundly based. Nor do we know who or what it was that the Committee thought was 'using' the so called rule as a barrier. I will return to this problem below, after completing this summary of the relevant parts of the Report.

The following discussion explores statistics as well as evidence given to the Committee. The Committee concludes that sole residence was still the result for the majority of families, whether by agreement or by court order, and that the evidence showed

that something close to '80-20' is the most common outcome, a justifiable confirmation for the perception of a rule to that effect.[16]

'Conclusion'

The Committee's conclusion was:

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

This important passage concludes the discussion under the major heading 'Problems with the current system'. In it, the Committee says that the 80:20 outcome was common, and that this had to be 'overcome'. It clearly identified its proposed solution: to revise 'language around post separation parenting' so that it would be 'neutral'[17] and would reflect the assumption that children would be given maximum opportunity of spending significant amounts of time with each parent.

The Report then briefly discusses child representation, under the heading '***Best Interests of the Child***'. Then there is a section on family violence and child abuse, concluding with the recommendation that s 60B(2) should be amended to add a reference to the child's right to safety.

Next comes a discussion of 'shared parenting' and 'parental responsibility'.[18] It starts with an attempt to clarify key terms, and identify different meanings of 'joint custody'. The Committee indicated clearly that when it used 'shared parenting', it meant shared decision-making.[19] More than once, it said that shared parenting had been an objective of the 1995 amendments but that there had been a failure to achieve it.[20] Perhaps the most succinct expression of this conclusion is the following passage:

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16 Paragraph 2.14.

17 Perhaps meaning neutral between men and women, but more likely meaning neutral as between sole parenting and shared parenting arrangements.

18 Paragraphs 2.30 - 2.37.

19 Paragraph 2.36.

20 Paragraphs 1.17, 2.10 - 2.12, 2.33.

> *2.56 As discussed above, the disappointment with the implementation of the 1995 reforms to the FLA has been a failure in practice, particularly in court outcomes, to match the expectation of Parliament for shared parenting…*

The asserted failure does not have to do with the making of *orders* about parental responsibility. The statistics earlier quoted by the Committee did not refer to such orders. Instead, the focus is on a 'failure in practice'. The Committee's point was that the outcomes it characterised as 80:20 meant that in practice the non-resident parent was not able to exercise much control or influence over the child's life. This interpretation is supported by a number of other passages.[21] For example:

> *2.33 Section 61C of the FLA specifies that parental responsibility lies with each parent. In practice this is often ignored. The parent with residence usually assumes the power because this is the practical outcome of living arrangements rather than as the result of legal exclusion…*

The Committee's concern is with the marginalisation of a parent as a practical result of one parent having residence, and a little later it identifies the sort of areas in which practices will need to change, such as access to the child's medical records.[22]

In relation to equal time, as is well known, the Committee rejected a legal presumption of equal time but nevertheless indicated that it should be 'the standard objective':

> *... the committee does not support forcing this outcome in potentially inappropriate circumstances by legislating a presumption (rebuttable or not) that children will spend equal time with each parent. Rather, the committee agrees that, all things considered, each parent should have an equal say on where the child/children reside. Wherever possible, an equal amount of parenting time should be the standard objective, taking into account individual circumstances.*[23]

This idea is developed in the next section, '***Parenting time***', which reviews the arguments in a little more detail, and concludes:

> *2.43 A key part of the committee's view of shared parenting is that 50/50 shared residence (or 'physical custody') should be considered as a starting point for discussion and negotiation. The committee acknowledges that there is a weight of professional opinion that stability in a primary home and routine is optimal for young children in particular. The objective is that in the majority of families,*

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[21] See also paragraphs 2.10-2.12.

[22] Paragraph 2.37.

[23] Paragraph 2.35.

parents would consider the appropriateness of a 50/50 arrangement in their particular circumstances taking into account the wishes of their child/children and that each parent should have an equal say as to where the children reside.

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

At this point there is a fairly brief passage about relocation: it will be quoted later, in connection with that topic.

'Steps to shared parenting'

The next section is what seems to me a slightly confusing discussion of four levels, or '**S*teps to shared parenting***'. In substance, however, this passage seems only to say that different degrees of cooperation are possible in different family circumstances, and it need not delay us.

'Ways of increasing shared parenting'

In this section the Committee develops the argument for a legal presumption of shared parental responsibility. The Committee's position is succinctly stated thus:

2.55 …[a presumption that both parents share in responsibility for their children] is the presumption that some have indicated is already implicit in sections 60B and 61C of the FLA. The committee has heard in evidence that in many people's experience this implied presumption is ignored. It has concluded that to increase the chances of truly shared parenting it needs to be made more explicit in the FLA. The committee has concluded from this that the provisions in the FLA need to be further amended to give this intention greater emphasis.

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

Conclusion

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

The report then discusses parenting plans; then consulting with children, and then community education. These discussions do not illuminate the present topic.

The chapter ends with a new major heading, '***Conclusions***', with two sub-headings, '***Is changing the Family Law Act enough?***' and '***Retrospectivity***'. The last topic need not detain us, but the following passages, though involving some repetition, seem to me significant to an understanding of that the Committee said, and did not say:

> ***Conclusions***
>
> *2.71 Despite the intentions of the Family Law Reform Act of 1995, shared parenting and shared physical care have not become a reality for the vast majority of separated families. There are still winners and losers and children are still treated as the spoils of divorce and separation. Whilst legislation cannot make people behave reasonably or be good parents, it can provide them with a template within which to develop their own approaches to their parenting responsibilities. The principles of the 1995 reforms remain relevant today. The committee believes that shared parental responsibility needs to become the standard. It believes that this can be achieved at least in part by making specific adjustments to the legislation.*
>
> *2.72 It would be dangerous to impose inflexible models in legislation which impacts on the private lives of the whole diversity of Australian families. Flexibility acknowledges the diversity of family circumstances. The committee believes that a preferred starting point might encourage maximum parental involvement.*
>
> *2.73 Legislation will not achieve all this on its own and may need to be supported by a range of other initiatives.*
>
> ***Is changing the Family Law Act enough?***
>
> *2.74 Legislation can have an educative effect on the separating population outside the context of court decisions, if its messages are clear, it is accessible to the general public and well understood by those who offer assistance under it. Most separating families reach agreements themselves, some with more help than others. Many will do this within the framework provided in legislation, many will be influenced by perceptions of what that framework is. It is important that the perceptions match the framework if the intended outcomes are to be achieved.*
>
> *2.75 The committee has concluded that this divergence between the provisions of the Act and community perceptions about it is where the 1995 reforms appear to have failed in achieving a shared parenting presumption.*
>
> *2.76 Many submitters have offered proposals for legislative amendment which would increase the possibility of shared parenting outcomes. The committee has found these suggestions helpful and taken account of them in drawing together the recommendations below.72 The committee has made some suggestions for drafting the legislative amendments. It also commends to government the suggestions made in submissions for further consideration.73*
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> *2.77 The committee has also concluded that community perception of legislation is as critical to its success as its actual content. Any legislative change which the government decides to implement may therefore need to be accompanied by community and professional education…*

4. THE PERCEIVED PROBLEM OF INADEQUATE PARENTAL INVOLVEMENT

I have argued that the Hull Report is the place to look in our search for what was seen as the problem. At one level the Committee's perception of the problem is clear, and is expressed in various ways in the Report. It may be summarised as follows:

> **Although it is in the interests of most children to be much involved with both parents, in practice most children are in the sole care of one parent, with limited involvement by the other.**

For convenience, in what follows I will refer to this perceived problem as 'inadequate parental involvement'.

The general direction of the Committee's proposals to deal with the problem is also clear. It is of course embodied in the recommendations, but at a general level the intention is nicely captured in paragraph 2.8, quoted above, which may be summarised:

> **to enable the majority of families and children to grow up with meaningful and positive relationships, while taking care that families and children subject to abuse are not exposed to further risk.**

This very general analysis may help us with statutory interpretation. But it might be even more useful if we can discern any more specific analysis by the Committee. Did the Committee give a more detailed account of what it considered to be the problem? In particular, what did the Committee think *caused* the symptom of inadequate parental involvement?

Some possible causes of inadequate parental involvement

Before returning to the Report for an answer to our question, let's note that the problem of inadequate parental involvement *could* have been caused by any

combination of a large range of factors.[24] This is not the occasion for a detailed account, but two clusters of factors should be mentioned.

Parent-related factors

The first cluster of factors relates to the parents, and may have nothing to do with the law. In some cases, the inadequate parental involvement might stem from parents' preferences and choices. Some mothers may feel that it is best for the children to have a primary residence with the parent who has previously played the major role in their care; and some fathers might agree. Some fathers, having re-partnered, may wish to spend more time with their new children. Some mothers, perhaps also having repartnered, might agree with this, seeing the children's interests as being advanced by developing their relationships with the new partner, and any other children involved in the household. Such decisions might be based on a mixture of ideas about what is best for the children, and ideas about what is best for parents and other family members.

Sometimes, too, such decisions may stem from the limits of what is practicable. If the parents live far apart, it may be too difficult, and too expensive, to have both parents closely involved. The parents' respective employment situations may also impose what the parents see as limits on what they can do: for example, parents whose work requires extensive interstate or overseas travel.

Finally, decisions in this group may also be affected by relationship difficulties and antagonisms. Hostility by one parent to another, or difficult relationships with new partners, grandparents or other family members, might make regular parental involvement in the children's lives fraught and painful, and this might lead to one parent playing a more peripheral role.

Law-related factors

It's possible that there could be a second cluster of factors, relating to the law, that cause or contribute to inadequate parental involvement. If courts were reluctant to

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[24] For a valuable recent review, see Joan Kelly, 'Children's living arrangements following separation and divorce: insights from empirical and clinical research' (2006) *Family Process* Vol 46 (No 1), 35-52, especially at 40-42. See also the discussion in B Smyth and R Chisholm, 'Exploring options for parental care of children following separation: A primer for family law specialists' (2006) 20 *Australian Journal of Family Law* 193.

make orders for anything other than '80:20' outcomes, this would be an obvious contributing factor. There are other possibilities, some more subtle. Perhaps the courts actually have no such reluctance, but some lawyers, counsellors, relatives and neighbours *believe* that they do, and advise parents accordingly. If so, many agreed outcomes might reflect a false perception of what the courts would be likely to do if they had to decide the case. Perhaps in earlier times there *was* a view that 80:20 outcomes were ideal for children, and some advisers are out of date, reflecting the previous approach. Perhaps '80:20' outcomes are not so much a conscious choice, but reflect what some parents assumed was regarded by the law as the ordinary, or normal arrangement.

Obviously, any combination of these and other factors *could* account for inadequate parental involvement. So, having surveyed some of the possibilities, let's return to the Report and consider what the Committee thought about such things.

The Committee's view of possible causes

The previous discussion identifies all the relevant passages in the Committee's Report, and it is apparent that the Report does not include any detailed discussion of the range of possible causes for the symptom of inadequate parental involvement. But there are some passages that indicate the Committee's view of the matter.

Some passages indicate that the Committee thought it had to do with the legal system. In particular, in the conclusion to the discussion of '***Problems with the current system***', we find an unequivocal statement of cause and effect:

> *the current experience with sole residence orders*[25] *results from the distinctions between residence and contact both in the legislation and in community perception.*[26]

As we have seen, the Committee recommended that the terms 'residence' and 'contact' be dropped from the legislation, as they were.

Another passage indicates that the Committee thought that the then-existing legal principles were 'not well understood'.[27] Clearly, the Committee thought it would be

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[25] It is clear from the context that in this sentence, arguably a key one, 'current experience' refers to the problem I am for convenience calling inadequate parental involvement.

[26] Paragraph 2.19.

useful to state them, or re-state them, even more clearly or emphatically than had been done in the 1995 amendments. Thus, the Report says:

> *To overcome the common '80-20' outcome, language around shared post separation parenting needs to be devised which is neutral and reflects assumptions that children will be given maximum opportunity of spending significant amounts of time with each parent.*

This general approach is reflected in the recommendations relating to legal principles, especially Recommendations 1, 2 and 3. They have also been implemented, although drafted in a slightly different way. These recommendations are clearly based on the view that the problem stems (at least in part) from what the second cluster of factors - things to do with the law and the way it is perceived. Recommendation 5, about mediators and legal advisers helping parents consider a starting point of equal, or substantially shared time with the children, is consistent with this: it seems intended to make sure that parents do not mistakenly act on a view that the law somehow encourages 80:20 outcomes. It reflects the Committee's belief that some of the unsatisfactory parenting outcomes occurred because parents settled for '80:20' outcomes because they relied on what they thought normal, or routine, rather than giving it careful consideration. The same applies to the recommendations about a community education strategy; also to the various services designed to 'facilitate shared parenting'.

Overall, therefore, it is safe to infer that the Committee considered that the primary cause of the problem of inadequate parental involvement was the law, or the way it was perceived. More than once, the Committee referred to the 1995 amendments, which it rightly saw as encouraging parental involvement, as having failed.

Did the Committee have a view about precisely *how* the law or its administration caused or contributed to the problem? There are three passages, all quoted above, that touch on this question:

1. The statement that the problem '*results from the distinctions between residence and contact both in the legislation and in community perception*';[28]

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[27] Paragraph 2.9, quoted above.

[28] Paragraph 2.19.

2. The statement that the legal principles were '*not well understood*';[29] and

3. The comment: '*there was a strong community feeling the '80-20 rule' was being used as a barrier…*'[30]

Let's look at these statements. The first is surprising, because there is little in the previous discussion that foreshadows it. It seems to mean that the problem was caused by one thing, namely the language introduced in 1995. But it is difficult to believe that the Committee really meant that the problem 'results from' the distinction. It probably meant that these terms played a part in reinforcing the idea that one parent should be mainly involved with the child.

The second statement has the vagueness typically associated with the passive voice: not well understood *by whom*? Parents? Counsellors? Lawyers? Judges? People in the general community? All of these? Much depends on the answer. Further, what sort of understanding did the Committee have in mind? Did it mean that people had some fundamental misunderstanding about family law, or that they were unaware of some principles, or provisions, in the Act? Perhaps the Committee meant that people thought that there really was something in the law like the mysterious '80:20 rule'. But we have to guess: we do not know what the Committee meant.[31]

The third statement is even more maddeningly elusive. The Committee shrinks from asserting that there *is* a 'barrier', or if there is, how it works. If there is a barrier, the report does not say who is controlling it: again, the passive voice comes down like a stage curtain, obscuring the actors.

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[29] Paragraph 2.9.

[30] Paragraph 2.13

[31] A report just before the 1995 amendments had indicated that the general principles were already well accepted in the community. See Kathleen Funder and Bruce Smyth, *Family Law Evaluation Project 1996: Parental Responsibilities: Two National Surveys* (AIFS). And they already well accepted in law: see eg 'It is now recognised as self-evidently true that apart from some cases of abusive relationships, children benefit from the development of a good relationship with both parents': Hayne J in *U v U* (2002) 29 Fam LR 74 (High Court of Australia), at paragraph [176].

Conclusions: the Committee's view of the problem and the solution

In view of the above analysis, the Committee's position can be summarised as follows. The Committee thought that the 80:20 pattern - the problem I have called inadequate parental involvement - was caused[32] by something to do with the law. The Report does not explain in detail how the Committee thought this happened, but the report suggests it was because of the distinction between residence and contact and the way that distinction was perceived in the community; because the principles in the Act were not well understood; and because there was a strong community feeling that there was a legal rule or principle that outcomes had to be 80:20.[33] The Committee's proposals were, in very general terms, to amend the legislation to re-state even more clearly and emphatically than had been done by the 1995 amendments the importance of parental involvement following separation. It hoped that this and related proposals would lead to a situation in which parents, encouraged by the law, would more commonly engage in cooperative parenting.

It is important to note what the Committee does *not* say. The Committee did not review any particular court decisions, or category of decisions, and so we have no indication what view the Committee might have taken about the outcomes in the difficult cases that come to lawyers, and the *very* difficult cases - 6% or so - that don't settle and have to be had determined by the courts. The absence of detailed discussion of these difficult cases is consistent with the Committee's emphasis on attending to the *majority* of families. It is also relevant that the Report contains an emphatic affirmation of the paramount consideration principle, and an acknowledgement of the great differences between family circumstances and an appreciation of the dangers of a one-size-fits-all approach.[34]

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[32] I'm tempted to add 'or partly caused': but I can't: however surprising it may seem, the fact is that the language of the Hull Report attributes the problem *entirely* to the law, or law-related matters.

[33] That seems to be what is meant by it being a 'barrier' (to shared parenting outcomes, presumably).

[34] See eg paragraph 2.39.

5. INTERPRETING AND APPLYING THE LEGISLATION

INTRODUCTION

This section explores the implications of the previous discussion. My argument is that acting professionally under the new laws should be enhanced by an understanding of what the legislature saw as the problem and how it saw the new measures addressing that problem. Since the key source of information about these things is the Hull Report, it has been examined in some detail.

In relation to particular matters, one might of course want to refer to other documents also. There are many issues of interpretation in this complex legislation, and many of the particular provisions result from the detailed consideration of draft legislation by the post-Hull parliamentary committees. Thus considering the interpretation of a particular provision may well require careful attention to the specific history of that provision, and consideration of any relevant passages in the parliamentary reports, the Government responses, and the Explanatory Memoranda. But the Hull report remains the essential starting point.

LEGAL PRACTICE

The implications for legal practice seem relatively clear. Lawyers obviously need to be familiar with the legislation, including its general principles and specific provision. They need to have regard to them in working with their clients. It may be desirable to provide clients with some kind of summary of the law, or extracts from the Act, although no doubt much would depend on the nature of the issues and the extent to which particular clients would be likely to benefit from that. Also, the advice given to clients should obviously be based on the legislation. What is required, of course, is a whole-hearted compliance, not a token or cynical one. It would be quite wrong, in my view, for a lawyer to hand some document to a client and then proceed as if the likely or obvious outcome is of the 80:20 kind. The lawyers should, I think, carefully review with the client the ways in which both parents can be optimally involved with the children, bearing in mind the clear legislative view that in the majority of cases this will be in the children's interests.

Equally, it would be wrong for lawyers to think that the legislation requires them to disregard difficulties or pressure a client to accept a shared parenting arrangement in circumstances where it is not likely to benefit the children. Just as an unthinking recommendation of an 80:20 would violate the spirit of the amended Act, disregarding real difficulties would equally do so: it would be contrary to the obligation to treat the child's best interests as paramount, and would disregard the emphatic view of the Hull Committee that each family is different, that one size does not fit all.

Similarly with process: clearly, lawyers should follow the spirit as well as the letter of the law, and engage in genuine and constructive efforts to help their clients reach an agreement, making appropriate use of the sources of counselling and other help that are available. It seems to me that the development of 'collaborative law' in recent years is entirely consistent with the legislative objectives.[35]

JUDICIAL DECISION MAKING IN GENERAL

It is obvious that the new legislation will significantly affect judicial reasoning. Courts must carefully apply the (now elaborate) guidelines and principles contained in the Act. If earlier judicial authorities are inconsistent with these principles, they must give way: the court starts with the legislation, not the earlier authorities: see *Goode v Goode.*[36] To the extent that the legislation is ambiguous, if my argument is accepted, one might usefully have resort to the background documents: most generally, the Hull Report, and, to the extent that they offer help in relation to particular points, the other reports, Government responses, and explanatory memoranda. The recent decision in *Goode* provides (at paragraphs 77-78) an excellent illustration.

There are two cautionary notes to be made about this process. Firstly, the painstaking review of the Hull Committee's reasoning in this article shows, I hope, that while the Committee did indicate what it saw as the problem, neither it nor any subsequent paper analysed whether there might be reasons unrelated to the law for what it called

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35 There is now a valuable account of collaborative law, by Lorraine Loppich, under a separate Guidecard in the Butterworths/Lexis Nexis Family law service.

36 *Goode v Goode* (2006) 36 Fam LR 422; (2006) FLC 93-286; [2006] FamCA 1346.

the 80:20 outcomes. Nor did it engage in a detailed analysis of what would be in children's interests in difficult cases, as distinct from saying that in the majority of cases the children would be better off if their parents were more involved. This is no doubt correct in general, but the question the law has to deal with is different, namely what is best for particular children, in particular circumstances. To put this more specifically, if the reason a parent is not seeing more of a child is the constraints of work, or distance, or a belief that his new family needs him more, changing the legal principles may not make any difference. Again, if a particular parent does become more involved in a child's life for some reason other than the child's interests, for example in order to pay less child support, that additional involvement might mean, not that the child gets better parenting, but that the child spends more time stuck in front of a TV, or in the care of others. The Committee's reliance on general statements about the benefits of parental involvement means that we should be cautious about assuming that it was the legislative intention to bring about any particular outcome in the circumstances of any particular case. All we know is that the legislature wanted, in the majority of cases…

Well, *what*, exactly? This leads me to the second cautionary point. It is important not to allow our perception of what the Government wanted to deflect us from the basic task of administering the law: referring to the background papers is useful mainly when it is necessary to resolve an uncertainty in the law, or, perhaps, to guide practice or discretionary decisions. Take, for example, parental responsibility when there has been no court order. The background papers' emphasis on the importance of sharing and co-operation might lead us to assume that after the amendments, parents have a duty to co-operate. But when you look carefully at the Act, this does not seem to be so. The key point is that the Act says that *each parent has* parental responsibility (not that they share it), and it creates an explicit obligation to co-operate (on major matters) only when the court makes an order for equal shared parental responsibility.[37] We must attend to the legislative language, first and foremost.

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[37] See the discussion in the commentary to s 61C in the Butterworths/LexisNexis family law service.

A second example is the need to look very carefully at the wording of the two-tier provision, especially of the first primary consideration, which relates to parental involvement. The provision speaks of 'the *benefit* to the child of having a *meaningful* relationship with both of the child's parents'.[38] These emphasised words are crucial. The Act does *not* say that it is better for children (or for the majority of children) to be more involved with both parents: it requires the decision-maker to consider the particular facts, and to make the evaluative judgments entailed by the words 'benefit' and 'meaningful' (Parkinson makes the important point that the 'additional considerations' need to be considered in this context).[39]

It follows that the success or failure of the Act cannot be measured entirely by counting the number of hours parents spend with their children, or how many decisions they make. The legislative words lead inexorably to the view that what matters is whether the children *benefit*.

JUDICIAL DECISION-MAKING IN RELOCATION CASES

I will conclude by considering a thorny problem that has already received a lot of consideration, namely the impact of the amending Act on relocation.[40] It is necessary to consider two things: the parliamentary consideration of the question whether to amend the law specifically in relation to relocation, and the implications of the two-tier provision.

The explicit consideration of amending the law about relocation

We start with the Hull Report. Here is the passage earlier deferred, being the *whole* of what the Committee said about relocation (citations omitted):

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[38] Section 60CC(2)(a).

[39] Patrick Parkinson, 'Decision-making about the best interests of the child: The impact of the two tiers' (2006) 20 *Australian Journal of Family Law* 179. Indeed, he argues that it will be very unusual for the primary and additional considerations to point in opposite directions, and that 'in almost all cases, the additional considerations will amplify the primary ones at another level of detail'.

[40] For a much more detailed account than is possible here, see Tom Altobelli FM, 'The search for wisdom: relocation in the era of shared parental responsibility' (a paper delivered at the 10th Australian Family Lawyers Conference 8-13 June 2007). Altobelli's paper contains a valuable discussion of the issues and of some of the early first instance authorities, notably *M & S* (2006) Fam CA1408 (Dessau J).

> ***Relocation***
>
> *2.45 Some of the most difficult cases that family law courts have to deal with are those that involve questions of parental relocation following separation and how this impacts on the child's relationship with the other parent. As the FCoA has pointed out in its submission:*
>
> > *… The opportunities which separation provides for parents to repartner, to reframe their lives and to put distressing experiences behind them makes them a particularly mobile population.*
>
> *2.46 The Court pointed out that decisions in these cases will, like other parenting cases, be made on the basis that the best interest of the child is the paramount consideration. The case of B and B which examined the impact of the 1995 amendments on this question confirmed this. Evidence to the inquiry pointed to the fact that geographic distance is a factor that works against shared physical care of children. Relocation obviously creates that distance.*
>
> *2.47 Shared parental responsibility will necessarily constrain the ability of separated parents to move freely. Moving interstate, overseas or even across to another side of a city is an important decision in the life of the child as well as the parent and should be decided jointly. If the parents cannot agree on it their recourse is to seek a decision by a court. Whilst the best interests of the child remains paramount it is not the sole consideration according to the Full Court of the Family Court. 'To the extent that the freedom of a parent to move impinges upon those interests, that freedom must give way'.*
>
> ***Conclusion***
>
> *2.48 The committee believes truly shared parental responsibility will inevitably mean that relocation of one parent, whether the primary carer or the other parent, should be less of an option.*

The key question is the meaning of paragraph 2.48; the earlier paragraphs provide the context. Does it mean that parents who are truly committed to shared parental responsibility will be unlikely to consider the option of relocation; or, more generally, that if there were to be a general move towards more co-operative parenting, as the Committee hoped, there would be fewer parents who chose to relocate? Or does it mean that if the Committee's recommendations about shared parental responsibility are implemented, the courts will be less likely to *allow* relocation?

In my view there are reasons for thinking that the first interpretation is correct. First, the Committee had referred to *B v B*, in which a relocation had been permitted, without any indication that it disagreed with the result or with the principles so extensively set out in the judgment of the Full Court; or, indeed, that it disagreed with any other relocation decision. Secondly, the expression '*truly* shared parental responsibility' (emphasis added) is not appropriate if the Committee is thinking of the

legal outcomes: it seems to refer to the genuineness of the parents' commitment. The word 'should' is also consistent with this. Third, none of the Committee's recommendations specifically deal with relocation. Fourth, this reading is supported by the fact that in its Response to the Hull Report, the Government did not mention relocation.

The topic arose, again, however in the LACA report. The Shared Parenting Council had suggested a provision that 'the court must be satisfied on reasonable grounds that such a relocation is in the best interests of the child'. The LACA Committee agreed, and so recommended,[41] saying this was 'to ensure that it is clear that relocation decisions are to be made in the best interests of the child'.[42] The Government's response was as follows:[43]

> *13. The Government agrees with this recommendation in principle but notes that the Family Law Council is currently examining the issue of relocation more broadly and expects to issue a discussion paper on the issue. The Government will request that the Family Law Council give particular consideration to this recommendation. The Government will then give further consideration to this recommendation and consider further amendments arising from both the recommendation and that advice.*

Thus, the Government decided not to act on it the recommendation to create an onus of proof in relocation cases, but instead referred the matter to the Family Law Council. And, indeed, the bill in its final form did not provide for an onus of proof, and it has been correctly held that there is none.[44] The LCLC Report of 2006 does not mention relocation.

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41 Para 2.80 ('*should a parent wish to change the residence of a child in such a way as to substantially affect the child's ability to either reside regularly with the other parent and extended family; or spend time regularly with the other parent and other relatives*').

42 This reason is unconvincing, since the paramountcy principle has always been associated with there being no onus either way.

43 The Response to the LACA Report, paragraph 13.

44 *M & S* [2006] Fam CA 1408 (Dessau J), espec at para 38. The reasoning - impeccable, in my view - was expressly adopted by Kay J in an appeal from a decision by a Federal Magistrate: *G & S* (2007) FamCA 102.

The Family Law Council published its report in May 2006.[45] It is a detailed and scholarly report, reviewing the existing law, the issues, submissions received, and overseas developments. On 7 August 2007 the Government tabled a Response to the Family Law Council's Report, indicating that it accepted all of the recommendations and would insert appropriate amendments to give effect to Recommendations 2 and 4. It is beyond the scope of this article to discuss this important development in detail, but the essence of the recommendations may be noted briefly.

Recommendation 1 was that any changes should be reviewed in the light of social science research. Recommendation 2 is of considerable potential importance, extending beyond relocation matters. It proposes two amendments 'to reinforce that orders impose obligations'. First, there should be a provision[46] to the effect that a parenting order that deals with whom the child is to spend time 'imposes an obligation to maintain a relationship with a child in accordance with the terms of that order'. Second, it would be a reasonable excuse for contravening a parenting order that 'the applicant has repeatedly failed to exercise his or her responsibilities in accordance with the order'.[47] In Recommendation 3, the Council rejected the insertion of a presumption to deal with relocation cases, thus rejecting the recommendation of the LACA report discussed above. Recommendation 4 proposes a rather detailed provision, essentially providing a structure for relocation decisions:

A) *Where there is a dispute concerning a change of where a child lives in such a way as to substantially affect the child's ability to live with or spend time with a parent or other person who is significant to the child's care, welfare and development, the court must:*

> *(1)* *Consider the different proposals and details of where and with whom a child should live, including:*
>
> > *(a)* *What alternatives there are to the proposed relocation;*
> >
> > *(b)* *Whether it is reasonable and practicable for the person opposing the application to move to be closer to the child if the relocation were to be permitted; and*

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45 Family law Council, Report, *Relocation* (May 2006); available on the Council's Website http://www.law.gov.au/flc.

46 As a new s 65N(2).

47 As a new subsection of s 70AE.

(c) Whether the person who is opposing the relocation is willing and able to assume primary caring responsibility for the child if the person proposing to relocate chooses to do so without taking the child.

(2) Consider which parenting orders are in the child's best interests having regard to the objects contained in section 60B and all relevant factors listed in section 60CC, and:

(a) Whether given the age and developmental level of the child, the child's relocation would interfere with the child's ability to form strong attachments with both parents;

(b) If a party were to relocate:

(i) What arrangements, consistent with the need to protect the child from physical or psychological harm, can be made to ensure that the child maintains as meaningful a relationship with both parents and people who are significant to the child's care, welfare and development as is possible in the circumstances;

(ii) How the increased costs involved for the child to spend time with or communicate with a parent or people who are significant to the child's care, welfare and development should be allocated;

(c) The effect on the child of the emotional and mental state of either party if their proposals are not accepted.

(B) The court may also consider the reasons the parent wishes to move away and any other relevant considerations.

The publication of this Response, just as this article went to press, marks the end, for now, of the explicit consideration of proposals about relocation. But what of the impact of the two-tier system on relocation decisions?

The ramifications of the two-tier provision

It will be recalled that the two-tier approach was not a part of the Hull recommendations, but appeared in the Exposure Draft of the bill. It was then the subject of discussion in the continuing process of parliamentary reports and Government responses, and we need to look at these.

The LACA Report, and the Government response

The starting point is probably the consideration of the two-tier provision by the LACA report of August 2005. The Law Council had submitted that the two tiers were

unnecessary and added to confusion about the weight to be given to those factors compared to other factors.[48] In response, the Attorney-General's Department had said[49] that the government's intention was

> *to better direct the court's attention to the objects of Part VII of the Act. The government does not consider that this amendment will unduly complicate matters for the court. Under subsection 68F(2) the court is currently required to consider a number of factors in determining the best interests of the child.*
>
> *The court is therefore used to dealing with weighing competing issues and, **depending on the particular circumstances of the matter**, elevating the importance of one factor over another.*

This passage, including the emphasised words, seems to indicate that the two-tier system does not involve any fundamentally different approach to decision-making, but rather ensures that the court *does not overlook* the importance of the primary considerations (and, one might infer, this is why they were repeated in what is now s 60CC, rather than left in s 60B.) A later passage reinforces this.

> *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.*

After noting that the provisions are consistent with the presumption of equal parental responsibility, the submission continues, however:

> *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.*

In contrast to the previous extracts from the submission, this remark does indicate a view that the two-tier provision will change the outcomes in relocation cases, and I will return to this issue later. (Note again how the passive voice obscures the meaning. The remark could mean that outcomes would be different because parents, or their lawyers, present their cases differently, or it could mean that the courts would take a different approach).

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[48] Paragraph 2.184.

[49] Paragraph 2.185.

What did the LACA Committee think about this? We don't know, because it did not comment on this aspect. Its conclusion does not indicate that it thought the two-tier provision would have a radical effect on decision-making, other than to reinforce the importance of the primary considerations:

> *Despite the concerns raised about the two tier approach to considering the best interests of the child the Committee considers 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.*

It is not clear, at least to me, whether the Committee thought that focussing the court's attention to those objects would change outcomes. Perhaps the answer is that it would do so if the court had previously ignored or undervalued those matters: but we don't know whether the Committee thought that this had been the case.

We have already noted the Government's response to the LACA Committee's proposal to create an onus of proof. What did it say about the two-tier provision?

The LACA Committee had approved the two-tier provision, with a modification (an excellent one, in my view,[50] but not presently relevant). The Government's response was:

> *The Government… notes the concerns that have been expressed about the complexity of the drafting and possible unintended consequences. However, the Government considers that the two tier structure currently in the Bill is valuable, and it will be retained in the Bill.*
>
> *In order to clarify that the primary factors should be the most important in the consideration of the court, a note has been inserted into the provisions which states that making primary considerations is consistent with the objects of Part VII as set out in section 60B. The court must therefore consider the matters set out having regard to the objects and principles and in particular the benefit to the child of a meaningful relationship with both parents and the need to protect a child from physical or psychological harm or from exposure to abuse, neglect or family violence.*

There is nothing in this that indicates a view about the impact on relocation matters.

The LCLC Report and the Government response

There is nothing explicit about relocation in the LCLC Report and the Government Response to it, but for completeness it is worth noting what was said about the two-

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50 See paragraph 2.193.

tier provision (which had been subjected to further examination in the LCLC Committee hearings):

> ***Committee view***
>
> *3.55 The Committee notes the concerns raised in relation to the two-tier approach to determining the child's best interests set out in proposed section 60CC. The Committee has also considered the Explanatory Memorandum, which provides that:*
>
> - *The safety of the child is not intended to be subordinate to the child's meaningful relationship with both parents; and*
> - *there may be some instances where [the] secondary considerations may outweigh the primary considerations.*
>
> *3.56 The Committee appreciates the explanation by the Attorney-General's Department as to why this particular approach has been adopted in the bill, namely:*
>
> - *the need to li nk the objects of Part VII (as set out in proposed subsection 60B(1)) with the critical elements of the Part VII; and*
> - *the primary considerations are the most important considerations, more important than the additional considerations.*

The Committee went on to say that the relationship between the primary and additional considerations in proposed subsection 60CC(2) and (3) was insufficiently clear. It suggested that there should be a note to the section, providing a 'better explanation should be provided as to the interaction of these considerations, particularly how each consideration is weighted against, limited by, or negatived by any other consideration'.

The Government however did not accept this recommendation. It noted that *'the Explanatory Memorandum accompanying the Bill already explains the relationship between the two tiers of factors that must be considered in determining the best interests of the child.'* It went on, however, to add three more paragraphs of explanation:

> *The House of Representatives Standing Committee on Legal and Constitutional Affairs in its report on the exposure draft of the Bill noted 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'.*
>
> *The primary considerations of the right of children to know their parents and to be protected from harm mirrors the two new objects of Part VII of the* Family Law Act 1975. *These factors have been elevated as they deal with important rights of children and will encourage a child focussed approach to assessment of best*

interests. Both considerations are of equal weight. The safety of a child is not intended to be subordinate to the child's meaningful relationship with both parents. Both factors are important and will be considered in light of the circumstances of the individual case. Where there is family violence then this factor will have particular relevance. In cases not involving issues of safety this factor will be less relevant and the benefit of a meaningful relationship will be more relevant.

There may be some instances where the court gives greater weight to the additional factors over the primary factors. While this is clear from the Explanatory Memorandum, the Government is concerned that any further steps to codify this point might undermine the legislative intent that, in general, the primary factors will be the most important.

Conclusions on relocation

It is difficult to overstate the agonising difficulty of relocation decisions.[51] You know that the decision will have a profound impact on the adults as well as the children. You shrink from ordering, in effect, that the mother must stay in Australia or lose the child; but you also shrink from ordering, in effect, that a loving father will see very little of the child in years to come. But you've got to do one or the other. Also, it is more than usually difficult in these cases to predict the likely consequences of an order, either way. If the relocation is allowed, how are things likely to work out in the other country? Will the proposed contact arrangements really happen? Will the child and the father drift apart? And if the relocation is prevented, will the child actually have the intended benefits[52] of a continuing close relationship with the father, or will the mother's distress at the outcome so inhibit her parenting, or so damage the working relationship with the father, that there will be increased acrimony and the child will have less adequate parenting from both parents? And at a more theoretical level, the agonies of the choice might involve a tension between communitarian values (which might suggest that parents' interests can be subordinated to their responsibilities to their children) and the values of autonomous individualism (which might support a parent's freedom of movement).[53]

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[51] Some of the difficulties were usefully described by Brown FM in *P & P* [2006] FMCAFam 518, discussed by Altobelli, above.

[52] Note the earlier discussion of the wording of s 60CC.

[53] My attention was drawn to this by an unpublished paper by Adiva Sifris.

Reflecting on my own experience, when preparing to determine such cases, I would agonise over the various factors, sometimes write down lists of matters favouring each outcome, pace up and down, try to imagine the likeliest outcome of particular orders, go back over the evidence again and again, sometimes, even, write a draft judgment for each of the two outcomes and read them over to see which was more persuasive… and at the end of all this I would arrive at a conclusion - a belief, really - that one outcome or the other was likely to be best for the child: and order accordingly.

How should these difficult decisions be made under the new law?

We have seen that the Government has now rejected the proposal to impose an onus of proof on the parent seeking to relocate, and has accepted the Family law Council's recommendation not to create a presumption against (or for) relocation. Thus the question is what impact the various amendments will have on these cases. In my view the critical question here is the likely impact of the two-tier provision. We know that it had two purposes: to make a link with s 60B, and to indicate that the primary factors were 'the most important'.

It is also necessary to consider the significance of the two brief remarks by the Attorney-General's Department, already quoted, to the effect that the outcomes in relocation cases are likely to be affected. The remarks might have meant - arguably consistently with the Hull Report - that the courts had previously given *inadequate* attention to the importance of the children's relationship with both their parents, and since as a result of the amendments they would now give that aspect the importance it deserves, the outcomes would be different. If this is the meaning, then logically, outcomes would change only if it was correct to assume that the courts had indeed previously undervalued the importance of parental relationships. There would be no change if, contrary to the assumption behind the remark, the court *had* previously given parental involvement proper attention. The other possible meaning of the remark is that the two-tier provision will bring about changed outcomes even if the courts had previously given parental relationships the weight that the Act (including the 1995 amendments) had indicated. Which is true? This important issue deserves some further discussion.

A hypothetical case

The question is most clearly posed by considering a difficult and fairly evenly-balanced relocation case about a 4 year old child, in which the mother, who had been and will continue to be the primary caregiver, sought to relocate, say, to England (her homeland). The proposed relocation would have various benefits for the child, such as benefits from the enhanced wellbeing of the mother, increased involvement with the mother's extended family, improved material circumstances, and relief from frequent exposure to conflict between the parents. These would have to be balanced against various detriments of the relocation, notably including less involvement with the father and his extended family. Assume that, just before the amendments, a judge had carefully and impeccably considered all the factors relating to the child's best interests, giving careful attention, among other things, to the child's relationship with both parents, and had in the end come to the conclusion that it would be in the child's best interests to allow the relocation. Now assume that after the 2006 amendments an identical case comes before the same judge. Should the outcome be different? As I have indicated, there are at least two possible answers, illustrated by the following two different judgments our hypothetical judge might give.

Interpretation 1

If my hypothetical judge took the first view, he or she might say something like this:

> *'I came to the conclusion in the first case, after giving it anguished consideration, that allowing the relocation would be best for the child, and so I allowed it. I did so on the basis of the law as it stood at the time. I considered the principles in s 60B(2), that children have the right to know and be cared for by both their parents, and have a right of contact, on a regular basis, with both their parents, that parents share duties and responsibilities concerning the care, welfare and development of their children. I also considered the range of factors in s 68F, giving each one the weight that I thought appropriate having regard to the particular facts of the case. Among those factors, of course, were the nature of the child's relationship with each of the parents, and the likely effect on the child of any separation from either parent: s 68F(2)(b) and (c). However I weighed those things up with all the other factors that related to the child's best interests. I came to the conclusion in the first case, after giving all this detailed consideration, that allowing the relocation would be best for the child, and so I allowed it.*
>
> *The second case is identical. I have given careful consideration to the amended provisions, in particular the only one of the two 'primary considerations' that is relevant here, namely 'the benefit to the child of having a meaningful relationship with both of the child's parents'. While I understand that the Parliament wished to give this increased emphasis and considered it of particular importance, Parliament has also maintained the fundamental principle, that the child's best*

interests must be regarded as paramount. Although I have reconsidered all the factors in the light of the new provisions, I remain convinced that in the particular circumstances of this case the child's interest would be promoted by allowing the proposed relocation. If I now refuse the relocation because of the two-tier provision, I will be making an order that I believe is contrary to the best interests of the child: the child will be disadvantaged by my decision. I cannot ignore this fundamental principle, and I therefore reach the same conclusion as I did under the previous law, namely that the relocation is the best (or least damaging) outcome for this child in the particular circumstances, and therefore should be permitted.

Interpretation 2

If my hypothetical judge adopted a different interpretation, he or she might say something like this:

'I came to the conclusion in the first case, after giving it anguished consideration, that allowing the relocation would be best for the child, and so I allowed it. I did so on the basis of the law as it stood at the time. I considered the principles in s 60B(2), that children have the right to know and be cared for by both their parents, and have a right of contact, on a regular basis, with both their parents, that parents share duties and responsibilities concerning the care, welfare and development of their children. I also considered the range of factors in s 68F, giving each one the weight that I thought appropriate having regard to the particular facts of the case. Among those factors, of course, were the nature of the child's relationship with each of the parents, and the likely effect on the child of any separation from either parent: s 68F(2)(b) and (c). However I weighed those things up with all the other factors that related to the child's best interests. I came to the conclusion in the first case, after giving all this detailed consideration, that allowing the relocation would be best for the child, and so I allowed it.

The second case is identical. But this time I cannot approach the matter in the same way, by giving such weight to the various matters as is appropriate in the particular circumstances. Parliament has now given much more explicit direction in s 60B about the objects of Part VII, and, in s 60CC, has elevated two considerations above all the others. Since there is no violence or abuse in this case, only one of those 'primary' factors is relevant, namely the benefit to the child of having a meaningful relationship with both of the child's parents. I cannot now give to the factors that I relied on before a higher priority than that factor. Acceding to the mother's proposal to relocate with the children would be directly contrary to promoting the meaningful involvement of both parents.

The decision over which I agonized so much last year is now, in law, a much more straightforward case. I am required to give effect to the intentions of Parliament. In the absence of concerns about violence and abuse I must now make the decision that preserves the meaningful involvement of the non-resident parent unless there are compelling reasons why this primary consideration must, in the circumstances of the case, be displaced. I am saddened to find myself making a decision that I consider is not in the child's best interests, but that evaluation must now be based on giving increased importance to the benefit to the child of having a meaningful

relationship with both of the child's parents. Accordingly, applying the law as it has been since 1 July 2006, I must rule against the proposed relocation.

Reflections

Do the new laws mean that the courts should restrain relocations in circumstances where, *applying the previous law conscientiously and properly*, they would have allowed them? Neither the legislation nor its history gives a clear answer, and the two imaginary judgments above illustrate two possible interpretations.

Those favouring the interpretation in the second judgment would no doubt rely on the unusual language of the two-tier provision, and the statements in the background papers to the effect that the primary considerations are 'more important' than the additional considerations. Those favouring the interpretation in the first judgment would rely on the fact that Parliament considered and rejected a suggestion to amend the law specifically about relocation, focussed on the majority of cases rather than difficult cases like this one, and chose not to dilute the paramountcy principle, but instead emphasised it. They might also find support in the Government's very recent Response to the Family Law Council's report on relocation, which not only rejects the idea of a presumption, but expressly praises the Family Law Council report for maintaining 'an exemplary focus on the bests interests of the child in relocation matters'.

But there is something else supporting the approach in the first hypothetical judgment: something more elusive, but more fundamental. It relates to the nature of a decision governed by the principle that the child's best interests must be treated as the paramount consideration. The child's 'best interests' is not an objective thing: it is a conclusion reached in each particular case, based, inevitably, on a complex and subtle mixture of factual findings, values and assumptions. And it is a conclusion reached *by the decision-maker*.

The first judgment accepts this. It treats the legislation as providing guidance, indicating what things are to be considered and pointing out how important some of them are. Having gone through the process the legislation requires, the judge reaches a conclusion about the child's best interests, and acts on it.

By contrast, under the approach in the second judgment, the decision-making process seems quite different. The judge assembles the same set of set of considerations, namely those indicated by the legislation. But then the process seems to involve allocating to those considerations a weighting that the judge considers was intended by the legislature, resulting in a conclusion that may be contrary to what the judge considers is best for the child.

This second approach would represent a quite fundamental change in the nature of decision-making in these cases. The history of the legislation does not clearly show an intention to make such a change. As we have seen, that history indicates that the legislature focussed on the majority of families, and saw the problem as inadequate parenting, caused by the distinction between residence and contact, by the principles not being well understood, and because of a strong community feeling that outcomes should be '80:20'. There is nothing in this to suggest it intended such a fundamental change in the way very difficult relocation cases are decided.

Further, I am not sure that the second approach is entirely coherent. There are at least two problems. Firstly, it involves an artificial allocation of values to different considerations. This would only be possible if there were some basis for knowing how much priority should be given to some factors over others: 10%? 50%? Of course the legislature has not attempted such precision: it would be absurd to do so in these complex cases. But in the absence of such precision, once the judge departs from his or her own conclusion about the child's best interests, arrived at after a careful evaluation of the matters set out in the law, it is hard to see any rational basis for deciding how much extra weight to give to the 'primary' consideration.

The second problem is Patrick Parkinson's point, already referred to, namely that the key terms constituting the first 'primary consideration' cannot be understood without referring to the additional considerations. For example, to identify the *benefit to the child* of having a *meaningful relationship* with both of the child's parents, you may have to take into account such things as the child's views, the quality of the relationship between the child and both parents, the quality of the parenting, and many other things that are included in the various 'additional' considerations. To say that the first primary consideration is *more important* than these other things is

difficult to understand. It would be like saying, of an athlete, that fitness is more important than such things as training, speed, strength, and agility.

These two logical problems may explain the wording of the key sentence in the second judgment. Our hypothetical judge says

> *'I must now make the decision that preserves the meaningful involvement of the non-resident parent unless there are compelling reasons why this primary consideration must, in the circumstances of the case, be displaced'.*

The asserted requirement of 'compelling reasons' may be intended to address the first of the two problems by providing some indication of the relative weighting of the primary and additional considerations. But it does so only by departing from the legislative language in a way that might not survive an appeal.[54] And the failure to refer to the *benefit to the child* obscures the complex interaction between the 'additional' and 'primary' considerations.

Section 60CC simply says that the court '*must consider the matters set out in subsections (2) and (3)*', and then says, in subsection (2), that the '*primary considerations are…. the benefit to the child of having a meaningful relationship with both of the child's parents…*' It goes beyond this language to say that the court 'must make a decision that preserves the meaningful involvement of the non-resident parent unless there are compelling reasons' for doing otherwise.

I suggest, therefore, that despite the difficulties and uncertainties of the legislation and its history, in the end the position represented by the first judgment is a more satisfying and plausible reading of the law than that of the second. It will be interesting to see whether the Full Court grapples with this problem, and expresses a view about it one way or another, when it gets the chance. In the meantime, it is reassuring that there is relevant research going on,[55] and there is to be an evaluation of

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[54] The judicial creation of the 'compelling reasons' requirement in the second imaginary judgment is reminiscent of the error that the High Court famously corrected in *AMS v AIF and AIF v AMS* (1999) 199 CLR 160; 24 Fam LR 756; FLC 92-852.

[55] The Family law Council Report on Relocation refers at paragraphs 3.14 - 3.23 to some existing research projects on relocation outcomes.

the impact of the reform package.[56] So next time the Act comes up for review, the Parliament might have more information about what is really happening, and what might benefit children, than it had in 2006.

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[56] See 'Framework for evaluation and longitudinal research - March 2007' on the Attorney-General's Website.